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# The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, & Economics

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# The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, and Economics

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HUSTON, REEVE. *Land and Freedom: Rural Society, Popular Protest, and Party Politics in Antebellum New York*. New York: Oxford University Press, 2000. Pp. 291. \$39.95.

MCCURDY, CHARLES W. *The Anti-Rent Era in New York Politics, 1839-1865*. Chapel Hill: University of North Carolina Press, 2001. Pp. 408. \$49.95.

If, like me, you tend toward indolence, then when you are presented with two recent books on the same topic, your first thought is "I am not reading both; I wonder which is better." I fear I have little succor to offer fellow sloths interested in the New York anti-rent movement (1839-65 or so). These two books are complements, not substitutes. McCurdy's *Anti-Rent Era in New York Politics, 1839-1865* provides essential political history and expertly, lucidly dissects abstruse, dated court decisions and statutes. Huston's *Land and Freedom: Rural Society, Popular Protest, and Party Politics in Antebellum New York* presents a rich, detailed social history of the same era. For catholic scholars interested in examining the anti-rent episode from different perspectives, these two works cover most of the angles. This essay endeavors to fill one important perspective omitted by both McCurdy and Huston: economics.

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Eric Kades is professor of law, William and Mary Law School. I thank Bob Ellickson, Reeve Huston, Rich Hynes, Jim Krier, and Charles McCurdy for helpful comments and suggestions.

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Neither author burdens his exposition of the complex anti-rent movement with an overarching, procrustean thesis. McCurdy, indeed, explicitly states in his introduction that "the book does not argue a single thesis" (p. xvi). That said, he highlights the effect that lawyers and their culture had on politics, and the protean politics of New York during the anti-rent era. Huston emphasizes the tenants' desire to own their farms as part and parcel of a "free labor" ideology solidifying in the antebellum North, and the effect of the "market revolution" on tenant farmers. He does not, however, limit his discussion of the contemporary social milieu to matters tied directly to these theses. Both authors highlight the give-and-take between the grass-roots anti-rent movement and the organized political parties.

Although this essay considers the authors' major themes and theses, it is organized around disciplines. After presenting a nutshell history, I examine the major political, social, and economic features of the anti-rent movement. Finally, I highlight a couple of surprising ways in which legal controversies from the movement remain relevant today.

## I. HISTORY OF THE ANTI-RENT MOVEMENT

The New York anti-rent movement, running from 1839 until after the Civil War, pitted large-scale landlords against their tenants in a struggle over lease terms that led to violence, political infighting, and judicial battles. At the core of the movement directed against New York's huge manorial estates along the Hudson River and in the Catskills foothills, unsurprisingly, was rent. Not just any rent but *perpetual* rent. Perpetual rent implies perpetual leases, and such leases truly were the root problem.<sup>1</sup> These leases went by the oxymoronic name "leases in fee," reflecting the bizarre combination of leasehold on one hand (periodic rent) and fee simple possession on the other (an open-ended inheritable term). Although leases in fee contained other features that made them appear feudal, a historian of the early history of the region concluded that "the landlord-tenant relationship was more capitalistic and modern in character than feudal" (Kim 1978, 21). Although a few landlords—or "patroons"—appear to have exercised the rights of a true manorial lord, such as running their own courts, these practices disappeared by the early 1700s (Kim 1978, 37, 87, 103, 107, 127, 234). Thus, it was not their feudal nature of the leases that perplexed contemporary laymen, lawyers, judges, and legislators; it was the combination of a fee simple term with tenancy-for-years payments.

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1. In addition to tenants with perpetual leaseholds, many tenants with two- and three-life leases participated in the anti-rent movement. Their disputes with their landlords were similar to those of perpetual tenants, though on some issues their interests differed. Some tenants had more conventional term-of-year leases.

There are no pat answer to the first set of obvious questions that come to mind: Why did colonial governments grant such huge tracts of land to a handful of owners? Why did landlords in the Hudson Valley select the lease in fee instead of the common alternatives? Why did tenants agree to leases in fee?

The government's motivation for making such large grants included venality, but also the belief that large, wealthy grantees could develop and populate the region efficiently. As time went on, however, a number of colonial governors and other leaders resisted the policy, fearing that the patroons retarded development by refusing to sell fee simple ownership (Kim 1978, 78, 129).

The landlords' reasons for selecting the lease in fee are difficult to plumb. Some patroons had failed to attract tenants with short-term leases, and may have turned to the lease in fee as a compromise with tenants desiring fee simple ownership. McCurdy describes the appeal of the lease in fee to landlords:

Owning a share of the Hudson Valley manor or patent was a *rentier* dream. The tenants absorbed all maintenance costs and paid any taxes; the [fees due on sale] tended to forestall turnover and provided landlords with a bounty when conveyances did occur. Although no investment of labor or [fresh] capital was required, trust and estate lawyers in Manhattan or Albany mailed a fat check every year. (P. 93)

This story requires additional assumptions, as the patroons could have obtained work-free income, and with much less trouble, by selling the land in fee simple and investing the proceeds in stocks, bonds, or other liquid assets. Perhaps, however, we are too hasty to assume that such investments existed in the late 1700s and early 1800s. The relative dearth of investment-grade stocks and bonds may have made land look like the most attractive option for risk-averse investors, and may have made diversification expensive or impossible.

Finally, why did tenants settle for leases in fee when the federal government and many private landholders were selling fee simple title to wide swaths of Pennsylvania, Ohio, Indiana, Georgia, Alabama, and other states? The most likely answer seems to be lack of cash for a down payment, and a similar need for more than a few years to pay off a mortgage. Mortgages were rare, and when available the terms were short—nothing approaching today's 30-year mortgages existed until the twentieth century. The federal government either offered no financing or required full payment within three years. For a typical quarter section (640 acres, selling at the statutory minimum \$2/acre), this required either \$1,280 up front, or the same amount, with interest, in three years. The federal government rarely sold parcels smaller than a quarter section.

The patroons sold 100-acre lots and required down payments of only \$25–\$100. In addition, the manorial landlords typically waived rent for the first seven years, giving tenants a chance to clear land and start generating income. Thereafter, annual rent and services due included about 14 bushels of wheat per 100 acres, four fowl, and one day's labor with a horse and cart. The sum total of these "services" averaged around \$20.

Plugging these terms into the usual present-value formulas, we can estimate the implied price of land once we supply an interest rate. Presumably these farmers were relatively high-risk borrowers, and so the discount rate must be significantly higher than the risk-free rate of about 2–4% during the first half of the nineteenth century (Great Britain Open Market Rates of Discount 1824–1939, 1824–60). If we assume an interest rate of 5%, this would imply tenants paid about \$4.50 an acre; under this assumption, the leases might appear exploitative, given the prevailing price of \$2/acre for many acres of federal land. If we discount at 10%, however, the implied per acre price of land comes to about \$2.15, in line with the fee sales. And applying a discount rate of 15%—not outlandish given the riskiness of lending to poorer farmers—implies a per-acre price of about \$1.50, making the lease in fee look like a bargain.

Other terms of the lease in fee complicate valuation. Landlords did provide substantial public goods, such as schools (buildings and teachers) and churches; accounting for these lowers effective rents charged. On the other hand, the lease indentures required tenants to pay fees if they sold their farms to strangers; most commonly, so-called quarter sale provisions entitled landlords to one-quarter of the sale price. This raised effective rents substantially. Tenants found these particularly objectionable, since the greater part of the sales price reflected improvements that the tenant had made in the form of homes, barns, and cleared land.

Whatever the parties' motivations, from the 1790s until 1819 the manorial estates along the upper Hudson attracted large numbers of new settlers, both immigrants to America and emigrants from overcrowded New England. The Panic of 1819 squeezed Stephen Van Rensselaer III (owner of the largest manorial estate) and the other landlords, who had let many tenants accumulate significant rent arrears. Feeling the pinch, Van Rensselaer for the first time in his long life filed suits to collect the back rents. He and the other landlords also renewed efforts to enforce timber and mill rights.

The timing could hardly have been worse for tenants. The Erie Canal and other internal improvements brought a flood of competing western farm products. Furthermore, many early tenants had exhausted the land and could no longer raise wheat. This, combined with wheat's rising price, made rent obligations (denominated largely in bushels of wheat) more onerous. Huston points out that hill farmers suffered the most under these adverse

economic developments: They were poorer than the more established valley farmers, and farther from markets.

Despite stalemated attempts to collect back rents, Van Rensselaer to some extent maintained his reputation for benevolence among the tenants. Some expected that on his death, he would forgive all past-due rent. His will, however, sorely disappointed tenants: It forgave nothing. Further, neither of his legatees (Stephen Van Rensselaer IV received his father's lands on the west bank of the Hudson; William Van Rensselaer, the lands on the east bank) showed the slightest inclination to cancel any tenant debts.

Lawsuits against tenants filed by Stephen Van Rensselaer IV in 1839 were the spark that ignited the anti-rent conflagration. Stephen had refused to deal with the tenants as a group, dismissing their representatives from his manor without a word. The first sign of fire was a tenant rally held in Bern, New York, on July 4, 1839. Tenant anger quickly grew, and focused on their landlords' jugular: They wanted to prove that the titles of the Van Rensselaers and other landlords were fatally flawed. Such title challenges, and tenant uprisings, were not entirely novel. Yet earlier uprisings, during the mid-1700s, largely had been fomented by rivalry between colonies (Massachusetts and New York boundary disputes), or between neighboring landowners. In 1839, however, the tenants were not the pawns of rival landlords (Kim 1978, chaps. 7, 8).

Anti-renters organized their efforts around three groups. First and foremost, they formed anti-rent associations on each manor. These associations organized rent strikes and assessed fees to finance litigation and lobbying. At their height, the associations may have included up to a quarter of the 260,000 Hudson Valley tenants. They did not limit membership to farmers; many lawyers, doctors, and small businessmen joined as well. Second, anti-renters eventually formed a political party that elected a number of state legislators, sometimes in alliance with the major parties, sometimes on its own. Finally, and most famously, militant anti-renters (largely younger, poorer landless men) organized a vigilante force dubbed *the Indians*. This label is a bit obscure, as members did not dress up as Indians, but rather donned the somewhat bizarre disguise of (1) calico dresses and (2) bulky, tall leather bag-shaped face masks. The use of such getups and the name *Indians* were not novel; tenants had adopted both almost a century earlier, in the uprisings driven by feuding landlords (Kim 1978, 330, 402). *Indians* first appeared in 1841, and by 1845 claimed 10,000 members. Although the associations and the party maintained a careful distance from the *Indians*, there was significant overlap in membership and tacit support, at least until Indian activities resulted in deaths.

Even before the *Indians* appeared, tenants quickly went from passively resisting service of legal process to active use of force. In the first round of



clashes, the so-called Helderberg War, in the fall and winter of 1839, they tarred and feathered, and kidnapped deputy sheriffs trying to serve process. Governor Seward eventually called out the militia, and the tenants relented. To the shock and dismay of the landlords, however, Seward expressed sympathy for the tenants' situation and declared that the government should find a way to help them. This set a pattern of mixed messages that continued throughout the anti-rent era. The state government acted relatively decisively to quell active resistance to the rule of law, but it simultaneously expressed sympathy for the tenants' "plight" and searched for ameliorative legal measures.

Despite these efforts, anti-rent activities resulted in three deaths from 1844 to 1845. The first was benign: A stray bullet fired during Indian maneuvers killed an innocent bystander. The next two were uglier. The Indians killed a tenant who signed a lumber lease with William Van Rensselaer as the tenant attempted to haul away some logs. Signing such a lease, which recognized the landlord's title, was antithetical to the tenants' burning desire to prove these titles void. The final death was even more menacing: Indians shot Undersheriff Osman Steele while he was selling a tenant's animals to satisfy a debt owed the landlord. Governor Wright declared the county in insurrection and sent in the militia; the town of Delhi, New York, became an armed camp for months.

These deaths, especially the final murder of a law enforcement official performing his duty, swung public opinion heavily against the Indians. The militia made scores of arrests, although in the end there were no executions, and two Indians found guilty of felony murder were granted clemency. Smith Boughton, one leader of the Indians, remained in prison under trumped-up charges of highway robbery, but he too eventually received clemency. The legislature passed a number of anti-Indian laws, including a statute criminalizing the act of being both armed and disguised in public. Even with this decisive defeat of the Indians, sheriffs continued to have severe difficulties serving process on debtor tenants, as neighbors would blow tin horns on the approach of a deputy, and the targeted family would hide with neighbors until the deputy departed.

The associations, despairing that their rent strikes would force landlords to sell out cheap, and realizing that illegal acts were unacceptable to most voters, increasingly focused their efforts on judicial and legislative remedies. Neither the Democrats nor the Whigs (the major parties during this era) made a natural fit for the anti-renters, as each had a significant wing opposed to any erosion of vested property rights. Frustration with both eventually led to the formation of the Anti-Rent Party.

The tenants had some notable judicial and legislative successes. The courts abolished all fines on alienation (quarter sales and similar fees due landlords on each sale) as inconsistent with the tenant's quasi-fee interest.

The legislature heeded the tenants' request to tax ground rents; before this measure, New York had taxed improvements on property but not the value of the soil itself (precisely the opposite of Henry George's famous exhortation to tax the ground and only the ground) (George 1879). Finally, the tenants obtained legislation abolishing the landlords' remedy of distraint—selling a tenant's chattels at a sheriff's sale to satisfy a debt judgment.

Although these measures placed significant pressure on landlords to settle, neither alone nor together did they provide tenants a comprehensive remedy. One of the earliest and most creative suggested solutions was for the state to give tenants a private power of condemnation, authorizing them to force landlords to sell their reversionary rights at a judicially determined fair market price. Tenants were not enamored with this solution, as it might have proven costly. Combined with poor political strategy, this lukewarm tenant support explains the failure to authorize a condemnation measure in the New York Constitution of 1846.

In 1844, Martin Van Buren suggested that New York bar the inheritability of the landlord's right of entry. Few seemed to doubt that this was constitutional, under the English view that the ability to pass property at death was created by, and revisable by, the state; there was no natural right to inherit (McCurdy p. 160, citing Blackstone 1832, 2:12). Further, there was an American precedent for abolishing the right to leave property on death: the abolition of entails by every state in the early Republic (Katz 1977). Tenants were not entirely satisfied with this measure, as they would continue to owe rents until the landlords, some of whom were young or middle-aged, died. Although proposed by Governor Wright in 1845, it fell victim to partisan maneuvering, and never reappeared.

The last major tenant legal maneuver that failed was a siren song: challenging the legitimacy of each landlord's title. It was the preferred remedy of tenants because, they believed, disproving their landlords' titles would vest title in them—without payment of even one cent. The landlords' titles were, undoubtedly, far from pristine. Some had laid claim to lands vastly exceeding the delineations of their deeds; others had failed to purchase the interests of co-owners; and still others had failed to fulfill requirements to attract a minimum number of settlers within a fixed time frame. The tenant uprisings of the 1700s, driven by conflicting claims among landlords and colonies, repeatedly had aired the flaws in titles to the manorial estates. Yet, as a legislative report noted, many if not most land titles in New York had similar imperfections. If the tenants succeeded in their title challenges, no land title in New York would be secure. Many anti-rent leaders, and more astute lawyers, realized that tenants who challenged the title of someone they had acknowledged as their landlord (discussed below) faced insurmountable doctrinal obstacles. Perhaps their leaders failed the tenants by pursuing this remedy despite the improbability of success. In the end, the



courts completely and unambiguously rejected all tenant challenges to the landlords' titles.

Although the landlords won this important battle, they did not win the war. The partial tenant victories summarized above, along with the financial and psychic costs of continual conflict, drove most landlords to reach settlements with tenants during the late 1840s and into the early 1850s. Huston's meticulous research demonstrates that on some estates as many as 75% of the tenants reached terms and bought out their landlord. John King, landlord of Blenheim Hill, sold out to his tenants en masse, placing the onus on the tenants to collect payments from all their members. Many tenants who did not buy out their landlords emigrated. The Van Rensselaers and a few other landlords, however, never settled with a significant number of their tenants. Both Stephen IV and William sold their interests to Walter S. Church, for 60% and 40% of face value respectively. Church evicted numerous tenants, including refractory ideologues who surrendered fine homes and farms worth thousands rather than pay rent or Church's price for full title. Despite these successes, Church himself went bankrupt shortly after the Civil War as a result of the expensive process of evicting recalcitrant tenants. A few tenants continued to honor their leases in fee, and as late as 1884, at least 300 such leases remained in existence.

Less pig-headed landlords and tenants split the difference. Those who refused to settle for anything less than complete triumph, whether tenant or landlord, ended up big losers. The outcome was reminiscent of a favorite aphorism on Wall Street: "Bulls make money, bears make money, pigs get slaughtered."

## II. POLITICAL ISSUES

The great, paradoxical tragedy of the anti-rent movement was the nearly universal admission that the manorial leases were socially pernicious—economically undesirable and inconsistent with the personal independence that was a prerequisite to prized republican virtue. Yet the legislature, and even the people of New York, in the 1846 constitutional convention, never crafted an effective, general solution. McCurdy focuses on the politics of the anti-rent era and documents the long series of political failures. In addition, as his title indicates, he examines other political issues brewing in New York during the anti-rent years.

Given the heated rivalry between the Democrats and the Whigs, the anti-rent tenants increasingly came to hold the balance of power. This seems an ideal position for a special-interest group. For reasons traced in detail by McCurdy, however, the party out of power, by attracting sufficient defectors from the majority, consistently managed to sabotage anti-rent legislation. The motive was always partisan: "As the Anti-Rent Party grew

larger, political credit for extinguishing manorial tenures became a kind of public good that neither major party wanted the other to appropriate" (McCurdy, p. 333). Thus the Democrats killed a Whig eminent domain bill that would have given tenants the power to force landlords to sell out at a price determined by the courts. The Whigs, when in the minority, managed to help sink a Democratic bill implementing Van Buren's scheme to declare landlords' interest in the lease in fee uninheritable. As is so common with politics, the devil is in the details. The Democrats' anti-inheritability bill failed in large part because the Whigs exploited a split among the Democrats over the choice of the state printer! Through a string of such examples, McCurdy recounts the endless difficulties that the Anti-Rent Party faced trying to pass legislation inevitably opposed by one of the major parties.

McCurdy also demonstrates the ineffectiveness of attempts by more radical groups to use the anti-rent tenants as one component of a broad lower-class coalition of urban workers and other poorer rural farmers. George Henry Evans and his National Reform Association made only moderate headway in selling anti-renters on an inalienable, fundamental, natural right to enough land, owned in fee simple, for familial sustenance. Thomas Devyr, a colorful radical with a long history of populist advocacy in Great Britain and then in America, and editor of the leading anti-rent newspaper, *The Freeholder*, was extremely popular among the tenants but never convinced enough of them to look beyond the confines of their local dispute.

To flip Tip O'Neal's adage that "all politics is local," McCurdy masterfully demonstrates how national politics repeatedly had a significant impact on the anti-rent struggle. The Panic of 1837 made Whigs everywhere retreat from their usually expansive plans for government-sponsored improvements. In New York, it also dashed any notion that the state might pay the landlords to cede their reversionary interests to the tenants. At other times, national politics helped the anti-renters. The annexation of Texas in 1845 was popular with Democrats elsewhere, especially in the South, but was intensely unpopular among New York Democrats. Thus, a weakened Democratic Party that had taken a hard anti-tenant line felt compelled to soften its position in order to obtain much-needed votes. Finally, it is no surprise that the slavery issue affected New York politics during this era. To take but one example, it so badly fractured the Democrats in 1848 that the Whigs felt little need to court the anti-rent vote.

For those interested in New York's protean political landscape during this period, such as the intra-party politics between Bucktails, Barnburners, and Hunkers, McCurdy's book is invaluable. He debunks the widespread belief that anti-renters were the moving force behind New York's constitutional convention in 1846 and the resulting constitution. His detailed anal-

ysis of voting patterns reveals that party loyalties, rather than anti-rent politics, explain support for the convention. As further evidence, he shows that the anti-rent forces never developed a plan to obtain relief in the new constitution; their failure even to suggest a clause authorizing tenants to condemn their landlords' interest shows that the anti-renters' attention remained focused elsewhere (e.g., on title challenges, which required no constitutional amendment). In the end, contemporaneous tenants received no relief at all from the New York Constitution of 1846: As to matters of leaseholds, it operated only prospectively (abolishing feudal tenures and declaring all lands held allodially; barring agricultural leases for more than 12 years; invalidating fines on alienation). Those without a primary interest in New York politics may want to skim parts of this discussion, as McCurdy covers this episode in great detail.

Huston's political analysis, in keeping with the rest of the book, tends to focus on concrete social relations. For example, he documents the tenants' traditional voting loyalty to their landlords, and the process by which this loyalty disappeared. Landlords reminded tenants around election day of any back rents due, and distributed ballots marked for the landlord or his candidate. In order to circumvent the secret ballot, they asked tenants to fold their ballots in a particular manner. Stephen Van Rensselaer III (or his designated candidate) routinely received around 90% of the votes of tenants on the manors, but only 50% to 65% of other votes. This pattern, changed with the arrival of large-scale partisan politicking, and professional politicians in the 1820s and 1830s, in turn formed much of the basis for the anti-rent movement.

### III. SOCIOLOGICAL ISSUES

In addition to this political split, Huston highlights a growing fracture in social relations. To use his wonderful label, landlords attached great importance to the "theatre of benevolence and deference" between landlords and tenants. Landlords seemed to have reaped significant psychic pleasure from their elevated social position. The deference they received, however, was paper-thin. For tenants, as both Huston and McCurdy note, it was the price paid for benevolence—for example, forbearance in collecting back rent. As soon as the landlords began pressuring tenants for payment and filing lawsuits, tenants' obeisance evaporated.

As the landlords' influence faded with their wealth, Huston traces the fascinating process by which they placed increasing emphasis on "breeding," manners, and education—dimensions in which, at least in their view, they remained distinguishable from and superior to others. Additionally, intermarriage among the landed families increased markedly during these "troubling" times. James Fenimore Cooper, a son of the aristocracy, wrote a little-

read trilogy, *The Littlepage Manuscripts*, that reflects all these themes: The aristocratic hero marries the daughter of another landowner, defeats the bad-faith attempt of upstarts to seize his lands, with the heavy-handed emphasis throughout on the social merits of the upper crust.<sup>2</sup>

Huston explores in even greater detail the social milieu of the tenants and the elements of their world that shaped the anti-rent movement. A particular strength of his analysis is that he asks profound questions that are obvious only after you hear them raised. For example, on what experiences did the tenants, simple farmers, draw in order to organize a mass social movement? Huston makes a strong case that the tenants borrowed many tools acquired in the ongoing temperance movement, which had broad and deep support in the area. From the temperance movement they had learned how to use newspaper ads; how to organize, publicize, and run rallies, pole raisings, and other mass meetings; how to educate their cohorts; how to monitor compliance with group norms; and how to shame violators of those norms.

Similarly, Huston traces elements of tenant culture that laid a foundation for the very idea of the Indians and their forceful assertion of community norms. Tenant communities had a loosely related class of activities, under the label of "charivari" or "skimeton," "ritualized methods of enforcing community standards and morality" (Huston p. 118, quoting Palmer 1978). For example, violators of sexual or marital norms suffered visits by intimidating crews of young men who serenaded them with cacophonous music (kettles or cow bells, e.g.), destroyed their target's personal property, and sometimes matters progressed (regressed?) to assault and battery.

Skimetons were not always so menacing; newlyweds received a light-hearted version designed to extract a round of drinks from the groom. Participants often wore costumes and masks to disguise themselves. Huston documents some reasons tenants selected Indians as their facade. The savage imagery of Indians was certainly part of the attraction, but Huston argues that tenants also invoked the ideal of the noble savage as a counterpoint to the corruption of their landlords. One story spun was that the Indians truly were Indian—the ancestors of the aboriginal occupants—and were returning to reestablish their title against the landlords' fatally flawed claims. Once they had done so, as noble savages they would gift the land to the tenants who had cleared the land, planted the crops, and built the homes and barns. Huston notes that younger, poorer men served as Indians because it gave them a rare chance to exercise power and gain respect in their communities.

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2. The *Littlepage* trilogy consists of *Satanstoe* (1845), *The Chainbearer* (1845), and *The Redskins* (1846). This trilogy is out of print for good reason; only those with a particular taste for the worldview of a smug aristocrat could possibly enjoy it. Apparently and unfortunately, keeping one's word is not an aristocratic trait, as Cooper vowed in *A Letter to His Countrymen* (1834) never to write again.

The Indians were unrepresentative of the anti-rent movement: Huston demonstrates that it was, in the main, rooted in the dissatisfaction of middle-class farmers. The movement offered nothing for the poorest segment of society, the landless. Indeed, many tenants owned timberlands and worried about the poor stealing their trees. More generally, Huston documents middle-class tenants' worries that their poorer neighbors were wasting common lands (lands still owned by the landlord, but that tenants used, legally or otherwise) by overgrazing and removing moss and other forest products.

On all these sociological topics, Huston has done an incredible amount of grunt work in archives of original sources. Just to give a few examples, he examined all public records left by the employees of one large farm over a 25-year period; many newspapers, meeting journals, and minutes; voluminous election records; and land records (Huston pp. 40, 54, chap. 2, nn.13, 29, 32, 40, 52–64).

Readers may take pause at Huston's assertions that "anti-renters helped destroy an entire system of property and labor" and that the anti-rent movement was an integral part of a "free labor" movement in the antebellum North. The first hurdle is semantic: The word *labor* and the phrase *free labor* obviously cannot refer to landlord-tenant relations on the great New York manors, as there simply were no labor relations between the tenants and landlords. Although couched in feudal terms, leases in fee created no elements of a lord-vassal relation in practice. On their face such leases might have looked like share-cropping agreements because tenants owed rent in wheat and fowl, but in practice, these obligations had long been reduced to a cash equivalent. Landlords had absolutely no say in what crops their tenants raised or how they raised them. The parties had a very troubled property relationship, but that was it.

Huston, however, uses *labor* more as a synonym for class relations (the propertied class versus mere tenants). Following Foner (1970) and others, by a *free labor* ideology, he means a belief that all men should be independent economic agents in an economy that fosters mobility and "the dignity of labor." Under these definitions, we can make sense of Huston's assertion that the anti-rent movement destroyed a "property and *labor*" system: Land tenure in the region did change from the anomalous lease in fee to title in fee simple. Although this sounds like the quintessential example of a pure property issue, property rights in large part define class relations.

Huston's assertion that the anti-rent movement was part of a broader free labor movement that culminated in the abolition of slavery rests largely on political correlations: Anti-rent leaders of both the Whigs and the Democrats went on to form the core of the anti-slavery Republican Party; many of these leaders also championed the Homestead Act; and anti-rent towns voted heavily Republican in the pivotal 1860 election. Correlation is not causation, however, and Huston does not present strong ideological or so-



cial evidence that the anti-rent movement was an important step along the path to abolition.

McCurdy along with Huston documents the legal profession's strong social norms in favor of protecting property rights. "Training and experience inclined them to take seriously the constitutional constraints that Anti-Rent leaders assailed as mere landlord talismans" (McCurdy p. 335). In the courts and even to a large extent in the legislature, both authors argue that tenant demands were "mediated" through lawyers whose internalized legal-social norms—in particular, deep-seated respect for property rights—served as a real limitation on the types of relief available to the tenants. There is, however, substantial counterevidence. Although lawyers may have been peculiarly staunch believers in vested property rights, these views more likely reflected widely held notions. There was not much of a separate "legal culture" during this age: only a handful of tiny law schools and no large firms existed, and many lawyers had no colleagues within close proximity. Lawyers' norms, it thus seems, must have come from broader elements of society. Thus, the legal profession's view of constitutional property protections probably reflected widely held sentiments. Neither Huston nor McCurdy makes a compelling case that the tenant lawyers' mind-sets prevented them from being effective advocates. As long as a significant portion of potential jurors and voters believed in property rights, it was sound strategy for litigating and lobbying lawyers to diffuse the more radical viewpoints of some anti-renters.

#### IV. LEGAL ISSUES

The Contract Clause of the federal Constitution and the public use requirement of the New York State constitutions (of 1822 and of 1846) embodied the norms that circumscribed the forms of tenant relief acceptable to attorneys of all stripes. The Contract Clause limited a state's ability to pass legislation that altered existing contracts. Applied literally, existing contracts would have been immune to legislative alteration, but the Supreme Court did not read the clause so broadly. State legislatures could modify *remedies*, but not *rights*. For example, the widespread abolition of imprisonment for debt applied retrospectively (to existing contracts), as imprisonment was a remedy provided by the state, not a right contained in contracts. Thus the tenants secured constitutionally valid legislation abolishing distraint. The tenants also dearly wanted to abolish the landlord's remedy of ejectment for nonpayment of rent; this would have made eviction of tenants impossible, and limited landlords to suing for damages (with no ability to seize the tenancy once they obtained a judgment!). In 1843, however, the Supreme Court in *Bronson v. Kinzie* struck down an Illinois statute setting a minimum price at foreclosure sales and giving tenants a statutory



right to repurchase the property for one year after foreclosure. This precedent made it clear that the more drastic step of extinguishing the right to eject breaching tenants would violate the contract clause.

At the time of the anti-rent movement, the Bill of Rights in the national Constitution did not apply against the state, and thus the Takings Clause of the Fifth Amendment was no obstacle to legislation expanding tenants' rights at the expense of their landlords. The New York Constitution, however (like those of most other states), contained a similar Takings Clause. Under the "public use" requirement of takings law, New York could exercise its condemnation power only for a public purpose. This requirement seemingly barred any attempt to force landlords to sell their rights to tenants, since the tenants did not seem to be a broad enough group to qualify as the "public."

William Duer, a young Whig star, rejected this reading of the public use requirement. Less than a year into the anti-rent movement, in 1840, he proposed legislation authorizing tenants, at their own option and expense, to force landlords to sell out at a price determined by the courts. He argued that these transactions qualified as a public use because the entire polity would benefit from a landownership regime that encouraged productivity and channeled land into the hands of those best able to use it. Duer supplied a colorful analogy employing temperance legislation: If the leases in fee had required tenants annually to deliver, for example, a gallon of hard cider to their landlords, and then the legislature outlawed the production, transfer, or consumption of alcohol, the leases could not stand in the way of this exercise of the police power. Duer maintained that landlords in such a case would have to settle for the monetary equivalent of the gallon of cider, just as his bill forced them to exchange their realty interest for cash.

The first blow to Duer's condemnation scheme came in *Taylor v. Porter*, an 1843 case striking down a New York statute authorizing owners of landlocked parcels to condemn roads across a neighbor's land to reach a public street. The New York Constitution of 1846 specifically reversed the outcome of *Taylor* and authorized a private power of condemnation for roads. This clause was written quite specifically, and the anti-rent leaders apparently made little attempt to broaden its language to legitimate Duer's scheme. Predictably, the New York Court of Appeals soon held in *Gilbert v. Foote* (1848) that the clause, by mentioning roads and omitting everything else, barred any other use of the condemnation power for subsets of the population.

These constitutional issues were child's play compared to the obscure and abstruse property law issues litigated in the course of the anti-rent movement. McCurdy does a splendid job of lucidly explaining the arcana of cases that, in trying to make sense of the lease in fee, included everything from medieval English statutes to the law of covenants that run with the

land. Few scholars possess both the legal and the historical knowledge necessary to decipher antebellum real property law so clearly.

Tenants hoped to abrogate their landlords' title by application of the medieval English *Statute Quia Emptores* (1290), which barred lords at any level of the feudal hierarchy from carving out new feudal tenancies from their holdings (so-called subinfeudation). *Quia Emptores* did not bar simple sublets or assignments, but rather the creation of new lord-vassal relationships and the attendant new layer of feudal obligations. One signature feature of subinfeudation had been that the newly minted sublord could hold his own manorial court. This had been illegal in England since 1290. The anti-rent tenants argued that since most of the Hudson Valley landlords' grants contained an explicit clause authorizing the operation of a manorial court, their interests violated the *Statute Quia Emptores* and therefore were void. This view had two problems. First, it appears likely that the statute did not become a part of New York law until an act of 1787—long after the Crown had made or affirmed the manorial grants. Second, the clauses of the landlords' deeds, under common canons of construction, were severable, and so the illegality of one clause (e.g., on the creation of manors) did not invalidate the rest of the deed (e.g., the naked grant of the soil).

The tenants made more headway attacking the quarter rents and similar fees owed their landlords on the sale of their farms. The common law of England, long hostile to such restraints on alienation, had limited the validity of such transfer fees to landlord-tenant relations; the law deemed such assessments on sale inconsistent with fee ownership. In two cases decided relatively late in the anti-rent movement (1850), the New York Court of Appeals reversed a 30-year-old precedent and found that the lease in fee gave tenants a fee interest, not a "mere" tenancy. The court so argued because the landlord's interest, a right of re-entry (on breach of some condition in the lease), at the time was deemed not significant enough to amount to a real property interest. If the landlord had nothing in the eyes of the land law, the courts reasoned that the tenants must have close to everything—a fee interest of some sort, if not a fee simple. Critically for the tenants, the court declared the fees on alienation void *ab initio*, and hence the cases applied retroactively to all leases extant (*Overbaugh v. Patrie* 1852; *De Peyster v. Michael* 1852).

The theory behind the cases abolishing alienation fees retroactively seemed to offer the tenants a second and decisive victory. The landlords' grounds for collecting rent from tenants was not contractual, as most tenants had inherited or purchased their holding and so had no privity with the landlord. Rather, landlords relied on the legal notion that their rights under the original lease "ran with the land"—that is, applied to successive possessors of the premise. Under English precedents in this obscure area, followed in most if not all states, covenants could only run if the original

transfer was a leasehold; English law did not permit running covenants when the transferee took a fee interest.

The tenants' conclusion then seemed irresistible:

- a. the courts had declared the tenants' interest a fee in abolishing fines on alienation,
- b. covenants could not run to the owner of a fee interest, ergo
- c. the landlords had no legal grounds to collect rent.

The landlords, however, had a surprising ace up their sleeve: covenants that could not run *at law* could nonetheless run *in equity*. Two decisions elaborating this theory in 1859 put an end to the tenants' search for a victory in the courts (*Van Rensselaer v. Hays* 1859; *Van Rensselaer v. Ball* 1859).<sup>3</sup>

As a matter of doctrine, the tenants' preferred judicial remedy, disproving the landlords' titles, appears to have been futile. The problem was simple: Even if a landlord's title was wholly defective, how would that help his tenants? One zealous advocate for the tenants maintained that the tenants would then have title by adverse possession. The key assumption is that any attempt by the landlords to assert adverse possession would fail for lack of actual occupation and use. This assertion is dubious. If *L* enters land he does not own for a day, and then leases it to *T*, it is *L* who satisfies the fundamental requirement of adverse possession: behaving like a true owner. *T*, by paying rent, concedes *L*'s title. Thus Samuel Tilden correctly argued that the "very idea of an adverse possession is of a possession claimed to be in the occupant's own right, and adverse to every other right . . . . A submission to another title, whether by entering the land under a grantor's indenture or paying any rent at all, destroys its character and effect" (McCurdy p. 255).

Despite McCurdy's clear and comprehensive explication of the litigation between landlords and tenants, a couple of legal puzzles remain. The cases do not mention any statute of limitations for the collection of back rent; was there any such statute? If so, why didn't the tenants assert it? It appears that tenants holding a lease in fee could sublet the premises. If so, did any of them try to circumvent the fee due on sale by the standard trick of subletting for 99 or 999 years? In a more practical vein, what prevented tenants from vastly understating the sale price to minimize the alienation fee? How would a landlord ever have known?

3. Interestingly, neither decision cited the key English precedent that supposedly created from whole cloth the rule that covenants ineligible to run at law could run in equity, *Tulk v. Moxhay* (1848). These New York cases, written after *Tulk* but not citing it, and relying on earlier precedents, suggest that *Tulk* was less groundbreaking than is commonly believed.

## V. ECONOMIC ISSUES

These legal questions left unanswered are of secondary importance. The same cannot be said for the unaddressed economic issues. Although both authors note the impact that business cycles had on each side, they otherwise offer almost no economic analysis of the anti-rent struggle. This is a bit puzzling, as it was, on its face, a fight over money. No doubt much of this fight played out in the political and judicial arenas on which McCurdy concentrates, and the sociology of the two antagonizing communities as described by Huston shaped the movement in part. Yet the root of the matter was economic: Tenants did not want themselves and their heirs/assigns to pay rent forever.

Economic thinking is a sort of Occam's razor, providing simple explanations for phenomena portrayed as subtle. For instance, Huston argues that the tenants experienced a complex cognitive dissonance: On the one hand they argued for the erosion of their landlord's property rights, but on the other hand, they stoutly defended their own rights against the landless. He describes this as a "dualistic class identity and Janus-faced political presence among farmers," and seems to castigate them for hypocrisy (pp. 208–9). Economics suggests, simply, that the tenants (and presumably the landlords, and the landless) acted in their self-interest, with little if any concern for ideological consistency.<sup>4</sup>

Both authors do quote contemporary descriptions of the basic economic problems with long-term leaseholds: Tenants and landlords have less incentive to improve the land, and tenants cannot borrow against the land on a secured basis (or at least they cannot borrow on the same terms as a fee owner). More perceptive landlords and observers had noted these problems beginning in the 1700s. Horace Greeley, writing in 1845, declared that the lease in fee "stifled incentives to improve the farms," including the construction of "poor shacks," and encouraged "bad husbandry." William Seward drew similar conclusions. Samuel Young, a radical Democrat said that the warped incentives created by the lease in fee were so powerful that "in riding through a tract of the country thus held, I can mark the difference between its appearance and where the cultivator is the independent lord of the soil" (Kim 1978, 185; McCurdy pp. 33, 37, 224–25; Huston pp. 141–42; Cheung 1975).

It would seem that tenants and landlords could solve all these problems with the right combination of cooperation and greed. If they could produce greater wealth by getting together to agree on optimal improvements, and by cosigning mortgages to obtain financing where necessary, all that would

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4. Huston repeatedly notes that sexism and racism (against African Americans and Indians) was omnipresent among the tenants, demonstrating that any free labor ideology motivating them was far from universal.

remain would be to divide up the additional wealth that their cooperation had just created. This is a simple application of the Coase Theorem (Coase 1960).

Unfortunately, dividing up the gains is far from a triviality. The Coase Theorem assumes that parties can reach a deal without undue difficulty (technically, that transaction costs are low). This assumption holds in ordinary markets: When you go to buy chewing gum, you encounter many sellers, so if any one has drawbacks (high price or low quality), you simply proceed to a better supplier; symmetrically, sellers can reject undesirable buyers (those who demand too low a price or who complain excessively about quality) and wait for other purchasers.

Anti-rent tenants and their landlords, however, did not find themselves in such a typical market. For a host of reasons, they were trapped into dealing with each other, and each other alone. This most clearly was true for landlords, as the lease in fee provided no way to get rid of irksome tenants and, more important, landlords had no cheap way to get rid of tenants in breach of their leases (e.g., for nonpayment of rent). Ejectment suits were expensive and time-consuming. It was cheaper to strike a deal than litigate. In addition, replacement tenants were not easy to find. For more than a century, "fear of mass desertion of tenants . . . constituted one of the important deterrents to any possible despotic tendencies of landlords" (Kim 1978, 219–20).

Each tenant, however, similarly was locked into relations with his landlord. First and foremost, the quarter sale provisions meant that they sacrificed 25% of the value of their farms if they decided to leave. Second, tenants made tract-specific improvements, such as homes, barns, and orchards, that they likely valued at a premium to market price. Third, they had family and communal ties to neighbors that they could not easily replicate at a different location. Such tenants valued their farms more highly than most other potential bidders, making the implicit cost of leaving significant.

Instead of a host of competing players, then, landlords and tenants were stuck with each other. The technical name for this sort of extremely truncated market is a bilateral monopoly. Since each side knows the other has no real (cost-effective) alternative, each has great incentive to engage in all sorts of bargaining ploys (threats to walk away; false assertions of limited wealth) to garner the lion's share of the gains from trade between the parties. To make this concrete, assume that landlords would have been willing to sell their rights for anything above \$1 an acre, and tenants would have been willing to pay up to \$10 an acre. This broad range of mutually agreeable prices creates incentives to bargain fiercely.

Fairly concrete evidence indicates that landlords demanded excessive prices for their interests. The Van Rensselaers and others offered to sell



tenants their reversionary rights for \$5 an acre. At a discount rate of 10%, future rents were only \$2 an acre. Thus, unless the value of quarter rents was significantly greater than the value of rents, the landlords' demand of \$5 an acre appears designed to garner a big chunk of any gains from trade with tenants. Tenants played the same game, offering \$2 an acre—not one cent more than the value of the rent they owed in perpetuity.

In addition to hard bargaining, each side turned to the legal system as a means to gain negotiating advantages. Economist Jack Hirschleifer colorfully labels the use of force or politics, as opposed to voluntary exchange, as the “dark side” of property relations (Hirschleifer 1987, 1994). A particularly stark example was the tenants' successful campaign to have the state tax landlords' ground rents. It seems universally acknowledged that tenants hoped that this tax would place pressure on landlords to sell on more reasonable terms (McCurdy pp. 171, 199). Note that this produced absolutely no direct benefit to the tenants: The tax revenue went to the state, not them, and indeed under their leases, they may have been liable for paying the tax (discussed *infra*). The tenants simply wielded their political power to impose costs on their opponents.

The protracted and expensive anti-rent standoff suggests that each side underestimated the strength and determination of the other. Avoiding expensive conflict is but another form of gains from trade. If both sides could have gazed into a crystal ball, they might likely have struck a deal splitting the difference in one way or another. When opponents underestimate each other's strength, however, they may join battle with mutual but contradictory assumptions of winning quickly and easily. Perhaps the rapidly evolving political landscape of Jacksonian America contributed to erroneous political calculations. Although their influence had begun to fade, landlords were accustomed to significant influence in both political parties. Tenants, focusing on the new tide of popular politics, may have believed that their overwhelming numerical advantage would prevail. They underestimated the difficulty of forming a coalition on one issue when other issues divided popular and party interests in so many ways (e.g., internal improvements; banking).

As it turned out, the two sides had rough parity of political clout; thus the long and expensive political warfare. McCurdy nicely sums up the anti-rent drama as “self-defeating posturing by landlords and tenants alike. Both spurned compromise, both posed as noble victims deprived of their rights, and both blamed their unhappy fate on the corrosive interaction between law and politics. In 1865 nobody else cared” (McCurdy p. 336).

Perhaps the most elegant solution offered for the root problem, bilateral monopoly, was the proposal to give tenants private condemnation power to buy out their landlords' interests. This is a natural solution, and has been employed frequently under Anglo American law in cases of bilat-



eral monopoly: roads for owners whose parcels are landlocked, land flooded by mill builders; and salvage fees for ships rescuing cargo and crew from disabled vessels (Posner 1998, 129–30).

This remedy likely was more popular with tenants than landlords, since it would give them almost all the gains from trade between the parties. Why? At bottom, no single “correct” price exists for parties locked in a bilateral monopoly. Condemnation solutions, in which a court determines just compensation, in effect ask what the price would be if there were *competing sellers*. Thus, buyers of private rights of way, of land to flood with a mill, and of salvage services at sea garner the lion’s share of the gains from trade. Efficiency requires only that the parties strike some deal at minimal transactions costs; it is agnostic about distributional issues. In this way, the eminent domain solution to bilateral monopoly is indeterminate and requires an additional rule to divide gains from trade. Why, then, does the law always favor buyers? It would be equally feasible to assume that there were many buyers, in which case sellers would reap the gains from trade in bilateral monopolies solved with private condemnation powers. Neither courts nor commentators, however, have offered a rationale for systematically favoring buyers.

Political posturing doomed the eminent domain proposal. The political process served neither side well, and it probably imposed costs on nonpartisans. Arguably, however, common law courts—here, as has so often been the case in property, contract, and tort law—settled on socially efficient rules. Fees on alienation were significant restraints on alienation, and such restraints prevent assets from flowing freely to the party best able to use them. Thus, the New York courts’ reiteration of the common law’s hostility to such restraints was sound social policy. Perpetual rents, however, are no more objectionable than perpetual taxes or perpetual association dues in many condos and gated communities today. There is no good economic reason to oppose such terms, and thus the courts’ refusal to abolish perpetual rents likely was efficient.

Landlord-tenant relations in the Hudson Valley illustrate a host of economic principles not directly tied to the anti-rent movement. Perhaps most prominently, both McCurdy and Huston discuss facts that raise the issue of economic waste—individually rational but socially inefficient use of land and exploitation of its products. One striking example was tenants with two- or three-life leases who, embittered by their landlord’s refusal to renew, “burned down their houses and threw down their fences rather than allow the fruits of their labor to vest in [their landlords] when their leases expired” (McCurdy p. 305). Such deliberate and wasteful (though possibly legal) behavior continued for decades after the last legal and political struggles ended

in the 1860s, demonstrating the depth of the bitterness tenants felt toward their landlords.<sup>5</sup>

Most cases of waste were less spectacular. Tenants extracted wood, plants, and stones, and they fished and hunted on lands retained by their landlords. Perhaps some leases gave tenants the right to enter unimproved tracts still owned by their landlord and to take as much forest product and game as they could. Other users were naked trespassers and thieves, though it was prohibitively expensive for landlords to monitor their thousands of wild frontier acres for such violations (Kim 1978, 228–29). Tenants without right who nonetheless entered and used the commons may have gained prescriptive or customary rights. Thus, the landlords along with many tenants had mutual, overlapping rights in the products of the forest and streams referred to as “the commons.”

As with most commons, a predictable tragedy occurred: Because no individual could control the use of others, nobody had incentives to let trees grow to optimal size before harvesting, to refrain from killing does and younger deer, or to throw back small fish. Tenants complained that many of their own number loosed herds of animals into the wood, accelerating the process of deforestation. Many towns established rules and administrative bodies to police such behavior, but these measures were ineffective. Overuse led to shortage, and by the 1820s, many tenants were purchasing lumber lots from their landlords to gain undisputed control over the trees necessary for fuel and construction. This is another example of Demsetz’s thesis that property rights tend to emerge when growing scarcity makes the creation of property rights worthwhile (Demsetz 1967). According to McCurdy, smarter tenants figured out the economics of waste and turned it to their advantage. They “mined the soil, saved their money, sold out to newcomers, and joined the procession into the new west” (McCurdy p. 12).

A second ancillary economic issue arises from the parties’ posturing on the taxation of the ground rents paid to landlords, and it demonstrates the economic sophistication of contemporary analysts. Representatives of city landlords, whose leases had very short terms (e.g., a year), argued that imposing the tax on them would only hurt urban tenants, as the landlords would pass on the tax in the form of higher rent. As for the Hudson Valley landlords, it is initially puzzling why they opposed the tax, as most of their leases required tenants to pay all taxes on the land they leased. Yet both

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5. It is unclear whether tenants burning improvements that they had made amounted to legal waste; it certainly would have been waste to burn premises provided by the landlord. Note that tenants must have derived significant utility from burning their houses at the end of their term. As long as it was legal, they could have threatened landlords that they would do so, and have extracted at least part of the value of their improvements as a payment for not burning their buildings. This is yet another aspect of the bilateral monopoly between the tenants and landlords. The rules of waste are simply defaults, of course, and the parties could have contracted for different rules in the leases.

Stephen and William van Rensselaer (unsuccessfully) challenged the tax in court. Transaction cost economics provides the answer. The law imposed the tax on the landlords, and so the government refused to look to tenants for payment. The costs to landlords of collecting the small sums due from each of hundreds or thousands of tenants exceeded the aggregate tax bill, and thus, as a practical matter, the tax fell on landlords.

In the end, economics may be unsatisfying as an explanation for the behavior of those tenants and landlords who never settled with each other. Bilateral monopolies are fairly common, and rarely do the bargaining games played by the parties reach such a fevered pitch. Part of the story, without doubt, was the sheer number of tenants and landlords: Statistics suggest that some pairings would consist of mutually stubborn parties. The large amounts at stake encouraged posturing.

In addition, the intensity of the felt injustice of perpetual (or multi-lives) rent seems to have played a role. This takes us beyond economics, where preferences are taken as fixed parameters, and into the realm of psychology and the formation of preferences in the first place. A French traveler, the Duke of La Rochefoucauld-Liancourt, who visited New York in 1795, may have pinpointed the dissatisfaction brewing two generations before the anti-rent movement. "A man, who is obliged to pay every year a groundrent, soon forgets the moderate terms on which he obtained possession of his estate, feels only the unpleasant compulsion of paying money at a fixed time, and eagerly seizes upon the first opportunity of freeing himself from his encumbrance" (Kim 1978, 187, quoting Munsell 1850-59, 4:238).

## VI. ENDURING LESSONS

In his last paragraph, McCurdy sums up the failures of law, politics, and ideology in dealing with the anti-rent movement, and warns that "[w]e forget them at our peril." Society's inability to ameliorate the deeply felt injustice of "rent forever" does indeed invite study so that we do not repeat past errors. Exactly what lessons politicians, lawyers, judges, and ideologues should draw from the anti-rent movement, however, is unclear. Perhaps private parties can learn a more definite lesson: Settling for half the pie likely is preferable to destroying most of the pie in a bare-knuckled brawl.

Two specific issues raised in the anti-rent movement surprisingly remain contentious today, almost a century and a half later. First, private powers of condemnation continue to trouble courts, as reflected in relatively frequent litigation over the meaning of the "public use" requirement in state takings clauses. Generally, the Supreme Court has defined the term expansively as a matter of federal law. Nothing better illustrates this proposition than *Hawaii Housing Authority v. Midkiff* (1984), a case with facts strikingly similar to those of the anti-rent movement. A handful of landlords held title

to almost half of all privately owned realty in the state of Hawaii. It was difficult, then, for many Hawaiians to become owners as opposed to tenants. The state legislature decided that this was socially undesirable for a host of reasons, including the usual economic problems with tenancies. Their rationales are strikingly similar to those advanced by William Duer, architect of the eminent domain proposal in the anti-rent movement. Hawaii, unlike New York, enacted an eminent domain scheme enabling tenants to buy out their landlords at prices determined by negotiation or by courts in formal condemnation suits. In sweeping language, a unanimous Court reversed a decision barring such condemnations and defined the class of public uses as all encompassing.

This, however, has not proved to be the end of the story. A number of state courts have interpreted their state public use requirements less permissively. Only last year, the Washington Supreme Court in effect rejected *Midkiff* and struck down a statute giving mobile home tenants a right of first refusal to purchase the land under their homes if and when landlords put the land up for sale (*Manufactured Housing Communities v. State* 2000). The court said that under the state of Washington's version of the public use requirement, this measure benefited only the private interests of mobile home owners. An earlier Washington decision struck down an urban renewal program that would have authorized the use of condemnation to transfer land from existing owners to private parties opening businesses in blighted areas (*In re Seattle* 1981). This again rejects more permissive federal case law (*Berman v. Parker* 1954).

Washington is not alone. The Michigan Supreme Court struck down a city ordinance giving a cable television provider the power to condemn easements and other property interests to assure service to apartment dwellers, finding that the private interests served predominated over any public uses (*Lansing v. Edward Rose Realty* 1992). A Montana court set aside the condemnation of property for a local chamber of commerce because that portion of the project did not serve a public purpose (*Chamber of Commerce v. Vaniman* 1995). And just last year, the Massachusetts Supreme Court declared that it would strike down any condemnation where the primary purpose was not for a public use (*HTA Limited Partnership v. Massachusetts Turnpike Authority* 2001). Recent case law by no means uniformly reads public use requirements strictly; in the famous *Poletown Neighborhood Council v. Detroit* (1981), the Michigan Supreme Court permitted the city of Detroit to condemn an entire neighborhood and turn it over to General Motors. The same court, however, explicitly declined to reverse this holding in *Lansing v. Edward Rose Realty*. The point is that state courts, like anti-rent lawyers, continue to wrestle with the extent to which the state can assist private parties with its power to condemn property.

Private powers of condemnation offer a middle ground in bilateral monopolies and other property disputes, forcing a transaction on an unwilling seller, yet requiring the buyer to pay a price determined fair by a disinterested court. In some states, however, the protection of property rights in effect trumps the benefits offered by private condemnation, and courts refuse to force the sale of private party A's property to private party B.

Perhaps even more surprising than the continued vitality of this limitation on private powers of condemnation is the ongoing use of fees on alienation in private agreements. Although the reservation of such fees in the sale of a fee interest is probably *per se* invalid in all states as a direct restraint on alienation, transactors find them irresistible and have found other ways to introduce them. Shared appreciation mortgages (SAMs) are one recently developed example. In a SAM, the borrower receives a lower interest rate on her mortgage in return for sharing some percent (usually from 30% to 60%) of any appreciation in the value of the property when eventually sold. Although different in form from the quarter sales in leases in fee, which required tenants to share 25% of the total price instead of just the increase in price, in substance they are quite similar. The lender, like the landlord, shares in part of the proceeds at sale. If we ever again experience significant inflation, SAM borrowers may find these terms as onerous as tenants found quarter sales and similar fines on alienation.

Another example of fees due on alienation comes from Co-op Village, a very successful cooperative housing complex in lower Manhattan, developed by unions and occupied by their members under terms giving the cooperative rights to repurchase units at a little over the seller's cost. As the value of the units has skyrocketed in recent decades, some occupants began clamoring for the right to sell their interest at market prices. Other tenants, feeling that such free-market transfers conflict with the communitarian ethic that motivated the construction of the complex in the first place, proposed that, if sales are allowed, the sellers should share one-fourth of the appreciation in the value of their unit (*New York Times* 1996). Eerily, this is precisely the fraction in the *quarter* rents commonly found in the leases in fee. In New York City today, down the Hudson River from the battleground of the anti-rent movement, then, a spirit of populism diametrically at odds with patroonery led to a proposal to use a despised tool of the mighty landlords to protect communitarian values from profiteering. Every dog has its day; creative minds have turned aristocratic restraints on alienation to populist ends.

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