Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743

CRAIG BRYAN YIRUSH

In 1773, with the empire on the brink of revolt, the Privy Council gave the final ruling in the case of the Mohegan Indians versus the colony of Connecticut. Thus ended what one eighteenth-century lawyer called "the greatest cause that ever was heard at the Council Board."[1] After a decades-long battle for their rights, involving several appeals to the Crown, three royal commissions, and the highest court in the empire, the Mohegans' case against Connecticut was dismissed. The dispute centered on a large tract of land (~20,000 acres) in southeastern Connecticut, which, the Mohegans claimed, the colony had reserved for them in the late

1. Quoted in Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 418.

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seventeenth century.[2] Concerned that the colony had violated its agreements, the Mohegans, aided by powerful colonists with a pecuniary interest in this tract of land, appealed to the Crown for redress. As a result of this appeal, what had been a narrow dispute over land became part of a larger conflict between the Crown, the colony, and the tribe over property and autonomy in the empire.

Although it was the longest dispute of its kind in the eighteenth-century British world, the Mohegan Case has received surprisingly little attention from modern scholars. Moreover, of the few recent scholarly accounts of the case, most focus on only one aspect of this long legal struggle. Mark Walters' pioneering article looks primarily at the stance of the Crown officials who adjudicated the dispute between the colony and the tribe, in order to ascertain whether the case can yield a precedent in support of Native self-government in modern-day Canada. David Conroy's insightful article also examines only one side of the dispute—the arguments of William Bollan, the tribe's lawyer before the 1743 royal commission, who believed that respecting Native rights would strengthen royal power in America. Similarly, Amy Den Ouden's ethnohistorical study of the dispute uncovers the Mohegans' perspective and makes a compelling case for their agency, but does not discuss the arguments made before the 1743 commission where the case received its fullest airing.[3]

2. For the decision, see James Munro, ed., *Acts of the Privy Council of England, Colonial Series*. Volume V (Kraus Reprint, 1966; Orig. Pub., London, 1912), 218 (hereinafter, *APC*). The decision was issued on January 15, 1773, based upon a December 19th committee report.

3. Mark D. Walters, "Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal* 33 (1995): 785–829; David Conroy, "The Defense of Indian Land Rights: William Bollan and the Mohegan Case in 1743," *Proceedings of the American Antiquarian Society* 103 (1993): 395–424; and Amy E. Den Ouden, *Beyond Conquest: Native Peoples and the Struggle for History in New England* (Lincoln: The University of Nebraska Press, 2005), 91–141. There is no book-length history of the Mohegan case (Paul Grant-Costa's 2008 Yale dissertation *The Last Indian War in New England: The Mohegan Indians v. The Governour and Company of the Colony of Connecticut, 1703–1774* was not available to scholars while I was researching and writing this article). In addition to the above, I have relied on: J.W. De Forest, *History of the Indians of Connecticut from the Earliest Known Period to 1850* (Hartford: W.J. Hammersley, 1852); Smith, *Appeals to the Privy Council*, 422–42; Michael Leroy Oberg, *Uncas: First of the Mohegans* (Ithaca: Cornell University Press, 2003); and Wendy B. St. Jean, "Inventing Guardianship: the Mohegan Indians and their Protectors," *The New England Quarterly* 72 (1999): 362–87. All of the important documents for the case can be found in an eighteenth-century collection: *The Governor and Company of Connecticut and Mohegan Indians, by their Guardians. Certified Copy of the Book of Proceedings before the Commissioners of Review, 1743* (London: W. and J. Richardson, 1769). I have used this collection as it is the published version of the official record of the case, and was submitted to the Privy Council following the 1743 commission.

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By contrast, this article analyzes the legal claims made by all of the principal actors in the case—the Crown and its agents, the colony of Connecticut, and the Mohegans and their English guardians. In doing so, it uses legal sources to understand the encounters between the English and Native Americans in the eighteenth century.[4] In particular, it asks how English jurists, officials, and settlers on both sides of the Atlantic understood indigenous rights, as well as how the Mohegans understood their own legal status in a world transformed by the arrival of the English.

I

Recent scholarship on the Algonquians of New England contends that after King Phillips' War (1675–76) an era of shared sovereignty and mutual accommodation came to an end and the tribes—especially those in the south such as the Mohegans—were legally subjugated to the English settlers. As Katherine Hermes puts it in *The Cambridge History of Law in America*, "after 1675, Algonquin jurisdictional autonomy . . . ended abruptly," and they were "reduced to exercising jurisdiction over themselves at English sufferance, on reservation lands set aside for them." Jenny Pulsipher has added a trans-Atlantic dimension to this story, arguing that in the seventeenth century the Algonquin tribes were able to reduce the autonomy of the Puritan colonies by appealing to the Crown for redress against the depredations of the settlers. But despite her emphasis on Native agency, Pulsipher also sees the war as a turning point, after which the tribes residing within colonial borders were "completely subordinate to English authority, no longer sovereign peoples."[5]

4. Although the efflorescence of scholarship on Native Americans in the last generation has produced rich accounts of contact, conflict, and co-existence between these two peoples, it has emphasized culture over law, and therefore has not examined the legal arguments about dispossession in any depth. For an overview of this new Indian history, see James Merrell, "'The Customes of our Countrey': Indians and Colonists in Early America," in *Strangers within the Realm: Cultural Margins of the First British Empire*, eds. Bernard Bailyn and Philip Morgan (Chapel Hill: The University of North Carolina Press, 1991), 117–56.

5. Katherine A. Hermes, "The Law of Native Americans, to 1815," in *The Cambridge History of Law in America: Volume 1. Early America (1580–1815)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 46. Jenny Pulsipher, *Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: The University of Pennsylvania Press, 2005), 269. Yasuhide Kawashima makes a similar claim, arguing that the "Puritans' aggressive extension of their jurisdiction . . . led directly to King Philip's War, which marked the end of legal coexistence between Indians and whites"; as well, he argues that after the war

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A similar conclusion about the subordinate legal status of indigenous peoples has dominated recent scholarship on early modern European justifications for empire. According to this work, beginning in the sixteenth century, European theorists drew on Roman law to develop a new law of nations (*ius gentium*) which would govern relations between the European empires and the indigenous peoples they encountered, as well as between the empires themselves as they competed for territory.[6] Because the tenets of this early modern law of nations were seen as a codification of natural law, Europeans deemed them binding on all peoples everywhere. In the Spanish world, jurists and theologians claimed that the indigenous people could be justly conquered because they had violated the natural law rights of Europeans to travel, trade, and proselytize in the Americas.[7] But according to this scholarship, English thinkers tended to argue that the New World was *res* or *terra nullius*—that is, unowned or empty land—because the Native Americans were not cultivating it in a fashion that the doctrine of natural law considered necessary to establish property rights.[8] This emphasis on the way in which land was used also

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"independent tribal government virtually disappeared from southern New England." See Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630–1763* (Middletown: Wesleyan University Press, 1986), 233, 234. On the years before King Philip's War as an era of shared sovereignty, see Hermes, "Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance," *The American Journal of Legal History* 43 (1999): 52–73; and Hermes, " 'Justice Will Be Done Us': Algonquian Demands for Reciprocity in the Courts of European Settlers," in *The Many Legalities of Early America*, eds. Christopher Tomlins and Bruce Mann (Chapel Hill: The University of North Carolina Press, 2001), 123–49.

6. For two of the most influential works, see Robert A. Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990); and Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999).

7. For the arguments of Francisco Vitoria, one of the leading figures in the sixteenth-century Spanish debates, see Anthony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," *Social & Legal Studies* 5 (1996): 321–36. For an account of Vitoria and his followers which argues that they were defenders of indigenous rights, see Anthony Pagden, "Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians," in *The Languages of Political Theory in Early Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 99–119.

8. But as Andrew Fitzmaurice has recently argued, the doctrine of *terra nullius* was not employed by Europeans until well into the nineteenth century. Instead, Fitzmaurice contends that early modern theorists employed a natural law argument derived from Roman law in which the first taker of unoccupied land becomes its owner. However, as Fitzmaurice points out, this doctrine was—especially in the Iberian world—used to *defend* indigenous rights on the grounds that the indigenous people were in fact occupying and using the land. Nevertheless, he argues that the English, beginning in the early seventeenth century and

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functioned to undermine Native sovereignty, for only peoples who had extensive property holdings and a money economy would have any need for fixed laws and a settled government. And because Natives were still in a pre-political state of nature (or had at best a weak form of sovereignty), they could not claim jurisdiction over unimproved land. As such, they could be dispossessed without the need for treaties, a formal cession, or indeed any kind of consent. According to a number of influential books and articles, the main thinker in this natural law tradition in the British world was John Locke, whose ideas dominated Anglo-American justifications for empire in the eighteenth century.[9] According to Anthony Pagden, "the major conclusion which Locke drew from his characterization of Amerindian society was that it was possible for Europeans to disregard all aboriginal forms of government, and consequently to deny them any status as 'nations'. This meant that all dealings between Europeans and

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culminating in the work of John Locke, inverted this argument, contending that the indigenous peoples of the Americas were *not* in fact using the land in ways that would confer legitimate rights of ownership and sovereignty. On these points, see Fitzmaurice, "The Genealogy of *Terra Nullius*," *Australian Historical Studies* 129 (2007): 7–8; and Fitzmaurice, "Moral Uncertainty in the Dispossession of the Native Americans," in *Virginia in the Atlantic World, 1550–1624*, ed. Peter Mancall (Chapel Hill: The University of North Carolina Press, 2007), 383–409.

9. According to Anthony Pagden, "The *res nullius* argument, with Locke's development of it, was . . . the most powerful and the most frequently cited legitimation of the British presence in America." Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c.1700," in *The Oxford History of the British Empire. Volume I: The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century*, ed. Nicholas Canny (New York: Oxford University Press, 1998), 47. David Armitage makes a similar claim: "From the 1620s to the 1680s in Britain, and then in North America, Australia and Africa well into the nineteenth century, the argument from vacancy (*vacuum domicilium*) or absence of ownership (*terra nullius*) became a standard formulation for English, and later British dispossession of indigenous peoples." Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 97. On the connection between indigenous systems of property and indigenous people's capacity to govern themselves, see Bruce Buchan, "The Empire of Political Thought: Civilization, Savagery, and the Perceptions of Indigenous Government," *History of the Human Sciences* 18 (2002): 1–22. On the role that Locke's ideas played in justifying empire, see James Tully's seminal articles: "Rediscovering America: The *Two Treatises* and Aboriginal Rights," in Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 137–76; "Aborginal Property and Western Theory: Recovering a Middle Ground," *Social Philosophy and Policy* 11 (1994): 153–180; and "Placing the 'Two Treatises'," in *Political Discourse in Early Modern Britain*, eds. Nicholas Phillipson and Quentin Skinner, (Cambridge: Cambridge University Press, 1993), 253–80; as well as, Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: The Clarendon Press, 1996); and Duncan Ivison, "Locke, Liberalism and Empire," in *The Philosophy of John Locke: New Perspectives*, ed. Peter Anstey (London: Routledge, 2003), 86–105.

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Amerindians were, in effect, between legitimate political societies on the one hand and simple individuals on the other."[10]

This scholarship on Locke and empire also contends that natural law theory was particularly attractive to English people as it allowed them to eschew claims to empire based on conquest, a legal doctrine that, given how the Norman invasion was used by apologists for royal power at home, raised the worrisome specter of monarchical absolutism. As David Armitage argues in an important article on the connections between Locke's political theory and his involvement with the founding of Carolina, "the agriculturalist argument was the best justification that could be given for dispossession after arguments from conquest and from religion had been gradually abandoned." Moreover, Armitage claims, the English had learned from the Spanish that "the argument from conquest could only justify *imperium* over native peoples but not *dominium* over American land."[11]

This new scholarship has enriched our understanding of the ideological underpinnings of early modern empire, highlighting the connections between some of the seminal political ideas of the seventeenth and eighteenth centuries and the dispossession of the indigenous peoples of the Americas.[12] But it has tended to base its conclusions about imperial ideology on the work of a handful of prominent European theorists, while giving little or no attention to the ideas of the royal officials and settlers who were responsible for claiming extra-European territory.[13] This scholarship has also failed

10. Pagden, "The Struggle for Legitimacy," 44. According to Richard Tuck, Locke was the most explicit of all the major natural law theorists on the European right to appropriate Native American property, arguing, *contra* Grotius, that they could not have jurisdiction over land that they had not cultivated. See Tuck, *Rights of War and Peace*, 175–76.

11. David Armitage, "John Locke, Carolina, and the *Two Treatises of Government*," *Political Theory* 32 (2004): 618. In the literature on Locke and empire there is some dispute over whether he invoked a right of war against the Natives for denying the English access to "waste" lands. Richard Tuck and James Tully both argue that he did. See Tuck, *Rights of War and Peace*, 177; and Tully, "Rediscovering America," 143. For a contrary view, see Arneil, *John Locke and America*, 163–65.

12. However, recent scholarship has begun to question this connection. In addition to the work of Andrew Fitzmaurice on the Spanish scholastics' criticism of empire cited in note 8 above, Lauren Benton and Benjamin Straumann have recently argued that "it was not until the second half of the eighteenth-century that writers on the law of nations developed a theory of occupation and *res nullius* more amenable to the needs of expanding empires." For most of the early modern period, they claim, the idea of *res nullius* was used "mainly to ends critical of empire." See Benton and Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28 (2010): 25–6.

13. In making this distinction, I have been influenced by Benton and Straumann's call for a closer examination of how imperial claims were made in practice in early modern empires.

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to examine the legal ideas and political norms articulated by the Native Americans themselves as they confronted European claims. Moreover, its emphasis on the European denial of indigenous rights overlooks the many treaties that Europeans signed with Native Americans, as well as (especially in the British Empire) the long-standing practice of obtaining land by purchase and voluntary cessions.[14] This in turn raises the question of the relationship between our current understanding of the intellectual underpinnings of European expansion, in which the idea that the New World was in effect a legal vacuum, lacking both owners and sovereigns, is dominant, and the actual policies of the early modern empires towards indigenous peoples.[15]

The rich array of legal records left by the Mohegans' long struggle against dispossession allows us to uncover a more complex trans-Atlantic debate about indigenous rights in the eighteenth-century British world, from claims that they were conquered peoples to powerful defenses of their political sovereignty and territorial integrity. And the fact that these arguments about dispossession were made in a legal forum enables us to tie them more closely to concrete disagreements over the ownership of land in America, the binding nature of treaties, and the locus of authority in the empire. The competing conceptions of indigenous rights presented in the case also reminds us of the importance of legal pluralism in early modern empires, characterized as they were by delegated authority, overlapping jurisdictions, and, as a consequence, by a number of competing sources of juridical authority, from

In their view, scholars have too easily assumed "the existence of direct and clear connections between the writings of jurists and scholars in Europe and the actions or pronouncements of imperial agents in empire." See "Acquiring Empire by Law," 1–2.

14. As argued most recently by Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005).

15. Stuart Banner sees a sharp dichotomy between English theory and colonial practice in early America, arguing that "there is no evidence that the *Two Treatises* caused anyone in colonial North American to cease respecting Indian property rights or to stop purchasing land from the Indians." Banner, *How the Indians Lost Their Land*, 48. Brian Slattery is equally critical of scholars who assume that the "New World" was "a legal vacuum" and that neither the British nor the French Crowns recognized the sovereignty or the property rights of Native Americans. Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America," in *Despotic Dominion: Property Rights in British Settler Societies*, eds. John McLaren, A.R. Buck, and Nancy E. Wright (Vancouver: U.B.C. Press, 2005), 50. It should be noted, however, that the colonial reading of such figures as Grotius and Locke is grounded in their work as imperial policy makers. See Armitage, "John Locke, Carolina, and the *Two Treatises of Government*"; and Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Leiden: Brill Academic Publishers, 2006).

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municipal law (in Anglo-America, the common law), to Roman law, the law of nations, and natural law.[16]

After describing the seventeenth-century background to the dispute, this article examines the arguments about the Mohegans' legal claims before the first royal commission in 1705. It then traces the subsequent history of the case, culminating with an analysis of the arguments over Native American rights before the final royal commission in 1743.

II

The origins of the conflict between the Mohegans and Connecticut lie in the complicated aftermath of the Pequot War in the late 1630s.[17] Uncas, sachem of the Mohegans, used the warfare between the English and the Pequots to undermine the powerful Pequot sachem, Sassacus.[18] According to Michael Oberg, "with the Pequots under attack by the Narragansetts and the Dutch, and ensnared in an increasingly tangled web of controversy with the English, Uncas saw alliance with the newcomers as a means to increase both his own power and that of the Mohegans."[19] In his bid to usurp Sassacus, Uncas allied with Major John Mason, an English soldier of fortune who prosecuted the war against the Pequots with particular brutality, torching their fort at Mystic and killing 600 men, women, and children.[20] Through Uncas' strategic alliance with the English, the Mohegans were able to replace the defeated Pequots and create a new Mohegan confederation that included Pequots and former Pequot tributaries.

The relationship between Uncas and Mason was central to the ensuing conflict over the Mohegans' land. As a result of his help in defeating the Pequots in the 1630s, Uncas came to control a large amount of territory east of the Connecticut River. Facing encroachment from the Dutch, the

16. On legal pluralism in early modern empires, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (New York: Cambridge University Press, 2009).

17. According to Richard Johnson, the Mohegans were "born of intra-tribal factionalism . . . they elected from the first to consolidate their separate identity through alliance with the whites, as when they promptly joined in the coalition already forming against their own Pequot kinsmen and shared the spoils of victory." Johnson, "The Search for a Usable Indian: An Aspect of the Defense of Colonial New England," *The Journal of American History* 64 (1977): 646.

18. For an account of his life, see Oberg, *Uncas*. For the conflict between Uncas and Sassacus as an example of pre-contact native factionalism, see P. Richard Metcalf, "Who Should Rule at Home? Native American Politics and Indian-White Relations," *Journal of American History* 61 (1974): 651–65.

19. Oberg, *Uncas*, 50.

20. For the relationship between Uncas and Mason, see St. Jean, "Inventing Guardianship."

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French and their Native American allies, as well as from the other English colonies, it was in the best interest of Connecticut "to help Uncas consolidate lands and Indian peoples under his rule. Uncas obliged by claiming a huge tract of land that constituted most of southeastern Connecticut and a small part of what is today Rhode Island."[21]

But in the decades following the defeat of the Pequots, Uncas' control over this territory was tenuous. Massachusetts, as well as the Narragansetts under their sachem, Miantonomo, made claims to the former Pequot lands, as did factions within Connecticut opposed to Mason's alliance with Uncas.[22] In order to safeguard his new acquisitions, Uncas entered into a series of agreements with both the colony and the Mason family. In 1638, he and his enemy, Miantonomo, signed the Treaty of Hartford, in which they agreed to submit their quarrel to Connecticut's adjudication rather than resort to arms.[23] And in the fall of 1640 in a vaguely worded deed, Uncas appeared to cede all of his lands to Connecticut, save "that ground which at present is planted and in that kind improved by us."[24] According to his biographer, however, Uncas saw the "deed not as a transfer of property but as something akin to a recognition of the colony's right of preemption over Indian lands within its borders." In other words, the deed was more like a trust, as Uncas would continue to control the lands he had acquired during the war, and would have the additional benefit of Connecticut's assistance in keeping them free from intruders.[25]

Following this cession, however, the pressure on the tribe's lands continued to increase. So in 1659, beset by the Narragansetts and by expanding English settlements, Uncas entrusted the remainder of the Mohegans' territories to Mason, who now would have to consent to any alienation of the tribe's land.[26] By doing so, Uncas hoped to protect the tribe from being cheated by unscrupulous colonists, as well as use Mason's connections in the councils of Connecticut to shield them militarily from their tribal enemies.[27] For his part, Mason aimed to profit from his privileged access to the lands the tribe controlled. In 1660, intending to aid the

21. St. Jean, "Inventing Guardianship," 368.

22. On Connecticut's territorial ambitions, see Richard Dunn, "John Winthrop, Jr., and the Narragansett Country," *The William and Mary Quarterly* 13 (1956): 68–86.

23. For the text of the treaty, see *The Governor and Company*, 33–34.

24. The deed is reprinted in Henry Baker, *History of Montville, Connecticut, formerly the North Parish of New London, from 1640–1896* (Hartford: Lockwood & Brainard Co., 1896), 11.

25. Oberg, *Uncas*, 89–90.

26. Ibid., 155.

27. Ibid., 154. Wendy St. Jean compares the relationship between Mason and Uncas to that of the "squirrel king," a practice common among "southeastern Indian clans" who cultivated a relationship with a powerful individual in a rival tribe so that he would promote their interests with his people. St. Jean, "Inventing Guardianship," 366–67.

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colony in securing a royal charter, Mason transferred jurisdiction over this land to the colonial government on the condition that, when they opened it for settlement, sufficient land would be set aside for the Mohegans.[28] And in 1662, helped in part by the land deeded to the colony by Mason, Connecticut received a royal charter, the boundaries of which included the Mohegans' territory.

Emboldened, the colony's new governor, John Winthrop, Jr., claimed that the relationship between Mason and Uncas was now void as the granting of the charter had extinguished the Mohegans' title. The colony also enacted a law that made all individual purchases of land from Native Americans subject to approval by the General Court. Mason countered that the charter only transferred jurisdiction over the land within the bounds of the patent but not the underlying title. Mason also signed further deeds with the Mohegans in 1661 and 1665, which granted him half of the proceeds of any sale of the tribe's lands in return for his assistance in representing their interests before the General Court.[29] And in 1671, the year before he died, Mason entailed a tract of land eight miles by four miles—or approximately 20,000 acres—lying between the towns of New London and Norwich for the exclusive use of the tribe.[30] This tract—referred to subsequently as the "sequestered lands"—was to be the principal (although not the only) one in question in the ensuing legal dispute.

Despite the entailment, in the decade following Mason's death, the towns of New London and Norwich began to encroach on the Mohegans' reserved lands.[31] The fact that the Mohegans once again allied with the English in King Philip's War did not halt this process of gradual dispossession, because the war changed the balance of power in New England, rendering allied tribes such as the Mohegans less important for the region's defense. Moreover, the violence of the conflict increased colonial hostility toward the Native Americans, especially among the settlers on the frontier who desired their land.[32] Nevertheless, in the years following the war, Uncas continued to resist the colony's encroachments through law

28. De Forest, *History*, 292–93.

29. St. Jean, "Inventing Guardianship," 375–77; and *The Governor and Company*, 41–42.

30. St. Jean, "Inventing Guardianship," 378. It is not clear from the surviving records just what percentage of the lands the Mohegans held prior to Uncas' alliance with Mason were left at the time of Mason's entailment. On this entailment, see also De Forest, *History*, 293–94.

31. Kawashima says that the General Court gave 600 acres to New London in 1679. Yasuhide Kawashima, "Uncas's Struggle for Survival: The Mohegans and Connecticut Law in the Seventeenth Century," *Connecticut History* 43 (2004): 119–131. See also De Forest, *History*, 294–95.

32. On the rise of "frontier interests" bent on dispossessing Native Americans, see Michael Oberg, *Dominion and Civility: English Imperialism and Native America, 1585–1685* (Ithaca: Cornell University Press, 1999), 219.

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and not violence.[33] In 1681, he concluded a treaty with Connecticut in which it undertook to provide "a sufficiency of land" for the tribe to plant on and to ensure that "a just price be paid" for "whatever plantations we grant to any people in their countries and territories." Also, the colony pledged that the Mohegans "shall have *equal justice* from us as our own people, in all manners which they shall bring before us." The colony also undertook to help defend the Mohegans should they be attacked by their enemies. In return, Uncas granted the colony "all my lands and territories," pledging that he would not dispose of them to anyone else without the colony's consent.[34] In return for these concessions, he demanded a "reasonable satisfaction for my propriety in them as we shall agree." Uncas also promised that he and his successors will be "friends and allies to the said colony" and not make "peace and war" without taking "advice" from "the General Court of Connecticut." Finally, Uncas promised "to assist" the colony against any "enemy" with "*a competent number of fighting men*."[35]

In 1684, the year he died, Uncas was also able to get the colony to establish a commission to ascertain the tribe's boundaries, but the final report confirmed that the bulk of their lands were no longer in their control.[36] Upon Uncas' death in 1684, his son, Oweneco, became sachem. In the same year, John Mason's son, Samuel, assumed his father's role as the colony's legal guardian. Samuel Mason used his long tenure as an assistant in the General Court to defend the tribe, arguing that the colony still needed the Mohegans for its defense, and trying to preserve their land from settler encroachment.[37] However, despite Mason's best efforts, by the late 1680s much of the territory the Mohegans had occupied at the end of the Pequot war was gone. All that remained was the land that Mason had entailed in 1671, as well as another tract on the northern boundary of Lyme, and a "third, usually styled the Mohegan Hunting Grounds," which "lay between the townships of Norwich, Lebanon, Lyme, Haddam and Middleton."[38]

33. On Uncas's attempts to seek legal redress in the colony's courts as well as before the General Court, see Yasuhide Kawashima, "Uncas's Struggle for Survival," 119–31.

34. Oberg argues that Uncas most likely understood this grant to be a right of pre-emption or first purchase, similar to his earlier dealings with the Masons. See Oberg, *Uncas*, 200–201.

35. For the text of the treaty, see *The Governor and Company*, 39–41. The terms of the treaty are discussed in De Forest, *History*, 295–96.

36. This was the Treat and Talcott commission. For its claim that the Mohegans had alienated the "greatest part" of their lands to the colony, see *The Governor and Company*, 36. On the commission's findings, see also Oberg, *Uncas*, 204.

37. St. Jean, "Inventing Guardianship," 382–85.

38. De Forest, *History*, 297, also refers to other, smaller tracts, as well as "considerable quantities" of land in Windham county. Oberg, *Uncas*, 204–5.

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In addition to the colony's appropriation of their lands, the Mohegans—Uncas as well as his sons—had also deeded large tracts of land to various colonists, often without the consent of the Mohegan community.[39] In 1659, there was a large sale to the town of Norwich, made with the consent of Mason.[40] A similar alienation occurred in 1668, this time to New London.[41] And in 1680 Oweneco deeded all the lands his father had given him in Quinnebag to the powerful Fitch family.[42] But the Mohegans' situation became truly dire in the late 1690s when, despite the terms of the 1681 treaty, Connecticut began to grant away even the entailed or "sequestered" land to new townships, often without their consent or that of the Mason family.[43] In 1698, the colony's assembly granted the governor, Fitz-John Winthrop, a farm out of these lands.[44] In 1699, part of the Mohegan hunting grounds was included within a grant made to the new town of Colchester.[45] And, in 1703, the General Court annexed the remainder of the sequestered lands to New London "without the Mohegans or their English protectors being consulted."[46]

Nicholas Hallam, a political ally of the Masons, observed the effect of the colony's usurpations on the Mohegans. In 1703, he was attempting to ascertain the boundaries between the Mohegans and the town of New London for Samuel Mason when he came across about thirty to forty "Mohegan Indians, men, women, and children, in a very poor and naked condition, many of them crying lamentably." When he asked them the

39. Den Ouden claims that "such transactions may have regularly taken place without the consent or consideration of the larger community of Mohegans." Den Ouden, *Beyond Conquest*, 102. Den Ouden estimates that Oweneco made at least twenty-five deeds of sale to colonists between 1659 and 1710. However, according to William Bollan, the Mohegans' lawyer before the 1743 royal commission, Uncas deeded the sequestered lands to the tribe in 1683. See *The Governor and Company*, 89.

40. De Forest, *History*, 290–91. According to De Forest, "The Norwich and New London records abound with deeds, conveying tracts, of usually from one to five or six hundred acres, to various persons of these towns."

41. For the deed, see *The Governor and Company*, 43.

42. De Forest, *History*, 290.

43. *The Governor and Company*, 27–29. For the continual incursions on the Mohegans' planting and hunting grounds, see Smith, *Appeals to the Privy Council*, 424; and St. Jean, "Inventing Guardianship," 385.

44. On this, see *The Governor and Company*, 52–53.

45. See *The Governor and Company*, 28.

46. Oberg, *Uncas*, 206. This was in September 1703. In May, the General Court had passed an act to enlarge the bounds of New London, followed by a patent to the town in 1704. See Den Ouden, *Beyond Conquest*, 105–7. According to Den Ouden, by 1704 the planting grounds—the "thirty-two-square-mile tract of land (20,480 acres) between New London and Norwich"—were "encompassed by the newly enlarged town of New London." Den Ouden, *Beyond Conquest*, 98.

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reason for their plight, they told him "that the governor had been up with them that day, and had drove them from their planting land, which they had enjoyed ever since the English came into the country, and that they were not willing to leave the English, unless they were forced to it."[47]

III

In response to the annexation of their remaining lands, Mason's son, Samuel, and Uncas' son, Oweneco, sought redress once again from the General Court. Failing to obtain it, they appealed across the Atlantic to Queen Anne, claiming that the colony was violating the terms of the various agreements that had set aside land for the tribe.[48] In making this appeal, Oweneco and the Masons received assistance from disaffected elites in Connecticut such as Nicholas Hallam, who had recorded the plight of the dispossessed Mohegans, and his brother John. The Hallams were angry with Connecticut's government for claiming that the colony's charter barred their right to appeal to the Crown over a court decision that had gone against them. The Hallams therefore had an interest in the Mohegans' case, as they hoped it would weaken Connecticut's legal autonomy.[49] In late 1703 and early 1704, Nicholas Hallam appeared before the Board of Trade in order to convince them that Connecticut's charter should not be a barrier to the Mohegans' attempts to seek redress. As he put it: "this being a controversy between the Indians and that Government, H. M. [Her Majesty] may, nothwithstanding the privileges then granted to the said Government, grant a Commission to indifferent persons in that or the adjacent Colonies to enquire into and determine this matter . . ." Hallam also told the Board that such a commission should be authorized

47. *The Governor and Company*, 54–55.

48. Ibid., 57–58.

49. The Hallams were challenging the disposition of their stepfather's estate by a Connecticut court. They were joined in their appeal to the Crown by Edward Palmes, the brother-in-law of Fitz-John Winthrop, who was also contesting the legality of a will. The Privy Council ruled against them, although it upheld their right to appeal to the Crown notwithstanding the charter. See Robert Taylor, *Colonial Connecticut: A History* (New York: KTO Press, 1979), 195–97. On the Crown's inherent right to hear appeals from all of its subjects, see J.M. Sosin, *English America and Imperial Inconstancy: The Rise of Provincial Autonomy, 1696–1715* (Lincoln: University of Nebraska Press, 1985), 179. The private colonies' denial of such a right was a central grievance in the Board of Trade's case against them. On this, see Louise P. Kellogg, *The American Colonial Charter* (Washington: Government Printing Office, 1904), 267–72.

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"to put the Indians into possession of their lands in case it shall duly appear they have been wrongfully disseised."[50]

Pursuant to the appeal, Hallam had a short letter printed in London in which Oweneco made his case to "the Great Queen Ann, and to her Noble Council" about the "Oppression" that he and his "People" had suffered at the hands of the General Court. In it, Oweneco warned that should he fail to obtain relief from the Queen, his "People" might "scatter from Me, and flee to the Eastern Indians," who, he noted, were "the French's Friends, and the English's enemies." In addition to pointing out the strategic significance of the Crown's alliance with the Mohegans, Oweneco argued that they had a "Hereditary Right to the Soyl and Royalties of our Dominions and Territories, before the English came into our Country." Oweneco also claimed that his authority as sachem was "not confer'd . . . by the English, but by the gods." His letter further bolstered the authority of the sachemship by relaying a story of a pipe which the gods had given his ancestors as "a Token" of "Our happy Reign." He then spoke of gifts—a Bible and a sword—sent by Charles II which the tribe had kept in the same place as a sacred pipe given them by their "gods."[51] In establishing the divine origin of his family's rule, Oweneco sought to place himself on an equal footing with the English Crown, a status that the exchange of diplomatic gifts with Charles II reinforced.[52]

50. "Case of the Mohegan Indians in Connecticut" (February 1, 1704), summarized in *Calendar of State Papers, Colonial Series*, No. 56. Volume 22 (1704–1705), ed. Cecil Headlam (London: Her Majesty's Stationary Office, 1916), 25 (hereinafter, *CSPC*). For Hallam's December 3rd memorial to the Board of Trade, see *CSPC*, No, 1353. Volume 21 (1702–1703), 856–7. Although Kellogg claims that William Blathwayt, the great opponent of chartered government, "became Oweneco's patron," there is no evidence that Oweneco travelled to London with Hallam. Kellogg, *The American Colonial Charter*, 302. Hallam suggests as much in his January 8, 1704, affidavit, where he informed the Board of Trade that "Ben Unkas, one of the Mohegan Indian Sachems" had told him that if he "had money he would go for England and make his complaint." *CSPC*, No, 11. Volume 22 (1704–1705), 4–5. For sharing his research on this point, I am indebted to Paul Grant-Costa.

51. *Owaneko, Chief Sachem or Prince of the Moheagan-Indians in New England, HIS Letter to a Gentleman Now in London* (London: Printed for Daniel Brown at the Black Swan without Temple-Bar, 1704), 1–2. The title page claims that Oweneco's letter was "Faithfully Translated from the Original in the Indian Language." It is a verbatim copy of a letter Oweneco wrote to Nicholas Hallam on July 14, 1703, which bore the sachem's mark, as well as a claim that it was "The true Interpretation of Oanhekoe's Grievance & Narration, by me John Stanton Interpreter Gent." Oweneco's letter is reprinted (with an interpretive essay by David Murray) in *Early Native Literacies in New England: A Documentary and Critical Anthology*, eds. Katrina Bross and Hilary E. Wyss (Amherst: University of Massachusetts Press, 2008), 15–27.

52. A point made by David Murray in *Early Native Literacies in New England*, 25–27.

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Oweneco's claim of equality with the English monarch was in marked contrast to the case Hallam made before the Board of Trade on the tribe's behalf, in which he claimed that the Mohegans had always "acknowledged the Kings and Queens of England as their Sovereigns and have been ever ready to pay all due obedience and to yield subjection to them."[53]

Appended to Oweneco's letter was a short statement of the Mohegan's legal case against Connecticut. Although written in the third person, its view of the tribe's political status is closer to Oweneco's than to Hallam's.[54] It began by stating that "Owaneko, and his Ancestors, were formerly Chief Princes, and Owners of All, or great Part of the Country now called Connecticut-Colony in New-England." Furthermore, it claimed that "when the English first came, these Indians received them very kindly, and for a very small and inconsiderable Value, parted with all or most of their Lands to the English, reserving to themselves only a small Quantity of Land to Plant upon, and Hunt in." The Mohegans had also "assisted" the colony "in their wars against the other Indians; and have, until of late, quietly enjoyed their reserved Lands." However, "about a Year or two ago," the colony annexed "these lands to the Townships of Colchester and New London." As a result, "these poor Indians have been unjustly turn'd out of Possession, and are thereby destitute of all means of Subsistence."[55] At the heart of the Mohegan's legal case, then, was the claim that Connecticut had violated its alliance with the tribe, the terms of which allowed them to maintain their political autonomy and to continue to own a portion of the territory that they had once controlled outright.

The Board of Trade referred the Mohegans' appeal to the Crown's legal advisors. On February 29, 1704, the attorney general gave his opinion on the merits of the Mohegans' appeal:

> It doth not appear to me that the lands now claimed by the Indians were intended to pass or could pass to the Corporation of the English Colony of Connecticut or that it was intended to dispossess the Indians who before and after the Grant were the owners and possessors of the same, and therefore what ye Corporation hath done by ye Act mentioned is an apparent injury to

53. *CSPC*, No, 1353. Volume 21 (1702–1703), 856.

54. For pre-contact Algonquin ideas of political authority, see Kathleen J. Bragdon, *Native People of Southern New England, 1500–1600* (Norman: University of Oklahoma Press, 1996), 141–55. According to Jenny Pulsipher, in the eighteenth century the Wabanakis viewed the English King as a "paramount sachem" who offered protection in return for loyalty, but without interfering in the tribe's "local governance." Pulsipher also says that this was not inconsistent with indigenous claims to be subjects of the Crown. See Pulsipher, "'Dark Cloud Rising from the East': Indian Sovereignty and the Coming of King William's War in New England," *The New England Quarterly* LXXX (2007): 592.

55. *Owaneko, Chief Sachem or Prince of the Moheagan-Indians in New England*, 3.

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> them, and H.M., notwithstanding the power granted to that Corporation, there not being any words in the Grant to exclude H.M., may lawfully erect a Court within that Colony to doe justice in this matter, and in ye erecting such Court may reserve an Appeale to H.M. in Council, and may command ye Governors of that Corporation not to oppress those Indians or deprive them of their right, but to doe them right notwithstanding the Act made by them to dispossess them, which I am of opinion was illegall and void.[56]

According to the attorney general, then, the Mohegans were the original owners of the disputed territory. Moreover, the grant of a royal charter to the colony of Connecticut did not in any way affect the Mohegans' ownership of the soil. And given that the colony had violated the tribe's legal rights, the Crown had the jurisdiction to set up a court to adjudicate the matter, the charter rights of the colony notwithstanding.

Following this opinion, the Queen authorized a royal commission to hear the dispute, informing the colony that "complaints have been made to us in behalf of the Mohegan Indians, that you have by an Act or Order of your General Court or Assembly taken from the said Indians that small tract of land which they have reserved to themselves." In addition to its concern that the colony's law was unjust, the Crown also warned Connecticut that, as war with the French had resumed, its treatment of the Mohegans "may be of fatall consequence by causing a defection of the Indians to our enemies." As such, the Crown instructed the colony "to pay all due obedience" to its commission, and, if "upon enquiry it be found that the said Indians have been deprived of their lands," to "immediately cause them to be put into possession thereof . . ."[57]

The language the Crown used in establishing the commission indicates that it did not view the Mohegans as subjects, but rather as allies, who, in addition to being the "chief proprietors of all the land in those parts," had "entertained and cultivated a firm friendship, by league, with our said subjects of Connecticut, and have, at times, *assisted them when they have been attacked by their enemies*."[58] However, if the Mohegans were a separate people governed by their own rulers and capable of entering into treaties with the Crown's subjects, they were also, in the words of the Board of Trade, "under your Majesty's Dominion," which gave them a right to appeal to the Crown for redress.[59]

The Crown's decision to proceed by commission was not without precedent. In 1664, a royal commission had heard the complaints of the

56. *CSPC*, No, 146. Volume 22 (1704–1705), 60–61.
57. *CSPC*, No, 181. Volume 22 (1704–1705), 76–77.
58. *The Governor and Company*, 24.
59. *CSPC*, No, 171. Volume 22 (1704–1705), 72–73.

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Narragansett Indians about the loss of their territory to colonial land speculators.[60] Also, the fact that the Crown again authorized a royal commission to hear the dispute between the Mohegans and Connecticut indicates that it viewed the tribe as a separate part of the empire, akin to an English colony, and therefore juridically independent of Connecticut. According to the legal historian Joseph Smith, the Mohegan litigation was analogous to "intercolonial boundary disputes, since the plaintiff tribe was recognized to possess attributes of internal sovereignty sufficient at least to maintain and prosecute an action."[61] Moreover, in the decades preceding the Mohegan case, both the Crown and the settlers acknowledged that Native peoples had the political capacity to enter "into treaties of peace, alliance, and submission."[62]

The Crown's willingness to grant the Mohegans standing was also a result of its concern that the autonomy of the chartered colonies was detrimental to the empire's struggle against the French for control of North America. For this reason, Crown policy had long sought to revoke the charters of the New England colonies and convert them to direct royal rule.[63] Although temporarily halted by the settler rebellions following the Glorious Revolution, this centralizing impulse returned during the wars with the French in the 1690s and early 1700s, in which the Crown considered Native allies such as the Mohegans to be vital to the security of

60. See Pulsipher, *Subjects unto the Same King*, 54–55.

61. Smith, *Appeals to the Privy Council*, 418. Mark Walters contends that "the Crown had an inherent power as sovereign of the empire to manage relations and determine disputes between components of the empire." See Walters, "Mohegan Indians v. Connecticut," 808–809.

62. Walters, "Mohegan Indians v. Connecticut," 801. In his discussion of the Mohegan case, P.G. McHugh argues that before the nineteenth century the Crown viewed its *imperium* as resting on Native consent, so that after treaties had been signed (or even after a conquest) it continued to recognize "their political integrity and customary authority within their own affairs." McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 102. The Crown's stance toward the Mohegans might also have been influenced by Chief Justice Holt's 1693 decision in *Blankard v. Galdy* (*English Reports*, Vol. 90, 1089) which held that the laws of conquered peoples continue in force after a conquest by the Crown. Modern scholars and jurists have used this case (as well as others, including the Mohegans' dispute with Connecticut) as the basis for a common law doctrine of the continuity of indigenous laws and title following the assertion of Crown sovereignty. On this doctrine, see Walters, "Mohegan Indians v. Connecticut," 790–91.

63. On the Crown's attempts to revoke the charters of the private colonies, see Ian K. Steele, *The Politics of Colonial Policy: The Board of Trade in Colonial Administration, 1696–1720* (Oxford: Clarendon Press, 1968), 60–81.

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the empire.[64] Finding that Connecticut had mistreated the Mohegans thus suited imperial reformers as it gave them a justification for weakening the colony's chartered autonomy.[65]

IV

The Crown chose Joseph Dudley, the Governor of Massachusetts, to preside over the royal commission. For years, Dudley had been hostile to what he saw as the excessive autonomy afforded Connecticut by its charter, which had survived the Dominion of New England, and which still featured an elected governor.[66] He was also a strong supporter of the Crown's right to control the colonies' policies toward Native Americans. Indeed, because of the lobbying of both Dudley and Lord Cornbury, the royal governor of New York, Connecticut's dispossession of the Mohegans was one of the charges in the 1706 Parliamentary Bill designed to annul the charters of all of the private colonies.[67]

Given the threat to its charter, Connecticut refused to appear before the Dudley commission, claiming that the Crown had no legal right "to enquire and judicially determine concerning the matter in controversy."[68] Such royal oversight, its lawyers argued, was "contrary to law and to the letters patent under the great seal." In addition, the colony maintained that the establishment of a juryless royal commission would violate "the known rights of her majesty's subjects throughout all her dominions . . ."[69]

64. In an important article, Eric Hinderaker argues that the British in the early eighteenth century began to recognize Native American rulers (and therefore their polities) as partners in the imperial project, whereas they "had previously tended to regard Indians as natural men living in weak, stateless societies." See Hinderaker, "The 'Four Indian Kings' and the Imaginative Construction of the First British Empire," *The William and Mary Quarterly* 53 (1996): 487–526 (quote at 488).

65. For the Mohegans' role in King Williams' War and Queen Anne's War, see Oberg, *Uncas*, 206.

66. On Dudley's enmity toward the private colonies, see Kellogg, *American Colonial Charter*, 301–2.

67. Kellogg, *American Colonial Charter*, 303. On Dudley's complaints against Connecticut for—among other things—its treatment of the Mohegans, see *CSPC*, No, 69. Volume 23 (1706–1708), 29–32.

68. The colony also forbade individual colonists from giving testimony before the commission.

69. *The Governor and Company*, 32–33. The colony also accused Dudley and the other commissioners of having an interest in the land in question. On this point, see Richard S. Dunn, *Puritans and Yankees: The Winthrop Dynasty of New England, 1630–1717* (Princeton: Princeton University Press, 1962), 340.

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On August 24, 1705, the Dudley commission, having heard the case *ex parte*, unanimously decided in favor of the Mohegans. The commissioners held "that the said Moheagans are a considerable tribe or people . . . and cannot subsist without their lands, of which they have been deprived *and dispossessed* . . ." Furthermore, Oweneco and his people "have at all times served the interests of the crown of England and the colony of Connecticut" and "have *faithfully kept their leagues and treaties* with the said colony."[70] However, the colony, "contrary" to these "reservations, treaties, and settlements," had "*granted away considerable tracts of the planting grounds of the said Moheagans*."[71] As a result of the colony's encroachments on their lands, the tribe has "been reduced *to great want and necessity*, and, in this time of war, are in great danger of deserting their ancient friendship."[72] Accordingly, the commissioners ruled that the Mohegans "*had a very good and undoubted right to a very* large tract of lands within the colony of Connecticut."[73] And it ordered the colony to return to them the land that Mason had entailed in 1671 between New London and Norwich, as well as several smaller tracts.[74] Upon hearing the verdict, Oweneco pledged that he and his sons would be "*ever under the allegiance and government of the queen* and crown of England . . ." Captain Ben Uncas, his brother, also thanked the court, claiming that its favorable decision prevented him from "staining his hands with the blood of the English, *notwithstanding the many and frequent provocations from them* . . ." In reply, the commissioners thanked "the said Indians for their zeal and affection to her majesty, the crown, and the government of England, and the interests of the English nation," assuring them that "her majesty would always be ready to take care of them and their people, both in protecting them and preserving of their rights and properties."[75]

Following the Dudley commission's adverse verdict, the colony instructed Henry Ashurst, its agent in London, to appeal the decision.[76] A staunch Whig, Ashurst had a long history of defending corporate rights in both England and America. In the 1680s, he opposed the Stuarts' attack on the charters of the boroughs; and, following the Glorious Revolution, he worked with Increase Mather to get a new charter for Massachusetts that preserved some of the colony's old autonomy, albeit under royal governors

70. *The Governor and Company*, 29, 27.
71. Ibid., 28.
72. Ibid., 29.
73. Ibid., 27.
74. Ibid., 29.
75. Ibid., 66–67.
76. Ibid., 153–57.

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such as Dudley, for whom Ashurst harboured an intense hatred.[77] In his petition to Queen Anne, Ashurst offered a comprehensive legal argument in defense of the colony, one which it would reiterate for the remainder of the long dispute with the Mohegans. Ashurst first informed the monarch that the colony had obtained the disputed territory from the Pequots by conquest.[78] As he put it: "your petitioners and their ancestors did formerly, with great difficulty, and by their only endeavours, expenses, and charge, acquire, *by conquest*, the plantation of Connecticut, within the territories called New England, whereby a large addition was made to the dominions of the crown of England." In conquering the Pequots, Ashurst argued, the settlers "became absolute owners of the lands and plantations of Connecticut."[79] Furthermore, Ashurst noted, the Pequots had themselves recently "subdued and conquered Unca Sachem, a subordinate tributary chief under him, who had then lately *revolted* and *rebelled*." As a result, Uncas, having been "expelled his government and country," joined with the English in the wars against the Pequot. According to Ashurst, however, he "served them in no greater station than a pilot to steer their vessels upon waters in those parts."[80] In return for his assistance, the colony had allowed Uncas and the Mohegans "to possess some part of the said conquered lands, under such terms as your petitioners thought fit." Ashurst added that the amount of land the colony granted him was small as Uncas barely had "enough to make a hunt." More importantly, this "reservation" did not mean that Uncas had "any *right*" to the land, but "only the *permission* of your petitioners, *the conquerors*, to *suffer* him to possess the same."[81]

Ashurst also grounded the colony's title to the Mohegans' land on the settlers' labor, arguing that they had "built upon, planted, and greatly improved the said country and plantation . . ." In addition, he claimed title by prescription, noting that the colony has "had the *general possession*" of the land in question "*ever since the said conquest*, being now near seventy years since." As well, many of "the freeholders and planters"

77. Gary S. de Krey, "Ashurst, Sir Henry, first Baronet (1645–1711)," *Oxford Dictionary of National Biography*. http://www.oxforddnb.com/view/article/74440 (March 31, 2010).

78. Neither Ashurst nor William Smith (Connecticut's lawyer before the 1743 commission) says whether the Pequots were conquered in a just war. But the legal brief the colony prepared in advance of the final Privy Council hearing in 1770 claimed that the English settlers "conquered the Pequots in a just War." *The Case of the Respondents the Landholders. To be heard before the Right Honourable the Lords of the Privy Council* (n.p., 1770), 1. For the Puritan invocation of just war theory against the Pequots, see James Muldoon, "Discovery, Grant, Charter, Conquest or Purchase: John Adams on the Legal Basis for English Possession of North America," in *The Many Legalities of Early America*, 43.

79. *The Governor and Company*, 153–54.

80. Ibid.

81. Ibid., 154.

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have held their individual plots of land "for thirty, others forty, and others fifty years last past."[82] In addition to conquest, labor, and possession, Ashurst also held that Connecticut had obtained a deed from Uncas granting it the disputed land, save for a smaller amount that the tribe had under cultivation.[83] However, Ashurst thought that the colony had obtained the deed in order to clarify its title and not because the Mohegans had a legitimate claim to the territory in dispute.

Crucially, according to Ashurst, it was only after the settlers had acquired the land for themselves that the Crown "erected your petitioners into a corporation, and granted and confirmed to them and their successors all the said country or province called Connecticut." For Ashurst, then, the royal charter merely confirmed pre-existing rights; it did not create them. Moreover, he added, with the Dudley commission very much in mind, the charter gave the colony the final say in "all manner of judicatories for the trial of all causes therein."[84] In other words, the Crown had no power to grant redress to the Mohegans because Connecticut had ultimate jurisdiction over all legal disputes arising within its chartered boundaries.

Following Ashurst's appeal, the Privy Council overturned the Dudley commission's award of costs to the Mohegans, and granted a commission of review, this time under the direction of Lord Cornbury, who, like Dudley, was hostile to Connecticut's autonomy. However, because of Ashurst's opposition to Cornbury's appointment, this commission never met.[85] But despite its willingness to reconsider Dudley's verdict, the Privy Council upheld the legality of the Crown's jurisdiction over the colony, arguing that because "the Mohegan Indians are a Nation with whom frequent Treatys have been made, the Proper way of Determining the aforesaid Differences, is by her Matys Royall Commission."[86] The Privy

82. Ibid., 154–55.

83. Ibid., 155. It is likely that Ashurst is referring to the deed of 1640.

84. Ibid., 154.

85. For the Queen's order-in-council granting a commission of review, see *CSPC*, No, 368. Volume 23 (1706–1708), 150–151. The stages of Connecticut's appeal can be followed in *APC*. Volume II, 460–61. On Ashurst's role in getting the ruling on costs reversed, see George Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776* (New York: Longmans, Green and Co., 1923), 103; and Sosin, *English America*, 181. On the 1706 appeal, see also Smith, *Appeals to the Privy Council*, 427.

86. "Report of the Committee for hearing of Appeals from the Plantations touching ye Mohegan Indians Lands" (May 21, 1706). PC 2/81, p. 204–205. One of the members of the appellate committee of the Privy Council was Chief Justice Holt of the King's Bench. Holt was the judge in *Blankard v. Galdy* (see note 62 above) where he held that the laws of conquered peoples survive the conquest. It is possible that the committee's decision that the Mohegans were a nation was influenced by Holt's earlier ruling. On Holt, see

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Council's determination that the Mohegans were a "Nation" with treaty rights was an emphatic rejection of the colony's claim that the tribe was subordinate to it. In his year-end letter to the Board of Trade, Governor Dudley seconded the Privy Council's conclusion: "if H.M. cannot grant commissions to hear so apparent a breach between that Government and a Tribe of independent [Indians] . . . that Corporation must be beyond all challenge."[87]

The arguments made before the Dudley commission and to royal officials in London set the intellectual framework for the ensuing debate about the Mohegans' rights. The legal position taken by the Mohegans and their English allies depended upon the tribe's original "Hereditary Right," which had survived contact with the English and the granting of a royal charter.[88] In addition, they held that the colony had made several treaties and agreements with the tribe, all of which it had broken. For its part, the Crown agreed that the Mohegans were politically independent from the colony, although under the dominion of the Crown. As a result, the colony's ability to take Indian land was legally limited and subject to the higher authority of the Privy Council in London. In its appeal, the colony based its claims to the disputed territory on conquest, improvement, possession, and Native grant, all of which were confirmed by the royal charter, and underpinned by the rights of Englishmen throughout the empire to freehold property.[89]

V

In part because of Ashurst's appeal and the subsequent decision of the Privy Council to set up a commission of review, the judgment of the royal commission in favor of the tribe was never executed.[90] Instead, the towns that had been founded on the Mohegans' reserved lands continued to expand. Samuel Mason, on the winning side in the case, found himself politically isolated. The nadir of the Mason family's fortunes came in 1711, when John Mason, Samuel's nephew, surrendered the family's rights

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Paul D. Halliday, "Holt, Sir John (1642–1710)," *Oxford Dictionary of National Biography* www.oxforddnb.com/view/article/13611 (September 15, 2010).

87. *CSPC*, No, 1422. Volume 22 (1704–1705), 659–60.

88. From Oweneco's letter cited in note 51 above.

89. Alhough forbidden by the colony from appearing before the Dudley commission, the settlers on the disputed territory echoed Ashurst's arguments, claiming they did "improve the lands belonging to the Mohegan Indians, formerly reserved to the said Indians in the tract of their hunting ground." *The Governor and Company*, 64.

90. Conroy, "The Defense of Indian Land Rights," 404.

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to the land that Captain Mason had entailed for the tribe in 1671.[91] And in 1718, the colony removed John Mason as the tribe's legal guardian, appointing in his stead others who promised to Christianize the Mohegans, funding this proselytization from the sale of their lands.[92]

The Mohegans' power also declined in the decades following the Dudley commission's verdict. Before his death in 1715, Oweneco continued to sell tribal lands to the settlers, further reducing the amount of land under the Mohegans' control.[93] In 1718, hoping to reverse the loss of their territory, the Mohegans petitioned the General Court, complaining of "entries, made upon the said land, and damage sustained by them in *their fields*."[94] Desiring to forestall another appeal to the Crown, the colony appointed a commission of its own to settle definitively the Mohegans' land claims. In 1721, this commission awarded the colony title to the bulk of the "sequestered lands," apart from 4,000–5,000 acres that it set aside for the Mohegans.[95] But even this small set-aside came with an important qualification, the colony promising that it "*shall for ever* belong to the Moheagan Indians," but only "so long as there shall be any of the Moheagans found or known of alive." However, "when the whole nation, or stock of said Indians are extinct, and none of them to be found," the colony decreed, "the said eastern part, which is now settled upon the Indians, shall for *ever belong to the town of New London*, as their full, free, and indefeasible estate in fee."[96]

In addition to dispossessing the Mohegans, the colony left the Masons with no chance of recompense for the legal costs incurred before the Dudley commission in 1705. As a result, in 1722, John Mason appealed to the General Court for redress, but was unsuccessful. In 1725, he presented a second petition asking that the decision of the Dudley commission be enforced, and that he be compensated. The colony once again refused to oblige, noting that Mason had been compensated in 1711 for renouncing his interest in the disputed land. The colony did, however, allow Mason to settle on the Mohegans' remaining lands, and once again take charge of their affairs. But the colony's concession did not temper Mason's

91. A copy of Mason's grant is in Mary Kingsbury Talcott, ed., *Collections of the Connecticut Historical Society*. Volume V (Hartford: Connecticut Historical Society, 1896), 123–25.

92. St. Jean, "Inventing Guardianship," 385.

93. De Forest, *History*, 313, provides details of these sales and argues that they angered members of the tribe.

94. *The Governor and Company*, 187.

95. Several documents pertaining to the commission are collected in *The Governor and Company*, 189–95. See also Den Ouden, *Beyond Conquest*, 117.

96. *The Governor and Company*, 194.

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sense of grievance. Instead, the growing discontent of the Masons and the Mohegans led to several more decades of legal and political conflict.[97]

VI

Soon after John Mason came to live among the Mohegans, he became involved in a dispute over who was the tribe's legitimate sachem. Following Oweneco's death, Caesar, the youngest son of Uncas, became sachem, as Mahomet, the real heir, was too young. However, when Caesar died in 1723, Mahomet was pushed aside by Uncas' illegitimate son, Ben. And when Ben died in 1726, his son, also called Ben, replaced him. This usurpation led to intra-tribal strife as Mahomet struggled to reclaim the sachemship. Mason, desiring to re-start the legal case, backed Mahomet, which led Ben Uncas to side with the colony. Although the majority of the Mohegans supported Mahomet, the colony continued to maintain that Ben Uncas was the legitimate sachem, and, further, that it had the right to insist that the tribes' leaders be amenable to colonial interests.[98]

In order to get the Dudley commission's verdict enforced, John Mason and Mahomet travelled to London in 1735 where they petitioned the Crown for another royal commission. Although successful, they paid a high price, both men dying in England before the commission met.[99] The new commission, which convened in 1738, was composed of the Governor and assistants of Rhode Island, along with two members of the New York council, Daniel Horsmanden and Philip Cortlandt. William Bollan, the advocate general of Massachusetts, and William Shirley, Bollan's patron and future governor of Massachusetts, represented the Mohegans and the Masons. Like the members of the earlier Dudley commission, both men were hostile to the autonomy enjoyed by the chartered colonies, and believed that better treatment for Native Americans loyal to the Crown was necessary for the defense of the empire against the French.[100] However, the advocacy of Bollan and Shirley was in vain

97. For Mason's petition, see Talcott, ed., *Collections of the Connecticut Historical Society*. Volume V, 384–90; and the discussion in De Forest, *History*, 319–21.

98. On the struggle over the sachemship, see Den Ouden, *Beyond Conquest*, 130–35; De Forest, *History*, 321–23; and Oberg, *Uncas*, 210.

99. For Mahomet's petition to the Crown, see *APC*. Volume III, 531. On his journey to London, see Alden Vaughan, *Transatlantic Encounters: American Indians in Britain, 1500–1776* (New York: Cambridge University Press, 2006), 162–63.

100. For Shirley's tenure as governor, see John A. Schutz, *William Shirley: King's Govenor of Massachusetts* (Chapel Hill: The University of North Carolina Press, 1961). For Bollan's

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as the Rhode Island commissioners, predisposed to support a fellow chartered colony, deemed Ben Uncas to be the rightful sachem, ignoring the claims of John Uncas whom the majority of the tribe had chosen upon hearing of Mahomet's death in London.[101] The commissioners then accepted Ben Uncas' decision to release the colony from all claims made by the Mohegans. They also refused to admit the evidence taken by the Dudley commission in 1705. As a result, the New York councillors, Horsmanden and Cortlandt, resigned from the commission in protest, complaining to the Board of Trade that the "constitution of the tribe" decreed that John Uncas, Mahomet's successor, was "sachem *de jure*."[102] In their absence, the Rhode Island commissioners overturned the Dudley commission's verdict and granted the bulk of the Mohegans' land to Connecticut.[103]

In June 1739, the Mohegan tribe, along with John and Samuel Mason (the sons of John Mason who had died in London) appealed the decision of the Rhode Island commissioners. The Masons argued that the 1738 commission was "Unjust, Illegal, Null & Void," and urged the Crown to uphold the Dudley commission's verdict, which, they claimed, was "a New Treaty in effect," the Mohegans agreeing to live under "the Allegiance and Government" of the Crown, and the Crown promising to take "great care of the said Sachem and his people . . ."[104] The Mohegans made a separate petition to the Crown about the decision of the 1738 commission, complaining that "We made our Appearance in a Body, and we were denyed to be heard." Instead, Connecticut set up an "Impostor as Sachem" who was "made by said Government" to "evade Justice" and "to Deprive us of our Lands . . ." As a result of this injustice, the tribe claimed that they were now "Exposed to the Utmost Limits of Poverty and Want . . ."; and they asked the Crown to "receive us under your Protection" and "Restore us to our Lands and Libertys." Unlike the assertion in the Masons' petition, however, the Mohegans did not claim to be subjects of the Crown, nor under its government or allegiance; rather, they continued to see their relationship to the Crown as a reciprocal one, rooted in alliance and

role in cracking down on smuggling in Massachusetts via the use of Admiralty courts, see Conroy, "The Defence of Indian Land Rights," 405–6. On his growing disaffection from the Crown in the 1760s and 1770s, see Joel D. Meyerson, "The Private Revolution of William Bollan," *The New England Quarterly* 41 (1968): 536–50.

101. De Forest, *History*, 323–24.

102. For their complaint, see *CSPC*, No, 508. Volume 44 (1738), 241–45 (quote at 243).

103. *CSPC*, No, 330. Volume 45 (1739), 165.

104. The Masons' petition is in Talcott, ed., *Collections of the Connecticut Historical Society*. Volume V, 139–59 (quote at 146).

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friendship.[105] After hearing these petitions, the Privy Council determined that the case should be heard again on the grounds that the proceedings of the 1738 commission had been "very irregular."[106] In January 1743, George II set aside its verdict and issued a new commission, this time to be drawn from the lieutenant-governor and councillors of New York, and the governor and councillors of New Jersey.[107]

VII

The commission that convened in Norwich in the summer of 1743 was the first to hear evidence from both Connecticut and the Mohegans.[108] Philip Cortlandt and Daniel Horsmanden, who had walked out of the 1738 commission in protest at what they felt was unfair treatment of the Mohegans, returned, and were joined by Cadwallader Colden, a powerful figure in New York politics; Robert Hunter Morris, the chief justice of the New Jersey Supreme Court; and John Rodman. Although several of the commissioners had been involved in disputes over Native lands in New York and New Jersey, they were less obviously biased in favour of either the Mohegans or the colony than the members of the 1705 and 1738 commissions had been.[109] William Smith, an eminent lawyer from New York with a long history of opposition to chancery courts, represented

105. For the Mohegans' petition, see Talcott, ed., *Collections of the Connecticut Historical Society*. Volume V, 159–63. It was signed by over fifty members of the tribe, all of whom left their marks.

106. *APC*. Volume III, 536.

107. For the text of the 1743 commission, see *The Governor and Company*, 5–8.

108. The original commission named Archibald Kennedy, James De Lancey, Philip Cortlandt, Henry Lane, and Daniel Horsmanden. However, when the commissioners met in the summer of 1743, Archibald Kennedy, Henry Lane, and James De Lancey were not in attendance. They were replaced by Cadwallader Colden, John Rodman, and Robert Hunter Morris. For the original commission and the contrasting list of commissioners who signed the final verdict, see *The Governor and Company*, 3 and 143–44.

109. Although Horsmanden and Cortlandt had previously supported the Mohegans, Robert Hunter Morris was a member of the East Jersey Board of Proprietors in whose service he had vociferously opposed the claims of settlers who had purchased their land from Indians. For Morris's denial of Native title as a basis for English property claims, see Brendan McConville, *These Daring Disturbers of the Public Peace: The Struggle for Property and Power in Early New Jersey* (Ithaca: Cornell University Press, 1999), 166. Like Horsmanden, Colden had been involved in land speculation (having served as surveyor-general of New York), but was also a forceful advocate of fairer dealings with the Iroquois (whom he saw as vital allies of the English). For Colden's time as surveyor-general, see Alice M. Keys, *Cadwallader Colden: A Representative Eighteenth Century Official* (New York: Columbia University Press, 1906), 27–105. I have been unable to identify John Rodman.

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Connecticut before the commission.[110] And William Bollan, who had defended the Mohegans before the ill-fated 1738 commission, was also back to make their case again, although this time without the help of his patron, William Shirley.

At the outset of the trial, William Smith attempted to have the commissioners recognize Ben Uncas as the legitimate sachem. When this procedural tactic proved unsuccessful, he proceeded to the merits of the case, making similar arguments to those that Ashurst had used in his appeal of the 1705 royal commission decision.[111] According to Smith, the English settlers who came to Connecticut in 1636 "had formed themselves into a small government." Following this, they "had gone through a war with the Pequots, and conquered them." In this endeavour, Uncas, "who was accounted a Pequot and lived at Moheagan," and the English "cultivated" a "friendship." As a result, the English "treated" the Mohegans "as a distinct people," with Uncas as the first sachem.[112] In the aftermath of the war, Uncas deeded all of the territory he controlled to the colony, apart from what he had already "planted" and "improved."[113] For Smith, then, the conquest of the Pequots and the subsequent deed from Uncas had ensured that "English subjects became seised and possessed of all the lands within the said Uncas's claim and right, saving the said lands reserved in and by the aforesaid grant, which was but a small quantity."[114]

According to Smith, however, Connecticut was concerned that these "reserved lands" were "very uncertainly described in the deed aforesaid." As a result, in 1659, the settlers, who were "desirous of having the native Indian right" to the "whole of Uncas's claim," got Major John Mason, "a principal member in and of their government," to obtain a further deed from Uncas. Once this had been done, Mason then "conveyed to the

110. An opponent of Governor Cosby, Smith was involved in the Zenger controversy, and also clashed with the governor over equity jurisdiction in New York. On which, see *Mr. Smith's Opinion Humbly Offered to the General Assembly of the Colony of New-York* (New York, 1734). Cosby had used equity to try to vacate the Oblong patent (a large tract of land that Connecticut had ceded to New York). Smith was among the patentees, while Colden served as their surveyor and advisor. Horsmanden represented the English patentees whose claims conflicted with those of Smith and Colden. See Stanley Katz, *Newcastle's New York: Anglo-American Politics, 1732–1753* (Cambridge: The Belknap Press of Harvard University Press, 1968), 80–81; and Keys, *Cadwallader Colden*, 40–41, 121–22.

111. For Smith's attempts to have the court recognize Ben Uncas, see *The Governor and Company*, 69–71.

112. Ibid., 77.

113. Ibid. Smith is referring to the deed between Uncas and the fledgling colony in 1640, the validity of which Bollan contested before the 1743 commission.

114. *The Governor and Company*, 78.

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colony of Connecticut those lands that the said Uncas . . . had granted to him"[115] By this act, "the Indian Sachems, and their people," in return for "planting ground" and a farm for Mason, "agreed . . . to hold their lands . . . possess, or improve, from and under the English."[116] The colony then petitioned the King for a charter "to be incorporated, with powers of government, and for his majesty's grant and confirmation of those lands obtained by Indian purchases and conquest as aforesaid."[117] By taking possession of this territory, Smith argued, the settlers had "made a considerable enlargement" to "the dominion" of the Crown.[118]

In addition to conquest and purchase, Smith grounded the colony's rights to the disputed land on labor and possession. As he argued before the commissioners: "many people in this colony have . . . made improvements on divers parts of the lands . . . brought into question by this suit." Furthermore, they "have lived and spent there days thereon," some for upwards of "seventy years." If they were now to be dispossessed by the Crown, it would result in "the demolishing of many Christian churches, and depopulating a considerable part of the colony, and turning it once again into a wilderness . . ."[119]

Not surprisingly, given his account of the early relations between Connecticut and the Mohegans, Smith argued that the 1681 treaty was not a binding agreement between sovereigns, but was rather a concession "to the prejudiced opinion of the said sachems." Under its terms, the colony paid again for land it already owned, promising to "take care that a sufficiency of lands" should "be reserved" for the tribe "to plant on," and that a "*just price* should be paid for the residue."[120] Given that "whatever lands were at first reserved by the said Indians" had been "conveyed" to "the English subjects" decades before the Dudley commission met, Smith concluded that its verdict "was without any just foundation" and "ought to be reversed, and made null and void."[121]

The Mohegans were once again represented before the 1743 commission by William Bollan, who crafted a powerful defence of the tribe based on their autochthonous rights.[122] Echoing the arguments that Oweneco had

115. Ibid.
116. Ibid.
117. Ibid., 79.
118. Ibid.
119. Ibid., 85.
120. Ibid., 80–81.
121. Ibid.
122. I have been influenced by David Conroy's account of Bollan's role in the case, especially his claim that Bollan adopted an indigenous perspective before the 1743 commission. However, I disagree with his assumption that Bollan was acting for the Masons and not the Mohegans. Although we appear to have no record of whom Bollan consulted with (or was paid by), his forceful defense of the Mohegans is closer in substance to the position

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made to Queen Anne, Bollan claimed that the Mohegans "were the original *only* owners of a large tract of land in these parts." And when the English arrived, the Mohegans had "*received and entertained them as friends*, and entered into a strict alliance with them." This was an alliance, Bollan insisted, that the Indians had, despite "*the severest trials*," "at all times observed and kept." Furthermore, "in order to promote the settlement of the English," the Mohegans had "from time to time spared them divers parcels of their lands," save for "the lands in controversy (*a small portion compared to what they owned when the English first settled here*)." However, having "admitted the English to settle in their country," the Mohegans found some of them to be "full of craft and guile" and so had made an alliance with John Mason and his family "to prevent their being cheated by any fraudulent *or unfair purchase*." By doing so, Bollan insisted, they hoped to preserve "*a sufficient* portion of lands for them to plant and hunt in, which were absolutely necessary for them, *in order to their continuance as a people*."[123]

In return for this protection, Uncas entrusted the tribe's land to Mason in 1659, a transfer that was confirmed by several deeds in the following decade. In doing so, the sachems promised never to "dispose of" these lands without "the consent and allowance" of "Major Mason, his heirs and successors." And in 1671, Mason returned the favour by entailing a tract of land between Norwich and New London for Uncas and his heirs.[124] The Mohegans' claim to these lands was strengthened, Bollan argued, by the 1681 treaty, which he called a "league of perpetual peace and friendship." According to its terms, "the Moheagans [*sic*] propriety in lands, and their having countries and territories" was "directly *acknowledged* by the said colony."[125] As such, it would be a great "injustice" if the colony were now to "depart from their treaties with their old and constant friends and allies."[126] In construing the terms of the treaty, Bollan also urged the commissioners to understand it from the Mohegans' perspective. According to Bollan, "the Mohegans beg leave to observe, that they are a people *unskilled in letters*." Also, "their adversaries have had the penning *this treaty*, and all the records of their other *transactions* with the said Indians." As Connecticut "doubtless took care to express matters

of the tribe (expressed in Oweneco's 1704 letter, as well as in their petitions to the Crown in the 1730s) than to the less robust claims of the Masons (which held that the tribe were subjects of the Crown rather than allies). Conroy, "The Defense of Indian Land Rights."

123. Ibid., 87.

124. Ibid., 88.

125. Ibid., 91.

126. Ibid., 91–92.

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favourably to their own interest," Bollan urged the commissioners to put "the most favourable construction for the said *Indians* . . . upon these writings."[127]

For Bollan, the political autonomy that enabled the Mohegans to sign binding treaties was necessary in order for them to protect their "antient territories."[128] As Bollan reminded the commissioners, the Mohegans "are a *free* and independent people" who are governed by an "ancient established constitution."[129] Moreover, Bollan insisted that the Mohegans' "policy, customs, and manners differ widely from those of the English (which they neither despise nor can approve) so they, by no means, like to be so mingled with them, which the Indians find, by experience, has a direct tendency *to drive them away from their ancient possessions*."[130] Indeed, Bollan contended that when the two peoples first met in the 1630s, it was the settlers and not the Mohegans who lacked a polity. Given that the settlers were effectively stateless until the grant of the charter in 1662, Bollan argued that there could have been no valid land transfers between them and the Mohegans prior to that time. As he told the commissioners, "it is impossible any lands should pass to them by force of any conveyance whatsoever, until they were enabled . . . by the incorporation of their prince."[131] And in response to Smith's claim that the royal charter had vested the Mohegans' lands in the colony, Bollan once again adopted an indigenous perspective. As he explained to the commissioners: the "Indians say that surely that prince, when he granted a charter to some of his own subjects, never intended thereby *to pass* to them *the lands of his friends and allies*." After all, "If the English colonies be permitted" to "depart from their treaties . . . the Moheagans cannot but say, that the English interest must finally suffer among the Indian nations . . ." For Bollan, then, the only effect of the royal charter was "to make such of their lands become part of the English colony as should from time to time be fairly purchased of them."[132]

VIII

Although Connecticut did not contest the legitimacy of the 1743 royal commission, the settlers whose property was on the disputed land contended that it did not have the authority "to determine upon their right

127. Ibid., 92.
128. Ibid., 91.
129. Ibid., 95.
130. Ibid., 93.
131. Ibid., 90.
132. Ibid., 91–92.

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and titles to their respective freeholds." After all, they claimed, "each of them . . . *doth hold the land in his respective possession*, by virtue of lawful *Indian grants* or purchases *for good* and valuable considerations paid to the native Indians."[133] In addition, they contended that the royal commission was "illegal" as "each of them are *freemen*, natural born subjects of the Crown of Great Britain."[134] As such, the Crown had no right to call their freeholds "into question in a course of equity." To do so, they argued, "would be . . . contrary to the laws and statutes of that part of Great Britain called England and the laws of this colony," all of which constituted their "undoubted birthright and inheritance."[135]

The settlers' objection to their jurisdiction forced the commissioners to make an interim ruling on whether they could in fact sit in judgement on the property rights of English subjects, which in turn led them to a consideration of the political status of the Mohegans. Daniel Horsmanden argued forcefully that the tenants should be subject to the commission's jurisdiction because "the Indians, though living among the king's subjects in these countries, are *a separate and distinct people from them*." After all, Horsmanden noted, "*they have a polity of their own*" and "they make peace and war with any nation of Indians when they think fit, *without controul* from the English." Furthermore, according to Horsmanden, the "crown" in both "queen Anne's and his present majesty's commission by which we now sit" "looks upon them not as subjects, *but as a distinct people*" who have "*the property of the soil* of these countries." For Horsmanden, therefore, a matter between "the Indians *a distinct people* (for no act has been shewn whereby they became *subjects*) and the English subjects, cannot be determined by the laws of our land." Instead, Horsmanden insisted, the issue must be tried "by a law *equal to both parties*, which is the law of *nature and nations*; and upon *this foundation*, as I take it, these commissions have most properly issued."[136]

133. Ibid., 124, 132.

134. Ibid., 124.

135. Ibid.

136. Ibid., 126–27. David Conroy suggests that Horsmanden's arguments "may have been politically motivated" as he was a speculator in Native American land. However, speculators in the eighteenth century usually contended that the Native Americans had property rights that could be transferred to them, but not the kind of sovereignty that Horsmanden insisted that the Mohegans had. See Conroy, "Defence of Indian Land Rights," 420, f.n., 38. Given his impassioned defense of the Mohegans' rights, it is more than a little ironic that Horsmanden was chiefly responsible for unfairly prosecuting slaves in New York who were accused of a conspiracy to burn the city down. On this, see Jill Lepore, *New York Burning: Liberty, Slavery and Conspiracy in Eighteenth-Century Manhattan* (New York: Alfred A. Knopf, 2005).

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Cadwallader Colden disagreed with Horsmanden on the question of the commission's jurisdiction over the tenants, and thus on the political status of the Mohegan.[137] As he put it: "I can in no manner consider the Moheagan Indians as a *separate or sovereign state*, or that either Ben Uncas or John Uncas are in any sense *sovereign princes*." "Such a position in this country," Colden argued, "where the state and condition of the Indians are known to everybody, would be exposing majesty and sovereignty to ridicule." Rather, he held that "every one of the Mohegan nation, are born under *allegiance* to the crown of Great Britain . . ." Colden did not feel that he was doing the Indians "any injury . . . when I allow them to be *subjects* of Great Britain," for they would then enjoy "the benefit and protection of the English law, and all the privileges of British subjects."[138] In denying the Mohegans' claims to be a separate people, Colden intended to limit the jurisdiction of the commission to the corporation of Connecticut, preventing it from subverting "the right of freehold or inheritance of any *particular* persons, and to evict them out of the same . . ."[139]

Colden's arguments did not persuade a majority of the commissioners who dismissed the landholders' plea, thereby denying that either the common law rights of individual colonists or the charter were a barrier to the Crown's jurisdiction. This interim ruling meant that a majority of the commissioners believed the Mohegans were an independent part of the empire, juridically separate from Connecticut, although they did not necessarily endorse Horsmanden's strong claim for the tribe's sovereignty.[140] In so doing, the majority were in agreement with the Privy Council's rulings in 1704, 1706, and 1738 that the Crown had a right to hear an appeal

137. On the dispute between Horsmanden and Colden over the commission's jurisdiction, see Smith, *Appeals to the Privy Council*, 434–35.

138. *The Governor and Company*, 127–28. Colden took a different view of Native American sovereignty in his celebrated account of the Iroquois confederacy, arguing that "Each Nation is an absolute Republick by its self, govern'd in all Publick Affairs of War and Peace by the Sachems . . ." Colden, *History of the Five Indians* (1727), xv. This discrepancy could have resulted from the fact that the Mohegans were living on what was in effect a reservation within the boundaries of Connecticut, whereas the Iroquois were still living on their own territory as a free people. On Colden's use of the word "nation" (as opposed to "tribe") and its relationship to an emerging sense of the importance of the Iroquois alliance among royal officials in the eighteenth century, see Eric Hinderaker, *The Two Hendricks: Unraveling a Mohawk Mystery* (Cambridge; Harvard University Press, 2010), 143–45.

139. *The Governor and Company*, 128.

140. Ibid., 126. Walters cautions against the claim (advanced by Smith in his *Appeals to the Privy Council*) that Horsmanden's arguments about the Mohegans' sovereignty represented the views of all of the commissioners. Rather, Walters thinks that it is more likely that they defended their jurisdiction over the tenants' lands on the grounds that without it they would be unable to provide any remedy to the Mohegans. Walters, "Mohegan Indians v. Connecticut," 821–22.

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from the Mohegans and to provide them restitution, including, if necessary, the return of the property of individual colonists to the tribe.

But despite this interim ruling asserting the Crown's jurisdiction over the colony, a narrow majority of the commissioners ultimately decided against the Mohegans' right to the bulk of the land in question, save for what had been set aside for them by Connecticut in 1721. Although they conceded that the Mohegans were the original owners of the land in question, the commissioners held that Uncas had deeded the land to the nascent colony in 1640, and again to Mason in 1659.[141] As the deputy governor, Mason had then granted these lands to the government in 1660 to support its petition for a royal charter. In return, the colony had guaranteed the Mohegans "a sufficient quantity of lands to plant on."[142] In 1662, the King granted Connecticut a charter that gave the "governor and company a large tract of land in America, including all the Mohegan lands, in controversy."[143] As a result of these transactions, the commissioners held that the Mohegans were left with only "an *equitable right* to a quantity of lands sufficient for their subsistence by planting."[144] It followed from this that Mason's 1671 entailment of the disputed land was legally invalid. The commissioners also dismissed the binding nature of the 1681 treaty, holding that the colony signed it "without any impeachment to their former right" because "one of the parties to that treaty were Indians, a barbarous people, not then subject to the regular course of any law, easily misled by misapprehensions, and as easily provoked to violent mischievous actions . . ."[145] Even though the treaty was not legally binding, the colony had, according to the commissioners, respected its terms and made "reiterated purchases . . . of ALL the lands in controversy, excepting those which the said Indians still possess."[146]

However, the commission's decision was by no means unanimous.[147] Not surprisingly, Daniel Horsmanden "found great reason to differ from other

141. *The Governor and Company*, 138. Although the commissioners accepted the validity of the deed to the Mohegan lands that Uncas had given the embryonic colony in 1640, the Mohegans and the Masons denied its provenance, claiming that it had only come to light in the 1730s.

142. *The Governor and Company*, 138.

143. Ibid., 139.

144. Ibid.

145. Ibid.

146. Ibid., 140.

147. This may explain why some scholars claim that the 1743 commission decided in favor of the Mohegans on the grounds that they were a sovereign nation, when in fact only Horsmanden made such a forceful claim. Also, such a claim ignores the fact that a (narrow) majority of the commissioners ruled that the Mohegans did not have a right to their traditional territories (apart for the land that Connecticut had set aside for them). See, for example, Tully, "Aboriginal Property and Western Theory," 171; and Carole

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commissioners in opinion upon the merits."[148] According to Horsmanden, the 1659 deed between the Mohegans and the Masons was "a trust, reposed by the Indians in Major Mason."[149] Moreover, when Mason in turn transferred this land to Connecticut in 1660, the colony's assembly "understood it to be a trust; and that, by the surrender of the *jurisdiction* power over the land, nothing more could be *meant* by the parties to that transaction, than to *enlarge* and *extend* the dominions of the English colony." The deed was not, Horsmanden insisted, "*intended* . . . to pass or convey away the *soil* to the said colony." Instead, the colony only gained "the *right of pre-emption*" to "such lands as were within the *said district or territory* so conveyed to Major Mason." Furthermore, this "right of pre-emption" could only lead to a legal title if "the Indians, by the advice of the Major and the male heirs of his family (*on whom the trust was thereby intended to descend*)" were willing to sell their land to the colony.[150]

Robert Hunter Morris joined Horsmanden in his dissent. According to Morris, the Mohegans had never intended to convey the "*absolute property*" in their land to the colonists, "but only to vest them with the sole *right* to purchase these lands." As such, Mason's "surrender" to the colony of the land Uncas had entrusted to him in 1659 was not a grant of "the *property* of the *soil*"; rather, it was solely designed "to give the English colony on Connecticut a *right* to *exercise* their *powers of government* over the lands conveyed to Mason . . ."[151] Although the final judgment was signed by all of the commissioners, Horsmanden and Morris reserved their right to dissent when the commissioners met again in the fall of 1743. However, when they reconvened, representatives of the colony prevented Horsmanden from entering his protest on the record, whereupon he vowed to transmit his case directly to the "lords commissioners for trade and plantations."[152] Over the objections of the colony, the Mohegans informed the commissioners that they, too, were going to appeal the decision. The Masons vowed to do the same. As a result, the case dragged on in a desultory fashion for several more decades. When it was finally heard again by the Privy Council in 1773, the imperial authority that had made possible the Mohegans' quest for justice was on the verge of collapse, rendering the final judgment moot.[153]

Pateman, "The Settler Contract," in *Contract and Domination*, eds. Carole Pateman and Charles Mills (Cambridge: Polity Press, 2007), 56–57.

148. *The Governor and Company*, 142.

149. Ibid.

150. Ibid.

151. Ibid., 141.

152. Ibid., 281.

153. On July 23, 1746, eighty-six Mohegans appealed the commission's verdict. Samuel Mason lived in London for many years seeking to have the 1743 decision overturned. For

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IX

That the Mohegan case ended on a dissonant note is emblematic of the contested nature of Native American rights in the eighteenth-century British Empire. Far from there being an Anglo-American consensus in favor of dispossession, the Mohegans were repeatedly able to get a hearing before the highest court in the empire, even though by the time they first appealed to the Crown they were living on what was in effect a reserve entirely within Connecticut's borders. And out of the subsequent litigation, three broad accounts of their legal status emerged. The colony's lawyers built their case against the Mohegans on conquest, which, they claimed, conveyed full title to the disputed lands to Connecticut. As a consequence, the Mohegans were not only dispossessed but also subordinated to Connecticut's jurisdiction. However, out of a concern for the Mohegans, the colony claimed that it had also purchased the land from them, always being careful to set aside sufficient territory for the tribe to hunt and plant on. Having obtained title by conquest and purchase, the colony's lawyers argued that the settlers had then labored on the land, making improvements to it that had strengthened their claim. They also invoked prescription, noting that by the time the case was litigated, the Mohegans' land had been occupied by the English for many years.

The consistency of the colony's arguments over many decades indicates the emergence of a coherent and sophisticated account of the rights of settlers in the eighteenth-century empire, able to justify dispossession by drawing on older arguments from conquest and purchase alongside newer claims based on labor and improvement. In this view, the rights of the settlers in Connecticut did not depend upon the grant in the royal charter. Rather, they had earned their autonomy by making war on the Natives and then by transforming what they had conquered into private property under cultivation. Seen in this light, Connecticut's legal stance in the Mohegan case amounted to a claim for territorial sovereignty under nominal Crown oversight, with royal officials having no right to interfere with the colony's authority over indigenous lands or persons within its chartered boundaries.[154]

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the Mohegans' appeal to the Privy Council and Samuel Mason's attempts to get Crown funding to pursue the case, see *APC*. Volume III, 537–38.

154. Or what Lisa Ford, in a comparative study of Georgia and New South Wales, has recently called "perfect settler sovereignty." Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge: Harvard University Press, 2010), 183–203, and passim. For a discussion of the "quasi-sovereign powers of chartered companies" in the British empire, see Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *The William and Mary Quarterly* LX (2003): 499–502 (quote at 502). Gould sees the "considerable degree of self-government enjoyed by the colonists" as resting on "canon law and the law of

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By contrast, Oweneco and his descendants contended that they had an autochthonous right to the lands in dispute that had not been transferred to the colony by conquest, purchase, or the granting of a royal charter. Bollan, their lawyer before the 1743 royal commission, expressed this indigenous perspective best when he stated that the Mohegans were a free people with ancient rights, including the right to live under their own laws and on their traditional territories.[155] In appealing to the Crown for justice, the Mohegans did not accept the status of subjects; rather, they repeatedly insisted that they were friends and allies of the English who had made a series of agreements with the Mason family in order to safeguard their territory from the colony. They had also signed a treaty with Connecticut, the terms of which guaranteed them land sufficient for their continued existence as a people. When this agreement was violated, they appealed to the Crown for justice, invoking their inherent rights, and insisting on what was in effect a federated relationship to the imperial center, one that was entered into voluntarily, and that allowed them to retain their autonomy as part of the empire's composite polity.

The Crown and its agents were divided on the extent to which the Mohegans had property rights or political autonomy. Although a bare majority of the commissioners in 1743 decided against the Mohegans' claim to their traditional territories, disregarding the treaty the tribe had signed with Connecticut, they did so on the grounds that the tribe had in a series of deeds or cessions transferred their territory to the colony, who had in turn set aside what it deemed a sufficient amount of land for them. By stressing that the tribe had voluntarily relinquished their title, the commissioners were acknowledging that the Mohegans had originally owned the land in dispute. Moreover, they never accepted Connecticut's claims that the land in question was conquered territory. And by siding with the tribe against the landholders in the interim ruling, a majority of the

nations" which both held that "settlers capable of establishing regular government and systems of law had an unambiguous right to occupy underdeveloped land" (quotes at 500, 499). However, as the Mohegan case shows, royal officials did not always share this interpretation of Native status; and even Connecticut drew on arguments from conquest and purchase rather than relying on the fact that the Mohegans had not cultivated the land (and when the colony's lawyers made arguments from improvement, they did so to strengthen the settlers' claim more than to deny the tribes').

155. As Nancy Shoemaker has recently argued, Native Americans in eighteenth-century North America did have a concept of territorial sovereignty much like that of the English. That is, they understood themselves to have the ability to control their territory collectively, even though within their sovereign boundaries they may have used the land in a more communal fashion than the English system of freehold property. See Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004), 17.

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commissioners in 1743 held that the Mohegans were a separate component of the empire, although subject to the Crown's overarching authority.

In doing so, these commissioners were in agreement with the attorney general and the Privy Council in 1704, Governor Dudley and the other members of the 1705 commission, and the Privy Council in 1706, all of whom had held that the Mohegans were "a Nation," with the capacity to enter into treaties in order to protect their territorial integrity from the colony's usurpations.[156] Indeed, even the 1738 commission, despite its lack of due process, recognized that the Mohegans had a constitution that allowed them to determine who their sachem would be. Therefore, despite the fact that the 1743 commission ruled against the Mohegans' claim to the bulk of their territory, the case taken as a whole indicates that the Crown recognized indigenous property rights and political autonomy, albeit with some equivocation as to whether they were like English subjects who had the right to govern themselves under its ultimate sovereignty, or, as both Horsmanden and the tribe itself insisted, fully independent allies.[157]

X

This analysis of the legal claims advanced in the Mohegan case provides a more nuanced picture of the debates about indigenous rights in the eighteenth-century Anglo-American world than the current scholarly consensus on the centrality of arguments for dispossession, a consensus derived largely from the writings of prominent European and English theorists.[158] In the Mohegan case, by contrast, none of the litigants contended

156. Although the majority of the commissioners in 1743 (Colden, Cortlandt, and Rodman) ruled that the 1681 treaty was not binding in their final judgment, all but Colden had also upheld the interim ruling against the tenants in which Horsmanden had argued that the tribe was a sovereign polity capable of making war and peace.

157. Paul McHugh argues that in the eighteenth century the Crown alternated between classifying the Native Americans as either "independent or under protection," but that despite the "slipperiness" of these categories, Crown officials "recognized the viability and continuance" of the Natives' "customary political forms." McHugh, *Aboriginal Societies*, 103. James Tully, however, contends that the Crown's policy toward Native Americans unequivocally embraced their juridical equality. According to Tully, the Crown recognized "the Aboriginal First Nations as a mirror image of itself: as equal in status and to be dealt with on a nation-to-nation basis." See Tully "Aboriginal Property and Western Theory," 170. The evidence in the Mohegan case supports McHugh's interpretation of Crown policy.

158. In a recent historiographical article, Gregory Dowd, himself a prominent proponent of the new Indian history, offers a summary of the current consensus. According to Dowd, "European nation-states" only "rarely" conceded that "Indians possessed *dominium* or, to use the modern term, sovereignty." Dowd adds that, unlike the Spanish, the French and

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that the New World was a legal vacuum, its inhabitants lacking property rights and political capacity. Rather, there was an intra-imperial disagreement about the legitimacy of Connecticut's acquisition of Mohegan lands. The majority of royal officials who adjudicated the case recognized that the Mohegans were the original owners of the land in question, thus having the ability to alienate it; and, further, that the tribe had the political capacity to enter into treaties with subjects of the Crown. By contrast, Connecticut treated the tribe as its tributary, arguing that it lacked political autonomy, as well as any title to territory independent of its grant. But in claiming title by conquest and purchase, it too recognized that the disputed territory had once had indigenous owners.[159] In making its case for dispossession, the colony's lawyers combined these arguments with a claim that the settlers had also established superior rights to the land by improvement and prescription.[160]

The centrality of conquest to Connecticut's case against the Mohegans indicates that it continued to be a powerful legal argument in the Anglo-American world in the eighteenth century.[161] The fact that Connecticut drew on several different justifications for dispossession also

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English "avoided justifying their sovereignty with arguments from just conquest and instead denied Indian sovereignty in the first place on the putative grounds that the Indians failed to improve the land (*terra nullius*)." Dowd, "Wag the Imperial Dog: Indians and Overseas Empires in North America, 1650–1776," in *A Companion to American Indian History*, eds. Philip J. Deloria and Neal Salisbury (Oxford: Blackwell Publishing, 2004), 46–67. Examples of this viewpoint could be multiplied. In addition to Dowd and the literature discussed in note 9 above, see Shoemaker, *A Strange Likeness*, 100 ("Indians were outside the British nation and, as peoples deemed barbaric, the laws of nations then being articulated by European political philosophers did not apply to them").

159. For an argument about the centrality of conquest and cession (and therefore the recognition of indigenous title to land pre-conquest) in eighteenth-century English debates about empire, see Merete Borch, "Rethinking the Origins of *Terra Nullius*," *Australian Historical Studies* 32 (2001): 222–39.

160. Although not as widely studied as the argument from improvement, the Roman law doctrine of prescription (*usucapio*) was an important part of both European and English justifications for empire. See Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c. 1500–1800* (New Haven: Yale University Press, 1995), 89–91; Pagden, "Struggle for Legitimacy," 50; and, most fully, Benton and Straumann, "Acquiring Empire by Law," 14, 16, and passim. In an important recent study, Ken MacMillan has argued for the importance of the Roman law insistence on effective occupation in justifying English territorial claims against other European empires. MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640* (New York: Cambridge University Press, 2006).

161. This calls into question the claim of David Armitage that Lockean arguments from labor and improvement (what he calls "the agriculturalist argument") replaced conquest as a justification for dispossession in the British world. See note 11 above. Indeed, international lawyers still recognized a right of conquest in the early twentieth century. See Sharon

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suggests that future scholarship on imperial ideologies needs to pay more attention to what Lauren Benton and Benjamin Straumann have recently called "the creative combination of legal arguments by imperial agents."[162] Such an approach would examine the extent to which those involved in making imperial claims both within and between empires drew freely on municipal law as well as on transnational discourses such as Roman law and natural law. That Crown and colony differed so vociferously about the Mohegans' rights also means that future scholars should pay more attention to which person (or institution) was making claims within each European empire rather than assuming (as scholarship in the Anglo-American world has largely done) that there was a widely-held English or British theory of dispossession.[163]

If the Mohegan case complicates our understanding of the arguments about dispossession in the British Atlantic world, it also suggests that we need to incorporate the ideas of the indigenous peoples themselves into our accounts of these early modern debates, while recognizing the ways in which their agency shaped imperial politics. Stymied by Connecticut in the aftermath of King Philip's War, the Mohegans appealed beyond New England, becoming, like other Native Americans in the eighteenth-century empire, political actors in the larger Atlantic world.[164] Moreover, their insistence on appealing to the Crown turned a provincial dispute into one in which the colony's chartered rights were brought into question. And the subsequent struggle for authority in the empire led to a trans-Atlantic disagreement on the nature of indigenous rights. The Crown's desire to rein in Connecticut's chartered autonomy gave its officials an interest in contending that the Mohegans had property rights, and, more importantly, political autonomy. In response, Connecticut had to deny the Mohegans the independent political status that the Crown had accorded them. In doing so, the colony argued that its autonomy in the empire had been gained at the expense of the Mohegans, who were now a tributary people, subject to its authority, and one day destined to become extinct.

The Mohegans' repeated claims for political autonomy also mean that the debate over indigenous rights in the eighteenth-century British world

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Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), 7–8.

162. Benton and Straumann, "Acquiring Empire by Law," 31. My reading of the range of legal arguments in the Mohegan case has been influenced by this important article.

163. On the ways that English law in New England was "a flexible discourse," one which "Indians or their advocates" could use "to right old wrongs or to protect resources," see Ann Marie Plane, "Liberator or Oppressor? Law, Colonialism, and New England's Indigenous Peoples," *Connecticut History* 43 (2004): 163–70 (quote at 165).

164. On which, see Vaughan, *Transatlantic Encounters*, passim.

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was about more than just the ownership of land. Indeed, if the Mohegan case is at all typical, property rights and political capacity were intertwined, for whichever group—the settlers or the Natives—could successfully assert its status as a polity was also likely to be the one in control of the distribution of land under their jurisdiction.

* * *

In the years following the 1743 commission ruling, the tensions in the Mohegan case between the Crown and quasi-autonomous colonies bent on turning Native land into private property were magnified on a continental scale. Facing another cycle of wars against the French, royal officials began to think about Crown policy toward Native Americans in a concerted way for the first time. Following the breaking of the Covenant Chain, the long-standing alliance with the Iroquois, the Crown appointed two superintendents to oversee all trade, diplomacy, and land cessions between Natives Americans and the British, matters that had previously been under the control of individual colonies such as Connecticut.[165] And in the wake of the Seven Years' War, and the Native American rebellion led by Pontiac in the Great Lakes region, the Crown issued the Royal Proclamation of 1763, which forbade all westward settlement beyond the Appalachians.[166] The Crown's attempts to restructure the empire and provide some protection for Native Americans provoked opposition in the colonies based on a conception of liberty which, like the arguments made by Connecticut in the Mohegan case, denied Native American rights in order to secure those of the settlers.[167] The stakes were made clear by William Samuel Johnson, Connecticut's agent in the late 1760s, as the

165. On the dissolution of the alliance with the Iroquois and the development of a more centralized Indian policy, see Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire: The Albany Congress of 1754* (Ithaca: Cornell University Press, 2000).

166. According to John Borrows, the Proclamation's claim that the Indians were under its ultimate sovereignty was challenged at a treaty council at Niagara in 1764 where the Natives insisted that they were allies of the Crown and had what was in effect a nation-to-nation relationship with Britain. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: U.B.C. Press, 1997), 155–72. For an argument that the Royal Proclamation "effectively denied native sovereignty," see Gregory Dowd, *War Under Heaven: Pontiac, the Indian Nations, & the British Empire* (Baltimore: The Johns Hopkins University Press, 2002), 177.

167. On the strength of the settler opposition to the Crown's desire to protect Native American rights in the 1760s and 1770s, see Daniel Richter, "Native Americans, the Plan of 1764, and a British Empire that Never Was," in *Cultures and Identities in Colonial British America*, eds. Alan Tully and Robert Olwell (Baltimore: The Johns Hopkins University Press, 2006), 269–92; and Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007), 19–93.

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Mohegans were making their final appeal. According to Johnson, the "Spirit" of the Mohegan case may lead "all the Indians in America to make claim & introduce the utmost confusion and mischief."[168] So, as the tensions that were to culminate in rebellion escalated in the 1760s and 1770s, the authority of the imperial center was once more pitted against the desire of the settlers to expand their property holdings westward. This time, however, the outcome would affect all of the Native American peoples of North America, as the settlers who held power in the new republic would prove less tolerant of indigenous rights than the Mohegans had found the old empire to be.[169]

168. Undated Manuscript. Mohegan Indian Case. William Samuel Johnson Diaries, v.p., 1765–1802, Columbia University Special Collections.

169. As Edward Countryman has argued, the eighteenth-century empire was akin to a European composite monarchy, a federation of many peoples under one Crown. As such, it allowed for a more pluralistic legal world, including a recognition of Native American rights, than the republican federation based on popular sovereignty and western expansion, which emerged from the Revolution. See Countryman, "Indians, the Colonial Order, and the Social Significance of the American Revolution," *The William and Mary Quarterly* 53 (1996): 342–62.

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