The English Revolutions and the Rule of Law

in Revolutionary New York:

Jay, Livingston, Morris, and Hamilton [1]

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Preface

Our meeting today, presumably a final commemoration of Columbia's 250th Anniversary, deals with a mixed legacy that the University has left in American history—that of patriots and loyalists in the era of the American Revolution. Let me say at the outset how very grateful that I am to be here. You see, fifty years ago Columbia and I were much younger, and as an undergraduate it was my privilege to tote luggage for distinguished professors arriving to celebrate the "Bicentennial" in 1954. Now, there was no one to tote my luggage this time; nor have I in the interim won a Nobel or Bancroft Prize, so my gratitude is primarily for having lived this long and having seen Columbia prosper in the past five decades.

Another reason for saying thanks is that this is an opportunity to deal with a topic that has intrigued me over the past four decades as a legal and constitutional historian. (1) When, how, and why did American constitutionalism depart from British constitutional thought, and (2) how did this impact the so-called Founding Fathers who fought the Revolution and drew up the U.S. Constitution? Now this is a variant on the historiographic debate over the American Revolution that has been raging for at least forty years, and perhaps is destined to continue to do so well into the future. It would be immodest to suggest that what I have to propose will constitute more than a brief skirmish in the on-going scholarly warfare. But I do believe that legal and constitutional history has something to say, and our four patriot Columbia grads—John Jay, Robert R. Livingston, Jr., Gouverneur Morris, and Alexander Hamilton—may help us to understand the origin and evolution of American constitutionalism in the Revolutionary Era.

Introduction

As a graduate student I arrived at the conclusion that the American Revolution was a reluctant uprising staged by men who were exceptionally dedicated to the English constitution. At the same time our so-called Founding Fathers held the strong conviction that in their day the English constitution was being subverted, not only in the colonies but also in the Mother Country. For many of them rebellion was not a rejection of the English constitution, but rather the only means available whereby they might preserve those aspects of English government and law which they held most precious. To put it in another way, for many Americans and for a majority of the legal profession, British and colonial legal relationships and constitutional thought were marked by profound differences over the nature of the English constitution as seen through two very different perspectives.[1]

This ambivalence toward an open break with Britain found its origin in a number of tensions in colonial life and law during the seventeenth and eighteenth centuries. First and foremost, there was the older tradition of fundamental law most eloquently propounded by Sir Edward Coke and his common law supporters. At some point between 1616 and 1775 that affection for the "ancient law" gave way to the doctrine of Parliamentary supremacy expounded most prominently by William Blackstone's *Commentaries* (1765–69).[2] Secondly, there was a question, dating back to the English revolutions of 1648–60 and 1688–89, that involved the locus of sovereignty: did it reside in the will of the people, or was it exercised by a supreme Parliament acting as the peoples' legislative representative? Thirdly, the so-called Glorious Revolution in England, which purportedly limited much of the royal prerogative by subjecting it to Parliamentary control, had, to say the least, a mixed and ambiguous constitutional impact upon the British colonies. Fourthly, the English colonial system and rules concerning the extension of English law to overseas possessions

had habituated American lawyers to use law and constitutional principles as defenses against imperial exploitation. And, fifthly, the English historical experience, as then known and understood by Americans, provided an appreciation for the virtues of republican government on one hand, and a fear of its weaknesses on the other. Small wonder that Benjamin Franklin, when asked what governmental system the 1787 Philadelphia Convention had crafted, replied, "A republic, if you can keep it."[3]

Today's conference, dealing with four New York lawyers and statesmen, permits us to deal with these tensions as they impacted the generation which launched and led the American Revolution, and shaped the new governmental systems that followed. John Jay, a 1764 graduate of King's College, along with Robert R. Livingston, Jr., (King's, 1764) and Gouverneur Morris (King's, 1768), was responsible for drafting the 1777 New York State constitution; with his younger colleague Alexander Hamilton (King's, 1775) Jay wrote a number of the *Federalist Papers*. Jay served in the Continental Congress, as did Livingston, his former law partner; Gouverneur Morris and Alexander Hamilton served terms in the Confederation Congress. Jay was first chief justice of the Supreme Court of the State of New York; at the same time Livingston was the state's Chancellor. Jay succeeded Livingston as the Confederation government's Secretary for Foreign Affairs. Morris was Assistant Financier in the Confederation Office of Finance, and Hamilton served the Confederation as its tax collector and agent in New York State. Yet these shared experiences tell only part of the story. These four King's College graduates developed close friendships and exchanged thoughtful and at times confidential views concerning government, politics, and law.[4] Viewed collectively, they may provide us with some very helpful insights into the constitutional theory and experiences that launched both our state and federal governments.

Colonial New York's Unique Constitutional Experience

The four statesmen we consider today shared membership in the New York legal profession.[5] As such they were inheritors of an interesting constitutional heritage, some parts drawn from recent experience, others from formative events that were quite remote. Now for historians, dependent as we are upon written records, that mind-set is difficult to recreate. This was a bar which practiced without case reports. It drew precedent from an oral tradition and from English law, and that very methodology made it much more conscious of past colonial events and English case law and treatises. In the case of Jay, Livingston, and Morris, family tradition reenforced provincial history. Jay's uncle and god-father, John Chambers, was an associate justice of the colonial Supreme Court of Judicature. Livingston's father served on the same court; Morris's father was long-time judge of the New York Vice Admiralty Court, and his grandfather in 1733 had been summarily dismissed from his chief justiceship of the New York Supreme Court of Judicature as a prelude to the famous *John Peter Zenger* libel case.[6]

The everyday practice of colonial lawyers and judges directed them to the state of English law during the seventeenth century. Legal historians are familiar with the so-called extension rules, which established a base-line for the law of each separate province. For most of the North American colonies the extension rule prescribed the date of English settlement as the time which determined the law that applied in the colony. For example, the law of Virginia was established as the statutes and case law of England as it existed in 1607; that law, of course, was subject to modification by legislation, by court decision, or by local custom.[7] However, New York had been settled for almost a half-century before it was conquered from the Dutch and incorporated into the English empire in 1664. For such a conquered colony, there was a different mode of determining the original law of the province. In the case of New York, the accepted extension date was

1691,[8] the time when the first legislature was convened under royal authority. Late in the colonial period the English Court of King's Bench held that once a conquered colony had been granted legislative powers, the King might no longer rule solely by his prerogative powers. Thereafter, matters of taxation (and presumably other objects as well) might be changed only with the consent of the colonial legislature, or by enactment of a statute by the British Parliament.[9]

That late colonial case, *Campbell* v. *Hall* (1774) certainly carries with it the implication that private rules of extension also applied to constitutional, or public law. Governmental consequences followed from granting legislative powers to a conquered colony, and indeed the very act of initial settlement bestowed some rights of Englishmen upon the new territory and its first European inhabitants. Speaking in 1965 Professor Mark DeWolfe Howe made a significant observation concerning the colonists who drafted the 1646 Massachusetts Declaration of Liberties.

> [T]hey looked upon that something known as the common law as a limited set of essentially constitutional principles–principles of public order to which their own scheme of government . . . [however] shaped. . .should conform . . . . Yet, quite naturally, they saw the non-constitutional and private segments of the laws of England as parts to which they owed no special deference.[10]

In Massachusetts, and perhaps elsewhere in British North America, the colonists saw "common law," as Howe asserts contemporary Englishmen saw it, "as a set of unchanging principles of public law, principles which our usage would describe as 'constitutional'"[11].

Important constitutional conclusions result from the application of the "settlement" and "conquest" extension rules. This becomes obvious with just a

brief reference to the constitutional history of seventeenth century England. During their colonial history, English settlers in North America were observers of a tumultuous and revolutionary period of English history. After 1607 they would be aware of the legal changes instituted by Sir Edward Coke, and then learn about the constitutional alterations made by the Petition of Right, the English Civil War, the Protectorate, the Restoration of the monarchy, and the Glorious Revolution of 1688. These developments were closely followed in the North American colonies, and both legal and public opinion pondered the degree to which the new "rights of Englishmen" were applicable to the residents of America.[12] Although the return of monarchy under Charles II resulted in nullification of Commonwealth and Protectorate legislation,[13] the political thought and constitutional experiments of the Interregnum were not as easily removed from the colonial mind.

New York's 1691 extension date is both late and constitutionally significant.[2] Did it bestow the fruits of the Glorious Revolution in England upon the residents of New York? Was the 1679 English habeas corpus act effective in New York? And did it confer religious toleration upon the non-Anglican residents of the province?

Between the seventeenth-century concept of constitutionalism described by Professor Howe, and British constitutional theory today, there are stark differences. As Professor Katz pointed out in introducing the first volume of Blackstone's *Commentaries*, the thrust of eighteenth-century political theory had been to limit the authority of the Crown.[14] This was the basis upon which the English Civil War was fought, and was substantially secured in1689 by the ratification of the English Bill of Rights. By contrast, in the colonial period of American history two themes were dominant: (1) the development of local self-government and (2) the defending of local initiatives against supervision either

by the Crown, or after 1763, by the Crown, Parliament, or both. Finally, it should be noted that the settlement of influential portions of British North America was undertaken by Englishmen and others fleeing persecution at the hands of the English government. That is particularly true of the New England colonies where the Great Migration (1630–40) was triggered by the rise of William Laud to the Archbishopric of Canterbury, and the resulting oppression of Puritan dissenters from the established church.[15]

Colonial constitutionalism, both in the future United States and in later British colonies, also early assumed a "defensive" character. In English constitutional theory the governance of the colonies, even after 1689, was vested in the Crown and exercised judicially and legislatively by the King's Privy Council. Acts of colonial assemblies were subject to review and disallowance by the King in Privy Council, and most colonial court decisions were subject to appeal to the Privy Council. In both instances the Privy Council's power was bottomed upon the principle that colonial laws should not be "repugnant" to the law of England. It was also constitutionally possible for Parliament to enact statutes that expressly applied to the colonies and thus became part of the local law. That authority had been exercised intermittently prior to 1763, but the need to raise additional revenues thereafter precipitated a series of British imperial statutes designed to extend taxation to the North American colonies.[16] In the eyes of the colonists, Parliament was an additional oppressor rather than a protector against the royal prerogative.

The province of New York was no stranger to constitutional debate.

We know that the spirit, if not the letter, of the 1679 Habeas Corpus Act was applied in the 1707 litigation concerning two Presbyterian ministers who were imprisoned by the governor for preaching without a license. The Rev. Thomas Makemie and the Rev. John Hampton were released on a habeas corpus

issued by Roger Mompesson, the Chief Justice of the Supreme Court of Judicature. Professor Hamlin and Mr. Baker correctly assert that usage and custom were as effective in extending English statutes to New York as was actual adoption of the statute by the colonial legislature, or the naming of the colony in the English enactment of the statute.[17] For all practical purposes the English Habeas Corpus Act was part of New York law. On the other hand, certain English statutes, such as the 1689 English Toleration did not extend to New York according to the Court in the Makemie case.[18]

Sir Edward Coke's emphasis upon the primacy of English courts in protection of constitutional rights finds an echo in the law and politics of colonial New York. One preliminary aspect of the struggle for a free press in *King* v. *John Peter Zenger* (1735), was the authority of the governor to erect a court of equity without the consent or the authorization of the General Assembly.[19] Two prominent lawyers, William Smith, Sr., and Joseph Murray were retained to argue the issue before the legislature. Smith's argument began by citing Sir Edward Coke that absent the consent of Parliament, the King could not create a court of equity.[20] For the same point he cited *Martin* v. *Marshal and Key*,[21] that the King may not grant anything in derogation of the common law; however, the King might create additional courts to hold pleas at common law. Sir Henry Hobart in the *Martin* case and later Sir Matthew Hale, held that equity tribunals being arbitrary courts, might be erected only by an Act of Parliament. Smith continued by arguing that the King's coronation oath assured subjects residing in the most remote dominions, that they shared in the same rights as subjects in England. "To affirm this Power in the Crown, without an Act of the Legislature, in my humble Opinion, supposes his Majesty to be vested with an Arbitrary Authority over his American Subjects, with Power to impose New Laws, without their Consent;. . ."[22] Smith buttressed his argument by pointing out that the 8th article of the impeachment filed against the Earl of Clarendon asserted that he attempted to introduce arbitrary government in the King's plantations, and

imprisoned those who objected to the innovations.[23] His conclusion was that "what is not lawful in England, cannot be lawful here," and since no court of equity could be created without Parliamentary consent in England, so in New York such a court could be created only by legislative enactment.[24]

Joseph Murray's opinion followed a different course, concluding that an equity or chancery court need not be subject to legislative approval. He asserted that the courts of England existed by virtue of the customs and common law of England, and were "Fundamental Courts." To say that the laws of England extend to New York, is to accept that the courts to administer those laws also must exist in New York Just as English courts were created neither by the King's grant nor by legislative action, so the New York courts might be established to secure the rights of Englishmen resident in New York. Presumably the argument was that a court of equity or a chancery court was part of the law and usage of the province by virtue of its being an English settlement. Hence the governor might recognize the existence of such a court and call it into existence. However, it is unclear whether a case pending in a common law court might, in light of Smith's opinion, be transferred to such a newly established court.

As the eighteenth century moved on, two additional questions arose concerning the origin and constitutional status of New York's courts and judges. The first involved judicial tenure, which prior to 1760 and the accession of George III, had been during good behavior. Commissions issued under the authority of the new monarch were to be revocable at pleasure. Since the English Act of Settlement (1701) English judicial commissions were issued during good behavior, and their removal from office was limited to proceedings instituted by the address of both houses of Parliament.[25] As a protest several justices of the Supreme Court of Judicature refused to accept their new commissions, and the tenure of judges became a major issue for constitutional debate in the province. John Jay's uncle, Justice John Chambers, was among those judges who lost their

positions by refusing to accept other than good behavior commissions.[26]

The second ground of contention involved the finality of a jury verdict in a common law case. Lieutenant Governor Cadwallader Colden insisted that an appeal might lie from a Supreme Court of Judicature judgment entered on a jury verdict in a tort case. A strong majority of the Bench and Bar argued strenuously that such a verdict and judgment was not appealable, and their position was ultimately upheld by the Privy Council.[27] As Professor Klein points out, this litigation caught the imagination of the public far more than the earlier judicial tenure dispute. In the public press the bench and bar argued that the right to jury trial was embedded in the English constitution, and that the substitution of a new procedure would be to prefer despotism to law. Lieutenant Governor Colden was preferring the rights of the prerogative at the expense of popular rights. Additional vehemence attached to the controversy when the news of the Stamp Act reached the embattled New Yorkers.[28]

Courts, Common Law, and Constitution

The constitutional position of courts was thus a theme running through New York's legal history, the main concern being the independence of the courts and protection of judges and juries from executive interference. This concern for the judiciary and what we might term the "rule of law" had memorable English antecedents. In 1607 Sir Edward Coke and the other judges of England were summoned to attend the King and to answer a question raised by the issuance of prohibitions to ecclesiastical courts. King James had been advised that he might personally decide such matters, thereby displacing the common law courts from this jurisdiction. As Coke records his reply, he informed the King that the customary course of law was for such matters to be determined in the common law courts, subject to reversal on appeal to either the court of King's Bench or the King and Lords in the court of Parliament. All persons, small or great, should be

tried in the King's courts, and ancient precedents indicated that judgments entered in any other tribunal were invalid and void. The discussion moved to a new level when the King observed that he had as good a reason as any man, and thus should be able to decide cases. Coke's reply was divided into three parts: (1) an observation that while the King undoubtedly had excellent reason, the ability to decide cases was based upon the artificial reason of the legal profession; (2) that artificial reason was derived from "long study and experience"; and, finally (3) "that the law is the golden met-wand[29] and measure to try the causes of the subjects and which protected his Majesty in safety and peace." Coke's report of the encounter assures us that the King was greatly offended, and then stated if that were the case then the King would be under the law, which was a treasonable position. Unabashed, Sir Edward replied, "that Bracton saith [the king ought not to be under any man, but under God and the law]." We may assume that the King was not pleased, but the fact that Coke had the backing of the other judges in attendance, won him a temporary reprieve.[30]

King James was again drawn into a dispute over court jurisdiction between 1613 and 1616; this time the conflict was between Lord Chancellor Ellesmere and the newly appointed chief justice of King's Bench—no other than Sir Edward Coke. Ultimately Ellesmere prevailed in his argument that the King was entitled to direct cases to the appropriate court, which in this case was Star Chamber. A decree in Chancery drawn by the King instructed that the Chancery take cognizance of any and all cases where equity relief was appropriate, regardless of whether a prior judgment had been entered at common law. Having lost the jurisdictional struggle, Coke was subsequently dismissed as chief justice of King's Bench; as Sir John Baker wryly observes, "If the King were tired of a Chief Justice who put the rule of law first, he would choose one who would put the King first."[31] Dismissing Coke from his judicial post did not remove James from his confrontation with the feisty jurist–it simply moved the conflict

into the House of Commons, the public press, and the memory bank of the legal profession for the next one hundred seventy years.

Before Lord Coke was elevated to King's Bench in 1613, he was in a position to deal with still another case that pitted statute against traditional common law–the famous and perennially controversial *Dr. Bonham's Case* (1610). Briefly, the litigation involved a medical doctor who had been practicing in London for about four years without having been admitted to membership in London's College of Physicians. In accordance with the statute establishing this regulatory body, the College might summon before it non-member physicians, and imprison or fine them for practicing without a license. Dr. Bonham, among other defenses, urged that the College, being a party to the case, could not by principles of common law, be judge of its own case. Coke agreed, and Bonham went free.[32] Following the statement of the court's decision, the chief justice proceeded to insert a passage of dictum which has perplexed scholars for nearly four centuries:

> And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void; for when an Act of Parliament is against Common Right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void . . . . [33]

What follows are two examples, which appear to be simply situations in which the statute commands the impossible. Needless to say, American scholars tend to find Coke's statement to be ruling case law upholding the subsequent practice of judicial review.[34] English scholars, for the most part view this assertion as an aberration in the development of legislative supremacy, read the statement as obiter dictum, and construe it narrowly.[35]

Two distinguished scholars' approach to the puzzle of Bonham's case should be mentioned briefly as evidence of the subtlety of meanings that color interpretations of these relatively few words. Professor Gough concluded that what Coke felt to be fundamental in the common law, was not specific details, but rather, common law's rules and fundamental points—in other words its basic principles of the constitution. Citing the analysis of Sir John Davys (1628), Gough suggested that since the accretion of common law wisdom comes closest to the law of nature, experience has shown that inconsistent statutes have always been found inconvenient, and thus have been repealed.[36] Professor Pocock looks to the late seventeenth century debate between philosopher Thomas Hobbes and Chief Justice Matthew Hale. Hale was unwilling to accept the thesis that customary common law worked the repeal of statutes; rather he, and perhaps Coke also, accorded to case law a presumptive validity, based upon its antiquity and its adaptability to new circumstances.[37]

Let me here suggest that neither what Coke meant, nor what subsequent generations of scholars thought he meant, need detain us this afternoon. Rather, how American Revolutionary leaders (including Columbia's four graduates), understood *Dr. Bonham's Case* and Coke's *Institutes*, are critical to evaluating the constitutional history of the American Revolution. The clearest and most visible evidence is the argument of Massachusetts lawyer, James Otis, in the writs of assistance case.[38] Special search warrants, the writs of assistance found their way into Massachusetts law in 1696, when colonial customs enforcement was conformed to that of England. In 1699 the Superior Court was granted the jurisdiction traditionally of the English court of Exchequer, which were expressly refused in 1754. However, writs of assistance were regularly issued until six months after the death of George II, when all outstanding writs lapsed, and new authorizations were required. This provided an opportunity to challenge the authority of the Superior Court to issue the writs, and allowed Boston merchants to question the validity of the writs and the authority of the court to issue them.

As attorney for the merchants, James Otis, Jr. presented a lengthy argument which was taken down by a young law clerk, John Adams. Despite Otis's inability to persuade the Superior Court, his argument has remained a classic statement of the patriot position on court jurisdiction, customs collection, and judicial power.[39]

Otis began by urging the position taken by Lord Coke–that acts of Parliament against the Constitution and natural equity were void, and that the judiciary "must pass such acts into disuse." John Adams's notes indicate that in support of this assertion, Otis cited the opinion in *Dr. Bonham's Case.* [40] Professor Wroth and Judge Zobel, the editors of Adams's legal papers, are careful to distinguish the circumstances in *Dr. Bonham's Case* from the law and facts of the writs of assistance litigation. They find Otis's argument to be constitutional in its challenge to legislative power, but at the same time, rather antiquated in light of eighteenth-century English constitutional law.

> In the latter half of the 17th century, as Parliament increasingly acquired the sovereignty formerly attributed to the Crown, *Bonham's Case*, taken out of its private law context, had often been relied upon in political and constitutional argument to support the proposition that there was a higher law to which Parliament must bow. Other authorities cited by Otis indicate that he quoted Coke's words in this constitutional sense, rather than as a canon of construction. The contrast between construction and constitution is emphasized by the fact that Otis also argued in conventional fashion that the statute should be read narrowly to permit only the special search warrant known at common law. [41]

Although the fact that Otis and other colonial lawyers would alter Coke's emphasis is not surprising, the main thrust of his argument for common law and

reason to control statutes was a significant base upon which to construct a system of fundamental, or constitutional, law.

Lawyers the age of Jay and Livingston, followed closely by Gouverneur Morris, would absorb these general principles as they read *Coke on Littleton* (also known as the *First Institute*) with its maxims concerning statutory construction: ". . .the words of an Act of Parliament must bee taken in a lawful and rightful sense . . . ."[42]; "reason is the life of the Law, nay the common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of man's naturall reason. . . .No man (out of his owne private reason) ought to be wiser than the Law, which is the perfection of reason."[43], and "the surest construction of a Sta[tu]te is by the rule and reason of the common Law."[44] This exposure to Chief Justice Coke cannot fail to have had a significant impact on these apprentice lawyers. Implicit in Coke's apotheosis of the majesty of "artificiall reason" of the law are a number of concepts that have become basic to American constitutionalism. For example, the right to jury trial was considered essential to due process and as a basis upon which the rights of Englishmen depended.[45] Independence and security of tenure were also matters of considerable concern. Hamilton wrote a powerful objection to the 1774 Quebec Act, pointing out that judicial appointments and dismissals were discretionary with the governor and council.

> There must be an end of all liberty, where the Prince is possessed of such an exorbitant prerogative, as enables him, at pleasure, to establish the most iniquitous, cruel, and oppressive courts. . .and to appoint temporary judges and officers whom he can displace and change, as often as he pleases.[46]

Due process concerns and separation of powers issues were addressed in Hamilton's Phocion letters, published during the months he was litigating the landmark case *Rutgers* v. *Waddington* (1784). The litigation involved New York's Trespass Act, which permitted patriot landowners to collect rents and damages from loyalists who had occupied their lands and premises during British military control of New York City and its vicinity. While rights accrued under the 1783 Peace Treaty constituted the bulk of Hamilton's argument for the *Rutgers* defendants, in the Phocion letters, he also argued issues of due process, and limitation of legislative powers.[47] Since there were cases involving loyalists that did not fall within the protection of the treaty or of international law, Hamilton sought to arouse public opinion to the fact that excessive and punitive use of legislative power was detrimental to the state's tranquility and contrary to its constitutional principles. In Phocion II he asserted that once a constitution is established, the actions of government must conform to "the constitution and the fundamental laws; if legislators go beyond their authority to make law, and instead determine guilt for violating the law they "subvert the constitution and erect a tyranny."[48] Furthermore, the legislature could not diverge from the constitution on a presumption that the people sanctioned the departure.[49] Should a constitution be silent, those with governmental power must "pursue its spirit, and . . . conform to the dictates of reason and equity." Hamilton's catalog of "Phocion's Principles" is a classic statement of both procedural and substantive due process:

> First, That no man can forfeit or be justly deprived, without his consent, of any right to which as a member of the community he is entitled, but for some crime incurring the forfeiture.
> Secondly, that no man ought to be condemned unheard, or punished for supposed offenses, without having an opportunity of making his defence. [citing Jay's Address of Congress to the People of Great Britain, Sept. 5, 1774]

> Thirdly, That a crime is an *act* committed or omitted in violation of a public law, either forbidding or commanding it. [citing Blackstone, *Commentaries*, IV, 5]
>
> Fourthly, That a prosecution is in its most precise signification, an *inquiry* or *mode of ascertaining*, whether a Particular person has committed or omitted such *act*.
>
> Fifthly, That duties and rights as applied to subjects are reciprocal, in other words, that a man cannot be a *citizen* for purpose of punishment, and not a *citizen* for purpose of privilege.[50]

Despite Hamilton's efforts, both in and outside the courtroom, a spirit favoring retribution on loyalists continued. There was an unsuccessful attempt to have the judges, Mayor James Duane and Recorder Richard Varick, dismissed from office by the state's Council of Appointment, and the *Rutgers* decision was attacked in the public press with assertions that the Mayor's Court had subverted the "supreme Legislative power" of the New York Assembly, and that no government could be free where courts, finding a law to be unreasonable, could set it aside.[51]

To Hamilton also belongs the distinction of having written the judiciary essays in *The Federalist Papers*, prepared in conjunction with John Jay and James Madison, to secure New York's ratification of the Constitution of the United States. Given the historical prominence of this effort, a short summary should suffice to connect Hamilton's reasoning to Coke and the English Revolutionary background. In Federalist No. 78 and No. 79 Hamilton argued for good behavior tenure and certain salaries as a means of assuring the independence of judges from legislative or executive influence. This certainty of position and salary was necessary to recruit and retain judges well steeped in the common law—Coke's "artificial reason."[52] All of these considerations are critically important in a government of limited powers, since it is the judges who must pass

upon the conformity of legislative acts to the superior constitutional law. Equally important is the degree to which judicial independence assured that judges would protect both the constitution and the rights of individuals.[53]

A federal judiciary was also needed to minimize embarrassment in international relations and to decide disputes between the states of the Union. This included maritime and admiralty jurisdiction, as well as original Supreme Court jurisdiction in cases involving diplomats and foreign nations. In regard to disputes between the states, Hamilton paraphrased *Dr. Bonham's Case* that "no man ought to be a judge in his own cause . . . ."[54].

When New York anti-federalists objected to the Constitution's lack of civil jury trial provisions, they raised specters of *Forsey* v.*Cunningham,*[55] but Hamilton vehemently denied any intention to make common law jury verdicts subject to reexamination on the facts.[56] In Federalist No. 83, civil jury trials are discussed at length. Admitting that a civil jury trial guarantee might be helpful, he insisted that criminal trial juries were an essential means to protect liberty and constitutional rights. However, the varying practices of the individual states made the statement of a uniform rule for civil juries difficult and perhaps inexpedient.[57] Submission of fine points of the law of nations, or prize issues, to a jury, would be an unwise procedure given the inevitable involvement of public policy considerations.[58] This particular attention to the question of civil jury trials, along with the Bill of Rights (Amendment VII of the U.S. Constitution) provision for civil jury trial in federal courts, suggests the importance which New York citizens attached to jury trial and the relationship between liberty and the structure and procedures of the courts. While colonial experience doubtless enhanced this concern for jury trial, it also was true that eighteenth century Americans were well aware of the abuse of the jury system in seventeenth and eighteenth century England.[59]

Military-Civilian Relationships and Respect for the Opinions of Mankind

While enhancement of judicial independence, coupled with concern for jury trial and due process, characterized American revolutionaries, another part of their English heritage was concern about the exercise of military power. Supplementing their readings in the classics about the demise of the Roman republic, they doubtless were familiar with David Hume's 1754–57 publication of his *History of England*, which dealt with the republican failure of the English commonwealth and protectorate.[60] They shared an already well-established English suspicion of military authority, and a strong antipathy to a standing army. Yet rebellions are not won with words, and harsh means are frequently demanded to secure noble ends. Their correspondence reveals some interesting views and concerns about the use and abuse of military power; it also gives some new insight into military-civilian dynamics in the formative era. It also reminds us that they, and many others were aware that their words were heard and their actions were observed, by a deeply interested and highly critical world. For this reason they had, to paraphrase the Declaration of Independence, "a decent respect . . . [for] the opinions of mankind."

Professor Lois Schwoerer has given us a vivid picture of anti-military ideology's origins in seventeenth century England.[61] Tracing the origins of opposition to standing armies back to medieval time, she shows convincingly that the English Civil War and Interregnum was the focal point for the evolution of anti-military sentiment. England's experience with the rule of Cromwell's major-generals instilled a "rooted aversion to standing armies and an abiding dread of military rule."[62] She notes that while modern scholars have found Cromwell's major generals to have ruled efficiently rather than tyrannically, it is clear that contemporaries in England thought otherwise.[63] So did historian David Hume, no enthusiast for the Lord Protector, who suggests that Cromwell

> . . . being sensible of the danger and uncertainty of all military government, . . .endeavoured to intermix some appearance, and but an appearance, of civil administration, and to balance the army by a seeming consent of the people.[64]

Alas, Cromwell called a new Parliament only to have it challenge his right to be protector. His establishment of twelve military districts in England, subject to rule by major generals, did not bode well for Cromwell's popularity, either with his people or with Hume and his readers. The historian commented:

> Not only the supreme magistrate owed his authority to illegal force and usurpation. He had parceled out the people into so many subdivisions of slavery, and had delegated to his inferior ministers the same unlimited authority, which he himself had so violently amassed. [65]

However, Hume admitted that the Lord Protector did appoint fair and capable judges, and "displayed as great regard to both justice and clemency, as his usurped authority, . . .founded only on the sword, could possibly permit." [66] The fate of the Protectorate was sealed by a series of rebellions or attempted uprisings, by royalists and disgruntled factions in the army; fear of assassination added to Cromwell's discomfort and declining health until his death. Shortly into the term of his son, Richard, Parliament and army delivered the nation into the care of the Stuart dynasty. "A republic, if you can keep it!"

It is not surprising that our Founding Fathers rarely mentioned the Civil War and Interregnum periods in their political tracts. To that extent they learned some important negative lessons from England's attempt at forming a republic.

Each of our Columbia grads were prominently involved in the work of New York's Council of Safety, which conducted governmental affairs in the state between the drafting of the constitution in April until the new government took office in the fall of 1777. Although the principal concern was governing and providing for the civilian population, the Council members also were engaged in communication with the Continental Army commanders. Gouverneur Morris was in contact with Generals Schuyler and Gates during the British Army's advance down the Lake Champlain–Lake George corridor, providing advice and perhaps sharing strategic planning suggestions.[67] Jay was a member of the New York Provincial Congress and the Continental Congress, was active in military affairs, and with his assumption of the presidency of Continental Congress in 1778, he became a critical link in the chain of command between Congress and the military.[68] Livingston was a member of the Provincial and Continental Congresses, and served with Jay and Morris on the Council of Safety.[69] Hamilton was in military service and had brief combat commands; for the most part his service was as a staff officer assigned as aide-de-camp to General George Washington.[70] When Hamilton left service and was elected as New York delegate to the Confederation Congress he was known as a loyal supporter of the army's need for adequate supply and back pay. [71]

Gouverneur Morris provided extremely useful service in connection with British General Burgoyne's invasion of New York by the Lake Champlain–Lake George Corridor. Sent north by the Provincial Congress to inquire why Fort Ticonderoga had been surrendered, he soon discovered the size of the invasion force, and the probable strategy of the enemy's campaign. Originally the Americans believed Burgoyne's march was intended to relieve British forces in New York City from patriot attack. Consequently, few reenforcements were sent up river. After consulting with General Philip Schuyler, Morris quickly grasped the rationale for the Fabian-like strategic retreat. This would stretch the British supply lines, making their force vulnerable to attack by New York units from the

south and New England troops from the east. Yet there was a need to reenforce the outnumbered American units facing Burgoyne, and in August 1777 Morris and John Jay traveled to Philadelphia to plead with Congress for additional troops.[72]

Subsequently Morris would serve on a Congressional committee visiting the harsh winter encampment at Valley Forge (1777–78). He was instrumental in blocking an ill-conceived plan to invade Canada the following spring. Morris and Francis Dana later chaired a Congressional committee that met at Valley Forge to consider Washington's draft for reorganization of the army. Thereafter Morris became Washington's ally and floor manager in Congress.[73] What is interesting in a constitutional sense is the manner in which civilian legislators cooperated with military generals throughout the war, gaining familiarity with operational and logistical problems and helping with solutions. That continuing oversight of military operations was to continue and to persist in John Jay's 1778–79 career as President of Continental Congress.

Despite the pressing needs of the war, American leaders were acutely aware of the need to maintain good public relations and to restrain the behavior of parties foraging for supplies. The problem was one that would recur throughout the duration of the war in New York. In December 1777, while on Washington's staff, Hamilton complained to New York Governor George Clinton that troops had seized cattle without compensating the owner, and had sold them at auction under the orders of a general officer. "Such enormities, if real, are evidently of the most mischievous tendency; a timely stop ought by all means be put to them, and the perpetrators brought to an exemplary punishment."[74] Clinton apparently agreed with him, investigated the matter and six days later wrote a reply. Confirming the sale and the likelihood of a general being involved, he pointed out that the animals had been taken to Connecticut to be auctioned. Clinton concluded,

> [T]he Soldiery claim as lawful Prize, every Thing they take within the Enemy's lines tho the Property of our best friends, . . . Perhaps . . . it is this Trade that makes People so very fond of little Expeditions.[75]

By the spring of 1778 the situation in New York had grown so demoralizing that John Jay in *A Hint to the Legislature of New York State* suggested that a procedure be instituted for the military impressment of horses, wagons, carriages, and other property.

> It would equally be an insult to our Government, which ought to be a Government of Laws, as well as a violation of the Rights of its Subjects, for the wisest and most discreet Man in the World, with a Party of armed Men at his Heels, without any Law, but that of *necessity of the Case*, which cloaks as many Sins in Politics, as Charity is said to do in Religion, arbitrarily and by Force, to take the Property of a free Inhabitant, for the Use of the Army.[76]

While the concerns of Jay, Hamilton, and Clinton probably had a minimal impact upon army behavior, their emphasis upon property rights, due process of law, and the need for legal restraints on military "mid-night requisitions" is notable. Doubtless their traditional English discomfort with standing armies was sharply reenforced by the actual experience of New York as a place of perennial skirmishes between opposing armies and militia units.

The unique border warfare in Revolutionary New York led to bitterness that would spill over into the persecution of former loyalists after the end of the war, as we have seen above. But it also resulted in sequestration of loyalist lands during the course of the war, and these confiscations were not invalidated by the 1783 Peace Treaty. However, concerns of due process and the impairment of

vested property rights were voiced strongly by John Jay in 1780. Writing to George Clinton, Jay noted reports in English newspapers exposing seizures of British and loyalist property by the state. Situated as Jay was, in Spain as the American minister to the Spanish court, his denunciation was terse and powerful, "If truly printed, New York is disgraced by injustice too impalpable to admit even of palliation, I feel for the honor of my country."[77]

In 1780 Hamilton wrote to James Duane that Congress' neglect of the army was leading to its dissolution. Furthermore, civil-military relationships were strained because the states refused to pay requisitions needed to supply the army. "We begin to hate the country for its neglect of us; the country begins to hate us for our oppressions of them." [78] This concern would continue and become more critical as active combat ground to a halt and the troops were idle but remained unclothed and hungry. In this difficult situation–between active war and final peace—Congress was unable to obtain any financial assistance from lethargic and complaisant state governments.

In 1783 the military situation reached a new low with a growing dispute between the army at Newburgh, New York, and Congress. This involved back pay due the army, and proposals to fund it through a system of half-pay certificates redeemable in the future. Correspondence between Alexander Hamilton, a New York member of the Confederation Congress, and General George Washington, documents the rising tension after February 1783. Hamilton reported to Washington that the attitude within the army was that "the disposition to recompense their services will cease with the necessity for them. . . ."[79] At the same time, the army felt that once it laid down its arms it would lose the opportunity to obtain justice. The tension was increased when a Colonel Walter Stewart arrived at camp, asserting that Congress intended to disband the army and avoid the payment of back pay. To a degree this was instigated by the attempt of Robert Morris the Fianancier, and Gouverneur Morris, his assistant, to unite

the creditors of the United States with the army, and thereby force Congress or the states to act responsibly. Hamilton was horrified, both at the army's plight and at the manipulation of the soldiers' just claims to put pressure on the civil authorities.

> Republican jealousy had in it a principle of hostility to an army, whatever their merits, whatever be their claims to the gratitude of the community. It acknowledges their services with unwillingness and rewards them with reluctance. . . . But supposing the Country ungrateful what can an army do? It must submit to its hard fate. To seek redress by is arms would end in its ruin. The army would moulder by its own weight and for want of the means of keeping together.[80]

The General shared Hamilton's views, and suspecting manipulation of army opinion observed that "the Army was a dangerous Engine to work with, as it might be made to cut both ways . . . ."[81] A week after this letter the General urged that a Congressional committee be sent to the army's camp to negotiate arrangements for the half-pay issue. At the same time Washington pointed out that Congress had to consider what to do with the British request that prisoners from Saratoga and Yorktown be released. Although technically the preliminary peace treaty had ended the war, the release of prisoners would increase British forces by five to six thousand men. Disbanding the Continental Army, or antagonizing it to desert, might well place the United State within the power of the British Army![82]

In his authorship of *The Federalist* essays dealing with the Constitution's provisions for a military establishment, Hamilton specifically referred to the English Bill of Rights provision requiring that the Crown's military establishment be subject to the consent of Parliament.[83] Answering anti-federalist complaints that the Constitution draft contained no prohibition of standing armies, he pointed out that no military appropriation might be for longer than two years,

and that this would maintain both Congressional and public awareness of any executive attempts to raise the army to a size that constituted a threat to liberty.[84] Furthermore, any outright prohibition of a standing army in time of peace would disable the United States from establishing an army until it was already in war.[85] The existence of British and Spanish territory surrounding the United States, coupled with threats from Indian tribes, necessitated the maintenance of a national standing army.[86] Because this was a national need, its responsibilities could not be left with individual border states to fund and equip the necessary defensive forces.[87] Turning to objections to the militia provisions, Hamilton demonstrated that uniformity of training was essential if national defense needs were to be met.[88] He dismissed as unreasonable the anti-federalist argument that militia from New Hampshire might be federalized to suppress an uprising in Georgia.

The care taken by Publius to dispel standing army objections would indicate that traditional English suspicion of peacetime military establishments was a very powerful influence in Revolutionary America. The seventeenth-century English, experience coupled with war-time excesses by American troops, fanned those fears and were a substantial part of anti-federalist criticism of the newly proposed frame of government. At the same time, the English solution—putting military appropriations and some control within the authority of the legislature—was for leaders of the new nation, an appropriate precedent for their proposed national army.

Tentative Conclusions

While much more work must be done even on the narrow coverage of this paper, it would appear that seventeenth-century English legal precedent and governmental traditions had substantial impact on American political thought in the Revolutionary and early national periods. Much of the political debates of the

era looked to English experience, even thought the programs and the failure of the Commonwealth and Protectorate were rarely mentioned. Americans held fast to the English view that governmental processes were to be controlled by fixed principles, and that legal (and one might add, constitutional) methods held the promise of solving a substantial number of a nation's difficulties, as well as providing for its physical and economic needs.

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1. Jay to John Vardill, Sept. 24, 1774, in *John Jay: The Making of a Revolutionary: Unpublished Papers, 1745–1780,* ed. Richard M. Morris (New York: Harper and Row, 1975), 130; Hamilton, "A Full Vindication of the Measures of Congress," in *The Papers of Alexander Hamilton,* ed. Harold C. Syrett, 27 vols. (New York: Columbia University Press, 1961–1987), 1:47, 48; Jay, "Proofs that the Colonies Do Not Aim at Independence," ca. Dec 1775, in Morris, *John Jay*, 198–200; Jay, Charge to the Grand Jury, Sept. 9, 1777, in *The Life of John Jay, with Selections from his Correspondence*, ed. William Jay, 2 vols. (New York: J. & J. Harper, 1833; reprint, Freeport, N.Y.: Books for Libraries Press, 1972), 1:79; see also Hamilton's controversial speech to the Philadelphia Constitutional Convention, June 1787, in *Papers of Hamilton*, 4:191; John V. Orth, *Due Process of Law: A Brief History* (Lawrence: University Press of Kansas, 2003), 6; Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), 2, 9.

2. Sir William Blackstone, *Commentaries on the Laws of England,* ed. Stanley N. Katz, et al., 4 vols. (Chicago: University of Chicago Press, 2002), 1:155–57. It is interesting that James Lord Bryce, writing in 1893, pointed out that Americans were well aware of English constitutional history, but that the theory of Parliamentary supremacy enunciated by Blackstone was enunciated well after the practice had begun; on the other hand, the full development of the principle was not established before the time the Philadelphia Convention met in 1787. James Bryce, *The American Commonwealth*, 3rd ed., 3 vols. (New York: Macmillan, 1903), 3:9–31. Legal historians take varying views concerning the significance of Blackstone in pre-Revolutionary America. Professor John Orth would suggest that 1760 marks the dividing point between Coke's emphasis on fundamental law and Blackstone's subsequently announced theory of Parliamentary supremacy, Orth, *Due Process*, 28, 30. On the other hand, Julius Goebel asserted that "The almost instant prestige [i.e. 1765 and after] that attached to the *Commentaries* led to the abandonment of *Dr. Bonham's Case* in the war of pamphlets, speeches, and resolves during the last stages of . . .[the pre-Revolutionary] debates." Yet he admits that there was "a strong indeed almost emotional attachment to the common law as the safeguard of constitutional rights." *The Law Practice of Alexander Hamilton: Documents and Commentary,* ed. Julius Goebel, Jr. (New York: Columbia University Press, 1964), 1:284–85. Given James Otis's 1764 reference to *Dr. Bonham's Case*, in arguing against writs of assistance in Massachusetts, and the 1770 publication date for the Philadelphia edition of Blackstone,

we may opine that the prestige was not quite as "instant" as Goebel suggests.

3. John Bartlett, *Familiar Quotations*, ed. Emily Morison Beck, 15th ed. (Boston: Little, Brown, 1980), 348. Franklin's apprehensions were widely echoed. South Carolinian Edward Rutledge wrote to Jay, Dec. 25, 1778, that "[A]n abundance of snakes are concealed in the grass. [If they are permitted to continue to bask in the sunshine] . . . an extended field will be immediately occupied by the factious and ambitious. The fate of America will then be like the fate of most of the republics of antiquity, where the designing have supplanted the virtuous, and the worthy have been sacrificed to the views of the wicked." George Washington affirmed these views in a letter to Jay, Apr. 21, 1779, citing the dangers of men of ambition "rendered giddy by elevation" to enact unwise and popular measures. "To me there appears reason to expect a long storm and difficult navigation," but at the end he felt that "things will come right." Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay, 1763–1826*, 4 vols. (New York: Putnam, 1890–93; reprinted, 4 vols. in 1, New York: DaCapo, 1971), I:205, 206 Jay wrote to Elbridge Gerry of Massachusetts, on Jan. 9, 1782, as the New York–Massachusetts boundary dispute was being discussed, that, in 1782, the union was guaranteed by the continuance of formal hostilities, but the coming of peace would give leisure to engage in "improper occasion[s] for employment." Ibid., 2:168.

4. Jay's career is covered in a rather dated and adulatory biography: Frank Monaghan, *John Jay: Defender of Liberty* (Indianapolis: Bobbs-Merrill, 1935); Robert R. Livingston, Jr., is the subject of a careful biography by George Dangerfield, *Chancellor Robert R. Livingston, of New York, 1746–1813* (New York: Harcourt, Brace, 1960), but unfortunately his papers have not been printed; Gouverneur Morris's colorful career has been narrated in William H. Adams, *Gouverneur Morris, An Independent Life* (New Haven: Yale University Press, 2003); Richard Brookhiser, *Gentleman Revolutionary: Gouverneur Morris, the Rake Who Wrote the Constitution* (New York: Free Press, 2003); Mary-Jo Kline, *Gouverneur Morris and the New Nation, 1775–1788* (New York: Anno Press, 1978); Max Mintz, *Gouverneur Morris and the American Revolution* (Norman: University of Oklahoma Press, 1970); and Howard Swagger, *The Extraordinary Mr. Morris* (Garden City: Doubleday, 1952); and some original sources were published in *The Life of Gouverneur Morris, with Selections from his Correspondence*, ed. Jared Sparks, 3 vols. (Boston: Gray and Bowen, 1832). Alexander Hamilton has fared the best in terms of scholarly coverage. Recent biographical studies include Ron Chernow, *Alexander Hamilton* (New York: Penguin, 2004); William S. Randall, *Alexander Hamilton: A Life* (New York: Harper Collins, 2003); Robert E. Wright, *Hamilton Unbound: Finance and the Creation of the American Republic* (Westport, Conn.: Greenwood Press, 2002).

5. Jay and Livingston were admitted to practice by the Supreme Court of Judicature in 1768; Gouverneur Morris was admitted by the same royal court in 1771; Alexander Hamilton was admitted to practice by the New York Supreme Court, as an attorney in 1782, and as a counselor the following year.

6. The importance of this removal to the Morris family is discussed in Stanley N. Katz, *Newcastle's New York: Anglo-American Politics, 1723–1753* (Cambridge, Mass.: Harvard University Press, 1968), 70–74; see also *A Brief Narrative of the Case and Tryal of John Peter Zegner, Printer of the New York Weekly Journal*, ed. Paul Finkelman (St. James, N.Y.: Brandywine Press, 1997) 40–41.

7. The technicalities of extension are set forth in Joseph H. Smith, *Cases and Materials on the Development of Legal Institutions* (St. Paul, Minn.: West Publishing, 1965), 415–48. A detailed discussion of New York is in Herbert A. Johnson, "English Statutes in Colonial New York," in *New York History* 58 (1977), 277–96. The factors influencing the development of colonial law, including the resulting variety in colonial law, are set forth in Herbert A. Johnson, "Sanctions in Colonial North America," in *Transactions of the Jean Bodin Society for Comparative Institutional History* (Brussels: De Broek Université, 1991), 109–16.

8. Paul M. Hamlin and Charles E. Baker, eds., *Supreme Court of Judicature of the Province of New York, 1691–1704*, 3 vols. (New York: New-York Historical Society, 1959), 1:378–80. I have suggested that the confluence of New England Bible codes, Dutch civil law, and English common law, created such a confusion of laws and practice, that 1691 was adopted as the best compromise date for extension to take place. "The Advent of Common Law in Colonial New York," in Herbert A. Johnson, *Essays on New York Colonial Legal History* (Westport, Conn.: Greenwood Press, 1981), 48–50; Martin L. Budd, "The Legal System of 1961," in *Courts and Law in Early New York*, ed. Leo Hershkowitz and Milton M. Klein (Port Washington, N.Y.: Kennikat Press, 1979), 7–18, 121–24.

9. *Campbell* v. *Hall*, 1 Cowper 204, 98 English Reports 1045 (K.B., 1774), as printed in Smith, *Development of Legal Institutions*, 420–26.

10. Mark DeWolfe Howe, "The Sources and Nature of Law in Colonial Massachusetts," in *Law*
and Authority in Colonial America, ed. George A. Billias (Barre, Mass.: Barre Publishers, 1965), 10–11.

11. Ibid., 15.

12. Hamilton argued eloquently that the right to legislate was an inherent right, without which freedom could not exist, and that the authority of Parliament to legislate was limited to Great Britain. "The Farmer Refuted," Feb. 25, 1775, in *Papers of Hamilton*, 1:96, 105. Jay asserted that the intervention of the ocean could not cause disparity between the rights of Englishmen in Britain and the rights of Englishmen in the North American colonies. Address to the People of England, Sept. 5, 1774, Johnston, *Correspondence and Public Papers*, 1:17, 19–20, 26. See also Kruman, *Between*

Authority, 9.

13. David Ogg, *England in the Reign of Charles II*, 2 vols. (Oxford: Clarendon Press, 1934), 1:153–55.

14. Blackstone, *Commentaries,* 1:ix–x.

15. On the English persecution of Puritan practices see Godfrey Davies, *The Early Stuarts, 1603–1660* 2nd ed. (Oxford: Clarendon Press, 1959), 72–79; Charles M. Andrews notes Archbishop Laud's efforts in the Privy Council to halt the emigration of persecuted Puritans to Massachusetts Bay, in *The Colonial Period of American History* (New Haven: Yale University Press, 1934), 1:410–12.

16. Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System before 1783* (New Haven: Yale University Press, 1930; reprint, New York: Frederick Ungar, 1958), 443–44.

17. Hamlin and Baker*, Supreme Court of Judicature*, 1:396–404; see also Johnson, "English Statutes."

18. Hamlin and Baker*, Supreme Court of Judicature,* 1:405–6. Unfortunately the jury returned a general "not guilty" verdict for the Presbyterian pastors, so the law was not clearly established.

19. Smith, *Development of Legal Institutions*, 441.

20. The reference may be in part to *Jentleman's Case,* 6 Coke Reports 11a–12b (K.B., 1583; reprinted in Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke*, 3 vols. (Indianapolis: Liberty Fund, 2003), 1:157–60, which, while acknowledging the King's authority to create new common law courts, denied that a plea commenced in an existing court might be removed to a newly created court. A second statement by Coke appears in his commentary on Magna Carta, chap. 24, in his *Second Institute*, where Coke points out that a writ of praecipe cannot, under Magna Carta, issue to remove a case from Common Pleas, where his case to obtain or defend a freehold is pending. Sheppard, *Writings of Sir Edward Coke,* 2:834–35.

21. *Martin* v. *Marshall and Key,* Hobart Reports 63, 80 English Reports 211 (County Court of Chancery, 1614), at 214.

22. Ibid., 442. The quoted material is from the ninth, rather than the eighth clause of the impeachment, *Crown and Parliament in Tudor-Stuart England: A Documentary Constitutional History, 1485–1714*, ed. Paul L. Hughes and Robert F. Fries (New York: Putnam, 1959), 270; and Andrew Browning*,* ed., *English Historical Documents, 1660–1714 ,* vol. 8 of *English Historical Documents*, ed. David C. Douglas (London: Eyre and Spottiswoode, 1953), 193–97, at 193.

23. Ibid.

24. Smith, *Development of Legal Institutions*, 443. Kruman suggests that two terms dominated the American colonial debate over constitutionalism: (1) the authority of Parliament to legislate for the colonies and (2) the nature of the charters granted by the Crown. "Was there a fundamental law . . . apart from acts of Parliament that restricted parliamentary power?" *Between Authority*, 7–8.

25. 12 and 13 William III, c.2 (1701), *Crown and Parliament,* 325–27, at 327.

26. Milton M. Klein, "Prelude to Revolution in New York: Jury Trials and Judicial Tenure," *William and Mary Quarterly*, 3rd Series, 17 (1960), 439–62. Chambers's resignation is mentioned at p. 453.

27. The case is discussed in Klein, "Prelude," 453–61; Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950, reprinted New York: Octagon Books, Inc., 1965), 390–412; and Herbert A. Johnson, "George Harison's Protest: New Light on *Forsey versus Cunningham*," in *Essays in New York Colonial Legal History* (Westport, Conn.: Greenwood Press, 1981), 171–92.

28. Klein, "Prelude," 457–60.

29. Presumably a ruler which contains a standard for measuring the metes and bounds of a piece of land.

30. The report of the audience, not published until 1655, is in 12 Coke's Reports 63–65 (1607); an edited version is in Sheppard*, Selected Writings of Sir Edward Coke*, 478–81.

31. Sir John Baker, "The Common Lawyers and the Chancery: 1616," in *Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke*, ed. Allen D. Boyer, (Indianapolis: Liberty Fund, 2004), 254–81; quotation at 275.

32. The official report is at 8 Coke's Reports 114a–121 b (C.B., 1610). For those who do not, or will not, read Latin, an edited version is at Boyer, *Law, Liberty, and Parliament*, 264–86. The secondary materials are interminable.

33. Boyer, *Law, Liberty, and Parliament*, 275; 8 Coke Reports 114a, at 118a.

34. The academic lineup is extensive, and the views advocated are not necessarily dictated by the writer's nationality. For a sampling of the most influential writings see Samuel E. Thorne, "The Constitution and the Courts: A Re-examination of the Famous Case of Dr. Bonham," in *The Constitution Reconsidered*, rev. ed., ed. Conyers B. Read (New York: Harper & Row, 1968), 15–24; Thomas F. T. Plucknett, "Bonham's Case and Judicial Review," *Harvard Law Review* 40 (1926), 30–70; Louis D. Boudin, "Lord Coke

and the American Doctrine of Judicial Review," *New York University Law Review* 6 (1929), 223, at 236–46; and Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," *Stanford Law Review* 30 (1978), 843, at 854–56, 865–69.

35. Among those cited in nt. 34, above, only Plucknett is British; Thorne adopts the British position despite American nationality.

36. J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, UK: Clarendon Press, 1955; reprinted, Littleton, Colo.: Rothman, 1965), 40–41.

37. J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, reissued ed. (Cambridge: Cambridge University Press, 1987), 338–39.

38. The profound influence of Bonham's case and Otis's use of the precedent in the Writs of Assistance case, is stressed in Peter Shaw, *The Character of John Adams* (Chapel Hill: University of North Carolina Press, 1976), 43, 60–61, and 77–78.

39. "The Petition of Lechmere," in *Legal Papers of John Adams*, ed. L. Kinvin Wroth and Hiller B. Zobel, 3 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1865), 2:110–15.

40. Ibid., 127-28; Otis did not cite Coke by name, but the citation to Bonham's Case in Coke's 8th Report appears in the notes at the appropriate place.

41. Ibid., 119

42. Sheppard, *Writings of Sir Edward Coke*, 2:741.

43. Ibid., 701.

44. Ibid., 736. It should be recalled that Jay and Livingston studied law between 1764 and 1768; Morris between 1771 and 1773. Their principal sources for law study would have been Coke's *Institutes.*

45. The 1777 New York constitution, to which all of our Columbia grads contributed, granted the right to assistance of counsel in felony cases, and abolished peine forte et dure as well as the dismemberment punishment extended to New York from the Tudor treason statute. *Law Practice of Hamilton,* 1:687; Alexander Hamilton's "A Full Vindication," Dec. 15, 1774, in *Papers of Hamilton,* 1:76; Jay, "Congress to Friends and Fellow Subjects", Sept. 5, 1774, in Johnston, *Correspondence and Public Papers*, 1:22–23; Adams, *Gouverneur Morris*, 81 (commenting on New York constitution). Pre-revolutionary resentments against non-jury trials in vice-admiralty courts, caused American statesmen to establish state admiralty courts which used juries to determine

issues of fact. Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill: University of North Carolina Press, 1960), 195–99.

46. "The Quebec Bill," June 15, 1775, *Papers of Hamilton,* 1:167

47. The Rutgers case is exhaustively covered in *Law Practice of Hamilton,* 1:282–543.

48. Both quotations from Phocion II, April 1784, *Papers of Hamilton*, 3:548. Hamilton proceeded to buttress his argument by pointing out that the constitution was a social compact, which society might not breach by denying rights to any individual without doing injustice. Ibid., 1:550.

49. Ibid.

50. Ibid., 3:532–33.

51. For quotations and further details, see *Law Practice of Hamilton*, 1:310–13, 314. The more things change the more they stay the same!

52. Jacob E. Cooke, ed., *The Federalist*. (Middletown, Conn.: Wesleyan University Press, 1961), 522–23, 531–33. The English Act of Settlement, 12 and 13 Wm III c.2 (1701) conferred good behavior tenure on all English judges; English judges were also assured of a fixed salary. In Federalist No. 81, referring to the inapplicability of jury trial in complicated cases of equity and admiralty, Hamilton again refers to the long and laborious study of the law required of trained judges. Ibid., 544.

53. Ibid., 524–27.

54. Ibid., 535–39.

55. See discussion at nt. 28 above.

56. The discussion begins in Federalist No. 81, ibid., 549–51.

57. Ibid., 563–70.

58. Ibid., 568.

59. See Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs-Merrill, 1965), 47, 83, 88, 107; see also Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999), 55–105. Criminal trial juries had been imprisoned by Star Chamber for not returning guilty verdicts, but this practice ended in 1670 with Bushell's Case. Mark A. Thomson, *A Constitutional History of England, 1642–1801* (London: Methuen, 1938), 142–45.

60. Hume, like the author of this paper, wrote his *History* backwards. Thus the first two of his published volumes were actually accounts of the reign of Charles I through the Interregnum and the Glorious Revolution. William B. Todd, "Foreword," David Hume, *The History of England from the Invasion of Julius Caesar to The Revolution of 1688*, 6 vols. (Indianapolis: Liberty Classics, 1983), i, xii.

61. Lois G. Schwoerer, *"No Standing Armies": The Anti-military Ideology in Seventeenth-Century England* (Baltimore: Johns Hopkins University Press, 1974).

62. Ibid., 51.

63. Ibid., 63. One is reminded that one of the remarkable accomplishments of Fascism is that it resulted in the Italian railroads running on time.

64. Hume, *History*, 6:70.

65. Ibid., 6:73.

66. Ibid., 6:85.

67. Sparks, *Life of Gouverneur Morris*, 1:128, 135, 150–51.

68. Monaghan, *John Jay*, 57–85, 87–88, 98–101, 114–21.

69. George Dangerfield, *Chancellor Robert R. Livingston of New York, 1746–1813* (New York: Harcourt, Brace, 1960), 55, 58–60, 75–84.

70. Broadus Mitchell, *Alexander Hamilton: The Revolutionary Years* (New York: Thomas Y. Crowell, 1970), passim; Nathan Schachner, *Alexander Hamilton,* Perpetua ed. (New York: Barnes, 1961), 45–101.

71. Adams, Gouverneur Morris, 88–90.

72. Ibid., 97–102.

73. Hamilton to Clinton, Dec. 22, 1777, in *Papers of Hamilton,* 1:368–69.

74. Clinton to Hamilton, Dec. 26, 1777, in *Papers of Hamilton,* 1:371–72.

75. Morris, *John Jay,* 462. Given the guerilla-like warfare between American and British lines, it is doubtful that any legislative action could stop the depredations. Military officers were also concerned that compensation be made, not only for actual property seizures, but also for incidental damages caused by military action. General Nathanael Greene, the Quartermaster General, suggested to President John Jay that a commission of claims should be established to deal with these matters. Greene to Jay, Feb 1, 1779, Morris, *John Jay*, 542–43.

76. Jay to Clinton, May 6, 1780, Johnston, in *Correspondence and Public Papers*, 1:315.

77. Hamilton to Duane, Sept. 3, 1780, in *Papers of Hamilton,* 2:406.

78. Hamilton to Washington, Feb. 13, 1783, ibid., 3:253, 254.

79. Hamilton to Washington, Mar. 25, 1783, ibid., 3:306.

80. Washington to Hamilton, Apr., 16, 1783, ibid., 3:330.

81. General Washington's awareness of this vulnerability is shown by his insistence that Sir Guy Carleton's troops be out of the city of New York before he would relinquish command of the Continental Army. See Douglas Southall Freeman, *Washington,* abridged by Richard Harwell (New York: Macmillan Company, 1968; orig. pub. in 7 vols., New York: Charles Scribner's Sons, 1948-57), 504–506.

82. Federalist No. 26, Cooke, *Federalist*, 165–66.

83. Ibid., 160–70.

84. Federalist No. 25, ibid., 161.

85. Federalist No. 25, ibid., 158–59.

86. Federalist 25, ibid., 158.

87. Federalist No. 29, ibid., 181.

88. Federalist No. 28, ibid., 176–77; Federalist No. 29, ibid., 187.