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THE POLITICS OF LAW IN COLONIAL AMERICA: Controversies over Chancery Courts and Equity Law in the Eighteenth Century

ALEXANDER HAMILTON, in *Federalist* 83, defended the proposed constitution's distinction between law and equity. The "separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence," he wrote, but "great advantages result from the separation . . .":

> The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law, but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from the courts of chancery . . . but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.[1]

Few American politicians of the colonial era would have seen equity law and chancery courts in such a favorable light. Indeed, no colonial legal institution was the object of such sustained and in-

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1. *The Federalist*, ed. Jacob E. Cooke (Cleveland, 1961), pp. 568–570.

tense political opposition as the courts dispensing equity law. More typical of the pre-Revolutionary attitude was the bitter criticism of another New Yorker, Lewis Morris, who feared that "the Chancellor-governour can (and I believe will) determine on the Suppos'd Side of the Crown":

> The danger Seemes inevitable. The banefull plant has allready taken root in a luxuriant Soyle . . . , Seemes to promise a thrifty growth, and future governours Sent to amasse a great wealth (if not much better men than the present) will cultivate it and revell in the Spoiles your ruines will afford, if the Spirrit of liberty doth not exert itself in Such a manner as to make them dread the Consequences of making Such an attempt.[2]

This essay will attempt to explain how equity law emerged in such high repute in the national period after a half-century of serious controversy in the colonies.

1. Equity in England: the High Court of Chancery

IN order to understand the troubled history of chancery courts in colonial America, it is necessary to pause for a brief consideration of the historical roots of equity law and the High Court of Chancery.

The court of chancery, the equitable jurisdiction of the chancellor, gradually emerged as an independent judicial institution in England during the fourteenth and fifteenth centuries. The distinction between law courts and chancery was not clear at first, since the common law courts often acted in a manner later thought of as equitable, but the two systems drew apart as the law courts abandoned their freedom of decisionary discretion.

The judicial theory on which the chancellor operated derived from the traditional role of the King as the fountain of justice. In particular, equity was a response to the emerging inflexibility of

2. Lewis Morris to James Alexander, August 25, 1735, Rutherfurd Collection, II, 129, New-York Historical Society (NYHS). Norris refers to Chancellor William Cosby's handling of the bill in the Oblong dispute, below, pp. 277–282.

the common law, which ceased to expand when it comprehended only a relatively narrow range of problems. More broadly, equity was a reaction to the morally obnoxious common law maxim that a "mischief" (a failure of substantial justice in a particular case) was to be tolerated rather than an "inconvenience" (a breach of legal principle). The chancellor operated on the opposite principle, stated by Aristotle in the *Nicomachean Ethics* that the essence of equity is the correction of positive law where that fails because too generally formulated.[3] Equity was thus an attempt to make law supple enough to do substantial justice throughout the broad range of human experience accessible to the power of the state.

The court of chancery was never quite so "equitable" as theory claimed, and under the Tudors it had already acquired a fairly well-defined area of jurisdiction. The difficulty of defining the scope of its power is best illustrated by Maitland's formulation:

> For suppose that we ask the question—What is Equity? We can only answer it by giving some short account of certain courts of justice which were abolished over thirty years ago. In the year 1875 we might have said "Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity."[4]

Nevertheless several descriptive categories can be listed.

(1) *Equity remedies defects in the common law.* It takes notice of fraud, accident, mistake, and forgery. It administers relief according to the true intentions of the parties. It gives specific relief in actions for contract and tort, and it gives relief against the penalties assessed by other courts. It has unique powers of examining witnesses, and joining parties to a suit.

(2) *Equity supplies omissions in the jurisdiction of the common law.* It deals with uses and trusts, and, especially, with mortgages and equities of redemption. It disposes of the guardianship of minors and lunatics. It has competence in mercantile law, family settlement, female property, and divorce.

3. *Nicomachean Ethics*, Book V, chap. X.

4. Frederic W. Maitland, *Equity: A Course of Lectures* ([1909], rev. ed., Cambridge, 1969), p. 1.

(3) *Courts of equity afford procedures not available at law*: the writ of subpoena, interrogatory process, discovery of evidence, written pleadings, judgment without jury trial, leeway for errors in pleading, specific performance, injunction, imprisonment for contempt, ability to act *in personam* rather than *ad rem*, powers of account, and administration of estates.

By the late sixteenth century, and especially with the accession of the Stuarts, the court of chancery was closely associated with the royal prerogative and became the target of opposition. Equity was therefore disadvantageously contrasted with common law in an era when the "ancient law" took on revolutionary constitutional overtones. The struggle between the two systems of law became explicit in Glanville's case, the 1616 litigation, jurisdiction over which was sought by Chancellor Ellsmere, who enjoined suitors from proceeding at law, and by Chief Justice Coke, who prohibited the same litigants from proceeding in equity, and in which James I finally intervened on the side of the chancery. The common lawyers of the early Stuart period strongly objected to the prerogative character of equity law, but they also attacked particular abuses: the use of chancery jobs as royal patronage, the delay and expense of chancery proceedings, and the increasing formalism of equity litigation. At bottom, of course, they anticipated Selden, who sneered that "Equity is a roguish thing. For the law we have a measure . . . [but] equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for measure a Chancellor's foot."[5]

The High Court of Chancery was one of the leading targets of Puritan legal reformers during the Interregnum, and an attempt to abolish the court was made during the Barebones Parliament.[6] The other prerogative courts had been destroyed in 1641, but the attack on chancery failed because the court was simply too useful

5. John Selden, *Table Talk* (London, 1821), p. 52.

6. See Stuart E. Prall, *The Agitation for Law Reform during the Puritan Revolution* (The Hague, 1966) and, especially, Donald Veall, *The Popular Movement for Law Reform, 1640–1660* (Oxford, 1970).

to be lost, and because the courts of common law were not sufficiently adaptable to incorporate the equitable jurisdiction. Perhaps even more important, most of the critics of chancery objected to the administration of the court rather than to the character of equity law. The court of chancery therefore operated under a commission in the absence of a chancellor, but resumed its traditional operation with the Restoration. The chancery of the late-seventeenth century was unsystematic and inefficient, however, until the administration of Chancellor Nottingham, 1673–1682, whose emphasis on the importance of precedent introduced a new element of rationality into its proceedings—although not without raising the question of whether the principle of *stare decisis* did not contradict the precepts of natural equity.

Thus the early history of equity in England involves a gradual emergence of a legal system in response to primitive deficiencies of the common law in the later Middle Ages, and an attempt to provide judicial processes adequate to the increasing complexity of English society. Even by the seventeenth century, however, equity displayed signs of rigidities peculiar to itself, and the eighteenth century was a period in which for the first time the probable results of suits in chancery could be predicted with some accuracy. The end result was an important legal system which was very imperfectly synchronized with the dominant common law, and which fostered delay, inefficiency, and even injustice—until the nineteenth century legislative intervention was necessary to effect a rational fusion of law and equity.

One problem which disappeared from view in England after the Restoration, was the objection to chancery as a prerogative court. In effect, the High Court of Chancery reappeared in the 1660's with undiminished powers and prestige, but seemingly without acquiring a rationalization of its existence to replace the traditional concept of the chancery as the personal expression of the sovereign's power to do justice. This may not be surprising, but the result was a theoretical void which did not go unquestioned in the colonies of North America.

II. Equity in the American Colonies: the Equitable Jurisdiction

GIVEN the peculiar nature of the High Court of Chancery, what sorts of equity courts developed in the new world setting, and what was the extent of their jurisdiction? This is an inquiry which must be made before one can even attempt to assess the larger significance of the law of equity in America.

In the seventeenth century there were in America few formal chancery courts and the relevance of contemporary English equity law seems slight. The oldest colonial chancery court appears to be that of Maryland, held by the governor of the colony and his council from the earliest years after its settlement in 1632. It also appears that in Virginia the General Court sat in equity from a very early period, and that even in New England the elective assemblies performed judicial functions, such as the chancering of bonds, which in England would have been considered equitable. Outside of Maryland, however, the period before the Glorious Revolution saw the development of no independent equity courts in mainland North America.

A number of attempts have been made to explain the apparently primitive character of equity jurisdiction in the era of settlement. Conditions of life were simple when compared to those in the mother country, the legal profession was practically nonexistent, and it was difficult, and perhaps useless, to establish sophisticated court systems. Rather than rigidly imitating English arrangements, Americans tended to establish courts suited to their needs, and the relatively simple social organization of the colonies did not require courts that specialized in technicalities of uses, mortgages, and wills —problems that took a generation or two to develop here.

In addition, many historians have followed Roscoe Pound in stressing the supposed Puritan opposition to equity derived from the English political tradition, but also referring to the Puritan assumption that all courts ought to be, in the broadest sense, equitable.

> The Puritan has always opposed [equity]. It acts directly upon the person. It coerces the individual will. It involves discretion in its application to concrete cases and that in the Puritan mind means that a magistrate is over us instead of with us. It means that he may judge by a personal standard instead of by the "standing laws" which the Puritan demanded in the Massachusetts Bill of Rights.[7]

Others have noted that American courts were based on local experience rather than on the central court system in England, and that county courts tended to act both in law and equity. It also might be said that colonial legislatures of the seventeenth century cannot generally be distinguished from courts and that a great deal of equitable business was transacted in the form of private bills, thus reducing the need for chancery courts.

The most general explanation of the virtual absence of equity in the seventeenth century, however, may be that its corrective function was simply unnecessary. Perhaps seventeenth-century common law courts in the colonies exercised the inventiveness and flexibility of their English counterparts in the fourteenth century, and thus the need for equity courts did not arise until they had developed their own standards, rigidities, and inhibitions. Equity, in this sense, may represent a sort of characteristically postadolescent stage of development in Anglo-American legal institutions. Alternatively, and with reference to the Aristotelian definition, it may be that seventeenth-century colonial laws and other legislative declarations were so specific as to minimize the need for relief from the generalizations of positive law.

With the eighteenth century, however, we reach the era of more sophisticated adoption of the common law and the emergence of a distinctive colonial equity law. A variety of institutional solutions were attempted, but they can be grouped in two general categories: on the one hand, there were chancery courts modelled on the High Court of Chancery; on the other hand, equity law and procedure were amalgamated into the courts of common law or also, as in New England, into the legislatures.

(1) Chancery courts on the English model were established in all of the royal colonies, in Maryland, and, briefly, in Pennsylvania. In New York, New Jersey, and Maryland the governor sat by

7. Roscoe Pound, *The Formative Era of American Law* (Boston, 1938), p. 155.

himself as chancellor, although elsewhere (in Pennsylvania and, at times, in Maryland and South Carolina) he acted in association with his council. The inescapable problem of such chancery courts was that few colonial governors had either the legal training, the time, or interest to exercise judicial office adequately. A related difficulty was that many governors altogether refused to act as chancellors, either out of principled antipathy to equity law or, more often, out of a fear of local political opposition to equity courts. The dilemma was intensified by the failure in most colonies to appoint masters in chancery or other subordinate officials to expedite business and lend expert assistance to the governors. Nevertheless, in New York, Maryland, and South Carolina, at least, chancery courts were in continuous existence for long periods of time and accommodated a fair amount of litigation. It even appears that these colonial courts quickly became as formalistically rigid as their English counterpart. A New York lawyer in 1774 advised a client to proceed at law rather than in equity, for "our proceedings in Chancery are so Extremely dilatory that a Person may as well almost seek for justice in the moon as in that Court."[8] In this respect at least, New York required only seventy-five years to achieve what had taken three centuries in England.

(2) Where chancery courts were not established, however, equity and law were somehow dealt with in a unitary legal system. In the New England colonies, with the exception of New Hampshire (which had a chancery court), both law courts and legislatures acted to incorporate certain elements of equity law and procedure, although probably only a fragment of that comprehended within colonial chancery courts. Contrary to the tradition that American Puritans despised equity, however, there was a recurrent desire among New Englanders for the establishment of equity courts.

The experience of Massachusetts demonstrates the point.[9] From

8. James Duane, Reel 1, Duane Papers, NYHS.

9. For the most recent study, see William J. Curran, "The Struggle for Equity Jurisdiction in Massachusetts," *Boston University Law Review*, 31 (1951), 269–296. See also the older article by Edwin H. Woodruff, "Chancery in Massachusetts," *ibid.*, 9 (1929), 168–192.

1675 the General Court empowered the county courts of the province to act as courts of equity, and they retained this authorization throughout the colonial period. In 1692, 1693, and 1699 the General Court passed legislation empowering the Superior Court to act as a court of equity, but each of these acts was negatived by the Crown. There is some evidence that the demand for equity in Massachusetts continued into the eighteenth century, but in Massachusetts as in all the other American colonies the Crown refused to accept legislation creating equity courts, reasoning that the prerogative was the proper and sufficient basis for their establishment, and that legislative creations were thus a serious encroachment upon the powers of the crown.

III. Opposition to Chancery Courts in the Middle Colonies

IN a variety of ways, each of the colonies adopted portions of the law and (especially) the procedure of the High Court of Chancery in the years following the Glorious Revolution. They also, as I have suggested, inherited the seventeenth-century English tradition of antagonism to their courts of chancery, and maintained it during an era in which chancery had long since been quietly accepted as a part of the legal system of England. Roscoe Pound long ago suggested that "Equity has never been popular in America,"[10] but he was imprecise. In the colonial period, at least, Americans objected to chancery courts rather than to equity law. The problem is to determine why there was such a radical disparity of attitudes toward on the one hand the institution and on the other the type of justice it dispensed.

Most of the colonies south of Connecticut experienced episodes of bitter opposition to their chancery courts. In New Jersey the issue flared up twice, the result of the Elizabethtown Bill in Chancery in the 1740's and of Governor William Franklin's efforts to reestablish the court in 1768. In North Carolina, grave difficulties

10. Pound, *Formative Era*, p. 155.

arose when Governor Gabriel Johnston attempted to establish an exchequer court to facilitate the collection of quitrents. In South Carolina, one of the results of the "revolution" of 1719 was the elimination of the colonial chancery court, though it soon reappeared in a slightly different form. Nowhere, however, was the question of chancery courts more divisive than in Pennsylvania and New York.

Controversy over the nature and jurisdiction of equity courts was a distinguishing feature of early Pennsylvania political life. Few records of the local courts of the seventeenth century survive, but there is at least some evidence that both the governor and Council, and the county courts, exercized an equitable jurisdiction. It seems likely, however, that the equity sides of these courts were largely inactive, and that the justice they dispensed was equitable only in the sense that it operated without juries and could set aside common law judgments.[11] Natural equity was no doubt also a feature in the extrajudicial Quaker mechanisms for mediating disputes though we know little about the procedures.

Political conflict over equity began with the eighteenth century, as the antiproprietary party headed by David Lloyd strove to establish local control of the court system as a popular cause in its struggle against the Penn family and its governors.[12] Throughout much of the first twenty years of the century, Lloyd and his followers in the Assembly contended both that the equitable jurisdiction should be in county courts rather than centralized in a high court in Philadelphia, and that the establishment of such courts required the consent of the Assembly. The Proprietors resisted pretensions of the Lloydians, fearing that local control of equitable remedies would endanger vested property rights in the colony, while the popular party trotted out the familiar seventeenth-century English arguments against the arbitrary and prerogative character of a government-appointed central chancery court.

11. [Albert Smith Faught, ed.,] *The Registrar's Book of Governor Keith's Court of Chancery of the Province of Pennsylvania, 1720–1735* (Harrisburg, Pa., 1941), pp. 5–8; Frank M. Eastman, *Courts and Lawyers of Pennsylvania* (New York, 1922), I, 229. See also *Minutes of the Provincial Council of Pennsylvania* (Philadelphia, 1852), II, 184, 430–432, 434 (hereafter, *Pa. Col. Recs.*).

12. Roy N. Lokken, *David Lloyd: Colonial Lawmaker* (Seattle, 1959); and, especially, Gary B. Nash, *Quakers and Politics: Pennsylvania, 1681–1726* (Princeton, 1968), pp. 264–267, 309, 312, 328–330.

The difficulty was exacerbated by a constitutional confusion which forced political rhetoric to a high level of abstraction. Penn's royal charter granted him the right to make "fitt and wholesome ordinances" and to appoint judges, but the Charter of Privileges the Proprietor granted Pennsylvanians in 1701 conferred legislative power and part of the appointive power upon the people of the province, sitting in the Assembly. Thus each side in the controversy felt it had a legal right to authorize the establishment of courts.[13]

As political tensions in the colony subsided and the proprietary party gained strength in the Assembly, however, opposition to a central chancery court abated. The Court Act of 1715 created "a Supreme or Provincial Court of Law and Equity" whose equitable jurisdiction was to be "according to such rules or orders and in such manner and form as the Courts of Chancery and Exchequer in Great Britain have used to proceed by." There was no grant of equity power to the county courts.[14] The 1715 act was disallowed by the Crown, but its passage was a clear indication of the gradual depoliticization of the equity court issue, which in 1720 permitted the Assembly to petition Governor William Keith "to open and hold a Court of Equity . . . with the assistance of such of his Council as he shall think fit, except such as have the same Cause in any inferiour Court."[15] The Council resolved, on August 6, 1720, that the powers granted by the 1682 crown charter permitted the establishment of a chancery court consisting of the governor and the six eldest councillors, empowered to hear all cases "as are regularly cognizable before any Court of Chancery, according to the Laws and Constitution of that Part of Great Britain called England." The official rationale for the new court was that it was necessary to meet the complaint that:

13. Staughton George, Benjamin M. Nead, Thomas McCamant, comps., *Charter to William Penn, and Laws of the Province of Pennsylvania, 1682–1700* (Harrisburg, Pa., 1879), pp. 82–90; Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters and Other Laws* (Washington, D.C., 1909), V, 3076–3081.

14. George et al., *Charter and Laws*, pp. 359–361. This volume contains a convenient compilation of the Pennsylvania court laws, *ibid.*, pp. 311–409.

15. *Pa. Col. Recs.*, III, 91.

. . . Courts of Chancery, or Equity, tho' obsolutely necessary in the Administration of Justice, for mitigating in many Cases the Rigour of the Laws, whose Judgments are tied down to fixed and unalterable Rules, and for opening a Way to the Right and Equity of a Cause for which the Law cannot, in all Cases, make a sufficient Provision, have notwithstanding been too seldom regularly held in this Province. . . .[16]

The need for an equity jurisdiction cannot have been very pressing, however, for it was five years before the first case was brought in Governor Keith's chancery court.[17] The court operated for only fifteen years and averaged only about three cases a year during its prime, although among its thirty recorded cases are a number of different types of equitable actions.[18]

The terminal crisis began very suddenly in January 1736, when Chester, Bucks, and Philadelphia Counties petitioned the assembly against the chancery court. The Chester County petition cited the sixth article of the Charter of Privileges:

That no Person or Persons shall . . . be obliged to answer any Complaint . . . relating to Property before the Governor and Council, or in any other Place, but in the ordinary course of Justice, unless Appeals thereunto shall be hereafter by law appointed.

The Chester petitioners feared that a chancery composed of the governor and Council would not deal fairly with the claims of provincial property holders when they came into conflict with the proprietary, and they complained of the expense and inaccessibility of the single chancery court sitting in Philadelphia. Within two weeks the Assembly resolved:

That the Court of Chancery, as it is at present established, is contrary to the Charter of Privileges granted to the Freemen of this Province.[19]

The complaint, we must notice, was not against equity—the Chester men requested "some other Relief for such Persons as may be

16. *Ibid.*, III, 105–106; Gertrude MacKinney, ed. *Pennsylvania Archives*, 8th ser. (n.p., 1931), II, 1355 (hereafter, *Pa. Votes and Proceedings*).

17. England v. Shute (1725), in Faught, *Registrar's Book*, pp. 22–31. Andrew Hamilton and James Alexander, of New York, were among the defense counsel in this case. For Hamilton's role, see "Petition of Thomas Shute and James Steel, defts.," n.d., Provincial Council Papers, Box 74, #1040, Historical Society of Pennsylvania (HSP).

18. Faught, *Registrar's Book*, pp. 8–11, 22–64.

19. *Pa. Votes and Proceedings*, III, 2316.

obliged to apply for Equity" than the chancery court—but against a central court composed of appointed proprietary officials, lacking legislative consent.[20] Indeed, at the same session of the legislature the opponents of the chancery court introduced two bills for the reestablishment of an equitable jurisdiction in the county courts.[21] The Council advised the governor (Patrick Gordon had succeeded Keith in 1726) that the court stood on a sound constitutional footing, a position supported by the attorney and solicitor general of England later in the year, stressing the Assembly's consent to the erection of the court in 1720.[22] Nevertheless, the last official act of the chancery court had been recorded on November 4, 1735, several months before the Assembly's attack.

The legitimacy of the chancery court was one of the leading topics of public discussion in the colony during the last two months of 1735 and the first months of 1736. The two Philadelphia newspapers were lined up on opposite sides, with Andrew Bradford's *Mercury* defending the existing court structure and Benjamin Franklin's *Gazette* contending for the necessity of a broad legislative basis for chancery. Both papers conceded the need for equity law, and they both drew most of their arguments from the nearly contemporaneous controversy over the chancery court in New York. Indeed, since so little business was being transacted in the Pennsylvania court at the time, it seems likely the open conflict in the Quaker province was a direct response to that in New York.

The links between the two colonies are clear. The speaker of the Pennsylvania Assembly in 1736, and one of the leading opponents of the chancery court, was Andrew Hamilton—a major figure in the establishment of the same court, but more recently a partisan of the Morrisite opposition to chancery in New York, the respondent in a proceeding in the High Court of Chancery, and no longer a Proprietary stalwart.[23] Andrew Bradford was the son of the New

20. Faught, *Registrar's Book*, pp. 12–13.

21. *Pa. Col. Recs.*, IV, 23–45; *Pa. Votes and Proceedings*, III, 2316–2352, passim.

22. *Ibid.*, IV, 41–46; Faught, *Registrar's Book*, pp. 14–15.

23. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, ed. Stanley N. Katz (Cambridge, 1963), pp. 1–35; Decree in Richardson v. Hamilton, William Henry Egle, ed., *Pennsylvania Archives*, 3d ser., VIII (Harrisburg, 1896), 69–80.

York government printer William Bradford, who defended the gubernatorial chancery court in New York. Hamilton and his associates in the Assembly no doubt sought political advantage from their attitude toward the chancery court, but the extensive debate in New York had raised, as we shall see, important constitutional questions as well as political pique. The *Mercury* and the proprietary supporters defended Governor Gordon's court by pointing out that the Pennsylvania court, unlike that in New York, possessed legislative consent in the form of the 1720 resolution. The *Gazette* denied that the resolve constituted legislative creation of the court, and argued for the bills currently before the Assembly.[24]

The 1736 Assembly resolution did not, of course, legally terminate the life of the court, but after serious consideration the Penns seem to have decided not to risk a political controversy over the chancery by continuing the court on the basis of their chartered prerogatives. They also felt that the province was better off with no court than with the assembly's proposed system of county equity courts:

> . . . it would through every thing into Confusion[,] be the Means of Promoting Numberless Suits in Chancery, and Submitt the Property of the People to be Absolutely Disposed of by People of very lettle Judgment and who being Neighbours & Acquaintances of the Partys may easily be byas'd in the cause; for as the Court of Chancery when well Manag'd is the finest in the world so on the other hand if managed by ignorance, Prejudice, or Interest must be the worst, and as the most Knowing and experienc'd Men in a Country should compose it so we think it will be very well if one Court in the Province can be fill'd in a Proper Manner, and we think no more should be thought off. . . .[25]

The contest over chancery threatened to erupt again in 1750–1751, however, when the proprietary party believed that its property rights were endangered by proposed legislation affecting the probate system.

Thomas Penn saw the stakes clearly: The people, he said ". . .

24. *American Weekly Mercury*, #833, December 11–18, 1735; *Pennsylvania Gazette*, #372 and 373, January 15–22, 22–29, 1736.

25. John and Richard Penn to Thomas Penn, draft, August 10, 1736, Penn MSS, Penn Correspondence, I, 170–172, HSP.

should not desire any matters in difference between us and them, to be tryed by themselves only, which is the Case in common law courts, but that we should have some share of influence else the Tryal would not be equal. . . ."[26] Governor James Hamilton, with the encouragement of the Proprietors, was eager to reopen the chancery court, but in the end backed away from the scheme when he became convinced that even lawyers favorable to the Proprietors would oppose any court which lacked legislative sanction. "[A]s the road both to power and wealth passes entirely through the channel of the People in this province, Our lawyers are such very prudent Gentlemen that they will not hazard their interest with them, by making an Application to the Court, unless established by Act of Assembly."[27]

Governor Hamilton and the Penn family, as well as the legal profession, were convinced of the necessity of a chancery court, but they were equally persuaded that the political price of opening the court (even if the role of the Council should be eliminated) was too high. Thomas Penn was willing to concede regulatory power over the courts to the Assembly, but loath to allow them the power to "constitute a Court," and he reluctantly concluded that "we must be content to stay a more proper time, and take care not to make such a Court less necessary by giving to others a power to take cognizance of Causes in Equity."[28] The result was that Pennsylvania had no chancery court after 1736, but her common law courts proved exceedingly imaginative in compensating by incorporating parts of equity law and procedure in their own proceedings.[29]

In all the colonies in which opposition developed to courts of chancery, the nature of the conflict was strikingly similar. Prac-

26. Thomas Penn to Richard Peters, September 28, 1751, Penn MSS, Official Correspondence, V, 55, HSP.

27. James Hamilton to Thomas Penn, September 24, 1750, Penn MSS, Official Correspondence, V, 55, HSP.

28. Thomas Penn to James Hamilton, February 25, 1750/51, Penn MSS, Penn Correspondence, III, 57–58, HSP.

29. Spencer R. Liverant and Walter H. Hitchler, "A History of Equity in Pennsylvania," *Dickinson Law Review*, 37 (1933), 156–183; William H. Loyd, *The Early Courts of Pennsylvania* (Boston, 1910), pp. 159–174.

tically everybody involved, whether he stood for royal, proprietary, Assembly, or landowner interests, agreed that it was necessary to supplement the common law with equity and equitable remedies. In retrospect, this is not surprising, for the eighteenth century was an era in which colonial common law courts were making a self-conscious effort to replicate the behavior of their English counterparts, whose very existence was predicated upon the complementary functioning of the High Court of Chancery. Unless the American courts were to strike out in a highly innovative direction by amalgamating law and equity (and Pennsylvania was unique in the degree to which her courts fused the two systems of law), they needed equity courts in order to handle the ordinary litigation which reached their doors. Where there were no separate equity courts, the common law coped as best it could, with varied results.

There was equal agreement, among the opponents of proprietary or royal chancery courts, that colonial equity courts required legislative consent. It was presumed that the assemblies would create "safer" equity courts. Colonial fears on this score are not hard to understand. Politically, there were objections to lodging the chancellor's discretionary powers in the governor, and these were strengthened by the knowledge that very few governors had the legal training necessary to execute the office intelligently. Economically, opponents of chancery feared both that the court would ruthlessly collect long-standing arrears in quitrents owed proprietors and the Crown, and that the governor-chancellors would use their legal powers to favor the property interests of their political allies. Legally, there were fears of the presumed arbitrary character of equity law, the operation of courts without juries, and the difficulty and uncertainty of appeals from chancery decrees.

There were sound reasons for each of the grounds of attack upon chancery although it is a bit jarring to see them resurrected practically unchanged from the Commonwealth era. With the sole exception of the well-justified colonial perception of a link between chancery courts and quitrent collection, however, the strength of political opposition to the courts seems strangely out

of proportion to their potential to do harm. Nowhere is this disproportion more evident than in New York.

The initial designation of a chancery court in New York was by the act of the colonial legislature in 1683 (reaffirmed in 1691 and 1692), which established the court in the governor and Council. The origin of the functioning chancery is found later, however, in the subsequent gubernatorial ordinances of Nanfan and Cornbury (1701 and 1704). The court operated sporadically for a few years until, in 1711, Governor Robert Hunter determined to provide an efficient equity court for the colony.[30]

Hunter hoped that he could persuade the royal authorities in England to order the establishment of an independent court, and he reported to the Board of Trade that he had been "pelted with Petitions" for the court both in New York and New Jersey. He argued that there was a need for relief from the vagaries of the common law, citing in particular an excessive judgment in an action for debt, and he also stressed his own inability, as a nonlawyer, to provide adequate judgment in chancery.[31] The home government cautiously assured Hunter that he had authority to act as chancellor by virtue of his royal commission, and he proclaimed the court open for business merely on the advice of his Council in 1711.[32]

From 1711 until the American Revolution a gubernatorial chancery court was maintained almost continuously in New York. A few governors, especially in the late 1720's and early 1730's, hesitated to exercise the chancellor's powers, but the framework of the court survived to be perpetuated by their successors. Its business grew quite rapidly after 1750, and by the time of the American Revolution the New York chancery was a respected and ordinary

30. Berthold Fernow, ed., *Calendar of Council Minutes, 1668–1783*, New York State Library, *Bulletin*, 58 (1902), 157–160, 202. *The Law Practice of Alexander Hamilton*, ed. Julius Goebel, Jr. (New York, 1964), I, 178–179.

31. Hunter to Board of Trade, May 7, 1711, in E. B. O'Callaghan and Berthold Fernow, eds., *Documents Relative to the Colonial History of the State of New York* (Albany, 1856–1887), V, 208 (hereafter, *N.Y. Col. Docs.*).

32. Board of Trade to Hunter, June 29, 1711, *ibid.*, V, 252.

court of justice which transacted much of the same sort of work as its counterpart in England.[33]

To reject "losers" is risky historical technique, though, and to ignore the thirty years of opposition to New York chancery is especially misleading, despite the fact that the court emerged apparently unchanged by the attacks upon it. The first chancery controversy was coincidental with Hunter's opening of the "modern" court and it appears to have been a classical legislative objection to the establishment of a prerogative court. On November 24, 1711, the Assembly resolved that "the erecting of a court of chancery without consent in general assembly, is contrary to law, without precedent, and of dangerous consequence to the liberty and property of the subject." To which the Council made the traditional retort: "It is not without precedent that a Court of Chancery has been erected in this Province without consent in General Assembly, and if the erecting of it without their consent be lawfull, we are very well assured that it will not be attended with any dangerous consequences."[34] Governor Hunter described the "angry mood" of the assemblymen, attributed their opposition to the court to their determination to disclaim "all powers not immediately derived from themselves," and maintained that the court must be kept open as a demonstration of the rights of the Crown.[35] The intensity of the conflict can probably better be understood by Hunter's boast to the Board of Trade in 1717 that prior to 1711 it had been impossible to collect quitrents in New York, but that subsequently "Delinquents were subpoen'd" to the chancery, the arrears "were immediately brought in and have ever since been regularly paid into the King's Receiver."[36]

Governor William Burnet, one of the few legally-trained New York chancellors, vigorously exerted his chancery powers in order

33. See *Hamilton Law Practice*, I, 170–173, 180–181.

34. *Journal of the Votes and Proceedings of the General Assembly of the Colony of New York* (New York, 1764–1766), I, 308 (hereafter, *Assemb. Jour.*); New York Council to Board of Trade, December 13, 1711, *N.Y. Col. Docs.*, V, 295–296.

35. Hunter to Board of Trade, January 1, 1712, *N.Y. Col. Docs.*, V, 298.

36. Hunter to Board of Trade, n.d. [1717], *ibid.*, V, 499. On November 6, 1711, the Council sent to the Assembly a bill "for the better Recovery of her Majesty's Quit-Rents." *Assemb. Jour.*, I, 304.

to collect quitrents. He also proclaimed a Chancery Fee Ordinance designed to regularize practice in the court and to avoid the excessively high fees charged by lawyers for equity litigation. Chancellor Burnet's zeal was finally rewarded on November 25, 1727, with a series of Assembly resolutions against his exercise of judicial power. The preamble to the resolves asserted that ". . . by the violent Measures taken in and allowed by it [the chancery court], some have been ruined, others obliged to abandon the Colony, and many restrained in it, either by Imprisonment, or by excessive Bail exacted from them, not to depart even when no Manner of Suits are depending against them. . . ." The first resolve stated that, without legislative consent, the chancery court ". . . is unwarrantable, and contrary to the Laws of *England*, a manifest Oppression and Grievance to the Subjects, and of a pernicious Consequence to their Liberties and Properties," and two additional resolutions promised an inquiry into the proper basis of an equity court in New York, and an act declaring ". . . all Orders, Ordinances, Decrees and Proceedings" of the court ". . . to be illegal, null and void, as by Law and Right they ought to be."[37]

The Council responded with the standard gubernatorial defense of the chancery: it had been established pursuant to the powers granted in the royal commissions to Governors Hunter and Burnet. The Councillors pointed out that the 1711 Assembly resolution had been rejected by the Board of Trade and asserted that "a Court of Equity is necessarily supposed in our Constitution, and that Justice cannot be obtained in all Cases without the Aid of such a Court, and therefore that the King has undoubtedly a Right of erecting the same in the Plantations." Admittedly, some reforms should be made, and the Council advised the governor to review the Chancery Fee Ordinance with an eye to changes which would prevent lawyers from augmenting bills of costs and which would end the traditional delay in chancery proceedings. More important,

37. William Smith, *The History of the Province of New York* (New-York Historical Society, *Collections*, 1st ser., IV–V [(1826), New York, 1829]), I, 237–238; *Assemb. Jour.*, I, 571–572. In an additional challenge to royal legal prerogatives, the Assembly passed a bill intended to prevent "Prosecutions by Informations" on November 10, 1727. *Assemb. Jour.*, I, 568–570.

they argued that the motives of the assemblymen were suspect: ". . . the Design of these Resolves was not to redress Grievances," but ". . . to show the People, what Influence the Assembly doth assume over the other Branches of the Legislature here, as well as to alienate the Peoples Affections from His Majesty's Government, by making them believe that illegal and arbitrary Powers were and are given to the Governours of this Province."[38]

Burnet and his supporters were in no doubt as to the true reasons for the outburst against the chancery court: the governor had sealed a decree "only two days before" which ran against Adolph Philipse, the speaker of the Assembly and the leader of its anti-gubernatorial faction. William Smith and Cadwallader Colden explained in detail how Philipse and his associates had rammed the resolves through in the closing hours of the last session of the 1727 legislature, which Burnet as quickly dissolved in retaliation. Burnet seemed to acknowledge that the opposition to chancery was based on something more than Philipse's spite, however, for he reported to the Board of Trade:

> One great reason why the Country People are prejudiced against the Court of Chancery has been that several Bills have been brought to ascertain and recover large sums due to the King for Quit Rents on which I have generally given Decrees in favour of the King . . . but this rais'd a pretty general clamour, because it fell heavy on several Patentees.[39]

The 1727 incident constituted a major political crisis in New York, and although Peter Zenger's *New York Weekly Journal* was reminding colonists of Philipse's self-interest in the matter a decade later, it seems clear that the attack on the court struck a genuinely sensitive spot in the government of the province.[40]

The repercussions of the Assembly resolves of 1727 were so profound that Governor John Montgomerie, who held office from 1728 to 1731, refused to act as chancellor. Montgomerie reported

38. Report of the New York Council, December 5, 1727, in *New York Gazette*, #114 and 115, January 1–8 and 8–15, 1727.

39. Burnet to Board of Trade, December 21, 1727, *N.Y. Col. Docs.*, V, 847. See also, Obadiah Palmer [et al.] . . . , *Complainants Against Jacobus Van Cortland & Adolph Philipse, Defendants* [New York, n.d.], NYHS.

40. See "A Word in Season," *New York Weekly Journal*, #200, September 5, 1737.

to the Board of Trade that the chancery controversy had divided the province into three parties: one, based in the Council, supported the court as reformed by Burnet's Fee Ordinance; another party opposed "this or any other Court of Equity that is not Established by an Act of General Assembly, and they particularly insist upon the Governors being by law incapable of being Sole Judge"; the third, "not so violent as the last but yet desirous of some alteration," preferred to reform the court by establishing the equity power in both the governor and Council.[41] Montgomerie confessed to Newcastle that he himself thought the court ought to be reformed, but there would seem to be a good deal of truth in Lewis Morris, Jr.'s charge that the governor's unwillingness to open the chancery was due to his fear of economic retaliation by the Assembly, which bitterly opposed the court.[42] The Board of Trade directed Montgomerie to hold courts of chancery (". . . when there shall be occasion, as former Governors have done"), but to no avail. Montgomerie, it would appear, simply refused to endanger his relations with the Philipse faction.[43] The Board also urged the Council President Rip Van Dam, who succeeded to the government upon Montgomerie's death in 1731, and the next governor, William Cosby, to hold the court, in order to facilitate the collection of royal quitrents in New York.[44]

The most dramatic, but by no means the last, act in the history of the chancery court in New York was played out during the Cosby administration. The script was more or less the same as it had been previously in New York—the argument turned on the necessity for legislative consent in the establishment of a chancery court—but, confusingly, the characters switched roles. The former defenders of the gubernatorial court became the leading protagonists of the prerogative of the Assembly, while Philipse and other antichancery men of 1727 took up the governor-chancellor's de-

41. Montgomerie to Board of Trade, November 30, 1728, *N.Y. Col. Docs.*, V, 874.

42. Lewis Morris, Jr. to Board of Trade, July 19, 1729, *ibid.*, V, 883–885.

43. Board of Trade to Montgomerie, May 28, 1729, *ibid.*, V, 876–877; Montgomerie to Board of Trade, October 20, 1729, *ibid.*, V, 897; Board of Trade to Van Dam, December 18, 1732, *ibid.*, V, 937.

44. Cosby to Board of Trade, December 18, 1732, *ibid.*, V, 937.

fense. The reason for the exchange was that with the change in governors from Burnet to Montgomerie and Cosby, the former political "ins" had become "outs," and one of the time-tested techniques of early-eighteenth-century "outs" was to attack the structure of chancery courts.

The details of the controversy of 1733–1737 can only be sketched hurriedly here, but the essential point is that two concurrent problems were involved. The first involved Cosby's attempt to establish an equity jurisdiction in the exchequer branch of the New York Supreme Court, and the second involved the governor's use of his personal chancery powers in determining the validity of conflicting titles to the "Oblong" land grant.

The exchequer episode is the better known. It arose from Governor Cosby's need to find a legal forum in which he might sue the Council President Van Dam for half his income as lieutenant governor in the brief period between Montgomerie's death and Cosby's arrival. A common law action was the ordinary procedure, but it had the twin disadvantages that it permitted trial by jury (between a newly-appointed royal official and a respected local merchant) and "set-off" (by which Cosby's recovery might be reduced by the extent to which he had received income from the New York post prior to his coming to America).[45] Neither could Cosby proceed in the chancery, where he would be sole judge in his own case, and therefore he prosecuted his suit on the equity side of the exchequer division of the provinicial supreme court. There was a rather vague tradition of such an equity jurisdiction in the supreme court, but the Council's ordinance of December 4, 1732, establishing the court provoked an immediate outcry by Cosby's opponents that such an establishment threatened their liberties and properties.[46] The Governor and Council defended the exchequer

45. Smith, *History*, II, 4. "Set-off" is a counterclaim by the defendant in an action for money damages which arises out of a transaction unconnected with the plaintiff's cause of action. The right of set-off was equitable rather than legal in origin, but the statute 2 George II c. 22 permitted the defendant to set his debt off against that of the plaintiff in a common law court.

46. See, for instance, James Alexander to Alderman Perry, December 4, 1733, Rutherfurd Collection, I, 169, NYHS.

court on the ground that it was simply a better means of affording an equity jurisdiction in New York, especially since the Governor was not a lawyer and he was so frequently away from New York City that sessions of the chancery could not be held regularly.[47]

When the Governor pressed forward with the suit against Van Dam, Chief Justice Lewis Morris denied that his court had jurisdiction to entertain the case, affirming his belief in the necessity for legislative consent in the establishment of new courts, and Cosby dismissed him from his judgeship. The case was never brought to a conclusion, but the controversy was deemed of such importance that, at the instance of the Morrisite opposition, the question of the exchequer jurisdiction was debated before the Assembly on June 7, 1734, by William Smith (against) and Joseph Murray (for the court). Perhaps, as Smith's son uncharitably concluded, "The Senators were confounded by the long arguments they had heard," or, more likely, their differences had in reality little to do with equity courts, but the Assembly took no action to alter the structure of the court system.[48]

The second part of the equity controversy took place in Governor Cosby's court, which was otherwise not a very busy institution. Cosby, like Montgomerie, was allied with those who had opposed Governor Burnet (and his chancery court) and he too was reluctant to hold the court. Vincent Matthews, a leading member of the anti-Cosby group, complained that the attorney general was bringing chancery bills for the collection of quitrents against Cosby's opponents in Orange County, but the minute book of the chancery court indicates that few bills were actually heard by Cos-

47. New York Council to Duke of Newcastle, December 17, 1733, *N.Y. Col. Docs.*, V, 980–981.

48. [Lewis Morris,] *The Opinion and Argument of the Chief Justice of the Province of New-York, concerning the Jurisdiction of the Supream Court of the said Province, to determine Causes in a Course of Equity*, New Jersey Historical Society, *Proceedings*, 55 (1937), 89–116; *Mr. Murray's Opinion Relating to the Courts of Justice in the Colony of New-York* . . . [New York, 1734]; *Mr. Smith's Opinion Humbly Offered in the General Assembly* . . . [New York, 1734]; Smith, *History*, II, 13–15. The arguments for and against the equitable jurisdiction of the Supreme Court were extremely formalistic, and based almost entirely on archaic notions of English constitutional law. For a brief discussion of the literature, see Katz, "Introduction," in Alexander, *Brief Narrative*, p. 206n8.

by.[49] The Governor knowingly provoked the wrath of his opponents in 1734, however, by entertaining a bill alleging that the local holders of a Montgomerie patent to the huge Oblong tract located along the New York–Connecticut border had acquired their title by fraud. The suit was initiated by Francis Harison, an associate of the Governor who was acting in behalf of a group of complainants who had a later English patent to the land. The importance of the suit was not only that it threw into question most of the existing titles to land in New York, but also that the Montgomerie patentees were without exception political opponents of Governor Cosby who did not scruple to interpret the attack on their grant in the most extreme light: ". . . if a Governour can set aside patents without a tryal at Law, a Governour can soon make himself master of any mans Landed Estate in the province that he pleases, & if the practice be once Established the whole people will in consequence soon become tenants at will and slaves to Governours."[50]

In October 1735, fifty-nine of the New York patentees petitioned the Assembly to intervene in the chancery proceeding against them, requesting the legislators "to take such Steps as may secure the Liberties and Properties of [the petitioners] . . . from being at the Disposal and meer Will and Pleasure of a single Man, without any reasonable Check or Appeal for Relief within this Province. . . ." They pointed out that the Assembly had twice previously spoken out against the governor's chancery court, and yet had neglected "to give these Resolves their full Force, by bringing in of Bills . . . or making proper Remonstrances thereupon. . . ." The case for action was now clear, since the equitable challenge to their patent had no precedent since the era of James II, when Chancellor Jeffries abetted the royal scheme to vacate English corporate charters in order to establish "a despotick Power in the King over

49. Matthews' speech of October 21, 1735, in New-York Historical Society, *Collections*, 1934, 235; Minute Book, 1720–1748, N. Y. Chancery, Hall of Records, New York City, New York County Clerk's Office; Orders in Chancery, N. Y., December 1720–June 1735, Klapper Library, Queens College, C.U.N.Y.

50. James Alexander to [Philip Livingston], draft, September 29, 1735, Rutherfurd Collection, II, 131, NYHS.

the Rights and Liberties of the Subject." The threat to New Yorkers was serious, since most landowners held such technically imperfect title that "there is not one patent in the whole Country for the setting aside of which a cunning Lawyer may not find a Pretence." Furthermore, costs in a chancery suit are high; the only appeal is to the Crown in Council ("no Costs are to be recovered (as it is said) when the Suit is brought in the King's Name"); and, worst of all, the chancellor is by definition an interested party since as governor he has the right to regrant forfeited lands. Lewis Morris, Jr. defended the petitioners and the pro-Morris Assembly on November 6 passed the by now traditional resolution that a gubernatorial chancery court, without legislative consent, was "contrary to law" and "of dangerous Consequence to the Liberties and Properties of the People."[51]

Like the exchequer incident, the Oblong suit provoked a loud and intense public debate in New York over the rights of the people and the prerogatives of the Crown. In both cases the defender of legislative consent in 1735 were the defenders of prerogative courts in 1727. In both cases the antigubernatorial lawyers offered exceptions to the equity jurisdiction contended for by government officials, and the exceptions were overruled. Neither case ever came to a final decision. The issue was as clear as it was narrow, for even former Chief Justice Morris admitted that New York required a court of equity. It was put precisely by Cadwallader Colden:

> . . . the Question must be reduced to this Whether all the Courts of Equity as well as Law are & ought to be erected by the Governour & Councils Authority alone or by the Concurrent Authority of the Assembly for as to what the King can do by his Prerogative comes not into the present debate.

Colden did not deny that New Yorkers had a "birthright" to a court of equity, but he argued that the court could not constitu-

51. For the petition, signed by William Smith and James Alexander, among the rest, see *New York Weekly Journal*, #107, November 24, 1735. See also *New York Gazette*, #525, November 10–17, 1735; *Assemb. Jour.*, I, 682, 685, 686–687. For Lewis Morris' speech, see *New York Weekly Journal*, #122, March 8, 1735/6. The Attorney General's complaint was filed on February 26, 1734, amended and refiled on March 10, 1739/40: New York Chancery, Decrees Before 1800, B–58, Klapper Library, Queens College, C.U.N.Y.

tionally exist "without any positive law determining it but in the Representative of the whole Community or in the Legislature. . . ."[52]

These prolegislative sentiments were echoed by the Assembly in its September 7, 1737, address to Lieutenant Governor George Clarke, asserting the impropriety of a gubernatorial chancery court founded on the commission of the governor. In what would prove to be the last of the Assembly's protests against the chancery, the legislators reminded Clarke of their previous resolutions on the subject: ". . . though these Resolves, have been as often as made, treated by the Governors, with an unreasonable Disregard and Contempt of them; yet to Men of Prudence, they might have been effectual to have made them decline persisting in a Procedure so illegal and so generally dissatisfactory; and which (as they managed it) proved of no use to the Publick, or benefit to themselves. . . ."[53] Clarke did not discuss the chancery question in his answer to the Assembly, but neither was he an active chancellor. In effect, however, the controversy over the New York chancery court ended with the death of William Cosby in 1736 and the dispersion of the Morrisite political faction in the Clarke administration. The chancery was henceforth removed from politics and freed for its dramatic legal development after mid-century.

IV. Conclusions

EVEN this rapid survey suggests certain conclusions about the colonial chancery controversies. Equity law was accepted by all concerned—the dispute was over the constitution of the courts that dispensed equity. The Crown and the proprietors insisted upon a narrow, prerogative authority for chancery courts, while most colonists were equally insistent upon the need for legislative consent. The occurrence of political attack upon chancery courts was closely related to their use as forums for the collection of quitrents and, more important, to their convenience as a rallying point for the "out" or "country" factions in colonial politics. Objections were seldom to the kinds of mundane private law which occupied most chancellors and equity courts. Finally, the controversies had pretty well ceased by 1750, when the generally recognized need for equity as part of the Anglo-American legal system had resulted either in viable chancery courts or in alternative devices in the existing common law system. Political criticism of chancery courts had lost even its rhetorical usefulness.

Two very general conclusions about eighteenth-century America can also be suggested. In the first place, the period from 1700 to 1750 can be seen as one of unexpected importance in constitutional and ideological development. The attack on chancery courts and the elaboration of the arguments for legislative consent appear as an important form of an emerging political maturity which operated to lend prestige and dignity to what seem to have been basically mean-spirited political disputes. The attack may also be a token of a growing intellectual awareness of American peculiarities—in particular, a probing toward the gradually-realized incongruity in the location of sovereignty in the colonies. The very existence of chancery courts, with their long tradition in English history, made it apparent that, in America, if the conscience of the King was not the source of equity jurisdiction, then a more popular legislative source must be identified. Power without an attributable source caused unease, and the legislatures rushed in to assert the prerogatives of the people. At the same time, the whole question of the relative functions of the different branches of government began to be explored, although the inquiry was not pressed home.

Second, one is struck by the tenuous connection between ideology and political action in the early-eighteenth century, as compared to the radical intensity of their interconnection in the Revolutionary era. To cite only the most obvious example, it was Lewis Morris who defended Governor Burnet's exercise of equity power in New York and New Jersey in 1727 but who opposed both chan-

52. "Reply to Arguments about Courts of Equity," n.d., NYHS, *Colls.*, 1935, 262, 260–261.

53. *Assemb. Jour.*, I, 707–708.

cery and exchequer equity jurisdiction in New York in 1733–1737, and yet himself served as an apparently untroubled chancellor in New Jersey after 1738. His inconsistency is typical of the era, and it indicates the ephemeral character of so many of the seemingly profound constitutional struggles of the first half of the century. Like so many others, the problem of the chancery courts arose fitfully, ran close to the surface of politics and ideology, and did not really have to be "solved." In the first half of the century ideas were brittle and discontinuous, contrasting dramatically with the more radical character of constitutional rethinking which developed after mid-century.

These first, tentative results of a study of colonial chancery courts confirm the view that we must learn far more about the legal process in colonial life if we are fully to understand the development of early American society. The real challenge is not to learn about the relatively infrequent intersection of law and political crisis, but to find out how legal institutions affected daily life.