

The Rule of Law and the Politics of Land in the Emerging Empire State

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As I typed the filename for this paper, my fingers slipped and "Columbia's Founders" momentarily became "Columbia's Funders." I know enough psychoanalysis to read that slip as revealing, particularly given my theme today. I want to talk about funding and founding, and, for that matter, about foundations, in a time when the foundations of both New York State and the United States were very weak. I want in particular to talk about Alexander Hamilton.

I'm coming at this problem from the perspective both of my original study of white society in revolutionary New York, in which I explored Hamilton's 1780s, and my involvement for the past four years in research regarding one of the Indian land cases, which has opened up dimensions that I did not imagine a quarter century ago. The standard discussions of Hamilton's financial plans turn either on his fiscal astuteness or on the combination of class privilege and doubtful public morality that James Madison and Thomas Jefferson began to discern early in the Washington presidency. But I want to go in another direction, because there was another situation of profound uncertainty that faced the separate states and the early republic. This was the question of dividing land and putting it to use. I want to explore the connections among his ideas about law and

finance, his understanding of the American future, and the manner in which Indian land as of 1783 became state and private property by 1790.

As anybody with casual knowledge is aware, Hamilton held only one elective office in his entire life. This was his single term in the New York State Assembly, in 1787. Usually historians treat that service as a springboard to the Constitutional Convention, which is certainly what Hamilton intended. But being himself, he put both his full energy and his own vision of what independent America should be into his brief service to his adopted state. In particular, he wanted to reduce the room for ad hoc decisions by government officials and substitute the predictability of statute law.

Consider one seemingly minor example, which actually reveals his fundamental way of thinking. The assembly charged Hamilton with preparing a response to Isaac Gouverneur's petition for a private bill of divorce. Private laws were how marriages ended in his New York. But instead of preparing a bill that suited the case, Hamilton proposed a general divorce law. It was not modern, no-fault legislation; it permitted only adultery as a ground. But proving this would be a matter of making a case in court, rather than having the legislature deal with an unhappy couple's private misery.¹

The assembly also charged Hamilton with drafting its annual tax bill. This, clearly, was a much larger matter, and Hamilton took his charge very seriously. The associated documents fill twenty-six pages in the modern edition of Hamilton's *Papers*. He proposed a very detailed statute, with specific tax rates on all manner of property. Impost rates would range from three pence a pound on foreign "starch or hair powder" to the weighty sum of ten pounds on imported

coaches and chariots. There would be excise taxes on land, houses, salt, carriages, taverns, servants, and lawyers. House taxes would be higher if the rooms within were painted or papered than bare-walled, unless the house was built of logs. He expected his proposed taxes to raise more than L100,000 and he laid down very detailed instructions for assessors and collectors to follow.

The legislature rejected his proposals. In their stead, it adopted its by-then standard mode of setting a global sum, apportioning that sum among the separate counties, and requiring elected assessors to apportion each county's quota according to "circumstances and other abilities to pay taxes, collectively considered."² It had been using this mode since the great financial crisis of 1778–1779, when what historians know as the *Clintonian party* had begun to assemble itself in response to public outcry against the state's original policies on finance and loyalism. Another aspect of its turn then had been a shift from controlling loyalists to outright punishment of them. At the end of 1779 Hamilton's future political allies John Jay, Gouverneur Morris, Robert R. Livingston, and Philip Schuyler withdrew from state-level politics. Turning to Congress, to its early bureaucracy and to the foreign service, they began to chart the path that would lead to Federalism's successful attempt in 1787–1788 to circumvent and defeat state-level popular politics. Within New York a new white, male elite, drawn from a different social level, took charge and bent the state's policies in a direction of its own choosing.³

As early as 1782, Hamilton's opinion of these new "rulers of this state" was scathing. Writing a detailed description of them to Robert Morris, about the best he could say was that one legislator among the new rulers "intends well whenever

he can hit upon what is right." Hamilton's opinion of their policies was scathing too. He railed in particular against the evil of taxing by "circumstances and abilities." Supposedly the formula rested on a "desire for equality," but perhaps the true reason was a desire to discriminate between the "*whigs*" and "*tories*." Whatever the reason for adopting it, "this chimerical attempt at perfect equality has resulted in total inequality." ⁴

Hamilton's response in print and at the bar to what the legislators did regarding loyalists, particularly the Trespass Act that underpinned *Rutgers v. Waddington*, is well known. Part of Hamilton's objection to further persecution was simply financial: Loyalists who fled would take their fortunes with them and New York needed that wealth. Part of it certainly was class: despite his own origins, Hamilton always preferred the company of the rich, the well-born, and the able. But part of it was a matter of regularity. Like its tax system, and even its manner of granting divorces, much of New York's Tory legislation had allowed ad hoc proceedings, often by commissioners rather than in court. Perhaps that had been necessary, particularly to win popular support when the state government was besieged by troubles and enjoyed virtually no legitimacy. Governor George Clinton certainly had recognized that point, calling on the senators and assemblymen in 1779 to pay attention to the demands that "your constituents loudly express" about the state's direction and policies.⁵ But now, in 1782, the war was over, and Hamilton wanted predictable law. He had a system to build.

Clearly, his tax proposal for New York fit with the proposals for national finance that he brought to Congress in his first Report on Public Credit. It might even be taken as a first draft. All evidence indicates that Hamilton had drafted the

tax bill as early as 1782.⁶ He worked these same themes of regularity and predictability in his seven contributions to *The Federalist* "concerning taxation." In the first of these, number 30, he made a withering comparison between the existing system of raising Congressional revenues by setting state quotas with the supposedly unlimited power of Ottoman Turk "bashaws or governors of provinces to pillage the people at will." He might have said the same about county quotas and *ad hoc* assessment in his own state.⁷ He was an astute politician, however. Rather than make another frontal attack on New York's tax system, he left the state's people to draw their own comparison.

Indian land enters the problem because in New York, at least, its acquisition and disposition were of a piece with how the state handled its taxes and the problem of loyalism. On the surface, this should not seem so. The Treaty of Paris yielded all the land enclosed by the Mississippi, the Great Lakes / St. Lawrence corridor and the border with Canada, the Atlantic seaboard, and the Florida line to the United States. As part of the settlement that allowed the Articles of Confederation to come into effect in 1781, the states with western land claims already had yielded them to Congress, creating a National Domain of vast extent and great possibilities. Thomas Jefferson's fertile, enlightened, rational mind conjured up a rational way to deal with the problem of jurisdiction in this new empire, by re-titling colonies as territories and extending the possibility that they could become full members of the federal metropolitan state. Jefferson solved the economic problem too, by proposing the grid system that any flight across the Midwest reveals to the eye. Under these provisions the land could be

governed in republican form. It also could be privatized and divided, both to make it a basis for smallholder citizenship and to allow its sale and capitalization.

But in New York it was not so simple. The people whose rule over New York Hamilton despised were also the people who gave the Empire State its modern outline, so familiar that like Texas, Florida, or California, it would be instantly recognizable to any American and to much of the rest of the world. This was not how New York appeared to the revolutionary generation. Consider two British separate descriptions on the very eve of the break. One is the Swiss-born cartographer Claude Joseph Sauthier's enormous "chorographical map" of "His Majesty's Province," published in London in 1779 and reproduced large-scale in Edmund Bailey O'Callaghan's *Documentary History of the State of New York*.⁸ The map betrays no hint that the whole of the province was wracked by war and that two of its parts, New York itself (north of lower Westchester) and Vermont, now called themselves states. It showed nothing like the familiar outline.

Sauthier's New York comprised Long Island and the Hudson and lower Mohawk Valleys. It seemed to stretch east from the Hudson to the Connecticut River, including Vermont, and large parts of Massachusetts and Connecticut. Still further east, Sauthier drew white space, denoting that land as clearly not part of New York. To the west he used the same device of white space, and the very same typeface, to denote "The Six Nations Indians Country." His New York seemed to end where Indian Country began.

In 1774 the map's dedicatee, Governor William Tryon, had described New York in quite different terms. Some historians have written about New York's colonial "charter." In fact, it had no such document. Writing a long report to

London, Tryon drew on a combination of early Dutch instructions to West India Company voyagers, the original seventeenth-century grant by Charles II to his brother James, Duke of York, and Indian-derived titles. Using these, he extended New York's boundary as far as the sway of the Iroquois Nations had been felt. This claim extended "no doubt" to the "straits of Detroit" and Lake Huron and possibly "much further westward." But Tryon knew that Massachusetts also claimed land "Westward to the South Sea" under its own Charter, which clearly did enjoy royal approbation. That particular problem would be resolved in the Treaty of Hartford in 1786, giving Massachusetts title to much of the land between Seneca Lake and the Niagara Frontier but affirming New York's legal authority. Hamilton was one of the lawyers whom New York retained in that case.⁹

The crown ceded its sovereign rights to Congress at the Treaty of Paris, and there was no doubt that Congress alone, not the states, could speak and act for these new "United States" on the world stage. But the transfer of sovereign rights created an additional complication that reached beyond any specific boundaries and grants. What entity had inherited the rights of the Crown in regard to *all* western lands? Sauthier's map clearly construed the territory of the Six Nations as lying west of New York itself. Governor Tryon thought otherwise; so had Cadwallader Colden, in his *History of the Five Indian Nations: [absent the Tuscarora] Depending on the Province of New-York in America*, published in the mid-eighteenth century.¹⁰ Both Tryon and Colden relied on a supposed deed of the Iroquois hunting grounds on the Niagara Peninsula to the English that dated from 1701.¹¹ The new state's first governor, George Clinton, was in complete

agreement with Tryon and Colden. These Indians and all the land they possibly could claim belonged to New York.

Good evidence exists that the Iroquois thought otherwise, regarding the 1701 "deed" (which is drawn in English style, rather than in the conventional format of an Indian treaty) as a diplomatic move linked to the "Grand Settlement" of the same year that ended their long, debilitating war with New France and its many tribal allies.¹² The Crown seems to have thought otherwise as well. For the first half of the eighteenth century it relied on New York's governor and Indian commissioners based in Albany to speak to the Iroquois on its behalf. But when it appointed William Johnson as Indian Superintendent for the northern colonies it meant him to be its own direct agent, superseding the previous role of colonial officials in Indian affairs. Provincial governors continued to take part in treaties, but as observers and lesser participants, not as crown spokesmen. Johnson's baronetcy was a clear mark of the Crown's intention that he should take priority. He negotiated the major Treaty of Fort Stanwix with the *Haudenosaunee* in 1768 without regard to provincial concerns. Historians' normal reading of that treaty turns on the Six Nations' great giveaway of settlement rights in Ohio, to the intense annoyance of the non-Iroquois Indians actually living there. But the Oneidas, who had become the main Iroquois spokesmen, were at great pains to insist that New York ended at the "Line of Property" that the treaty traced. This is roughly the line described on Sauthier's map.

The point is not to establish who was "right" or "wrong" regarding western lands. It is simply to describe a situation of immense confusion that involved

complex matters of law and sovereignty, and that also involved Indian as well as white participants. This is the background to the scramble for control that ensued at independence. That scramble was fully as chaotic as the state's white politics. Its qualities and outcome bear directly on Hamilton's proposals in 1787 for financing both the State and in 1790 for financing the Republic.

We need not sort out the jockeying, the backbiting, and the tangles of 1775–1776, as both colonial New York and the *Haudenosaunee* came apart during the independence crisis. For present purposes it is enough that both Congress and the revolutionary leaders in New York sought to establish primacy in dealing with the Six Nations. On the New York side, the leaders were the Albany Committee of Safety, who claimed the mantle of Indian dealings that the Crown had stripped from the colonial-era Albany commissioners when it elevated Sir William to primacy. But in August 1775 Congress asserted its own primacy, inviting the Iroquois to a treaty, held at Albany under its auspices. One of its commissioners was an Albanian, but another was a Massachusetts man. As matters worked out, the Six Nations split, only the Oneidas and the Tuscaroras choosing the American side. White Mohawk Valley society split open too, and until 1783 the Revolution there and in Six Nations country was a bloody war of all against all. The *Haudenosaunee* itself, created prior to European contact and kept alive and supple for more than three centuries, came to an end with the mutual carnage of Oriskany in 1777 and the extinguishing of the Six Nations council fire at Onondaga two years later.¹³

When the war ended, the jockeying for primacy resumed. New York was ready. Its constitution of 1777, written by Jay, asserted flatly that the state

government had inherited the Crown's exclusive right to purchase Indian lands.¹⁴ Taking the point further, when the State confiscated loyalist property in 1779, it also declared its own sovereignty "in respect of all property within" its boundaries.¹⁵ At that point those boundaries remained totally uncertain. A statute in 1780 ratifying the Articles of Confederation relinquished the state's western claims; the Treaty of Paris established its northern boundary and ended all American claim to the Niagara Peninsula; commissioners appointed under a statute of 1785 worked out the line with Pennsylvania. The problem of the western Massachusetts claim took longer, but by the time of the Federal Constitution only the Vermont question remained unresolved.¹⁶

New York's leaders, the men who became its anti-Federalists, were bootstrapping the Empire State into its modern form. But they had no reason to believe their creation was secure. Leaving aside the problems posed by the restoration of the Southern District from British control, they understood that four of the Six Nations remained hostile. The specter of another Vermont haunted them as well, both in such a development's own right and when knowledge leaked that Vermont's own frustrated leaders conducted a mild flirtation with Sir Frederick Haldimand in Montreal. Would-be settlers from New England were crossing the Berkshires and working their way up the Mohawk Valley. Among them were veterans of the Sullivan-Clinton campaign of 1779 that had laid waste the country of the Cayugas, Onondagas, and Senecas and who had seen its potential richness. These people had no reason for loyalty to New York. Perhaps worse of all, the state was broke. Recovering the Port of New York presented the prospect of taxing imports bound for New Jersey or western New

England, which may be one reason why Clinton and his allies resisted granting a Federal impost in 1784 and again in 1787. But committed as they were to a tax system that worked badly, and to the low burden that it imposed on their own constituents, they needed another source of revenue.

All these are reasons why the state made a most determined effort as peace was returning to acquire Indian land. Reasoning that colonial New York had enjoyed a special relationship with the Six Nations, that it had inherited the Crown's sovereign rights regarding them, that four of the six had lost their rights by supposedly unprovoked hostility and now stood to it as conquered people, and that its boundaries enclosed them all, it appointed commissioners with the specific purpose of "the Extinguishment of Indian Titles." The commissioners began their work in 1784 and continued to deal with the Iroquois until 1791. During that time they acquired most of the land east of the line drawn at Hartford in 1786 to separate New York's preemption area from that of Massachusetts.

The state commissioners' records fill two sizable volumes.¹⁷ They do not make pretty reading. They reveal a pattern of continuous mendacity and deception, with repeated assurances to the Oneidas in particular that their lands were safe until they desired to sell, with a pretence of pretending to protect Indian titles against private projects, with threats to withdraw the State's protection against squatters unless the Indians did comply with its demands, and with refusal to recognize Indian efforts to adjust creatively to the new situation. State officials distributed a great deal of alcohol, and dangled the promise of food in front of people who were starving, if only they would sign. After 1785 they

operated under the terms of "An Act to facilitate the Settlement of the Waste and Unappropriated Lands Within this State."¹⁸

Congress took a different perception. Under the Articles of Confederation it enjoyed sole control over relations with Indians "not members of any state," and to its collective mind the Six Nations were not members of New York. The immediate result was a squalid confrontation at Fort Stanwix in 1784, when commissioners dispatched by Congress and commissioners sent by New York vied for access to the Indians, to the point that the Federal Commissioners ordered their armed guards to remove a New York official who was observing them too closely. In the immediate run, Congress won. New York's attempt at a separate treaty that year proved fruitless. Congress promised protection for the lands of the Oneidas and forced the four formerly hostile nations to cede their western claims.

But between 1785 and 1788 New York returned repeatedly to the matter. As Congress's revenues dwindled, largely because of New York's refusal to grant an impost, it lost its ability to make credible promises to anybody. It did not attempt to intervene when state commissioners negotiated a series of treaties between 1785 and 1788. Among the last of these, one with the Oneidas took approximately five and a half million acres of the six million acre domain that they had been assured was entirely theirs when the war came to an end. This immensely valuable holding abutted the area where white settlement was pressing west. It stretched from the Adirondacks to the Pennsylvania line and incorporated the future starting point of the Erie Canal, the beginnings of the fertile plain on the south side of Lake Ontario, and the headwaters of the

Susquehanna. It was land worth having in commercial terms, as the Oneidas had been fully aware for decades.

The treaty yielding it was signed by the Oneidas and the state at Fort Stanwix on September 21, 1788. New York had ratified the Federal Constitution by then, and it was the very eve of the Federal Government's going into business. It would be most interesting to find evidence that the State was acting in the knowledge that its putative claim to sovereign right in regard to Iroquois land was about to end. But nothing survives in Governor Clinton's papers, or the legislative record, or the Indian Commissioners' minutes, or the ratification debate to establish that point. What is beyond question is that once the State acquired the former Iroquois land, it proceeded to dispose of it "on a scale more lavish than that of any royal governor."¹⁹ The core of Clinton's electoral constituency was small holders, but the politicians who surrounded him, and who acquired much of that land, were on the make.

Whoever acquired the land, be the person a speculator, a former soldier taking up a bounty, or a small-scale settler, the state wanted revenue. Alan Taylor will demonstrate in his forthcoming book on the U.S.–Canada boundary that during the late 1780s and 1790s the state was able to sell former Indian land at very large profits, providing serious income to itself. This was a matter of liquidating capital, not of generating working revenue. Of course it was not alone in this practice. On the Federal level, too, selling off the public domain was an important source of funds. As I already have suggested, Hamilton had very different ideas about raising public revenue. Whatever else might be said about

his proposals regarding state and Federal finance, his goal was that white American society should pay its own way.

Before proceeding further, we would make a mistake to suggest that Hamilton or Columbia's other founders, or the Federalists whom they joined, were completely remote to the state's concerted and successful assault upon the Iroquois lands. Hamilton was no speculator himself, but men with whom he associated acquired Iroquois land on a grand scale, once it became available. Hamilton became involved in land litigation, both in regard to pre-independence grants in the lower and middle Mohawk Valley and to land that the state handed out after the Revolution. He was not in the least hostile to the idea that well-connected men could use their positions to acquire Indian land, and the opinion that he wrote in 1795 regarding Georgia's fraudulent disposition of its western lands in the Yazoo scandal prefigured John Marshall's opinion on the sanctity of contracts in *Fletcher v. Peck*.²⁰ King's College graduate and Hamilton associate Egbert Benson was Governor Clinton's closest legal advisor during the great assault on the Iroquois holdings. This is not a morality tale of good guys and bad ones. Nor is it one in which proto or actual Federalists worked to protect Indian land rights against rapacious localists. I am describing shifting fields of force and different people's ability, or inability, to act within those fields.

But unlike virtually all the other American founders, including George Washington, Hamilton never was in the habit of looking west, which is the key both to my argument and to its larger implications. Whether he was driven by a vision of national development or by class interest, or by a mixture of both, it is plain that he wanted the emergent, developing bourgeois society that he favored

to fund itself, from the proceeds of its own economy. He did not propose to shunt the costs of development off onto people who had virtually no prospect of enjoying those fruits who, indeed, would be specifically denied those fruits by their forced exclusion and impoverishment. Within white society he had his full share of class bias. Ordinary white New York City people, who provided his popular base in the ratification struggle, came in the 1790s to have good reason to think that Hamilton did not have their interests in mind. Pennsylvania farmers rebelled against his excise policies. Perhaps white New Yorkers would have rebelled the same way, had his tax proposals in 1787 become law. But his penchant for regularity, especially in fiscal matters, did not permit a system in which buying land cheap and flipping it rapidly for revenue could solve financial problems.

By themselves, Indian matters formed only a blip on Hamilton's mind. But consider John Jay's transformation. In 1777 he was the author of the state constitution's assertion that New York had inherited the Crown's rights and responsibilities regarding Iroquois land. Twenty-one years later, however, Governor Jay would be the only New York chief executive to conduct a treaty with the Oneidas that actually complied with Federal procedural requirements. Speaking for the Federal Government, Hamilton's ally Timothy Pickering negotiated the Treaty of Canandaigua in 1794. To this day, that treaty forms the basis of New York Indian nations' assertion of their rights vis-à-vis the State. That matter is under litigation, of course and one aspect of it is before the Supreme Court in the present term. Whatever the court decides, the

contemporary triangulation of Indian nations, New York State, and the Federal Government has deep roots.

It reaches back to Canandaigua in 1794, to the contest of Congressional and State negotiators at Fort Stanwix a decade earlier, and to the not entirely misplaced confidence of pre-revolutionary Indians that Sir William Johnson and the Crown were more likely to respect their interests and protect their property than local colonial officials. This, in turn, continued the earlier triangulation that had enabled much stronger Indians to protect themselves by playing off the English to their east and the French to their north. Taken that way, Hamilton's insistence that New York should establish regular procedures and pay its own costs, rather than keep taxes artificially low and foist those costs on others, has a small place in a much larger and very American story. Whatever else might be said of him, he did not believe that direct expropriation was the way to achieve the society he wanted, whoever was being expropriated, loyalists and Indians alike.

1. Harold C. Syrett and Jacob E. Cooke, eds., *The Papers of Alexander Hamilton* (hereinafter PAH), Vol. 4, ed. (New York: Columbia University Press, 1962), 70–71.

2. PAH, 4:40–66.

3. Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760–1790* (Baltimore: Johns Hopkins University Press, 1981), chap. 5–6; Alfred F. Young, *The Democratic Republicans of New York: The Origins, 1763–1797* (Chapel Hill: University of North Carolina Press, 1967), chap. 1–2.

4. Hamilton to Robert Morris, August 13, 1782, PAH (1962), 3:132–45.

5. Edward Countryman, "Consolidating power in Revolutionary America: The Case of New York, 1775–1783," *Journal of Interdisciplinary History* (1976), 6:645–77; Clinton

quote in Charles Z. Lincoln, ed., *Messages from the Governors*, 11 vols. (Albany, N.Y.: J. B. Lyon, 1909), 2:77.

6. Editor's Notes to Hamilton's draft tax bill, *PAH*, 4:40–41.

7. James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin, 1987), Federalist No. 30, quote at 213 (orig. pub. 1788).

8. Edmund Bailey O'Callaghan, *Documentary History of the State of New York*, 4 vols. (Albany, N.Y.: Weed, Parsons, 1849–1851), insert at 1:775.

9. Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 4 vols. (New York: Columbia University Press, 1964–1980), 1:553–656.

10. *History of the Five Indian Nations: Depending on the Province of New-York in America* (Ithaca, N.Y.: Cornell University Press, 1958) (orig. pub. 1727–1747).

11. Edmund Bailey O'Callaghan, ed., *Documents Relative to the Colonial History of New York*, 15 vols. (Albany, N.Y.: Weed, Parsons, 1853–1857), 4:904–910.

12. Gilles Havard, *The Great Peace of Montreal: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal: McGill-Queen's University Press, 2001) (orig. pub. in French, 1992).

13. This paragraph is drawn from William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, Okla.: University of Oklahoma Press, 1998), chap. 36–37; Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse, N.Y.: Syracuse University Press, 1972); and Isabel Thompson Kelsay, *Joseph Brant: Man of Two Worlds* (Syracuse, N.Y.: Syracuse University Press) chap. 9–11.

14. Article 38. The text is available in William A. Polf, *1777: The Political Revolution and New York's First Constitution* (Albany, N.Y.: New York State Bicentennial Commission, 1977).

15. *Laws of the State of New York*, 3d sess., chap. 25.

16. *Ibid.*, 3d sess., chap. 28; 8th sess., chap. 29; 8th sess., chap. 2, chap. 4, chap. 28, 9th sess., chap. 53, 10th sess., chap. 46.

17. Franklin B. Hough, ed., *Proceedings of the Commissioners of Indian Affairs, Appointed by Law for the Extinguishment of Indian Titles in the State of New York*, 2 vols. (Albany, N.Y.: Joel Munsell, 1859).

18. *Laws*, 8th sess.

19. Young, *Democratic Republicans*, 55.

20. *Ibid.*, 356–435.