

COMMENT: FROM THE PERSPECTIVE OF LAW

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To be successful, a revolution must be constructive as well as destructive. Not only must it sweep away an existing order that is, or seems, oppressive, it must also build a new order that responds to the ills against which the revolution broke out and improves upon what has been swept away. It must reorder the world with words. In that effort, the Revolutionary generation's leading spirits—among them, the four graduates of King's College whom we honor today—played pivotal roles. Three distinguished scholars have offered us further illumination of various aspects of their labors in meeting that constructive challenge. I am deeply honored to share this panel with them and to have been asked to comment on their presentations.

In his bravura paper, which previews a forthcoming book that I am eager to read, Herbert A. Johnson elucidates how ideas of the rule of law, specifically the rule of English and later of Anglo-American law, shaped the thought, words, and deeds of Jay, Livingston, Morris, and Hamilton. Professor Johnson bears out the arguments made by his mentor, and mine, Richard B. Morris. In his 1967 book *The American Revolution Reconsidered*, he argued that the American Revolution was in many ways a conservative revolution—a revolution in defense of shared legal, political, and constitutional values against what Americans saw as dangerous innovations prevailing in Great Britain, innovations giving rise to even

more perilous colonial policies that flew in the face of those shared values.

Bernard Bailyn, Gordon S. Wood, and John Phillip Reid have further explored this dimension of the Revolution. Resonating with their work and building on his own investigations of the intellectual and legal archaeology of colonial and revolutionary America and New York, Professor Johnson brings out the myriad ways that learned and remembered English law shaped and powered Americans' arguments and actions during the Revolution.

Professor Johnson adds a key point, one that Daniel Hulsebosch's forthcoming monograph, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, will address at length. Given that Americans had waged vigorous, bitter struggles for self-government in each colony, it was only natural that they should resent and seek to resist similar impositions from the mother country. Colonial politics was a nursery for resistance to policies and taxes and regulations imposed from above, for what Professor Johnson has called "the defensive colonial constitutional ethos;" it also was a crucible for the challenges and problems of federalism – the problems of striking a balance between center and periphery in an extended polity.

New York was integral to Americans' wrestling with federalism. Unique among the contentious and lively colonies of British North America, New York had been added to the empire by conquest in the 1660s, raising issues of what English rights, privileges, and liberties the settlers and colonists could claim under the ancient English constitution. It was heterogeneous—socially, politically, ethnically, culturally, and religiously—and thus had to deal with the

problems of a pluralist society long before Americans had the constitutional and intellectual concepts of what pluralism might mean and what it might require. In many ways, eighteenth-century New York was America in microcosm, and New York's leading politicians were uniquely qualified and experienced to grapple with American political problems.

Professor Johnson focuses on what John Reid has called "law-mindedness," and, like Reid, Johnson stresses law-mindedness as a core component of the success of the Revolution. But one question forces itself to the fore: which law? For example, in *Common Sense*, Thomas Paine proclaimed, "In America the law is king." But was Paine's idea of law identical to, or even congruent with, those of Jay or Hamilton or Livingston or Morris? In the realm of constitutionalism, we know the answer. Few constitutions clash more than New York's 1777 constitution, which Jay and company helped to frame, and Pennsylvania's 1776 constitution, which Paine embraced and defended. One consequence of 1776 was the freeing of Americans in the several states to approach new ideas and conceptions of the nature and purposes of law and the reform of law. The contest over such questions was made possible by, but not controlled or resolved by, the law-mindedness of the period before 1776.

Contrasting with the broad chronological, political, and constitutional sweep of Herbert Johnson's paper is Robert A. Ferguson's focused literary and rhetorical exploration of John Jay, and, tangentially, of Alexander Hamilton. As befits a founder of the interdisciplinary field known as Law and Literature, Professor Ferguson teaches us the inestimable value of paying attention to the words by which Jay and Hamilton sought to persuade their fellow citizens to

endorse the proposed Constitution—in longer view, of paying attention to these men's uses of words as a means of ordering a newly revolutionized world.

Brilliantly rescuing John Jay from obscurity, Prof. Ferguson restores him to a central place in the intellectual pantheon of the early Republic, showing how Jay skillfully drew on so many of the intellectual and rhetorical traditions that made up the American Enlightenment. Further, juxtaposing Hamilton's contentious, almost pugilistic rhetoric in *The Federalist No. 1* with John Jay's collegial and welcoming rhetoric in *The Federalist Nos. 2–5* and in his far more influential *Address to the People of the State of New-York*, Professor Ferguson shows us how Jay sought to build a sense of shared values, shared political community, and shared creative enterprise with his fellow New Yorkers and his fellow Americans. In the process, Jay helped turn the tide for the proposed Constitution.

And yet I confess to a few niggling doubts. For example, later in *The Federalist* Hamilton returned to the fight, gleefully attacking what he saw as the double-dealing, the willful inconsistency, the mendacity, and the corruption of Governor George Clinton and his allies. Though in the *Address* and in his speeches and behind-the-scenes politicking at the ratifying convention in Poughkeepsie Jay worked hard to repair the damage done by Hamilton's occasional explosiveness and consistent loquacity, Hamilton closed *The Federalist* (in a paper that, irony of ironies, cites Jay's *Address*) on a note similar to the combative tone of his first essay.

A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling

anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and after having passed over so considerable a part of the ground, to recommence the course. I dread the more the consequences of new attempts, because I know that POWERFUL INDIVIDUALS, in this and in other States, are enemies to a general national government in every possible shape.

Further, recent scholarship on the reception of *The Federalist* in 1787–1788 removes some of Publius's luster. Not only did the essays circulate sporadically and fitfully outside New York, and not only did the French consul deride them in a despatch to his superiors as "too long and learned for the ignorant," on New Year's Day 1788 a group of subscribers to the *New-York Journal* asked that the printer no longer "cram" them with "the nauseous Publius." *The Federalist*, they said, was making them sick. Questions about the impact of *The Federalist* in the immediate context of 1787–1788 raise questions about the impact of Jay's essays as Publius. Finally, just how far did Jay's contemporaries see him as a model of conciliatory politics? Various Americans in Southern states, for example, saw Jay as the Secretary for Foreign Affairs who, in his 1786 negotiations with the Spanish envoy Don Diego de Gardoqui, seemed willing to give away Americans' claimed rights to navigate the Mississippi River and to use the Port of New Orleans to secure trading advantages for the Northern states. As recent studies of the Louisiana Purchase by Roger Kennedy and Jon Kukla suggest, the Jay-Gardoqui negotiations exposed the fragility of the Union, and that sense of the Union's fragility echoed for generations, in the process tainting Jay's reputation as a national political figure. But I offer these as caveats to, not as a dissent from,

Professor Ferguson's elegant and profound meditation on John Jay—a meditation worthy of Jay himself.

Whereas Professors Ferguson and Johnson offer visions of the Revolution's roots and achievements that are both appealing and persuasive, the vision offered by Professor Edward Countryman is no less persuasive, but far more bleak and troubling. He tells a story not of contests of principle but of struggles for profit. The Revolution smashed many aspects of colonial society, among them patterns of ownership of land. Land is at the core of his story—land as prize, as focus of speculation, as source of revenue, as foundation of an independent and prosperous New York. To be sure, competing visions of how to create a prosperous New York existed—notably, Alexander Hamilton's rejected proposals for raising revenue for the state—but the majority brushed them aside. In Professor Countryman's account, winners busily, ruthlessly dispossessed losers. He shows how New York's dispossession not only of Loyalists but also of four of the Six Nations of the shattered Iroquois Confederacy pitted a determined, insistent, and powerful New York against not just the defeated Native American nations but also against an increasingly fragile and impotent Confederation Congress. Three features of this story resonate unsettlingly with aspects of Professor Johnson's paper. First, New York's clashes with the Confederation Congress over these issues highlight the centrality of problems of federalism in the era of the Revolution. Second, to bolster the legal case for dispossessing Native American nations, New Yorkers invoked old English legal and constitutional doctrine that conquered peoples were at the mercy of their conquerors, with no legal rights that conquerors were bound to respect. Finally,

though Hamilton and Jay were, as Professor Johnson notes, alert to the need to respect the due process rights of Loyalists, they had a far more ambiguous record in dealing with the demands of due process when applied to Native American nations.

As Professor Countryman notes, Hamilton and Jay and their allies, such as Egbert Benson, played complex and changing roles, though, ultimately, Hamilton and Jay pursued alternatives to the rapacious land hunger of New York's political leaders. His is not a story of clearly defined heroes and villains. Rather, it is a story of shifting alliances and interests, of moral and legal ambiguities. He reminds us that revolutions are not morally pristine, and sometimes give rise to some of the least creditable aspects of human nature and politics. He deserves our gratitude for helping us to develop a more complete, and more troubling, understanding of all that was at stake in the American Revolution.