

Defense of Liberty 1691-1791

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Good evening,

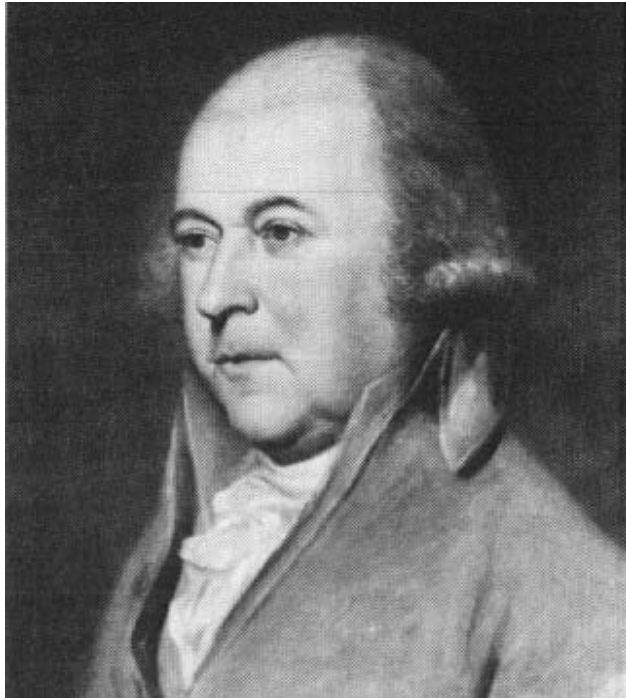
Welcome to the second lecture in this five part series covering the genesis and defense of our liberties as Americans. This lecture was first presented by myself, Bob Ficalora, on Thursday, August 29th 2002, at the Montauk Firehouse in Montauk, Long Island, New York, and is improved in this version.

This lecture series is intended to educate the citizens of Montauk and Long Island of the central role that Easthampton and New York played in establishing democratic government in America, and how it can play an equally central role in recovering and protecting these liberties today.

I will start with a quick recap of last week's lecture entitled "The Genesis of Liberty 1492 to 1691" to provide an understanding of the importance of the establishing of our liberties at law

I will then cover the period beginning with the contentious first assembly of the Royal Province of New York in 1691, and then jump ahead to the situation in New York during the Revolutionary period focusing upon events leading to the final adoption of the federalist Constitution of the United States of America and the Bill of Rights in 1791 showing that in every case the rights established by colonial charters such as the Dongan patents for the Long Island towns and New York City were closely protected.

I have found that New York's history is every bit as powerful as that of Massachusetts Bay, and we should understand it and be proud. I wish to impress upon you the wisdom of our founders: without law we have no liberty. It's really that simple.



Our American republic was born out of monarchy. In his 1776 essay *“Thoughts on Government”*, John Adams wrote that “there is no government but what is republican” and that the very definition of a republic is “an empire of laws, and not of men.” He looked to the example of Connecticut and influenced the Declaration of Independence and the first Constitution of the United States of America, the Articles of Confederation.

Government by laws grew out of English feudalism and the establishing of private property. Feudalism, also known as “manorialism”, was used by royalty to extend their powers by establishing manors (also known as “towns” or “parishes”) under the ownership and jurisdiction of powerful subordinate lords. The method used for establishing manors was by letters patent.

The lords of the manors were the “lords of the fee” of the lands within the dominion contained in their respective letters patent. In 1290 the Statute of Edward I concerning the buying and selling of land (*Quia Emptores*) allowed conveyances of land to be made in “fee simple” within a manor while remaining under the lord’s jurisdiction.

Land today is purchased in fee simple within a municipality that claims jurisdiction over it to tax and to regulate. Even today under our State and Federal Constitutions, the only bodies politic that can claim such jurisdiction in Easthampton and Montauk are those

claiming through the 1686 Dongan Patent. All other such claims (such as exist today in Easthampton) are unconstitutional impositions by other constitutionally restrained bodies (in our case the State legislature).

The contemporaneous circumstances of the 1691 Assembly and the laws that were enacted are very important to us here in Easthampton and Montauk.

The 1680s were a tumultuous decade both in England and New York. James Stuart, the Duke of York and lord proprietor of the colony of New York, was heir apparent to the throne upon the death of an aging King Charles II. The cause of the tumult was that James had converted to the Roman Catholic religion in 1672 and was considered a papist. Englishmen remembered the last time that there had been an attempt to return England to Roman Catholicism under Queen Mary in 1555. Three hundred (300) men had been burned at the stake for espousing their Protestant Christian religion, including Thomas Cranmer, the renowned Archbishop of Canterbury (1489-1556).

This situation led to great concern both in England and New York. Easthampton took the lead in demanding the allowance and protection of democratic and civil liberties. On June 19th, 1682, it raised its militia and devised a grievance and petition that was approved by its town meeting of June 21st. The petition was approved by all of the towns of Long Island and delivered to the Duke of York. In significant part as a result of Easthampton's petition, the first convening of the democratic legislature of New York was convened on October 17th, 1683, and the original constitution of New York was enacted on October 30th. The legislature proceeded to assemble three times and to enact a number of laws.

Then King Charles II died in February of 1685.

Albany and New York City moved quickly to obtain charters from Governor Dongan, and on April 27th 1686 a charter incorporating the territory and body politic of

New York City was issued granting explicit conditional but powerful sovereignty to it to make laws and to control its lands and waters.

Then, on May 9th, 1686, Governor Dongan received new instructions from King James II instructing him that the 1683 Constitution "bee forthwith repealed and disallowed, as ye same is hereby Repealed, determined & made void." and continued to confer absolute legislative power to the Governor "with the advice of our Council".

In his other actions King James II also disregarded the Test Act of loyalty to the Protestant Christian religion and appointed Roman Catholics to high offices and ordered Governor Dongan of New York to introduce that religion as the established form.

The protections of the cherished civil and religious liberties of the Puritan settlers of Long Island and Easthampton were, therefore, threatened and they record clearly shows that they rose up in rebellion.

The rebellion was settled by the granting of the Dongan Patents of 1686 through 1688 chartering all of the corporations of bodies politic of the cities, towns and manors of New York. New York City had just received a powerful charter from Governor Dongan just before the above referenced May 9th decree (see below). Understanding that their colonial assembly was to be denied for the making of law, these charters established powerful liberties of self-governance. The jurisdiction granted was of the feudal tenure of the king's royal manor of East Greenwich in the County of Kent, the most powerful that the king could grant, and that which was granted to most of the thirteen colonies (now states).



Courtesy of New York Historical Society.

New York City corporate seal

In 1688 the “Glorious Revolution” occurred in England. William III of Orange, a Dutchman, landed with troops in England and king James II fled to France. He was married to Mary Stuart, the daughter of king James II. Algernon Sydney, the great hero of American republicanism, had opposed him and the settlers of eastern Long Island in association with Connecticut had successfully fought off his troops in 1674 during the third Anglo-Dutch war. In 1689, however, the English Parliament passed the English Bill of Rights proclaiming William and Mary as the king and queen of England.

The governance of New York had fallen into chaos and riots spread throughout New York City. Governor Nicholson, claiming his authority under king James II, once threatened to burn the town if the riots did not end.

On June 2nd, 1689, a band of rebellious militia commanded by Captain Jacob Leisler ousted Governor Nicholson and seized control of Fort James at New York (at “the Battery”). The following day official word arrived of the coronation of William and Mary.

Captain Leisler then assumed the title of Lieutenant Governor, a title that he maintained for two years. He sent evidence of his loyalty to King William to the effect that he would give up the colony to the governor sent by his majesty.

Leisler received a vaguely addressed letter from King William to whoever might be in charge in September 1689. The document continued the authority of those in office until further notice and on that basis Leisler claimed authority for his administration. Henry Sloughter was commissioned as Governor of New York at the Court at Whitehall on Nov. 14th, 1689.

On February 9th, 1690 a French force attacked Schenectady and burned it to the ground threatening Albany. The situation led to Leisler taking full control of the colony for the purpose of its effective defense.

On March 10th, 1690, the men of Easthampton (always with a keen eye to their liberties!) petitioned Jacob Leisler to approach the king to allow it to

“be rejoined with Conecticut Government as formerly, agreeably to that Act of Parliament, that all places being perticulary Mentioned Shall have the same privileges they enjoyed in the year 1660 restored unto them...” The Leisler Papers 1689-1691, Peter R. Christoph, editor. Syracuse Univ. Press, 2002, p. 73-4.

In that same letter they informed him that they would scout from “Montaukut” and provide warning of approaching vessels.

During the Leisler government two assemblies were called on April 24th and September 15th, 1690. Laws were passed pertaining to trade, taxation and the defense of the colony from attacks of the French at Albany

Captain Richard Ingoldsby arrived in New York with his troops before the new governor in late January 1691. Lieutenant Governor Leisler refused to yield the fort on the ground that Ingoldsby had no authority to govern the colony. Leisler resisted a siege and defended his post to the shedding of blood with two British soldiers killed.

When governor Sloughter arrived at New York City on March 19th 1691 Leisler attempted to negotiate terms of surrender for the colony, but his negotiators were arrested.

The next day he submitted to Governor Henry Sloughter and was charged with rebellion and imprisoned.

Twenty days later, and with Jacob Leisler still in jail, on April 9th, 1691, the first session of the first assembly of the royal province of New York was convened under Governor Henry Sloughter.

Understanding the above circumstances and the decidedly republican sentiments of the people of New York (especially Long Island), the first several laws can only be understood as a negotiated surrender to the new royal authority.

The first two acts were passed almost one month after the legislature was convened, on May 6, 1691.

The first law passed - **Chapter 1 of the Laws of 1691** - is entitled:

“An act for the quieting and settling the disorders that have lately happened within this province for the Establishing and Securing their Majestyes present government against the like Disorders for the Future.”

In summary, the act was,

“enacted and ordained by the Governor and Council and Representatives mett in General Assembly ... that no power and authority held and exercised over their Majestyes Subjects in This Their Province and Dominion but what must be derived from their Majestyes their Heirs and Successors, and Wee doe hereby Recognize and acknowledge that their Majestyes William and Mary are and as of right ought to be by the laws of the Realme of England our liege Lord and Lady King and Queen of England...”

OK, that’s surrender. But to put some teeth into it, it continues that

“BE IT FURTHER ENACTED ... [that] whatsoever person or persons shall by any manner of way or upon any pretence whatsoever Endeavour by force of arms or otherwise to disturb the peace, good and quiet of this their Majestyes government as it is now Established shall be Deemed and Esteemed as Rebels and Traitors unto their Majestyes and incur the pains, penalties and forfeitures as the Laws of England hath for such Offences made and provided”

Chapter 2 of the Laws of 1691 is entitled:

“An Act for the Setling, Quieting and Confirming unto the Cities, Towns, Mannors, and ffreeholders within this province their several Grants, Patents and Rights Respectively.”

“FORASMUCH ... that the rights and priviledges formerly held by and granted to the respective Cittys, Towns Mannors and ffreeholders within this Province &c. should now be ratified and confirmed

BE IT THEREFORE ENACTED by the Governour Council and Representatives convened in General Assembly, and it is hereby enacted and declared by the Authority of the Same; that all he Charters, Pattents, Grants made, given, and granted, and well and truly executed under the seale of this Province, Constituted and Authorized by the late and present Majtys the Kings of England and Registred in the Secretaryes office, unto the severall and respective Corporations of bodyes politick of the Cittys, Towns and Mannors, and also to the severall and respective ffreeholders within this Province, are and shall for ever be deemed, esteemed and reputed good and effectual, Charters, Patents and Grants Authentick in the Law *against their Majesties, their heires and Successors forever...*”
(emphasis added)

AND IT BE FURTHER ENACTED by the Authority aforesaid, That all the Charters, Pattents, grants, made, given and granted as aforesaid, unto all and every the severall and respective Corporations, or bodyes politick of the Cittys, Towns and mannors and their successors and also unto all and every the respective ffreeholders, their heirs and assignes forever; within this Province, ARE to all intents and purposes whatsoever hereby ratified and confirmed To have hold exercise Occupy, Possess and Enjoy all their and every of their former rights Customes, Prerogatives, priviledges preheminiencies, practices Immunities Libertys, ffranchisses, Royaltys and usages whatsoever...”

POWERFULL WORDS! After almost one full month of negotiation, with Jacob Leisler and others in jail, *at Chapter 1 of the laws of 1691 the legislature of New York accepted the authority of William and Mary as King and Queen of England as enforceable against the people. Immediately following, at Chapter 2, the King and Queen accepted the charters and patents of the cities, towns and manors as enforceable against themselves and their heirs and successors forever.*

The first Assembly of New York was, therefore, successful in securing a legal guarantee that the chartered liberties in the patents and charters to bodies politic were enforceable against the king. Among the charters and patents protected was the Dongan patent of 1686 issued to the Town of Easthampton.

Ten days after these first laws of the Legislature were enacted, on May 16th 1691, Jacob Leisler and his newly betrothed son-in-law Jacob Milbourne were hanged, cut down “half-dead” and their heads cut off. Four years later, on May 3rd, 1695, King William signed an act reversing the New York court proceedings to clear Jacob Leisler’s name and restore his estate while pardoning the 20 other men who were also sentenced to death. The final “penalties” clause cited above was later repealed at chapter 145.

The State of New York is, of course, the successor to the king and queen under Chapter 2 of the Laws of 1691. The protection of the rights, liberties and privileges granted by royal charters would later be the central cause of the American Revolution and protected at Article XXXVI of the 1777 Constitution of the State of New York and the Ninth and Tenth Amendments to the Constitution of the United States of America. The United States Supreme Court also held such charters to be a contract enforceable against the State (Trustees of Dartmouth College versus Woodward, U.S. Supreme Court (1819), 4 Wheaton 518, U.S. Constitution, (contracts clause)).

The “First Assembly” of 1691 enacted two other laws worth noting and re-enacted the Constitution of 1683 modified only to the extent that it was established within a royal province instead of the proprietary colony of the Duke of York.

Laws of the 1691 and 1692 Assemblies established, among other things, the orderly regulation of militia and the structure the courts of the colony. This is notable with regard to the third amendment to United States Constitution and our general understanding of that amendment today. It is also interesting that the judiciary of New York was first established for the expressed purpose of assisting the cities and towns of New York operating under their powerful charters. Chapter 28 of the Second Session dated November 11th, 1692, was entitled “*An Act for he Establishing Courts of Judicature for the Ease and benefit of each Respective Citty, Towne and County within the Province*”. The local courts were limited in their jurisdiction to causes involving “40 shillings and under” but were clearly not established to enforce laws imposed upon the people in their cities, towns and counties by the colonial Legislature in violation of their charters.

Finally, although never fully settled in 1691 the Assembly re-enacted Constitution of 1683 and it was thereafter acted upon and used as the Constitution of the Royal Province of New York until the Revolution. It was the first Constitution of its type in America, and is considered the original Constitution of the State of New York.

The years leading up to the Declaration of Independence and the enacting of the 1777 Constitution of the State of New York were similarly tumultuous.

The era of the American Revolution is often considered to have begun with the Proclamation of 1763 whereby a “division line” was established between lands open for settlement and lands reserved to the Indians. Colonists in the upper region of the Ohio River were ordered, “forthwith to remove themselves”. Meanwhile, the wars with the Indians raged and the military costs to England increased.

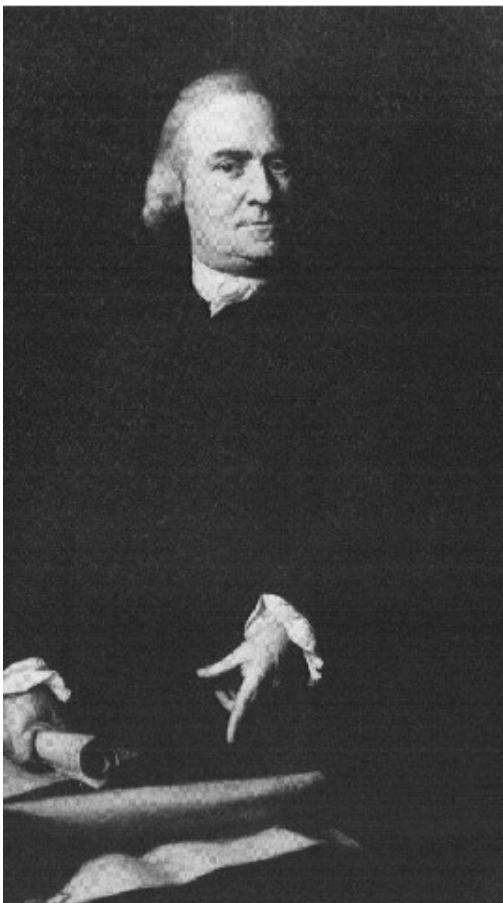
In 1764, the first act was passed in Parliament to raise revenue in America (the Sugar Act). This was followed by other intrusive acts of Parliament causing a great increase in colonial opposition.

On May 24th, 1764 a Boston town meeting denounced taxation without representation and proposed united action by the colonies to do without certain English imports in protest. By the end of the year the protest had spread, most notably to New York.

In March of 1765 Parliament passed the Stamp Act, the first direct tax by Parliament upon the Colonies. This act was intended to finance the military upkeep of the British army in America.

The argument against the Parliamentary imposition of taxes internal to America were then challenged as illegal in the seven Virginia resolutions introduced before the House of Burgesses by Patrick Henry on May 29th 1765, one of which asserted that Virginia asserted complete legislative autonomy under its royal letters patent, or charters.

In 1766 Richard Bland, also of the Virginia House of Burgesses, published **“An Inquiry into the Rights of the British Colonies”**. That provided substance to Patrick Henry’s assertions by claiming that:



“every act of Parliament that imposes internal taxes upon the Colonies is an act of *power*, and not of *right*... Great is the power of Parliament, but, great as it is, it cannot, constitutionally, deprive a People of their *natural* Rights, nor, by Virtue of the same principle, can it deprive them of their *civil* rights, which are founded in a Compact, without their own Consent”.

By “Compact” Mr. Bland meant a contract as manifested in the letters patent issued to the colony of Virginia. Samuel Adam’s portrait speaks directly to the same concern as he points to the 1629 charter of the Massachusetts Bay colony.

In 1769 a division had emerged in the New York Assembly between the Livingstons and Presbyterians (Puritans) arrayed against the De Lanceys and the Episcopalians. The latter were successful in controlling the Assembly and voting supplies for the standing army of the British. This action caused a mass meeting to be held at the Fields in NYC presided over by John Lamb of the *Sons of Liberty*, who denounced the assembly for “betraying their country”. In January of 1770 a bloody fight took place on Golden Hill in New York City between British soldiers and the citizens. This altercation, known as “***The Battle of Golden Hill***”, happened two months before the Boston Massacre and has been called the first bloodshed between American Patriots and the British soldiery.

The patriotic sentiment was not unique to New York City. On April 29th 1775 a compact of General Association was adopted by the “freemen, freeholders and inhabitants of the city and county of New York” that was reviewed and signed by “*every male of the Town of Easthampton ... that are capable of bearing arms.*” The compact held that:

“Persuaded that the Salvation of the Rights and liberties of America, depends, under God, on the firm union of its inhabitants, in a vigorous prosecution of the measures necessary for its safety; and convinced of the necessity of preventing the Anarchy and confusion, which attend dissolution of the powers of Government, we, the Freemen, Freeholders and Inhabitants of Easthampton being greatly alarmed at the avowed design of the Ministry, to raise a revenue in America, and shocked by the bloody scene now acting in Massachusetts Bay, do, in the most Solemn manner Resolve never to become Slaves, and do associate under all the ties of Religion, honour and Love to our Country, to adopt and endeavor to carry into execution, whatever measures may be recommended by the Continental Congress, or resolved upon by our Provincial Convention, for the purpose of preserving our Constitution, and opposing the execution of the several arbitrary and oppressive acts of he British Parliament, until a reconciliation, between Great Britain and America, on Constitutional Principles., (which we most ardently desire) can be obtained; that we will in all things, follow the advice of our General Committee, respecting the purposes aforesaid, the preservation of the peace and good order and the safety of individuals and private property.”

On July 4th 1776 of the following year the Continental Congress issued the **Declaration of Independence**. It was spread quickly throughout the colonies. Among its complaints made against King George was that:

“The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states...”

The Declaration then goes on to list complaints concerning the king’s interference with rights of representation and jurisprudence established under the colonial constitutions and charters.

It then says

“He has combined with others to subject us to the jurisdiction foreign to our constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation...”

including

“For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our governments...”

What is most striking to me is that this is exactly the complaint that we have in Easthampton with the legislature’s 1909 legislation to enable a governmental imposition in disregard of and injurious to the people’s rights under the Dongan patent of 1686.

On July 26th, 1776 the Easthampton militia was raised and a muster roll prepared by David Mulford. One month later, on August 27th the Battle of Long Island was fought at Brooklyn and lost to the British. The Patriot cause lost 312 men with 89 officers and 1,097 others were taken prisoner. Many from Easthampton fled to behind Patriot lines.

On April 20th, 1777, the first Constitution of the State of New York was enacted at Kingston. At Article XXXVI it held:

“That ... nothing in this constitution contained shall be construed to affect any grants of land within this State, made by the authority of the said King or his predecessors, or to annul any charters to bodies-politic by him or them...”

All of the laws previously made by the Colonial Assembly of New York were also carried forward, including Chapter 2 of the Laws of 1691. As of 1777, therefore, both the New York State Constitution and the Laws of the State of New York protected the Dongan patent from state interference.

When the federalist constitution of the United States was presented to the New York State legislature for ratification it was solidly opposed. Two of the three deputies sent to the Congress of the United States of America, then organized under the Articles of Confederation, withdrew upon the grounds that to participate in the framing of a new form of government that had not been previously considered by the State Assembly exceeded their deputized powers. The only deputy to remain was Alexander Hamilton, of New York City.

The history of the ratifying conventions of the states was extremely contentious and would require a separate lecture just to cover them. Suffice it to say that the critical attack upon the proposed federalist constitution in New York was intense with Governor George Clinton, Robert Yates and many of the most prominent men in the government being opposed to ratification.

The New York assembly was slow in deliberations upon ratification of the new and unusual federalist constitution. After a sufficient number of states had ratified to ensure that the United States of America would continue with or without New York, the debate changed to whether New York should be in or out of the new union. With the vote still close, the Federalists led by Alexander Hamilton threatened that if the assembly failed to ratify that the southern counties would secede and join the union.

When the votes were finally cast in the New York State Assembly, the federalist constitution was adopted by a vote of 30 to 27. Twenty seven members of the Assembly, including Governor Clinton, voted to secede from the United States rather than to ratify. The Assembly still retained a majority of Anti-federalists, however, who were now focused on the Amendments that we know today as the Bill of Rights.

During the ratification process one of the most pointed deficiencies was a lack of a Bill of Rights. The most articulate criticism to this effect was by the Honorable Robert Yates, later the Chief Justice of the New York State Supreme Court (writing as Brutus, see “Anti-Federalist no. 84 see: www.anti-federalist.org/contents.htm).

All of the States had bills of rights or rights interwoven in their Constitutions. Some had considered bills of rights before the framing of their governments. Massachusetts had ratified the federalist constitution upon the condition that it be amended with a suitable Bill of Rights. A few New York Assemblymen were swayed to ratify by the assurance that a Bill of Rights was to be attached.

Bill of Rights amending the federal constitution was enacted in 1791. The preamble was clear as to its importance in adding “declaratory and restrictive clauses” to “prevent Misconstruction and Abuse of its Powers”. It read that:

CONGRESS of the UNITED STATES

Begun and held at the City of New-York, on Wednesday, the Fourth of March, One Thousand Seven Hundred Eighty-nine.

The Conventions of a Number of the States having at the Time of their adopting the Constitution, expressed a Desire, in Order to prevent Misconstruction or Abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government will best insure the beneficent Ends of its Institution,

RESOLVED, by the Senate, and House of Representatives, of the United

States of America, in Congress assembled, Two Thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States: All, or any of, which Articles, when ratified by Three-Fourths of the said Legislatures, to be valid to all Intents and Purposes as Part of the said Constitution, viz.

ARTICLES in Addition to, and Amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution.’

Most on point are the Ninth and Tenth Amendments.:

Amendment IX - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Dongan patent is a contract between the king and the property owners and inhabitants of Easthampton and Montauk that was assumed by the constitutional governments of the State of New York and of the United States of America. New York had just fought a war to regain and protect these liberties, and the legislature made very, *very* sure that they were secure from the new governments being established.

Next Thursday, September 5th, 2002, I will cover the history of the Proprietors of Montauk and how their rights evolved to establish what we assert through the Dongan patent to be the incorporated Township of Montauk.

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