Alexander Hamilton and the Development of American Law

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This dissertation is dedicated to the memory of Matthew and Theresa Mytnik, my Rana and Boppa.

ABSTRACT

"Alexander Hamilton and the Development of American Law," is the first comprehensive, scholarly analysis of Alexander Hamilton's influence on American jurisprudence, and it provides a new approach to our understanding of the growth of federal judicial and executive power in the new republic. By exploring Hamilton's policy objectives through the lens of the law, my dissertation argues that Hamilton should be understood and evaluated as a foundational lawmaker in the early republic. He used his preferred legal toolbox, the corpus of the English common law, to make lasting legal arguments about the nature of judicial and executive power in republican governments, the boundaries of national versus state power, and the durability of individual rights. Not only did Hamilton combine American and inherited English principles to accomplish and legitimate his statecraft, but, in doing so, Hamilton had a profound influence on the substance of American law, the contours of federalism, and the expansion of federal judicial and executive power in the early national period.

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INTRODUCTION

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ALEXANDER HAMILTON, LAWYER AND LAWMAKER

A glaring omission exists in the vast body of scholarship written about Alexander Hamilton. Hamilton, as we know from his scores of biographers, was a prodigious lawyer throughout his postwar, professional career. After leaving the Continental Army in 1781, Hamilton could practice before New York's Supreme Court bar by July 1782. An astonishingly quick study, the state admitted him as common-law counsel in October 1782, and he qualified as both a solicitor and counsel in Chancery in 1783.[1] Hamilton practiced law in New York state until he became the young republic's first Secretary of the Treasury in September 1789; he then quickly resumed his private caseload after resigning his cabinet post in January 1795. Ever the industrious attorney, Hamilton had pressing business awaiting him in the New York courts up until his untimely death at the hands of Aaron Burr, a fellow member of the New York bar, on July 12, 1804.

Alexander Hamilton's post-Revolutionary career was one that constantly engaged with law. Like many other members of America's founding generation, Hamilton trained and practiced in the tradition of the common law, a centuries-old amalgamation of homegrown English, and later, American colonial law, that also incorporated elements borrowed from the civil, cannon, and natural law traditions. At the same time that Hamilton participated in America's nation-building experiment, he was steeped in English legal traditions. When writing his authoritative commentary on the nature of federal constitutional power in *The Federalist*, he juxtaposed the British constitution with the new American one he helped to create; when

[1] Julius Goebel Jr. and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964-81), 1: 47 [hereafter, *LPAH*].

proposing commercial, monetary, banking, administrative, or foreign policy in President George Washington's cabinet, he used legal arguments to justify his desired course of action. In short, lawyering and common law permeated Alexander Hamilton's professional career; why, then, have scholars and biographers routinely ignored his influence on the development of American law?

Nineteenth-century festschrift contributor Daniel W. E. Burke reflected on, and presciently anticipated, a formidable problem facing historians: though Hamilton was "retained in every important case and recognized as the ablest advocate in New York...so chaotic was the system of reporting in those early days, that few of his great cases have come down to us in the books."[2] To be sure, scholars have caught glimpses of Hamilton's seminal influence on American law through a particular set of famous, well documented cases—including *Rutgers v. Waddington*, *Hylton v. U.S.* , and *People v. Croswell*—but largely gave up on piecing together the larger scope and importance of Hamilton's legal career.[3] (Julius Goebel, Jr. and Joseph H. Smith, the editors of Hamilton's law papers, are the two noteworthy exceptions).

During the course of his fifteen-year practice, Hamilton argued hundreds of cases and advised an even greater number of clients. And while case-reporting was haphazard in the early republic, Hamilton's reputation as a superb lawyer still managed to persist despite an incomplete historical record. Chancellor James Kent celebrated Hamilton's achievements in the New York courts, and described his posthumous reputation among jurists: "But among all his brethren

[2] Daniel W. E. Burke, "Alexander Hamilton as a Lawyer," in Melvin Gilbert Dodge, ed., *Alexander Hamilton: Thirty-one orations delivered at Hamilton College from 1864 to 1895 upon the prize foundation established by Franklin Harvey Head, A.M.* (New York: G.P. Putnam's Sons, 1896), 181. Burke, a graduate of Hamilton College's Class of 1893, identified three cases which "present Alexander Hamilton, the lawyer, as the defender of truth, the champion of justice, and the expositor of liberty," and include *People v. Levi Weeks* (Court of Oyer and Terminer and General Gaol Delivery for the City and County of New York, 1800), the extended litigation involving merchant Louis Le Guen, and *People v. Harry Croswell* (3 Johns. Cas. 337 (N.Y., 1804)).

[3] See Elizabeth Rutgers v. Joshua Waddington (NY Mayors Ct., 1784); Hylton v. U.S., 3 U.S. (3 Dall.) 171 (1796); and People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct., 1804).

Colonel Hamilton was indisputably pre-eminent. This was universally conceded." A century and a half later, historian Forrest McDonald described Hamilton's particular legal expertise: "for Hamilton did not like arguing the facts or merits of cause nearly so much as he enjoyed doing battle on grounds on the law, and he became master of the kind of special pleas that made argument on the latter grounds possible." [4] Thus, generations of scholars and biographers have only superficially recognized Hamilton's influence on American law, acknowledging his brilliance, but confining their exploration of his legal career to only a handful of high-profile cases.

Cursory studies of Hamilton's legal practice will not suffice, however, as Hamilton lived during a transformative era in American public and private law and he contributed significantly to its development. Moreover, Hamilton used inherited, English legal principles to help conceptualize, define, defend, and explain the distinctly American policies that biographers and scholars associate with Hamilton. Understanding the centrality of law to Hamilton's career is therefore essential because Alexander Hamilton consistently and purposefully used the law as an instrument to accomplish his national, economic, and republican statecraft goals.

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[4] James Kent, "Alexander Hamilton: Address delivered before the Law Association of New York, October 21, 1836" (Brooklyn, N.Y.: George Tremlitt, 1889), 13; Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W.W. Norton & Company, 1979), 63.

Robert Troup also recalled Hamilton's legal aptitude and particular "first principle" approach after the death of the Secretary-turned-Major General of the United States Army: "the General invited me to spend the ensuing summer with him, in his family, with the double view of pursuing my legal studies, and instructing him in the practice. I accepted the General's invitation, and domesticated myself with him for three months; during which period, he acquired a thorough knowledge of the practice, and wrote a Treatise on it; which served as an instructive grammar to future students, and has been the ground work of subsequent practical treatises by others on a larger scale. At the end of the three months, the General was admitted to the bar; after passing a brilliant examination.

"I need not tell you [the Reverend Dr. John Mason] how far he surpassed us all in abilities. As soon as New York was evacuated, the General took his station there as a practising Lawyer, with Col. Burr, Mr. John Lawrance, Mr. Brockholst Livingston, and myself. I need not tell you how far he surpassed us all in abilities. The General however was not a learned Case Lawyer. Never failing to be busied, more or less, in politics, he had only time to read elementary books. Hence he was well grounded in first principles; and these the Herculean powers of his genius, enabled him to apply with wonderful facility, to every question he argued. But if you stated a Case to him, and allowed him time to examine the Reporters, he would profound [*sic*] the law respecting it, and give an opinion that would bear the test of the severest discussion." See Nathan Schachner, "Alexander Hamilton Viewed by His Friends: The Narratives of Robert Troup and Hercules Mulligan," *William and Mary Quarterly*, 4 (1947): 215-16.

The following chapters aim to recast our understanding of Hamilton's political career, his policy achievements, and his significant role in the American founding by considering him, first and foremost, as a preeminent lawyer who instrumentally applied law and legal arguments to accomplish his statecraft. By re-examining Hamilton's post-war accomplishments through the lens of the law, I argue that Hamilton's thoroughly-studied political career, as well as his contributions to republican political science, cannot be fully understood without recognizing and investigating how Hamilton used Anglo-American legal principles to achieve these ends.

Historians frequently examine the successes and occasional failures of Hamilton's core economic policies, including his funding, assumption, and central banking plans;[5] they also study his political legacy, partisan disagreements, and foreign policy.[6] Political scientists and the occasional legal scholar have also examined Hamiltonian constitutionalism, a topic that routinely includes the political science of Publius (Hamilton's shared pseudonym with James Madison and John Jay in the *Federalist* essays), the Hamilton-Jefferson divide over broad constitutional construction, the origins and development of judicial review, and sometimes Hamilton's tax-clause advocacy in *Hylton v. U.S.* as well as his freedom of the press arguments in *People v.*

[5] See, for example, Thomas K. McCraw, *The Founders and Finance: How Hamilton, Gallatin, and Other Immigrants Forged a New Economy* (Cambridge, Mass.: Belknap Press, 2012, 2014); Max M. Edling and Mark D. Kaplanoff, "Alexander Hamilton's Fiscal Reform: Transforming the Structure of Taxation in the Early Republic," *The William and Mary Quarterly* 61 (2007): 713; Max M. Edling, "'So Immense a Power in the Affairs of War': Alexander Hamilton and the Restoration of Public Credit," *The William and Mary Quarterly* 64 (2007): 287; Stanley Elkins and Eric McKitrick, *The Age of Federalism* (New York: Oxford University Press, 1993), 107-131; John R. Nelson, Jr., *Liberty and Property: Political Economy and Policymaking in the New Nation, 1789-1812* (Baltimore: Johns Hopkins University Press, 1987); Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W. W. Norton, 1980), 136-165; Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W. W. Norton, 1979).

[6] Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009); Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vintage Books, 2002), 48-80; Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2002); Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford: Stanford University Press, 1970); John Lamberton Harper, *American Machiavelli: Alexander Hamilton and the Origins of U.S. Foreign Policy* (New York: Cambridge University Press, 2004).

Croswell.[7] Also, a cadre of biographers has presented a thorough timeline of Hamilton's life and accomplishments while simultaneously attempting to assess his character and motivations.[8] All of these studies take note of the major policy innovations and statecraft goals that Hamilton worked to achieve. None, however, recognize that Hamilton primarily relied on legal tools to accomplish these desired ends.

In addition, while scholars have come to a general consensus about Hamilton's influence on early republican economic and commercial policies on the development of robust national government power and on the party-politics of his day, I argue that he has yet another critically important legacy: Alexander Hamilton developed the substantive foundations of American jurisprudence. To this end, Hamilton's most significant and enduring achievement was to translate and transform English legal traditions into explanations for and defenses of a robust federal judicial power. But, he also used the law as a flexible legal toolbox to enhance federal executive power, to grow the republic's commercial strength, to protect the federal government's fiscal powers, and to preserve the common-law due process, jury trial, and press freedoms that secured the liberties enjoyed by ordinary Americans. Moreover, Hamilton's influence on the

[7] Samuel J. Konefy, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (New York: The Macmillan Company, 1964); Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York: Harcourt, Brace, & World, Inc., 1964); Paul Finkelman, "Alexander Hamilton, Esq.: Founding Father as Lawyer" (Review of Julius Goebel Jr., and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton*, 5 vols. (New York: Columbia University Press, 1964-81), *American Bar Foundation Research Journal*, 9 (1984): 229-52; Michael I. Meyerson, *Liberty's Blueprint: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made the Democracy Safe for the World* (New York: Basic Books, 2008); Harvey Flaumenhaft, *The Effective Republic: Administration and Constitution in the Thought of Alexander Hamilton* (Durham: Duke University Press, 1992); Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and the American Founding* (New York: Hill and Wang, 2005); Michael P. Federici, *The Political Philosophy of Alexander Hamilton* (Baltimore: The Johns Hopkins University Press, 2012).

[8] Hamilton biographies date from the nineteenth century, but select modern biographies include John C. Miller, *Alexander Hamilton: Portrait in Paradox* (New York: Harper, 1959); Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W.W. Norton & Company, 1979); Jacob E. Cooke, *Alexander Hamilton* (New York: Charles Scribner's Sons, 1982); Roger G. Kenney, *Burr, Hamilton, and Jefferson: A Study in Character* (New York: Oxford University Press, 1999); Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004); and John Ferling *Jefferson and Hamilton: The Rivalry that Forged a Nation* (New York: Bloomsbury Press, 2013). Also, for a survey of Hamilton's popular reception see, Stephen F. Knott, *Alexander Hamilton and the Persistence of Myth* (Lawrence: University Press of Kansas, 2002).

development of American law proved to be enduring and authoritative; the U.S. Supreme Court contemplated and upheld Hamiltonian legal arguments well into the nineteenth century, and even Jeffersonian and Jacksonian jurists deployed Hamilton's principles to support their legal claims. Hamilton's legacy thus extends beyond the usual summary of his contributions to the early republic—a national debt, a central bank, the *Federalist* essays, and his party politics—to include an accomplishment befitting a founding American common lawyer: a formative influence on the substance of federal and state jurisprudence.

By examining Hamilton's statecraft through the lens of the law, I engage with generations of legal and political scholars of the early republic as well as Hamilton's many biographers. Legal historian James Willard Hurst both praised and critiqued Alexander Hamilton as a lawmaker, suggesting the strengths and limitations of Hamilton's economic policies that sought to release the creative energy of the American marketplace.[9] Hurst got it right; Hamilton's various reports on public credit (his funding and assumption plan), central banking, and manufacturing were attempts by the Treasury Secretary to use Congressional statutes to, in Hurst's words, "mobilize the resources of the community" and to increase Americans' general economic liberties.[10] Hamilton also planned for these policies to enhance the power and stature of the new national government. Generally, Hamilton succeeded in transforming his economic policy into enacted legislation.[11] But Hurst has only taken account of Hamilton as a lawmaker of *statutory* law; here, I suggest that Hamilton is better understood as a lawmaker of the common-law variety, using a combination of case-law, legal maxims,

[9] Hurst, "Alexander Hamilton, Law Maker," *The Columbia Law Review* 78 (1978): 483-547.
[10] James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956: University of Wisconsin Press, 1956), 6.
[11] Although Congress ignored Hamilton's *Report on Manufactures* (1791) at first, the House and Senate eventually implemented Hamilton's tariff recommendations in 1792. See Douglas A. Irwin, "The Aftermath of Hamilton's 'Report on Manufactures," *The Journal of Economic History* 64 (2004): 800-821.

institutions, constitutional text, and then statutory law, to release the energy of the newly created national government. If the framers of the U.S. Constitution created a new constitution to address the many problems of the Confederation era, then Hamilton used the many varieties of law in his common-law toolbox to ensure that the federal constitutional framework would work as he planned.

Hamilton thus used inherited English and new American legal tools to release the energy of the federal government. In particular, Hamilton used law to expand and enhance the power of the national executive branch (both the office of the President and the powers of his administrative officials) as well as the federal judiciary. Hamilton succeeded in both endeavors, but the primary effect of Hamilton's impact on the development of American law was to expand federal judicial power. In this way, however, Hamilton's story recasts the traditional narrative of how nationally-minded, power-grabbing federal judges became such powerful constitutional expositors in the early republic and antebellum eras.

For years, historians have described the growth of federal judicial power by celebrating the instrumental decisions of John Marshall, Joseph Story, and their brethren on the early-national U.S. Supreme Court.[12] Grant Gilmore described the era overlapping with Marshall's thirty-five year tenure on the Supreme-Court bench as one defined by "great judges deciding great cases greatly"—and John Marshall was perhaps the greatest of them all.[13] He seized any

[12] See, for example, Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996); Julius Goebel Jr., *Antecedents and Beginnings to 1801,* The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, vol. 1 (New York: The MacMillan Company, 1971); George Lee Haskins and Herbert A. Johnson., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Foundations of Power: John Marshall, 1801-15*, vol. 2 (New York: Macmillan Company, 1981); G. Edward White, *The Marshall Court and Cultural Change,* 1815-1835, Abridged Edition (New York: Oxford University Press, 1991); Richard E. Ellis, *Aggressive Nationalism*: McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007); William R. Casto, *The Supreme Court in the Early Republic: the Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia, S.C.: University of South Carolina Press, 1995).

[13] Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 41.

opportunity to assert the Court's judicial duty to determine the constitutionality of statutory law (*Marbury v. Madison*), to defend the national government's powers in the face of state encroachment (*McCulloch v. Maryland*, *Cohens v. Virginia,* and Justice Story in *Martin v. Hunter's Lessee*), and to interpret and wield Article I, section 10's contract clause so as to keep unconstitutional state legislation from running roughshod on individuals' rights (*Fletcher v. Peck, The Trustees of Dartmouth College v. Woodward*).[14]

Yet, the U.S. Supreme Court was not the primary driver of federal judicial power in this formative era in American law; instead, federal judicial power was enhanced, at every turn, by collaborations between executive administrators (from the Treasury Secretary down to the customs collectors stationed at far-away ports), by litigation strategies drawn up by common-lawyers in lower state and federal courts, and by federal district judges who simultaneously acted in both executive and judicial capacities. Federal judicial power was thus inextricably tied to the energy and actions of the executive branch, as well as the work of district judges and local attorneys.[15] These oft-forgotten jurists, administrators, and strategists expanded the scope of federal judicial power day-by-day, transaction-by-transaction such that, by the time a constitutional question about the scope of federal judicial power made it before the U.S. Supreme Court's bench, the federal courts already had practice exerting a wider scope of power. This

[14] This is Charles F. Hobson's main argument in *The Great Chief Justice: John Marshall and the Rule of Law*. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin, Heir at law and devise of Fairfax, v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); and Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[15] My project contributes to a small, but growing literature that takes these actors seriously, including Frederick Dalzell's "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *The New England Quarterly* 65 (1992): 355-88 (1992); Dalzell, "Taxation with Representation: Federal Revenue in the Early Republic" (Ph.D. diss., Harvard University, 1993); Gautham Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution," (unpublished Ph.D. dissertation., University of Chicago, 2008).

made it all the more feasible for the Court to adopt an expanded federal judicial power as a principle of American constitutional law.

As a high-ranking administrator, as a frequent district-judge collaborator, and as a public and private litigator, Alexander Hamilton considered the common law to be a flexible, adaptable tradition to be applied instrumentally in order to accomplish his statecraft as well as to shape the contours of American constitutionalism. By focusing on the ways in which Hamilton translated and transformed inherited English legal principles into a distinctly American jurisprudence, this dissertation also engages with past and recent historians considering the nature and extent of America's reception of English common law after the Revolution.[16]

Daniel J. Hulsebosch, for example, argues that many structural aspects of British constitutionalism found their way into the federal and New York state constitutions. Hulsebosch sees Hamilton, as well as other Federalists, as key figures in this process and as such, he closely examines Hamilton's arguments in *Rutgers v. Waddington*.[17] Phillip Hamburger, an English legal historian, has noted how the American notion of judicial review was really only a highly specific adaptation of the English common law's concept of judicial duty. Mary Sarah Bilder, however, argues that the "transatlantic constitution" forged between the British King and his North American colonies provided practical origins for American federalism and the practice of

[16] For the classic works on common-law reception, see: Julius Goebel Jr., *Antecedents and Beginnings to 1801,* The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, vol. 1 (New York: The MacMillan Company, 1971), 116-18; William B. Stoebuck, "Reception of English Common Law in the American Colonies," *William and Mary Law Review* 10 (1968): 393-426; Paul Samuel Reinsch,"The English Common Law in the Early American Colonies," in *Select Essays in Anglo-American Legal History*, 3 vols. (Boston: Little, Brown, and Company, 1907-9) , 1:367-415; Julius Goebel Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review* 31 (1931): 416-48, and "The Common Law and the Constitution," in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones (Ithaca: Cornell University Press, 1956), 101-23; Elizabeth Gaspar Brown, *British Statutes in American Law, 1776-1836* (Ann Arbor: University of Michigan Law School, 1964).

[17] Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005).

judicial review.[18] Finally, Ellen Holmes Pearson demonstrates how late eighteenth- and early nineteenth-century American legists ("law experts") "remade" English custom to better fit the American republic.[19] Pearson's work demonstrates how particular common-law concepts changed over time according to American legal experts; her study describes common-law doctrines as they transformed from their colonial/English origins into modified, republican forms (i.e. the process by which Americans selectively "remade" English customs).

Yet, by confining her study to the realm of legists and their legal treatises, Pearson provides a descriptive, juristic perspective only, rather than a practical exploration of common law in action. Hamburger and Bilder are primarily interested in the American courts' judicial review powers, while Hulsebosch argues that an English-colonial model of competing local jurisdictions transformed into an American system of constitutional jurisprudence. None of this recent work on Anglo-American constitutionalism emphasizes how, when applied by savvy legal practitioners like Hamilton, inherited English legal principles could be put to work to justify republican policy and law. Therefore, this dissertation demonstrates how Hamilton used the common law to explain, defend, and implement actual policy, as well as America's new brand of

[18] Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008), and Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004). Also, James Stoner, Jr. argued that common law ideas influenced the American judiciary, particularly its notion of judicial review (*Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992)).

Kunal M. Parker posited that precisely because the common law could be understood as both an agent of history and simultaneously resistant to historical specification, it provided America with an "integral mode of governance and public discourse" from the founding until the late-nineteenth century. Parker was most interested in the nineteenth century, however, and his work overlooked Hamilton's legal thought; also, Parker was concerned with the common law's applicability to constitutional interpretation (that is, the common law's incorporation into the text of the constitution) as opposed to the common law's influence on American statecraft. See *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (New York: Cambridge University Press, 2011).

[19] Pearson, *Remaking Custom: Law and Identity in the Early Republic* (Charlottesville: University of Virginia Press, 2011).

constitutionalism.[20] When Hamilton applied common-law principles to his statecraft goals, the common law provided the tools that did the work of governing.

Throughout his career, Alexander Hamilton consciously and purposefully looked backward to soak up the principles of English law while he simultaneously applied them forward to shape a distinct and novel American republic. That he continually referred to English legal concepts reflected how, in the day-to-day business of governing under a newly-minted federal constitution, America's break from England was every bit as conservative as it was radical and innovative. Like Hamilton, early-republican common lawyers, judges, administrators, and statesmen all thought in English. These founding officials continued to scrutinize English constitutionalism in order to make sense of their own radical innovations, such as how to separate governmental power in practice, how to preserve federal and state sovereignty, and how to maintain popular sovereignty.

Hamilton's adaptive uses of English law embrace elements from both the "conservative" and "radical" historiographical traditions that contemplate the nature of the American founding. The founding experiment was one in which innovative, radical republican ideas mattered—they influenced Hamilton's common-law litigation strategy, for example—but so did an elite group of men who, because they held judgeships, argued in court, or served as governmental officials and statesman, set a course for how American institutions would act and what constitutional law would mean in practice. During the imperial crisis, and right up through the early national period, the founding generation frequently contemplated and revised their laws and legal institutions. To be sure, these eighteenth-century statesmen innovated—the concepts of popular sovereignty and of written constitutions ratified by the people in convention were particularly

[20] In this way, my arguments here are in line with Morton Horwitz's classic *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977) in that I demonstrate in the realm of public law what Horwitz does in the realm of private law: that common-law was an instrumental tool that shaped policy.

unique advances in Anglo-American constitutional law—but in many ways Americans still embraced English customs, and kept the substance, process, and history of English law alive in their institutions. New York state provides a particularly good example of this tendency for Americans to tweak inherited English traditions, but not overhaul or throw them out. And so, it was natural for Alexander Hamilton to bring his thoroughly English, common-law training to his interpretations of the U.S. Constitution and to his administrative actions in Washington's cabinet.[21]

[21] A vast literature contemplates the radical change or lack thereof that followed the Declaration of Independence. Charles A. Beard and his school of Progressive historians considered the American Revolution to be inherently conservative, with elite white statesmen breaking from England for their own benefit, with little real change (*An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1913, 1986). While Beard's argument overlooked much that did change over the course of the Revolutionary, Confederation, and Early Republic eras, he was correct to note that elite statesman mattered a great deal, as they steered the new American nation out of a war and into a new constitutional order. These elites also made crucial decisions along the way, as to how Americans would govern themselves and to define what popular sovereignty, divided sovereignty, and executive, legislative, and judicial power meant in practice. In contrast with Beard, Gordon S. Wood argued that the American Revolution unleashed momentous changes in Anglo-American constitutionalism in *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), as Americans wrestled with republican ideas and in the process transformed "Whig" law into American concepts, including popular sovereignty, the separation of governmental powers, and judicial review. Wood also argued that America's break from England was a social revolution in *The Radicalism of the American Revolution* (New York: Vintage Books, 1991), and, like his mentor Bernard Bailyn, that ideology and republican rhetoric mattered to the American founding (Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap Press, 1967). Wood's work contrasts with John Philip Reid, who posited that the American Revolution was primarily an intellectual and constitutional break from England, rather than a social revolution (*Constitutional History of the American Revolution*, Abridged Edition (Madison: University of Wisconsin Press, 1995)). Yet, Reid and Wood share common ground in that disagreements over ideas drove the American colonists to declare their independence; to Reid, however, the Revolution was about revising English constitutionalism to thwart arbitrary power and about restoring the rule of law. Like Bailyn, Wood, Reid, and T.H. Breen—but unlike Beard—historians writing in the mid-to-late twentieth century tended to emphasize the participation of ordinary Americans in the revolutionary struggle, thus de-emphasizing the importance of elite statesman as contributors to the founding era. (See Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* (New York: Oxford University Press, 2004) and note 22, *infra.*)

I have modeled this project after those legal historians who tended, instead, to emphasize how the founding has both radical and conservative elements. Daniel Hulsebosch, for example, could not help but tell a story of legal continuity in New York, but still described how American constitutionalism rejected the British competing-jurisdictions model. Also, Morton J. Horwitz set the starting point for the "transformation of American law" in 1780, and yet, not much common-law doctrine changed until the nineteenth century's Market Revolution. Horwitz and Hulsebosch also emphasized the actions of elite legal actors—judges, lawyers, and the merchant elite—as they considered the effects and aftermath of the American Revolution. (See Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, and *The Transformation of American Law, 1780-1860*.) Here, I emphasize that elite statesmen were crucially important actors, as they simultaneously set the course for the development of American law while transforming English raw materials into institutions and concepts that were novel and distinctly American.

Finally, this dissertation intends to remind us that we study the "Founding Fathers" for a reason. Alexander Hamilton and his close circle of professional or elite, white, and male colleagues mattered indispensably to the development of the American nation, and crucially, they were key figures in the development of American law.[22] These men were privileged, learned, and influential—but, rather than re-examine their contributions to American political science (through their political essays, pamphlets, or participation in constitutional conventions), I aim to highlight their less heralded, but no less important, accomplishments in solving the practical, day-to-day problems of running the new republic.[23] Alexander Hamilton and his supporting cast of lawyers, judges, administrators, insurers, merchants, Loyalists, and libelous printers faced the same problem: now that they had a new constitutional framework for government, how did it work in practice? Hamilton, in particular, did much to figure it out, as well as to set legal and institutional precedents to guide the course of republican governance for the future. Part of the reason that Hamilton was so influential to the development of American

[22] I refer here to the historiographical trend of examining the founding era "from the bottom up." Women, free African-Americans, slaves, and Native Americans mattered, too, in shaping American jurisprudence, but I argue that the founding generation, and in particular Alexander Hamilton, did the most to influence the substance of American law and the direction of constitutional governance. For influential titles emphasizing history "from the bottom up," see: Gary B. Nash, *Red, White, and Black: The Peoples of Early North America* (Upper Saddle River, N.J.: Prentice-Hall, 1974); Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980); Bruce E. Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquios and the Rationale for the American Revolution* (Ipswich, Mass.: Gambit, 1982); Woody Holton, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1997); Michael A. McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia* (Chapel Hill: University of North Carolina Press, 2007); and Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (New York: Cambridge University Press, 2010). Also, Robin L. Einhorn warned against putting too much emphasis on the elites of the founding generation in *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006).

[23] Scholars of administration and administrative law have recovered the work of bureaucrats, far-flung customs collectors, auditors, and land-office outlets, and demonstrated how these ordinary American officials made an impact on national governance. See Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); Leonard D. White, *The Federalists: A Study in Administrative History* (New York: The Macmillan Company, 1948); White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (New York: The Macmillan Company, 1961); White, *The Jacksonians: A Study in Administrative History, 1829-1861* (New York: The Macmillan Company, 1954); Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution," (unpublished Ph.D. dissertation., University of Chicago, 2008).

law was because he set crucial precedents that shaped the contours of substantive law and institutional power after his death.

Each of the following chapters begins by outlining Hamilton's particular, desired statecraft objective and the English legal principles he instrumentally applied to achieve his policy goals. After describing how Hamilton used a particular legal tool to prevail in private litigation or to administer the U.S. Treasury department, the chapter then explains how judges and jurists adopted, deployed, or modified Hamilton's legal arguments in early-republican and antebellum jurisprudence.

The first two chapters, "Creating the Federal Magistracy: Discretionary Power and Hamilton's Energetic Executive" and "Administrative Accommodation in the Federal Magistracy," describe how Alexander Hamilton articulated a lasting doctrine of necessary, inherent executive discretionary authority and put it to use in order to create an "energetic" executive branch. Hamilton's arguments about the executive's prerogative power were also related to the federal judiciary: both departments had discretionary authority, as well as administrative responsibilities, inherited from the practices of the English and colonial magistracies. Therefore, judicial and executive magistrates constantly negotiated the balance between executive prerogative and judicial oversight, and in the process developed an enduring federal jurisprudence that delimited the contours of executive and judicial power. The federal courts set some limits on executive authority, but mostly the courts accommodated executive actions and even engaged with Treasury officials to administer the law. Over time, the federal courts upheld the executive's robust prerogatives while, in turn, the federal judiciary's coordinate and federal review powers expanded as a result of their close collaboration with the executive department.

Chapter 3, titled "Creating the 'Commercial Republic:' Neutrality and Law in the American Courts," examines how Hamilton accomplished his statecraft goal of building a "commercial republic" through the federal courts' expanding admiralty jurisdiction. As long as the United States remained neutral during the French Revolutionary and Napoleonic Wars, federal district and circuit courts administered neutrality law with the help of Hamilton's Treasury department and port-side district attorneys. As a result, the federal judiciary's prestige and jurisdictional reach expanded so as to encompass more commercial jurisdictions, including lucrative marine-insurance contract disputes. In the fourth chapter, "Developing the Jurisprudence of Federalism: Hamilton and the Defense of the Federal Fiscal Powers," I demonstrate how Hamilton's extended defense of the federal government's robust taxing and borrowing powers became "legalized"—that is, the legal arguments that Hamilton articulated as Treasury Secretary became incorporated into federal jurisprudence through two decades of Marshall Court decisions.

In "Litigation, Liberty, and the Law: Alexander Hamilton's Common-Law Rights Strategy," my fifth chapter, I describe Hamilton's career-long rights consciousness. This chapter constitutes a major departure from the popular and scholarly misconceptions about Hamilton, which insist that he was a monarchical elitist who privileged creditor and mercantile interests above all else. What scholars and biographers have missed, however, is that Hamilton was always a common-lawyer at heart; therefore, he held a deep reverence for the rights and liberties provided and protected by the Anglo-American common law. And so, throughout his career, Alexander Hamilton fiercely and consistently fought to preserve common-law rights for all Americans. By surveying the span of Hamilton's law practice in New York state courts—from his defense of minority (Loyalist) rights in *Rutgers v. Waddington* (1784) to his defense of the

freedom of the press in *People v. Croswell* (1804)—I argue that Hamilton was dedicated to preserving the people's rights to due process, jury-trials, and press freedom at common law. To Hamilton, the common law provided a common shield to benefit *all* Americans from their government's overreaching and abuse of power.

By focusing on these particular episodes and themes that span the entirety of his legal career, I offer an intensive, but not a comprehensive, examination of Alexander Hamilton as both a lawyer and a lawmaker. I do not discuss Hamilton's extensive land dealings, for example, where he helped to sort out and to quiet titles between feuding patroon families in upstate New York; nor have I detailed the complex contractual litigation and arbitration proceedings in which Hamilton participated when representing French merchant Louis Le Guen or members of New York's mercantile class. These protracted disputes were important in Hamilton's day, as they sometimes yielded large settlements for his clients and they won acclaim for Hamilton as one of New York's premiere lawyers. Yet, while Hamilton clarified or innovated upon the procedural law involved in this litigation, his efforts had little impact on his greater statecraft goals, and therefore I omit them below. Similarly, I also exclude discussions of the routine or insignificant cases, mediations, or advisory opinions that occupied Hamilton's time, but had a negligible influence on the development of the law.

Instead, I examine only those episodes in Hamilton's career in which his extensive legal practice intersected with his ambitious, republican statecraft goals. In doing so, I provide a selective but intensive way to understand, and thus to appreciate fully, the numerous and profound ways in which Alexander Hamilton developed the substance of American law.

CHAPTER ONE

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CREATING THE FEDERAL MAGISTRACY: DISCRETIONARY POWER AND THE ENERGETIC EXECUTIVE

In the annals of American political science, Alexander Hamilton is often remembered for his prescription for a strong, federal executive power—an administration replete with the necessary "ingredients" of "energy," including unity, duration, adequate support, and competent powers.[1] Although his general philosophy on executive power is well known, scholars have been much less interested in how the first Treasury Secretary converted his political theory into an enduring practical reality.[2] Hamilton spoke of the need for energy in executive action, but in practice and under the law, how did an energetic, republican executive act without overstepping its authority? Hamilton's answer to this delicate and momentous question relied on an implicit assumption of a limited, legally bound prerogative power—what customs collector Otho H.

[1] Hamilton introduced these "ingredients" in *Federalist* No. 70, and expounded on them in *Federalist* Nos. 71-77.

[2] Political scientists and historians have long noted that Alexander Hamilton sits at the foundational epicenter of American executive power. His essays on Article II in *The Federalist* are foundational legal commentaries for executive power, and his practices as Treasury Secretary and cabinet member/adviser to Washington set precedents for the nature and scope of executive power. Aside from Hamilton's polarizing influence on political discourse in the American republic and his legislative statecraft (including his funding and assumption schemes, and his plan for a national bank), Hamilton is most well-known for desiring and helping to create a strong executive at work in a strong central government. For examples of historical, legal, and political science scholarly commentary on Hamilton and executive power, see Harvey Flaumenhaft, *The Effective Republic: Administration and Constitution in the Thought of Alexander Hamilton* (Durham: Duke University Press, 1992); Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York: Harcourt, Brace, and World, Inc., 1964); Michael P. Federici, *The Political Philosophy of Alexander Hamilton* (Baltimore: *The Johns Hopkins University Press*, 2012); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008); and Edward S. Corwin, *The President Office and Powers, 1787-1948: History and Analysis of Practice and Opinion* (New York: New York University Press, 1948); and Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004). Scholarship on Hamilton's influence on administrative theory and practice will be cited below.

Also, Hamilton's arguments about executive discretionary authority have an intellectual lineage that include not only Marshall and Taney court decisions (to be discussed below) but also twentieth-century Court decisions on executive power such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *U.S. v. Nixon*, 418 U.S. 683 (1974). See William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (Columbia: University of South Carolina Press, 2006), 177-91, for an explicit discussion of Hamilton's influence on *Youngstown Sheet & Tube*.

Williams referred to as Hamilton's "doctrine of discretionary Executive power."[3] In order to translate the theoretical executive power described in the *Federalist* essays into a smoothly-running, capable, and efficient administration, Hamilton argued that an energetic executive was also a magisterial executive—that is, an administrator empowered to act with discretionary license. He spent his public career articulating enduring legal arguments to define and defend the executive's practical, prerogative power, and in doing so, Hamilton transformed early-republican political science into the foundations of American administrative law.[4]

This Hamiltonian "doctrine" of executive discretion has gone mostly unnoticed because Hamilton—the early republic's premiere "administrative genius"—expressed it only through occasional, yet careful and conscientious legal arguments dispersed throughout his voluminous correspondence.[5] Hamilton advocated for executive discretion through open letters to the public, as well as through arguments made in behind-the-scenes memos and in day-to-day correspondence with Congress, district attorneys, and other federal officials.

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[3] Otho H. Williams to Hamilton (July 27, 1792), in Harold C. Syrett, ed., *The Papers of Alexander Hamilton,* 27 vols. (New York: Columbia University Press, 1961-87), 12: 119-122. [Hereafter *PAH.*] Lynton K. Caldwell identified the law as an important, stabilizing force that undergirded Hamilton's administrative theories and practices. See *The Administrative Theories of Hamilton & Jefferson: Their Contribution to Thought on Public Administration* (Chicago: University of Chicago Press, 1944), 18-22.

[4] For a recent analysis of Hamilton's strident defense of the royal prerogative, as well as the presidential prerogative, throughout the imperial crisis, Confederation era, and the constitutional debates of 1787/88, see Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge, Mass.: Belknap Press, 2014), 53-56, 102-103, 168-70, 190-95, 210-13, 217-26.

[5] Leonard D. White referred to Hamilton as "the greatest administrative genius of his generation in America, and one of the great administrators of all time," in *The Federalists: A Study in Administrative History* (New York: The Macmillan Company, 1948), 125-26.

Scholars have praised Hamilton's administrative theory, practice, efficacy, and achievements. Jerry L. Mashaw noted that Hamilton helped establish managerial and hierarchical control in the federal administration by producing forms and detailed procedures for his collectors to use. Hamilton's intra-administration instructions proved to be so useful that Congress eventually codified Hamilton's procedures in the 1799 Collection Act ("An act to regulate the collection of duties on imports and tonnage," ch. 22, 1 Stat. 627 (1799)). See *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 29-33, 56. Biographer Ron Chernow also praised Hamilton's administrative accomplishments (in *Alexander Hamilton,* 291-95). For extended treatments of Hamilton's administrative theory, see, in general, Leonard D. White's *The Federalists,* and Lynton K. Caldwell, *Administrative Theories of Hamilton & Jefferson.*

Hamilton's approach to defending executive discretion was produced largely on-demand and as needed because during the first years after American Independence, the idea of discretionary executive power proved to be complicated, if not outright controversial, in a constitutional republic. Executive power carried with it the unsavory taint of monarchism, and thus the potential for despotic abuse.[6] During and after the Revolutionary War, newly-ratified state constitutions either stripped state governors of their Crown-bestowed prerogatives or diluted their power in favor of legislative authority.[7] Nationally minded delegates to the 1787 Philadelphia convention also expressed concerns about excessive executive power, and even President George Washington approached executive action cautiously so as to avoid the charge of being "monarchical."[8]

Despite this sentiment, the desire for a robust federal executive persisted among nationally minded Americans during the Confederation era, and grew stronger under the

[6] "An Old Whig" worried about the president's constitutional prerogatives: "To be the fountain of all honors in the United States, commander in chief of the army, navy, and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to put a negative upon all laws...is in reality to be a KING as much a *King as the King of Great Britain*, and a King too of the worst kind—an elective King," in John P. Kaminski and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution Public and Private, Volume 1, 21 February to 7 November 1787*, vol. 13 (Madison: State Historical Society of Wisconsin, 1981), 541-42

[7] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), 132-50.

[8] James Madison, for example, warned that "If [the Executive Power is] large, we shall have the Evils of Elective Monarchies." (Quoted from Rufus King's notes on the 1787 Convention in Charles R. King, ed., *The Life and Correspondence of Rufus King*, vol. 1 (New York: G.P. Putnam's Sons, 1894), 588.) President George Washington also expressed concerns that the public suspected his administration of establishing monarchical practices, among other misdeeds. (See, for example, Washington to Hamilton (July 29, 1792) in W.W. Abbot et al., eds., *The Papers of George Washington, Presidential Series*, 18 vols to date. (Charlottesville, Va: University of Virginia Press, 1987—), 10: 588-92. [Hereafter, *PGW*.])

Also, see Kathleen Bartoloni-Tuazon, *For Fear of An Elective King: George Washington and the Presidential Title Controversy of 1789* (Ithaca: Cornell University Press, 2014) for a discussion of the uncertainty, fear, and sense of possibility associated with presidential power at the beginning of Washington's terms in office. Ralph Ketcham described the historical lineage of American presidential power, as well as the "Unsettledness of 1789" in *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill: University of North Carolina Press, 1984), quote at 3.

Federalist-dominated Congresses of the 1790s.[9] During these years, Congress conceded that executive discretion was a necessary and convenient way to administer federal law; the House and Senate saw fit to grant the president certain discretionary powers in matters of calling out the militia, raising additional regiments in the regular army, fortifying ports, closing public debt-related transactions, administering embargos, as well as overseeing administrative districts and their staffs. Early national Congresses also vested discretion in subordinate executive officials, especially in the valuation of goods and property for assessment, determining compliance with federal rules and policy, and initiating litigation to prosecute violators of federal law.[10]

These grants of executive prerogative were limited and based in statutory authority, however, and as such, they could be permitted and revoked at Congress's will. But to Hamilton, the business of administering government well required more nuanced discretion and administrative maneuvering than statutory language could articulate or anticipate. Moreover, exercises of administrative discretion often amounted to implementing executive policy that the administration did not want Congress or the courts to overturn. For Hamilton, prerogative powers were necessary, but limited tools for the efficient administration of government. Restraining executive discretionary power not only prevented abuses of power, but Hamilton also intended for it to deter opposition to the administration's actions and therefore, to discourage interference with his policy agenda.

[9] On early American views of the prerogative power, see Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding*, and "Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769-75," *William and Mary Quarterly*, 68 (2011): 533-72. See also Gordon S. Wood, Pauline Maier, and Daniel J. Hulsebosch. Nelson, in turn, addressed their critiques. See Gordon S. Wood, "The Problem of Sovereignty," *William and Mary Quarterly*, 68 (2011): 573-77; Pauline Maier, "Whigs against Whigs against Whigs: The Imperial Debates of 1765-76 Reconsidered," *William and Mary Quarterly*, 68 (2011): 578-82; Daniel J. Hulsebosch, "The Plural Prerogative," *William and Mary Quarterly*, 68 (2011): 583-87.

[10] Leonard D. White provided an extensive list of Congress' various grants of discretionary power to the executive departments. See, *The Federalists*, 450-455.

In order to make the case that executive power required discretionary license, Hamilton made three moves. First, he wrote legal "briefs" scattered across a variety of sources, about the discretionary nature of executive power: in his *Federalist* and Pacificus essays, in customs circulars, and in reports and letters addressed to Congress. Next, Hamilton translated his legal arguments about executive prerogatives into practical administrative precedent. Finally, he cultivated a close relationship between the energetic executive department that he led at Treasury and the federal judiciary in order to demonstrate that executive prerogative in a constitutional republic was subjugated to law. By instructing his employees to combine both execution and judgment in the administration of the laws, while at the same time inviting federal judges to advise and oversee administrative action, Hamilton developed a new, informal institution in the new national government: the federal magistracy.

I use the term "federal magistracy" to refer to the administrative model that Hamilton envisioned and put into practice, which transplanted English administrative methods into America's new republican institutions. The federal magistracy collectively signifies the discretionary authority inherent in the administrator's power to execute law, the legal boundaries that limit this executive-function prerogative, and the oversight provided by judicial courts to ensure that administrative authority remained within its lawful bounds. In short, the federal magistracy denotes the constitutional relationship between the executive department and the judiciary, as well as the discretion and judgment inherent in both types of governmental power.

Through written "briefs," through administrative practice, as well as through his interactions with the federal courts, Hamilton argued that executive power possessed significant discretionary authority, albeit a discretion bound by constitutional, statutory, and common law. As such, Hamilton understood the federal courts to have a duty to oversee administrative actions

to ensure that the executive exercised his prerogative according to the law. Although Hamilton did not use the term "federal magistracy" to describe the relationship between the Washington administration and the federal courts, he frequently referred to executive officials, and occasionally to the courts, as "magistrates" or as part of the "magistracy."[11]

The English and colonial magistracies served as models for Hamilton's energetic executive department and for a federal judiciary fully engaged in the day-to-day business of governing.[12] Under Hamilton's federal magistracy, the executive and judiciary simulated the close relationship shared between English magistrates and common-law judges in the administration and review of law. Executive officials at all levels—but particularly department heads and the president, or the "Chief Magistrate," as Hamilton referred to him—interpreted and administered the law with discretion and good judgment, and federal judges reviewed administrative actions to ensure compliance with federal law.[13] Federal judges administered law and policy as well.

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[11] Hamilton was not alone in describing judges and executive officials as "magistrates;" other members of the founding generation, including James Madison, Thomas Jefferson, and George Washington, did so as well. See, for example, Jefferson speaking of "the most determined zeal of our chief magistrate" and Madison referring to the "present chief magistrate," when discussing the president's removal powers. Washington did the same. At the outset of his second inaugural address, the unanimously re-elected president gratefully acknowledged that "I am again called upon, by the voice of my country, to execute the functions of its Chief Magistrate." (See Jefferson to Harry Innes (March 7, 1791), in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson*, 40 vols. to date. (Princeton, N.J.: Princeton University Press, 1950 –), 19:521; Madison's "Removal Power of the President" speech in Congress (June 16, 1789), in, William T Hutchinson, et al., eds., *The Papers of James Madison*, Congressional Series, 17 vols. (Chicago and Charlottesville: University of Chicago Press and the University of Virginia Press, 1962-1991), 19: 225-26; and, Washington's "Second Inaugural Address" (March 4, 1793), *PGW* 12: 264.)

[12] It is also worth noting that Hamilton simultaneously conceived of "administration" broadly, as a responsibility undertaken by all governmental departments, as well as the particular province of the executive. In *Federalist* No. 72 he articulated both ways to think about administration in government: "The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department." Hamilton then listed a range of executive responsibilities "most properly understood" as important tasks constituting "the administration of government."

[13] Hamilton referred to the President as the "Chief Magistrate" throughout his *Federalist* essays on executive power. English and colonial magistrates had administrative, discretionary authority to execute local laws, in addition to judicial commissions to adjudge civil disputes and misdemeanors, and yet decisions made by magistrates could be reviewed by higher courts. For scholarship on English and colonial magistrates, see: Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984); James A. Henretta, "Magistrates, Common

The Treasury Secretary also sought out federal judges to review or to advise executive decisions, and he understood judicial oversight to occur in different ways: as tort litigation brought against a federal official by a wronged party, as a mandamus action asking the court to compel an administrator to act while executing the law, as part of the judiciary's inherent responsibility to protect individuals' rights, and though the federal judges' involvement in advising the Treasury about the administration of law.[14] Although Hamilton thought it inexpedient to turn to the federal courts to approve *all* questions concerning executive discretion, he sought out judicial advice and oversight where it was necessary and practicable, when he thought it prudent to settle a political or statutory controversy, or whenever he could involve the federal courts in administrative matters. Hamilton did not seem to think that federal judges should sit idle, simply waiting for cases or controversies to come before their benches.[15] Hamilton is known for his crucial insight that, in a republic, judicial power must be coextensive over legislative power, but he also intended judicial coextensivity to encompass executive actions as well. By creating the federal magistracy, Hamilton built judicial coextensivity into

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Law Lawyers, Legislators: The Three Legal Systems of British America," in *The Cambridge History of Law in America, Vol. 1: Early America (1580-1815)*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 555-592; and John H. Lanbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen Publishers/Wolters Kluwer Law & Business, 2009*)*: 229-238, 880.

[14] No one disputed the propriety of civil liability lawsuits brought by wronged private parties against executive officials, but early republican jurists contested the federal courts' authority to hear mandamus actions directed at administrators. I will discuss Secretary Hamilton's efforts to involve the courts in administration, including the mandamus action orchestrated by him, in the next chapter.

[15] If the Treasury was going to successfully collect revenue, the collectors at port needed to process incoming vessels efficiently. Therefore, initiating lawsuits to clarify each detail of statutory construction would be time-consuming and not conducive to active trade. In response, Hamilton advised his customs collectors to turn to him, rather than to the courts, to clarify points of law. As a high-ranking executive magistrate and as their boss, Hamilton was more than willing to exercise the executive's prerogative to interpret laws in order to facilitate uniformity and efficiency in his department. Hamilton instructed the collectors: "It is true that a remedy, in a large proportion of the cases, might be obtained from the Courts of Justice; but the vexatious course of tedious law suits to decide whether the practice of one Officer, or of another, was the most legal, would be a mode of redress very unsatisfactory to suffering parties—and very ill suited, as an ordinary expedient, to the exigencies and conveniences of Trade." See "Treasury Department Circular to the Collectors of the Customs," (July 20, 1792), *PAH*, 12:59.

administrative practice and court precedent—through formal courtroom proceedings as well as through informal advisory relationships between the departments.[16]

Constructing a legal foundation for executive discretion also provided Secretary Hamilton with the opportunity to accomplish multiple statecraft goals: empowering executive officials with the energy required for good government, defending or deflecting the implementation of (usually Hamiltonian) administration policy, and encouraging the judiciary to enhance its authority by getting involved in the business of governing. Yet, creating the federal magistracy was a multi-faceted endeavor: Hamilton defined and defended executive discretion at the same time he encouraged the federal courts to actively participate in and oversee administrative action. This chapter examines the first of these endeavors, Hamilton's articulation of the discretionary authority inherent in executive power and its close connection to judicial power. No matter how much discretion Hamilton conceded to the executive, he always assumed that the executive prerogative was guided and constrained by the law, a principle intended to explain executive action when under review either by the federal courts or by the "court" of public opinion.

While Hamilton went to great lengths to describe presidential and administrative prerogatives, he only indirectly suggested to what extent the federal courts could limit executive discretion. When in office, the Secretary did not test the constitutional limits of executive and judicial discretion, but subsequent administrations did—particularly after the Jeffersonian "revolution" of 1800 divided the federal courts and executive along opposing-party lines. After

[16] In *Federalist* No. 80, Hamilton introduced "the propriety of the judicial power of government being coextensive with its legislative" as a "political maxim" undergirding Article III judicial power. Hamilton did not articulate a commensurate coextensivity over executive action in words, however, but as we will see, he did through his actions as Treasury Secretary. Hamilton's judicial-legislative coextensivity principle was, indeed, a first-rate political maxim in the early republic: G. Edward White's seminal volume on the Marshall Court is an extended study on how Chief Justice John Marshall and his associates put the Hamiltonian concept of coextensivity into practice. See, in general, *The Marshall Court and Cultural Change*, 1815-1835, Abridged Edition (New York: Oxford University Press, 1991).

1800, Republican administrators began to challenge the Federalist judiciary's authority to limit or command executive action. In response, the federal courts elaborated on the federal magisterial relationship by establishing legal rules to balance executive discretion with the judiciary's duty to protect individual rights and to interpret federal law. These guiding principles included an affirmation of the courts' mandamus-review authority, the ministerial-versus-political act distinction, and the strict construction of statutory executive discretion.

When expounding the federal magistracy, the courts built upon Hamiltonian ideas about executive discretion and judicial authority in order to preserve and, under certain circumstances, to carefully circumscribe the executive's prerogatives. In doing so, federal judges both accepted and rejected those Hamiltonian administrative practices and legal arguments that Jeffersonian and Jacksonian administrations used to justify executive discretion. As the first head of the Treasury department, Hamilton "had to trace out his own path" in the formulation and implementation of administrative practice; therefore, his arguments about the nature of executive discretion and judicial power had a particularly formative and lasting influence on the development of American law.[17] By orchestrating the federal magistracy, Hamilton created practical precedents for both the lawful exercise of executive discretion and the judicial review of executive action. In doing so, Hamilton set the terms of future legal debates about the proper constitutional relationship between the executive and the courts.[18] Because Hamilton laid the conceptual and legal foundation for executive and judicial power in the new republic, the federal magistracy persevered in administrative practice and in federal jurisprudence long after Hamilton finished defending it.

[17] Quote from Hamilton's "Explanation" (November 11, 1795), *PAH*, 19: 423. This passage is discussed below.
[18] These controversies, first between the Federalists and Jeffersonian Republicans, and then between Republican Nationalists and Jacksonian Democrats, will be discussed in Part III, below.

AN INHERITED TRADITION: PRESIDENTIAL POWER AND THE ANGLO-AMERICAN MAGISTRACY

When Alexander Hamilton described the constitutional nature of executive power in the *Federalist*, he focused on the limited and necessary prerogatives delegated to the President of the United States. Rather than classifying them as prerogatives outright, Hamilton prudently referred to the U.S. Constitution's specific grants of executive power as those "competent powers" necessary for executive energy, and thus the crucial components for waging good government. Hamilton did not elaborate on the scope of the executive's discretionary authority, however, as New Yorkers were skeptical enough of a strong federal executive in 1788.[19]

Yet, when practical administrative questions and political controversies arose during Washington's terms in office, Hamilton responded by publicly clarifying the contours of executive discretion. In those first, precedent-setting years of the federal republic, most administrative uncertainties resulted from either a lack of explicit direction from Congress or the use of ambiguous language in federal revenue laws. Indeed, the most important prerogative power exercised by the Washington administration was the ability to construe federal statutes—a routine task that could have major consequences. If the administration reasonably interpreted federal law, it could simultaneously minimize judicial challenges, avoid Congressional meddling in administrative action, and prevent public dissatisfaction with the administration itself or with its policy agenda. Interpreting federal law required finesse, foresight, and most of all, knowledge of the law.

While interpreting statutory law was the most frequently used—and thus, the most frequently claimed and defended—discretionary power, Hamilton defined and explained other

[19] So intent were New York Anti-Federalists to "grossly misrepresent" presidential power that Hamilton found it necessary to painstakingly describe how the nation's president resembled New York's republican governor more so than he did the British king. Hamilton devoted two essays to dispelling this notion, in *Federalist* Nos. 66 and 67.

executive prerogatives, including the presidential pardon and the administration's statutory discretion to resolve Revolutionary War claims. Sometimes Hamilton made his case in order to address a question arising from internal, administrative circumstances but, just as often, public outcries and opposition-politics challenged Treasury policy and demanded redress from the administration. In response, Hamilton countered abuse-of-power charges by crafting legal arguments to defend the executive prerogative. In this way, the politics surrounding executive action influenced Hamilton's articulation and practice of executive power—before and after the U.S. Constitution was ratified—and therefore, both politics and practical administrative concerns shaped the legal contours of executive discretion.

Even before ratification, Hamilton had a federal magistracy in mind. Dispersed throughout his *Federalist* essays on executive and judicial power, Hamilton described the basic contours of the magisterial relationship: administrators operated with some discretionary authority when executing the law, and judges ensured that governmental action—in this case executive action, rather than legislative output—conformed to the law of the land.[20] While the exercise of administrative and judicial power in a republic would necessarily depart from analogous practices in England's constitutional monarchy, the English magistracy had already informed American administrative and legal practices for over a century and would continue to influence the federal government under the U.S. Constitution.

The English magistrate, or justice of the peace, served at the pleasure of the King and represented royal authority in England's localities. Justices of the peace presided as both judge and local governor of the county for which they were commissioned, and from the fourteenth century (when justices began exercising true judicial powers at Quarter Sessions) until the late-

[20] This formulation of the judge's "judicial duty" was inherited from English common-law judges, and described in Philip Hamburger's *Law and Judicial Duty* (Cambridge, Mass.: Harvard University Press, 2008).

seventeenth century, local magistrates had significant autonomy and little oversight.[21] The justices' administrative authority pertained only to local matters, but their particular powers and duties numbered in the hundreds. Local magistrates' most significant power was the discretion to levy taxes among the local community in order to accomplish local up-keep and other administrative tasks.[22] Because of these formidable taxing powers, justices of the peace could easily reign over their locality as either "a petty tyrant or a benevolent ruler."[23]

English magistrates also possessed judicial authority to hear and determine misdemeanors and some felonies, as well as the power of summary conviction. By the late seventeenth century, however, magistrates' judicial autonomy came increasingly under certiorari review (certifying the record produced in a lower court by a superior court) by the King's Bench. Over time, the King's Bench developed extensive judicial oversight of local magistrates and "had flourishing jurisdiction as a court of review for both summary convictions and orders of quarter sessions relating to such matters as public works, licensing, and the settlement of the poor."[24]

Also, despite the robust administrative and judicial authority exercised by English magistrates, their discretion was, at least in theory, highly circumscribed. Michael Dalton's *Countrey Justice*, a popular handbook for English and American magistrates warned that the "commission of the peace (in it selfe) doth leave little (or nothing) to the discretion of the

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[21] Norma Landau, *The Justices of the Peace*, 6, and J.H. Baker, *An Introduction to English Legal History* (New York: Oxford University Press, 2007), 149.

[22] Michael Dalton's *Countrey Justice*, a thick handbook published in 1619 for local English magistrates and was also widely read in America, indicated just how extensive local, magisterial responsibilities could be. These obligations included administering the poor laws, imposing quarantines during plague outbreaks, organizing and implementing efforts to repair local infrastructure (particularly bridges, roads, and sewers), setting and overseeing weights and measures used in trade, and keeping the peace throughout the county. (Michael Dalton, *Countrey Justice*, Classical English Law Texts (London: Professional Books Limited, 1973), 34-36, 58-64, 79-90, 118-122, 128-135.)

[23] Landau, *The Justices of the Peace*, 22.

[24] Baker, *An Introduction to English Legal History*, 143, 149. The writ of certiorari could not be used to call into question or overturn the magistrates' purely administrative (discretionary) decisions, however, a distinction that the U.S. Supreme Court would later maintain for mandamus actions. Baker described the central courts' use of certiorari: "as with error, the superior court was limited to an examination of the record to ensure that no order or conviction was *ultra vires*. It could not conduct a new trial or act as a court of appeal." (149)

Justices of the P[eace] but doth limit them to proceed *secundu Leges, Consuetudines, Ordinationes, & Statuta*."[25] In other words, the King's commission limited the magistrate's discretion according to the law, customs, ordinances, and statutes of the realm.

Colonial British America relied on the English magistrate model to administer law and justice at the local level. American justices of the peace presided over county criminal courts (Quarter Sessions, or General Sessions), but enjoyed a broader civil jurisdiction than their English counterparts (in Courts of Common Pleas). In some southern and mid-Atlantic colonies, magistrates heard criminal trials for slaves, as well. In America, justices of the peace also retained administrative duties—responsibility for maintaining local infrastructure, administering poor relief, and levying taxes, for example—but the extent and scope of these duties varied across the colonies.[26] As in England, the American magistrate's authority and autonomy decreased throughout the eighteenth century, as the specialized, learned, and more-centralized authority of common-law judges, lawyers, and juries "challenged the hegemony" of local justices of the peace.[27]

Although neither the Framers of the U.S. Constitution nor Congress organized the federal court system to include quarter sessions, courts of common pleas, or justices of the peace, Congress recruited federal judges to serve in administrative capacities. Similarly, Congress also expected federal administrators to exercise some discretionary authority, as spelled out in federal statutes, and authorized the federal courts to inherit the Crown's prerogative writs (like

[25] Dalton, *Countrey Justice,* 18.
[26] Erwin C. Surrency, "The Courts in the American Colonies," *American Journal of Legal History,* 11 (1967): 267-268, and Robert Olwell, " 'Practical Justice:' The Justice of the Peace, the Slave Court, and Local Authority in Mid-Eighteenth-Century South Carolina," in *Money, Trade, and Power: The Evolution of Colonial South Carolina's Plantation Society*, ed. Jack P. Greene, Rosemary Brana-Shute, and Randy J. Sparks (Columbia: University of South Carolina Press, 2001), 256-77.
[27] Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," quote at 569, but see, in general, 555-82.

mandamus and certiorari) to review governmental action.[28] Thus national lawmakers, as well as Alexander Hamilton, retained the English-magistracy mindset, if not its particular institutional arrangements, in the early years of the federal republic. Hamilton would further articulate the details and nurture the relationship between the republican executive and judiciary to encourage and support a federal magistracy.

Hamilton's first steps in devising and implementing a federal magistracy included defining both the Chief Magistrate's prerogative powers under Article II and the nature of republican judicial power under Article III. It was no accident that Hamilton organized his *Federalist* essays with a thorough account of judicial power directly following his eleven articles on executive power. Under Hamilton's exposition, executive and judicial power complemented each other with similar, overlapping authorities and responsibilities: the executive could properly exercise judgment, while the judiciary's effort helped to ensure lawful administrative practices and good government.

Borrowing from the inherited English conception of judicial duty, Hamilton defined the federal judiciary's particular, necessary purpose under the limited federal Constitution as "to declare all acts contrary to the manifest tenor of the Constitution void, " since the "interpretation of the laws is the proper and peculiar province of the courts."[29] The judge's duty to review the constitutionality of Congressional or executive acts ensured that the federal government did not overstep its delegated authority. Furthermore, Hamilton noted that "the judicial magistracy is of vast importance in mitigating the severity" of law, and that the courts served as "the best

[28]See, for example, the Remitting Act, ("An Act to provide for mitigating or remitting the forfeitures and penalties accruing under the revenue laws, in certain cases therein mentioned"), ch. 12, 1 Stat. 122 (1790), and the 1792 Invalid Pension Act ("An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions," ch. 11, 1 Stat. 243 (1792). For federal process acts, see section 13 of the 1789 Judiciary Act ("An Act to establish the Judicial Courts of the United States,") ch. 20, 1 Stat. 73, 81 (1789) and the Process Act ("An Act to regulate Processes in the Courts of the United States"), ch. 21, 1 Stat. 93 (1789). Also see Mashaw, *Creating the Administrative Constitution*, 40-64.
[29] *The Federalist* No, 78.

expedient which can be devised in any government *to secure a steady, upright, and impartial administration of the laws*."[30]

In *Federalist* No. 78, Hamilton also emphasized the judiciary's responsibility to protect and uphold the rights of individuals. He argued that an independent judiciary (that is, one shielded from legislative or executive meddling by a fixed salary and good-behavior tenure) provided "inflexible and uniform adherence to the rights of the constitution and of individuals," which he considered to be "indispensable in the courts of justice." Judges were "an essential safeguard against the effects of occasional ill humours in the society... [that] sometimes extend[ed] no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws."[31] Under Article III, the federal courts would protect individual rights not only through the nature of their judicial office, but through their general appellate power to review the proceedings of other tribunals.[32] U.S. Attorney Charles Lee would later cite Hamilton's explanation of the federal courts' appellate and supervisory powers to justify the U.S. Supreme Court's mandamus authority in *Marbury v. Madison*.[33]

Although he never explicitly described judicial review of executive action in his *Federalist* essays, Hamilton endorsed judicial coextensivity over the executive department in practice. Judicial review of executive action derived from pre-existing Anglo-American legal

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[30] Quote from *Federalist* No. 78 (emphasis added). Judicial discretion thus performed particular, necessary functions in the American republic, allowing the people to maintain their sovereignty. It was not an unlimited discretion, however; judges served during good behavior, but they could be impeached for certain misconduct, and they were always constrained by the law of the land. By judging within the boundaries of written constitutional and statutory law, as well as by the principles of more diffuse bodies of law (like admiralty, common law, or *lex loci*), federal judges had at once a vast, but controlled, power of judgment under the law.

[31] *The Federalist* No. 78.

[32] In *Federalist* No. 81, Hamilton stated: "The word 'appellate' therefore will not be understood in the same sense in New-England as in New-York, which shews the impropriety of a technical interpretation derived from the jurisprudence of any particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision, (in a new government it must depend on the latter) and may be with or without the aid of a jury, as may be judged adviseable."

[33] 5 U.S. (1 Cranch) 137 (1803), to be discussed in Part III, below.

traditions, where the authority to review executive actions existed inherently in the common-law judge's duty and office.[34] Moreover, Hamilton went out of his way to ensure that any administrative discretion exercised under his watch comported with statutory language or common-law principles, indicating that Hamilton assumed that the official expounders of the law—the courts—could review executive actions to ensure conformity with the law. To this end, Hamilton initiated a mandamus suit in 1794, *U.S. v. Hopkins*, to test the Treasury's construction of a federal revenue statute. By denying the writ of mandamus requested by the United States, the U.S. Supreme Court reviewed and affirmed not only the executive' actions, but Hamilton's construction of a state-to-federal debt subscription statute.[35]

Hamilton's depiction of judicial power simultaneously evoked and complemented his description of executive power. Just as the federal judiciary reviewed federal acts to protect individual liberty, to ensure good government, and to oversee the "steady, upright" administration of the law, a sufficiently energetic and well-supported executive magistracy possessed a responsibility to ensure the same. He even used similar language to describe the judicial and executive powers: energy was to Hamilton the most vital, indispensable feature of executive power. Executive energy was "essential. . . *to the steady administration of the laws*" and to the "security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[36] Discretion was essential to the exercise of judicial power, but it was no less so in Hamilton's formulation of executive power; he devoted his most careful exposition of Article II to the executive magistrate's "competent powers"—each an exercise of executive prerogative.

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[34] Hamburger, *Law and Judicial Duty*, 380-383.
[35] See the 1790 Funding Act ("An Act making provision for the Debt of the United States") ch. 34, 1 Stat. 138 (1790). *U.S. v. Hopkins* (1794) went unreported, but can be found in the Minutes of the Supreme Court during February 13-15, 1794. Also, see Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800,* Vol. 6 (New York: Columbia University Press, 1998) 356-63, [hereafter, "*DHSC*"], and the 1790 Funding Act ("An Act making provision for the Debt of the United States") ch. 34, 1 Stat. 138 (1790).
[36] *The Federalist* No. 70.

Each of the "competent powers" comprising executive energy contained some degree of discretionary license. The Constitution's framers modeled the president's veto power—or as Hamilton called it, the "qualified negative"—after the one of the British King's most significant prerogatives.[37] When exercising his veto, the president not only partook in the business of lawmaking, but he had the opportunity to adjudge the propriety and constitutionality of bills before they became law. The president also exercised discretion when appointing federal officers, when presenting Congress with information on the state of the Union, when receiving ambassadors, and when faithfully executing the laws.[38] Undoubtedly a strategic move, Hamilton did not explain in the *Federalist* what the executive prerogative required to faithfully execute the laws. But this discretionary authority—the ability to interpret the meaning or instructions embodied in federal statutes—cut to the heart of practical administrative discretion, and Hamilton would define it frequently during his tenure in the Treasury.

In these essays, Hamilton elaborated on the president's explicit, constitutionally ordained powers. Yet, his arguments implicitly affirmed both that discretionary authority was inherent in the nature of executive power and that the president could not operate above the law. Indeed, the executive was "subordinate to the laws"—including the U.S. Constitution—and Hamilton evidenced this by confining his discussion of presidential power to its relevant constitutional provisions.[39]

Hamilton gave considerable discussion to two prerogative powers, pardoning and treaty-making, that would, in time, be associated with political controversies arising during Washington's tenure in office. Hamilton referred to the president's pardoning power as a "benign prerogative" required by "humanity and good policy," and instituted primarily "for the

[37] *The Federalist* No. 73.
[38] See *Federalist* Nos. 73, 74, 76, and 77 for Hamilton's discussions of these powers.
[39] *The Federalist* No. 71

mitigation of the rigor of the law," especially "in seasons of insurrection." [40] Hamilton was particularly prescient here, as George Washington made shrewd political use of his pardoning power in the aftermath of the 1794 Whiskey Insurrection. After the Pennsylvania Circuit Court tried, convicted, and sentenced insurgents Philip Vigol and John Mitchell to hang, Washington issued stays of execution and then pardons to spare the convicts' lives.[41] Washington strategically employed his pardoning prerogative to demonstrate the fair-mindedness and mercy of the national government after he enforced the legitimacy of federal law.[42] In doing so, Washington substantiated Hamilton's observation that "there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[43] Because this critical period could pass quickly, only the Chief Magistrate—as opposed to the deliberative Congress—had sufficient energy and maneuverability to make a quick decision to pardon.

Hamilton and Washington also confronted a more uncertain, but less politically-sensitive, occasion to use the pardoning prerogative in 1791, but this time the constitutional limits of the presidential pardon came into question. By the terms of the August 1790 Collection Act, customs officials could not land cargo after sunset. On October 7, 1790, Samuel Dodge, a

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[40] *The Federalist* No. 74.

[41] See "Philip Vigol Stay of Execution" (June 16, 1795), *The Papers of George Washington,* Presidential Series, 18: (forthcoming) as well as Washington's stay of execution for John Mitchell in DNA: RG 59, Copies of Presidential Pardons and Remissions, 1794–1893. Washington's pardons for Mitchell and Vigol can be found at DNA: RG 59, Copies of Presidential Pardons and Remissions, 1794–1893.

[42] Washington had no doubt that he, as chief magistrate, had a constitutional duty to prevent western Pennsylvanian tax payers from dodging the federal tax on spirits. In 1792, Washington wrote to Hamilton about a draft presidential proclamation to discourage opposition to the federal excise and affirmed: "When...lenient & temporizing means have been used, and serve only to increase the disorder, longer forbearance would become unjustifiable remissness, and a neglect of that duty which is enjoined to the President. I can have no hesitation, therefore, under this view of the case to adopt such legal measures to check the disorderly opposition which is given to the executive of the Laws laying a duty on distilled spirits, as the Constitution has invested the Executive with; and however painful the measure would be, if the Proclamation should fail to produce the effect desired, ulterior arrangements must be made to support the Laws, & to prevent the prostration of Government." (Washington to Hamilton (September 17, 1792), *PAH,* 12: 391-92.) Washington published the final draft of his proclamation on August 7, 1794 (See "Proclamation," in *PGW,* 16: 531-37).

[43] *The Federalist* No. 74.

customs inspector in New York, landed seven or eight hogsheads of molasses at port in New York Harbor, in violation of the federal customs statute. Dodge was subsequently indicted in federal court in February 1791 for the infraction, but he maintained that he had been ignorant of the after-sunset unlading provision of the statute because it had gone into effect only a few days before Dodge unloaded the molasses. After a grand jury handed down an indictment acknowledging that Dodge acted without fraudulent intent, Dodge pleaded guilty, but asked the court to suspend judgment against him so that he could plead his case to President Washington.[44]

Dodge's petition to Washington raised two legal issues.[45] The first was whether the fines and other penalties for Dodge's customs violation could be excused under a 1790 act to remit and mitigate penalties and forfeitures for customs violations (the Remitting Act), as Dodge claimed.[46] Under the act, Congress bestowed the Treasury Secretary—in this case Hamilton, Dodge's supervisor—with a limited pardoning power; because Congress authorized the Secretary to remit certain revenue-related penalties, Dodge hoped that his boss could relieve him. Secretary Hamilton was skeptical, however, but as he always did when faced with important legal questions, Hamilton consulted his close friend and colleague Richard Harison, the District Attorney for New York. Harison did not think that the 1790 Remitting Act could relieve Dodge—Congress intended the act to mitigate penalties incurred by merchants and ship captains, not Treasury employees—and, as Hamilton noted, the presidential pardon was a more

[44]See George Washington to Edmund Randolph (March 1, 1791), *PGW*, 7:493-95, fn 1, as well as the 1790 Collection Act: "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels," ch. 35, 1 Stat. 145 (1790). The 1790 act went into effect on October 1, 1790 (per section 74).

[45] See Washington to Edmund Randolph (March 1, 1791), *PGW*, 7: 493-95, including footnote 1, which reproduces parts of Dodge's petition. For the entire petition, see Samuel Dodge's petition, dated February 24, 1791, in DNA: RG 59, Miscellaneous Letters, 1790-1799.

[46] 1 Stat. 122 (1790).

appropriate tool for redress.[47] Yet, even the pardoning prerogative raised its own constitutional question.

No one doubted that Washington could pardon Dodge and relieve him of the fines and penalties incurred under the federal statute and owed to the federal government. There was a catch, however; the Collection Act stipulated that one-half of Dodge's fine was to be paid to the informer who had reported Dodge's violation to John Lamb, the federal customs collector in New York. Therefore, Washington could pardon Dodge and forgive him the fine owed to the federal government, as well as reinstate Dodge as inspector, but could the presidential pardon divest the informer of his statutory right to one-half of Dodge's fine?

Hamilton raised the constitutional question to Harison "concerning the extent of the power to pardon," while Washington consulted the U.S. Attorney General Edmund Randolph as well.[48] Randolph's response has not been found, but Harison agreed with Hamilton that the "power to pardon which the Constitution has vested in the President of the United States cannot extend to affect the rights of Individuals."[49] Could the pardon issue at all, then? Yes, but Harison suggested that the pardon be conditional on Dodge's payment of the informant-fee, and possibly the expense of prosecution. He noted that "A Practice somewhat analogous to this, has prevailed in England[.]"[50] In 1792, Washington issued the pardon to Dodge.[51]

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[47] See Hamilton to Harison (March 18 and April 26, 1791), *PAH*, 8:202, 312-14, and Harison to Hamilton (May 24, 1791), *PAH*, 8: 352-52.

[48] Hamilton to Harison (April 26, 1791), *PAH*, 8: 312-14 and Washington to Randolph (March 1, 1791), *PGW*, 7: 493.

[49] Hamilton and Harison both thought that common-law principles governed this question. Hamilton noted that "There is a general rule that a power to pardon cannot be exercised so as to divest Individuals of a right of action for their sole benefit, or of a *vested* right which they have in conjunction with the sovereign; as where there is a penalty part to the use of the Public and part to the use of an informer." Harison agreed that "[t]he principles of the Common Law of England upon this Subject appear to be founded in good sense and I think must govern where-ever they apply." (Hamilton to Harison (April 26, 1791), *PAH*, 8:312 and Harison to Hamilton (May 24, 1791), *PAH*, 8: 352.)

[50] Harison to Hamilton (May 24, 1791), *PAH*, 8: 352-53.

[51] See Nicholas Romayne to Hamilton (April 9, 1792), *PAH*, 11: 257 fn 2.

The Washington administration's handling of Dodge's petition demonstrates how mindful Hamilton and Washington were to ensure that executive discretion conform to existing law. The president's power to pardon derived from Article II of the U.S. Constitution, but the prerogative's particulars had to be carefully delineated from English common-law principles and case-law. Also, Hamilton, Washington, and Harison were particularly concerned about the monetary right vested by law in Dodge's informant, and thus were careful to preserve it. Hamilton and Harison's assumption that executive discretion could not infringe individual rights not only echoed Publius' claims in *Federalist* No. 78, but it presaged Chief Justice John Marshall's similar conclusion in *Marbury v. Madison.*

In his *Federalist* treatment of the presidential prerogative, Hamilton also detailed the executive's treaty-making powers, a discretionary authority unto itself, as the president made the decision to enter into a contract with another sovereign. After the parties involved drew up their agreement, only then would the Senate ratify the contract. Like any other federal law, however, the president would have to interpret existing treaties, and act on his conclusions. This discretionary authority to interpret law and to act accordingly has become an integral part of executive power, and yet it sparked fierce public outcry during the 1793 neutrality crisis. In defense of Washington's Neutrality Proclamation, Alexander Hamilton became the first and foremost expounder of the executive's discretion to interpret the law.

In the first of his four Pacificus essays, Hamilton defended Washington's constitutional authority to issue the Neutrality Proclamation by demonstrating that inherent in the power to execute the law is the necessary authority to interpret it. Hamilton described the executive, "as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the

National Treaties in those cases in which the Judiciary is not competent."[52] Washington sought to faithfully execute his peacetime obligation to the nation (as Congress had not declared war on either the French or the British), and so "in fulfilling that duty, [the executive] *must necessarily possess a right of judging* what is the nature of the obligations which the treaties of the Country impose on the Government."[53] In this case, Washington and his cabinet adjudged that American neutrality did not violate the provisions of the 1778 Franco-American Treaty of Amity and Commerce.

Hamilton's final summation in *Pacificus* No. 1 endures as a strong, definitive statement about the nature of executive power under the U.S. Constitution.[54] But it also had a particular public purpose: the Pacificus essays helped to soothe the political frenzy incited by the Washington administration's neutrality-based approach to Atlantic-world politics. Hamilton concluded his first Pacificus essay by forcefully articulating the discretionary authority inherent in executive power:

> The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. *He who is to execute the laws must first judge for himself of their meaning.* In order to the observance of that conduct. . . it was necessary for the President to judge for himself whether there was any thing in our treaties incompatible with an adherence to neutrality. Having judged that there was not. . . it was [the President's] duty, as Executor of the laws, to proclaim the neutrality of the Nation. . ."[55]

When reflecting on Hamilton's contributions to constitutional law, legal scholar William R. Casto carefully combed through Pacificus's "careful and lucid argument. . . grounded in the a structure and actual words of the Constitution," and concluded: "Simply put, Pacificus No. 1 is

[52] Pacificus No. 1 (June 29, 1793), *PAH*¸15:37.
[53] Ibid., 40. (Emphasis added in second quote).
[54] See Part III, below, and Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail,* 177-91.
[55] Pacificus No. 1 (June 29, 1793), *PAH*, 15: 43. Emphasis added.

one of the best essays ever written on a specific issue of constitutional law."[56] Hamilton successfully argued that the U.S. Constitution authorized the executive's necessary, inherent discretionary authority. While Pacificus developed his masterful exposition of executive power in the face of political opposition, Secretary Hamilton would continue to articulate these arguments under the pressures of maintaining his own administrative policy agenda.

PREROGATIVE IN PRACTICE: DEFENDING ADMINISTRATIVE ACTION

Alexander Hamilton was known to have run a "notoriously tight ship" in the Treasury department.[57] He directed his own remarkable reserves of energy toward overseeing his far-flung employees by circulating departmental memos that kept them uniformly up-to-date and apprised of his directives.[58] Hamilton's close-management style was a natural result of his personality—he loved to be at the center of the action—yet he also had policy and governance goals at stake: restoring and maintaining the public credit, successfully collecting federal taxes, and demonstrating how a strong, centralized national government would help, rather than harm, the constitutional republic. Hamilton realized early on that successful administration could help to accomplish these goals just as readily as his various policy-reports to Congress did.

Just as the Chief Magistrate relied on discretionary authority to act with sufficient vigor, so would the administrative department under Hamilton's direction. Hamilton's employees and colleagues in the Treasury exercised routine, discretionary authority as part of their day-to-day tasks; for instance, the Comptroller's responsibilities were considered by Congress to be quasi-

[56] Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail*, 82.
[57] I borrow Jerry L. Mashaw's apt characterization of Hamilton's administrative style. See Mashaw, *Creating the Administrative Constitution*, 56.
[58] Mashaw observed that in the early republic, "The most impressive contribution to [administrative] lawfulness came...from the system of internal control established by the Treasury." Hamilton began this system—particularly the circular communications—and Oliver Wolcott Jr. and Albert Gallatin continued it to great effect. (*Creating the Administrative Constitution*, 100, 104.)

judicial in nature, and customs collectors had to make valuations and statutory-construction decisions daily.[59] But whenever possible, Hamilton tried to insert himself into the collectors' decision-making processes to limit their interpretive latitude. The Secretary did this to ensure administrative uniformity across the department, but also to be sure that collectively, the Treasury department made smart, well-supported decisions that reflected well on the administration's policy goals.

Hamilton's defense of administrative action can be found throughout his work-related correspondence, including his Revolutionary War claims adjudication reports and his various memos and testimonies dealing with administrative interpretation of federal law. Sometimes Hamilton defended administrative prerogative proactively—that is, Hamilton claimed the authority to make quasi-judicial decisions or statutory interpretations so that he could direct the outcomes of the decisions. At other times, however, Hamilton articulated a defense of administrative prerogative in order to retroactively defend his or his department's actions in the face of political, and sometimes public, controversy. Whether proactively or not, Hamilton always grounded his defense of administrative discretion in law by demonstrating how the administrative decision-making process conformed to well-reasoned rules or common-law principles, by consulting legal counsel to inform and guide Treasury action, or by defending discretionary authority inherent in the nature of executive power.

Hamilton took a proactive approach to adjudicating the Revolutionary War claims pouring into Congress during the first years of the federal republic. Scores of soldiers, merchant-suppliers, and widows applied to the first federal Congress—the first solvent Congress that they had encountered, thanks to Hamilton's assumption and funding plan—requesting pensions,

[59] James Madison considered the comptroller's claims-adjudication function to be partaking of both executive and judicial duties. See *Annals of Congress*, 1st Congress, 1st Session, 636.

restitution for damages, backpay, reissued government securities, and compensation for contracted goods and services.[60] To dispose of each claimant's petition, research would have to be conducted to verify the veracity of the claim (if at all possible) before Congress could ultimately decide whether the claimant deserved payment and if so, how much. This process of adjudicating claims seemed to fit better in a court of law: as a relatively large, deliberative body Congress was bogged down by the time-consuming research, debate, and decision-making responsibilities that accompanied each individual's petitions for compensation. Yet, rather than establishing a court of claims, Congress simply referred most of the petitions to the department heads for consideration. If Congress agreed with the advised dispositions provided by Secretary Hamilton or by Secretary of War Henry Knox, then Congress would appropriate money for the petitioner.[61]

Adjudicating claims provided Hamilton with an opportunity to further his goal of establishing and maintaining the public credit.[62] Adjudicating compensatory petitions oftentimes amounted to weighing the interests of the public against the interests of the petitioners—which typically meant that the public good was better served by rejecting a questionable claim for

[60] The first Congress received hundreds of petitions, which ranged from citizens' unsolicited advisory opinions to Congress regarding policy to protests against slavery. For a summary of the various types of petitions submitted to the First Federal Congress, see William C. diGiacommantonio, "Petitioners and Their Grievances: A View from the First Federal Congress," in Kenneth R. Bowling and Donald R. Kennon, eds., *The House and Senate in the 1790s* (Athens: Ohio University Press, 2002), 29-56. For a brief history of the right to petition in America, see Stephen A. Higginson, "A Short History of the Right to Petition Government for the Redress of Grievances," *The Yale Law Journal*, 96 (1986): 142-166.

[61] The Gilder-Lehrman Institute of American History holds documents relating to Knox's claims-adjudication process. Included are a 1790 statement of facts relating to *U.S. v. George Tyler*, a libel brought by a John Lee, a collector at Penobscot, as well as a letter between Tyler and Knox (Gilder Lehrman Collection #GLC02437.04749 and GLC02437.04748). Also, Gilder-Lehrman holds a 1793 list of Revolutionary War officers' claims under consideration by Knox (#GLC02437.05837).

[62] It also gave the Treasury Secretary an overwhelming workload. After Congress hounded him for an answer to the petition of Arthur Hughes, a merchant seeking compensation for services and supplies provided during the late war, Hamilton could not locate the petition and suspected that he never received it or that it had been lost in a fire. On February 22, 1794, an exasperated Alexander Hamilton wrote to John Adams to complain: "The occupations necessarily and permanently incident to the office are at least sufficient fully to occupy the time and faculties of one man. The burthen is seriously increased by the numerous private cases [petitions], remnants of the late war, which every session are objects of particular reference by the two houses of Congress." (Hamilton to John Adams (February 22, 1794), *PAH*, 16: 47-48.)

money. Hamilton viewed some of the more dubious claims as potential threats to the public credit, and in these cases he reinforced his own statecraft by denying the claim. Since Hamilton's public policy goals could be served by each of his decisions, the Secretary would not want Congress to second-guess and overrule his hundreds of recommendations; therefore, to validate his recommended outcomes, Hamilton ensured that his decisions conformed with reasonable, non-arbitrary rules and pre-existing statutes of limitations. By adopting legal limitations in his adjudications, Hamilton effectively accomplished two things: first, he gave Congress less of a reason to overrule his decisions, and second, he helped to set a precedent for the exercise of administrative discretion.

On August 7, 1790, Congress read and approved a "Report on the Petition of Jacob Rash" as submitted by the Treasury Secretary.[63] Rash had originally petitioned Congress on June 29, requesting duplicates of Continental Loan Office certificates that were destroyed by fire in 1785.[64] Congress submitted the petition to Hamilton and he responded favorably to Rash.

In his report, Hamilton reasoned that many petitioners found themselves in the same predicament as Rash, and justice should be done for them by granting new certificates. However, Hamilton would not re-issue certificates without assurances that the former certificates were actually destroyed (not just floating around somewhere, diluting the marketplace for government securities) and that the petitioner could be confirmed as the legal holder. These two concerns directly engaged Hamilton's larger administrative concerns over restoring and maintaining the public credit. If Hamilton authorized loan certificates to be re-issued without confirming that the originals had been destroyed, then the value of public securities, as well as the public's confidence in the marketplace, would be undermined.

[63] "Report on the Petition of Jacob Rash" (August 5, 1790), *PAH*, 6:543-4.
[64] *Journal of the House*, 1st Congress, June 29, 1790, 253.

Hamilton proposed a solution to help identify the creditors who lost their certificates through a verifiable accident, and applied these guidelines to Rash's petition.[65] On April 21, 1792 Congress received from Hamilton a batched submission of claims also requesting renewals of loan certificates.[66] Hamilton considered each petition on its own merits, but he applied the same rubric to help standardize his decision-making process. He also annexed a copy of his Rash report to remind Congress of his applied principles.[67]

Because Hamilton's judgments had real consequences for the public credit, he set the claimant's burden of proof relatively high to ensure their credibility. For example, Hamilton threw out the petition of Laurana Richardson, who, as the legal representative for her dead husband, claimed that the earth destroyed the certificates when they were buried with her husband.[68] Hamilton did not find Richardson's conjecture to be enough proof for a certificate re-issue. But William Baker had a more credible claim: he gave his certificates to his mother for safekeeping, and while Mother Baker had the certificates in her cupboard, vermin destroyed them. Accompanying Baker's claim was testimony from his mother, a confirmation of the facts

[65] Hamilton's proposed solution created a procedure that if legalized by statute, would help to identify these creditors who lost their certificates through a verifiable accident. First, the renewed certificates could only be re-issued to those who held them at the time the certificates were destroyed; second, the holders must adhere to the common-law practice of presentment, or advertising in newspapers, for set time, the time, place, and means for the destructions of their certificates; third, a copy of the advertisements had to be on file with the state office of the Commissioner of Loans; fourth, the holders would enter into a bond with other freeholders to indemnify the United States against the possibility of the certificates suddenly reappearing as possessions of other holders; finally, no certificates would be renewed until three months after the newspaper advertisements had been published. He concluded the petition with a warning that proving ownership of certificates that had been lost or captured would be so difficult that no remedy could be available. Otherwise these claims would "subject the United States to so much hazard of imposition and injury." (See "Report on the Petition of Jacob Rash" (August 5, 1790), *PAH*, 6:543-4.)
[66] "Report on Sundry Petitions" (April 18, 1792), *PAH*, 11:299-315.
[67] "Report on Sundry Petitions" (April 18, 1792), *PAH*, 11:299. Hamilton told Congress, "The said Secretary, in a report heretofore made to the House of Representative on a petition of Jacob Rash (a copy of which is annexed) has stated his opinion concerning the propriety of renewing Certificates…and concerning the precautions, which ought to accompany relief, in cases, in which it may be deemed proper to grant it."
[68] "Report on Sundry Petitions" (April 18, 1792), No. 7, *PAH*, 11:305.

by a friend, and an advertisement run in the newspapers for the lost certificates. Baker had met Hamilton's general standard of proof, and so the Treasury Secretary recommended a re-issue.[69]

In addition, Hamilton strictly construed and upheld statutes of limitations, and as a result, many petitioners with good, provable claims were barred from relief because the Secretary declined to mitigate the effects of various Acts of Limitations.[70] Hamilton also refused to give preferential treatment or to consider compensating petitioners for depreciation. In 1779, Joseph Bennett received payment in Continental money that he knew to be worth less than the amount of goods he provided to the government. Years later, Bennett sought compensation for the difference between the real value of his goods and the depreciated value of the Continental money which he had accepted at its face value. Yet, when considering his 1792 petition, Secretary Hamilton seemed unsympathetic to Bennett's loss, reasoning that "There is nothing in the Case of the Memorialist to distinguish it from the general Case of the Creditors who made similar Loans to the United States, and of course the Claim does not in the Opinion of the Secretary admit of a distinct treatment."[71] Hamilton did not think it good policy to compensate for depreciation on government accounts and securities, or to distinguish between creditors by favoring some over others.[72]

Claims adjudication gave Hamilton an opportunity to simultaneously exercise rule-bound discretion and to uphold his policy agenda. Of course, Congress could always overrule the Secretary's decision and reconsider the petitioner's claim or refuse to appropriate money for its redress. This rarely happened, however, in part because Congress did not want to look into and

[69] "Report on Sundry Petitions" (April 18, 1792), No. 11, *PAH*, 11:307-308.
[70] "Report on Sundry Petitions" (April 16, 1792), *PAH*, 11:282-288. The Continental Congress passed acts of limitations in 1780, 1785, and 1787.
[71] "Report on the Petition of Joseph Bennett" (February 27, 1794), *PAH*, 16:62-63.
[72] Hamilton avoided the unworkable precedent of compensating for depreciation in his "Report on the Memorial of James Warren" (April 12, 1790). Hamilton stated "That every precedent of an admission of a claim upon that ground [depreciation] beyond the limits now observed at the Treasury, must be more or less dangerous." (*PAH*, 6:362-364).

resolve individual claims (that's why it punted them to Hamilton and Knox in the first place), but also because Hamilton wrote convincing, well-researched and well-reasoned reports on each petition. While immersing himself in the administrative drudgery of claims adjudication, Hamilton set a precedent for how the executive's rule-bound, expedient discretion worked in practice.

When Hamilton was not busy reporting to Congress, he was in constant communication with his employees, and in particular, his customs collectors. The collectors were both the front line and the face of the federal executive authority to Americans engaged in maritime commerce, and as such, they inherently executed the most important administrative prerogative: interpreting the law before executing it.[73] Hamilton knew this, but sought to limit his collectors' desire to interpret and execute federal statues independent of him. The Treasury's customs collectors were headstrong, smart, and personally liable in civil court for their actions, however, and so some collectors resisted Hamilton's authoritative interpretations of federal law.[74] Yet, because

[73] For a closer examination of the relationship between Hamilton (or Wolcott or Gallatin) and his customs collectors, in addition to the legal, political, and local pressures put on the collectors at port, refer to Frederick Dalzell and Gautham Rao's separate work on the relationships among customs collectors, the Treasury Secretary, and merchants in the early republic. See Dalzell's "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *The New England Quarterly* 65 (1992): 355-388; Dalzell, "Taxation with Representation: Federal Revenue in the Early Republic" (Ph.D. diss., Harvard University, 1993); and Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution" (Ph.D. diss., University of Chicago, 2008).

[74] Collectors were individually liable for their decisions and any resulting injuries from them; they were not absolved of liability simply because their superior gave them legal advice or instruction. Hamilton knew this, and understood that collectors would ultimately make decisions to limit their own personal liability. Yet, Hamilton was one of the premiere legal minds in the nation, and when he dispensed legal advice or instructions to his employees, he was helping them to make the best, liability-limiting decisions possible. Not only did Hamilton give advice, but he oftentimes consulted other lawyers to weigh-in and confirm his instructions to the collectors, particularly if he was construing a federal statute. Scholars of administrative law have been keenly interested in collector-liability and the lawsuits arising from their liability; for example, see, in general, Jerry L. Mashaw, *Creating the Administrative Constitution*, and Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

Hamilton demonstrated the legal justification behind his statutory constructions and because he generally gave good advice, most of the time the customs collectors deferred to Hamilton.[75]

But not always. When, in the summer of 1792, Secretary Hamilton sensed that some of his customs collectors had been deviating from his instructions regarding the duty on spikes (fasteners) and fees collected under the Coasting Act, he issued a statement describing the executive department head's superintending power to interpret the law.[76] Concerned that "deliberate deviations from instructions. . . would be subversive of uniformity in the execution of the laws,"[77] Hamilton insisted that because Congress gave the Secretary of the Treasury the responsibility "to superintend the Collection of the Revenue," he had the definitive administrative authority to interpret the laws for the collectors.[78]

Hamilton argued that the "power to superintend must imply a right to judge and direct. . . It is not possible to conceive how an Officer can *superintend* the execution of a law, for the collection of a tax or duty. . . unless he is competent to the interpretation of the law, or in other words, has a right to judge of its meaning."[79] But if superintending meant that Hamilton possessed a prerogative to interpret the laws, he also had the necessary authority to fix statutory meaning for his inferiors: "The power of *superintending* the Collection of the Revenue. . . comprises. . . the right of *settling*, for the government of the Officers employed in the Collection

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[75] Hamilton and his customs collectors seemed to assume, however, that Hamilton's advice would not absolve the administrator from liability if sued in federal court. Consulting Hamilton was, therefore, like getting legal advice before going into court. The federal courts would make this official in *Little v. Barreme* and *Gilchrist v. the Collector at Charleston*, to be discussed below.

[76] "Treasury Department Circular to the Collectors of the Customs" (July 20, 1792), *PAH*, 12:57-62. Regarding the duty on spikes and nails, see: "An Act for laying a Duty on Goods, Wares, and Merchandises imported into the United States," ch.2, 1 Stat. 24 (1789) and "An Act making further provision for the payment of the debts of the United States," ch. 39, 1 Stat. 180 (1790). Regarding the fees under the Coasting Act, see: "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes," ch. 11, 1 Stat. 55 (1789). See "Treasury Department Circular to the Collectors of the Customs" (July 20, 1792), *PAH*, 12:60-62, including footnotes.

[77] "Treasury Department Circular to the Collectors of the Customs" (July 20, 1792), *PAH*, 12:58.

[78] Ibid. Hamilton's quote referred to Section 2 of "An Act to establish the Treasury Department,"ch. 12 1 Stat. 65 (1789).

[79] "Treasury Department Circular to the Collectors of the Customs" (July 20, 1792), *PAH*, 12:59-60.

of the several branches of the Revenue, in all cases of doubt. This right is fairly implied in the force of the terms, 'to superintend,' and is essential to uniformity and system in the execution of the laws."[80]

This discourse was in line with Hamilton's other articulations of executive discretion, as judgment and discretionary authority were inherent in the nature of executive power, particularly for the crucial business of executing the laws. But the supervisory authority that Hamilton derived from the power "to superintend" merely allowed him to request that his inferiors abide by his constructions—at least, that is what the federal courts determined during Jefferson's administration. Hamilton understood, just as his collectors did, that because the collectors were personally liable in court for their actions, individual collectors might follow their own interpretations of their responsibilities and duties under the law. Despite the fact that Hamilton articulated an executive superintending power, neither Hamilton nor his collectors attempted to use the Secretary's superintending authority as a shield against collector liability or as an excuse for the president to exercise his discretion in place of his employees' discretion in court (the Jefferson and Jackson administrations made these arguments, however, but the courts largely rejected them). By circulating memos declaring his authority to interpret the law, Hamilton could only reassert the executive's prerogative and guide his employees, with the hope that, for the sake of administrative uniformity, he convinced each collector to abide by his construction and his legal arguments.

Statutory interpretation caused another internal controversy, this time over the collectors' fee schedule provided under the 27th and 30th sections of the 1789 Coasting Act.[81] Through his multiple customs circulars addressing the Coasting Act, Hamilton clarified the construction of

[80] Ibid., 58.
[81] "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes," ch. 11, 1 Stat. 55, 63 (1789).

various components of the act, but he ultimately could not get his collectors to comply with his interpretation of its problematic fee provisions. The issue turned on how many times the collector could legally collect his sixty-cent fee. Did the collector earn sixty cents after he received the entry of inward cargo and qualified each manifest on board (all considered to be one service, as Hamilton claimed) or did the collector earn sixty cents for receiving the entry of inward cargo, followed by sixty cents earned for each manifest qualified (multiple actions and thus multiple earnings, as the collectors claimed)?

Hamilton clearly wanted his employees to collect their fee only once per inward cargo, after the collector had properly received the cargo and qualified all of the related manifests. He admonished them that, "Uniformity in practice as to the article of fees is particularly desireable. The want of it has already been a source of complaint, and is of a nature to produce both discontent and censure."[82] Moreover, he thought it "an important principle of public policy that allowances to officers should not be extended by implication or inference; as discretion on that head, must from the nature of the thing be liable to great abuses."[83] Hamilton devoted three customs circulars to explaining his construction of the law, the legal principles guiding his reasoning, and the public policy concerns he had. He also relied on his most frequently used statutory-construction strategy: consult other lawyers for their input. The Secretary asked Samuel Jones, New York City's recorder, and the Treasury's informal, outside legal advisor, Richard Harison, for their thoughts on the matter, and they agreed with Hamilton's

[82] "Treasury Department Circular to the Collectors of the Customs" (August 5, 1791), *PAH,* 9:17.
[83] "Treasury Department Circular to the Collectors of the Customs" (November 30, 1789), *PAH,* 5: 575.

interpretation. When Hamilton consulted two Virginians, William Heth and U.S. Attorney General Edmund Randolph, however, they agreed with the collectors' interpretation of the law.[84]

After all of the research, consultations, and informal legal briefs, Hamilton finally conceded that his collectors would not follow his interpretation of the fee schedule. He "rescinded" his instructions, but still maintained that his construction of the Coasting Act's fee provisions were correct. A final brief demonstrated that he genuinely thought that his construction was correct, based in sound legal principles, and perhaps most importantly, the interpretation of the law that would protect his collectors in court. When constructing the fee provisions, along with other problematic sections of the Coasting Act, Hamilton had already reminded his collectors that if contested, their constructions could be "overruled by the Courts."[85] By soliciting legal advice from the nation's top commercial attorneys—which included himself—the Secretary attempted to limit his collectors' liability.

When trying to dissuade his collectors from charging sixty-cent fees per manifest entered, Hamilton noted that already the practice garnered complaints from the public. Public or political outcry was a typical response to the administration's efforts to "faithfully execute the law" by faithfully interpreting the law (as the neutrality controversy demonstrates). Even though Secretary Hamilton tried to be proactive about minimizing controversy surrounding executive construction, he found himself retrospectively defending executive action.

Preliminary controversies that would eventually erupt into the Whiskey Insurrection plagued Hamilton even before Pennsylvanian distillers refused to pay the excise tax. When the offending excise on domestic and foreign distilled spirits first passed Congress in 1791,

[84] See Hamilton to Harison, with Enclosure (November 9, 1789), *PAH*, 5:504-506; Harison and Jones to Hamilton (November 18, 1789), *PAH*, 5: 521-22; Heth to Hamilton (November 20, 1791), *PAH*, 9: 511-13; and Randolph to Hamilton (June 21, 1792), *PAH*, 11:536-41.
[85] "Treasury Department Circular to the Collectors of the Customs" (November 30, 1789), *PAH*, 5: 578.

Hamilton anticipated uncertainties, and attempted to resolve its statutory ambiguities from the start.[86] To this end, he circulated a memo to his customs collectors with an extensive enclosure detailing how the collectors were to construe particular provisions of the law.[87] Despite his best efforts, public protests induced Congress to ask Hamilton to report on the difficulties of executing the law.

In his "Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits," the Secretary described various problems with the law and suggested solutions. One of the first issues addressed, however, was the public's outrage over the collectors' perceived arbitrary discretion including a "summary and discretionary jurisdiction" in the collectors that ran counter to common law and abridged the people's right to jury trials, and a general discretion to search and to seize indiscriminately.[88] Hamilton dismissed the first charge regarding the collectors' summary jurisdiction outright, as "there is nothing in the act even to give colour to a charge of the kind against it." But the collectors' discretion to search and seize did exist, and Hamilton inferred that the real issue was not that "general discretionary power of inspection and search" existed, but that the discretionary authority extended in this case to domiciles and dwellings. Nevertheless, Hamilton defended his collectors' prerogative to search: if the distiller would not separate his place of business from his home, then his home would necessarily be subject to inspection when the collector assessed the undistinguished distillery. He also

[86] "An Act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same," ch. 15, 1 Stat. 199 (1791).
[87] "Treasury Department Circular to the Collectors of the Customs", and "[Enclosure:] Explanations and Instructions Concerning the Act" (May 26, 1791), *PAH*, 8: 365-87.
[88] "Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits" (March 5, 1792), *PAH*, 11: 79.

recommended the practice of marking the distilleries as separate buildings or entrances from the home, so as to avoid as much confusion as possible for the collector.[89]

As noted above, the Whiskey Insurrection would also provide President Washington with the opportunity to exercise his pardoning prerogative. Together, the three instances of executive discretion associated with the tax rebellion—Hamilton's proactive construction of the law, his report defending the collector's exercise of discretionary authority, and Washington's final pardon of the convicted rebels—demonstrate how Hamilton relied on administrative discretion to implement his policy agenda (the tax on distilled spirits was Hamilton's idea in the first place) and how frequently the executive used judgment to interpret and faithfully execute the laws.[90] The prerogative exercised here ranged from behind-the-scenes and mundane, to politically charged and extraordinary. Hamilton considered each to be inherent in the nature of executive power.

Hamilton devoted hours to defending his department's exercise of executive discretion while serving in the Washington administration, and yet, even when he left his cabinet-post, he found it necessary to continue explaining and justifying the administration's prerogative powers. In the fall of 1795, months after he left the Treasury, Hamilton published a signed, open letter defending the Treasury's past and current practice of paying officials' salaries in anticipation of services rendered. President Washington, former Treasury Secretary Hamilton, and current Secretary Oliver Wolcott Jr. had been accused in the press of corruption for paying extra

[89] "Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits" (March 5, 1792), *PAH*, 11: 80-81.
[90] Hamilton proposed a tax on spirits in his first *Report Relative to a Provision for the Support of Public Credit* submitted to Congress on January 14, 1790.

compensation to the President.[91] To Hamilton, this was an attack on the Treasury's necessary discretion to decide when to disburse money that had been legally appropriated.

In his letter, Hamilton argued that appropriations had to be balanced against the availability of Treasury reserves in order to avoid a serious cash-flow problem. The department's head thus needed discretionary authority to disperse appropriated salary payments when Treasury reserves could support them—even if the salary paid out was in advance of work done for that pay-period. "The business of administration requires accommodation," Hamilton reminded his audience, and this accommodation was the Secretary's discretionary authority to release salary payments when he thought the Treasury could best support and manage inflows and outflows of cash.

Hamilton denied that the Treasury violated the terms of the president's compensation statute with this construction, and went on for pages with a record of warrants attached, to prove his point.[92] But he also had more to say on the exercise of executive discretion. Noting that a "discretion of this sort in the head of the department can at least involve no embarrassment to the Treasury," he claimed that it was non-arbitrary, partly because the Secretary had been careful to act with an "eye to the public interest and safety," but also because he could be dismissed and punished for true misconduct. Moreover, he explained that this was an "example of a discretion to do what there is not a right to demand [by the president, or other officials]. The existence of

[91] Hamilton responded to the criticism of "A Calm Observer," written to the editor of Philadelphia's *Aurora General Advertiser* on October 23, 1795. See Hamilton's "Explanation" (November 11, 1795), *PAH*, 19: 426, fn 1.
[92] See "Explanation" (November 11, 1795), *PAH*, 19: 410-11 and "An Act for allowing a Compensation to the President and Vice President of the United States," ch. 19, 1 *Stat.* 72 (1789). Hamilton stated: "I trust, the construction of the Treasury as to the power of making disbursements in anticipation of services and supplies, if there has been a previous appropriation by law for the object, and if the advances never exceed the amount appropriated; and at the same time evince that this practice involves no violation of the constit[ut]ional provision with respect to appropriations." (410)

this discretion can do no harm, because the head of the Treasury will judge whether the state of it permits the required advances."[93]

So exasperated was Hamilton to have to defend reasonable, non-arbitrary, *necessary* Treasury practices that he took a moment to indulge in self-pity: "Preeminently Hard in such circumstances, was the lot of the man who[,] called to the head of the most arduous department in the public administration, in a new Government, without the guides of antecedent practice & precedent, had to trace out his own path and to adjust for himself the import and bearings of delicate and important provisions in the constitution & in the law!"[94] Yet behind his dramatic tone, Hamilton neatly summarized what made his five years as Treasury Secretary so extraordinary. Without precedent to guide him, Hamilton was forced to "trace out his own path" in order to figure out how to interpret and execute statutory law within the untried bounds of the new Constitution. As a department head, Hamilton learned to improvise daily, and he relied heavily on the executive's inherent discretionary authority to allow him the freedom to maneuver, reason, and adapt accordingly.

The necessity of executive discretion prompted Hamilton's repeated defense of it: without prerogative license, and without the ability to accommodate vague statutory language or practical, administrative problems, the federal executive would be ineffective and inadequate. Hamilton would not tolerate an inept executive—not when he labored for so long to create the energetic executive magistrate—but neither, it turned out, would the federal courts. In the years after Hamilton left office, the Marshall and Taney Courts would consider, accept, reject, and expand on Hamiltonian administrative practices, and in doing so, the federal courts sustained and elaborated on the federal magistracy.

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[93] "Explanation" (November 11, 1795), *PAH*, 19: 408-09.
[94] Ibid., 423.

PUBLIUS MEETS PACIFICUS: THE FEDERAL MAGISTRACY IN THE FEDERAL COURTS

Hamilton's tenure in the Treasury was a testament to the benefits of executive discretion, as expert use of the executive prerogative helped him to accomplish his favored policy goals. These achievements included Washington wielding his presidential pardon to quell domestic rebellion, and Hamilton using discretionary license to endorse revenue-generating taxes, to manage Treasury cash flow, and to adjudicate monetary claims in order to preserve the nation's purse. While presiding over his Treasury administration, Hamilton also articulated legal arguments about the propriety of executive discretion, and how this power would manifest itself in practice. These arguments included multiple justifications for the administration's inherent discretion to interpret the laws in order to execute them, an explanation for limiting executive discretion when it infringed on individual rights, and a claim for an intra-administration superintending power to interpret federal statutes for lower-level officials. Once Hamilton left office, however, the federal courts took up this task of elaborating the contours of the federal magistracy, and they did so amidst a changing political climate marked by interdepartmental clashes.

Hamilton lived just long enough to witness his ideological opponents challenge the federal court's authority to review executive action. Once in power, President Thomas Jefferson, Treasury Secretary Albert Gallatin, and other Jeffersonian-Republican jurists advocated for robust executive prerogatives, but they did so by denying that the federal courts had any authority to limit executive discretion. To justify these claims, the Jefferson and Jackson administrations relied implicitly and explicitly on Hamiltonian arguments. And so, just by adopting the language and practice of a strong, discretionary executive, Jeffersonian and Jacksonian jurists ensured that Alexander Hamilton's model of the energetic executive became

the norm for presidential and administrative practice. Yet at the same time, this political re-purposing of Hamiltonian arguments forced the judiciary and the executive to clarify and further refine their constitutional relationship.

The introduction of ideological opposition dividing the national government into discrete departments raised questions about the federal magistracy that Hamilton had neither answered nor anticipated. While he expected judicial review of executive action (including mandamus review), he never had to clarify where, exactly, to delimit executive prerogatives and judicial review if the president or his administrators contested court oversight. Opposition politics soon made these distinctions imperative, however, and it was thus left to the courts to continue defining the limits of executive and judicial discretion.

Beginning with *Marbury v. Madison*, John Marshall inscribed the components of Hamilton's magistracy into the federal government's nascent administrative jurisprudence, but further elaborated on executive discretion by classifying it as either "ministerial" or political (discretionary) in nature. If the executive action under review was ministerial, then the courts had complete authority to limit or command the executive to act in a judicially prescribed way. Marshall's ministerial distinction provided a sturdy legal rule to balance Hamilton's energetic executive against the court's review powers, should they collide. While in *Marbury*, the Court carved out and preserved a political-act category—a prerogative sphere—for executive discretion to thrive, untouched by the Court, a year later it rejected a revived version of Hamilton's superintending power in *Little v. Barreme.*[95]

The federal circuit courts soon followed Marshall's lead. In *Gilchrist v. the Collector of Charleston*, the federal Circuit Court for the District of South Carolina affirmed its mandamus-review authority over the class of discretionary powers delegated to the executive department by

[95] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

Congress, while it simultaneously denied the President's and Treasury Secretary's asserted superintending powers. Rather than rely on Marshall's ministerial distinction, the court strictly construed the statutory language that granted the inferior administrator his discretion. The U.S. Attorney General protested the decision, however, arguing that only the president, and not the federal courts, had the authority to limit or command the executive official's decisions. Eventually, in *Kendall v. U.S. ex. rel. Stokes,* the Taney Court re-affirmed and adopted the four legal rules articulated by these earlier decisions, including mandamus review, the ministerial distinction, the rejection of an intra-administration superintending power, and the strict construction of the executive's statutory discretion. In doing so, the Taney Court emphasized the Hamiltonian claim that discretion was necessary and inherent in the exercise of executive power, but that it must also conform to law and judicial review.[96]

When incoming Secretary of State James Madison refused to deliver justice of the peace commissions signed by the outgoing President Adams, William Marbury (along with four other would-be magistrates) asked the Court to issue a writ of mandamus commanding Madison to deliver the signed commissions. The Court ultimately determined that, while Marbury had legal title to the office and thus had a legal remedy available to him, the Court could not grant the mandamus because, in this particular case, it lacked jurisdiction. Marbury was out of luck.[97]

Despite the Court's jurisdictional limitations, Chief Justice Marshall still wrote an opinion for a unanimous Court, offering dicta that would become the judicial touchstone for

[96] Gilchrist et. al. v. Collector of Charleston, 10 F. Cas. 355 (C.C.D. S.C., 1808) and Kendall v. U.S. ex. rel. Stokes et. al., 37 U.S. (12 Pet.) 524 (1838).

[97] Marshall reasoned that section 13 of the 1789 Judiciary Act, which gave the Court authority to issue the writ, violated the U.S. Constitution. Article III granted the U.S. Supreme Court original jurisdiction in only certain, enumerated cases; however, section 13 of the Judicial Act violated Article III by granting the Court original jurisdiction to hear mandamus actions.

presidential and administrative litigation in the early-national period.[98] Although the Chief Justice did not explicitly refer to Hamilton in his opinion, it was the Hamiltonian magistracy that Marshall described, upheld, and adapted for a federal government divided along party lines.

When Marshall commented on the nature of executive and judicial power—which had collided in *Marbury*—he deferred to the executive's unquestioned prerogative powers to nominate and appoint officials to federal offices. When the executive had discretionary authority, "whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists, and can exist, no power to control that discretion. . . being entrusted to the executive, the decision of the executive is conclusive."[99] Marshall wholly acknowledged the legitimacy and finality of executive discretionary authority. But, echoing Hamilton's careful consideration of the presidential pardon and Samuel Dodge's informant-fee, Marshall also affirmed that the executive "cannot at his discretion sport away the vested rights of others."[100] Therefore, the Court determined that the president's appointment prerogative had ended, and Marbury's right to the office had vested, once the commission had been signed, sealed, and ordered to be recorded. The plaintiffs thus possessed legal title to their offices.

Marshall articulated two important dimensions of executive discretion that conformed to Hamilton's conception of executive power. First, where discretion was explicitly granted to the executive (like the pardoning or appointment powers), the executive had complete authority to judge when and how to wield these prerogatives. Second, because executive prerogatives were either explicitly or implicitly conferred by law, the judiciary was naturally authorized to ensure

[98] Thomas W. Merrill argues that *Marbury* should be considered today, as nineteenth-century jurists thought of it: as a guide for limiting or allowing executive actions, as opposed to a check on congressional legislation. See "*Marbury v. Madison* as the First Great Administrative Decision," *The John Marshall Law Review* 37 (2004): 481-522.
[99] 5 U.S. (1 Cranch) 137, 166 (1803).
[100] Ibid.

that executive discretion remain within it proper bounds. Marshall's distinction is slight, but important: the Court may not "enquire how the executive, or executive officers, perform duties in which they have a discretion," but where that discretion ends, or "where he is directed by law to do a certain act affecting the absolute rights of individuals," then the Court can step in to review the executive's action and to command him to act.[101]

In this case, former President Adams exercised his proper presidential prerogative to nominate and appoint justices of the peace, and so the Court could not review his decisions. However, Secretary Madison had no discretionary authority to deny Marbury his commission since the executive's legal window for exercising his appointment prerogative had closed (the legal boundary was, according to the Court, after the commission was signed, sealed, and ordered to be recorded). Where the executive's prerogative ended, the individual's vested right began.

Chief Justice Marshall thus adopted both components of Hamilton's federal-magistracy model. He acknowledged that executive magistrates necessarily exercise discretion, but that discretion had finite legal contours; in addition, Marshall upheld the idea, as articulated by Hamilton in *Federalist* No. 78, that the judiciary's particular constitutional duty was to protect individual rights. To this end, Marshall distinguished between the magistrate's "ministerial" and discretionary duties to use as a handy rule to guide the Court and future administrations: "It is a ministerial act which the law enjoins on a particular officer for a particular purpose."[102] If executing a ministerial duty, the executive possessed no prerogative authority and thus the courts could command him to act. Yet, if the executive performed a legitimately discretionary duty,

[101] Ibid., 170, 171. Marshall repeated to clarify, "Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."
[102] Ibid., 158.

then, so long as he did so within the limits of his prerogative (for example, acting without violating an individual's right), the court could not review his decision or circumscribe his prerogative. The ministerial distinction provided a legal guideline to allow the Court to compartmentalize and navigate the overlapping exercise of judicial responsibility and executive prerogatives.[103]

Marshall was not the only jurist involved in *Marbury* to endorse Hamilton's conception of magisterial authority. During oral argument, former U.S. Attorney General Charles Lee, attorney for the plaintiffs, quoted from three of Hamilton's *Federalist* essays on judicial power in order to argue for the judiciary's right to give legal remedy to his slighted clients.[104] Lee broadly construed Hamilton's arguments about the Supreme Court's appellate authority to implicitly justify its exercise of mandamus review. Also, Lee cited Publius in order to persuade the court that Madison's denial of the commissions compromised the independence of the federal judiciary, as well as Marbury's rights. Lee referred to *Federalist* essays Nos. 78, 79, and 81 to convince the Court that it had a duty "to maintain the rights of [his clients'] office" as well as to maintain the integrity of an independent judiciary.[105] Moreover, since Hamilton initiated a mandamus suit in the U.S. Supreme Court during his Treasury tenure, Lee cited the case, *U.S. v. Hopkins*, as precedent for the Court's jurisdiction in William Marbury's mandamus action.[106]

Although Marshall's adoption of the federal-magistracy model in *Marbury* occurred only through dicta, his opinion formalized the fundamental components of the Hamiltonian magistracy into a reported judicial opinion. *Marbury* also initiated a new phase in development

[103] What I call the "ministerial distinction" comports with what Thomas W. Merrill identified as Marshall's "two tier standard of review" for executive actions that originated in *Marbury* and lives on in modern constitutional decisions like *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* (467 U.S. 837 (1984)). See ""*Marbury v. Madison* as the First Great Administrative Decision," 498-99.
[104] Ibid., 146-152. Lee cited *Federalist* Nos. 78, 79, 81.
[105] Ibid. 152.
[106] U.S. v. Hopkins (1794) and Marbury v. Madison, 5 U.S. 137, 149 (1803). There is no indication that Hamilton found the Supreme Court's jurisdiction lacking or complicated when he brought *Hopkins* before the 1794 bench.

of American administrative law: the case marked the moment when the federal courts began refining the details of the executive-judicial relationship and sorting out where, exactly, the executive's discretion ended and the judiciary's oversight began. By establishing legal rules for limiting executive discretion, *Marbury* became the pivotal precedent for Federalist, Jeffersonian, and Jacksonian lawyers to use when arguing about the proper contours of the federal magistracy.

A year after *Marbury*, the Marshall Court adjudged *Little v. Barreme*, a civil lawsuit that raised questions about discretionary authority exercised within the administration's hierarchy. In a 1799 non-intercourse statute, Congress authorized the seizure on the high seas of United States vessels bound for any port or place in the French Republic. The act did not authorize the seizure of vessels sailing *from* the French Republic, nor did it allow the capture of non-American vessels.[107] In December 1799, the U.S. frigate *Boston*, led by Captain Little, seized a neutral Danish vessel leaving Jeremie, a French port, to Danish St. Thomas. Little then libeled the vessel, the *Flying Fish*, as an American ship violating the 1799 act.

As measured by the statute's provisions, Little blatantly violated his mandate, first by capturing a Danish vessel instead of an American vessel, and second by seizing a vessel headed *from*, rather than headed *to*, a French port. Based on these acts, Little seemed clearly liable for damages against Barreme, presumably the owner of the vessel. But there was one complication that could release Little from liability: President Adams had instructed the captain to act as he did.

In 1799, Adams issued instructions to his merchant marine that badly misconstrued the provisions of the 1799 act.[108] He told his captains to capture vessels headed to and *from* French

[107] "An Act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof," ch. 2, 1 Stat. 613 (1799).

[108] The fifth section of the 1799 act authorized the President to instruct the armed merchant marine "to stop and examine any ship or vessel of the United States on the high sea which there may be reason to suspect to be engaged

ports, which directly violated the terms of the statute. Moreover, the president implied that seemingly "Danish" vessels were particular targets for seizure because they so often were American vessels sailing under false papers. Captain Little so deliberately defied the terms of the 1799 act because he acted under orders from his administrative superior. And so the key question for the Court became: did Adams's instructions absolve Little from liability?

The Marshall Court thought not, and held Little liable for the damages incurred by Barreme after the mistaken seizure. Writing the opinion for the Court, Marshall pointed out that the statute did not authorize seizures heading *from* a French port, nor did it give the president any power to authorize them; therefore, Adams had badly misconstrued the law. While Marshall sympathized with the obedient Little for acting on his superior's erroneous instructions, it ultimately did not release the captain from liability for superseding his statutory authority. The Chief Justice decreed that the "instructions cannot change the nature of the transaction or legalize an act which without those instructions would have been a plain trespass."[109] Therefore, the Court would hold those administrators vested with statutory authority responsible for construing the law for themselves.[110]

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in any traffic or commerce contrary to the true tenor" of the law (1 Stat. 615). If the suspicious vessel was headed *to* the French Republic, then it could be seized and libeled at port. President Adams subsequently issued instructions to the merchant marine that outright ignored the statute's precise permission for making seizures. Adams instructed his merchant marine that the act "will require the exercise of a sound and impartial judgment," and that they were to "do all that in you lies to prevent all intercourse...between the ports of the United States and those of France and her dependencies..." (Note how Adams ignored the statute's specific rule that seized vessels be travelling *to* French ports.) His instructions continued, "...in cases where the vessels or cargoes are apparently, as well as really, American...but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound *to or from* French ports do not escape you." (Little v. Barreme, 6 U.S. (2 Cranch) 170, 171, 172 (1804).)

[109] Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

[110] This put administrators in an unenviable position. Under the *Little* decision, executive administrators had to be legal experts—construing the law accurately so as to avoid liability—all the while knowing their decisions made to prevent legal liability might not please their bosses. Hamilton's practice of conveying legal advice could still aid administrators, however, as any legal advice helped them to make their decisions (even if the executive's instructions or advice did not absolve the administrator from culpability).

Although the Marshall Court never mentioned Hamilton or Treasury practice in its opinion, by refusing to allow an administrative superior's instructions to substitute for an inferior's statutorily-conferred judgment, Marshall implicitly rejected Hamilton's notion of an executive superintending power. Moreover, the Court also demonstrated that it would strictly construe executive discretion conferred by Congress. These principles became re-occurring themes in administrative law, and only a few years later, the federal courts would reiterate them during another politically contentious mandamus action.

Gilchrist et al. v. the Collector of Charleston, or the Case of *the Resource*, reprised the themes of *Little v. Barreme* and sparked a politically charged debate between Federalist courts and the Jefferson administration about the limits of executive discretion and judicial oversight. The case arose when Robert Gilchrist, owner of the *Resource*, brought a mandamus action against Simon Theus, collector at Charleston, asking the South Carolina Circuit Court to command Theus to release his vessel detained under the 1807 Embargo Act.[111]

In his opinion for the court, Associate Justice William Johnson stated that under the act, the "granting of clearances is left absolutely to the discretion of the collector" and this right remained "in him unimpaired and unrestricted" as long as the collector suspected that the vessel had violated or was attempting to evade the embargo.[112] In other words, the collector's discretion was proper and binding, but only within the limited parameters spelled out by Congress; the collector did not have the authority to detain vessels for reasons unrelated to those specified in federal customs law. Furthermore, contrary to Theus's claims, Johnson determined that only the collector wielded a prerogative power; the statute did not grant discretionary

[111] "An Act laying an Embargo on all ships and vessels in the ports and harbors of the United States," ch. 5, 2 Stat. 451 (1807). Gautham Rao discussed the political context of the *Gilchrist* case in "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution," 337-38 (Ph.D. diss., University of Chicago, 2008).
[112] Gilchrist et. al. v. Collector of Charleston, 10 F. Cas. 355, 356 (C.C.D. S.C., 1808).

authority for detaining vessels to Treasury Secretary Gallatin or to President Jefferson (nevertheless, Jefferson, acting through Gallatin, had advised Theus to detain the *Resource*). In consequence of these findings, the court granted the mandamus, and ordered the collector to issue clearance for the *Resource* to depart Charleston.

Whether or not Theus intentionally targeted the Federalist merchant Gilchrist for detention, the case took on an overtly political dimension when U.S. Attorney General Caesar A. Rodney published an open letter critiquing the circuit court's decision. In it, Rodney relied on *Marbury's* jurisdictional demurrer to deny that the circuit court had authority to issue the mandamus.[113] Moreover, Rodney defended those Hamiltonian administrative practices that Jefferson and Gallatin had continued since taking office. Both the President and Treasury Secretary attempted to preserve Hamilton's suggested superintending hierarchy, whereby upper-level administrators directed the decisions of lower officials to ensure best practices as well as conformity to policy. The Attorney General thus argued that the circuit court violated the discretionary authority of both the collector and the president by granting the mandamus; Rodney insisted that the Embargo Act allowed the collector to detain vessels until he could consult the president, and therefore the "Chief Magistrate" had a supervisory authority (a "controlling power," derived from his authority to faithfully execute the laws) over the collector's decision to detain *The Resource*.[114]

Like *Little v. Barreme*, *Gilchrist* revolved around how much discretionary authority attached when Congress conferred administrative discretion through statute. But unlike *Little,* the courts in *Gilchrist* were not reviewing the administrator's liability on the backend, after he had finished executing the law; rather, the *Gilchrist* court purported to command the

[113] Rodney noted that if the U.S. Supreme Court denied itself jurisdiction for an original jurisdiction mandamus suit, then the Circuit Court for the District of South Carolina should as well. (Ibid., 357.)
[114] Ibid., 358.

administrator to act while he was still engaged in executing the law. In order to refute the federal court's authority to oversee the collector's actions, the Jefferson administration claimed that it possessed a Hamiltonian superintending power that excluded judicial oversight. To this end, Rodney argued that since Congress gave discretion to the collector, the court did not have any authority to review the collector's act in mid-execution; instead, Collector Theus was only responsible to his bosses, Jefferson and Gallatin, and they, rather than the courts, would decide whether Theus's actions faithfully executed the law.

In his open letter, Rodney articulated a modified, compartmentalized relationship between the executive and the judiciary. He observed that there did not "appear in the constitution of the United States any thing which favours an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department," and suggested that there were two ways to proceed, one acceptable under the Constitution and one not. Rodney thought that judicial intervention to retrospectively redress a wrong committed by an executive officer was proper (that is, non-mandamus litigation to determine executive civil liability), but "an interposition by a mandatory writ, taking the executive authority out of the hands of the president, and prescribing the course, which he and the agents of any department must pursue" was not. The difference was that "[i]n one case the executive is left free to act in his proper sphere, but is held to strict responsibility; in the other all responsibility is taken away, and he acts agreeable to judicial mandate."[115] Whereas Hamilton and Marshall considered mandamus review to be appropriate, Rodney thought that such an intervention would violate the

[115] Ibid., 358-59.

"proper sphere" of executive and judicial power. In making these claims, Rodney faithfully articulated the theory of "co-equal" department first pronounced by Jefferson.[116]

In response, Justice Johnston published remarks of his own. He denied Rodney's claims to an intra-administration superintending power and affirmed the court's mandamus review. In addition, Johnson forcefully contested Rodney's "proper sphere" approach to delimiting executive and judicial power.[117] To him, the matter was simple: Congressionally-delegated executive discretion went only so far as the law explicitly allowed, and the court, as the constitutional organ responsible for declaring the law, could strictly police it. In *Gilchrist*, the Embargo Act gave discretionary authority to the collector only, according to Justice Johnson, and so only the collector could wield this discretion when he was suspicious of the vessel's intentions to evade the embargo. Since Collector Theus admitted that he was not suspicious of Gilchrist's intentions, but detained *The Resource* anyway, Theus violated the boundaries of his statutorily conferred prerogative powers. Therefore, because the collector transcended the bounds of his statutory discretion, the judiciary did not infringe on the executive's authority when it commanded the collector to give clearance to *The Resource* to leave Charleston.[118]

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[116] Jefferson articulated the idea that the president held a coequal power with the federal courts to engage in constitutional review in a September 11, 1804 letter to Abigail Adams and in a September 28, 1820 letter to William Charles Jarvis. (See Paul Leicester Ford, ed., *The Writings of Thomas Jefferson*, vols. 8 and 10 (New York: G. P. Putnam's Sons, 1897 and 1899), 8: 311, fn. 1 and 10: 160-61.) Also, see Calabresi and Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*, 69-70.

[117] According to Johnson, Rodney misunderstood the jurisdictional component of *Marbury*; the case did not preclude the federal courts from issuing mandamus writs as outside the scope of Article III powers. To the contrary, Johnson said, *Marbury* restricted mandamus writs to exercises of its appellate jurisdiction only. Furthermore, he thought that the 1789 Process Act implicitly conferred on the federal courts the authority to issue the writ of mandamus. (Gilchrist et. al. v. Collector of Charleston, 10 F. Cas. 355, 362-63 (C.C.D. S.C., 1808).)

[118] "The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States. Of these laws the courts are the constitutional expositor; and every department of government must submit to their exposition..." He further explained, "The courts of the United States never have laid claim to a controlling power over officers vested by law with an absolute discretion, not inconsistent with the constitution; for in such a case, the officer is himself the paramount judge and arbiter of his own actions." (Ibid., 364, 365.)

The legal debate incited by *Gilchrist* simultaneously confirmed, rejected, and expanded upon Hamilton's formulation of the federal magistracy. By using *Marbury* as the key precedent informing *Gilchrist*, both the Circuit Court and Attorney General Rodney accepted Hamiltonian premises about discretionary authority as a necessary component of executive power. Disagreement arose over the scope of judicial review of executive action, however. Hamilton, Marshall, and Johnson endorsed mandamus review of executive action, against the arguments offered (again) by the Jefferson administration. Also, Hamilton understood executive and judicial power to be overlapping and complementary, and would have found it to be both difficult and undesirable to separate them into Rodney's distinct "spheres."

Rodney, in contrast, sought to limit the court's mandamus-review powers and instead, to take advantage of Marshall's ministerial/political distinction in order to free the executive's prerogatives from judicial limitation. The Jefferson administration assumed an administrative hierarchy whereby the president and his department heads exercised a superintending power over their employees, whether or not statutory language specifically granted them that power. The courts, however, rejected this superintending claim and asserted its own authority instead: when administrative discretion derived from statute, the courts would strictly construe the law's provisions and police executive action. *Gilchrist* did not settle the matter for the administration, however, and in its aftermath, the debate over the contours of the magisterial relationship continued under Andrew Jackson.

Jackson's administration made the grandest claims yet about executive discretion and the federal courts' limited ability to review it. The resulting Supreme Court contest, *Kendall v. The United States, on the Relation of William B. Stokes et al.*, gave the Taney Court the opportunity to re-affirm its mandamus-review authority and the Marshall Court's ministerial rule, as well as

to revisit judicial review of statutory executive discretion.[119] The *Kendall* litigation originated in executive noncompliance: Jackson's Postmaster General, Amos Kendall, refused to comply with an 1836 special act passed by Congress directing him to pay disputed monies owed to four contractors who had transported U.S. mail. Kendall's predecessor had approved payment to the creditors, but Kendall subsequently re-examined and denied the allowances and credits granted. When Stokes and three other contractors complained, Congress passed an act, which Jackson signed, for their relief. Under the terms of the act, the solicitor of the Treasury would calculate the balance due to the petitioners, and submit the bill to the Postmaster for payment. However, after the solicitor calculated and submitted to Kendall the amount due (the creditors' award totaled over $162,000 owed), the Postmaster General authorized payment for only $122,101.46. Kendall thus intentionally denied payment of $39,462.43 to the contractors (and President Jackson apparently approved). As a result, the deprived creditors brought a mandamus action to the Circuit Court for the District of Columbia and the judges ordered Kendall to fully comply with the terms of the 1836 act; Kendall then asked the U.S. Supreme Court to reverse the circuit court's decision on a writ of error.

The special act did not delegate any discretionary authority to Kendall (only the solicitor had judgment to determine the amount owed to Stokes), but the lawyers for Kendall nevertheless argued that the executive's discretionary authority inherently existed whenever he read, interpreted, and executed the laws. Kendall's lawyers, Francis Scott Key and U.S. Attorney General Benjamin F. Butler, resurrected Pacificus's arguments to make these claims, although they applied Hamilton's reasoning in a way that the former Treasury Secretary would have disputed. Key and Butler claimed that the President Jackson's inherent discretionary authority—which he conferred on Kendall through his approval of the postmaster's noncompliance—was

[119] Kendall v. U.S. ex. rel. Stokes et. al., 37 U.S. (12 Pet.) 524 (1838).

beyond the Court's authority to review. Key declared that "Not only is it the President's duty to see how the laws are executed: he is invested with discretion as to when they are to be executed." And on what authority did the executive have such discretionary license? "One of the political powers or duties of the President, as given by the constitution, is to see that the laws are faithfully executed; and both the late Chief Justice [Marshall]. . . and Mr. Hamilton. . . in the letters of Pacificus[,] say, that he must ascertain what the law means; must judge of it for himself."[120] Because the executive possessed a discretionary authority inherent in his duty to execute the laws, Butler claimed that the judiciary had no power "to interfere in advance, and to instruct the executive officer how to act for the benefit of an individual."[121]

Butler's arguments echoed those of former Attorney General Caesar Rodney. He cited an assortment of Hamilton's *Federalist* essays on executive power in order to make the point that, since the Constitution vested the entire executive power in the president (an arrangement that both Hamilton and Madison vindicated), then only the president could be constitutionally responsible for reviewing the acts of his administrators "in advance."[122] Faced with these formidable authorities, Richard S. Coxe, for the defendants-in-error, could only reply that the proposition "for the first time distinctly advanced by General Hamilton, in his Letters of Pacificus" made the executive authority into an unchecked power, commensurate with that of a "king, czar, emperor, or dictator." Therefore, according to Coxe, the Court should regard Hamilton as "A great and revered authority, but subject to occasional error."[123]

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[120] Ibid., 544. Key cited Marshall's arguments in the case of Jonathan Robbins as well as in *Marbury*. Key made the distinction that when the public has no direct interest in the laws being executed—like where only individual rights are concerned—then the President exercises political discretion that the court does not review. For all others, "laws which affect the public," they "are political; and the execution of those laws, their faithful execution, as he thinks they ought to be executive, the President must see to. And such are all the cases given in that opinion, as illustrations of executive acts, wherein the control belongs to the President." (544)
[121] Ibid., 600.
[122] Ibid.
[123] Ibid, 572.

Kendall's attorneys made bold claims about executive power. They also used Hamiltonian arguments to make Jeffersonian claims about the co-equal and co-sovereign executive and judicial departments. Butler and Key pushed the logic of Hamilton's Pacificus arguments to the extreme, claiming that so important was the executive's inherent discretionary authority to faithfully execute the laws that the courts could neither review nor interfere with his ability to exercise discretion.[124] They adopted a Hamilton-like superintending argument as well, and claimed that only the heads of the administration, and not the courts, could determine whether or not subordinate officials were faithfully executing the law (Hamilton would have denied this). The Jacksonian jurists thus denied Hamilton's magisterial relationship, but still embraced the first Treasury Secretary's robust conception of executive power.

The Taney Court rejected their claims, however, and re-affirmed the components of the federal magistracy, beginning with the Court's authority to review Kendall's actions. Writing for the majority, Associate Justice Smith Thompson confirmed that "Under this law the postmaster general is vested with no discretion or control over the decisions of the solicitor," rendering his duty a ministerial one. Therefore, as Marshall had determined before him, the federal courts could review the executive's non-compliance and command him to act.

Thompson also denied that "the postmaster general was alone subject to the discretion and control of the President, with respect to the execution of the duty imposed upon him by law," because to allow the president to claim this sort of unchecked, superintending discretionary authority "would be vesting in the President a dispensing power, which has no countenance for

[124] Note, however, that no one in *Kendall*, *Gilchrist*, or *Marbury* ever suggested that the court could not review executive criminal or civil liability in separate, non-mandamus litigation, after the executive had definitely acted. The Jeffersonian and Jacksonian administrations objected, in these cases, to the Court's "in advance" mandamus review of executive action, while the executive was in the process of executing the law.

its support in any part of the constitution."[125] To this end, he repudiated Kendall's claim that simply executing a statutory duty put the executive's actions into *Marbury's* discretionary category and thus out of the reach of the courts:

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper...and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President...[126]

Furthermore, since executive discretion was "subject to the control of the law," the executive's political/discretionary duties were not wholly free from review; if Congress granted discretionary authority specifically to the executive, then Congress, and by extension the courts, had the authority to review and limit them. Taney concurred in this constitutional sentiment (though he dissented to the Court's holding), adding "...the office of postmaster general is not created by the constitution...The office was created by act of congress; and wherever congress creates such an office as that of postmaster general, by law, it may unquestionably, by law, limit its power, and regulate is proceedings; and *may subject it to any supervision or control, executive or judicial*, which the wisdom of the legislature may deem right..."[127]

The Court's decision in *Kendall* sustained the various legal principles that previous federal courts had devised to balance the federal magistracy's competing forms of discretionary authority. *Kendall* upheld Marshall's ministerial/political distinction, which it then used to affirm its own mandamus review of the Postmaster's non-discretionary duty to Stokes. The Taney Court also rejected the administration's claims for an inherent, intra-administrative

[125] Kendall v. U.S. ex. rel. Stokes et. al., 37 U.S. 524, 611 (1838).
[126] Ibid., 610.
[127] Ibid., 626. (Emphasis added).

superintending authority, and reaffirmed that the federal courts would strictly construe any executive discretion granted by Congressional statute. Stokes's special act did not grant discretionary authority to the Postmaster General, and so the Court was not about to find it emanating from the executive's general authority to faithfully execute the laws.

At *Kendall's* conclusion, the federal courts had staked a limited claim to reviewing executive action, and they did so without smothering or dominating the executive branch. To the contrary, a theme underlying each decision was the courts' careful regard for the propriety and necessity of administrative discretion. The guiding principles developed by the judges to define their review reflect this cautious approach to preserving executive prerogatives: the courts acknowledged a wide berth for executive prerogatives, and the ministerial/political distinction carved out a prerogative sphere whereby executive actions could not be reviewed. The limits created by the courts included the ministerial distinction, where no executive discretion existed, and the vested-rights boundary whereby even constitutionally guaranteed prerogatives—like the pardoning power—stopped where an individual's vested right began. (Hamilton assumed this to be true before Marshall declared it to be a rule.) Moreover, discretionary powers conferred by Congress were merely revocable prerogatives; that the federal courts construed them strictly did not impair the executive's inherent or constitutional powers.

The federal courts thus preserved the federal magistracy by acknowledging and preserving the executive's prerogatives, while developing a limited oversight of administrative action. *Marbury, Little, Gilchrist,* and *Kendall* constitute a line of cases that enhanced both the executive's authority—the administration's discretionary authority had been acknowledged and preserved in federal case-law—as well as the courts' powers. As Robert McCloskey has noted, in *Marbury* John Marshall asserted the mighty power to review Congressional law by denying

the Court's jurisdictional authority to do so.[128] Similarly, the federal judiciary assumed the power to review executive acts by acknowledging that the executive's inherent, constitutional prerogatives were off-limits to the courts. During the first fifty years of the early republic, judicial power expanded coordinately with executive power, and the Hamiltonian federal magistracy endured.[129]

THE HAMILTONIAN MAGISTRACY AND THE FOUNDATIONS OF AMERICAN ADMINISTRATIVE LAW

By recovering the federal magistracy, a set of constitutional arguments that structured the executive-judicial relationship in the early republic, we can better understand how novel republican legal principles developed as a continuation of and innovation on inherited, past practices. Administrative law developed not as a niche offshoot of the regulatory state in the twentieth century, not as an inevitable triumph of executive prerogative over judicial power, and not as a centuries-old power struggle between the coordinate branches of the federal government.[130] Instead, administrative law originated in the customs of an inherited English-

[128] Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1994), 26-27.

[129] After its decision in *Kendall v. U.S. ex. rel. Stokes*, however, the Taney Court would be much more deferential to executive power than the Marshall Court. Taney's Supreme Court issued a series of decisions that narrowed its ruling in *Kendall v. U.S.*, and created uncertainty as to just how far coordinate judicial review could extend. See, for example, Kendall v. Stokes (44 U.S. 87 (1845), the supplementary decision to *Kendall v. U.S. ex. rel. Stokes*), Rankin v. Hoyt (45 U.S. (4 How.) 327 (1846)), and Bartlett v. Kane (57 U.S. (16 How.) 263 (1853)).

[130] Today, modern administrative law looks nothing like it did in the early republic, and legal historians puzzle over how administrative agencies came to exercise so much seemingly *judicial* power. By trying to either explain or deny a usurpation of judicial power by the executive branch, these scholars miss the fact that, due to its English and colonial origins, American administrative jurisprudence developed through the interdependent, coordinate expansion of judicial and executive power.

Jerry L. Mashaw attempted the most ambitious synthesis of the history and development of administrative law in *Creating the Administrative Constitution*—a monograph compilation of his previous studies of administrative law throughout different periods in American history. Mashaw does not attempt to locate administrative law and practice in English and colonial traditions, however, an oversight boldly remedied by Philip Hamburger. In Hamburger's recent critique of modern administrative law, *Is Administrative Law Unlawful?*, he answers a resounding "Yes!" by reading the history of American administrative practice through the lens of post-Glorious

colonial magistracy, but it became an applicable jurisprudence for a republic through the various efforts of American jurists, Congresses, and administrators throughout the early-national period. English and colonial magisterial practice exemplified and legitimated law-bound administrative discretion and a limited judicial oversight of it; the founding generation put these customs into practice by refracting them through the lens of republican principles and through the structural framework provided by federal Constitution. Despite this collaborative effort, no individual influenced the founding of administrative law more so than Alexander Hamilton.

Hamilton's important contributions to administrative law can be found in his potent, foundational ideas about the extent of judicial and executive authority. Hamilton considered the federal courts to be the national government's ultimate constitutional expositor, while he also argued that the executive properly exercised prerogative powers. During his time in office, Secretary Hamilton did not have to reconcile these two conceptions of departmental power, but during his lifetime, John Marshall did. The Marshall Court compromised with the executive department, however, splitting the difference between the departments and their respective prerogatives. In *Marbury*, the ministerial-versus-political distinction carved a prerogative sphere

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Revolution Anglo-American constitutionalism. In the twentieth century, Hamburger claims, American administrative law took a turn for the worst, when the executive began acting judicially and thus extra-legally—most notably by exercising the court-like power to bind an individual (through punishment or legally-binding commands) as well as to deny him his legal rights. Alarmingly and inexplicably to Hamburger, federal courts continue to defer to this usurpation of judicial power, and modern administrative law thus recalls the monarchical tyranny of the Stuart regime. Hamburger also demonstrated that the American executive did not have such power in the early republic and throughout the nineteenth century, and so American law began "lawful," although it has since become "unlawful."

Hamburger was right to trace the development of American administrative practice to its English origins, and all of his conclusions about the early republic comport with Hamilton's law-bound understanding of administrative discretion under the U.S. Constitution. Hamburger has most recently faced criticism, however, for his arguments about the lawfulness of modern American law. Adrian Vermeule and Gary Lawson have fundamental disagreements with Hamburger's argument and conclusions. Both accused Hamburger of misrepresenting or misunderstanding the central questions of modern administrative law, and crucially, for failing to specifically and fully define what "lawful" and "unlawful" means in American (rather than English) constitutionalism. No one disagreed, however, with Hamburger's original and important insight that the foundations of American administrative law are intimately connected with English law. See Vermeule, "No: Review of Philip Hamburger, *Is Administrative Law Unlawful?*" and Lawson, "The Return of the King: The Unsavory Origins of Administrative Law," both forthcoming in the Texas Law Review.

for judicially untouchable executive action, while reserving to the courts their authority to judicially protect individual rights (a limit on executive discretion recognized by Hamilton). The federal courts continued to place some limits on the executive's superintending powers but only to preserve administrators' civil liability (*Little*) or to strictly construe statutory grants of discretionary powers (*Gilchrist* and *Kendall*). The executive's prerogative sphere was consistently maintained by the federal courts, even if the judges simultaneously set limits to the boundaries of executive power.

As a result, the federal courts claimed a wider scope of authority as constitutional arbiters and as limited overseers of executive action. At the same time, however, executive power expanded in the early republic; presidents, department heads, and their far-flung employees exercised an increasing amount of inherent, constitutional, and statutory prerogative powers. The federal courts also strengthened executive discretionary authority by repeatedly acknowledging that it existed and that it was, in certain cases, not subject to review by the courts. In this way, both the executive department and the judiciary enhanced their authority while developing an American administrative jurisprudence distinct from, although originating in, the English magistracy.

Perhaps the most striking part of this extended negotiation between the two departments of the federal magistracy is that both the courts and the executive branch relied on Hamilton's arguments to make their claims. Hamiltonian administrative practice and constitutional theory sit squarely at the center of both Marshall and Jefferson's opposing visions of the executive and judicial relationship. Alexander Hamilton influenced Marshall's vision of the federal judiciary as final constitutional arbiter and he also provided practical and legal foundations for Jefferson's (and later Andrew Jackson's) co-equal department theory.

That Hamiltonian theory inspired John Marshall is familiar and unsurprising; both were staunch Federalists who deeply valued the judiciary's role in preserving popular sovereignty by reviewing exercises of governmental power.[131] *Marbury v. Madison* restated Hamilton's description of judicial power in *Federalist* No. 78, and William Marbury's attorney, Charles Lee, cited from *Federalist* No. 80 to argue that the Supreme Court's appellate power implicitly covered executive acts. Moreover, Hamilton participated in a precedent-setting mandamus suit before *Marbury*, never questioning the federal court's authority to oversee the executive action under review.[132]

But Alexander Hamilton's model for the energetic executive, as well as his arguments for executive discretion, influenced Jefferson's co-equal department theory as well. Of course, Hamilton would not have agreed that executive action was immune from judicial review—the ultimate takeaway of co-equal department theory—but Jefferson and his political sympathizers adopted Hamiltonian arguments to advocate for an executive superintending power and discretion in the execution of law. Not only were both of these Hamiltonian claims incorporated into Jefferson, Gallatin, Jackson, and Kendall's administrative practices, but lawyers for the Jeffersonian and Jacksonian administrations relied on these same Hamiltonian arguments—sometimes explicitly—to make the case for co-equal department theory in court.

By recovering the federal magistracy, we see how American administrative law evolved from its monarchical roots into a republican jurisprudence, as well as how the federal courts and the executive enhanced their prerogatives through negotiating their constitutional relationship. Yet the federal magistracy also reveals how central Alexander Hamilton's constitutional theory

[131] See, for example, Samuel J. Konefsky's scholarship on the intellectual affinities between Hamilton and Marshall in *John Marshall and Alexander Hamilton: Architects of the American Constitution* (New York: The Macmillan Company, 1964).

[132] Hamilton did not seem to think that the original review that Supreme Court gave to *U.S. v. Hopkins* violated Article III, as Marshall would later assert in *Marbury v. Madison*.

and practice was to not only the development of administrative law, but to the republican constitutionalism of John Marshall and Thomas Jefferson. In the early republic, then, the federal magistracy was a Hamiltonian magistracy.

CHAPTER TWO

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ADMINISTRATIVE ACCOMMODATION IN THE FEDERAL MAGISTRACY

Hamilton had a singular influence on the articulation and subsequent development of the executive's prerogative powers, the first component of the federal magistracy. But the second part—a close, symbiotic relationship between the executive and the judiciary—was established by a more collaborative effort among the Treasury Secretary, the federal courts, and Congress. This relationship between the magisterial departments of government grew out of separate but similar efforts by Congress and Hamilton to get federal judges actively involved in the administration of federal law and policy. Rather than exclude the federal courts from the day-to-day business of administering law, both Hamilton and Congress actively sought federal judges' input in the executive's decision-making process and in the processing and supervision of national policy. For the most part, the federal judges eagerly complied.

Exploring the close-knit, collaborative relationship between executive officials and judges-as-administrators exposes a bustling, but usually forgotten, jurisdiction of the federal courts.[1] As we have already seen, John Marshall and his brethren took the opportunity presented by those legal questions surrounding executive discretion to position the federal courts as the final expositors of constitutionality for the national government. The Marshall and Taney Courts oftentimes made these sorts of constitutional claims in the early republic and antebellum eras.[2] The still-dominant narrative of federal-court development tracks the Supreme Court's

[1] Scholars of administrative law have paid attention to interactions between judges and executive officers; however, they do not consider the judicial-executive relationship to be collaborative.

[2] See, for example, coordinate judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) and Kendall v. U.S. ex. rel. Stokes et. al., 37 U.S. (12 Pet.) 524 (1838); the early national Supreme Court also positioned itself as the final arbiter of constitutional questions in the federal system in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), McCulloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819), and Cohens v. Virginia 19 U.S. (6 Wheat.) 264 (1821).

adjudications of great constitutional questions, and as a result, the judiciary appears to be aloof and distant from the day-to-day business of governing.[3]

This familiar and important narrative presents only one side to the development of federal courts' function, jurisdiction, and authority in the early republic. The constitutional-arbiter story ignores not only the early courts' active engagement in the business of administering law, but it almost always neglects the involvement of busy federal district courts in administrative matters. In fact, federal district judges most directly resembled their English and colonial magistrate forebears, as judges clothed with judicial power who also ensured that laws enacted by the sovereign would be executed within their districts. These judges worked and corresponded with Secretary Hamilton and his customs collectors as well, as part of a combined judicial-executive effort to execute federal law. In this way, the federal courts became, right from the start, a vibrant, busy federal venue for administering law and policy—a lucrative function set apart from, though contributing to, their tentative but developing role as constitutional umpires.[4]

The federal courts did not get involved in administrative matters by pronouncing themselves to be administrators. To the contrary, Congress usually created administrative responsibilities for a particular federal court or its justices through statute. The most notorious example is Congress' failed efforts to include the federal courts in the administration of the 1792

[3] The U.S. Supreme Court under John Marshall attempted to appear distant from the day-to-day workings and political intrigue of governing by separating itself from open involvement in political controversies, writing unanimous opinions for a seemingly united bench, and positioning itself as the last, sober word on constitutional matters—which included defending federal powers from encroachments by the states. See Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996); George Lee Haskins and Herbert A. Johnson., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Foundations of Power: John Marshall, 1801-15*, vol. 2 (New York: Macmillan Company, 1981); G. Edward White, *The Marshall Court and Cultural Change*, 1815-1835, Abridged Edition (New York: Oxford University Press, 1991); Richard E. Ellis, *Aggressive Nationalism*: McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007).

[4] Frederick Dalzell and Gautham Rao have begun to explore the relationship between Treasury administrators and district courts in their dissertations. See Dalzell, "Taxation with Representation: Federal Revenue in the Early Republic" (Ph.D. diss., Harvard University, 1993); and Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution" (Ph.D. diss., University of Chicago, 2008).

Invalid Pension Act.[5] The federal courts' protested their assigned roles in administering the act, citing the statute's purported violation of the separation of powers principle. Ultimately, federal circuit judges refused to fulfill their statutory mandate in *Hayburn's Case*.[6] Under the Invalid Pension Act, the particular problem was that Congress gave the federal circuit *courts* administrative responsibilities, and then allowed the Secretary of War to revise their judicial decisions. When instead Congress assigned tasks to the judges as individuals—rather than to the judicial court upon which they sat—then the federal judges were willing to participate as administrators.[7]

Congress, for example, recruited district judges to administer the provisions of its 1790 statute concerning the seaworthiness of sailing vessels. In order to go to sea, Congress required the master of the vessel to petition a district judge (or local justice of the peace) to first appoint three mariners to appraise the vessels for statutory required food, water, and medicine chests as well as its general fitness for ocean-voyaging. After the mariners reported back, the judge had the ultimate discretion to decide on the vessel's seaworthiness, or the steps that must be taken before the vessel could sail.[8] Similarly, under the Remitting Act, Congress also involved district

[5] "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions," ch. 11, 1 Stat. 243 (1792).
[6] 2 U.S. (2 Dall.) 409 (1792). The Court also disavowed its administrative role in *Hayburn's* companion cases *Ex parte Chandler* (1794) and *U.S. v. Yale Todd* (1794). For discussions of how jurists in the early republic instituted the separation of powers principle, see Maeva Marcus and Emily Field Van Tassel, "Judges and Legislators in the New Federal System, 1789-1800," in *Judges and Legislators Toward Institutional Comity,* ed. Robert A. Katzmann (Washington DC: The Brookings Institution, 1988), 31-53; Gerhard Casper, "An Essay in Separation of Powers: Some Early Versions and Practices," *William and Mary Law Review,* Vol. 30, Issue 2 (Winter 1989), 211-262; and M.J.C. Vile, *Constitutionalism and the Separation of Powers,* 2nd edition (Indianapolis: Liberty Fund, 1998).
[7] Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 211-15. Jerry L. Mashaw has uncovered the one exception to this rule—but an exception that did not involve an administrator reviewing and potentially overturning the courts' decisions. Under the 1790 Naturalization Act, Congress authorized any federal or state common law court of record to bestow persons of "good character" with U.S. citizenship. See "An Act to Establish an Uniform Rule of Naturalization," ch. 3, 1 Stat. 103 (1790) and Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 74.
[8] "An Act for the government and regulation of Seamen in the merchants service," ch. 29, 1 Stat. 131 (1790). See Mashaw, *Creating the Administrative Constitution,* 73-74.

judges in the administrative process by which the Treasury Secretary adjudged and mitigated statutory penalties relating to coasting-trade violations.[9]

In addition, Congress actively involved the federal district and circuit courts in the administration of federal policy by assigning them criminal and civil jurisdiction over neutrality, embargo, and non-intercourse act violations. When, for example, the Washington administration declared that the United States would remain neutral until Congress declared war, Congress responded by passing a criminal statute to prosecute violators of U.S. neutrality.[10] Although Congress specified which actions constituted a breach of the law, it fell to the federal courts to translate and apply explicit statutory language to the many vagaries of wartime Atlantic-world commerce.[11] The success of federal neutrality policy thus hinged on how the courts would construe, apply, and prosecute Congress' statutory provisions. Also, the judiciary played a similar role in overseeing the Jefferson administration's embargo and non-intercourse acts, as well as the Adams's administration's highly unpopular Sedition Act.[12] Because Alexander Hamilton was actively involved in prosecuting neutrality violations in federal court, the federal judiciary's responsibility for administering neutrality will be discussed in the next chapter; the importance of the courts' involvement in embargo litigation will be discussed below.

While Congress defined the courts' magisterial functions in national governance, Hamilton also recruited the federal courts to help him administer the law. In particular, the Secretary looked to federal judges for their input and oversight over those Treasury matters that

[9] An Act to provide for mitigating or remitting the forfeitures and penalties accruing under the revenue laws, in certain cases therein mentioned"), ch. 12, 1 Stat. 122 (1790).
[10] "An Act in addition to the act for the punishment of certain crimes against the United States," ch. 50, 1 Stat. 381 (1794).
[11] See, for example, the case of the *Young Ralph*, discussed in my next chapter (U.S. v. The Ship Young Ralph (D. N.Y., 1802; C.C.D. N.Y., 1802-1805)).
[12] For the December 1807 embargo act, see "An Act laying an Embargo on all ships and vessels in the ports and harbors of the United States," ch. 5, 2 Stat. 451 (1807), and for the 1798 Sedition Act, see "An Act in addition to the act entitled 'An act for the punishment of certain crimes against the United States," ch. 74, 1 Stat. 596 (1798).

affected his favored policies. For example, Hamilton took seriously the opportunity presented by the Remitting Act to delicately balance the collection of federal coasting and customs revenue against the growth of domestic and international shipping in American ports. Therefore, Hamilton actively engaged district judges in conversation so that both executive and judicial magistrates conferred on whether to remit or mitigate coasting-trade penalties. Secretary Hamilton also initiated and involved himself in federal-court litigation in order to receive a legally binding interpretation (and most often, validation) of his construction and execution of federal statutes. By turning to the courts, Hamilton intended for the federal bench to authorize and validate Treasury policy to answer political opponents who contested Hamilton's execution of the law.

The result of these combined legislative and executive efforts to involve the courts in the business of administering law was threefold. First, as noted above, the courts gained prestige, jurisdiction, and a busy docket by taking part in various administrative matters. Second, the courts and their justices developed their place within the federal magistracy, functioning as both judicial overseers of administrative action, as well as administrators themselves. Finally, and most importantly for Hamilton, a functioning federal magistracy fostered a symbiotic relationship between the executive and judicial departments, whereby the administration relied on judicial input to validate executive policy, while the courts gained jurisdiction and authority as part-time administrators, and full-time overseers of national and state governance. Each time the courts reviewed an executive act, they exercised their constitutional function as expositors of national law and coordinate-department review. Sometimes this oversight allowed the federal courts to make constitutional claims about the limits of executive power or their role as umpire of the federal system, as demonstrated in *Marbury*, as well as in *U.S. v. Hopkins* and the

companion cases *Olney v. Arnold* and *Olney v. Dexter*.[13] Other times, however, federal court review simply authorized and executed federal policy, thus engaging and uniting federal judges and executive officials in a common purpose.

The ultimate result of this close cooperation was administrative accommodation—that is, judicial deference given to administrators' actions in the execution of federal law and policy.[14] Although the federal courts policed the executive prerogative and occasionally placed limits upon it, more often federal judges deferred to executive decisions and administrative proceedings when these actions were exercised within their proper (usually statutory) limits. Administrative accommodation meant that while both the executive and judicial departments cooperated in the administration of federal policy, federal judges tended to respect and to uphold the administrative decisions made by executive officials, their frequent collaborators. And so, not only did the federal magistracy enable executive administrators to act with discretionary authority, it also encouraged justices on the federal bench to be both administrators and common-law judges. For Hamilton, the constitutional theorist and practitioner behind the federal magistracy, accomplishing executive policy goals was an inter-departmental, collaborative affair.

THE REMITTING ACT IN ACTION

One of the first petitions that Congress handed over to Hamilton for review had nothing to do with Revolutionary-war debt or missing loan certificates. Instead, it came from a foreign merchant who had been caught unaware by the federal government's newly enacted customs

[13] Olney v. Arnold, 3 U.S. (3 Dall.) 308 (1796); Olney v. Dexter (1796) and U.S. v. Hopkins (1794) were unreported.

[14] Ann Woolhandler described a fluctuating degree of deference given by the nineteenth-century federal courts to executive administrators in "Judicial deference to Administrative Action—A Revisionist History," *Administrative Law Review*, 43 (1991): 197-245. Also, Thomas W. Merrill argued that *Marbury v. Madison* originated the "rise of the deference doctrine" in modern administrative law," in "*Marbury v. Madison* as the First Great Administrative Decision," *The John Marshall Law Review* 37 (2004): 512-22.

laws. Christopher Saddler, a shipper from Nova Scotia, petitioned Congress for "relief from the forfeiture of his vessel and cargo, which ha[d] been seized in the port of Boston, for a violation of the impost law of the United States; of which law the petitioner was wholly ignorant."[15]

On January 19, 1790, the Treasury Secretary returned a *Report on the Petition of Christopher Saddler* to Congress, responding only ten days after Saddler submitted his initial plea for relief. Hamilton had not yet received all of the pertinent facts of the incident from Benjamin Lincoln, the customs collector at Boston, so that he could decide whether or not Saddler's inadvertent violation should be forgiven.[16] But the details of the Saddler decision seemed less pressing to the Secretary than the fact that the newly enacted impost laws were taking merchants involved in the sea-faring and coastal trades—the federal government's primary revenue source—by surprise.[17] In response, Hamilton's report recommended to Congress a remedial course of action: the Secretary proposed, undoubtedly with himself in mind, that circumstances like Saddler's required "vesting somewhere a discretionary power of granting relief." Furthermore, "the Secretary begs leave to submit to the consideration of the House, whether a temporary Arrangement might not be made with expedition and safety, which would avoid the inconvenience of a Legislative Decision on particular Applications."[18] After considering Hamilton's report in committee, the House took Hamilton up on his suggestion.

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[15] "Report on the Petition of Christopher Saddler" (January 19, 1790), in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961-87), 6:191-92, and 192 fn 2. [Hereafter *PAH*.]

[16] Saddler most likely violated "An Act for laying a Duty on Goods, Wares, and Merchandise imported into the United States," ch. 2, 1 Stat. 24 (1789).

[17] During the 1790s, Congress enacted, repealed, and modified tonnage, duty, and excise acts numerous times. See the *US Statutes at Large* for tonnage acts enacted (or modified) on July 20, 1789 (ch. 3, 1 Stat. 27), September 16, 1789 (ch. 15, 1 Stat. 69), and July 20, 1790 (ch. 30, 1 Stat. 135); for duty acts, see July 4, 1789 (ch. 2, 1 Stat. 24), August 4, 1790 (ch. 35, 1 Stat. 145), March 3, 1791, (ch. 15, 1 Stat. 199; ch. 26, 1 Stat. 219), May 2, 1792 (ch. 27 1 Stat. 259) , June 5, 1794 (ch. 49, 1 Stat. 378), and January 29, 1795 (ch. 17, 1 Stat. 411), among other dates for all tonnage, duty, and excise acts. With the constant overturning and modification of laws, it seems reasonable that Congress and Hamilton would want to provide an efficient way of mitigating penalties incurred because of the changing nature of the law.

[18] "Report on the Petition of Christopher Saddler" (January 19, 1790), *PAH*, 6: 191,192.

Congress subsequently passed "An Act to provide for mitigating or remitting the forfeitures and penalties accruing under the revenue laws, in certain cases therein mentioned"[19] (the Remitting Act) which went into effect on May 26, 1790.[20] The act gave the Secretary of the Treasury the authority to decide whether or not shippers and merchants should receive reduced or outright remitted penalties when they inadvertently violated federal customs law. Congress also recruited federal district court judges to report to and to advise the Treasury Secretary before he made his decision. Rather than creating a federal court of claims to handle these equitable petitions, Congress conferred the power to adjudicate revenue penalties to an executive official acting on the advice of the federal district courts. Under the Remitting Act, Congress inverted and entwined the typical functions of executive and judiciary: the Treasury Secretary became a judge within a highly specified jurisdiction, while the district judge provided the relevant facts and circumstances to report to the Secretary.

The Remitting Act helped to establish, right from the start of the early republic, the overlapping and collaborative functions of the federal magistracy. Hamilton suggested that Congress confer on the executive the discretionary authority to remit or mitigate revenue-related penalties, and Congress not only granted his request, but it saw fit to recruit the federal district judges as investigators, reporters, and advisers to the Treasury Secretary. Therefore, the successful execution of federal customs law involved a cooperative effort among Treasury officials (as collectors and compliance-officers stationed at port), federal district courts (as sites for prosecuting statutory violations and as fact-finding venues), district judges (as reporters to the Treasury Secretary), and the Secretary of the Treasury (as head of both the administrative efforts and the remission adjudications involved).

[19] 1 Stat. 122 (1790).
[20] Congress first extended, then renewed, the Remitting Act on May 8, 1792 (ch. 35, 1 Stat. 275) and March 3, 1797 (ch. 13, 1 Stat. 506).

Aside from mitigating the cumbersome and time-consuming process of initiating collections suits in court, the Treasury and Congress also had a vested interest in ensuring that they struck a balance between collecting a sizeable revenue and maintaining a bristling merchant trade. The logic behind the act made sense in the particular context of the early republic. As the national government opened for business and thus sought to collect duties from trade, Congress frequently passed new laws, with different penalties attached, to generate this key source of government revenue. But foreign merchants, or even domestic merchants who had yet to hear about the new revenue or coasting-trade laws, could easily arrive at port, inadvertently fail to comply with the various requirements, and then face penalties that they unintentionally incurred. Neither Hamilton nor Congress wanted to discourage maritime trade by imposing surprise penalties on otherwise well-meaning merchants, so the Remitting Act offered a way to get around the penalties—as long as the merchants had no intent to defraud the government from collecting duty revenue.

And the Treasury Secretary had the best vantage for ensuring that consistent remittances comported with these policy considerations. Ideally, remissions of revenue penalties would be applied consistently across all ports, and therefore, it made sense to vest a single department head with the task of ensuring consistency rather than relying on the separate district courts. Furthermore, penalties computed by juries might be too sympathetic and lenient to the unsuspecting merchants (thus jeopardizing the national revenue) or they might be too harsh (which might discourage trade). If non-compliant merchants had only judicial remedies available to mitigate duty and tonnage penalties, then the extra cost and hassle incurred though litigation might also stifle trade.

Another advantage of the Remitting Act was to give merchants the option to petition for a remission or mitigation of penalties before or after going to court. Merchants thus benefitted from the opportunity to forum-shop, as they could opt for a jury trial in federal court or they could petition the American "Chancellor of the Exchequer"—as Hamilton referred to himself as the Secretary of the Treasury—for his equitable relief.[21] Overall, then, the design of the Remitting Act was to benefit all parties involved: coastal trade would be less hampered by lawsuits, remittances could be more consistently applied, federal revenue income would be protected, and from the merchants' point of view, the cost of doing business with the United States would be lessened.

This section will examine how the Remitting Act operated in practice, engaging both executive and judicial magistrates in the process of balancing law enforcement against the benefits of equitable relief. The procedural provisions of the 1790 Remitting Act specified that if a person could be liable, or had already been found liable by a court, for any fine, forfeiture, or penalty under the laws for collecting impost and tonnage duties, then he could petition a district judge for a remission or mitigation of the fine, penalty, or forfeiture. The judge would then give notice to the petitioner, as well as to the U.S. district attorney, to show cause for or against the remission or mitigation of the penalty. After this summary hearing, the judge transmitted the facts of the summary hearing to the Secretary of the Treasury:

> …who shall thereupon have power to mitigate or remit such fine, penalty or forfeiture, or any part thereof, if in his opinion the same was incurred without wilful [*sic*] negligence or any intention of fraud, and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be

[21] Hamilton teased his sister-in-law, Angelica Church, about stepping down from his Treasury post: "you would lose the pleasure of speaking of your brother [in-law as] 'The Chancellor of the Exchequer' if I am to give up the trade..." From "Alexander Hamilton to Angelica Church," April 4, 1794, as quoted in Ron Chernow's *Alexander Hamilton* (New York: The Penguin Press, 2004), 457.

> discontinued, upon such terms or conditions as he may deem reasonable and just.[22]

As provided by the act, Hamilton had the power to remit or mitigate the penalty if the petitioner could incur a fine, but had not yet been convicted by a district court. The Secretary also had the statutory authority to direct all prosecutions to cease, once he decided to remit or mitigate the fine, forfeiture, or penalty.

As the foremost advocate for executive discretionary authority, Hamilton embraced his role as the final arbiter of remissions decisions. In contrast to his adjudication of Revolutionary-war claims, he tended to be more forgiving toward the mishaps and extenuating circumstances that caused sea-faring merchants to violate federal law. And though Hamilton had complete authority over the final decisions to remit or mitigate revenue-related penalties, he cultivated a cooperative partnership with the district judges who advised him on each petition. Because of this collaborative relationship, the district judges provided informal oversight as well as advice for Hamilton's Remitting Act adjudications.[23]

The *Rising Sun* forfeiture demonstrates how the remittance process worked in practice. Jeremiah Olney, the customs collector at Providence, Rhode Island, initiated a suit against the British schooner *Rising Sun* because the schooner's tonnage was less than the thirty tons

[22] 1 Stat. 122, 123 (1790).

[23] Yet some Congressmen had concerns that an adjudicating executive would act arbitrarily or irresponsibly with his newly acquired power. Although the Remitting Act process granted Hamilton judicial powers in narrow, well-defined circumstances, indirect evidence exists that Congress considered the insertion of federal judges into administrative processes as judicial oversight intended to supplement and check complete executive discretion. During early debates over legislation that would become the Remitting Act, Congressman Michael Jenifer Stone suggested the need for judicial supervision of an adjudicating executive to prevent "an arbitrary determination, independent of the principles of law." Although the Remitting Act created a process that circumvented the normal course of legal action, district judges still had influence over the Treasury Secretary's decisions through their exposition of the facts and their insights into the nature of the merchants' circumstances before them. See *Annals of Congress*, 1st Congress, 2nd Session, 1168.

requisite, by law, to import foreign merchandise.[24] The owner of the vessel, Thomas Hazard Jr., did not realize that his schooner violated American tonnage requirements and he petitioned the Rhode Island district court under the Remitting Act to avoid Olney's lawsuit. Henry Marchant, District Judge of Rhode Island, sent Hamilton the necessary facts: even though Hazard's vessel had been to U.S. ports in the past, Hazard did not realize that the American measurement for tonnage differed from the tonnage listed on the ship's British paperwork. Hazard had not captained the *Rising Sun*, or any other vessel, before this incident and he did not anticipate the difficulty he encountered with new American tonnage requirements.[25]

Judge Marchant presented the "Truth of the Facts" to Hamilton, and in this written brief, the judge clearly thought that Hazard had been unaware of the penalties awaiting him at the port of Providence. Marchant also indicated that he found no fraudulent intent. A few weeks later, Hamilton sent Jeremiah Olney a note conveying his decision: Hamilton remitted the penalty, though Hazard still owed an unspecified fee to other parties (not the United States government) for costs and charges.[26] Through the Remitting Act's summary process, Hamilton authorized Hazard's remittance in advance of the lawsuit that Olney had set into motion, rendering it unnecessary.

The remissions process did not always go so smoothly, however. Hamilton relied heavily on accounts collected, written up, and sent to him, and when the evidence seemed suspicious or incomplete, Hamilton requested clarifications from the district judges. In regard to the petition

[24] Jeremiah Olney to Hamilton (August 25, 1792), *PAH*, 12:273. Also see section 70 of "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels" (ch. 35, 1 Stat. 145, 177 (1790)). Discrepancies existed between foreign regulations of tonnage and the American method of measuring tonnage which resulted, in the case of the *Rising Sun*, in a vessel that was too light to meet the American tonnage requirement for importation. See *PAH*, 12:300 fn 4.

[25] Henry Marchant to Hamilton (August 31, 1792), *PAH*, 12 299-300.

[26] Hamilton to Jeremiah Olney (September 13, 1792), *PAH*, 12:376. Note how Hamilton maintained the same principle he articulated in the controversy over Samuel Dodge's pardon: that executive discretion cannot infringe on the vested monetary rights of third parties.

of George Tyler, Hamilton sent a letter to David Sewall, judge of the District Court of Maine, to clarify certain omissions and inconsistencies regarding the facts surrounding Tyler's possible fraudulent intentions.[27] John Lee, the Penobscot collector involved in prosecuting Tyler, suspected fraud in Tyler's request for a remittance; yet Judge Sewall found the case—which went to trial—difficult to decide, indicating that he did not suspect ill-intent. Sewall did not sufficiently explain *why* the decision was so difficult in his opinion, however, and on this point, Hamilton pressed for an explanation. In contrast to Sewall's uncertainty, Lee maintained that "the Petitioner had not the least claim to a mitigation" and should a remittance or mitigation be authorized, it "would have a very bad effect upon the minds of people" of Penobscot, where they all suspected that Tyler had no claim to a mitigated fine. And so, in this public-relations opportunity, Hamilton wanted to be very sure that Tyler did not deserve a remittance, for he had to decide between Tyler's pleas and the public's judgment. In order to do so, he needed Sewall's opinion on whether or not Tyler intended on defrauding the government.[28]

Hamilton's ultimate opinion on Tyler's case has not survived, but from his letter to Judge Sewall, Hamilton made it clear that his decision would not be arbitrary: Hamilton depended on the judge to provide the best account of the truth and he upheld a quasi-legal standard for "admitting" evidence—it had to be consistent and verified by the judge or the collector—which lent a degree of legal accountability to Hamilton's decisions. With the additional supervision of fact-finding district court judges added to Hamilton's relatively rigorous decision-making

[27] Hamilton to David Sewall (November 13, 1790), *PAH*, 7:150-152.
[28] Ibid., 151-152. Hamilton also objected to a discrepancy involving the residence of another party to the transaction, Finley Malcom. Judge Sewall had not clarified Malcom's residence in his summary of the facts, and Hamilton wanted this conflicting detail resolved before determining the outcome of the petition.

process, Hamilton's adjudications self-consciously conveyed a sense of impartiality and fairness.[29]

As mentioned above, the Remitting Act served a policy-oriented purpose. Both Secretary Hamilton and Congress wanted to vigorously collect revenue without impeding trade, and the Remitting Act allowed for a more efficient administrative means of accomplishing this balance. The Remitting Act streamlined the remittance process by placing the Treasury Secretary in charge of the final decision, but Hamilton further unified the remittance process by issuing directives to the district judges as if the judges were Treasury officials. In Hamilton's *Treasury Department Circular to the District Judges*, a memo sent out to the judges to ensure uniform participation under the Remitting Act, Hamilton addressed the question of whether a petitioner awaiting resolution of his request could provide "some proper surety" in exchange for their confiscated vessel or goods. Hamilton informed them that he thought " it expedient to say that if such a proceeding should appear to the Judge, before whom the matter is brought, legal, I shall have no objection to its being adopted, due care being observed as well with regard to the competency of the sum, in which the security may be taken as of the sureties themselves."[30]

By advising the district judges to release the confiscated property on proper security, Hamilton directed his judicial administrators to ensure uniformity in the remitting process. Behind this request, Hamilton also had a commercial consideration in mind: since in all likelihood the confiscation penalty would be remitted, then the merchant's ability to trade should not be further hampered while awaiting Hamilton's decision. As long as a sufficient surety was

[29] Jerry L. Mashaw suggested that the insertion of courts or judges into administration, as seen in the Remitting Act, marked the beginnings of a certain tradition in American administrative law, characterized by "the identification of fair individualized decision making with judicialized or trial-type procedure." See, "Recovering American Administrative Law: Federalist Foundations, 1787-1801," *The Yale Law Journal*, 115 (2006): 1333. This also indicated Congress' intent to temper administrative discretion in adjudications with the impartiality and fairness of a true judicial proceeding.

[30] "Treasury Department Circular to the District Judges" (October 17, 1791), *PAH*, 9:402.

in place, petitioner-merchants had access to their confiscated goods and vessels, and commerce could continue. Always with his policy goals in mind, Hamilton used his limited quasi- judicial authority to meet executive ends.

ESTABLISHING THE UMPIRE: *HOPKINS*, *OLNEY*, AND HAMILTON IN THE U.S. SUPREME COURT

The Remitting Act demonstrates how both Hamilton and Congress recruited the federal courts to participate in the execution of federal law and policy. As executive and judicial magistrates, Hamilton and the district judges had interwoven responsibilities for administering the provisions of the customs laws and the Remitting Act, at the same time that both exercised various degrees of discretion over the prosecution and remission of statutory penalties. The Remitting Act relied extensively on inter-branch cooperation, and because Hamilton took it upon himself to foster on-going conversations between him and his judicial administrators, the Treasury and the federal courts began to develop a close, cooperative, and accommodating relationship.

As part of their magisterial relationship, Hamilton occasionally sought out the federal courts to give judicial sanction to his construction of Treasury laws. Because the judiciary heard civil litigation arising between customs officials and merchants, Hamilton would get involved, advising his defendant-employee about law and strategy. Federal judges would not allow the Secretary's advice or direction to absolve the collector of his civil liability (as we have seen, the courts rejected this form of executive superintending power); still, Hamilton became involved not only to help his employee, but also to influence or at least to be appraised of the court's ruling on the customs statute involved. This was the case in the protracted litigation between merchant Welcome Arnold and Jeremiah Olney, the collector at Providence.

Hamilton also liked to "stage" cases—that is, he oftentimes used the common eighteenth-century legal fiction of generating a legal dispute and enlisting opposing parties to the litigation so that the question or issue in dispute could be put before a court. Staged cases were useful mechanisms for recruiting the courts to rule on particularly pressing legal questions *now*, rather than waiting for the issue to come before the bench organically. As we will see in chapter four, Hamilton helped to stage *Hylton v. U.S.* in 1796, in order to test the meaning of the Constitution's direct tax clauses.[31] Yet, when Hamilton could not convince the Virginia Governor, Henry Lee Jr., to adopt Treasury's construction of Hamilton's own, enacted assumption plan, the Secretary staged a mandamus case, *U.S. v. Hopkins,* to test his construction in federal court.[32]

For Hamilton, the importance of *US v. Hopkins* was rooted in policy. A crucial part of Hamilton's public finance proposals pivoted on the assumption of the states' Revolutionary war debt into the national and foreign debt, which would then be funded by nationally levied taxes. As the coordinators of the assumption scheme and as the collectors of taxes, customs collectors and loan officers in the Treasury Department administered Hamilton's public finance policy through their routine activities enforcing revenue laws at port and exchanging old securities for newly issued certificates. The loan officers executed Hamilton's assumption policy by receiving the states' unpaid war debts and exchanged those state certificates of debt for federal certificates—a process known as subscription (that is, subscribing the state debt to the national debt). This exchange could be accomplished at the Treasury itself or through the federal loan offices set up in each state. The federal loan officers, including Virginia's officer John Hopkins,

[31] 3 U.S. (3 Dall.) 171 (1796).
[32] *U.S. v. Hopkins* went unreported by Alexander Dallas, but references to the case can be found in the Minutes of the Supreme Court for February 13-15, 1794 and on the Docket of the Supreme Court, February 1794 term.

exchanged the state certificates only if the debt was eligible to be subscribed to the national debt under federal law (what I refer to as the Funding Act).[33]

Complicating this exchange of one debt for another was the fact that some state debt had already been redeemed. Redemption occurred when the state debt was either returned to the state treasury (for example, as payment of state taxes, for purchase of state lands, or through retirement) or by outright purchase by a state's "sinking fund."[34] The Funding Act made no provision for this redeemed debt, but Secretary Hamilton had; in communications with his loan officers stationed in the several states, Hamilton construed the Funding Act as not encompassing redeemed debt. He told the loan officers to refuse redeemed state certificates as ineligible for assumption into the national debt.[35]

Some states did not interpret the Funding Act in the same way, however, and Virginia, South Carolina, North Carolina, Georgia, and Rhode Island attempted to subscribe already redeemed certificates and even to reissue the redeemed certificates for subscription into the assumption program.[36] Of course, Hamilton would have none of this; according to the Treasury Secretary, and corroborated by Attorney General Edmund Randolph, once a certificate had been redeemed by the state, the debt it represented ceased to exist and did not qualify to be assumed under Hamiltonian policy.[37] Both men based their interpretation of what qualified as subscribable certificates on common law's understanding of debt instruments.[38]

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[33] See Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 1998), 6: 356-57, [hereafter, *DHSC*], and the 1790 Funding Act ("An Act making provision for the Debt of the United States") ch. 34, 1 Stat. 138 (1790).
[34] *DHSC*, 6: 357.
[35] Hamilton to William Skinner (August 12 and September 8, 1791), *PAH*, 9:33, 191-192; Hamilton to Benjamin Hawkins (December 9, 1791), *PAH*, 10:353; and Hamilton to Theodore Foster (September 1, 1791), *PAH*, 9:153-157.
[36] *DHSC*, 6: 357.
[37] Ibid. For Randolph's supporting opinion, see Edmund Randolph to Hamilton (November 9, 1791), *PAH*, 9:486.
[38] *DHSC*, 6: 357.

Hamilton thought that the Funding Act barred already-redeemed state certificates and his decision had been uniformly executed by his loan officers. But in 1792, the Virginia legislature indirectly challenged Hamilton's interpretation of the Funding Act by passing a statute that allowed holders of Virginia debt certificates issued after January 1, 1790—the Funding Act's cut-off date, after which certificates could not be subscribed—to exchange those certificates for already redeemed certificates with earlier issue dates.[39] In essence, the Virginia legislature tried to pass off its post-Revolutionary War debt as debt eligible under Hamilton's assumption plan by reissuing redeemed state certificates.

This did not comport with Hamilton's interpretation of the Funding Act, and he wrote to Virginia Governor Henry Lee, Jr., a close friend of President Washington's and a wartime colleague of Hamilton's, to clarify the law. Hamilton told Lee that "after full deliberation at The Treasury in conformity with the opinion of the Attorney General of the United States," the question had been settled: "the Certificates or evidences of debt of any state which had been once paid off or redeemed could not legally be received on Loan; upon the plain principle that they thereby ceased to constitute any part of the existing debt of a State."[40] Hamilton continued, relying on the common-law definition of debt to explicate his understanding of what was eligible for subscription: "And though a state may[,] by a subsequent act[,] restore to such certificates the quality of *debt* which they had lost—this would plainly amount to the creation of a new debt, not in existence when the Act of Congress passed, not contemplated by it, and manifestly intended to be excluded by its provisions[.]"[41]

Plainly, Virginia's statute violated Hamilton's interpretation of the Funding Act, and so, under his superior's direction, loan officer Hopkins could not accept Virginia state certificates

[39] Ibid., 358.
[40] Hamilton to Henry Lee (March 22, 1793), *PAH* 14: 232-233.
[41] Ibid.

unless he could verify that the certificates had not been redeemed. Still, Hamilton knew that even though his construction of the Funding Act had been in force for some time, and that it had been uniformly applied to all the states, his interpretation of the law would be more readily accepted if it had the authority of a judicial adjudication behind it. Moving toward a resolution, Hamilton suggested that he and the attorney general stage a case in order to get the question before the federal courts: "If the Executive of Virginia should eventually disagree with the construction of the law. . . I shall with pleasure concur in any proper arrangement for revising, and, if found wrong upon further examination for rectifying it."[42]

New Attorney General William Bradford and former Attorney General Randolph[43] recruited Richmond securities broker Richard Smyth to serve as plaintiff, and together, they worked out the details and presented the action for *US v. Hopkins* to the Supreme Court. Bradford arranged for Edward Tilghman to be Smyth's counsel, and Tilghman formally initiated the proceedings by requesting a writ of mandamus from the Court to compel Hopkins to accept Smyth's redeemed certificates. Bradford argued that the writ of mandamus should not be issued for redeemed certificates, thus directly testing the Treasury's construction of the Funding Act.[44]

After the case went before the U.S. Supreme Court, Hamilton earned a somewhat ambiguous victory. The Court ultimately denied the writ, thus confirming that Hopkins' refusal to accept the Virginia certificates and Hamilton's construction of the Funding Act would stand. However, the Court seemed to have questioned the plaintiff's right to request the writ in the first place, and so it rejected Tilghman's arguments rather than outright endorsing the Treasury's

[42] Ibid.
[43] *U.S. v. Hopkins* did not reach the Supreme Court until the February 1794 term, and by this time, Randolph had become the Secretary of State, succeeded by William Bradford as Attorney General. (*DHSC*, 6: 360.)
[44] Ibid.

construction.[45] Nevertheless, Hamilton's interpretation of the Funding Act endured without any new challenges to Treasury's process of subscribing state debt.[46]

By the time the Court denied the writ, however, the subscription period for state certificates had expired (March 1, 1793) and the states had received final settlements for their Revolutionary expenses from the federal government (states received credit for expenses not assumed through the subscription program). Legal historian Maeva Marcus suggests that the end of the subscription period and the finality of settlement could have "worked to bring about acquiescence to the Treasury Department's policy regarding redeemed state certificates" because no new subscriptions would be rejected since the subscription window had closed. Also, any uncertainties over outstanding state Revolutionary debt had been resolved by the finality and credit provided by a final settlement of state accounts.[47] Despite these mitigating factors, states or individuals who had already attempted to subscribe redeemed debt during the subscription period could still have brought lawsuits or questioned the Treasury's actions; that no new challenges arose suggests a general acceptance of the Court's decision, and the ultimate triumph of Hamilton's statutory construction.

Hamilton's assumption plan was a hard-won, crucial component in his larger scheme to restore the nation's credit, and he was not about to allow a few crafty states to create and then benefit from a legal loophole in the Funding Act. Subscription was the actual mechanism for assuming state debt—it was the very process that enabled the assumption plan to work—and so, Hamilton did not simply assert that he or President Washington had the constitutional prerogative to declare, with finality, what this momentous law meant. By staging the mandamus

[45] Ibid., 361.
[46] North Carolina had previously requested an explanation of the Treasury's subscription policy before the *Hopkins* action began. See Ibid., 361, fn 35.
[47] Ibid. The final settlement of accounts concluded on June 29, 1793, months before the ruling in *Hopkins*.

suit, the Secretary demonstrated that Hamiltonian constitutionalism depended on the courts to provide the ultimate interpretation of statutory law. The executive had the prerogative to exercise discretion when interpreting a law, but, when a proper legal controversy arose (or was generated, as it may be), then only the courts had the binding authority to review the executive's construction and declare the meaning of the provision in question.

U.S. v. Hopkins demonstrates the cooperative federal magistracy in action. Hamilton exercised and defended his executive discretion, but then recruited the federal courts to review and definitively declare the law. By simply denying the writ, however, the pre-Marshall Supreme Court provided the judicial oversight sought by Hamilton, but declined to offer any extra commentary on the limits or extent of executive discretion. The court simply cooperated in addressing the mandamus question at hand, and allowed both Virginia and the Treasury to quickly resolve their dispute. Staged cases like *Hopkins* as well as *Hylton,* demonstrated the level of collaboration exercised among the various departments of the federal government, as well as the states. In *Hopkins,* executive officers Hamilton, Randolph, and Bradford gathered documentation, selected the plaintiff and counsel, and initiated the legal action; Lee, Smyth, and Tilghman then willingly complied. And the Supreme Court played along, hearing opposing arguments and providing a resolution to the contrived action before it.

Most interestingly, state legislatures cooperated with the ruling as well. *Hopkins* was a staged action, conjured up by federal executive officials and Virginia's governor, and yet every state government complied with the Supreme Court's ruling on the matter rather than bringing their own separate challenges to court. Importantly, Virginia's legislature accepted the fact that its remaining redeemed certificates would not be assumed or credited by the Treasury: in 1795, the state legislature resolved that the governor should destroy those redeemed certificates

languishing in the state's sinking fund.[48] By accepting the Court's ruling in *US v. Hopkins* the state legislatures tacitly acknowledged both the constitutional authority of the federal courts to interpret the Funding Act and to adjudge controversies arising over such federal statutes, as well as the implicit cooperation between executive, judicial, federal, and state authorities to interpret, execute, and adjudge the law.

Hamilton's success in *Hopkins* was repeated in the federal courts when the U.S. Supreme Court construed select provisions in the 1789 Collection Act according to the Secretary's interpretation. This protracted litigation, *Olney v. Arnold* and *Olney v. Dexter,* called into question the actions of customs collector Olney, as well as the Treasury's construction of its duty to extend credit to merchants arriving at port laws under sections 41 and 45 of the Collection Act.[49] These provisions allowed importing merchants to obtain credit on their customs duties by submitting a bond to the collector promising payment on or before a future date. If a merchant did not pay on time, the act required the collector at port to bring suit against the merchant and to extend no further credit until the delinquent bond had been paid.[50]

In 1792, prominent Rhode Island merchant Welcome Arnold attempted to circumvent Olney's suspension of his credit after Arnold had become delinquent on a bond due to the collector. In order to do this, Arnold transferred his cargoes to other merchants, who then submitted duties for the goods under their names. While Arnold maintained that this transfer was a bona fide sale, the collectors and Hamilton thought it a collusive maneuver to avoid the

[48] Ibid., 361.
[49] Olney v. Arnold, 3 U.S. (3 Dall.) 308 (1796). For a detailed account of the complicated proceedings, see Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 2003), 7:565-577.
[50] "An Act to provide more effectually for the collection of the duties imposed by law on goods, ware and merchandise imported into the United States, and on the tonnage of ships or vessels," ch. 35, 1 Stat. 145, 168. Maeva Marcus noted that this system benefitted both the merchants and the U.S. Treasury, as merchants had a window of time to sell their goods in order to pay their duties, while the Treasury secured future payment on the duties owed. (*DHSC*, 7:566.)

terms of the act. Hamilton agreed with Olney that the "appearances stated by you afforded the presumption of a design to evade the law sufficiently strong to *justify* an Officer in refusing the credit." Moreover, Hamilton assured Olney that if Arnold sued him for damages for denying him credit, the Treasury would indemnify the collector.[51]

In November of 1792, after Olney had already initiated a district-court suit against Arnold for another delinquency, Arnold again had unpaid bonds outstanding. This time, however, Arnold transferred his latest cargo to Edward Dexter, who then offered a bond for the goods. Olney, in turn, declined to accept it, acting on Hamilton's advice. Arnold then demanded that Olney receive the bond, but the collector still refused and continued to detain the cargo. Only after the conclusion of the first lawsuit, *U.S. v. Arnold*, restored Arnold's credit, did Olney finally take Dexter's bond.[52] Although the bond had been accepted and his credit restored, Arnold and Dexter brought two separate trespass on the case actions for damages against Olney in the state Court of Common Pleas for Providence County.

Hamilton had anticipated Arnold's spiteful litigation and offered not only to pay Olney's legal costs, but also gave the collector crucial advice for conducting his defense. The Secretary wrote, "Should Mr. Arnold (as you say he threatens) commence a prosecution in the State Court, care must be taken so to conduct your defence as to admit of an appeal to the proper federal one." Hamilton's proposed strategy, therefore, was to use section 25 of the 1789 Judiciary Act to bring the suit before the U.S. Supreme Court on writ of error from the Rhode Island courts. In order to do this, however, Olney's state court defense had to raise a claim arising under the U.S. Constitution, federal treaty, or federal law. Olney pleaded the 1789 Collection Act, citing the

[51] Hamilton to Olney (October 12, 1792), *PAH*, 12:579; see also Hamilton to Olney (September 19, 1792), *PAH*, 12: 404.
[52] *U.S. v. Arnold* (1792) went unreported; see *DHSC*, 7: 567, fn. 12.

section 41 stipulation that collectors should deny credit to delinquent merchants. He also argued that the fraudulent collusion between Arnold and Dexter warranted the refusal of credit as well.[53]

After more than a year in state court, Rhode Island's highest judicial court, the Superior Court of Judicature, ruled that Olney's plea did not bar his actions toward Arnold and Dexter.[54] Again, Hamilton helped Olney to strategize, encouraging him to bring his case before the federal courts. The Treasury Secretary was acutely interested in the outcome, telling Olney, "I approve of your intention to take measures for an appeal to the proper Court of the United States. I could wish that you would request the District Attorney to forward to me the pleadings in the cause, and the reasons upon which the Court founded its decision."[55] Hamilton sensed the larger importance of Olney's suit, which tested the U.S. Supreme Court's section 25 review of state-court judgments on federal questions. Without section 25 review, state courts could impede or harass federal-government operations simply by rejecting federal administrators' legitimate claims that they acted under federal law. Federal officials, who were already held liable to wronged third parties in court, would be hesitant or unwilling to enforce federal law if unaccommodating state courts willfully ignored the administrators' statutory duties and found them liable for damages.

Although Arnold's counsel introduced procedural questions about whether a bona fide federal question had been raised in the course of the state court proceedings, the U.S. Supreme Court upheld Olney's plea and reversed the judgment of Rhode Island's Superior Court of

[53] Ibid., 570.
[54] When under section 25 review in the U.S. Supreme Court, lawyers for Arnold argued that the Rhode Island General Assembly, and not the Supreme Court of Judicature, constituted the highest court in the state. The U.S. Supreme Court rejected this argument. (Ibid., 575-76.)
[55] Hamilton to Olney (April 24, 1794), *PAH*, 16:333; also see Olney to Hamilton (April 14 and 24, 1794), *PAH*, 16: 258, 333-34; and Olney to Hamilton (May 5, 1794), *PAH*, 16: 378-79.

Judicature.[56] By turning to the federal courts to view Olney's actions, Hamilton and the Treasury Department earned another federal-court victory in their interpretation and execution of federal law. Congress even translated administrative policy into federal statute law by passing a 1799 Collection Act with provisions to prevent "frauds arising from collusive transfers."[57]

More was at stake, however, than simply Olney's reputation as an honest and meticulous, if somewhat uncompromising, collector.[58] For Hamilton, the *Olney* suits became test cases to help establish the U.S. Supreme Court's authority as arbiter of the federal system. If in *U.S. v. Hopkins*, the U.S. Supreme Court exercised coordinate review over executive actions, in *Olney v. Arnold* and *Olney v. Dexter*, the U.S. Supreme Court exercised federal review of state-court decisions involving executive actions. Establishing the Supreme Court's federal-question review powers was crucial for Hamilton for both practical and theoretical reasons. Hamilton and his collectors invested much time and energy into their faithful interpretations and executions of federal statutes; therefore it was gratifying for the federal courts to uphold executive's construction of the law. Also, by validating the Treasury's construction of the 1790 Collection Act, the federal courts prevented others from suing Treasury officials for similar acts. Hamilton sought out federal review of executive actions, and because of the executive's good-faith effort to faithfully construe the law, the Supreme Court approved Treasury practice.

Hamiltonian constitutional theory also relied on the federal courts as the ultimate interpreters of federal law, particularly because states had concurrent authority to review questions arising from federal law. In *Federalist* Nos. 82, Hamilton anticipated and directly

[56] Chief Justice Oliver Ellsworth's opinion for the court is incomplete. See "Judgments of the Supreme Court" (August 11, 1796) in *DHSC*, 7: 617. Also see *DHSC*, 7:572-77 for the procedural issues involved.
[57] See section 62 of "An Act to regulate the collection of duties on imports and tonnage," ch. 22, 1 Stat. 627, 675 (1799) and *DHSC*, 7: 577.
[58] Frederick Dalzell examined Olney's career at port in "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *The New England Quarterly* 65 (1992): 355-388.

addressed the constitutional theory undergirding section 25 review, as well as the U.S. Supreme Court's unique role as umpire of the national and state governance. In that essay, Publius forthrightly asked: "What relation would subsist between the national and State courts in these instances of concurrent jurisdiction?" The answer: "The Constitution in direct terms [Article III] gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance. . . " This meant that, while states acted as "natural auxiliaries to the execution of the laws of the Union," the U.S. Supreme Court ensured that state decisions comported with federal law: "an appeal from [the states] will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions." Hamilton concluded: "To confine, therefore, the general expressions giving appellate jurisdiction to the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."[59]

Since section 25 of the 1789 Judiciary Act inscribed Publius' constitutional vision into law, it was fitting that Alexander Hamilton helped to formulate the legal strategy that first made use of the provision's federal-oversight machinery. When Hamilton turned to the federal courts for review in both *U.S. v. Hopkins* and in the *Olney* lawsuits, his closely reasoned interpretation of federal statutes paid off; federal judges accommodated the Treasury department's efforts to faithfully read, interpret, and apply the first federal revenue code. And, by intentionally recruiting the U.S. Supreme Court in the review of executive action, Hamilton involved the courts in those administrative matters most important to the Treasury.

[59] *The Federalist* No. 82.

OVERSEEING FOREIGN POLICY AND THE "POWER...TO REMIT":

ADMINISTRATIVE ACCOMMODATION AND THE EXECUTIVE PREROGATIVE REVISITED

When surveying the existing scholarship on executive-judicial relations in the early republic, inter-branch conflict persists as the dominant theme.[60] This narrative focuses on a line of cases, many of which involved judicial oversight of executive discretion, where the predominantly Federalist courts squared off against the Jefferson, Madison, and Jackson administrations. This case law includes *Marbury v. Madison*, *Stuart v. Laird, Gilchrist v. the Collector at Charleston,* and *Kendall v. U.S. ex. rel. Stokes,* as well as Aaron Burr's 1807 trial for treason.[61] Andrew Jackson also contributed to this executive-judicial contest with his 1832 Bank Veto, a powerful retort to *McCulloch v. Maryland*. While these occasional conflicts were real and important—as we have seen, they generated a constitutional conversation about the limits and prerogatives of the national executive power—they are a select, splashy bunch of controversies that raised political, as well as constitutional, questions. These occasional contests did not wholly define the relationship between the executive and judicial branches, however, and by focusing exclusively on these notorious clashes, historians have ignored and obscured the more frequent judicial accommodations made to uphold executive action.

[60] For scholarship focused on the more contentious side to the executive-judicial relationship in the early republic, see Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987), and *Aggressive Nationalism*: McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007); Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: Belknap Press of Harvard University Press, 2005); George Lee Haskins and Herbert A. Johnson., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Foundations of Power: John Marshall, 1801-15*, vol. 2 (New York: Macmillan Company, 1981).

[61] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803), Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), Gilchrist et. al. v. Collector of Charleston, 10 F. Cas. 355 (C.C.D. S.C., 1808), Kendall v. U.S. ex. rel. Stokes et. al., 37 U.S. (12 Pet.) 524 (1838), and U.S. v. Burr, 25 F. Cas. 55 (C.C. D. Va., 1807).

During the first decades of early republic, the executive and federal judiciary were not on a constant collision course; in fact, their relationship is better characterized by the many day-to-day interactions that brought executive magistrates in contact with judicial ones. During these frequent, everyday exchanges, the intense pressure of negotiating party-line constitutional politics lifted, and the federal courts and the executive's administrators worked closely and collaboratively to administer federal law. And while the federal courts always heeded the limits of the executive's prerogatives, they simultaneously displayed deference to administrative action as well as a willingness to uphold the executive's interpretation and execution of the law.

Alexander Hamilton experienced administrative accommodation throughout his tenure in Washington's cabinet. Simply enforcing federal customs laws sent Hamilton's collectors into federal district court weekly, if not daily, to participate in lawsuits arising from their statutory duties. And the Treasury Secretary did not sit back, aloof from the courtroom action; instead, Hamilton involved himself in devising legal strategies, consulting lawyers for advice, and closely monitoring the outcomes of the port-side libel suits initiated by his employees. Yet Hamilton also engaged with the federal courts through Congressional mandate—the remitting process—as well as through his own initiative in *Hopkins* and the *Olney* cases. The business of administering federal customs law inevitably required the executive and the courts to work closely together. And, since the early-national Congress enforced the most important federal policies in district court—including U.S. neutrality policy, Sedition Act prosecutions, and the 1807 embargo—federal judges and executive officials shared the responsibility of administering the law.

District judges were the key judicial-administrative personnel in the early republic. Under the various iterations of the Remitting Act, district judges reported to and investigated for the Treasury Secretary, but under the customs, coasting, embargo, and neutrality laws, they

enforced federal policy within their courtrooms.[62] Take, for example, *U.S. v. The Hawke*; the collector at Charleston initiated this 1794 suit in the South Carolina District Court, alleging that the claimant, Mr. Bolchos, had purchased the vessel in violation of the 1793 Enrollment Act.[63] Congress had passed this statute to enforce U.S. neutrality during the early years of the maritime wars between France and Britain, as well as to enforce a short-lived trade embargo to any foreign port.[64] The libel alleged that the *Hawke* traveled on a foreign voyage without forfeiting its American coasting license, and that the captain of the schooner sold the vessel to Bolchos, a foreigner. Both of these actions constituted violations of the act.[65]

District Judge Thomas Bee determined that the *Hawke's* convoluted voyage was nothing but a "fraudulent contrivance" meant to evade Congress's embargo. The vessel violated the licensing provision of the Enrollment Act, but not the foreign-sale clause; Bee ruled that because of the intentionally fraudulent nature of its voyage, the *Hawke's* sale to Bolchos was illegal, and thus the ship retained its American character. Acting in concert with the collector and District Attorney, Bee upheld national foreign policy.

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[62] The original Remitting Act passed on May 26, 1790 (ch. 12, 1 Stat. 122) and was extended, renewed, or revised on May 8, 1792 (ch. 35, 1 Stat. 275), March 3, 1797 (ch. 13, 1 Stat. 506), and January 2, 1813 (ch. 7, 2 Stat. 789). On February 11, 1800, Congress passed an amendment to the 1797 Remitting Act that removed the sunset provision on the Treasury Secretary's remitting powers (ch. 6, 2 Stat. 7). Congress also inserted remitting clauses in subsequent revenue acts that authorized or slightly altered the remitting process under those particular statutes. See section 3 of "An Act further to regulate the entry of merchandise imported into the United States from any adjacent territory," ch. 14, 3 Stat. 616, 617 (1821). Also, in an 1823 tonnage-act amendment, Congress gave the Treasury Secretary a remitting-like power to admit entry of foreign goods or persons if he did not suspect fraud. In this provision, district judges are not involved in the Secretary's adjudication process. See section 10 of "An Act supplementary to, and to amend an act, entitled 'An act to regulate the collection of duties on imports and tonnage,' passed second March, one thousand seven hundred and ninety-nine, and for other purposes," ch. 21, 3 Stat. 729, 734 (1823).

[63] U.S. v. the Hawke, 26 F. Cas. 233 (D.C. S. C., 1794). See "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," or the 1793 Enrollment and Licensing Act, ch. 8, 1 Stat. 305 (1793).

[64] On March 26, 1794, Congress passed a joint-resolution declaring "That an embargo be laid on all ships and vessels in the ports of the United States," 1 Stat. 400 (1794).

[65] See sections 8 and 32, at 1 Stat. 305, 308, 316 (1793).

Interestingly, the District Attorney prosecuting the libel made the argument that since the United States had proof of the vessel's Enrollment Act violations, the court could not inquire into the motives or causes of the violation; the court should, instead, simply approve the libel. Also, the libellant claimed that under terms of the Remitting Act, only the Secretary of the Treasury—Alexander Hamilton at the time—had the power to investigate whether or not fraud was intended; if he thought not, then the Secretary could mitigate or remit the penalty. Judge Bee resisted these claims, however, and construed the claimant's violations of the Enrollment Act through the lens of his fraudulent motives.

The *Hawke* libel demonstrates the multi-valent role of the district judge in the early republic. On one hand, the judge, collector, and district attorney represented the magisterial might of the federal government, each taking part in the investigation and prosecution of Congress and the Washington administration's foreign policy. Yet, although he took part in the administration of federal law, the judicial magistrate was still, first and foremost, a judge. To this end, Judge Bee upheld the integrity of the district court's jurisdiction by maintaining its judicial prerogatives. Bee resisted the District Attorney's argument that, because the Remitting Act was also in force, the district court should suppress its judicial operations and confine itself to fact-finding, or to simply rubber-stamping statutory violations.

U.S. v. the Hawke also demonstrates how, in addition to collaborating on administrative matters, the federal magistracy operated as two separate jurisdictions, both adjudicating federal customs law. Coasting-trade and revenue-law violations could be brought to either the district court or to the Treasury Secretary for adjudication, and while the Secretary could not overturn a conviction in court, he could direct court proceedings to stop once he determined to mitigate or remit a statutory penalty. Judge Bee would not follow the District Attorney's suggestion to

approve the seizure and forfeiture of the *Hawke* because, even though the claimant *could have* petitioned the Secretary for a mitigated penalty, he had not done it. Because the *Hawke* found itself in a judicial venue, rather than in the executive's jurisdiction, the district admiralty court would properly and judicially adjudicate the libel.

And though the Remitting Act created a non-judicial forum to which merchants could petition, federal judges still upheld and deferred to the Treasury Secretary's limited alternative jurisdiction. In the *Case of the Cotton Planter*, for example, a libel originating in the District Court for New York but appealed to the New York Circuit Court, the claimant ship owner violated the December 1807 embargo by sailing to the West Indies in January 1808.[66] The claimant originally petitioned the Treasury Secretary, Albert Gallatin, for a remitted penalty, claiming ignorance of the law. Gallatin refused to remit the penalty and subsequently, the collector and district attorney for New York successfully libeled the *Cotton Planter* in the district court.

On appeal, Circuit Judge Robert Livingston reversed the forfeiture, determining that, while ignorance of the law was not a valid legal excuse, the embargo did not specify a commencement date; moreover, the ship owner's home port had not received timely news of the embargo. Therefore, the Circuit Court granted relief to the ship owner for these mitigating circumstances. In his opinion for the court, however, Livingston noted that "There is a power in the secretary of the treasury to relieve in case of an unintended violation of laws relative to trade, and therefore the less occasion for the interposition of the judiciary; that the secretary has refused relief here, because he considered the alleged ignorance of the claimant a mere pretence." Did the Secretary's decision preclude the federal court's jurisdiction? No, said Livingston, because

[66] *The Cotton Planter*, 6 F. Cas. 620 (C.C. D. N.Y., 1810) and the 1807 embargo, "An Act laying an Embargo on all ships and vessels in the ports and harbors of the United States," ch. 5, 2 Stat. 451 (1807).

the original libel and its appeal "is a question purely of judicial cognizance, and may be decided without interfering with any other department of government."[67] In other words, two separate adjudicatory processes existed under Congress's Remitting Acts; since the Treasury Secretary did not halt the district court's proceedings, the libel could continue.

Livingston continued by acknowledging the integrity of the executive's jurisdiction to remit revenue penalties: "Nor is there any doubt that the secretary of the treasury would have remitted the forfeitures, in any had accrued, if he had been satisfied of the bona fides of the transaction." But because Gallatin's decision occurred before the libel began in federal district court, did the subsequent judicial adjudication interfere with the executive's remitting powers? Livingston thought not: "As the decision of that gentleman has been incorporated with the proceedings in this cause. . . it may be thought by some that this court thinks itself competent to reverse what he has done. The court disclaims any such right."[68]

The federal courts continued to uphold the executive's jurisdiction under the Remitting Acts, even considering it to be a compulsory procedure for investigating suspect cargos. In 1825, Supreme Court Associate Justice Smith Thompson considered the remitting provision of an 1818 act (which incorporated the 1797 Remitting Act) in *U.S. v. One Case of Hair Pencils*, and he interpreted the Treasury Secretary's remitting powers to be a procedural necessity for determining whether or not fraud was involved.[69] Thompson determined that, "[u]nder the authority given to the secretary of [the] treasury, he may remit in whole or in part, so as to meet the equity of the various cases that may occur. He is entrusted with equitable powers to grant

[67] *The Cotton Planter*, 6 F. Cas. 620, 621 (C.C. D. N.Y., 1810).
[68] Ibid., 622.
[69] Section 22 of an 1818 amended duty act described cargo-to-invoice search requirements for customs collectors to follow, and then section 25 incorporated the 1797 Remitting Act's process if the invoice and cargo did not match. See "An Act supplementary to an act, entitled 'An act to regulate the collection of duties on imports and tonnage,' passed the second day of March, one thousand seven hundred and ninety-nine," ch. 79, 3 Stat. 433, 438 (1818) and "An Act to provide for mitigating or remitting the Forfeitures, Penalties and Disabilities accruing in certain cases therein mentioned," ch. 13, 1 Stat. 506 (1797).

relief. . . it is not an unlimited discretion, however."[70] To Thompson, the Secretary's power was not unlimited, but it was required; he construed the 1797 Remitting Act and the 1818 Duty and Tonnage Act as requiring that the Treasury Secretary be involved if an invoice did not match its received cargo. Thompson reversed the lower court's decision, ruling that under the 1818 act, the question of fraud could not be submitted to a jury (that is, to any judicial proceedings), but only to the Treasury Secretary.

Chief Justice John Marshall, the chief combatant for the federal courts in the traditional narrative of executive-judicial relations, also deferred to the Treasury Secretary's remitting powers. When Marshall considered the provisions of the 1813 Remitting Act while riding circuit in Virginia, he explained how the district court and Treasury jurisdictions continued to work with each other in the same ways Hamilton interacted with district judges like Marchant and Sewall. Marshall described the collaborative remitting process as it stood under an 1813 customs law:[71]

> The legislature seems to have intended, that the act of the treasury department, should be final and conclusive, and that all the facts should be placed before him, before he performs that act. Those articles, the forfeiture of which is remitted, are of course restored to the proprietor. The prosecutions, if instituted, are to cease. It would seem to be a part, and an essential part, of the duty of the secretary, to define the articles on which this remission operates; or if it be only on a certain interest on those articles, to define that interest.

And he noted the particularly Hamiltonian part of the process:

> If the statement of facts made by the court, did not enable the secretary to ascertain this interest, it would seem to be his duty, to require a more full statement; and the case should go back to him for a final decision.[72]

[70] U.S. v. One Case of Hair Pencils, 27 F. Cas. 244, 247 (C.C.D. N.D. N.Y., 1825).
[71] "An Act directing the Secretary of the Treasury to remit fines, forfeitures and penalties in certain cases," ch. 7, 2 Stat. 789 (1813).
[72] Gallego et al. v. U.S., 9 F. Cas. 1105, 1107 (C.C. D. Va., 1820).

If district judges failed to provide a satisfactory account of the facts, then the Treasury Secretary would demand a better report from them—a precedent set by Hamilton decades before. Also, Marshall clarified another collaborative part of the remitting process: if the Secretary chose to remit only a portion of the petitioners' seized property, then the Secretary handed off the rest of the forfeiture to be adjudicated in federal court. Therefore, both departments could administer and adjudicate violations of the law for the same petitioner.

Marshall also noted, echoing his ministerial distinction in *Marbury v. Madison*, that the Treasury's properly employed statutory remission powers fell within the executive's untouchable prerogative sphere: "Could the court in which the prosecutions were depending, have proceeded to an investigation of the extent of the interest of the petitioners, after receiving this instrument from the treasury department? I believe it could not." Marshall concluded his opinion by declaring that "The secretary acts...and his acts cannot be revised by this court."[73]

The Treasury Secretary's statutory remitting powers also resembled the President's constitutional pardoning prerogative—a similarity not lost on early national judges and lawyers. In two separate but related cases, the federal courts considered the limits of the executive's remission and pardoning powers on individuals' vested rights. In the 1821 circuit-court case of *U.S. v. Lancaster*, Associate Justice Bushrod Washington considered whether the presidential pardon used to remit the federal government's interest in a forfeited bond also negated the moiety of the penalty claimed by the customs collectors. This question recalled Alexander Hamilton's consideration of Samuel Dodge's pardon and, with a common-law based reasoning that echoed Hamilton's decision, the court determined that the presidential remission could not impair the right of customs officer to his lawful moiety.[74]

[73] Ibid., 1108.
[74] U.S. v. Lancaster, 26 F. Cas. 859 (C.C.D. E.D. Pa., 1821).

Only four years later, however, the U.S. Supreme Court construed the collectors' moiety rights under a federal non-intercourse act to be conditional on the Treasury Secretary's remission decision.[75] Determining that "the law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-house officers," the Court inferred from the statutory language that, at least under this particular statute, Congress specifically meant for the collectors' monetary reward to vest only if a forfeiture actually occurred. Therefore, the Court did not uphold the collector's asserted right to the seized property.

These cases demonstrate how the federal courts cooperated with the executive department, balancing the Treasury Secretary's remission adjudications with their judicial libels. The federal courts also helped to enforce the executive's administration of federal law and policy by deferring to the Treasury's reasonable constructions of federal statutes. Encouraging this judicial deference is exactly what Hamilton had in mind when he explained and defended his construction of federal statutes by way of common-law principles and accepted rules of statutory construction. If the Treasury construed federal statutes within the reasonable bounds of the text, then the courts tended to defer to the executive's interpretation and execution of federal policy.

In *U.S. v. the William*, for example, the Massachusetts District Court upheld the constitutionality of 1807 and 1808 embargo statutes, and in doing so, supported President Jefferson's bold foreign and commercial policy.[76] Under the embargo, the Jefferson administration's executive authority exploded, so much so that administrative law scholar Jerry

[75] U.S. v. Morris, Marshal of the Southern District of New York, 23 U.S. (10 Wheat.) 246 (1825). In his opinion, Justice Smith Thompson noted, "The provision in the third section of the act under which the remission is allowed, affords a very strong inference, that the rights of the custom-house officers are conditional, and subordinate to the authority to remit." (at 292). The Court closely read and interpreted the 1797 Remitting Act, found at ch. 13, 1 Stat. 506, 507 (1797).

[76] U.S. v. The William, 28 F. Cas. 614 (D. C. D. Mass., 1808). At issue were "An Act laying an Embargo on all ships and vessels in the ports and harbors of the United States," ch. 5, 2 Stat. 451 (1807) and the March 12, 1808 supplementary statute, "An Act in addition to the act, intitled 'An act supplementary to the act, intitled An act laying an embargo on all ships and vessels in the ports and harbors of the United States'," ch. 33, 2 Stat. 473 (1808).

Mashaw remarked that "[l]imited government was clearly out the window, as was congressional control of administrative authority."[77] Although *The William* decision signaled to the administration that the federal courts would support its embargo policy, the Massachusetts district court also claimed for the federal courts the status of final arbiters of constitutional questions. It did so by citing a long line of Supreme Court case law, as well as extensive quotations from Hamilton's *Federalist* essays on judicial power, including numbers 78, 80, 81, and 83.[78]

The federal courts continued to support the Jeffersonian embargo by deferring to the administration's construction and interpretation of customs laws during this period. In 1809, the U.S. Supreme Court considered the Treasury's interpretation of federal duties on salt, and John Marshall affirmed that, "If the question [regarding the proper duties on salt] had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions."[79]

In two other embargo-related cases—both reaching the U.S. Supreme Court on writs of error from superior state courts—the Court gave an expansive reading to the customs officials' statutorily conferred discretion. In *Crowell et al. v. M'Fadon*, inspector of revenue Joseph Crowell detained the *Union*, a vessel waylaid in Barnstable, Massachusetts. Crowell suspected that the *Union* had attempted to evade or violate the embargo laws, and so he detained it under

[77] Mashaw, *Creating the Administrative Constitution*, 96.
[78] Judge John Davis wrote the opinion for the court. He began his discussion of Hamilton's *Federalist* essays with this introduction: "The work to which I shall refer, is that admirable commentary on the constitution of the United States, intitled, 'The Federalist,' the author of which is pronounced by one of our learned judges, to be superior to Blackstone, or his successor Woodeson, for extensive and accurate knowledge of the true principles of government. If we love and cherish that constitution, we shall highly esteem this excellent commentary on that precious instrument." (U.S. v. The William, 28 F. Cas. 614, 618 (D. C. D. Mass., 1808).
[79] U.S. v. Vowell and M'Clean, 9 U.S. (5 Cranch) 368, 372 (1809).

his authority provided by an April 1808 act.[80] Although Crowell had an "honest" suspicion, he turned out to be incorrect; the *Union* did not act unlawfully. M'Fadon then sued Crowell, claiming that collectors had to have a "reasonable" suspicion—that is, a more rigorous standard than just a hunch—to detain vessels under the embargo laws. The Court disagreed, however, and upheld Crowell's discretionary judgment. Writing for the Court, Justice Gabriel Duvall noted that, "The law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it."[81]

In a similar case, *Otis v. Watkins*, Chief Justice Marshall reaffirmed the *Crowell* principle: "In construing this [embargo] law it has already been decided in this Court that the collector is not liable for the detention of a vessel. . . whenever, in his opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo." Furthermore, he added that the "correctness of this opinion [is that] he is not responsible. If, in truth, he has formed it, his duty obliges him to act upon it; and when the law affords him no other guide than his own judgment, and declares that judgment to be conclusive in the case it must constitute his protection, although it be erroneous."[82] Although the Court refused to hold the collector accountable for acting on what turned out to be an incorrect opinion, it did find Otis liable for acting outside his statutory authority; Otis had *removed* the vessel from port, when Congress had only authorized him to *detain* the vessel at port.[83]

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[80] Crowell and others v. M'Fadon, 12 U.S. (8 Cranch) 94 (1814). See section 6 and 11 of "An Act in addition to the act intitled 'An act laying an embargo on all ships and vessels in the ports and harbors of the United States,' and the several act supplementary thereto, and for other purposes," ch. 66, 2 Stat. 499, 500, 501 (1808).
[81] Crowell and others v. M'Fadon, 12 U.S. (8 Cranch) 94, 98 (1814).
[82] Otis v. Watkins, 13 U.S. (9 Cranch) 339, 356-57 (1815).
[83] See section 11 of "An Act in addition to the act intitled 'An act laying an embargo on all ships and vessels in the ports and harbors of the United States,' and the several act supplementary thereto, and for other purposes," ch. 66, 2 Stat. 499, 501 (1808).

What this demonstrates is that, through *Marbury's* ministerial-versus-political distinction combined with the administration's reasonable attempts to interpret and execute federal law, federal judges gave the executive department leeway and deference when they reviewed administrative actions. When confronting the routine, day-to-day legal questions arising from commerce at port, the federal courts and the Treasury's administrators did not have a contentious relationship; rather, they worked collaboratively, both taking part in the process of administering and adjudicating federal law.[84] Their accommodating relationship benefitted both parties as well; Treasury policy benefitted from the Secretary's discretion to remit or mitigate revenue penalties, judges aided port officials by providing a consistent, strict-but-reasonable standard for the interpretation of revenue laws, and the federal courts continued to enhance their own authority and profile by constantly reviewing executive actions, as well as state-court decisions. The U.S. Supreme Court began exercising its writ of error review of state decisions through the private liability lawsuits generated by administrative actions. In this way, the growth of federal court jurisdiction developed from its administrative interactions with and oversight of execution action.

MAGISTERIAL CONSTITUTIONALISM: THE EXECUTIVE'S INFLUENCE ON FEDERAL COURT AUTHORITY

Administrative accommodation in the federal magistracy reveals the close, symbiotic relationship between executive and judicial power in the early republic, and the connection between administrative action (which scholars tend to ignore) and constitutional jurisprudence

[84] Administrators in the public land offices also adjudicated land claims and federal courts tended to treat their patent decisions as binding, unless jurisdictional errors arose. See Mashaw, *Creating the Administrative Constitution*, 137 and Ann Woolhandler, "Judicial Deference to Administrative Action—A Revisionist History," 216-219.

(which scholars tend to follow closely). The executive and the courts collaborated to administer the law on a day-to-day basis, and this relationship proved to be mutually beneficial. For the federal courts, especially, their involvement in administrative matters meant enhancing their prestige and authority, as well as exerting their authority to review executive and state actions. John Marshall and Joseph Story, therefore, built their celebrated constitutional jurisprudence—like *Marbury v. Madison, Martin v. Hunter's Lesee,* and *Cohens v. Virginia*—upon the foundations laid by federal judges-as-administrators, and the magisterial relationship developed between the executive and judicial departments.

As the first Treasury Secretary, Alexander Hamilton's influence on the federal magistracy's tradition of administrative accommodation is significant. Hamilton proposed the executive's remitting power to Congress, and then set a practical precedent for the executive/district judge relationship to result from the remitting process and from normal customs-collection activities. He also used litigation as means to find out whether the federal courts would accommodate his department's interpretation and execution of federal law. In *U.S. v. Hopkins*, Hamilton's staged mandamus action set a precedent for federal court review of executive action; in the *Olney* cases, Hamilton instigated the federal court's first writ of error review of a superior state court's decision. Both of these actions constituted opening moves in establishing the federal courts as umpires of not only the federal system (state-national government relations), but also as umpire of the coordinate system (among the branches of the national government). Administrative action and the development of federal court jurisdiction were thus inextricably entwined in the early republic.

Hamilton, as we have seen, was a precedent-setting practitioner of energetic executive discretion, of collaboration between the nation's executive and judicial magistrates, and of

judicial oversight of executive action; he was also the foundational constitutional theorist for the federal magistracy. As such, Hamilton influenced both Federalist and Jeffersonian Republican legal thought, particularly about the nature of executive power under the U.S. Constitution. It should be no surprise, then, that the Hamiltonian constitutionalism cultivated in the federal magistracy provided key foundations for Jacksonian dual federalism as well.

Jacksonian federalism did not comport exactly with Hamiltonian constitutionalism—Hamilton and Andrew Jackson would not have agreed on the proper construction of Congress's Article I, section 8 powers, for example—but Jacksonian constitutionalism developed from Hamilton's vision of the federal magistracy. Jackson embodied an energetic, Hamiltonian executive who defended his prerogatives but abided by the ministerial/discretionary act distinction that somewhat limited his authority to act. This distinction was John Marshall's legal rule, but the Chief Justice articulated it in order to reconcile two Hamiltonian ideas: robust executive discretion and the judiciary's duty to protect individual rights.

Like Hamilton, Jackson and the Taney Court also believed that the U.S. Supreme Court provided the final word on constitutionality within the federal system.[85] Congress conferred the writ of error review to the U.S. Supreme Court in section 25 of the 1789 Judiciary Act, but the intellectual origins and practical development of this power can be traced to Hamilton. He not only strategized how to use this review machinery in Olney's litigation, but he anticipated and explained the need for it in *Federalist* No. 82. And so, when Joseph Story declared the Supreme Court's review of state court decisions to be constitutional in *Martin v. Hunter's Lessee*, he adopted Hamilton's reasoning and transformed it into formal constitutional law. In *Martin*, Story recognized the need for some ultimate tribunal to harmonize discordant state

[85] See, for example, Andrew Jackson's 1832 Nullification Proclamation, and Taney Court decisions like *Kendall v. U.S. ex. rel. Stokes et. al.*, (37 U.S. (12 Pet.) 524 (1838)) and *The Propeller Genesee Chief v. Fitzhugh* (53 U.S. (12 How.) 443 (1851)).

interpretations of federal laws, thus closely paraphrasing Hamilton's contemplation of the power in *Federalist* No. 82.[86] Andrew Jackson would subsequently agree with both Story and Hamilton that the U.S. Supreme Court was the final arbiter of constitutionality across the federal system (if not among the coordinate branches of the federal government). Jackson asserted in his 1832 Nullification Proclamation that if a state could nullify federal law, thus assuming the authority to determine the constitutionality of federal law, then "the Union would have been dissolved in its infancy."[87]

Under Roger Taney's leadership, the Jacksonian-era Supreme Court continued to negotiate limits on executive prerogatives, as well as to accommodate them. Although President Jackson advocated for Jefferson's co-equal department theory, the Taney Court subscribed to a limited and somewhat ambivalent vision of federal courts' coordinate review of executive action. In *Kendall v. U.S. ex. rel. Stokes*, the Taney Court emphatically rejected the administration's arguments that only the President could review his administrators' actions. It upheld the federal courts' previous rules about executive power, including the ministerial versus political distinction and a strict construction of statutory discretion. Yet, at the same time, Roger Taney and his brethren could also be accommodating towards executive action; for example, the Court allowed Navy Secretary James Paulding to exercise a questionable prerogative to deny a

[86] Story noted, "Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a State of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution." (Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816).)

[87] Andrew Jackson, "Proclamation Regarding Nullification," December 10, 1832.

widow's pension, and it also attempted to protect administrative officers who were sued at common law.[88]

The authority and activity enjoyed by the early republic's federal courts developed from its close interaction with the executive department, and in particular, with its close working relationship with the Treasury. Beginning with Hamilton, executive and judicial magistrates shared an overlapping constitutional function, since both exercised discretion and both participated in the administration of law. But only the judiciary had the authority, according to Hamilton and Marshall, to oversee executive action. Therefore, executive action and executive legal arguments were crucial to the development of the federal courts' coordinate and federal jurisdictional oversight. During the early republic, the growth of federal judicial authority was rooted in, and inextricably bound with, its interactions with the executive. And so, the federal magistracy and the Hamiltonian ideas animating it lived on, beyond Hamilton's tenure in office, to become foundational principles in early-republican constitutional thought and jurisprudence. By overseeing the federal magistracy, the U.S. Supreme Court established its authority as the constitutional umpire for the American republic.

[88] Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840). The Taney Court accommodated administrative action in a number of cases which narrowed the scope of the Court's decision in *Kendall v. U.S. ex. rel. Stokes.* More so than the Marshall Court, Taney's Supreme Court was conflicted about just how much coordinate oversight it could exercise. See Kendall v. Stokes (44 U.S. (3 How.) 87 (1845), the supplementary decision to *Kendall v. U.S. ex. rel. Stokes*), Rankin v. Hoyt (45 U.S. (4 How.) 327 (1846)), and Bartlett v. Kane (57 U.S. (16 How.) 263 (1853)). Louis L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown, and Company, 1965), 178-79 and Jerry L. Mashaw, *Creating the Administrative Constitution,* 210-18.

CHAPTER THREE
♦♦♦

CREATING THE "COMMERCIAL REPUBLIC": NEUTRALITY AND LAW IN THE AMERICAN COURTS

The Washington administration's 1793 decision to remain neutral during the French Revolutionary wars, followed by the federal government's maintenance of this neutrality policy for almost two decades afterwards, was the most important event to influence the development of American commercial law in the early republic. Neutrality amidst a world at war—a policy endorsed and extensively defended by Alexander Hamilton—had tremendous implications for the American economy, resulting in a flourishing carrying trade into lucrative overseas markets, the growth of an American marine-insurance market, and general prosperity at home.[1] But within state and federal courtrooms, neutrality had the effect of expanding the federal courts' jurisdiction over commercial transactions such that, by 1815, the United States Supreme Court could preside over the vast majority of maritime commercial disputes. By contrast, in 1789 the federal courts' most direct claim over maritime commerce arose from its limited, but exclusive, admiralty jurisdiction over commercial litigation involving seamen's wages, bottomry bonds (maritime liens), and civil salvage suits. The federal admiralty courts did not even have

[1] Stanley Elkins and Eric McKitrick argued that when Hamilton endorsed American neutrality and supplied John Jay with pre-treaty instructions, he was attempting to "take advantage of a crisis" and to use America's neutral status to create a stable system of international trade. This was Hamilton seizing an opportunity to enact his "vision of the commercial future"—a vision inspired by America's prosperous carrying trade. See, *The Age of Federalism* (New York: Oxford University Press, 1993), 396, 399.

On the relationship between neutrality and economic growth, see Douglas C. North, *The Economic Growth of the United States, 1790-1860* (New York: W.W. Norton & Company, 1996), 24-58; Donald R. Adams, "American Neutrality and Prosperity, 1793-1808: A Reconsideration," *The Journal of Economic History* 40 (1980): 713, 714, 720, 726, quote at 727; and Christopher Kingston, "Marine Insurance in Philadelphia During the Quasi-War with France, 1795-1801," *The Journal of Economic History* 70 (2011): 162-184.

exclusive jurisdiction over cases involving maritime matters.[2] And yet, over the course of the early national period, federal admiralty jurisdiction expanded to encompass virtually all types of legal disputes arising from maritime commerce. By exploring this extension of federal power, we uncover the story of how Alexander Hamilton used the law to create a unified "commercial republic."[3]

From the outset of America's experiment in self-government, Hamilton envisioned that the U.S. Constitution would produce what he called a "commercial republic," a polity that united Americans through their commercial interests and possessed a national government strong enough to protect and foster those commercial pursuits.[4] Hamilton considered it to be the particular and obvious goal for the new national government to facilitate this commercial republic by establishing some degree of unity and uniformity in commercial interests, policies, and law across the states. Writing as Publius, he warned his fellow New Yorkers that "[a] unity of commercial, as well as political interests, can only result from [a] unity of government."[5] For Hamilton, then, achieving commercial unity across the states meant aligning mercantile and state interests with the preservation of the national government (the same objective of his most noteworthy legislative achievements, his funding and assumption schemes) and enforcing a uniform, national commercial policy through the administration of government.

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[2] Despite Article III's seemingly broad grant of federal jurisdiction in "all Cases of admiralty and maritime Jurisdiction," the first federal Congress allowed suitors to bring claims that could have been heard in admiralty to the state common-law courts, if the common law was "competent" to provide a remedy (thus, "saving to suitors" a remedy at common law). If the claim met certain statutory jurisdictional requirements, the suitor could also initiate an action in the common-law, rather than the admiralty, "side" of the federal courts. I discuss the "saving to suitors" clause below. See Section 9 of "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 76-77 (1789).

[3] Hamilton wrote, "Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord." See *The Federalist* No. 6.

[4] See, Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W. W. Norton & Company, 1980), 77, 166-84.

[5] *The Federalist*, No. 11.

The political economy of the Hamiltonian commercial republic has been well studied; scores of economic, political, and even legal historians have noted the significance of Hamilton's economic policies, including his various reports on the nation's credit, the benefits of a sound national bank, the wisdom of levying certain federal taxes, and the encouragement of manufacturing in America.[6] Hamiltonian fiscal policies relied on the enumerated powers of the national government to create economic stability, including unifying U.S. creditor interests, levying uniform imposts, stabilizing the value of circulating currency, and, in general, stabilizing markets too.[7] Hamilton also considered the state and federal courts to be crucial actors in the creation of this unified, uniform commercial republic, yet neither his foresight in this regard, nor his practical use of American courts to affect commercial unity, have been acknowledged.

Moreover, historians overlook the ways in which the system of federal courts—and not just John Marshall's Supreme Court—consistently increased its authority throughout the early national period, with assistance from the state courts. By focusing on a cannon of landmark decisions handed down by the Marshall Court—like *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*—scholars presume that the U.S.

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[6] For example, Stanley Elkins and Eric McKitrick argued that Hamilton shared, with David Hume, a belief that in order to create the optimal conditions for economic development, capital must be concentrated in the merchant class (encompassing "the merchant-trader, merchant-banker, and the merchant manufacturer"). See Elkins and McKitrick, *The Age of Federalism,*107-131, quote at 111.

For historiographical treatments of Hamilton's policies and their effect on American commerce, see Max M. Edling & Mark D. Kaplanoff, "Alexander Hamilton's Fiscal Reform: Transforming the Structure of Taxation in the Early Republic," *The William and Mary Quarterly* 61 (2007): 713; Max M. Edling, "'So Immense a Power in the Affairs of War': Alexander Hamilton and the Restoration of Public Credit," *The William and Mary Quarterly* 64 (2007): 287; E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: University of North Carolina Press, 1961); Thomas K. McCraw, *The Founders and Finance: How Hamilton, Gallatin, and Other Immigrants Forged a New Economy* (Cambridge, Mass.: Belknap Press, 2012, 2014); McCoy, *The Elusive Republic*, 136-165; Curtis P. Nettels, "The Federalist Program," in *The Emergence of a National Economy, 1775-1815* (New York: Harper & Row, 1962), 109; James Willard Hurst, "Alexander Hamilton, Law Maker," *The Columbia Law Review* 78 (1978): 483-547; Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004).

[7] Nettels, *The Emergence of a National Economy*, 112-26; North, *The Economic Growth of the United States*, at 46; and Richard Sylla, "The Transition to a Monetary Union in the United States, *1787-1795," Financial History Review* 13 (2006): 73, 73-79.

Supreme Court developed the bulk of federal judicial power haltingly, one decision at a time.[8] The federal courts' authority accumulated either through occasional decisions otherwise intended to limit state power or through deliberate, aggressive power grabs inspired by the nationalistic jurisprudence of Marshall or Joseph Story.[9] Also, because Article I, section 8's commerce clause remained "dormant" in this period, historians assume that the federal courts took only an occasional interest in overseeing economic and commercial matters.[10] Beginning in 1793, however, neutrality gave the states reason to create, alongside the federal courts, an increasingly uniform set of commercial legal principles.[11] Neutrality also prompted the federal courts to be consistently and actively involved in adjudicating matters related to the carrying trade, the most important sector of the early republic economy.[12]

Hamilton recognized the federal admiralty courts' potential to enact his vision of a commercial republic, and, as we will see, his strategic engagement with the early federal courts

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin, Heir at law and devise of Fairfax, v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[9] Charles Hobson and Gordon Wood suggested that the Marshall Court decided cases in ways intended only to limit state power, rather than to deliberately augment federal power. (See, generally, Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University of Kansas Press, 1996) and Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009).) G. Edward White, Charles Sellers, and Richard E. Ellis, however, argued that the Marshall Court acted aggressively to increase the federal courts' power whenever it could. In his chapter on admiralty, White used Story's opinion in De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass., 1815), to make just this point. (See, generally, Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991); Ellis, *Aggressive Nationalism:* McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007); and White, *The Marshall Court and Cultural Change, 1815-1835,* Abridged Edition (New York: Oxford University Press, 1991), 427-84).

[10] The U.S. Supreme Court first considered the meaning of Article I, section 8's commerce clause in Gibbons v. Ogden, 22 U.S. (9 Wheat,) 1 (1824).

[11] Scholars writing about American neutrality in the young republic have generally overlooked the federal courts' role in resolving neutrality-related disputes, tending, instead, to examine the executive department's role in the foreign crisis. Even historians who study American neutrality from a legal or constitutional perspective have failed to see the longer-term expansion of the federal admiralty jurisdiction and the states courts' role in adjudicating neutrality-related litigation. (See, for example, Elkins and McKitrick, *The Age of Federalism*.) And though William Casto did not demonstrate Hamilton's use of the American courts to create a uniform commercial law, he argued that Hamilton played the leading role in navigating the constitutional and foreign affairs issues raised during the Neutrality Crisis of 1793. See William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (Columbia: University of South Carolina Press, 2006).

[12] Nettels, *The Emergence of a National Economy*, 227, 232-38, and North, *The Economic Growth of the United States*, 25-26.

helped them to develop an active oversight of national commercial matters. During each phase of Hamilton's legal career—including his first years practicing law in the 1780s, as chief administrator-lawyer of the U.S. Treasury, and finally, his return to private practice in 1795—he considered the federal admiralty courts to be the key jurisdiction for adjudicating the nation's commercial questions. As Treasury Secretary, Hamilton provided attentive oversight and direction to his customs collectors when they initiated libels in federal court. By actively engaging the federal admiralty courts to adjudicate violations of U.S. customs laws, Hamilton not only filled the admiralty docket, but he also protected the federal government's most lucrative revenue and upheld the nation's credit. And as a private attorney, Hamilton took part in neutrality-related libels that contemplated and sometimes expanded the jurisdictional reach of the admiralty courts.

In addition, Hamilton also articulated the constitutional theory that anticipated and gave support to the federal courts' broad claims to commercial jurisdiction. In *Federalist* No. 82, Hamilton described the "rule" by which overlapping federal and state jurisdictions could co-exist under the constitutional republic, sharing and dividing their jurisdictional authority in a concurrent system.[13] He premised his description of judicial concurrence on the notion that "states will retain all pre-existing authorities," except in three overlapping cases: "[1] where an exclusive authority is in express terms granted to the union; [2] or where a particular authority is granted to the union, and the exercise of a like authority it prohibited to the states, [3] or where an authority is granted to the union with which a similar authority in the states would be utterly

[13] As James Kent put it, Hamilton's *Federalist* No. 82 "laid down as a rule that state courts retained all preexisting authorities, or the jurisdiction they had before the adoption of the constitution, except where it was taken away" by Hamilton's three exceptions. For Kent, then, Hamilton's concept of concurrence was a "rule" for American constitutionalism. See, James Kent, *Commentaries on American Law*, 4 vols. (New York, O. Halsted, 1826-1830), 1:370.

incompatible." [14] Moreover, Hamilton envisioned that the state and national courts would work together "as parts of ONE WHOLE"—as a system collectively adjudicating matters of national concern (whether or not a question of federal law was actually involved).[15] Concurrence, therefore, described how the state and federal courts could work together toward creating his commercial republic.

Admiralty jurisdiction qualified under Hamilton's enumerated exceptions because Article III expressly delegated "all Cases of admiralty and maritime Jurisdiction" to the federal courts. As a result, whereas states presided over admiralty courts during the Revolutionary and Confederation eras, they could no longer do so under the Constitution. However, state courts could still consider cases that touched on matters of a national concern. The states adjudicated thousands of marine-insurance disputes during the early republic period, and these cases quite literally influenced how the carrying trade was underwritten. Yet, Hamilton's articulation of concurrence described the parameters of a reserved jurisdictional space to which only the federal courts had access; if state litigation overlapped with matters national in scope or kind, then the federal courts might also claim cognizance over those types of cases within this exclusive jurisdictional sphere.

Admiralty lent itself well to this sort of gradual accumulation of federal power: because admiralty was an exclusive jurisdiction delegated only to the federal courts, anything cognizable in admiralty was properly within the purview of the federal courts. In this way, if federal judges claimed that certain types of maritime commerce qualified as a subject for admiralty's

[14] *The Federalist* No. 82.

[15] He also resolved the question of how any federal law—including the U.S. Constitution—could be uniformly enforced if each of the state courts, in addition to the federal courts, interpreted federal law in their own particular way. As Hamilton described it, the system worked such that if the interpretation of a federal statute, treaty, or the Constitution was in question, the U.S. Supreme Court could hear it on appeal, as the *dernier resort*, the ultimate arbiter of the federal system. While the state courts were "natural auxiliaries to the execution of the laws of the Union," an appeal from them would lie to the federal courts, and particularly the Supreme Court "which is destined to unite and assimilate the principles of national justice and the rules of national decisions." See *Federalist* No. 82.

consideration, then the federal courts could take cognizance of those matters which were historically adjudicated only by the state common-law courts. The state courts would still maintain their "pre-existing authority" to hear those cases, but now the federal courts could hear them too. This was exactly the move Joseph Story made in his precedent-setting opinion in *De Lovio v. Boit*.[16]

American neutrality, a combination of both statutory law and general policy, created concurrence between the federal and state courts where there was little overlap before. During America's neutral years, the increasingly vibrant federal admiralty courts adjudicated neutrality violations, revenue libels, and prize cases, while state courts interpreted the effects of neutrality on the overseas carrying trade—the heart of American commerce. Thus, both the state and federal courts considered legal questions arising from a national policy. While adjudicating these neutrality-related questions, state judges also demonstrated a willingness to look to other states and to the federal judiciary for guidance when considering neutrality's effects on maritime litigation. Over time, state action helped to unify American commercial law during an extended period of wartime uncertainty; this, in turn, forged the legal bonds of a commercial republic.

At the same time, the federal admiralty courts gradually expanded their jurisdictional reach and prestige until, in 1815, Story announced in *De Lovio* that all maritime contracts and torts previously considered cognizable only in the state courts were also within admiralty's jurisdiction. Because *De Lovio* made it official, the federal courts now had concurrent jurisdiction over the bulk of maritime commercial litigation and could, in theory at least, enforce

[16] 7 F. Cas. 418 (C.C.D. Mass., 1815). In his biography of Joseph Story, R. Kent Newmyer noted that Story's *DeLovio* decision "did not guarantee a unified body of maritime contract law, but it did give Story a hand in its creation." Although Newmyer identified the significance of *DeLovio* and its claim for a more expansive admiralty jurisdiction, he, like other scholars of the Marshall Court, missed the importance of neutrality and its effects on admiralty and marine-insurance law as the crucial, legitimizing context for Story's opinion. See R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 125.

uniformity over maritime commercial law.[17] Story seized upon the opportunity to further unify maritime commerce that the federal and state courts had been working towards since the 1790s.

Neutrality was thus the crucial event in the development of commercial law in the early republic because it forced both the federal and state courts to contemplate neutrality's effects on the law. Neutrality was the consistent, common denominator between the federal and state courts: once the states routinely decided questions that not only arose from federal policy, but also affected interstate and international commerce, it became reasonable and even natural for the federal courts to lay claim to the states' jurisdictional territory. The federal courts' expanded admiralty jurisdiction over maritime commerce put them in a better position to oversee and unify America's commercial republic. And because Alexander Hamilton was actively involved in all types of neutrality- and revenue-related litigation, his legal practice offers unique insight into the federal courts' ascent over commercial law.

ALEXANDER HAMILTON AND THE RISE OF THE FEDERAL ADMIRALTY JURISDICTION

The American colonies-turned-states inhabited a transatlantic world connected through maritime commerce. Yet, at the outset of the early republic period, litigation arising from these

[17] Because state courts did not usually adjudicate federal neutrality statutes, but mainly grappled with questions about how neutrality, as a policy, affected maritime contracts, the U.S. Supreme Court could not be the ultimate appellate arbiter for suits originating in the state courts. The part of Hamilton's *Federalist* No. 82 model which contemplated federal statutes, treaties, and the U.S. Constitution did not apply to the concurrence described above. Neutrality created concurrence between the federal and state courts because it was a policy, and not because the state and federal courts each interpreted federal neutrality statutes. Therefore, even after *De Lovio*, the U.S. Supreme Court could not review the state courts' decisions on maritime contracts and torts made at common law.

However, as will be noted in the conclusion below, after *De Lovio* it was theoretically possible for federal judges to decide that only the federal courts could hear maritime contract and tort litigation. As this logic went, Article III's admiralty jurisdiction was exclusive, and so if maritime contracts and torts qualified as an admiralty matter (as *De Lovio* said they did), then the states should not have cognizance over them at all. Although James Kent would fret about this sort of power-grab in his *Commentaries on American Law*, the federal courts did not claim that their admiralty jurisdiction over maritime contracts and torts stripped the states' of their "pre-existing authorities" to hear these cases at common law. In this way, the federal courts conformed to Hamilton's conception of concurrence.

overseas transactions could only occasionally be resolved in an admiralty court; most often, state common-law courts heard such disputes. More than a decade before Story made his sweeping claim in *De Lovio*, the federal courts' admiralty jurisdiction first began to expand to revenue seizures brought under Section 9 of the 1789 Judiciary Act; it then continued to grow, albeit gradually, under the prize and neutrality-related litigation arising from congressional law.

Alexander Hamilton's commercial-litigation practice maps onto the gradual expansion of the federal admiralty jurisdiction, as he participated in Section 9 revenue suits and neutrality prosecutions during and after this term in public office. As Treasury Secretary, Hamilton directed his customs collectors to initiate libels (the form of action used to initiate a suit in admiralty) in order to reinforce his larger commercial and economic policy goals, which included effective revenue collection (to service the assumed war-debt) and fostering an equitable business environment for both foreign and domestic mariner-merchants. Hamilton also prosecuted neutrality-related libels on behalf of the U.S. government, and represented libellants and claimants in prize cases as a private attorney.

Federal admiralty jurisdiction was limited in 1789 because state common-law courts still enjoyed, to use Hamilton's words, their "pre-existing authorities" over maritime contracts and torts, and the prize "side" of the federal court was inactive during peacetime. However, under Section 9, Congress gave the federal admiralty courts cognizance over federal revenue laws—a departure from the English High Court of Admiralty's traditional jurisdiction.[18] Apart from this

[18] Section 9 of the 1789 Judiciary Act extended the federal courts' admiralty jurisdiction over revenue-related lawsuits ("seizures under laws of imposts, navigation, or trade of the United States"), whereas in England, the common-law side of the Exchequer adjudicated revenue-related cases. However, courts of vice-admiralty presided over revenue and navigation laws for the British North-American colonies. See "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 76-77 (1789).

Note, however, that while Section 9 seemed to make clear that revenue-related seizures would be adjudicated in the federal district courts, it was not always clear whether the suit should be heard in admiralty or at common law. In *U.S. v. The Ship Young Ralph* (D. N.Y., 1802; C.C.D. N.Y., 1802-1805; discussed below), Congress passed a navigation act that did not explicitly provide for the federal admiralty courts to adjudicate

break from English convention, it seemed, at least before 1793, that the federal courts' cognizance over admiralty and maritime matters would remain quiet and unassuming. Indeed, Americans' past experience suggested that the authority exercised by the state common-law courts usually kept earlier "federal" admiralty courts in check.[19]

The federal admiralty courts' initial, limited jurisdiction can be traced to the history of English admiralty and common-law courts. During the fifteenth and sixteenth centuries, the High Court of Admiralty thrived, adjudicating the bulk of litigation arising from England's growing overseas commerce. But, as so often was the case in English legal history, the land-locked, common-law courts at Westminster wrested judicial authority away from competing jurisdictions until, by the latter half of the seventeenth century, the English admiralty court's civil and commercial jurisdiction (its instance, or peacetime, jurisdiction) had been restricted to only a short list of cognizable actions. These included: contracts made on the high seas (that is, not on land or in coastal waters) *and* executed on the high seas, torts committed on the high seas, suits for mariner's wages and civil salvage, *in rem* proceedings on bottomry bonds entered into abroad, and the enforcement of judgments of a foreign admiralty court.[20] The High Court of Admiralty's prize, or wartime, jurisdiction remained intact, but only active when England was at war.

Across the Atlantic, the American colonies received conflicting messages about what constituted the jurisdictional boundaries of admiralty courts. While the High Court of Admiralty endured its much-truncated jurisdiction throughout the eighteenth century, the vice-admiralty

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seizures made under the act. When the U.S. seized the *Young Ralph* in county waters and brought it into federal court, the judge dismissed the libel on the motion that the case should be heard at common law.

[19] By this I refer to the various vice-admiralty courts established during the colonial period, and the Continental and Confederation Congress' experience with creating the Commissioners of Appeals in Cases of Capture and the Court of Appeals in Cases of Capture, to be discussed below.

[20] Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787* (Philadelphia: The American Philosophical Society, 1977), 13-14.

courts created from Parliament's 1696 Navigation Act enjoyed an enlarged instance (civil/commercial) jurisdiction over the colonies, in addition to authority over prize cases and cognizance over suits brought for violations of British acts of trade. By 1700, eleven vice-admiralty courts functioned across Britain's American and West Indian colonies. Throughout the seventeenth century however, some colonies found it expedient to adjudicate local admiralty matters in their own common-law courts; therefore, the vice-admiralty courts enjoyed an effective, concurrent jurisdiction with these colonial courts.[21] Appeals from the vice-admiralty courts would lie to either the Lords Commissioners for Prize Appeals or, if arising from the instance "side" of the court, to the Privy Council. Appeals arising from the Navigation Acts could be heard in either the High Court of Admiralty or the Privy Council.

After the Seven Years' War, the appellate structure of the vice-admiralty system changed, as did the political implications surrounding admiralty jurisdiction.[22] As a response to the colonial sentiment that jury-less customs suits in admiralty violated American civil liberties, the American states innovated on British practice by introducing the jury into state prize proceedings during the Revolutionary War.[23] Also during the war, Congress established, first, a committee to

[21] Ibid.. at 22-26. Parliament passed the 1696 Navigation Act "for Preventing Frauds, and Regulating Abuses in the Plantation Trade,"7 & 8 William III, ch. 22. Before the Act, the colonial admiralty system was incoherent; provincial courts assumed for themselves the authority to hear admiralty cases. The Act gave structure and coherence to the colonial admiralty system, and by 1700, the eleven fully-functioning, vice-admiralty courts in the British colonies corresponded to the following areas: Virginia, North Carolina/Bahamas, Maryland, Massachusetts, New Hampshire, Rhode Island, New York, East New Jersey/Connecticut, Pennsylvania, West New Jersey, and South Carolina. The colonies interpreted the 1696 Act as allowing concurrent jurisdiction between the vice-admiralty courts and the common-law courts, and the British Board of Trade did not contradict this interpretation.
[22] Ibid.,. at 28-33. In 1666/67, Parliament re-organized the colonial vice-admiralty's appellate process. It created a layer of four vice-admiralty courts that had concurrent and appellate jurisdiction over the eleven lower vice-admiralty courts within their districts. The four districts included: Boston (presiding over New Hampshire, Massachusetts, Rhode Island, and Connecticut), Philadelphia (over New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia), Charleston (over North Carolina, South Carolina, Georgia, and the Floridas) and Halifax (over Quebec, Newfoundland, and Nova Scotia). Also, in 1764, the Sugar Act granted the district-level vice-admiralty courts with concurrent jurisdiction (with common-law courts) over revenue cases, and allowed the petitioner to bring the case to the Halifax vice-admiralty court if he chose. In addition, the Stamp Act granted the Halifax court with the appellate authority to oversee all cases brought in the various acts of trade and revenue.
[23] Ibid.,. at 192-93. Americans introduced other common-law elements to admiralty procedure, like the motion to set aside a verdict and the motion to grant a new trial if improper evidence had been admitted. Also, because

hear prize cases (the Commissioners of Appeals in Cases of Capture), and then created the first federal appellate court, the Court of Appeals in Cases of Capture, in 1780. The Court of Appeals, a limited jurisdiction that oftentimes encountered resistance from the states, would determine more than 60 appeals until it ceased operating, in 1787.[24]

By the time the delegates to the Philadelphia convention drafted the U.S. Constitution, American admiralty law had become familiar with the notions of appellate review and concurrence, and yet it remained fraught with jurisdictional tension among competing courts. States had administered their own bustling admiralty courts throughout the Confederation period, and many of the lawyers and judges practicing in state courts or in the Court of Appeals also participated in the Philadelphia convention. Alexander Hamilton was one of those delegates.[25]

As a lawyer only newly admitted to the New York bar, Hamilton engaged with both the Confederation and New York's admiralty courts. For example, he served as proctor for the claimant John Riolz in a 1785 customs libel in the New York Court of Admiralty.[26] The libellant, a collector of customs for the port of New York named John Lamb, had seized two trunks of Riolz's merchandize, claiming that the trunks were landed without Lamb's permission and without the necessary inventory and bills of lading, making the landing contrary to state

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admiralty sat at the intersection of multiple types of law—Continental Europe's civil-law traditions, English admiralty and vice-admiralty practices, the law of nations, natural law, the law merchant—during the early republic and through most of the nineteenth-century, judges were willing to examine any or all of these legal traditions in order to answer a question of law arising in federal admiralty court. See Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (Brooklyn, N.Y.: The Foundation Press, 1957), 40-42 and David R. Owen & Michael C. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776* (Durham, N.C.: Carolina Academic Press, 1995), 223-29.

[24] Bourguignon, *The First Federal Court*, 121, 320-23.

[25] Ibid., at 328-29. Bourguignon determined that "twenty-one of the fifty-five members of the Philadelphia convention of 1787 had some direct acquaintance with the work of the Committee on Appeals or the Court of Appeals," as lawyers or judges.

[26] John Lamb Qui Tam v. Two Trunks of Merchandize, John Baptist Riolz, Claimant (N.Y. Adm., 1785; N.Y. Ct. Err., 1785-86), microfilmed on *Case Papers of the Court of Admiralty of New York, 1784-1788*, M 948, Film 573, Reel 1, found under *U.S. v. Riolz* (National Archives, Washington, D.C.); see also, Julius Goebel, Jr. and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964-81), 2:831-41 [hereinafter *LPAH*].

law.[27] Collector Lamb prayed condemnation of the goods. Hamilton answered that Riolz was a Frenchman, and was not well-acquainted with New York's customs laws. In fact, Hamilton argued that Riolz had left his trunks unattended at the dock so that he could find a friend in town and inquire as to the steps required to lawfully land the goods.[28] After much litigation, Riolz eventually lost his claim, but Hamilton later recorded that, in sympathy for this "bad business" experienced by the "poor fellow," Hamilton would not charge Riolz a fee for his services.[29]

During these early years of Hamilton's career, he also represented libellants and claimants in suits involving bottomry bonds and civil salvage in New York's admiralty court.[30] His practice extended to the Confederation's highest court as well, as Hamilton was involved in at least three Court of Appeals cases.[31] From these experiences, he learned not only the particulars of American admiralty process (a hybrid mixture of English admiralty procedure, combined with elements of the common law), but also the practice of enforcing customs laws within admiralty jurisdictions.

Once Article III divested the state courts of their formal admiralty jurisdiction, Hamilton spent a good deal of time as head of the Treasury department directing and advising his customs collectors when they became involved in revenue-related libels. Section 9 of the 1789 Judiciary Act gave the federal district courts an "exclusive original cognizance of all civil causes of

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[27] 1784 Impost Law, N.Y. Laws, 8 Sess. 1784, ch. 7; amended, 8 Sess. 1785, ch. 34.
[28] "Answer and Claim of J. Riolz," (July 23, 1785) in *LPAH* 2: 833.
[29] *LPAH*, 2: 832, "Riolz & Lamb" (undated note).
[30] Hamilton's extant bottomry cases include: James Dall and John Heathcote v. The Ship Betsey, Thomas Coates, Claimant (N.Y. Adm., 1784); and Bartholomew and Anthony Terrason v. One Moiety of the Ship Diligent, John Ross and John Vaughn, Claimants (N.Y. Adm., 1785). Civil Salvage suits include: Robert Thompson v. The Ship Masborough, George Danser and John Walker Claimants of the Vessel, John Murray, Isaac Gouverneur, and John Read, Claimants of the Cargo (N.Y. Adm., 1784-87); and Charles March et al. v. Sundry Goods and Merchandize saved from a deserted vessel by The Brigantine Port Roseway, Gibbon Bourke, John Donnan et al., Claimants, Daniel McCormick on behalf of Hyem Cohen, Claimant, and William Cock on behalf of Richard Hall, Claimant (N.Y. Adm., 1785-87). Documents for *Dall v. Betsey* and *Marsh v. Salvaged Goods* in *LPAH* 2: 861-902.
[31] Nathan Jackson v. The Schooner Dolphin (N.Y. Ct. App., 1783-84); The Brigantine Hope (N.Y. Ct. App., 1786-87); and The Owners of the Sloop Chester v. The Owners of the Brig Experiment et. al (S.C. Ct. Adm., 1777; S.C. Ct. App., 1787).

admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States..." –but specifically—"...where the seizures are *made on waters which are navigable from the sea*..." [32] The U.S. Supreme Court would, in time, broadly construe the "waters navigable from the sea" clause in order to ensure that the federal admiralty jurisdiction became robust. Note, also, that the district courts had to share their jurisdiction over certain maritime matters with the state common-law courts. With the Judiciary Act's "saving-to-suitors" clause, the first federal Congress created a concurrent jurisdiction for litigants with *in personam* claims so that the suitors chose whether to litigate by filing a libel in federal admiralty court or by initiating an ordinary common-law action state court.[33] Still, the exclusive federal jurisdiction over revenue libels enabled Hamilton to look to the federal courts as an instrument for his statecraft: the admiralty courts could provide equity, unity, and uniformity over the revenue laws that put his commercial policies into effect.[34]

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[32] Emphasis added. As James Kent noted, the phrase "waters which are navigable from the sea" was ambiguous as to whether seizures made "on tide waters in ports, harbours, arms, and creeks of the sea" were cognizable exclusively in admiralty, or if they could be heard on the common-law "side" of the district courts. Over time, the Supreme Court determined that cases arising from these appendages of the sea would be heard in admiralty. See Kent, *Commentaries on American Law*, 1: 347-48.

Other qualifications to this exclusive, original district-court cognizance included: "...where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen...saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." See, "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 76-77 (1789).

[33] Gilmore and Black, *The Law of Admiralty*, 33-36. William Casto contended that the framing generation did not intend to distinguish ordinary civil versus admiralty jurisdiction in state and federal courts along the *in rem* /*in personam* distinction. Casto argued that instead, jurists of the early republic thought that concurrence or exclusivity between state common law and federal admiralty courts would be determined on substantive grounds (i.e. was the issue at hand a "public" matter—like prize cases or revenue collection—for national cognizance?), rather than procedural distinctions. And until 1867, certain states—California, for example—assumed that state-level courts possessed jurisdiction over both *in rem* and *in personam* suits. However, in The Moses Taylor, 71 U.S. 411 (1867), and The Hine v. Trevor, 71 U.S. 555 (1867), the U.S. Supreme Court ruled that state courts could not adjudicate civil admiralty suits, and that *in rem* proceedings could not be "saved-to-suitors," as they were not remedies provided by common law. (See William R. Casto, "The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates," *American Journal of Legal History* 37 (1993): 117, 140-49, and Charles W. McCurdy, "Prelude to Civil War: A Snapshot of the California Supreme Court at Work in 1858," *California Supreme Court Historical Society Yearbook* 1 (1994): 3.)

[34] The majority of all admiralty suits filed from 1789-1797 were seizures made to enforce revenue laws. See Dwight F. Henderson, *Courts for a New Nation* (Washington D.C.: Public Affairs Press, 1971), 55.

And so, Secretary Hamilton's day-to-day responsibilities included overseeing the libels initiated across the various federal district courts by his customs collectors. Usually Hamilton acted as a gatekeeper of sorts, giving advice and direction to his staff right before or soon after a collector reported a revenue-law violation to the local district attorney. Although the customs collectors had strict instructions to follow the letter of the revenue laws, discretion and negotiation crept into all steps of customs collection, usually to ensure good-will with the merchants paying the duties.[35] Therefore, Hamilton kept a watchful eye on his collectors to be sure that they initiated prosecutions that were fair and consistent with the course of the law.

Hamilton had a self-serving interest in ensuring that customs collection be (and be perceived as) fair, lawful, and equitable: the federal government depended on customs revenue to finance its operations and to service its debt, and Americans were notoriously suspicious of taxes and tax enforcement. Also, since the specter of Stamp Act prosecutions in the colonial vice-admiralty courts remained fresh in the revolutionary generation's minds, the district-court judges were most likely aware that customs prosecutions should be adjudicated with care.[36]

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[35] Hamilton told Jeremiah Olney, the collector at Providence, "The good will of the Merchants is very important in many senses, and if it can be secured without any improper sacrifice or introducing a looseness of practice, it is desirable to do it." He elaborated to John Brown, President of the Bank of Providence: "...That valuable class of Citizens [merchants] forms too important an organ of the general weal not to claim every practicable and reasonable exemption and indulgence." See Hamilton to Jeremiah Olney (April 2, 1793) and Hamilton to John Brown (April 5, 1793), in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961-87), 14: 276, 283-84 [hereinafter, *PAH*].

[36] On colonial responses to these Stamp Act prosecutions, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005),134-142 and Owen and Tolley, *Courts of Admiralty in Colonial America*, 202-9.

Frederick Dalzell and Gautham Rao have noted just how careful Hamilton and his Treasury department were to maintain good relationships with the local merchants paying their duties, and thus increasing the federal coffers. Hamilton and his customs collectors engaged in what Rao has called a "politics of accommodation" to broker smoothly-running and effective revenue-collection operations. See Dalzell's "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *The New England Quarterly* 65 (1992): 355-88 (1992) [hereafter, "Prudence and the Golden Egg"] and Gautham Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution," (unpublished Ph.D. dissertation., University of Chicago, 2008), 1-23, 87-144.

Hamilton often confirmed for his collectors that certain libels were worth pursuing, and he also wrote to his staff to instruct them as to which vessel to seize and bring into court.[37] For instance, the Secretary directed Jeremiah Olney, a fellow Lieutenant-Colonel in the Continental Army and the collector at Providence, Rhode Island, to seize the *Sloop* Polly of Sandwich for fraudulently landing rum, molasses, and sugar at port.[38] When collector William Ellery responded on Olney's behalf, he conveyed a tale of deception and intrigue whereby the master of the sloop evaded detection by blacking over the name "Sloop Polly" on her stern.[39] The master also reported fake specifications when obtaining his license at port to further hide the vessel's true identity. When Ellery heard of a suspicious sloop tucked away in a small harbor, he guessed the mode of the master's deception and then confirmed his hunch by washing off the blackened "Sloop Polly" and measuring the vessel's dimensions. Ellery ended his account by assuring Hamilton that he would convey all information to Edward Pope, the New Bedford collector who would then "cause her to be libeled and prosecuted as the law directs."

Just as the customs collectors looked to Hamilton to interpret the nuances of federal revenue laws, they also posed legal questions to the Secretary relating to seizures and revenue suits.[40] William Ellery, ever the diligent official, wrote to Hamilton with a list of concerns.

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[37]In 1791, William Ellery, the customs collector stationed at Newport, Rhode Island, informed Hamilton that he had seized a vessel, the *Charming Sally*, and her cargo because it did not meet the thirty-tons burthen requirement stipulated by the 1790 Collection Act, ch. 35, 1 Stat. 145, 177. Ellery had already lined-up the local district attorney, William Channing, to prosecute, but he sought confirmation from Hamilton, deferring to the Secretary's thoughts on whether the decision to prosecute was appropriate. Hamilton responded that in his estimation the proceeding "is conformable with law, and I do not see fit to interfere. Her case must have a legal decision." See William Ellery to Hamilton (March 15, 1791) and Hamilton to William Ellery (April 11, 1791), in *PAH,* 8: 183, 271-2.

[38] Hamilton to Jeremiah Olney (July 31, 1792) in *PAH,* 12: 140.

[39] William Ellery to Hamilton (August 27, 1792), *PAH,* 12:278-9. A prominent lawyer and Federalist, Ellery had a distinguished career as a revolutionary statesman and dedicated public servant. After signing the Declaration of Independence, Ellery served as a delegate from Rhode Island in the Continental Congress and adjudged prize cases in its Committee on Appeals. In addition to his 1790 appointment as collector at Newport, Ellery briefly served as Chief Justice of Rhode Island and as commissioner of the Continental Loan Office.

[40]Hamilton also fielded legal questions relating to the credit on duties-owed extended to merchants by the customs-collectors in the form of bonds. And, in the case of Rhode Island collector Jeremiah Olney and merchant Welcome Arnold, Hamilton gave Olney legal advice after Olney brought suit against Arnold and another merchant, Edward

First, Ellery asked "to have your opinion on this question whether an officer making seizure of a vessel without his District may not remove her from the Place where she is seized, to an adjoining District provided it can be done with convenience and safety[?]"[41] Next, he wished "to be directed to what Collector to apply to commence a prosecution," and to know how to interpret the moiety provision of the Collection Act to be sure that all parties involved were paid lawfully.[42]

Finally, Ellery posed a more complex legal question regarding a buyer's right to access cargo that Ellery held until the seller made payment on a bond due to the Treasury Department. Ellery remarked that "I find a case will probably occur in this Custom house altogether new, and in which unless I am early favoured with your direction I may incur censure embarrassment and expense," indicating how crucial Hamilton's legal expertise was to the everyday operations of his department.[43] Ellery was sensitive to any "embarrassment" caused by his actions as an executive official, and, as evidenced by the volume and length of the customs circulars issued by the Treasury Secretary, Hamilton shared the same concern. Customs collection in the young

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Dexter. (See Dalzell, "Prudence and the Golden Egg," 362-375, as well as the section "Olney v. Arnold; Olney v. Dexter" in Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 2003), 7: 565-77 [hereinafter, *DHSC*].

[41] William Ellery to Hamilton (September 3, 1792), *PAH,* 12: 315.

[42] Ellery referred to Section 69 of the 1790 Collection Act, ch. 35, 1 Stat. 145, 177. He asked, "By the 68th [sic] Sec. of the same law one moiety of all penalties &c shall be divided into equal parts and paid to the Colle. Naval Offe & Surveyor of the port wherein the same shall have been incurred; the mode of expression would seem to exclude the Colle. Navl Offe & Surveyor of the Port of Newport from any part of the moiety of the forfeiture of the Polly of Sandwich if she should be condemned. Please to favour me with your sentiments in this respect; and if it should be that they are not entitled to any part of such moiety, whether the Colle. may not avail himself of one half of such moiety as Informer." See Ellery to Hamilton (September 3, 1792), *PAH,* 12: 315-16.

[43] William Ellery to Hamilton (September 4, 1792), *PAH,* 12: 318-19. Ellery described the situation as such: "A is indebted by bond to the United States for duties, the day of payment arrives, instead of discharging the debt he suffers a prosecution. After the commencement of the prosecution he executes a bill of sale of the cargo on board a vessel abroad to B. She arrives in this Port, the bond still unpaid. The master produces a manifest in which it is expressed that A is the owner of the Vessel, and that the Cargo is consigned to him. The Vendee appears at the Custom-house produces his bill of sale and demands an entry of the Cargo as his property, at the same time offering to give bond for the duties on said Cargo &c. Is B by his Bill of sale entitled to such entry?

"But throwing the circumstances of the unpaid Bond out of the question, please to inform me, whether a bill of sale of goods abroad entitled the Vendee to an Entry thereof on their importation, on his own account and not as agent to the Vendor, giving bond to pay the duties, and otherwise complying with the Law?"

republic was new and tremendously important, and part of Hamilton's responsibility was to ensure that the national revenue was collected seamlessly and lawfully.[44] Although Hamilton's answers to these questions do not survive, Ellery acknowledged the receipt of Hamilton's responses with a gentle reminder to his boss that he also had queries pending on "the credit on salt," "drawbacks on Spirits distilled in the United States," "the Act [concerning] fisheries," and even more questions relating to the case of the *Sloop Polly*.[45]

The various sorts of legal guidance that Hamilton provided to his employees extended beyond the interpretation of revenue laws and pre-trial libel preparations to the enforcement of the Washington administration's neutrality policy. To address the enforcement of American neutrality, Hamilton released, in characteristic fashion, a detailed circular letter to the customs collectors in August of 1793 intended "[t]o assist the judgment of the officers" while they kept a watchful eye out for "repeated contraventions of our neutrality. . . taken place in the ports of the United States." The circular relayed "schedule of rules, containing sundry particulars, which have been adopted by the President, as deductions from the laws of neutrality, established and received among nations," and the Secretary warned that "[w]hatever shall be contrary to these rules will, of course, be to be notified" to the governor and district attorney overseeing the state and district where any such contravention occurred. Hamilton was preparing his staff to intercept those vessels that would be subject to prize proceedings in federal admiralty courts.[46]

As the French Revolutionary wars persisted, Hamilton's collectors—like Meletiah Jordan, collector at Frenchman's Bay in the District of Maine—continued to update the Secretary

[44] Hamilton was constantly worried that the federal government would incur "embarrassment." Writing to John Brown, President of the Bank of Providence, Hamilton lamented "I regret much every embarrassment which is experienced by the Mercantile Body—whether arising from the public operations, from accidental and unavoidable causes, or from a spirit of enterprise beyond the Capital which is to support it." He followed this statement with an encomium praising the merchant class. See Hamilton to John Brown (April 5, 1793), *PAH,* 14: 283-84.
[45] William Ellery to Hamilton (October 1, 1792), *PAH,* 12: 512.
[46] "Treasury Department Circular to the Collectors of the Customs" (August 4, 1793), *PAH,* 15: 178-81.

and to seek confirmation from him regarding the seizures and libels initiated in the wake of neutrality and the thirty-day embargo passed in March 1794.[47] Again, Hamilton exercised his option to confirm, correct, or countermand the revenue and neutrality-related lawsuits that the Treasury department initiated in federal admiralty court. This discretion, combined with Hamilton's license to remit or mitigate revenue penalties, and his consequent close correspondence with federal district judges, meant that not only did Hamilton have a great deal of influence over the types of cases reaching the admiralty court, but he also worked with the judiciary to meet shared, national goals. As an executive agent, Hamilton influenced the way commercial laws were enforced, interpreted, and adjudicated in the young republic. He set a precedent for how an energetic, highly-involved Treasury Secretary could successfully monitor and intervene in the legal matters facing customs collectors, a tradition followed by successors Oliver Wolcott, Jr. and Albert Gallatin. [48]

In peacetime, the admiralty "side" of the federal courts was relatively quiet, but for the libels initiated by Hamilton's staff (which went unreported in early court records). With the beginning of the French Revolutionary wars and the declaration of American neutrality, however, the volume of federal admiralty business boomed, increasing from just three reported admiralty cases in 1793 to ten cases only a year later. Between 1793 and 1815, court reporters included 193 admiralty cases in their volumes of federal cases, from both the instance and prize

[47] See Meletiah Jordan to Hamilton (May 7, 1794) and "Treasury Department Circular to the Collectors of the Customs" (April 18, 1794), *PAH*, 16: 239-40, 387-88; and Congress' joint-resolution "That an embargo be laid on all ships and vessels in the ports of the United States," 1 Stat. 400 (1794).

[48] The Napoleonic wars complicated the Treasury Secretaries' abilities to tolerate discretion and accommodation at the local level. For a direct comparison of Hamilton's adjudicatory style with another Treasury Secretary, see U.S. v. The Ship Huron (D.N.Y., 1800-1803), where Treasury Secretary Albert Gallatin considered a remission petition for a claimant whose ship was libeled in federal admiralty court by Hamilton (acting again as a prosecutor, alongside Richard Harison and Edward Livingston). See Rao,"The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution," 168-222 and *LPAH*, 2: 823-25.

"sides" of the courts, in addition to adjudicating other maritime suits involving the decisions of foreign admiralty courts.[49]

By closely mediating the relationship between the district courts and the Treasury's collectors, in addition to vetting customs libels, Hamilton helped to ensure that the federal admiralty courts successfully opened for business. But when America found itself a lonely neutral in an Atlantic world at war, neutrality-related lawsuits gave the federal judges their first opportunities to expand the boundaries of the admiralty jurisdiction.[50]

In 1793 it was not clear that the federal courts would adjudicate neutrality-related cases, but the Supreme Court soon declared, in *Glass v. The Sloop Betsey* (1794), that the federal courts could hear privateering cases that involved neutral powers.[51] When district and circuit court judges declined to hear Swedish and American claims against a French privateer, the Supreme Court affirmed the federal courts' jurisdiction. In their decision, the Court determined, without citing any precedent, that the district courts had plenary admiralty jurisdiction—that is, they possessed all the instance and prize powers of admiralty courts. This sweeping declaration of the admiralty courts' powers quickly came to mean that the federal admiralty courts would hear many (though not all) privateer cases brought by British litigants.[52] Privateering cases took up about half of the Supreme Court's docket from 1794 until the U.S. entered into its Quasi-War with France.[53]

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[49] Counted on November 26, 2013 from the LexisNexis Academic database of reported federal cases.
[50] Congress expanded the federal admiralty jurisdiction before federal judges even had the chance to do so. See *supra*, note 18.
[51] Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794).
[52] Because neutral nations did not usually take cognizance of claims arising from wartime captures, federal judges hesitated at first to adjudicate privateering cases. In *Glass*, along with other cases, the federal courts made exceptions to this general rule and adjudicated privateering cases when U.S. citizens participated in non-neutral activities, when privateers outfitted their vessels within U.S. territories, and when the cases involved neutrals.
[53] David Sloss, "Judicial Foreign Policy: Lessons from the 1790s," *St. Louis University Law Journal* 53 (2008): 145, 147.

When Hamilton participated in federal neutrality prosecutions, he partnered with his close friend and colleague, Richard Harison, the U.S. District Attorney for New York.[54] Together, Hamilton and Harison libeled violators of the Registry Act of 1792 and the Enrollment and Licensing Act of 1793.[55] The duo handled prosecutions in the following way: Hamilton or both Hamilton and Harison would compose court documents or agreements made with the opposing counsel, and Harison would file any necessary paperwork with the court. Hamilton often appeared for the government in court, and both he and Harison shared the responsibility of arguing before the judge and jury.[56]

Oftentimes the federal courts made decisions about their jurisdictional limits—that is, whether or not the dispute under question qualified as an admiralty or common-law action. In one such case, *U.S. v. The Ship Young Ralph*, Hamilton appeared for claimant, Robert Cummings, and made a winning argument *against* the cause being heard in admiralty.[57] The case arose under the Slave Trade Act of 1794, which forbade the fitting out or equipping of vessels in the United States for the purposes of trading or trafficking slaves in any foreign

[54] Since the late 1780s, Hamilton and Harison shared a close, professional relationship. A prominent attorney practicing in the same commercial-legal circles as Hamilton, Harison served as the first U.S. District Attorney for New York from 1789 to 1801. Harison and Hamilton worked as both co-counsel and as opposing counsel on various cases ranging from marine-insurance disputes and libels in admiralty to litigation involving the disposal of western lands. Hamilton also consulted Harison for legal advice on official Treasury business, and Harison served as the director of New York's branch of the Bank of the United States from 1792-93.

[55] Julius Goebel Jr. summarized the main purpose of the Registry Act, ch 1., 1 Stat. 287 (1792) and the Enrollment and Licensing Act, ch. 8, 1 Stat. 305 (1793) as: "Whereas the Registry Act of 1792 was designed to reserve the advantages of American registry to United States citizens and exclude foreigners therefrom, the Enrollment and Licensing Act of the following year sought both to extend the same control to coastwise and inland navigation and to prevent the use of vessels so enrolled or licensed in foreign trade." Both of these acts empowered the Secretary of the Treasury to remit or mitigate any fines or forfeitures decreed by the district courts. See *LPAH*, 2: 791.

[56] See, for example, "Agreement" by Peter du Ponceau (representing the claimant) and Hamilton (representing the libellant) in Don Diego Pintado v. The Ship San Joseph (D.N.Y., 1795; C.C.D. N.Y., 1795-96; U.S., 1796), which Harison also borrowed and signed for use in his companion case, U.S. v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796). Also, Hamilton and Harison tag-teamed in court for U.S. v. The Ship Lydia (D. N.Y., 1801). See *LPAH*, 2: 804-05, 825-26.

[57] U.S. v. The Ship Young Ralph (D. N.Y., 1802; C.C.D. N.Y., 1802-1805).

country. Unlike other navigation acts that expressly provided that seizures should be within the federal admiralty jurisdiction, the Slave Trade Act was silent on the matter.[58]

Hamilton represented the party requesting a dismissal of the libel, and the district court granted his petition in March, 1802. After the courts' decision, however, Hamilton and Harison—the opposing counsel in this case—each issued written opinions on the ruling. As measured by his opinion, Hamilton thought the most decisive component of his argument had to do with the fact that the statute involved was penal, and thus required "full consummation"—that is, a complete fitting-out as a slave-trading vessel, in order to be found guilty. His client's vessel did not meet the criteria of "complete preparation for the [slave-trading] voyage."

Yet, accompanying this well-developed exposition was a brief and uncharacteristically short-sighted argument—but a *winning* one—claiming that "the proceeding was irregular[,] the case being plainly of common law not of Admiralty Jurisdiction." Presumably, Hamilton considered the case "irregular" and "plainly of common law" because the seizure of the *Young Ralph* occurred, not on the high seas, but in waters considered to be part of the county, which, according to English admiralty practice, would have triggered a common-law action.[59] Also, as noted above, the statute did not specify admiralty jurisdiction, and Hamilton exploited this technicality on behalf of his client.[60]

Harison argued that the *Young Ralph* should have been libeled in the federal admiralty courts because other federal statutes had provided for seizures taking place in local tidewaters (that is, not on the high seas) to be prosecuted in admiralty. Moreover, Harison thought that

[58] See Section 1 of the Slave Trade Act, ch. 11, 1 Stat. 347, 347-49 (1794) and *LPAH,* 2: 847.
[59] Harison admitted as much in his "Draft Opinion" (April 6, 1802), *LPAH,* 2: 854.
[60] "Opinion," by Hamilton (March 29, 1802), *LPAH,* 2: 850-854, quotations from 852.

regardless of a specific provision in the Slave Trade Act, any seizure would automatically come under Section 9 of the 1789 Judiciary Act.[61]

The fact that Hamilton argued against admiralty's cognizance over *U.S. v. Young Ralph* underscores the real constraints of the muddled English admiralty tradition that American jurists inherited and still abided by in the early republic.[62] In *Young Ralph*, Harison may have made the better legal argument about the propriety of admiralty jurisdiction (especially in hindsight), but Hamilton, ever the clever advocate, made the winning argument for his client. The *Young Ralph*'s strict adherence to English admiralty principles also gives us a sense of how great a legal transformation had to take place before the Taney court could plausibly claim, decades later in *The Propeller Genesee Chief v. Fitzhugh*, that Article III's grant of admiralty jurisdiction extended to all navigable waterways—including "county" waters, rivers, the freshwater Great Lakes, in addition to the high seas—where vessels carried on interstate or foreign commerce.[63]

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[61] Harison quoted the law in his opinion, noting that the district-court admiralty jurisdiction extended to "all Seizures under Laws of Impost, Navigation or Trade...where the Seizures are made on Waters which are navigable from the Sea by Vessels of ten or more Tons Burthen, within their respective Districts, as well as upon the high Seas." See "Draft of Opinion" by Richard Harison (April 6, 1802), *LPAH*, 2: 855. Harison cited Section 9 of "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 76-77 (1789).

[62] Even James Kent, when publishing his *Commentaries on American Law* in the 1820s, would cast doubt on the legitimacy and good sense of the expansion of federal admiralty jurisdiction beyond the high seas. He suggested that because Congress and the U.S. Supreme Court had defied English admiralty precedent and had extended the scope of federal admiralty jurisdiction to include revenue-related seizures and to waters not confined to the high seas, their actions were insufficiently considered and possibly illegitimate. The U.S. Supreme Court consistently upheld its earliest expansion of the federal admiralty jurisdiction in *U.S. v. La Vengeance* (3 U.S. (3 Dall.) 297 (1796)). Note, however, that before *The Propeller Genesee Chief v. Fitzhugh* (53 U.S. (12 How.) 443 (1851)), the Court confined its admiralty jurisdiction to only the high seas and to coastal waters, where the tide ebbed and flowed. See, in general, *Commentaries on American Law*, 1: 331-61; also, Edgar H. Farrar, "The Extension of the Admiralty Jurisdiction by Judicial Interpretation," *Annual Report to the American Bar Association* 33 (1908): 459, 472-74, 482-86.

Also, in the early republic period, even authorities on law sent mixed messages as to where exactly admiralty jurisdiction extended: Blackstone said "on the seas," but, while writing on *La Vengeance* in his *Commentaries*, Kent suggested that the admiralty jurisdiction extended to bays and harbors (corresponding to the ebb-and-flow of the tide rule that the Supreme Court would adopt for the first half of the nineteenth-century). Also, Richard Harison distinguished between the "high seas" and waters "within a County," but the Court in *La Vengeance* did not specify where on the water the admiralty jurisdiction extended; it bluntly stated that the unlawful act in question (exportation, in violation of U.S. law) was an act that took place wholly on the water (not in a county vicinity) and was part of their civil admiralty jurisdiction. Thus, in the 1790s, the exact boundaries of admiralty's extension over local waters remained muddled.

[63] The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

The common-law argument was put forth by Hamilton on behalf of his client, because, even in 1802, it was still somewhat persuasive to some federal judges—even after the U.S. Supreme Court upheld the contrary in *U.S. v. La Vengeance*.[64] The expansion of federal admiralty jurisdiction progressed gradually, but was far from complete.

In *U.S. v. La Vengeance,* the Supreme Court rejected the notion that its admiralty jurisdiction was confined only to the high seas, and thus broadened the federal courts' territorial jurisdiction over U.S. coastal waters. Although Hamilton participated in *La Vengeance,* Harison prosecuted the case, and Hamilton represented Don Diego Pintado, the libellant in *La Vengeance's* companion suit, *Don Diego Pintado v. The Ship San Joseph.*[65] Hamilton teamed up with Richard Harison and they worked both cases simultaneously.

Pintado v. San Joseph arose after Pintado's ship, the *San Joseph,* was seized by the French privateer *La Vengeance* (Pintado was a Spanish subject and France was at war with Spain). *La Vengeance*'s master, Jean Antoine Berard (the claimant), brought the *San Joseph* into New York as a prize, and Hamilton filed a libel on Pintado's behalf for restoration, claiming that because Berard outfitted the vessel in the United States, the capture was in violation of the 1794 Neutrality Act.[66] At almost the same time, Harison filed a libel against *La Vengeance,* charging that the ship was outfitted in New York City, with the intent to be employed in the service of

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[64] U.S. v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796). James Kent thought that the Supreme Court wrongly decided the case, and he complained that the whole body of federal admiralty decisions was premised on this one questionable decision. See *Commentaries on American Law,* 1: 347-38.

Also, during the 1790s, district court judges tended to be more conservative, understanding a more limited scope of federal admiralty jurisdiction. See, for example, the differences in opinions between the district court judges and the Supreme Court in Glass v. The Sloop Betsey (3 U.S. (3 Dall.) at 6). The lower courts did not consider their admiralty jurisdiction to include the prize "side" when the United States was neutral, but the U.S. Supreme Court ruled that the federal admiralty power encompassed both the instance and prize sides of the court, whether the nation was a neutral or at war. See, Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 1998), 6: 302,310.

[65] *Pintado v. The Ship San Joseph* went unreported; its journey through the federal court system can be traced through the minutes and dockets of the U.S. District Court for N.Y. (1795), the U.S. Circuit Court for N. Y. (1795-96), and the U.S. Supreme Court (1796).

[66] "An Act in addition to the act for the punishment of certain crimes against the United States," ch. 50, 1 Stat. 381 (1794).

France, and in violation of the Arms Embargo Act of 1794.[67] The cases overlapped so much that the lawyers used the same testimony and exhibits in each.[68]

At the end of much litigation, the district and Supreme courts sided with Berard, affirming that *La Vengeance* had not been fitted out as a privateer on American waters.[69] Despite the ruling against the government and Pintado, the Supreme Court's decision claimed a more expansive admiralty jurisdiction in three ways. First, and most importantly, the Court surreptitiously extended its jurisdiction in admiralty to waters previously considered "local," and not solely confined to the high seas, which in this case were the waters off of Sandy Hook, New Jersey. Next, the Court held that an action of forfeiture for illegal arms exportation was a matter of civil admiralty jurisdiction as encompassed by Section 9 of the 1789 Judiciary Act. (Recall, however, that the Court's holdings on these matters were still somewhat tentative, as the district judge in *Young Ralph* allowed a seizure to be prosecuted at common law.) Finally, by holding that embargo violations were matters of admiralty, seizures made under trade, navigation, or impost laws did not require a jury-trial.[70]

In the years following Washington's 1793 Neutrality Proclamation, the U.S. Supreme Court considered its admiralty jurisdiction to be expanding, and part of the larger effort to enforce U.S. neutrality policy. *La Vengeance* was a landmark in this regard, and the U.S. Supreme Court thought it settled the law with regard to the fact that federal admiralty jurisdiction was not confined only to the high seas, and that jury-trials would not be necessary for seizures made under U.S. revenue laws. Nevertheless, the Court still faced challenges to both holdings.

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[67] "An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same," ch. 33, 1 Stat. 369 (1794).
[68] *LPAH,* 2: 796.
[69] *La Vengeance* and *Pintado* had a complex journey through the federal courts. For a clear, complete narrative of the relevant events, legal maneuvers, and holdings, see *DHSC,* 7: 524-537 and *LPAH,* 2: 792-97.
[70] *DHSC,* 6: 535-37.

Despite the New York District Court's decision in *Young Ralph*, the U.S. Supreme Court effectively overturned it in 1805 by citing *La Vengeance,* and by maintaining that vessels seized under Congress' 1794 Slave Trade Act were matters of admiralty, and not of common law.[71] In *U.S. v. The Schooner Betsey,* Congress passed an act forbidding trade with St. Domingo and the Supreme Court had to decide whether a vessel seized in violation of the act should be tried in the district courts as an admiralty or common-law proceeding.[72] Citing *La Vengeance,* the Court determined that since the seizure was made on waters navigable from the sea, and not on waters considered to be within the body of the county, the proceedings would be in admiralty and without a jury.

And in a preview of his sweeping pronouncement in *De Lovio,* Joseph Story described the admiralty's prize jurisdiction in 1813 as "not only tak[ing] cognizance of all captures made at sea, in creeks, havens and rivers, *but also of all captures made on land,* where the same have been made by a naval force, or by co-operation with a naval force." This exercise of jurisdiction," he affirmed, "is settled by the most solemn adjudications."[73] Therefore, once the Court broke away from the English precedent that confined admiralty's jurisdiction only to the high seas, the federal courts generally refused to retreat or to give up on any of the jurisdiction they had claimed for their admiralty "side." James Kent considered the question of the admiralty's jurisdiction to be a mostly settled matter in American law.[74]

During the early republic period, the federal admiralty courts actively participated in commercial litigation through revenue-suits and neutrality prosecutions. Along the way, they

[71] U.S. v. The Schooner Sally of Norfolk, 6 U.S. (2 Cranch) 406 (1805).
[72] U.S. v. The Schooner Betsey and Charlotte and her Cargo, 8 U.S. (4 Cranch) 443 (1807).
[73] The Emulous, 8 F. Cas. 697 (C.C.D. Mass., 1813). Emphasis added.
[74] Despite James Kent's critique of the Court's decision in *La Vengeance*, the Court's holding that seizures made under U.S. revenue laws did not require a civil jury trial was firmly upheld in subsequent cases. In addition to *U.S. v. The Schooner Sally of Norfolk* and *U.S. v. The Schooner Betsey and Charlotte and her Cargo,* the case of Waring v. Clarke, 46 U.S. (5 How.) 441 (1847) upheld *La Vengeance*'s decision. Also see Farrar,"The Extension of the Admiralty Jurisdiction by Judicial Interpretation," 472-74.

established and maintained an expanded prize and civil instance jurisdiction over all coastal waters, a departure from English precedent and a firm resolve against encroachment from either state or federal common-law jurisdictions.[75] The federal admiralty court's activities in the years before 1815 are therefore significant because they demonstrate not only a gradual expansion of admiralty's jurisdiction—a trend upon which *De Lovio* would capitalize—but a constant participation in commerce and maritime commercial law. The admiralty docket transformed this initially quiet "side" of the federal courts into a feasible and vibrant jurisdiction to eventually oversee most of maritime commerce. And still, while admiralty grew in importance, the state common-law courts would simultaneously take part in a national legal conversation about how to underwrite the carrying boom brought about by American neutrality.

WORKING AS "ONE WHOLE": CREATING THE COMMERCIAL REPUBLIC IN THE STATE COURTS

The federal admiralty courts' oversight of national commerce began with Section 9's assignment of revenue-law seizures to the district courts, and it continued with the surge of prize and neutrality statute cases heard after 1793. Yet, because the central courts at Westminster had eventually denied the High Court of Admiralty cognizance over maritime contracts and torts by common-law courts, the federal judiciary did not claim that Article III's grant of admiralty and maritime jurisdiction included marine-insurance contracts until *De Lovio* in 1815.

During the years following the Neutrality Proclamation, the American marine-insurance business, which was in its stagnant infancy during the Revolutionary War, became suddenly

[75] The federal courts were hesitant to claim an expanded territorial jurisdiction over criminal cases, however. The courts confined their criminal jurisdiction to the high seas only, unless Congress specifically granted jurisdiction via statute. See Kent, *Commentaries on American Law*, 1: 337-42.

active, growing tremendously after 1793.[76] Investment in insurance corporations exploded, as $600,000 of investment capital in 1792 ballooned to $10 million by 1804. The number of American insurance companies increased from one to forty during the same twelve years.[77] The early national period was also a unique time in the American marine-insurance market, as it marked an extended period where private, individual underwriters co-existed with the growing number of incorporated insurers. The 1798 Quasi-War with France gave insurance corporations a distinct risk-pooling advantage in the insurance marketplace, but private underwriters persevered, both before and after the Quasi-War, using brokers to organize their hundreds of privately-underwritten insurance contracts transacted each year.[78]

This boom in the insurance industry corresponded to the increased demand for American international shipping services and underscored the uncertainty inherent in the business of carrying goods during wartime. European warfare meant that as neutrals, American "free" ships could carry "free" goods (including enemy goods, but not articles deemed "contraband" by the belligerents) to any and all of the warring countries or their colonies without hassle.[79] While neutral American carriers were always subject to the regulations imposed on them by various nations—including treaty provisions, blockades, or decrees made by foreign sovereigns—these restrictions did little in the aggregate to diminish the booming re-export trade carried out by

[76] Julius Goebel Jr., "The Business of Marine Insurance in New York," in *LPAH*, 2: 391-413; and Christopher Kingston, "Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis," *Journal of Economic History* 67 (2007): 379-409.
[77] North, *The Economic Growth of the United States*, 50. In 1792, the Insurance Corporation of North America, the first incorporated, American marine-insurance company, opened for business.
[78] Kingston, "Marine Insurance in Philadelphia During the Quasi-War with France, 1795-1801," 174-76.
[79] In 1805, the British Lords Commissioners of Appeals decided, in a case called the *Essex*, that Great Britain would reinstate the "Rule of 1756"—that is, trade ordinarily closed to shippers in peacetime was not open to those shippers, as neutrals, during wartime. Of course, this rule went against the United States' carrying-trade interests and would have severely undercut the American re-export trade, had the British enforced the decision rigorously. See North, *The Economic Growth of the United States*, 37 and Wood, *Empire of Liberty*, 640.

American merchant mariners from 1793 to 1808.[80] During this fifteen-year period, writes one economic historian, "the economic development of the United States was tied to international trade and shipping."[81]

The growing marine-insurance sector served the nation's larger commercial goals by providing crucial financial intermediation services to the young American economy. Insurers provided security against financial loss, and prevented individual merchants from having to hold large caches of "precautionary savings" in order to remain solvent if their ship or cargo was lost at sea; therefore, insurance firms enabled risk-averse merchants to take advantage of the high-risk, high-return carrying trade opportunities enabled by American neutrality.[82] Marine-insurance companies contributed to the development of American law as well, introducing the logic of actuarial statistics to common-law judging.[83]

Questions arising from the new volume of marine-insurance disputes were largely adjudicated in state common-law courts in commercial cities like New York, Philadelphia, and Boston. Yet, even though the federal courts' admiralty jurisdiction was formally closed-off from considering most of the special assumpsit actions initiated against marine-insurance policies, the

[80] According to Douglass C. North, U.S. shipping carried only 59% of foreign trade in 1792. Yet by 1795, U.S. shippers carried 90% of foreign trade, and by 1807, their market-share increased to 92%. Yet, revisionist Donald R. Adams Jr. had a more sober view of the period. Although he calculated that U.S. shipping, in total and foreign tonnage, increased from 1793 to 1807, he observed that the increase in U.S. tonnage shipped began in the period 1789-1792. Whereas North considered neutrality to be an overall positive force on the U.S. economy in the early republic, Adams saw neutrality as having limited effects. Nevertheless, both economic historians demonstrated that during the years of American neutrality, the carrying trade grew. See North, *The Economic Growth of the United States*, 41 and Adams, "American Neutrality and Prosperity, 1793-1808: A Reconsideration," 723-24.

[81] President Thomas Jefferson's December 1807 embargo put an end to American economic growth in the early republic period. Shipping activity somewhat rebounded when Congress repealed the embargo and replaced it with the Non-Intercourse Act of March 1809, which permitted commercial intercourse with all countries except England and France. When the War of 1812 broke out, however, the British "effectively ended [U.S.] external trade and concluded an era of growth based on American neutrality in a world at war." See North, *The Economic Growth of the United States*, 38, 42, 46.

[82] Robert E. Wright and Christopher Kingston, "Corporate Insurers in Antebellum America," *Business History Review* 86 (2012): 447, 448.

[83] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), 226-37. Alexander Hamilton helped introduce actuarial science to marine-insurance law in Barnewall v. Church, 1 Cai. 217 (N.Y. Sup. Ct, 1803).

common-law "side" of the federal courts occasionally adjudicated marine-insurance litigation before 1815. Because the federal judges already had experience adjudicating those insurance cases arising from the era of American neutrality, Story's claim in *De Lovio* was less of an overreach and more of a natural extension of federal power.

The common-law "side" of the federal judiciary could always hear marine-insurance disputes arising from their diversity jurisdiction—that is, if the insurer and insured were from different states, or if one were a non-citizen alien.[84] Also, when Congress created the Circuit Court for the District of Columbia in 1801, it gave the court jurisdiction over all cases in law or equity (including marine-insurance disputes) where either or both parties were resident or found within the district.[85]

Admiralty courts also heard cases arising from maritime liens such as bottomry bonds.[86] Bottomry created an obligation whereby the master or owner of a ship borrowed money from a lender at a foreign port in order to continue the ship's voyage (to make repairs, or as a line of credit to continue the voyage). If the ship or cargo now "underwritten" by the loan was lost at sea, the borrower did not have to pay the lender (though the lender would have to be paid from

[84] See, for example, Warren Manufacturing Company v. Etna Insurance Company, 29 F. Cas. 294 (C.C.D. Conn., 1837). Section 11 of the 1789 Judiciary Act, ch. 20, 1 Stat. 73, 78-79 (1789), gave this jurisdiction to the circuit courts. It reads: "And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

[85] See "An Act Concerning the District of Columbia," ch. 15, 2 Stat. 103, 106 (1801).

[86] Bottomry bonds were agreements whereby the owner/master of a vessel borrowed money for the use or repair of the vessel upon pledging the "bottom" of the ship as security. Bottomry was a means for the ship master to raise money for unexpected repairs or to continue the voyage while at a foreign port. The borrower and lender entered into the agreement knowing that bottomry bonds were made with the condition that if the vessel reached the destination safely, the money advanced plus interest would be paid back to the lender. If, however, the vessel were lost at sea, then the borrower would not be obligated to pay anything back to the lender. (If something of the cargo or vessel could be salvaged, then the lender would receive some recompense from the salvaged items.)

Shippers relied on two main types of bottomry bonds, respondentia and hypothecation. A respondentia bond applied to a loan of money on merchandize laden on board a ship, where the repayment depended on the safe arrival of the goods at the destined port. Hypothecation bonds referred to the pawn of the ship itself or its cargo for relief-funds when the ship found itself in distress at sea. Hypothecation bonds specifically required the loan to fund repairs needed on the voyage. See *LPAH*, 2: 238-39, 861.

anything salvaged from the voyage). The nature of these transactions prompted James Kent to analogize bottomry with marine insurance, calling the lender "in effect, an insurer," where both lender and underwriter "contribute to the facility and security of maritime commerce."[87]

With the federal admiralty courts already adjudicating select maritime contracts like bottomry bonds, in addition to some marine-insurance disputes, it was not such a great extension of logic or of jurisdiction to allow the federal admiralty courts cognizance over all maritime contracts. And as marine-insurance law developed among the various state courts and, to a degree, in the federal courts, neutrality policy forced these disparate jurisdictions to grapple with the same pervasive problem: how should each jurisdiction's marine-insurance law address novel questions about neutrality? As marine-insurance law developed around the exigencies of American neutrality, the state and federal courts adjudicated the consequences of national policy.

While states could (and sometimes did) decide legal questions by looking only to their state-law precedent, the nature of marine-insurance litigation discouraged this sort of inward-looking judging. First, all of the jurisdictions considering marine-insurance contracts faced the same questions arising from American neutrality. In this way, neutrality became the common-denominator—that is, the basis of an effective federal-state concurrence that united, at least in substance, the decisions of all the commercial courts across the United States. Also, if another court had already reasoned through a particular problem—the status of a foreign court's judgment, for example—it made sense to borrow that court's logic in order to settle the dispute arising at home.

[87] Kent analogized the two because the bottomry bond was a contract that had similar terms as marine-insurance policies and were decided, at law, upon similar principles. The lender took the risk that he would be made whole (with interest) if the ship/cargo completed the voyage successfully; likewise, the underwriter would collect the premium and would not have to pay out if the insured ship/cargo completed the voyage successfully and without peril. See James Kent, *Commentaries on American Law*, 3: 300-303.

But most importantly, the creation of any sort of uniformity in commercial decisions benefitted the merchants, shippers, and underwriters facilitating America's prosperous re-export trade; therefore, unity and uniformity in maritime commercial law added an element of certainty to an already highly-uncertain, wartime atmosphere. Just as nineteenth-century judges had an incentive to apply the law instrumentally in order to facilitate transactions and "release energy" in the domestic marketplace, the judges of the early republic had similar reason to create uniformity in the transnational marketplace.[88]

From 1795 until his death in 1804, Hamilton participated in at least 136 marine-insurance actions and was generally regarded as one of the finest lawyers ever to litigate maritime questions in the early national period.[89] The New York legal scene was such that Hamilton and a group of six other colleagues litigated most of the marine-insurance caseload, partnering on and off with each other; sometimes working together for one client, other times representing the plaintiff (usually the insurer) and defendant (usually the underwriter).[90] During the years 1796-1798, he also served on retainer as general counsel for the newly established United Insurance Company.

The jurisprudence that Hamilton litigated in New York state became part of a national judicial conversation about neutrality and marine insurance. As the French Revolutionary and

[88] I refer, of course, to James Willard Hurst's lecture on "The Release of Energy" in *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 3-32 and to Morton Horwitz's in *The Transformation of American Law*, 83.

[89] According to James Kent, "Alexander Hamilton was a leading advocate at our [New-York] bar." Hamilton demonstrated a thorough knowledge of maritime law in both the common law and civil law traditions. He "showed, by his precepts and practice, the value to be placed on the decision of Lord Mansfield. He was well acquainted with the productions of Valin and Emerigon, and if he be not truly one of the founders of the commercial law of this state, he may at least be considered as among the earliest of those jurists who recommended those authors to the notice of the profession, and, rendered the study and citation of them popular and familiar. His arguments on commercial, as well as on other questions, were remarkable for freedom and energy; and he was eminently distinguished for completely exhausting every subject which he discussed, and leaving no argument or objection on the adverse side unnoticed and unanswered." *Commentaries on American Law*, 2: 527-28.

[90] These lawyer-colleagues included two of Hamilton's closest friends and trusted advisors, Richard Harison and Robert Troup, as well as Josiah Ogden Hoffman, Nathaniel Pendleton, George Caines, and, before he assumed his position on the state Supreme Court, Brockholst Livingston.

Napoleonic Wars dragged on, the marine-insurance industry grew in the United States, as well as in England, producing volumes of case law on insurance.[91] With such a vast literature compiling, and with individual firms proliferating, marine-insurance litigation in the early nineteenth century was quickly becoming complex and nuanced. Despite the intricacies of the developing law, the two most pervasive questions in marine-insurance law coming before federal and state judges were: what were the obligations of the insured as a consequence of American neutrality, and what was the status of a foreign decree (a determination from a foreign admiralty court) in the American courts.

These neutrality related concerns arose from the particulars of the insurance disputes adjudicated in New York, Massachusetts, Pennsylvania, and in federal courtrooms, and in order to address them with consistency, the courts consciously looked to each other in order to synthesize and unify the law. In this way, the state and federal courts acted as "one whole" of a concurrent system, as Hamilton predicted. While the judges' efforts did not create a unified code of maritime law, the state and federal courts created enough uniformity and consistency in marine-insurance law that treatise-writers like James Kent and Wendell Phillips could summarize the principles of neutrality warranties and foreign decrees in their respective commentaries on insurance law.

Perhaps the most controversial question arising out of American neutrality was the status of foreign decrees, or whether the American courts would give comity to decisions made by foreign admiralty courts. Although jurists in America considered it to be settled in English law that foreign decrees would be adjudged conclusive on the evidence presented to it, it was a

[91] English treatise-writer James Allan Park issued multiple editions of his *A system of the law of marine insurances: With three chapters on bottomry; on insurances on lives; and on insurances against fire* in the late eighteenth century. American Wendell Phillips also wrote *A treatise on the law of insurance* in 1823, before James Kent summarized the principles of American marine-insurance law in his *Commentaries on American Law.*

momentous and difficult question for American courts to settle.[92] The question of the conclusiveness of foreign decrees arose frequently, usually as a result of the following fact-pattern: the underwriter insured a voyage and stipulated that the ship or the cargo insured be warranted neutral. While undertaking the voyage, a belligerent intercepted, seized, and condemned the ship or cargo for any number of reasons, and consequently, the insured made a claim to the insurer for compensation on the ship or cargo's loss. The insurer denied the claim, citing the condemnation as conclusive evidence of a breach of the neutrality warranty.

The difficulty of the question, then, arose from the insurer's assumption that the foreign court correctly determined that the insured's actions were non-neutral. Foreign admiralty courts considered the neutrality violation mid-voyage, and were thus spatially and temporally closer to the insurer's actions. The foreign courts' proximity to the neutrality violation suggested that they were better situated than an American court to determine evidence against the insurer. Yet, what if, during the extended, tense years of wartime, the decisions of foreign courts were vindictive, faulty, or appeared, at least to Americans, to be inequitable?

Alexander Hamilton represented the defendant insurer in *Ludlow & Ludlow v. Dale*, and assisted the defense in *Goix v. Knox* (along with its companion case, *Goix v. Low*) and in *Vandenheuvel v. United Insurance Company*; together, these cases comprised New York's precedent-setting opportunity to grapple with the question of foreign decrees.[93] In *Ludlow v. Dale*, the Ludlows opened a policy of insurance for cargo, warranted as American property. The vessel transporting the cargo was owned by an American. When at sea, the vessel and cargo

[92] American jurists considered cases like Hughes v. Cornelius, 89 Eng. Rep. 907 (K.B., 1683), Beak v. Thyrwhit, 87 Eng. Rep. 124 (K.B., 1689), and Phillips v. Hunter, 126 Eng. Rep 618 (Ex., 1795) as indicative that England had adopted the principle that foreign sentences were conclusive and would have the same force as domestic decrees.
[93] Ludlow & Ludlow v. Dale, 1 Johns. Cas. 16 (N.Y. Sup. Ct., 1799); Goix v. Knox, 1 Johns. Cas. 337 (N.Y. Sup. Ct., 1800); Goix v. Low, 1 Johns. Cas. 341 (N.Y. Sup. Ct., 1800) and 2 Johns. Cas. 480 (N.Y. Ct. Err., 1802); Vandenheuvel v. United Insurance Company, 2 Johns Cas. 127 (N.Y. Sup. Ct., 1801) and 2 Johns Cas. 451 (N.Y. Ct. Err., 1802).

were captured by the British, libeled, and condemned in a vice-admiralty court as lawful prize; the Ludlows then brought suit against the underwriter, Dale, when he refused to compensate them for the loss of the cargo. The defendant argued that the vice-admiralty's decision was conclusive evidence of the non-neutral character of the property, and New York's Supreme Court agreed.

In *Goix v. Low* and *Goix v. Knox,* each defendant insurer had underwritten a ship and cargo, respectively; while no neutrality warranty existed in the policy, the ship was described as "the American ship," and the cargo insured "against all risks." The vessel and cargo were condemned by a foreign admiralty court in Antigua, with no reason given, and Knox and Low refused to compensate Goix for his losses. Goix brought suit and the question before the New York Supreme Court was whether or not the Antiguan courts' decree amounted to a breach of the policies. Citing both *Ludlow* and English precedents, New York's justices upheld the conclusiveness of the foreign court's determination in *Low*, but thought the expansive language "against all risks" covered the plaintiff's loss in *Knox*.

The facts and holding in *Vandenheuvel* were similar to those in *Ludlow*, except that the case was taken, on writ of error, to New York's highest appellate court, the Court for the Correction of Errors. In 1802, the Court of Errors—a hybrid court, made up of New York's Chancellor, Lieutenant Governor, the justices of the Supreme Court, and the Senate—reversed the lower Supreme Court's holding. Because of the Court of Error's intervention, New-York law would ultimately reject the rule of the conclusiveness of foreign decrees and overturn the Supreme Court's ruling in *Ludlow, Low,* and *Vandenheuvel*. The rest of the state courts would largely ignore the Court of Error's decision, however.[94]

[94] Alexander Hamilton's thoughts on the conclusiveness of foreign decrees remain unclear. Hamilton successfully defended Dale and participated in the defense of Low and Knox, by arguing in favor of the conclusiveness of

When determining the politically sensitive, and legally momentous question of foreign decrees, both the state and federal courts looked to each other for cues and justifications for adopting the rule that foreign decrees were conclusive. As early adopters of the rule, however, New York and Pennsylvania referred back to the annals of English history, rather than to their sister-states, in order to find the rule conclusive.

The Pennsylvania Supreme Court was generally more skeptical of foreign-decree comity than New York's court. Two years before the New York Supreme Court heard *Ludlow v. Dale*, the Supreme Court of Pennsylvania considered the validity of a foreign decree on a ship and cargo warranted American. In *Vasse v. Ball*, the court refused to find the French admiralty court's determination conclusive because there were manifest inconsistencies and errors in the libel.[95] Under less suspicious circumstances, however, the Pennsylvania courts determined that foreign decrees were conclusive in *Dempsey v. The Insurance Company of Pennsylvania*—that is, until savvy Philadelphian insureds began inserting clauses into their policies that read: "warranted by assured to be American property, *to be proved, if required, in this city, and not elsewhere*."[96] This clause effectively forced the courts to reconsider all available evidence concerning the foreign libel at home. Ultimately in Pennsylvania, like in New York, once the state's legislature became involved, the foreign decree was no longer considered conclusive in state law.[97]

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foreign decrees. Yet, there is evidence to suggest that Hamilton did not personally agree with this principle, and only made it when defending his underwriter-clients. See *LPAH,* 2: 619 (for Hamilton's memorandum in *Goix*) and 622.

[95] 2 U.S. 270 (Pa. Sup. Ct., 1797).

[96] Emphasis added, as quoted from the policy at issue in Calhoun for the use of Fitzsimmons and another v. The Insurance Company of Pennsylvania, 1 Binn. 293, 302 (Pa. Sup. Ct., 1808). According to notes in *Calhoun*, the Pennsylvania case establishing the conclusiveness of foreign decrees was Dempsey v. The Insurance Co. of Pennsylvania (cited as 1 Binn. 299 in Kent, *Commentaries on American Law,* 2: 103, note c; the case is unreported in LexisNexis Academic). Kent referred to *Dempsey* as evidence that the Pennsylvanian courts also adopted the rule of conclusiveness for a foreign decree before their legislature intervened.

[97] Per an act passed in March 1809. See Kent, *Commentaries on American Law,* 2:103, note c.

By the time the U.S. Supreme Court considered the matter during its 1806 term, the justices were aware of the jurisdictions which had adopted the foreign-decree rule. In *Croudson v. Leonard* and *Fitzsimmons v. The Newport Insurance Co.*, suits brought on writs of error from the Circuit Courts of the Districts of Columbia and Rhode Island, the Court heard arguments about the conclusiveness of a foreign admiralty decree as evidence against insured plaintiffs.[98] In *Fitzsimmons*, counsel referred to *Vandenheuvel*, *Vasse*, and a previous federal case, *Maley v. Shattuck*.[99] In *Maley*, Chief Justice John Marshall set aside the question of the conclusiveness of foreign decrees, and just assumed for the sake of argument that the decree was conclusive. After hearing arguments about the status of the rule in both English and state case-law, the Court again dodged the question when delivering its opinion in *Fitzsimmons*, but ruled in *Croudson* "that the sentence of the court of admiralty. . . is conclusive evidence in this case against the insured, to falsify his warranty of neutrality."[100]

Although the Supreme Court made no move in any of these cases to assume jurisdiction over maritime contracts, the Court was aware of the fact that its admiralty jurisdiction frequently overlapped with state common-law jurisdictions. In *Fitzsimmons*, counsel noted that "[t]he common law courts have exclusive jurisdiction of questions of insurance, and whether the question of neutrality is necessarily involved in a question of insurance, they have as complete jurisdiction to try the question of neutrality, as a court of prize has."[101] Resolving the legal issues raised by America's neutral status thus united both state and federal courts around their common national policy.

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[98] Croudson and Others v. Leonard, 8 U.S. 434 (1807) and Fitzsimmons v. The Newport Insurance Company, 8 U.S. 185 (1808).
[99] 7 U.S. 458 (1806). *Maley* arose as a libel in federal district court and came to the Supreme court on appeal from the Pennsylvania Circuit Court in 1805 (see Shattuck v. Maley, 21 F. Cas. 1181(C.C. D. Pa., 1805)).
[100] Justice Washington, in Croudson v. Leonard, 8 U.S. at 442.
[101] This comment was made by either Alexander Dallas or Charles Lee, as counsel for the insured.

By 1810, when Massachusetts had finally gotten around to deciding the status of foreign admiralty decrees, federal and state case law on the matter had been largely settled. Massachusetts adopted the rule that foreign decrees were conclusive and Justice Theodore Sedgwick went on at length surveying all of the other jurisdictions that had already adopted the rule.[102] He began summarizing English cases, but moved on "to consider how this question stands, in point of authority, in the United States."[103]

Connecticut had determined that the sentence of a foreign court was conclusive in *Warner v. Stewart*.[104] In *Vandenheuvel*, the New York Supreme Court had determined the same, and though the Court of Errors reversed the decision:

> when I [Sedgwick] consider the character of the judges of the two courts—the first composed of grave, respectable, and learned lawyers, and the second constituted by popular elections—I derive, at least, as much satisfaction from the unanimity of the former, the result of their laborious investigation, as from the opposing decision of the latter. It can hardly be supposed that the reversal of a judgment so rendered can be considered as finally deciding, in that state, this important question.[105]

To Sedgwick, as well as to the other state courts considering the rule, the fact that New York's Supreme Court had initially adopted the rule of conclusiveness mattered more than the fact that the Court of Errors had reversed the holding.

Sedgwick continued, noting that the courts of "the great commercial state of Pennsylvania" had adopted the rule that foreign decrees were conclusive, citing *Dempsey* and *Calhoun*. Finally, he briefly discussed the Supreme Court's decision to adopt the rule in

[102] During the Revolutionary War, Theodore Sedgwick held the rank of Major in the Continental Army and served as member of both the Continental Congress and the Massachusetts legislature. After voting to ratify the federal Constitution in Massachusetts' 1788 convention, Sedgwick became one of Hamilton's Federalist allies while serving in the U.S. Congress in the capacity of Representative, Senator, and Speaker of the House. A prominent lawyer, Sedgwick was appointed to the Supreme Judicial Court of Massachusetts in 1802.
[103] John Baxter et al v. The New England Marine Insurance Company, 6 Mass. 277 (Mass. Sup. Ct, 1810).
[104] 1 Day 142 (Conn. Sup. Ct. Err., 1803).
[105] Sedgwick in Baxter v. New England Insurance Co., 6 Mass. at 298.

Croudson. According to Kent's *Commentaries,* South Carolina could have been added to this list as well.[106]

Sedgwick was, of course, an old Federalist, and so it was fitting that one of his final comments in *Baxter v. The New England Insurance Co.* would conjure a Hamiltonian vision of commercial unity and uniformity, as enforced by the federal courts. After noting that the Supreme Court adopted the conclusiveness rule in *Croudson*, Sedgwick concluded that "[i]f this decision is to be considered as an authority in the national courts...it would be with extreme reluctance that I should feel myself bound to dissent from it, by prescribing a different rule for the administration of justice in the courts of the state." He then articulated the unspoken move that Story would make five years later in *De Lovio*. Sedgwick continued:

> There seems to be a peculiar propriety in respecting the decisions of the Supreme Court of the United States upon this subject; because *there is delegated to the national government an authority to regulate commerce, and because it is highly interesting to commerce, that the same rule of decision, in this respect, should pervade the whole country.*[107]

In this concluding comment, Justice Sedgwick implicitly noted the way in which neutrality had created concurrence between the federal and state courts. He also paid tribute to Hamilton's commercial republic by recognizing national government's responsibility to oversee interstate and foreign commerce.

By surveying the state and federal cases addressing foreign decrees, it becomes clear that in this one particular, but important and reoccurring, question of marine-insurance litigation,

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[106] Calhoun for the use of Fitzsimmons and another v. The Insurance Company of Pennsylvania, 1 Binn. 293, 302 (Pa. Sup. Ct., 1808); Dempsey v. The Insurance Co. of Pennsylvania (cited by James Kent as 1 Binn. 299 in Kent, *Commentaries on American Law,* 2: 103, note c; the case is unreported in LexisNexis Academic); and Croudson and Others v. Leonard, 8 U.S. 434 (1807). Kent cited the South Carolina court's decision in 2 Bay 242 (unreported in LexisNexis Academic). See Kent, *Commentaries on American Law,* 2: 103, note c.

[107] Sedgwick in Baxter v. New England Insurance Co., 6 Mass. at 299. Emphasis added.

neutrality created concurrence between the state and federal courts. Over time, American courts concurred with each other in order to achieve a roughly uniform commercial law consensus on the rule of conclusiveness. This concurrence and consensus occurred as well when courts considered other marine-insurance law matters—like what, exactly, were the insured's obligations in order to uphold his neutrality warranty?

When composing his lectures on American law, James Kent discussed the particulars of the neutrality warranty—even though it had long been out of use—because of its importance to American jurisprudence during the early national period. Kent wrote that of all the legal questions arising out of the "long maritime wars that grew out of the French revolution," the neutrality warranty found in marine-insurance policies "attracted great attention" as "a fruitful topic of discussion in the courts of justice."[108] The American courts strictly construed neutrality warranties, along with any other explicit warranty, and put the burden of appearing and acting neutral on the insured.[109] As a premiere practitioner of commercial law, Alexander Hamilton helped to devise and settle the legal obligations of neutral insureds in New York's courts.

In *Blagge v. New York Insurance Co.*, the insurance contract at issue contained both a clause prohibiting illicit trade—an innovation on insurance policies ostensibly drafted by

[108] Kent, *Commentaries on American Law*, 3: 236.

[109] The exception was the carrying of contraband. Kent and another marine-insurance treatise writer, Wendell Phillips, described the development of the law of carrying contraband. In short, American neutrals could carry belligerents' goods—including goods that treaties, like the Jay Treaty, considered contraband—and not violate their neutrality warranties. Carrying contraband was not, *ipso facto*, a breach of neutrality. This rule was qualified, however. The insured could not defraud the insurer (that is, if the underwriter asked for the insured to disclose his cargo and the insured lied, or if the cargo carried did not match the specific goods ensured in the policy, then the insurer breached his implicit or explicit neutrality warranty). Also, if a belligerent condemned the insurer's cargo as contraband, the foreign decree would be considered conclusive evidence as to a breach of neutrality.

Hamilton participated in at least two cases that helped establish this rule in the New York courts. See Seton, Maitland & Co. v. Low, 1 Johns. Cas. 1 (N.Y. Sup. Ct., 1799), and Juhel v. Rhinelander, 2 Johns. Cas. 120 (N.Y. Sup. Ct., 1800). Massachusetts followed New York's lead, and by 1823, Wendell Phillips considered it a rule that carrying contraband did not violate the neutrality warranty. See Phillips' *A treatise on the law of insurance* (Boston: Wells & Lilly, 1823), 121, for the cases that generated this rule, including Hamilton's abovementioned litigation, see Skidmore & Skidmore v. Desdoity, 2 Johns. Cas. 77 (N.Y. Sup. Ct., 1800), Richardson v. Maine Fire & Marine Insurance Company, 6 Mass. 102 (Mass. Sup. Ct., 1809), and Stocker v. Merrimack Marine & Fire Insurance Company, 6 Mass. 220 (Mass. Sup. Ct., 1810).

Alexander Hamilton—and a warranty that the cargo was American property.[110] Blagge (the insured) had entered into a joint venture with Lovett, the master of the *Flora*, to ship goods to La Guaira, Venezuela. After encountering legal troubles in Cartagena, Colombia, Lovett made an arrangement with a Spanish shipper named Thomas Thorres to ship some of the goods—ingots and doubloons—as Spanish property. [111] In order to accomplish this, Lovett drew up a false invoice that omitted the cargo of ingots and doubloons from the vessel's documentation. When the *Flora* was subsequently seized by a British man-of-war, British officers discovered the omitted cargo and the paperwork listing the Spanish Thorres as owner of the goods. The cargo was then condemned and sold as lawful prize. The question before the New York court was whether the false invoice produced as a consequence of Lovett's side-deal with Thorres voided the insurance contract.

Hamilton, appearing on the underwriter's behalf, argued that the master's actions voided the contract because the creation of false papers subjected the cargo to an additional risk for which the insurers did not insure, and "if the assured has it in his power to give any aspect he may think fit to the property insured," how can the underwriter know how to calculate his

[110] Blagge v. The New York Insurance Company, 1 Cai. R. 549 (N.Y. Sup. Ct., 1804). In Bowne v. Shaw, 1 Cai. R. 489, 490 (N.Y. Sup. Ct., 1803), Hamilton claimed that the illicit trade clause was "framed by myself," and explained that "[i]t is contrary to the principles of a warranty, that it should extend to all things. It can relate only to the subject matter insured. When we warrant of a certain thing, we warrant of that thing alone...[Therefore] [t]he intent of the clause cannot be doubted. It was framed by myself to avoid the construction contended for on the other side, and to confine the operation of it simply to the article insured." As included in a cargo policy written by the United Insurance Co. in October 1799, the clause read: "It is also agreed, That the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure of detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." See *LPAH*, 2: 654-655.

[111] According to the case report, this was done in order to take advantage of a Spanish royal order that restricted North American trade with Spanish colonies ("the royal order of His Most Catholic Majesty of the 17th November, 1797"), whereby American goods shipped in American bottoms would be introduced to the Cartagena market. To do this, it was necessary that the cargo appear to be Spanish property, and so the cargo was consigned to Thorres as his property, shipped for him by Blagge as Thorres' agent based in New York. Thorres would receive a cut of the net proceeds in return for facilitating the transaction. See Blagge v. The New York Insurance Company, 1 Cai. R. 549 (N.Y. Sup. Ct., 1804) and *LPAH*, 2: 658-660.

risk?[112] Richard Harison, appearing for the plaintiff-insured, argued that the insurer was aware that the voyage was an attempt to evade Spanish import restrictions, and so Lovett's creation of the false documentation was in good faith and "a means of carrying on the trade." Although Harison indicated that the insurers understood that Blagge and his ship's master would try to circumvent Spanish trade restrictions, the court ultimately sided with the underwriters and Hamilton. In doing so, the bench clarified the obligations of neutrality warranties. The clause warrants not only the property as neutral but it implicitly requires that the neutral property be accompanied by documentation to insure it as such, as accustomed by the law of nations.[113]

The appellate courts of Pennsylvania, Maryland, and the U.S. Circuit Court for Pennsylvania adopted similar principles. In *Calbreath v. Gracy,* the Circuit Court found that because the underwriters insured cargo warranted as American property, the warranty and policy were voided when Spaniards were revealed to be one-third owners of the cargo.[114] In subsequent cases before the Pennsylvania and Massachusetts courts, opposing counsel would oftentimes refer back to the Circuit Court's holding in *Calbreath.*[115]

In *Phoenix v. Platt*, the Pennsylvania Supreme Court ruled that when the insured's ship-captain attempted to "cover" or disguise cargo on board from his British captors, his actions voided the insured's neutrality warranty.[116] And while sitting on the Court of Appeals of Maryland, Justice Samuel Chase came to the same conclusion. In *Carrere v. Unions Insurance Co.*, Chase declared that in his opinion, "the concealed papers, the artifice practised to prevent

[112] According to the case report, Hamilton declared that "An underwriter ought to know how to calculate his risk: this is never to be done if the assured has it in his power to give any aspect he may think fit to the property insured." (Blagge v. The New York Insurance Company, 1 Cai. R. at 563)
[113] Ibid.
[114] 4 F. Cas. 1030 (C.C. D. Pa., 1805). The plaintiff and defendant's names were also commonly found as "Calbraith" and "Gracie".
[115] See, for example, Pollock v. Babcock, 6 Mass. 234 (Ma. Sup. Ct., 1810) and Calhoun for the use of Fitzsimmons and another v. The Insurance Company of Pennsylvania,1 Binn. 293 (Pa. Sup. Ct., 1808).
[116] The Phoenix Insurance Company v. Pratt and Clarkson, 2 Binn. 308 (Pa. Sup. Ct., 1810).

detection of them, the fictitious names used, and the mystery in which the whole are enveloped, contradict and discredit the legal documents...which cover the whole property insured as his property."[117] Needless to say, the insurer's actions had voided his neutrality warranty.

By the 1820s, marine-insurance law had become so complex that Kent found it "difficult to bring the subject within manageable limits" for his lectures on the law. Also, by this time those "very vexed discussions" arising from wartime—particularly over the status of foreign decrees—had faded in importance because of the long peace that followed the War of 1812.[118] Still, the lasting effects of American neutrality continued to be felt in insurance law: the decisions that arose from the United States' many years of neutral commerce created enough unity and uniformity in maritime law that Kent summarized the leading principles of marine insurance as part of an *American* law.

De Lovio v. Boit and Neutrality's Lasting Influence on American Commercial Law

In the early republic, neutrality significantly impacted the development of American commercial law, allowing the federal courts to claim an expanded jurisdiction over commercial matters usually adjudicated by the states. Neutrality influenced the federal courts in two ways: first, neutrality vitalized the federal admiralty jurisdiction, increasing its volume of business, and giving the admiralty "side" of the federal courts opportunity to gradually expand its authority over coastal waters. Simultaneously, neutrality created a point of convergence for federal and state courts, whereby both considered the effects of neutrality on maritime commerce. While the

[117] Carrere v. The Union Insurance Company, 3 H. & J. 324, 328 (Md. Ct. App., 1813). Counsel cited *Blagge v. New York Insurance Co.* and *Vandenheuvel v. United Insurance Co.* in their arguments before the court.
[118] Kent, *Commentaries on American Law,* 3: 203, 267.

federal courts initially had limited access to the routine litigation arising from such commerce, questions arising from the thriving marine-insurance industry were routine in the state courts.

Neutrality, however, revolutionized the business of marine insurance—the number of insurance policies underwritten, and thus the volume of insurance litigation initiated, exploded because of the neutral carrying trade—and it forced the nascent body of American marine-insurance law to innovate in order to answer questions arising from the nation's neutral status. Because this innovation occurred at both the state and federal levels, the American courts began to create, for the first time, a roughly uniform, constantly unifying body of American commercial law.

Along with Alexander Hamilton's financial programs, neutrality—the common-denominator converging state and federal maritime commerce decisions—helped to create Hamilton's "commercial republic." When adjudicating cases arising from neutrality-related suits, the federal and state courts acted in concert, just as Hamilton predicted they would in *Federalist* No. 82. Both courts worked as part of system united around the common purpose of creating a stable commercial environment, marked by certainty and uniformity in maritime commercial law. Hamilton's active participation in federal and state courtrooms—first as an administrator, and then as a practicing attorney—demonstrates how the expansion of federal admiralty jurisdiction and the gradual unification of marine-insurance law developed over the course of the early national period.

And so, when Justice Story officially announced, in *De Lovio v. Boit,* that the federal admiralty jurisdiction encompassed those maritime contract and tort disputes which had been adjudicated primarily, but not exclusively, by the state common-law courts, he did so not as "an

aggressive extension of the jurisdiction of the federal courts."[119] Instead, *De Lovio* was the natural extension of the federal courts' gradual accumulation of power, and the state courts' complicity in generating a national commercial law. Although Story grounded his decision in the annals of English legal history (a true enough claim; once upon a time, the High Court of Admiralty did have jurisdiction over maritime contracts and torts), his extension of federal power was politically and legally legitimated by the effects of nearly two decades of neutrality-related litigation in the federal and state courts.

Story also implicitly modeled his decision on Hamilton's notion of concurrence. The states retained their pre-existing sovereignty to hear common-law contract and tort suits, but the states could not erect admiralty courts. The federal courts had an exclusive authority to sit in admiralty, however, and because Story declared that admiralty encompassed maritime torts and contract disputes too, the federal and state courts truly exercised concurrence over the legal questions that had the greatest effect over the national commerce.

Once the United States chose war over neutrality, the common-denominator uniting state and federal commercial decisions disappeared. *De Lovio* was an action brought by the libellant, De Lovio, specifically to test the viability of adjudicating a marine-insurance suit in admiralty; had the case been brought a few years later, instead of right at the conclusions of Anglo-American hostilities, Story's claim might have been less feasible. After 1812, the courts were no longer grappling with the consequences of American neutrality. Story, therefore, took advantage of a propitious moment to further claim an expanded federal admiralty jurisdiction—a moment generated by the past two decades of federal and state courts working in tandem on neutrality-

[119] White, *The Marshall Court and Cultural Change,* 443.

related legal questions.[120] In the years following the 1815 Treaty of Ghent, however, the federal and state courts had reverted back to their separate spheres, adjudicating maritime contracts and torts independently, and without concern for neutrality or war, while transforming domestic commercial law in the face of a market revolution at home.[121] The only difference was that now the federal admiralty jurisdiction had officially expanded, in a post-neutrality America, to encompass the bulk of maritime commercial litigation as well.

After *De Lovio*, a petitioner could initiate his marine-insurance suit in either his state's common-law court or in the admiralty "side" of the federal district courts without regard to diversity or alien jurisdiction stipulations. In the wake of Story's decision, however, James Kent expressed concern that perhaps the federal courts would now reduce the states' authority to adjudicate maritime contracts and torts—perhaps even to deny the states' jurisdiction over those matters at all. It was only a few years after *De Lovio* that Justice Story asserted the U.S. Supreme Court's authority, in *Martin v. Hunter's Lessee*, and ruled that where the federal courts had jurisdiction, exclusive or concurrent, over a federal statute, treaty, or constitutional question, the U.S. Supreme Court stood as the ultimate, final arbiter.[122] Kent worried that as an exclusive grant from Article III, the admiralty power might soon be construed by the Supreme Court to deny the states any cognizance over matters—like maritime contracts and torts—that were considered part of the federal courts' exclusive admiralty jurisdiction. He only grudgingly accepted the possibility that the federal admiralty courts could theoretically take exclusive cognizance of maritime contracts and torts, but he hoped that because their new jurisdiction was

[120] Ibid., at 429. G. Edward White claimed that "*De Lovio* was a convenient case, seized upon by Story as material for the larger juristic and political campaigns he had begun to wage." Certainly Story seized upon the opportunity presented by *De Lovio*, but the nature of Story's power-grab was not nearly as sudden, nor as aggressive, as White claims. By 1815, neutrality-related cases had made Story's expansion of federal admiralty jurisdiction a natural progression in law, rather than an assertive, sudden burst of judicial activism.
[121] See Horwitz, *The Transformation of American Law*, 226-37.
[122] Martin, Heir at law and devise of Fairfax, v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

a recent innovation, the federal judges would not be so bold.[123] Perhaps as a precautionary gesture, Kent emphasized in his *Commentaries* the Hamiltonian premise that state courts retained their pre-existing authority, even after *Martin*.[124]

As the nineteenth century progressed, however, Kent's fears went unfulfilled. Federal judges did not assume that they had an exclusive jurisdiction over maritime contracts and torts, but merely a concurrent one, shared with the state common-law courts. Still, the federal admiralty courts continued to expand their jurisdiction over maritime commerce, sometimes even directly citing Hamilton's *Federalist* No. 82 to explain commercial concurrence between the state and federal courts.[125] Neutrality was no longer a concern for American maritime commerce, but by creating a concurrent, federal jurisdiction over such commerce, neutrality had a lasting effect on federal judicial power, American law, and the creation of Hamilton's "commercial republic."

[123] Kent, *Commentaries on American Law*, 1: 352-52.
[124] Ibid., at 370-79.
[125] Federal judges cited Hamilton's *Federalist* No. 82 in U.S. v. New Bedford Bridge, 27 F. Cas. 91, 102 (C.C.D. Mass., 1847), when drawing a boundary around federal admiralty jurisdiction and in Rhode Island's Supreme Court referred to Hamilton as well to justify its concurrent jurisdiction over Narragansett Bay. See Philip B. Chase, Administrator v. The American Steamboat Company, 9 R.I. 419,430-31 (R.I. Sup. Ct., 1870).

During the antebellum years, the U.S. Supreme Court made its broadest statement about admiralty jurisdiction in *The Propeller Genesee Chief v. Fitzhugh* (53 U.S. (12 How.) 443 (1851)). Story underscored the importance of admiralty's cognizance over commercial matters like marine-insurance contracts in Hale et. al v. Washington Insurance Co., 11 F. Cas. 189, 191 (C.C.D. Mass., 1842), noting that he was assured of the admiralty's "importance to the commercial and maritime world [because] [t]o no nation is [admiralty jurisdiction] of more importance and value, to have it preserved in its full vigor and activity, than to America, as one of the best protections of its maritime interests and enterprises."

CHAPTER FOUR
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DEVELOPING THE JURISPRUDENCE OF FEDERALISM: ALEXANDER HAMILTON AND THE DEFENSE OF THE FEDERAL FISCAL POWERS

During the particularly fraught summer of 1791—that season in which speculation in Bank of the United States scrip brought the young republic's first financial panic to Philadelphia—Treasury Secretary Alexander Hamilton received an alarming piece of news from Boston. William Lowder, the Chairman of the town's Board of Assessors, wrote an open letter to the Secretary asking to see the federal government's "public books of loans"—that is, the Treasury's record of U.S. bond holders. Lowder requested the names and valuation of Boston-area, federal-securities holders because the town had levied a tax on its residents' personal property, which included the interest-income earned on U.S. bonds.[1] This news could hardly have been worse for the Secretary, who had only managed to launch the major components of his fiscal program within the last year.[2] Now, the town of Boston sought to tax the lucrative product of Hamilton's assumption scheme—the highly liquid, in-demand 6%, deferred 6%, and 3% securities issued to domestic holders of the newly-nationalized war debt—and in response, the Treasury Secretary strenuously denied Lowder's request, citing the levy's harmful effects on the public credit. Yet, despite the threat Boston's tax posed to his fiscal statecraft, Hamilton offered no legal or constitutional arguments to support his opinion, choosing, instead, to defend his position on policy, rather than legal, grounds.

[1] William Lowder to Hamilton (July 14, 1791), Harold C. Syrett, ed., *The Papers of Alexander Hamilton,* 27 vols. (New York: Columbia University Press, 1961-87), 8:549-50. [Hereafter *PAH.*] Lowder published the letter in the August 30, 1791 edition of *The Federal Gazette and Philadelphia Daily Advertiser.* Also see Tobias Lear to George Washington (October 9, 1791) in W.W. Abbot et al., eds., *The Papers of George Washington, Presidential Series,* 18 vols. to date. (Charlottesville, Va: University of Virginia Press, 1987—), 9: 62-63. [Hereafter, *PGW.*]

[2] Only months before, in February 1791, President Washington called upon the Treasury Secretary to defend the constitutionality of the proposed central bank, and after much political wrangling, Hamilton's assumption plan had finally passed through Congress in July 1790.

Contrast Hamilton's reticence with Chief Justice John Marshall's bold assertions in *Weston v. Charleston,* an 1829 tax case adjudicated before the U.S. Supreme Court.[3] The facts of *Weston* are nearly identical to the 1791 Boston incident: in February of 1823, the city council of Charleston, South Carolina passed an ordinance to raise revenue that taxed all sorts of personal property, including "all personal estate, consisting of bonds, notes, insurance stock, *six and seven percent stock [bonds] of the United States*, or other obligations upon which interest has been or will be received during the year."[4] Yet, nearly four decades after Boston sought to levy a similar, local tax on federal securities, Marshall pronounced that Charleston's attempt to do the same was unequivocally unconstitutional. The Chief Justice cited a number of legal arguments to bolster his argument: he pointed out that U.S. bonds taxed by the ordinance were direct manifestations of the federal government's enumerated power to borrow, and that those securities represented an inviolable contract made between the federal government and its creditors. Therefore, the state had no authority to infringe upon the national government's sovereign, and *supreme*, authority to borrow money, nor to interfere with the terms of its contracts. Furthermore, Marshall thought that Charleston's tax impaired the federal government's implicit responsibility to maintain the public credit.

Why did Hamilton and Marshall—both nationalists who opposed the city taxes levied on U.S. bonds—offer such different responses to Boston and Charleston's assessments? During the years separating the Boston tax from Plowden Weston's lawsuit against Charleston, American constitutional law developed the legal tools necessary to justify and to defend the federal government's power to tax and to borrow. And though he invoked no constitutional arguments to Lowder in 1791, Alexander Hamilton was the pivotal figure in the development of this fiscal

[3] Plowden Weston and others v. The City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829).
[4] Ibid., 450 (Emphasis added). When speaking of securities in the eighteenth and nineteenth centuries, Hamilton, Marshall, and their contemporaries oftentimes referred to bonds as "stock."

jurisprudence, as he articulated, and then put to use, the key constitutional principles that enabled jurists like Marshall to mount a legal defense of the federal government's fiscal powers.

Hamilton's fiscal jurisprudence—the legal strategy he employed to defend the federal government's taxing and borrowing powers—also became part of the early republic's jurisprudence of federalism. It had two main components. First, Hamilton sought to realize the potential of the expansive taxing and borrowing powers permitted to the federal government under the Constitution. Whereas the states exercised their considerable powers to tax and to borrow since declaring their independence in 1776, the national government had only enjoyed its theoretically concurrent—but not yet realized—fiscal authority with the states since ratification in 1788. To this end, Hamilton was the single most important figure in the early republic: when he joined the Washington administration, he quickly refinanced outstanding foreign loans and engineered the assumption-and-swap of domestic war debt for new U.S. securities. In addition, his funding plan relied on a variety of newly proposed federal taxes that not only brought in revenue to service the national debt, but also discouraged desuetude—or, the potential that dormant fiscal powers would enervate from disuse. And by legislating the Treasury Secretary's proposals into law, Congress helped Hamilton to establish early-on that the federal government had a vastly expanded power to tax.[5]

In addition to establishing the reality of federal fiscal concurrence, Hamilton also developed legal arguments to justify and to defend the federal government's taxing and borrowing powers when various state *and* national challenges threatened them. His articulation of legislative concurrence helped to quell the states' fears of plenary, federal fiscal powers, and his successful defense of the carriage tax in *Hylton v. U.S.* thwarted Virginia's attack on the

[5] In Hamilton's "Report on a Plan for the Further Support of Public Credit" (written January 16, 1795 and communicated to the House and Senate within the following week), the outgoing Treasury Secretary listed the fourteen revenue-raising acts that Congress had passed since June of 1789. See *PAH*, 18: 59-65.

national government's taxing power.[6] In addition, Hamilton developed arguments in favor of a broad construction of federal fiscal power and he convinced Congress that U.S. securities should be treated as inviolable, tax-immune contracts. Hamilton developed these legal maxims to assert and to defend the vigorous and concurrent federal fiscal powers that he had proposed and exercised as head of the Treasury Department.

While some of Hamilton's legal arguments are familiar to scholars of the early republic, historians have overlooked the coherence and long-term impact of his constitutional defense of the federal fiscal powers. This legal strategy helped Hamilton accomplish desired policy goals during his term in Washington's cabinet, but it also became a lasting legal framework that persevered in constitutional jurisprudence long after Hamilton was out of office. Therefore, the existing scholarship consistently underestimates not only the extent of Hamilton's efforts to restore and maintain the public credit, but also fails to acknowledge his seminal influence over the jurisprudence of federalism in the early republic. Political and economic scholars, for example, have meticulously examined Hamilton's financial programs and argued that Hamilton's combined funding, assumption, and central banking policies were effective at jumpstarting the United States' economy and restoring the nation's credit.[7] Others have scrutinized the political consequences of Hamilton's financial programs, or parsed his partisan

[6] 3 U.S. (3 Dall.) 171 (1796).

[7] Max M. Edling, "So Immense a Power in the Affairs of War": Alexander Hamilton and the Restoration of Public Credit, *The William and Mary Quarterly* 64 (2007): 287-326 [hereafter, "Restoration of Public Credit"]; Max M. Edling and Mark D. Kaplanoff, "Alexander Hamilton's Fiscal Reform: Transforming the Structure of Taxation in the Early Republic," *The William and Mary Quarterly* 61 (2004) [hereafter, "Hamilton's Fiscal Reform"]: 713-744; see, generally, Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003) [hereafter, *A Revolution in Favor of Government*]; Douglass C. North, *The Economic Growth of the United States, 1790-1860* (New York: W.W. Norton & Company, 1966), 46; Curtis P. Nettels, *The Emergence of a National Economy, 1775-1815* (New York: Harper Torchbooks, 1969),121-26; Stuart Bruchey, *The Roots of American Economic Growth, 1607-1861* (New York: Harper Torchbooks, 1968), 108-113; Richard Sylla, "Shaping the U.S. Financial System, 1690-1913: The Dominant Role of Public Finance," in *The State, the Financial System and Economic Modernization*, ed. Sylla, Richard Tilly, and Gabriel Tortella (New York: Cambridge University Press, 1999), 254-62.

motivations for recommending such a centralizing scheme for the young republic.[8] Economic historians interested in wealth distribution and taxes also take interest in Hamilton's policies and the new Constitution's fiscal powers, but they remain mostly unconcerned with the intersection of tax policy and the development of constitutional law.[9]

These accounts demonstrate the particulars of Hamilton's policy recommendations, along with their economic and political consequences, but historians assume that his efforts were complete—apart from a rhetorical defense continued through partisan squabbling—once the Congress passed the requisite statutes to enact Hamilton's recommendations. This approach misses the fact that Hamilton did not rely solely on enacted policy to accomplish his statecraft; instead, his work to restore the nation's credit continued through each and every Treasury-department transaction, and through a strategic, legal defense of the federal government's fiscal powers.[10]

Legal historians have missed Hamilton's fiscal-defense strategy as well. Because legal scholarship so often clusters around particularly noteworthy cases, legal developments that arise across multiple, interconnected, or little-known cases can be obscured. For example, Hamilton frequently appears in the huge volume of commentary on the Marshall Court's "aggressive,"

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[8] John R. Nelson, Jr., *Liberty and Property: Political Economy and Policymaking in the New Nation, 1789-1812* (Baltimore: Johns Hopkins University Press, 1987), 22-36; Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009), 95-97; John C. Miller, *Alexander Hamilton: Portrait in Paradox* (New York, 1959), 238-54; Forrest McDonald, *Alexander Hamilton: A Biography* (New York: W. W. Norton & Company, 1982), 163-88; Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vintage Books, 2002), 48-80; Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2002), 22-23, 36.

[9] Roger H. Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (Baltimore: Johns Hopkins University Press, 1993) [hereafter, *Redeeming the Republic*]. In *American Taxation, American Slavery*, however, Robin L. Einhorn briefly considered the effects of the U.S. Supreme Court's decision in *Hylton v. US* (Chicago: University of Chicago Press, 2006).

[10] As Thomas K. McCraw noted, by the end of his tenure in the Treasury department, Hamilton had come to understand the nature and need for credit better than any other American statesmen. The outgoing Treasury Secretary devoted much of his 1795 "Report on a Plan for the Further Support of Public Credit" to describing the ongoing importance of credit to the nation's stability and ongoing growth. See McCraw, *The Founders and Finance: How Hamilton, Gallatin, and Other Immigrants Forged a New Economy* (Cambridge, Mass.: Belknap Press, 2012), 354-56.

nationalistic decision in *McCulloch v. Maryland* because his opinion on the constitutionality of the first Bank of the United States provided key legal arguments for Marshall's opinion.[11] Yet, Hamilton's involvement in *McCulloch* is never compared with his related arguments before the Supreme Court in *Hylton v. U.S.*, and *McCulloch* is not put into conversation with his other, significant legal legacy: Hamiltonian concurrence. And though Hamilton figures prominently in scholarly treatments of *Hylton*—a case concerned with the meaning of the Constitution's "direct tax" clauses—the *Hylton* historiography is particularly disjointed and does not attempt to recognize a Hamiltonian legal strategy over and above the arguments he pursued in that case alone. [12]

The legal strategy that Hamilton used to maintain and sustain the public credit, as well as to defend the national government's fiscal powers, is thus in need of recognition and re-

[11] 17 U.S. (4 Wheat.) 316 (1819). Richard E. Ellis has most recently argued that Marshall seized on *McCulloch* as an opportunity to instill a particularly "aggressive nationalism" in the Supreme Court's jurisprudence. Ellis noted the close connection between Hamilton and Marshall's constitutional interpretations, and Samuel J. Konefsky went farther, calling Marshall a "conscious disciple of the Hamiltonian brand of nationalism," as evidenced by the *McCulloch* decision. Clinton Rossiter discussed broad construction of the U.S. Constitution as Hamilton's particular brand of constitutional theory—a "fortress of logic" from which Marshall determined *McCulloch.* See Ellis, *Aggressive Nationalism*: McCulloch v. Maryland *and the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007), 34-36, 95 [hereafter, *Aggressive Nationalism*]; Konefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (New York: The Macmillan Company, 1964), 71, 165 [hereafter, *John Marshall and Alexander Hamilton*]; Rossiter, *Alexander Hamilton and the Constitution* (New York: Harcourt, Brace, & World, Inc., 1964), 185-208, quote at 200.

[12] There are two mostly non-overlapping threads of *Hylton* historiography: one discusses the case within the context of the "origins" or development of judicial review in America, and the other is concerned with the consequences of the Supreme Court's interpretation of the "direct tax" clauses. Examples of this judicial-review line of scholarship include: Julius Goebel, Jr., *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Antecedents and Beginnings to 1801*, vol. 1 (New York: Macmillan Company, 1971), 778-84; William R. Casto, "James Iredell and the American Origins of Judicial Review," *Connecticut Law Review*, 27 (1995): 329-63; Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 221; Robert P. Frankel, Jr., "Before *Marbury*: *Hylton v. United States* and the Origins of Judicial Review," *Journal of Supreme Court History*, 28 (2003): 1-13; ad Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 102-103.

Some of the scholarship concerned with the meaning of "direct tax" and its implications for American constitutional law includes: Bruce Ackerman, "Taxation and the Constitution," *Columbia Law Review,* 99 (1999): 1-58; Erik M. Jensen, "Taxation and the Constitution: How to Read the Direct Tax Clause," *Journal of Law and Politics*, 15 (1999): 687-716; James R. Campbell, "Dispelling the Fog about Direct Taxation," *British Journal of American Legal Studies*, 1 (2012): 109-72; Joel Alicea and Donald L. Drakeman, "The Limits of New Originalism," *University of Pennsylvania Journal of Constitutional Law*, 15 (2012-2013): 1161-1220.

construction. In order to do so, this chapter examines the intervening legal developments, and Hamilton's role in crafting them, that explain why Marshall's assertions in *Weston v. Charleston* are so different from Hamilton's reply to William Lowder in 1791. Hamilton's legal arguments, and particularly his articulation of concurrence, provided the legal tools that both he and subsequent jurists—both nationalists and states-rights proponents, alike—used to discuss the increasingly robust nature of the federal government's taxing and borrowing powers. Hamilton's legal strategy not only succeeded in defending those institutional and administrative measures enacted to restore and to maintain the nation's credit, but his arguments also became a fundamental part of the early republic's language of sovereignty and federalism.

When, after Hamilton's death, antebellum jurists adjudicated questions involving collisions between the federal and state governments, Hamiltonian principles provided them with an articulated framework (legislative concurrence) and a set of legal tools for discussing and resolving these inevitable clashes of sovereignty. Hamilton's legal arguments originated the jurisprudence of "defensive" federalism in American constitutional law—that is, Hamiltonian concurrence, broad construction, and his securities-as-contracts arguments comprised a legal defense to be deployed specifically to protect the federal government's expansive taxing and borrowing powers. What Hamilton had yet to completely articulate in 1791, Marshall expressed fully in 1829. In this way, then, Alexander Hamilton's legal legacy sits squarely at the center of the jurisprudence of American federalism.

ESTABLISHING CONCURRENCE

While Hamilton would eventually articulate a variety of legal arguments to counter challenges posed to the federal taxing and borrowing powers, his primary defense was in

response to lessons learned from the American Revolution. Anglo-American constitutional law had taught Hamilton that hastily-conceived taxes could threaten (or be perceived as a threat to) the security of individual rights, and that sovereign power could in fact weaken, or altogether disappear, if not regularly exercised. More importantly, Hamilton understood that even after the Confederation Congress's impotence was fully on display during the 1780s, Americans still remained skeptical of a strong, centralized authority and its power to tax them.

In response to these wartime lessons, Hamilton transformed the Constitution's abstract grant of federal fiscal powers into a thriving reality. During the debate over ratification, and throughout his tenure as Treasury Secretary, Hamilton defined, and then executed, the concept of legislative concurrence in American law. Rather than operate in wholly separate spheres, the federal and state governments often had the authority to simultaneously exercise the same types of power. The taxing power exemplifies this concurrent authority, as both the federal and state governments could and did tax the same articles of personal property—like dwelling houses, slaves, or carriages—at the same time.

Concurrence provided Hamilton with both a challenge and an opportunity. Because concurrence meant that the federal government had a vastly expanded arsenal of revenue-generating powers, the states would naturally be jealous of this power and concerned that it would impair their abilities to collect revenue. Hamilton met this challenge with a well-articulated argument made both in speech and in print that described how concurrence would work in practice. Hamilton assured the states that under the new Constitution they retained most of their legislative sovereignty—and particularly their still-ample powers to tax—but also enumerated the circumstances that would result in an alienation of these prerogatives. Concurrence formed the intellectual framework for Hamilton's overall legal strategy, because it

explained how the federal government could be just as fiscally assertive as the states, but without denying the states their legislative sovereignty or the majority of their traditional revenues.

But the federal government's potential for fiscal assertiveness provided the real opportunity for Hamilton. Back in 1782, Hamilton spent a frustrating five months as a continental tax-receiver, working under Superintendent of Finance Robert Morris and attempting to collect New York's share of continental taxes. Despite Hamilton's best efforts, he neither made headway collecting all of the arrearages owed by the state, nor did he succeed in reforming New York's tax system.[13] But as Treasury Secretary, Hamilton could achieve what the Confederation Congress could not. If he could execute the newly-minted federal taxing and borrowing powers, he could accomplish the new nation's highest priority: to restore the public credit.[14] Hamilton took immediate advantage of this opportunity through his policy proposals, as well as through his leadership and oversight of the Treasury Department. Therefore, the first component of Hamilton's legal defense of the federal fiscal powers was defining and exemplifying concurrence in action.

The federal government's power to tax proved to be contentious before it was even exercised. In a momentous departure from the Articles of Confederation, the Constitution gave the General Government an extensive power to tax the American people directly. Whereas the Articles made the Confederation Congress dependent on the states to raise money for national exigencies (under the inefficient requisitions system), the Constitution authorized a taxing power

[13] Hamilton served as continental receiver from July to November, 1782. He described his "sensible mortification" at New York's arrearages, as well as the problems with New York's tax system and his efforts to reform it, in letters written to Robert Morris and in circulars to New York's county treasurers. See Hamilton to Robert Morris (July 22 and August 13, 1782), with enclosure, *PAH*, 3: 114-17, 132-44 and Hamilton to the County Treasurers of the State of New York (September 7, 1782), *PAH*, 3:160. Also see John C. Miller, *Alexander Hamilton: Portrait in Paradox*, 83-84.

[14] So fundamental was this priority, that Stanley Elkins and Eric McKitrick described "[t]he absolute soundness of the public credit," as "a prerequisite to everything else." Both Federalists and their Jeffersonian opponents shared the belief that the nation's credit must be restored. (See, Elkins and McKitrick, *The Age of Federalism* (New York: Oxford University Press, 1993), 117, and Edling, "Restoration of Public Credit," 291.)

completely independent of state action. In fact, the few limitations proscribed on the national taxing power seemed inconsequential to the vigorous potential of Congress's Article I, section 8 authority "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . [and] to borrow Money on the credit of the United States."[15] The limitations, in contrast, were comparatively minor to what they were under the Articles, and included: rules for apportioning direct taxes (Article I, sections 2 and 9), the requirement that duties, imposts, and excises should be levied uniformly across the states (Article I, section 8), a cap on the amount of tax that Congress could levy on imported slaves (Article I, section 9), and a prohibition on taxing the states' exported goods (Article I, section 9).[16] The Constitution made no mention of a limit on the Congress' authority to borrow.

At the same time that the Constitution vested the national government with unprecedented fiscal authority, it deprived the states of their ability to tax imports and exports without Congress' consent.[17] The states still retained the rest of their pre-existing fiscal powers (which left them many options for raising taxes), but the federal government now shared with them a concurrent jurisdiction over most articles of revenue.[18] This yet-to-be-realized,

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[15] Article I, section 8.

[16] Although some scholars have contended that the U.S. Constitution's grant of taxing powers is virtually plenary (because the abovementioned limitations are so minor), Erik M. Jensen wrote that these limitations are meaningful and effective. Moreover, Jensen argued that the Framers—including Hamilton—intended it to be so. As we will see in the discussion below, *Hylton v. U.S.* demonstrated the potential for the apportionment clause to be extremely limiting to the federal government's ability to tax. Yet, even if the U.S. Constitution did not grant an unlimited taxing power to the federal government, it expanded the taxing power tremendously simply by freeing the national government from the Confederation's requisitions system and by allowing the federal government to levy virtually any *kind* of tax. See Erik M. Jensen, *The Taxing Power: A Reference Guide to the United States Constitution* (Westport, Conn.: Praeger, 2005), 2-8 [hereafter, *The Taxing Power*].

[17] Article I, section 10 states "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

[18] Before the ratification of the U.S. Constitutions, states collected most of their revenue from direct taxes (the most important revenue-stream) and customs duties. States also levied excises and fees. After ratification, states could no longer collect taxes on imports and exports, but they could still levy the direct taxes, excises, and fees. Therefore the states retained a concurrent authority to levy the following types of taxes, which they relied on before ratification: land, poll, slave, marriage and tavern licenses, court fees, professional fees, penalties (for refusing

concurrent federal power became cause for much alarm during the debate over ratification. (Note, however, that in general, Antifederalists did not object to Congress's power to borrow.)[19]

Antifederalists strongly resisted the national government's newly augmented taxing power in part because a distant, central authority now had the potential to pass onerous taxes that could, in turn, suppress individual rights.[20] Just as a far-off British Parliament once insisted on its right to tax and "to bind" its colonies "in all cases whatsoever," so could an American Congress, the Antifederalists feared, if allowed such an extensive power to tax the people *directly*.[21] Federalists, in contrast, thought that the new republic needed exactly this sort of vigorous taxing power so that the national government could act appropriately in times of national crisis, but also so that it could accomplish fully the duties of a modern fiscal-military state.

Antifederalists had another concern as well: if the federal government could assess a person's land, slaves, luxuries, or home—among the many other articles of taxable personal property—would the states still be able to tax these things too? Or would federal taxes end up starving the states? Concurrence alarmed the states because it created a regime where state governments might have to compete with the federal government to collect their traditional revenues. In theory, then, the federal government's concurrent taxation powers had the potential to make the Antifederalists' consolidationist nightmares come true.

In order to address these fears, Alexander Hamilton presented his first arguments in defense of the federal fiscal powers. He offered this opening salvo in both the New-York

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militia service, for example) and duties on billiard tables, playing cards, dice, carriages, sales at auction, and alcohol. (Edling and Kaplanoff, "Hamilton's Fiscal Reform," 720-21.)

[19]New York's convention proposed an amendment to the Constitution that required a two-thirds majority of both the House and Senate before Congress could exercise their power to borrow. (Edling, *A Revolution in Favor of Government*, 175).

[20] Ibid., 163.

[21] I refer, of course, to the American Colonies Act of 1766, better known as the Declaratory Act (6 Geo 3 c. 12).

ratifying convention and in his *Federalist* essays—notably, No. 32—and he intended for his claims to explain how legislative concurrence would work in practice in the new, federal republic. Whenever possible, Hamilton exemplified his claims with tax examples.

When members of the New York ratifying convention raised concerns that concurrence could ultimately lead to the eradication of state governments, Hamilton answered them, first, by associating the federal government's robust taxing powers with their proper objectives: the restoration of the nation's credit and the ability to meet exigent circumstances. He implored the convention that "[l]imiting the powers of government to certain resources, is rendering the fund precarious; and obliging the government to ask, instead of empowering them to command, is to destroy all confidence and credit," adding the very Hamiltonian maxim, "[a] government, to act with energy, should have the possession of all its revenues to answer present purposes." He then directly addressed the perceived threat of concurrence: "With regard to the jurisdiction of the two governments," the Constitution did not "prevent the states from providing for their own existence."[22]

Concurrence did not invite a collision between the two, independent sovereigns because "both might lay the tax; both might collect it without clashing or interference. . . the states have an undoubted right to lay taxes in all cases in which they are not prohibited." Moreover, if a tax was laid on an article by both the federal and state governments, and the individual assessed could not pay, both sovereigns would be treated as co-equal creditors. According to Hamilton, this meant that the first government to sue for the collection of the tax-debt would be the first

[22] Hamilton's New York Ratifying Remarks (Francis Childs's Version), made on June 27, 1788, *PAH*, 5: 99, 102.

creditor in-line to receive payment.[23] He further denied that any other collisions between the federal and state sovereigns would result from their concurrent powers.

Richard Harison and James Kent, in particular, thought Hamilton's convention remarks persuasive, but it was his explanation of concurrence in *Federalist* No. 32 that would provide American jurists with a lasting, and much cited, framework for comprehending the federal and state governments' shared legislative powers.[24] In this essay, one of seven discussing the federal government's power to tax, Hamilton made two main points. The first was yet another assurance to the states, that they "should possess an independent and uncontrollable authority to raise their own revenue [. . . and] they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense," with enumerated prohibitions excepted.[25] Note that when Hamilton discussed the states' retained, concurrent taxing powers, he spoke only of their *pre-existing* authority to collect taxes; Hamilton's goal was to assuage the Antifederalists fears that New York's usual revenue streams would be overtaken by the federal government's new taxing power.

Yet, Hamilton's second point also spelled out the three instances where, under the Constitution's "partial union or consolidation," the "alienation" of state sovereignty occurred.[26]

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[23] Hamilton's New York Ratifying Remarks, Third Speech of June 28, 1788 (Francis Childs's Version), *PAH,* 5: 116.

[24] After hearing Hamilton's June 27, 1788 remarks in convention, Richard Harison exclaimed: "Mr. Hamilton—bravo! as far as it went one of the most excellent energetic Speeches that ever I heard. He began by displaying the Form of the proposed Constitution, shewing that it was truly republican—that if the Govt. was such as to be deserving of Confidence all Confidence should be placed in it otherwise it could not answer the Purposes of Govt.—that the Situation of the Country might require the Use of all its Resources—that as to direct Taxation the two Govts. possessed concurrent Jurisdiction—that it was not probable they would interfere—that the Authority of Congress to make Laws which were to be the Supreme Law of the Land, did not imply that the State Laws where they have concurrent Jurisdiction should not also be *supreme*." (*PAH,* 5:104 fn. 9).

[25] This would come to seem like an out-of-character admission coming from Hamilton, but nineteenth-century states-rights proponents quoted from the Arch-Federalist himself to support their claims to their "concurrent sovereignty theory." G. Edward White discussed this theory in *The Marshall Court and Cultural Change,* 1815-1835, Abridged Edition (New York: Oxford University Press, 1991), 538-541, 571-585.

[26] These three exceptions included: "[1] where the Constitution in express terms granted an exclusive authority to the Union; [2] where it granted in one instance an authority to the Union, and in another prohibited to the States

He acknowledged the states' retained rights to their legislative sovereignty, and particularly their still-robust authority to tax, but he emphasized that when states exercised their taxing powers, any "direct contradiction or repugnancy in point of constitutional authority" would result in the alienation of state prerogative. By carving out this "repugnancy" exception, Hamilton left an opening in his articulation of concurrence for a legal trump, whereby a true clash of federal-state sovereignty could be resolved in the national government's favor. During his career, Hamilton shied away from making this argument more explicit, or even from using this subtle suggestion of federal supremacy to defend the federal fiscal powers. Yet, as we will see, this nationally-oriented loophole empowered federal and state judges to consider the effect of federal supremacy on the states' concurrent powers.[27]

Once enough state conventions ratified the U.S. Constitution, concurrence was enacted, but not yet put into practice. This unrealized potential of the federal government's concurrent fiscal authority was especially important at the beginning of Hamilton's tenure in office, when national powers were untried, and potentially vulnerable. In order to transform concurrence from a theoretical to a practical legal doctrine, Hamilton operated strategically, suggesting those taxing and borrowing policies that asserted federal power while they simultaneously restored the public credit. In this way, making concurrence a reality became the cornerstone of Hamilton's legal strategy: through his tax proposals, assumption scheme, foreign-loan refinancing, and revenue collection efforts, Hamilton successfully executed the federal government's concurrent powers to tax and to borrow.[28]

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from exercising the like authority; [3] and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *The Federalist* No. 32.

[27] The U.S. Constitution provides the ultimate justification for federal supremacy, as Article VI states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

[28] See, in general, Hamilton's "Report Relative to a Provision for the Support of Public Credit," (January 9, 1790), *PAH,* 6: 65-110. For Hamilton's tax proposals, see the report's enclosed Schedule K, along with a discussion in the

Although his policies proved to be politically controversial, Hamilton's programs were unquestionably successful. The Treasury Secretary succeeded at using the federal government's fiscal powers to restore the nation's credit. During his tenure in office, the federal government enacted a tariff-heavy tax policy, whereby Congress imposed relatively few internal taxes, but many ad valorem customs duties which fell mostly on merchants. As Max M. Edling and Mark D. Kaplanoff demonstrate, this program allowed the federal government to collect the maximum amount of revenue, with the least amount of imposition on individual citizens. And it worked. After Congress assumed approximately 70% of the states' debt under Hamilton's plan, the states were then able to reduce their direct-tax levies by 75 to 95%. Thus, the Constitution's grant of fiscal power, combined with the particulars of Hamilton's financial policy, created real tax relief for the majority of Americans.[29] Moreover, this federal fiscal policy also met Hamilton's primary goal of restoring the nation's credit. In addition to raising the value of federal securities, the combined components of Hamilton's financial program introduced "institutions of debt management"—including the initial program to pay-down the principal of the domestic debt—that allowed the federal government to gradually reduce and ultimately, to completely redeem, both its domestic and foreign debt.[30]

Yet, Hamilton had another reason to vigorously exercise the federal fiscal powers: to create what Fisher Ames called "habits of acquiescence" to the national government's authority

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body of the report (*PAH*, 6: 102-107, 137). A few months later, Hamilton critiqued certain revenue statutes enacted by Congress in his "Report on the Defects in the Existing Laws of Revenue," (April 22, 1790), *PAH*, 6:373-97. In characteristic fashion, the Treasury Secretary also included suggested revisions to the "defective" federal taxes.

[29] Edling and Kaplanoff, "Hamilton's Fiscal Reform," 715-16, 717-18, 732-33, 736. Roger Brown argued that "the Constitution brought tax relief to rural America"—including landowners and farmers (*Redeeming the Republic*, 236).

[30] Edling,"Restoration of Public Credit," 290-91, 322-24. Hamilton implored Congress to pay down the principal, rather than just the interest, on the assumed domestic debt in his "Report for the Further Support of Public Credit." Soon after Hamilton left office, Congress passed two statutes to gradually redeem the public debt (on March 3, 1795 and on April 28, 1796). Hamilton's successor in the Treasury, Oliver Wolcott Jr., created a plan to amortize the debt and to fully redeem it by 1809 (for foreign loans) and by either 1818 or 1824 for domestic loans. As Edling noted, Republicans eventually paid off the revolutionary war debt, but they did not initiate the debt-redemption policy (319-321).

among the American people.[31] In other words, new fiscal power should be put to use so that Americans would become accustomed to the federal government's authority, and so that this authority did not weaken through disuse. This, too, was a lesson learned from the recent imperial crisis.

Desuetude was an old principle found in the annals of Scottish and English law that described how disuse of a law or custom could, over time, effectively repeal it.[32] Scotland adhered to the doctrine openly and considered desuetude to be a legitimate form of repeal for its statutes. English lawyers, on the other hand, rarely admitted to its legitimacy, though eighteenth-century jurist Richard Wooddesson noted that in practice, desuetude worked to quietly repeal customary and statutory law in England as well.[33]

In America, Justice James Wilson noted that "[d]isuse may be justly considered as the repeal of custom," an idea that the colonists had invoked during the Stamp Act crisis.[34] After Parliament levied the 1765 stamp tax—a revenue-tax that funded the British Treasury, rather than a duty on imports—American Whigs claimed that Parliament lacked the authority to tax the colonies in such a manner. The colonists argued that according to the Anglo-American constitution of customary rights, Parliament had never before exercised an authority to raise a revenue tax, and thus they lost their right to do so in 1765.[35] To the American Whigs, Parliament's disuse of their taxing power led to desuetude.

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[31] Fisher Ames to Hamilton (January 26, 1797), *PAH*, 20:485.
[32] Richard Wooddesson stated that civil laws "may be repealed, either expressly, or by implication, founded on disuse." (Wooddesson, "Positive or instituted law," in the Preliminary Discourses of *Lectures on the Law of England*, vol. 1, ed. William Rosser Williams (Philadelphia: John S. Littell, 1842), xxxii.)
[33] Richard Wooddesson, "Positive or instituted law," in the Preliminary Discourses of *Lectures on the Law of England*, vol. 1, ed. William Rosser Williams (Philadelphia: John S. Littell, 1842), xxxiii, second footnote.
[34] James Wilson, "Lectures on Law," in *The Works of the Honourable James Wilson*, vol. 2, ed. Bird Wilson (Philadelphia: At the Lorenzo Press, printed for Bronson and Chauncey, 1804), 39.
[35] In the eighteenth century, Parliament and her American colonies knowingly adhered to different, conflicting constitutional paradigms. For British imperialists, the Anglo-American constitution was whatever the sovereign Parliament said it was; therefore, Parliament expected its colonies to obey its sovereign commands as law.

And so, if the imperial crisis preceding the American Revolution taught Antifederalists to be wary of a strong, centralized government and its prerogative to tax, it demonstrated to Federalists the importance of exercising taxing powers, so as not to lose them. Hamilton learned this lesson loud and clear: he proposed eight duties in his first 1790 report on public credit, and offered various critiques and suggestions to Congress' tax policy during his five-year term in office.[36] By the time he left the Treasury, Congress had passed fourteen revenue acts, imposing taxes of different varieties: imposts, excise, and luxury-good taxes before 1795, and a few years after Hamilton left office, the first federal direct tax on dwelling houses.[37] Defining and exercising concurrence thus comprised the first part of Hamilton's legal efforts to defend the federal taxing and borrowing powers. Hamilton's next step was to articulate specific legal arguments to preserve these fiscal powers when challenged by the states, by his colleagues in Washington's cabinet, and by Congress.

Americans, however, maintained that they enjoyed a "constitution of customary rights," where law was not simply the command of a sovereign Parliament, but a combination of natural law, established usage, and customary practice. Under the American version of the constitutional arrangement, there were customary limits placed on what Parliament could do, and legislation that violated these norms could and would be called-out by Americans as unconstitutional.

When Parliament passed the 1765 stamp tax, a levy to raise revenue to fund the British Treasury, Americans argued that Parliament overstepped its constitutional authority, as it could only levy taxes to regulate trade—like import duties—on the colonies. Revenue taxes were unprecedented—at least according to the colonists—and thus restrained by the constitution of customary rights. See John Phillip Reid, *Constitutional History of the American Revolution,* Abridged Edition (Madison: University of Wisconsin Press, 1995), 5, 26-48.

[36] See Schedule K of Hamilton's "Report Relative to a Provision for the Support of Public Credit," (January 9, 1790), *PAH*, 6: 137 for his proposed duties. The Treasury Secretary made suggestions to improve the revenue laws in his "Report on the Defects in the Existing Laws of Revenue," (April 22, 1790) and "Report on the Improvement and Better Management of the Revenue of the United States," (January 31, 1795).

[37] See "Report on a Plan for the Further Support of Public Credit," (January 16, 1795), *PAH*, 18:59-65. Congress passed the first, apportioned direct tax in 1798 with "An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States," ch. 70, 1 Stat. 580 (1798).

DEVELOPING HAMILTON'S LEGAL TOOLBOX

When William Lowder, chairman of the Board of Assessors for the Town of Boston, published his open letter to Secretary Hamilton in July 1791, Boston had already enacted the personal property assessment that taxed the interest earned off "monies in the public funds." Lowder contacted Hamilton because Nathaniel Appleton, the commissioner of loans for Massachusetts, refused to open the federal record-books to the assessors, thereby denying the city tax-collectors the names and holdings of the Boston-area residents who owned U.S. securities. The Board wanted to avoid the "disagreeable necessity of taxing the stock-holders according to their reputed property in the funds," so Lowder appealed to Hamilton to direct Appleton "to expose the public books of loan to the inspection of the assessors of the town of Boston."

The Secretary replied two weeks later with his own open letter in which he denied the request, respectfully submitting "that every thing, in the nature of a direct tax on property in the funds of the United States, is contrary to the true principles of public credit and tend to disparage the value of the public stock." Surely, Hamilton continued, neither Boston nor Massachusetts would pass a tax with the intent of impairing the public credit; thus, the Treasury Secretary felt confident that even in denying Lowder's request, he did not challenge the integrity of Boston's tax law. Nowhere in the letter did Hamilton mention the assessment as a threat to the sovereignty of the federal government's power to borrow, nor did he argue that securities were contracts and thus states were forbidden—on principle as well as by Article I, section 10—to impair their obligations. Perhaps it was because he was writing a public letter and not a legal brief that Hamilton chose to omit any legal grounds for denying Lowder's request; instead, he chose to defend the first direct challenge to the federal fiscal powers on public policy alone.

It is not known for sure how successful the Board of Assessors were in collecting their tax, but their request inspired alarm, bitter feelings, and possibly breaking and entering. Writing to Hamilton in July and September from Boston, Fisher Ames reported that certain "country gentlemen thought less favorably" of the Secretary's letter, and would applaud "acts of rapine in the shape of a tax" against all holders of federal securities. Also, in spite of Hamilton's refusal to open up federal records to them, "[t]he Assessors are, in some places, disposed to pry into the entries of the Custom House, and the Loan Office Books."[38] And in October, Tobias Lear alerted the President to the situation, commenting to Washington that if the Assessors had the right to tax federal bonds, "it would appear that it is in the power of the state governments or corporations to ruin the public Credit; for if they have a right to tax them at all, there seems to be no limits set to the quantum—and it may be laid on so heavily as to make the securities hardly worth holding..."[39]

This direct collision between Boston's tax and the federal government's ability to borrow money (and therefore, to restore the public credit) was a collision of sovereignty between the national and state governments. Boston's city council believed that the federal government had the constitutional authority to borrow money and to issue securities, but the council also thought that it had the prerogative to tax the interest earned from federal debt. During his lifetime, Hamilton would not have to contend with another direct collision of sovereignty like this; the next time a state would threaten federal sovereignty with its taxing prerogatives occurred in 1817, when Maryland sought to raise revenue by taxing the Baltimore branch of the second Bank of the United States. Instead, Hamilton devoted his efforts as both Secretary and as a private

[38] Fisher Ames to Hamilton (September 8 and July 31, 1791), *PAH*, 9: 188, 591.
[39] Tobias Lear to George Washington (October 9, 1791), *PGW*, 9:62. Lear's postscript to Washington described a first-hand account of the negative consequences of the Boston tax on federal securities holders.

lawyer to defending challenges made to the national government's ability to exercise its taxing and borrowing powers.

Take, for example, a question about concurrence that arose in New York in 1799. In 1794, Congress passed an act that taxed property sold at auction, and included provisions regulating the appointment of auctioneers, who, along with running the auction would also collect federal duties on the goods sold.[40] While Congress took care to prevent any inconvenience to the states, the act made these auctioneers *federal* officials, appointed by Congress and overseen by federal, rather than state, authorities. Because a levy on goods sold at auction was typically an exercise of the states' taxing powers, the 1794 federal tax demonstrated concurrence in action—as well as the questions that could arise from it.

New York's Governor John Jay did not doubt the federal government's authority to exercise this concurrent tax power, but he questioned the constitutionality of Congress's ability to oversee the auctioneers. Jay consulted one of Hamilton's close colleagues, New York lawyer Josiah Ogden Hoffman, to inquire into the auctioneers' legal status, and Hoffman subsequently posed the question to Hamilton as well. As Hoffman described Jay's concern to Hamilton, the Governor believed that under the U.S. Constitution, any auctioneers would have to be considered "municipal Officers," and not federal appointees. Jay thought that the auctioneer would collect the federal tax, but "without any of the Checks contained in the Act of Congress."[41] Hoffman disagreed, however, telling Jay and recounting to Hamilton that the "Government of the United States and the State Government possess a concurrent Jurisdiction, in this Article of Taxation, as

[40] "An Act laying duties on property sold at Auction," ch. 65, 1 Stat. 397 (1794).
[41] Josiah Ogden Hoffman to Hamilton (September 11, 1799), *PAH,* 23:408. During his decades of service to the New York bar, Josiah Ogden Hoffman acted as state attorney general, recorder for the city of New York, and a judge on the Superior Court of Common Pleas. According to James Kent, a long-time friend and colleague, Hoffman was a distinguished counselor, a dedicated Federalist, and an intimate of Hamilton, John Jay, and Egbert Benson Hoffman served in the New-York Assembly with Kent in 1791, 1792, and 1797. (James Kent, as transcribed in Donald M. Roper, "The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies," *New-York Historical Society Quarterly* 61 (1972): 227.)

they do in man[n]y other Instances. . . " and if "Auctioneers were *exclusively* subject to the State Governments, it might be in *their* [the states'] power by a non-Appointment, wholly to defeat the Laws of the Union, or. . . the payment of the Tax might be liable to evasion."[42]

Hamilton's reply has not been found, but it seems likely that he would have agreed with Hoffman. Since the federal government's power to tax property sold at auctions was concurrent and constitutional (which no one doubted here), then, as Hamilton had previously argued in defense of the first Bank of the United States, the government had a "right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power."[43] Appointing and overseeing federal auctioneers to collect a federal tax qualified as fairly applicable and requisite means to accomplish the end goals provided in the act.[44]

This exchange among New York's elite jurists demonstrates that as the federal government exercised its concurrent authority, questions arose as to the nature and extent of its fiscal powers. It was unclear how, in practice, concurrence could be satisfactorily executed, without compromising either state or federal sovereignty. The interstitial rules of federalism would only develop as questions were asked of, and challenges were mounted against, specific exercises of the federal fiscal powers. As the chief theoretician of legislative concurrence, Alexander Hamilton took part in these challenges, developing legal arguments aimed at defending the most expansive exercise of the federal government's taxing and borrowing powers against threats coming from both the national level and from the states.

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[42] Josiah Ogden Hoffman to John Jay (August 15, 1799), as quoted in *PAH*, 23:410, fn. 2.
[43] "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," (February 23, 1791), *PAH*, 8:98.
[44] Julius Goebel suggested that Hoffman's opinion prevailed because New York state passed a law, in 1801, that regulated public auctions and recognized auctioneers acting under the authority of the United States. See Julius Goebel Jr. and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964-81), 4:505-507, [hereafter, *LPAH*]; and "An Act to regulate sales by public auction, and to prevent stock jobbing," N.Y. Laws, 24 Sess. 1801, c. 116.

The first principle that Hamilton articulated to uphold the federal government's concurrent fiscal powers is perhaps his most famous legal argument: that the federal powers enumerated in Article I, section 8 should be construed broadly. First pronounced in his 1791 opinion on the constitutionality of a national bank, Hamilton's principle of broad construction had two components, both of which helped to make his case not only for the first Bank of the United States, but also for a broad construction of the means to implement the federal taxing and borrowing powers.

Since Secretary of State Thomas Jefferson and Attorney General Edmund Randolph had both looked through the Constitution's list of Congress' enumerated powers and failed to find a power to erect corporations, they both denied that the federal government could charter a bank.[45] Hamilton disagreed, however, arguing that the Constitution contained express *and* implied powers, and that erecting corporations qualified as an acceptable, implicit exercise of national sovereignty. To test the propriety of such an implied power, Hamilton proposed the following rule: "If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority."[46] Because a bank would assist the federal government to exercise its other, enumerated powers—to tax, to borrow, to regulate commerce—then, Hamilton thought the implied authority to incorporate a bank to be constitutional.[47]

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[45] See Thomas Jefferson to George Washington, "Opinion on the Constitutionality of the Bill for Establishing a National Bank," (February 15, 1791) in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson*, 40 vols. to date. (Princeton, N.J.: Princeton University Press, 1950 –), 19:275-82; and Edmund Randolph to George Washington, and its enclosures, "Opinion on the Constitutionality of the Bank" and "Additional Considerations on the Bank Bill," (February 12, 1791), *PGW*, 7:330-40.

[46] "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," (February 23, 1791), *PAH*, 8:107.

[47] In *Federalist* No. 33, Hamilton argued that it was a "palpable truth that a power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power."

The next component of Hamiltonian broad construction addressed the problem of construing the Constitution's explicit text. Hamilton critiqued Jefferson's narrow interpretation of the "necessary and proper" clause, noting that Jefferson would give the text such a "restrictive operation" that only an "extreme necessity" could possibly justify any un-enumerated exercise of federal authority, which Hamilton and other Federalists regarded as an impossible standard for a government tasked with responding to innumerable national exigencies.[48] Instead, Hamilton proposed that the words of the clause be construed by their "obvious & popular sense." He also advocated that any policy justified as "necessary and proper" be judged by how well its proposed means accorded with the proper ends of governing.[49] In other words, constitutional text should not be hamstrung by restrictive definitions, but rather "the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence &c ought to be construed liberally, in advancement of the public good."[50]

Generations of scholars have contemplated the Treasury Secretary's persuasive, and ultimately successful, arguments to justify his desired bank to President Washington, but Hamilton offered his principle of broad construction as more than just an argument to secure part of his financial program. Indeed, Hamiltonian broad construction offered a far-reaching defense of the federal government's authority to tax and to borrow.

The power to tax, for example, was never far from Hamilton's mind as he contemplated the constitutionality of the bank.[51] He noted that the federal government's authority to tax rum

[48] "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," (February 23, 1791), *PAH*, 8:102-103.
[49] Ibid., 104-105.
[50] Ibid., 105.
[51] Hamilton observed that a central bank would facilitate the federal government's exercise of its taxing powers in his "Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit" (Report on a National Bank, December 13, 1790), *PAH* 7:309-10.

was an already accepted, *implied* excise of its general, explicit power to lay and collect taxes, and later made the case that a "Bank relates to the collection of taxes in two ways; *indirectly*, by increasing the quantity of circulating medium & quickening circulation, which facilitates the means of paying—*directly*, by creating a *convenient species of medium* in which they are to be paid."[52] And just in case Washington had not yet been persuaded, Hamilton directly affirmed that "the sovereign power of providing for the collection of taxes *necessarily includes* the right of granting a corporate capacity to such an institution, as a *requisite* to its greater security, utility and more convenient management."[53]

Broadly construing the federal government's constitutional powers also protected its ability to borrow, as the bank had "a direct relation to the power of borrowing money, because it is [a] usual and[,] in sudden emergencies[,] an essential instrument in the obtaining of loans to Government."[54] Furthermore, the implied power to incorporate a bank had an obvious relation to the enumerated power to borrow: "The legislative power of borrowing money, & of making all laws necessary & proper for carrying into execution that power, seems obviously competent to the appointment of the *organ* through which the abilities and wills of individuals may be most efficaciously exerted, for the accommodation of the government by loans."[55] Hamilton intended the principle of broad construction to incorporate policy considerations into constitutional adjudication: if the policy means accomplished constitutional ends, then the Constitution should be interpreted to accommodate those means. Constitutional interpretation should not stray too far from the text, but it should take into consideration national exigencies and public policy goals and empower the federal action whenever possible.

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[52] "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," (February 23, 1791), *PAH*, 8:113, 121. (Hamilton's emphasis.)
[53] Ibid., 122. (Emphasis added.)
[54] Ibid., 124.
[55] Ibid., 125.

Hamilton's arguments for the constitutionality of the bank simultaneously accomplished multiple goals. Most directly, Hamilton persuaded Washington to sign the bank bill into law, thus enacting one of the components of Hamilton's financial program. At the same time, Hamilton used the principle of broad construction to justify the most useful, institutional means with which the federal government could facilitate tax collection or borrow money in a pinch. By defending the means used to execute or assert the federal taxing and borrowing authority, broad construction, in turn, protected these fiscal powers. Hamiltonian broad construction also introduced a particularly potent, well-articulated legal principle into American constitutional law that empowered, rather than restricted, federal actions. And finally, Hamilton's explicit defense of the bank, as well as his implicit defense of the taxing and borrowing powers, directly served Hamilton's overarching statecraft goal of restoring the nation's credit.

Hamilton relied on his principle of broad construction again, five years later, when he defended the United States against Virginia's attack on the federal taxing power. The resulting litigation, *Hylton v. U.S.*, marked not only Hamilton's first and only oral argument before the U.S. Supreme Court but also the first time the high court reviewed the constitutionality of a federal law.[56] Also, *Hylton* is noteworthy because federal actors—including Hamilton, before he left office, and U.S. Attorney General William Bradford—worked in conjunction with the plaintiff-in-error, Daniel Hylton, to put a test-case before the U.S. Supreme Court. The staged case turned on the meaning of "direct tax," found in Article I, sections 2 and 9.[57]

[56] 3 U.S. (3 Dall.) 171 (1796). Also, see Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 2003), 7: 358. [Hereinafter, *DHSC*].

[57] Article I, section 2 reads, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Section 9 states, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."

The facts of the case were as follows: Congress passed "An Act laying duties upon Carriages for the Conveyance of Persons" on June 5, 1794 to set uniform duties on various types of carriages (that is, across the states, all coach owners would have to pay a $10 duty, but chariot owners owed only $8, etc.).[58] When the bill was still in committee, however, southern congressmen objected to the tax in part because they viewed it as a discriminatory levy on the South, and raised the question of whether the carriage tax should be considered a direct or an indirect tax. The distinction was significant; if Congress categorized the carriage tax as an "indirect" duty or excise, then the Constitution required it to be levied uniformly across the states (as Hamilton intended when he proposed it, and as the act's framers designed the tax to be).[59] If, however, Congress determined that carriage taxes were actually direct taxes (like poll, land, or capitation taxes), then the Constitution stipulated that the tax be apportioned by population.[60] Arguing that the carriage-tax was actually a direct tax because "all taxes are direct which are paid by the citizen without being recompensed by the consumer," the Virginia delegation in the House led the protest against the non-apportioned, and thus possibly unconstitutional, carriage tax.[61] Despite their efforts, a glum James Madison lamented to Jefferson in May 1794 that "the tax on carriages succeeded in spite of the Constitution." Washington signed the bill into law a month later.

Yet Virginia's protests did not stop there. Secretary Hamilton got wind of Virginia's continued grumbling in the summer of 1794 and advised Tench Coxe, the U.S. Commissioner of

[58] The rates for the other types of carriage were as follows: $6 for every phaeton and "coachee," $2 for every other four-and two-wheel "top carriage," and $1 for every other two-wheel carriage (ch. 45, 1 Stat. 373, 374 (1794)).
[59] Hamilton suggested a federal tax on carriages in his "Report on the Redemption of the Public Debt," (November 30, 1792), *PAH*, 13:270. The U.S. Constitution uses the term "direct tax" but not "indirect tax"; Article I, section 8 stipulated duties, imposts, and excises be levied uniformly across the states, thereby implicitly categorizing those taxes as "indirect."
[60] Article I, sections 2 and 9.
[61] Samuel Dexter, a Federalist from Massachusetts, quoting John Nicholas of Virginia in the *Annals of Congress*, 4:646. Also see *LPAH*, 4:306.

Revenue, to instruct Edward Carrington, the Supervisor of the Revenue for the District of Virginia, to "give facility to a legal decision in any case where it may be desired—taking care to secure an appeal in the last resort to the Supreme Court."[62] Hamilton assumed that Virginia's claims about the unconstitutionality of the carriage tax would have to be resolved in court, and in early 1795, Attorney General William Bradford devised a two-tiered strategy to bring the case into both state and federal court.[63] When a prominent cadre of Virginian gentlemen—including Daniel Hylton, Spencer Roane, Edmund Pendleton, and John Taylor of Caroline—refused to pay their carriage taxes in September 1794, Bradford and Hamilton brought an action of debt against Hylton, their willing defendant, for a total of $2,000 in taxes-owed plus penalties.[64] This outrageously inflated sum, along with the collusion between the parties, demonstrates the extent to which all participants used legal fictions and extensive maneuvering to bring *Hylton* before the federal courts. For their part, Hamilton and Bradford calculated the inflated amount of back-taxes and penalties in order to meet the jurisdictional thresholds stipulated by the 1789 Judiciary Act for the federal circuit courts.[65] After the circuit court issued a split decision, the case rose to the U.S. Supreme Court on a writ of error. As the litigation proceeded, the federal government agreed to pay for all of Daniel Hylton's incident expenses, including his lawyers' fees.[66]

This complicity and maneuvering suggests the high stakes involved in *Hylton v. U.S.*: if Virginia's direct-tax argument was adopted, it would have had dangerous consequences for the

[62] Hamilton to Tench Coxe (undated, but written during August 1-15, 1794), *PAH,* 17:2.
[63] *LPAH,* 4:310. The state suit was dropped or deferred at some point.
[64] Hylton had previously been involved in another federal case, *Ware v. Hylton* (3 U.S. (3 Dall.) 199 (1796)). Daniel Hylton, citing a Virginia statute, refused to pay a bond he owed to a British creditor, and the creditor's agent sued in federal court to recover the bond. In *Ware,* the U.S. Supreme Court held that Virginia's statute authorizing the confiscation of debts owed to foreign creditors was in violation of the 1783 Treaty of Paris and therefore unconstitutional. .
[65] Interestingly, Hamilton and Bradford miscalculated, making the *Hylton* suit worth exactly $2,000 (back-taxes plus penalties) when the Judiciary Act stipulated that only suits valued *in excess of* $2,000 could be heard in the U.S. Supreme Court on a writ of error from the circuit courts. This technicality did not impact the litigation, however. See sections 11 and 22 of "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 78, 84 (1789).
[66] *LPAH,* 4:315.

federal government's taxing powers. In their arguments before the federal courts, both Virginia and the federal government spent an inordinate amount of time discussing the proper definition of "direct tax"—a debate that has been discussed elsewhere, and does not need to be repeated here.[67] The extant evidence strongly suggests that no precise, technical meaning existed for the term "direct tax," and so both parties could only muster their most authoritative arguments to persuade the Supreme Court as it determined for the first time, what, exactly, qualified as a "direct tax" (besides capitation, land, and poll taxes).[68] This debate over definitions masked the real threat that Virginia's direct-tax strategy posed to the federal fiscal powers: if a tax like the carriage tax qualified as a direct tax, then the federal government's concurrent authority to tax the American people would be severely limited in practice.

Because the Constitution required that taxes categorized as "direct" had to be apportioned, a direct tax on personal property would result in grossly unfair, skewed tax burdens across the states. The carriage tax offered a perfect example of this inequity in practice. Relatively few Americans owned carriages, and the 18,384 carriages that belonged to U.S. taxpayers in 1794 were unevenly spread across the states. If Congress levied the carriage tax as a direct tax, then carriage owners would owe their tax based on a complicated calculation that combined the number of carriages in their state plus the states' population.[69] Robin Einhorn has calculated what this hypothetical, "direct" carriage tax would have looked like in practice: Delaware, with the most carriages per person, would end up paying $0.73 per carriage, while

[67] See *DHSC,* 7: 358-69, *LPAH*, 4:297-340, and see *supra* note 12.
[68] On August 20, 1787 Rufus King directly asked the members of the Philadelphia convention "what was the precise meaning of *direct* taxation?" According to James Madison's notes, "No one answerd." (See *The Records of the Federal Convention of 1787*, vol. 2, ed. Max Farrand (1911), 350.)
[69] Einhorn, *American Taxation, American Slavery,* 161. Einhorn demonstrated that the total population for tax-purposes (including 3/5 of enslaved persons) was 3,650,668 in 1794.

Georgia, the state with the fewest carriages per person, would have paid a relatively extravagant tax of $5.69 per carriage.[70] Virginian carriage-owners would have been taxed $2.93 per carriage.

Direct taxes, therefore, were not only more difficult to calculate than uniform, indirect taxes, but they easily produced unfair, unequal, and even "absurd" results.[71] Under a direct-tax computation, carriage-owners in Pennsylvania ($4.11 per carriage) and Georgia would have been saddled with a disproportionately onerous tax bill not because they chose to own so many carriages, but because they lived in a state where so few carriages were owned, relative to the population (calculated based on the number of free persons, plus 3/5 of enslaved persons). Surely, if Congress drafted the 1794 carriage tax as a direct tax, then every state but Delaware would have balked at their disparate, and increasingly disproportionate, tax burdens. Therefore, if most federal property taxes had to be categorized as direct taxes—the outcome that Virginia sought in *Hylton*—then most internal federal taxes would immediately become not only highly unpopular, but also politically impracticable.[72] Virginia's direct tax strategy would effectively strangle the federal taxing power and severely limit the extent of federal concurrence.

Thus, *Hylton* offered Virginia the opportunity to accomplish a number of its states-rights goals, including the limitation of the federal government's concurrent tax powers and the defeat of one unpopular federal tax in particular. Virginia perceived the carriage tax to be a discriminatory measure inflicted on the South, but this was based on an incorrect assumption that

[70] Einhorn, *American Taxation, American Slavery*, 160, and table on page 161.

[71] In their seriatim opinions, both Justices William Paterson and James Iredell called the idea of an apportioned carriage tax "absurd." See Hylton v. U.S., 3 U.S. (3 Dall.) 171, 179, 182 (1796).

[72] By "internal" taxes, I mean those that were not levied on goods leaving or entering the country. Note, also that there were other problems with levying direct taxes that had to do with how they would be administered. Did the federal government assign the calculated tax burden to each state as a requisition (in which case, the states would administer taxes as part of their own tax-system, and just pay the federal government out of the state treasury)? Or, would federal direct taxes be levied as a separate federal tax, administered and collected by federal personnel (without any state involvement)?

Furthermore, as Robin Einhorn quipped, the apportionment of direct taxes "was and remains an almost laughably unfair way to distribute the tax burden." She calculated a modern federal income tax that would result in a greater tax rate for poorer states, and a lesser tax rate for the wealthiest states. And the inequality of apportioning direct taxes worsened if applied to the 1794 carriage tax. (*American Taxation, American Slavery*, 158-160).

the South had more carriages than the North.[73] In addition, the state's counsel complained that any "local" tax—that is, what attorney John Taylor defined as a federal tax on goods that did not circulate between the states—should be considered a direct tax, presumably because direct taxes were harder to levy, and this would protect the usual objects of state taxation from additional federal tax-burdens.[74]

Virginians also feared that the carriage tax set a precedent for a future slave tax to be levied on the South. In his arguments before the U.S. Circuit Court in Virginia, Taylor admitted as much, alluding to slaves as the next type of southern property to be "particularly exposed" if the carriage tax remained on the books.[75] Typically, Southerners feared any threat to slavery and, according to Robin Einhorm, they successfully employed early republic and antebellum tax policy as a shield to protect their peculiar institution. For Virginia, then, *Hylton* was an opportunity to prevent the potential of a uniform federal tax on slaves by defeating a tax precedent.

Taylor also relished the setback Virginia's strategy would cause for Hamilton's despised financial program: if Hylton prevailed, then the federal revenue streams on which Hamilton's funded debt depended would be severely limited in practice—perhaps leaving imposts as the only reliable federal revenues. To accomplish this end, Taylor invoked the boogeyman of national consolidation by openly questioning the wisdom and constitutionality of federal legislative concurrence: "If Congress can tax people's means of subsistence, without limitation,

[73] Robin Einhorn calculated that U.S. citizens owned 18,384 carriages in 1796, and based on her data, the six southern states (De., Md., S.C., N.C., Va., Ga.) housed less than half of the total number of extant carriages. When the federal government eventually levied a tax on slaves in 1798, it did so as a direct tax (See *American Taxation, American Slavery,*158, 161, and "An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States," ch. 70, 1 Stat. 580 (1798).)
[74] John Taylor, "Argument on the Carriage Tax, &c." (May [27], 1795), *DHSC*, 7:392-93.
[75] Ibid., 404.

is there any real restriction on their power to tax?"[76] According to Hamiltonian concurrence, there was no real limit on the national government's power to tax, but for the Constitution's few, explicit prohibitions. Taylor denounced this position, however, referring to it as a "web of pretended federalism." He also suggested that federal taxation was particularly vulnerable to corruption and manipulation "by the will of a minister."[77] Undoubtedly Hamilton was not amused at this oblique reference to him, nor to Taylor's other jabs aimed at his administration.[78]

In response, Alexander Hamilton met Virginia's attack on the federal taxing power with a variation on his own principle of broad construction. When arguing before the Supreme Court, Hamilton averred that "direct taxes" had no precise legal or technical meaning, and thus the case required the Court to determine the text's meaning for the first time: "Such a Construction must be made," Hamilton noted in a brief prepared for his oral arguments, that the "[p]ower to tax may remain in its plentitud[e]."[79]

Just as he argued in his opinion on the bank, Hamilton stressed that the task at hand—the interpretation of the Constitution's text—required the Court to construe the relevant clauses in context with the federal government's responsibilities and appropriate policy goals. "In such a case," Hamilton argued, "no construction ought to prevail calculated to defeat the express and ne[ce]ssary authority of the Government."[80] The Court should consider the carriage tax to be either an excise or a duty because such a construction allowed the federal government to exercise the expansive taxing powers intended and granted by the Constitution's tax provisions. To determine otherwise—that is, to force internal federal taxes to be inequitably apportioned as

[76] Ibid., 387.
[77] Ibid., 399, 400.
[78] Taylor took shots at Hamilton's fiscal program through his extensive, meandering arguments before the court. He criticized, in particular, the tax-immunity enjoyed by the Bank of the United States and by federal securities. Taylor was critiquing Hamilton's recently submitted "Report on a Plan for the Further Support of Public Credit," and the Treasury Secretary's comments on the non-taxable nature of federal debt. (Ibid., 405-406.)
[79] Alexander Hamilton's "Brief," (composed before February 17, 1796), *DHSC*, 7:457, 463.
[80] Alexander Hamilton's "Opinion," (composed before February 17, 1796), *DHSC*, 7:465.

direct taxes—would be to deliberately limit federal authority in spite of Article I's broad grant of power. Hamilton noted that "[i]t would be contrary to reason and every rule of sound construction to adopt a principle for regulating the exercise of a clear constitutional power, which would defeat the exercise of the power"—and to adjudge the carriage tax as a direct tax, would defeat the federal power to lay taxes on personal property.[81]

When faced with two alternatives—a broad interpretation of the Constitution's tax clauses that empowered the federal government to collect revenue, versus a confining construction that limited federal power—Hamilton aimed to persuade the Court to adopt a broad construction. If the end was constitutional (a robust federal taxing power), then any fairly applicable means to attain that end should "come within the compass of national authority" as well.[82] If Congress intended its uniformly-assessed carriage tax as a means to exercise its constitutional power to tax, then the Court should not construe the relevant tax clauses so as to defeat or to restrict Congress' ability to do so.

In February 1796, the Justices of the Supreme Court sided with the federal government in *Hylton*, and maintained in their seriatim opinions that the 1794 carriage tax was constitutional. Justice Samuel Chase adopted Hamilton's principle of broad construction when he declared that "[t]he great power over taxation granted Congress by the Constitution was to give Congress a power to lay taxes, adequate to the exigencies of government."[83] Therefore, the Court disavowed a construction of "direct tax," "excise," or "duty" that implied otherwise and limited the federal concurrent power to tax. Furthermore, Justice William Paterson noted how "absurd" and "inequitable" a direct tax on carriages would be: "A tax on carriages, if apportioned, would

[81] Ibid., 465-66.
[82] "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," (February 23, 1791), *PAH*, 8: 97, 107.
[83] 3 U.S. (3 Dall.) 171, 173 (1796).

be oppressive and pernicious. How would it work? In some states there are many carriages and in others but few. Shall the whole sum fall on one or two individuals in a state who may happen to own and possess carriages?"[84] And Justice James Iredell added that "[i]f any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported."[85]

But Virginia *knew* that a direct tax on carriages would be completely ridiculous and inequitable—it was the key component to their legal strategy. If direct taxes resulted in a reasonable, equitable distribution of the federal tax burden, then it would not really matter if the 1794 carriage tax was declared unconstitutional; Congress would just have to pass it again, this time with apportionment built into the bill, and the federal taxing power would remain robust. Yet, because direct taxes did create inequality and absurdity, and were thus politically impracticable, it mattered that the Court declared the "indirect" carriage tax to be constitutional. Their decision in *Hylton v. U.S.* not only upheld the constitutionality of Congressional law, but it maintained the federal government's ability to exercise a robust, concurrent tax power.

Hamilton's principle of broad construction helped him to defend the federal taxing powers from both national- and state-level challenges. Yet, the Treasury Secretary also articulated a second principle in defense of the federal fiscal powers, though it is not nearly as well-known. Hamilton developed this second principle—that federal securities should be considered as federal contracts, and that this contract-status conferred tax-immunity on the securities—not because a state attempted to tax federal bonds, but because Congress threatened to do so. In 1795, Hamilton offered this securities-as-contracts argument to convince federal

[84] Ibid., 179.
[85] Ibid., 182.

lawmakers that preserving the sanctity and tax-immunity of U.S. bonds protected both the public credit and the national government's ability to borrow money.

Hamilton first made the argument that Congress should treat federal securities with the sanctity of a legal contract in 1790, when he opposed the suggestion that the federal government discriminate between original and current debt-holders. In his first report on public credit, Hamilton denounced discrimination as "inconsistent with justice" and "a breach of contract; in violation of the rights of a fair purchaser."[86] Five years later, in his parting advice to Congress, the outgoing Secretary reiterated this argument in his "Report on a Plan for the Further Support of Public Credit." This time, however, Hamilton was responding to four proposed House resolutions discussed during the previous spring. Two of the resolutions provided that any debts owed from American citizens to British subjects be sequestered and paid into the U.S. Treasury instead of to British creditors. The seized proceeds would be used to indemnify Americans who had suffered at the hands of privateers, or who had their rights as neutrals violated by the British.[87] Although the proposed resolutions did not mention it specifically, Hamilton worried that Congress would also deny payment to British subjects holding federal securities, and he wanted to explicitly argue against such a policy before leaving office. The second set of resolutions called for a tax of five cents per every hundred dollars to be levied on both transferred U.S. bonds and Bank of the United States stock.[88]

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[86] Report Relative to a Provision for the Support of Public Credit," January 9, 1790, *PAH*, 6:73-78, quote at 73. Forrest McDonald also argued that two "philosophical premises" run through the entire corpus of Hamilton's arguments in favor of restoring the public credit. These premises are 1) that "the sanctity of contracts is the foundation of all private morality and the indispensable condition of every sane social order," and 2) that "good government," that is, "active, affirmative" governing, "is essential to the happiness and freedom of society." In *Alexander Hamilton: A Biography* (New York: W. W. Norton & Company, 1982), 165.

[87] *Annals of Congress* 4:535.

[88] When discussing these resolutions as a Committee of the Whole, some congressmen objected to the proposals and declared that the sanctity of contracts should lead Congress to oppose the measures. Referring to the sequestration resolutions, William Loughton Smith, of South Carolina, observed that "the sacredness with which the modern usages of nations has shielded debts is a great bar to our proceeding in the present case. Contracts between

In the third and final section of his 1795 report, Hamilton expressed his concerns over the 1794 resolutions. He bluntly asked, "Is there a right in the Government to tax its own funds?" before steadfastly denying that such a right existed. Premised on the implicit authority of a legislature to raise revenue from the property of the state, the supposed right of a government to tax its own funds would be, according to Hamilton, in violation of the contract made between the government-debtor and citizen-creditor and in contradiction of the "maxims of credit."[89]

Federal securities were, by nature, federal contracts; a creditor loaned money to the federal government in exchange for interest paid on the money borrowed. The federal government, in turn, raised revenue through taxation in order to pay the creditor the principal and interest stipulated by the terms of the security. If, after the federal government issued these security-contracts, it then decided to tax the debts held by foreign-creditors or to claim a transactional fee every time a holder transferred their securities to another creditor, it would retrospectively violate the terms of the contract.[90] To charge a transfer tax or to otherwise tax the security itself would be tantamount to denying payment of the interest owed or principal

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individuals are now considered as out of the reach of Governments." Connecticut representative Uriah Tracy also noted that "a breach of bargain was a breach of honesty" with regard to taxing the transference of federal securities. None of these resolutions became law, but Hamilton was alarmed enough to address the debates, and to expound on the legality of taxing federal securities and violating the sanctity of contracts. (See the *Annals of Congress*, 4: 540, 617, 619.)

[89] "Report on a Plan for the Further Support of Public Credit," (January 16, 1795), *PAH*, 18: 116, 121.

[90] Hamilton addressed each of these specific situations separately. Foreign-creditors should enjoy the same contractual sanctity bestowed on American debt-holders because "[w]hen a Government enters into a contract with the Citizen of a foreign country it considers him *as an individual in a state of Nature, and Contracts with him as such.* It does not contract with him as *the member of another society*."

Hamilton objected to the transfer-tax proposed on federal bonds, because "[t]he Stock in its *creation* is *made transferrable.* This quality constitutes a material part of its value, and the existence of it is a part of the contract with the Government...It is as completely a breach of contract to derogate from this quality in diminution of the value of Stock, by incumbering the transfer with a charge or tax, as it is to take back in the same shape a portion of the principal or interest." (Hamilton's emphasis; "Report on a Plan for the Further Support of Public Credit," (January 16, 1795), *PAH*, 18: 120, 123.)

borrowed. And "who," Hamilton exclaimed, "would not pronounce this to be a breach of contract, a fraud, which nothing could disguise?"[91]

Congress' proposals created an interesting tension between the power to tax and the power to borrow: if Congress had the constitutional authority to exercise both, then what was to stop Congress from taxing federal securities? When Hamilton balanced the federal government's authority to raise taxes against both its power to borrow and the moral and contractual obligations due to its creditors, he determined that the federal right to tax should be abridged:

> When a Government enters into contract with an individual, it deposes as to the matter of the contract its constitutional authority, and exchanges the Character of Legislator for that of a moral Agent, with the same rights and obligations as an individual. Its promises may be Justly considered as excepted out of its *power to legislate*, unless in aid of them. It is in Theory impossible to reconcile the two ideas of a *promise which obliges* with *a power to make Law which can vary the effect of it.* This is the great principle, that governs the question, and abridges the general right of the Government to lay taxes, by excepting out of it a species of property which subsists only in its promise. . . If the Government had a right to tax its funds, the exercise of that right would cost much more than it was worth.[92]

Indeed, by proposing taxes on federal securities, Congress imperiled the restoration of the nation's credit and the federal government's practical ability to borrow in the future; what creditor would loan money to a government who could then reduce his return after the fact? Moreover, by infusing riskiness into the market for federal securities, Congress would drive up

[91] After all, Hamilton noted, "[t]he true definition of public debt is *a property subsisting in the faith of the Government.* Its essence is promise. Its definite value depends upon the relation that the promise will be definitely fulfilled." (Hamilton's emphasis; "Report on a Plan for the Further Support of Public Credit," (January 16, 1795), *PAH,* 18: 118.)

[92] Hamilton's emphasis; "Report on a Plan for the Further Support of Public Credit," (January 16, 1795), *PAH,* 18: 119,121.

interest rates on the federal bonds, and thus increase its own cost of borrowing. A federal tax on federal securities was thus bad on principle, and it was bad in practice.[93]

THE ROAD TO *WESTON V. CHARLESTON*

When appraising Alexander Hamilton's tenure in the Treasury Department, his combined efforts to make federal fiscal concurrence a lived reality stands out as the defining accomplishment of his career as a statesman. Hamilton's financial policies—his reports on public credit, the bank, manufacturing, and his occasional critiques of Congressional policy—aimed to mobilize the federal government's fiscal powers, not only to restore the public credit, but also to fight the possibility that a concurrent authority to tax and to borrow would eventually atrophy from disuse or underuse. And while Hamilton acted as both lawmaker and energetic administrator—the most well-known accomplishments of his tenure as Treasury Secretary—he also developed legal arguments to defend the federal government's concurrent powers to tax and to borrow. These principles, including broad construction and the tax-immunity of federal securities, along with Hamilton's articulation of concurrence in *Federalist* No. 32, would re-emerge long after Hamilton deployed them to become a lasting part of the jurisprudence of federalism.

[93] Note, however, that Hamilton never claimed that Congress would have violated its constitutional authority if it taxed federal securities. The Constitution granted the national government an extensive power to tax and to borrow, but it never alludes to a collision between the two exercises of sovereign power. Moreover, Article I, section 10 bars the states, but not the federal government, from impairing the obligations of contracts. He therefore had to rely on principle, policy, and a balancing of opposing federal powers in order to craft his argument that securities were inviolable contracts.

Hamilton was involved in developing "contracts clause" jurisprudence, however. In 1796, Hamilton drafted a legal "Case and Answer" for a client involved in Georgia's land-speculation scandals. In that document, Hamilton argued that Georgia's legislature acted in violation of Article I, section 10's contracts clause by granting, and then subsequently rescinding, titles to contested land. Hamilton's argument that the legislature's first grant of land constituted a contract would ultimately influence John Marshall's opinion on the nature of contracts and the contracts clause in *Fletcher v. Peck* (10 U.S. (6 Cranch) 87 (1810)). See *LPAH*, 4:420-22, 428-31, and Konefsky, *John Marshall and Alexander Hamilton*, 123.

The road to *Weston v. Charleston* demonstrates how, over time, Hamilton's "defensive" federalism became embedded in American constitutional law. In the early years of the nineteenth century, a change took place in the jurisprudence of fiscal concurrence. The United States Congress and federal and state judges began to readily assert that the federal government's claims to tax, to borrow, and to exert its sovereign authority were supreme to those claims made by individual creditors or by the states. Although the supremacy clause had been in Article VI since 1787, jurists did not readily wield it because state legislation rarely clashed with exercises of federal sovereignty during the first years of the early republic.[94] Yet, in the first two decades of the nineteenth century, judges at both the state and federal levels began considering cases involving outright collisions of federal and state power. When lawyers brought these direct confrontations before state and federal courts, judges invoked federal supremacy, in addition to Hamilton's principles, to resolve the controversies before them, and ultimately, to defend and uphold the federal government's fiscal powers.

Recall that when Hamilton championed federal concurrence in both the New-York state ratifying convention and in his *Federalist* essays, he downplayed the likelihood that state and federal power would collide, suggesting that even if the two sovereigns did clash, the federal government had more to fear from state action than vice versa.[95] Hamilton presented concurrence in language designed to ease the fears of New York's Antifederalists, and to assure them that the states' pre-existing authority to tax remained under the federal Constitution; yet, he still incorporated one "rule" into *Federalist* No. 32 that suggested how state exercises of concurrent

[94] That is not to say that state action did not contradict the U.S. Constitution—it did, see *Calder v. Bull* (3 U.S. (3 Dall.) 386 (1798)), for example—nor that states always agreed with federal action, because they did not. It was not until *McCulloch v. Maryland* that state law clashed with federal law, and the federal courts resolved the dispute. In this "direct" collision, the exercise of one sovereign's power (the state's concurrent authority to tax) threatened the existence or exercise of the other sovereignty's authority (the federal government's power to charter a bank in order to collect taxes, borrow, and facilitate commerce).

[95] *The Federalist* No. 31.

powers could regularly be subordinated to the federal action. This rule—Hamilton's "repugnancy" caveat—posited that where the Constitution granted power to the federal government, if "a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*," then the state's power would be alienated. As we will see, subsequent jurists would use this caveat to justify federal supremacy over the states' concurrent authority when state and federal power collided.

As time passed, these collisions became more frequent, raising novel legal questions in their wake. In life, Hamilton did not take part in settling these conflicts, but in death, his past actions and writings set the terms for their resolution: Hamilton's articulation of concurrence lent the framework for the jurisprudential debate over how far, exactly, a state's sovereign, concurrent powers could extend when they challenged or overlapped with federal authority.[96] *Federalist* No. 32 came to define the very nature of concurrence in American law and, according to Joseph Story the "correctness of these rules of interpretation has never been controverted; and they have been often recognized by the Supreme Court."[97]

Federalist No. 32 did not explicitly contemplate the kind of direct federal-state collisions that began to occur in the first few decades of the nineteenth century; in consequence, the lawyers and judges contemplating these controversies built upon Hamiltonian concurrence—

[96] He did, however, defend a federal tax collector who prosecuted in state court for a mistaken tax assessment. In *Henderson et al. v. Brown*, the defendant William Brown erred when collecting the 1798 federal direct tax on lands, dwelling-houses, and slaves ("An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States," ch. 70, 1 Stat. 580 (1798)). The injured plaintiff brought suit for damages. However, the New York Supreme Court broke with English precedent and sided with the defendant after Hamilton successfully persuaded the court that the collector's mistake was a good-faith error and that "the inclination of the courts has been to narrow the liabilities of all mere executive officers." (See 1 Cai. 92, 94 (N.Y. Sup. Ct., 1803) and *LPAH*, 4:517-23).

[97] Joseph Story, "Rules of Interpretation of the Constitution," in *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution*, 3 vols. (Boston: Hilliard, Gray, and Company, 1833), 3: §436. He then cited Hamilton as the authority consulted in the following Supreme Court cases: Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), Houston v. Moore, 18 U.S. 1 (1820), Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

particularly his repugnancy caveat—by asserting federal supremacy over the states. Smith Thompson, an associate justice on the New York Supreme Court, described the principle of federal supremacy in an 1811 steamboat-monopoly case, *Livingston v. Van Ingen*: "The only restriction upon the State government, in the exercise of all concurrent powers is, that the State must act in subordination to the general government."[98] Federal supremacy could be used as an absolute trump over state action—as John Marshall would do in *McCulloch v. Maryland*—but not necessarily. Thompson, for example, acknowledged the federal government's supreme authority to regulate patents and commerce, for example, but he still upheld the New York legislature's prerogative to grant exclusive navigation rights on state waterways. In this case, Thompson did not think that the state law interfered with the federal government's powers.

In *Livingston v. Van Ingen*, counsel for the respondents (the party lacking navigation privileges) argued that the New York act violated the federal government's Article I, section 8 authority to regulate commerce and to grant patents.[99] But the state's highest appellate court disagreed. In his opinion for the Court for the Correction of Errors, Thompson explained that "[i]t is not a sufficient reason for denying to the states the exercise of a power, that it may possibly interfere with the acts of the general government"—though, when a conflict did arise, states would "surrender the power" to the federal government. As for the act in question, the court determined that no "interference or collision of power" occurred.[100] In a concurring

[98] Robert R. Livington and Robert Fulton, Appellants v. James Van Ingen, et al., Respondents, 9 Johns. Cas. 507, 567-68 (N.Y. Ct. Err., 1811, 1812) (Yates, J.). Hamilton would have agreed. In *Federalist* No. 32, he indicated that if the states acted in direct contradiction or repugnancy to constitutional authority, then their prerogative to legislate would be abridged. Hamilton did not suggest outright that the supremacy clause would trump exercises of the states' concurrent powers, but admitting such a thing to the people of New York state before their ratifying convention would have been ill-advised.

[99] Article I, section 8 grants that: "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" and "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[100] 9 Johns. Cas. 507, 567-68 (N.Y. Ct. Err., 1811, 1812).

opinion, Chief Justice James Kent agreed with Thompson and affirmed that if New York's grant came "in collision with the exercise of some congressional power," then "state authority would so far be controlled, but it would still be good in all those respects in which it did not contravene the provision of the paramount law." To justify this, Kent cited Hamilton's repugnancy caveat, and noted that "[t]his construction of the powers of the federal compact has the authority of Mr. Hamilton."[101]

Livingston v. Van Ingen illustrates how Hamilton's articulation of concurrence set the framework for debating collisions of federal and state power in the early republic. Counsel for the respondents attempted to persuade the court that New York had no authority to grant exclusive access to commercial waterways. To do so, they contended that a concurrent legislative power in the states "must either be in conformity with that of Congress...and so nugatory, or else, in collision with, or contradictory to, the law of Congress, and so void." According to the respondents' counsel—John Wells, John V. Henry, and Abraham Van Vechten—since Congress had exercised its power to regulate patents, the federal government's concurrent power became, in effect, an exclusive power.[102] Van Ingen's attorneys did not explicitly cite *Federalist* No. 32 to make this argument, but they did credit their interpretation of the U.S. Constitution (which was a variation of Hamilton's repugnancy caveat) to the former Treasury Secretary: "The true meaning of [concurrent legislative power,] has been stated and explained by a very able commentator, an illustrious statesman and distinguished lawyer."[103]

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[101] Ibid., 576.

[102] James Kent considered all of the lawyers arguing *Livingston v. Van Ingen* to be excellent attorneys, and wrote obituaries of all but Emmet and Wells in his "Necrologies." In a list that Kent complied in May 1832, however, he included T.A. Emmet and John Wells as part of an exclusive group of New York's great lawyers. Kent listed Alexander Hamilton at the very top of this list. See James Kent's obituaries, as well as the introductory essay, in Donald M. Roper, "The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies," *New-York Historical Society Quarterly* 61 (1972): 202, 203, 214, 225-26.

[103] 9 Johns. Cas. 507, 539 (N.Y. Ct. Err., 1811, 1812).

Hamilton's description of concurrence in *Federalist* No. 32 could also align with the appellants' position. The counsel for Robert Livingston and Robert Fulton, the beneficiaries of New York's exclusive grant, argued that states always enjoyed a right to grant navigation privileges, and in absence of any constitutional language prohibiting or excluding this prerogative, the New York act was valid. Attorney Thomas Addis Emmet quoted Hamilton's "rules" of concurrence in order "to secure him on the side of the appellants, and avail myself of [Hamilton's] authority to show that some of the powers granted to Congress are concurrent." He dismissed Hamilton's repugnancy clause, however—the maxim most likely to undermine his argument—and deemed it "wholly unnecessary." Emmet focused instead on the fact that Hamilton absolved any "occasional interferences in the policy of any branch of the administration" from qualifying as a constitutional repugnancy.[104] Naturally, then, Emmet considered his clients' privileges to be nothing more than "an accidental or occasional interference" in federal policy.[105] Emmet would not convince the court to reject Hamilton's repugnancy caveat—Kent would cite it as authoritative—but he was ultimately persuasive; the court upheld the appellants' exclusive privileges as constitutional.

Judges and lawyers continued to rely on Hamiltonian concurrence when considering a spate of federal cases concerning sovereignty and concurrence after *Livingston.* In *Houston v. Moore*, for example, the U.S. Supreme Court referred to *Federalist* No. 32 in order to uphold Pennsylvania's power to regulate its state militia, and in *Gibbons v. Ogden*, counsel from both parties relied on Hamiltonian concurrence to discuss competing state and federal claims to regulate steamboats on interstate waters.[106] When considering these cases, along with other commerce-related lawsuits, the Marshall Court oftentimes used federal supremacy as a trump to

[104] *The Federalist* No. 32.
[105] Emmet paraphrased it at 9 Johns. Cas. 507, 548 (N.Y. Ct. Err., 1811, 1812).
[106] Houston v. Moore, 18 U.S. 1 (1820) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

the state's concurrent power, voiding state law where the Court thought that the state's action directly collided with federal law. However, the Court would sometimes allow the states to exercise a concurrent power—to pass bankruptcy laws, for example—if Congress had not yet legislated on the matter.[107]

And though Congress did not pass much commercial legislation during the early national period, it did assert the federal government's fiscal supremacy as early as 1797. In that year, Congress passed an act making the United States the preferred creditor over any other creditor in bankruptcy proceedings—thus establishing that no matter how many creditors awaited payment from an insolvent debtor, the federal government would be paid back first.[108] By enacting this law, Congress quietly revised what Hamilton had promised his fellow delegates in convention, that the federal government would follow a "first-come, first served" protocol, as one of many creditors waiting to receive payment.

The assignees of one insolvent debtor tested the constitutionality of this preferred-creditor status in litigation culminating in *U.S. v. Fisher*.[109] In this case, Peter Blight was indebted to the United States before becoming insolvent, and after his death, the federal government brought suit to establish the priority of its claims to Blight's estate. Although the Pennsylvania Circuit Court denied the federal government's first-priority claims, the U.S. Supreme Court upheld the plaintiff's preferred status and the act establishing it. To do so, the

[107] See, for example, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 1819. In *Gibbons*, however, the idea that Congressional inaction permitted state action remained confused and muddled, and legal historian G. Edward White critiqued Marshall for failing to clarify this doctrine when the opportunity arose. Marshall missed such an opportunity to clarify his confused "preclusion" doctrine in *Brown v. Maryland* (25 U.S. (12 Wheat.) 419 (1827)), a combined tax and commerce-clause case where Maryland required that importers be licensed by the state, and the Court found that this violated both the commerce clause and the Constitution's prohibition upon states to lay any imposts/duties on imports or exports. (See White, *The Marshall Court and Cultural Change*, 1815-1835, Abridged Edition (New York: Oxford University Press, 1991), 535, 580-83

[108] Section 5 of "An Act to provide more effectually for the Settlement of Accounts between the United States, and Receivers of public Money" reads: "And be it further enacted, That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent...the debt due to the United States shall be first satisfied..." See ch. 20, 1 Stat. 512, 517 (1797).

[109] United States v. Fisher et al Assignees of Blight, a Bankrupt, 6 U.S. (2 Cranch) 358 (1805).

Court used federal supremacy to resolve the concurrent-creditor conflict arising explicitly between the federal government and individual creditors, as well as implicitly between the federal and state governments. The Court also applied Hamiltonian broad construction to uphold the act and to defend the federal power to borrow.

Chief Justice Marshall wrote the opinion for the court. First, echoing Hamilton's arguments in defense of the bank, Marshall affirmed that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." The Constitution grants a robust power to tax and to borrow, and thus it also permits the federal government to vigorously collect revenue to pay back its debts: "The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object." In other words, Marshall relied on Hamilton's principle of broad construction to defend those means (tax collection and Congress' asserted preferred-creditor status) that the federal government employed to exercise its constitutional taxing and borrowing powers.[110]

Marshall then went one step further. Taking note of the states' concurrent authority to collect on debts owed to them, Marshall added, "[t]his claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers." Yet, Marshall would not allow the states' sovereign authority to impair the federal government's ability to enact reasonable means to exercise its own constitutional authority. This was an "objection to the constitution itself," he wrote. "The mischief suggested, so far as it can really happen, is the necessary

[110] Ibid., 396.

consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends."[111]

In *U.S. v. Fisher,* the Marshall Court used Hamiltonian broad construction to defend the federal government's power to borrow money and to pay it back and added a dash of federal supremacy to further justify the national government's preferred-creditor status. Of course, a direct collision between the federal and state governments could also have been resolved in the first-come, first-served manner that Hamilton proposed to the New-York ratifying convention—but, if Congress had already declared federal claims to be supreme, Marshall could not resist the opportunity to uphold national law with Article VI's supremacy clause.

Years later, when reflecting back on the significance of Marshall's decision in *Fisher,* James Kent concluded that "it would seem, therefore, that the concurrent power of legislation in the states, is not an independent, but a subordinate and dependent power, liable, in many cases, to be extinguished, and in all cases to be postponed, to the paramount or supreme law of the union, whenever the federal and the state regulations interfere with each other."[112] With Marshall's decision in *Fisher,* federal supremacy, along with Hamilton's more subtle, repugnancy caveat, had been successfully integrated into constitutional law, and subsequent litigation—like *Livingston v. Van Ingen* and the Marshall Court's other concurrent-sovereignty cases—would only affirm this doctrine.

The fiscal controversy at the heart of *U.S. v. Fisher* arose between the federal government and an individual, not between the federal government and a state. And so, though *Fisher* had

[111] Ibid., 396-97.

[112] In his lecture entitled "Of the Concurrent Jurisdiction of the State Governments," James Kent used Hamilton's *Federalist* No. 32 as the basis of his discussion of concurrent federal and state powers. When considering *U.S. v. Fisher,* Kent recalled Hamilton's first-come, first-served approach in convention, but noted that in *Fisher*, along with later concurrent-sovereignty cases, the doctrine of federal supremacy trumped most state claims when federal and state powers directly collided. (Kent, *Commentaries on American Law*, vol. 1 (New York: O. Halsted, 1826), 369-370.)

implications for federal and state creditor-collisions, no state had actually challenged the federal government's preferred-creditor status in the litigation. *McCulloch v. Maryland* presented a wholly novel challenge to the courts, however, as the case involved an actual, direct collision between a state's sovereign, concurrent power to tax, and the federal government's presumably sovereign power to erect a corporation (which, in turn, allowed the federal government to exercise its taxing and borrowing powers). *McCulloch* required the first true judicial defense of the federal government's concurrent fiscal powers.

In 1817, the state of Maryland needed to raise revenue and thus decided to tax the notes of all banks not chartered in Maryland, including the Baltimore branch of the second Bank of the United States.[113] The bank's branch manager, James McCulloch, refused to pay the tax, however, and as a result, Maryland sued to collect the taxes owed. When the case reached the U.S. Supreme Court, Marshall combined a number of Hamiltonian principles, plus a full-throated assertion of federal supremacy doctrine, to declare the Maryland tax unconstitutional and void.

In oral argument, Hamilton's ghost pervaded the courtroom. Counsel for McCulloch, including Daniel Webster, U.S. Attorney General William Wirt, and William Pinkney, relied on Hamilton's opinion on the constitutionality of the first Bank of the United States to argue that the federal government had the constitutional authority to erect a corporation. But, counsel for Maryland relied on Hamilton *even more*.

Maryland's attorneys, including Luther Martin (the state attorney general), Joseph Hopkinson of Pennsylvania, and Walter Jones of Washington D.C., countered the plaintiff-in-error's claims by exploring Hamiltonian concurrence and its implications for the controversy at

[113] Maryland levied a tax of $15,000 per year on the Baltimore branch of the second Bank of the United States in February 1817. Over the next two years, five other states taxed Bank stock or local branches. In contrast to Maryland, Kentucky and Ohio levied enormous sums intended not to raise revenue, but to attack the unpopular national bank. (Ellis, *Aggressive Nationalism*, 65).

hand. Hopkinson quoted the text of *Federalist* No. 32 directly, focusing on passages where Hamilton affirmed that the right of taxation in the states was inviolable—except for duties on imports and exports. To Hopkinson, then, Hamilton's interpretation of the U.S. Constitution clearly intended for the states to retain this authority "in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any articles or clause of its constitution."[114] Furthermore, Hamilton clearly asserted, in *Federalist* No. 34, that the states "would have CO EQUAL authority with the Union, in the article of revenue, except as to duties on imports."[115] Hopkinson even cited a federal statute authorizing a federal tax on state bank notes as evidence of the constitutionality of Maryland's tax and the state's truly concurrent taxing powers.[116] With on-point quotations like these coming from Alexander Hamilton, no less, Hopkinson, Jones, and Martin had no shortage of authoritative commentary to bring to the Court's attention.

After reading from the *Federalist,* as well as from the New York and Virginia ratifying debates, Maryland's Attorney General Martin also noted that the plaintiff-in-error's arguments—that the supremacy of federal law abridges the state's taxing authority—ran wholly contrary to the promises made by Federalists in these pre-ratification debates. Hamilton, and others, denied that the Constitution "contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to...the rights of the States," and yet, was this

[114] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 344 (1819).
[115] Ibid., 345.
[116] Maryland's counsel most likely referred to "An Act laying duties on notes of banks, bankers, and certain companies; on notes, bonds, and obligations discounted by banks, bankers, and certain companies; and on bills of exchange of certain descriptions," ch. 80, 1 Stat. 77 (1813). This wartime act levied a federal stamp tax on promissory notes and notes payable issued by any banks established in the United States. The act did not make an exception for banks chartered by a state government. Because the duration of the statute lasted only until February 1816, it seems to have been a wartime revenue-raising measure that Congress did not renew in peacetime. Perhaps because this federal tax on state corporations was no longer federal law, Marshall did not explain its constitutionality (or possible lack thereof) in his *McCulloch* opinion.

not exactly what opposing counsel contended?[117] Martin implored the Court to resist the urge to depart from the Federalists' early interpretations of the U.S. Constitution, and to uphold Hamilton's own exposition of concurrence.

Of course, John Marshall would have none of this. Because Maryland relied so heavily on Hamiltonian concurrence, however, Marshall had to distinguish between Hamilton as the authority on broad construction, the power to erect a bank, and the meaning of the necessary and proper clause versus Hamilton as the authority on the state's absolute right to exercise concurrent taxing powers. To do this, Marshall noted that the times had changed, and in his day, Hamilton did not address the same sort of federal-state collisions that the federal and state courts now encountered with regularity (this was true for Hamilton's articulation of concurrence). Marshall thus dismissed Maryland's invocation of Hamiltonian concurrence as not quite relevant to the present collision of federal and state authority:

> The objections to the constitution [noted in Hamilton's *Federalist* essays on taxation]...were *to the undefined power of the government to tax,* not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation.[118]

The Chief Justice acknowledged that the states retained their concurrent taxing powers under the U.S. Constitution—just like Hamilton promised—but decided that since Hamilton's commentary on concurrence addressed a fundamentally different scenario than *McCulloch* did, Hamilton

[117] 17 U.S. (4 Wheat.) 316, 372 (1819).
[118] Ibid., 434 (Emphasis added).

would object to the present conclusions drawn from his essays by the state of Maryland.[119] Undoubtedly, Marshall was right; Hamilton would not have meant for his 1788 comments to justify such a direct threat to the federal government's fiscal sovereignty.

And so, while it remained true for Marshall that the states retained their concurrent taxing powers, it was also true that the federal government had acted within its sovereign authority to charter a bank. Therefore, because federal law was the supreme law of the land, and because Maryland's tax was "on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution," Maryland's tax on the second Bank of the United States could not stand.[120] While delivering this opinion, the Chief Justice concurred with Hamilton's defense of the first Bank of the United States and in *Hylton,* and used Hamilton's principle of broad construction to interpret Article I, section 8 clauses to justify the federal government's implied power to erect a corporation. Just as he did in *U.S. v. Fisher*, Marshall specifically paraphrased Hamilton's legal maxim that as long as the ends are legitimate, any related, relevant, and non-prohibited means may be employed by the federal government to exercise its constitutional powers.[121]

Livingston v. Van Ingen, U.S. v. Fisher, and *McCulloch v. Maryland* demonstrate how, after his death, Hamilton's arguments in support of a "defensive" federalism had become fully integrated into the jurisprudence of American federalism. Hamiltonian concurrence provided the legal language and standard for discussing all manner of federal-and state collisions; in fact,

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[119] Marshall thought that, "[h]ad the authors of those excellent essays been asked whether they contended for that construction of the Constitution which would place within the reach of the States those measures which the Government might adopt for the execution of its powers, no man who has read their instructive pages will hesitate to admit that their answer must have been in the negative." (Ibid., 435.)

[120] Quote at 436-37. Also, see Marshall on federal supremacy: "...[t]he same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union." (Ibid., 425.)

[121] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (Ibid., 421.)

Hamilton's *Federalist* No. 32 had become such an authority that John Marshall had to specifically acknowledge Hamilton's state-centric arguments and distinguish them from the Court's decision in *McCulloch*.[122] Also, the Marshall Court regularly employed Hamilton's principle of broad construction to uphold federal laws, particularly those that maintained to the federal fiscal authority, like erecting a bank and claiming a preferred-creditor status. And though Hamilton did not assert federal supremacy as strongly as the federal and state courts would in the nineteenth century, his repugnancy caveat created enough legal and intellectual space so that judges could assert federal supremacy without contradicting the rest of Hamiltonian concurrence.

With its direct collision between the fiscal powers of the state versus those of the federal government, *McCulloch* was one of two directly on-point legal precedents to influence the Court's decision in *Weston v. Charleston*. The other case, *Bulow and Potter v. The City Council of Charleston*, arose in South Carolina, but never made it into the federal courts.

During the second decade of the nineteenth century, Charleston's city council passed an ordinance that laid a tax on all bank stock held within the city, except those exempted from taxation by legislation. The exemptions did not exclude stock from the second Bank of the United States, and in *Bulow*, the question before South Carolina's Constitutional Court of Appeals was whether the city could tax Bank of the United States stock held by individuals. In a 3-1 decision, the South Carolina court said that it could.

[122] In *Federalist* No. 33, Hamilton uttered another seemingly anti-national admission. In reference to the states' abilities to levy taxes, he noted that "a [federal] law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution." Though seemingly damning to Marshall's read on Hamiltonian concurrence, Hamilton's statement actually comported with Marshall's *McCulloch* opinion. Just as he did throughout his defense of the federal fiscal powers, Hamilton spoke in terms of the states' *pre-existing* revenue streams—that is, the taxes that they had levied in the past, and could still levy under the U.S. Constitution. Hamiltonian concurrence protected the states' *pre-existing* (i.e. pre-ratification) right to levy taxes, which did not include a potentially destructive tax on the federal government's sovereign authority. Marshall knew that his opinion aligned with Hamiltonian concurrence and Hamilton's brand of defensive federalism.

Reasoning that Charleston's tax applied to the individual property owner, rather than to the Bank itself, the majority opinion acknowledged that *McCulloch* immunized the Bank from a state tax, but correctly held that Chief Justice Marshall did not intend for his decision to extend to individuals who owned stock in the Bank.[123] The court held that "the interest of the *United States* and the *individual stockholders* are distinct and independent," and thus the state—or the city in this case—retained its authority to assess any and all "legitimate subjects of taxation," including U.S. Bank stock.[124]

One South Carolinian Justice dissented, however. Justice Abraham Nott suspected that the federal courts might interpret the majority's decision as an unconstitutional challenge to federal authority. Any tax levied on securities made those investments look less attractive (Hamilton made this argument about the Boston tax and Congress's proposed bond resolutions); therefore, if a state or local government taxed securities related to, or derived from, sovereign federal law, then that tax directly—if not deliberately—defeated "the object intended to be effected by Congress." Nott most likely had Hamilton, Marshall, and Kent in mind when he noted that all commentators on the U.S. Constitution concurred that "where the *exercise of any power* by the State is *inconsistent* or *incompatible with* such delegation, it must be considered as *exclusively* granted to the general government."[125] In other words, the states were

[123] J. Bulow and J. Potter v. The City Council of Charleston, 1 S. C. L. (1 Nott & McC.) 527, 529-29 (S.C. Ct. App., 1819). In *McCulloch*, Marshall declared that that the national bank's tax-immunity did not extend to the shares of bank-stock held by private-citizen shareholders: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." (17 U.S. (4 Wheat) 316, 436 (1819).)

[124] J. Bulow and J. Potter v. The City Council of Charleston, 1 S. C. L. (1 Nott & McC.) 527, 530-31 (S.C. Ct. App., 1819).

[125] Ibid., 532-33. Nott continued, "I cannot conceive a more effectual source of *domestic discord*, than a power in the States to *resist* or *defeat* the operation of a constitutional Act of the *general government*."

constitutionally prohibited from interfering with the federal government's sovereign powers, concurrence notwithstanding.

With *Bulow* on the books in 1818, only five years passed before the City Council of Charleston was at it again. In 1823, the council passed another ordinance, this time assessing the "six and seven per cent stock of the United States" held by Charleston residents. Rather than tax privately-owned stock issued by a federally-incorporated bank, this time Charleston taxed United States' bonds. This was a significant departure from past practice; in *Bulow,* the court could reasonably claim that enough separation existed between a local tax laid on individually-held Bank securities and the sovereignty of the Congress chartering the Bank to prevent state interference with federal authority. No such claim could be made under the new ordinance, however, as Charleston now potentially threatened the federal government's ability "to borrow money on the credit of the United States." Plowden Weston, along with other holders of U.S. securities, decided to challenge the city ordinance in court, but lost in both Charleston's court of common pleas and South Carolina's highest court of appeals. Weston would eventually prevail in the Marshall Court.

A divided U.S. Supreme Court handed down its decision in *Weston v. Charleston*, and Marshall spoke for the majority. In his opinion, Marshall put together a Hamiltonian defense of the power to borrow, resting his arguments on the contractual nature of federal securities, federal supremacy, and the importance of an un-restricted federal borrowing power to the maintenance of the public credit. Echoing Hamilton's defense of the federal borrowing power in his "Report on a Plan for the Further Support of Public Credit," Marshall declared that "[t]he tax in question is a tax upon the contract subsisting between the government and the individual," and this contract was intimately related to the government's power to borrow money. The power to tax

was "one of the most essential to a state, and one of the most extensive in its operation," yet, for Marshall, it was "not the want of original power in an independent sovereign state" which restrains Charleston from taxing U.S. securities, but the fact that the local tax interferes with the federal borrowing power—and when federal and state actions collide, the supremacy of federal law trumps the state's authority. "The American people," Marshall explained, "have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments." Therefore, "[t]he tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution."[126]

Marshall avoided any explicit discussions of Hamiltonian concurrence by referring his reader to the Court's previous comments on *Federalist* No. 32 in *McCulloch*. Yet dissenting Associate Justice Smith Thompson—who, when presiding on the New York Supreme Court, had concurred in *Livingston v. Van Ingen*—would not let this omission slide. Thompson thought that the Charleston did not tax the "means used by the government to carry on its operation," but only assessed "*property acquired through one of the means* employed by the government to carry on its operations, viz. the power of borrowing money upon the credit of the United States."[127] Also, *Weston* did not overturn *Bulow*, and Thompson failed to see any distinction between U.S. securities and Bank of the United States securities, as both qualified to him as private property acquired through federal means, rather than as the means themselves.

To support his opinion, Thompson turned, again, to Hamilton's words in *Federalist* No. 32, noting that they were "often referred to as a work of high authority" on questions of federal

[126] 27 U.S. (2 Pet.) 449, 465, 466, 468, 469 (1829).
[127] Ibid., 479. (Emphasis added.)

power. Thompson observed that "the author has seldom been charged with surrendering any powers that can be brought fairly within the letter or spirit of the constitution," so surely Hamilton anticipated that the general government exercise its power to borrow money and as a result, create U.S. securities. And yet "it never entered into the discriminating mind of the writer...that merely investing property, subject to taxation, in stock of the United States, would withdraw the property from taxation." Thompson was thus unconvinced that Hamiltonian concurrence addressed a fundamentally different type of federal-state conflict; to him, Hamilton was clever enough to foresee the dispute at issue in *Weston*, and so, if Hamilton thought a state tax on federal bonds unconstitutional, then he would have said as much.[128]

Thompson was wrong on this last point, however. Hamilton encountered a *Weston*-like scenario in 1791, when Boston taxed federal securities, and he thought then that the tax was ill-advised and refused to comply. Furthermore, when Congress threatened to interfere with U.S. securities during the French Revolutionary wars, Hamilton argued, just as Marshall would in *Weston*, that U.S. bonds should be treated as contracts, thus inferring that the securities enjoy a tax-immune status. For Hamilton, these arguments not only sought to maintain the nation's creditworthiness, but they also protected the federal government's ability to exercise its borrowing powers in the future. Thus, Hamilton had experience, rather than simply foresight, regarding the legality of taxes imposed on federal securities. Still, he was never called upon to articulate a legal response to the constitutionality of a state tax on federal securities, and that is why Thompson would not find Hamilton commenting on the matter.

Even though Hamilton would have agreed with Marshall, rather than Thompson, in *Weston v. Charleston,* Thompson's dissent demonstrates just how extensively Hamilton's legal principles had permeated American constitutional law. In the cases concerning federal-state

[128] Ibid., 477-78.

concurrence, Hamilton oftentimes provided legal arguments for *both* parties involved—for the advocates of the state sovereignty and for those in favor of federal supremacy. Hamilton's legal defense of the federal fiscal powers had become a foundational part of the jurisprudence of federalism.

ALEXANDER HAMILTON'S DEFENSIVE FEDERALISM

While *Weston v. Charleston* is most often overlooked by modern scholars, the U.S. Supreme Court never forgot the principles of federalism at issue in the case. When contemplating the nature of American federalism in the wake of the Civil War, for example, the Chase Court looked to both *McCulloch* and *Weston* in order to determine that a federal income tax could not be levied on state officials. In *Collector v. Day*, a ruling that echoed Hamilton's defense of the federal fiscal powers, the Court decided that the national government could not tax the "means or instrumentalities" employed by the states for "carrying on the operations of their governments" or for "preserving their existence." [129]

Over twenty years later, the Supreme Court again looked to the fiscal-defense principles adopted in *McCulloch*, *Weston*, and *Collector v. Day*, to consider whether a federal income tax levied in-part on state and local municipal bonds was constitutional. In *Pollock v. Farmers Loan & Trust Co.*, the Fuller Court cited *Weston* directly to explain why a federal tax on state bonds was unconstitutional: "We have unanimously held in [*Weston*] that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the

[129] 78 U.S. (11 Wall.) 113, 125 (1871).

Constitution."[130] The main question before the *Pollock* Court was whether Congress's non-apportioned income tax violated the Constitution's direct-tax clauses; because the majority thought that it did, the *Pollock* decision overturned *Hylton v. U.S.*'s narrower definition of a direct tax. Still, over a century after Alexander Hamilton recommended various federal taxes in his first report on public credit and endorsed the federal taxing power in *Hylton*, the U.S. Supreme Court continued to look to his defense of the federal fiscal powers for guidance.

Hamilton's fiscal-defense principles thus became inseparable from the jurisprudence of federalism that developed during the long nineteenth century. By recognizing and re-constructing the various components of Hamilton's fiscal defense, we see that his influence over the establishment of the public credit extended far beyond his various reports, which have become the focal point of many historical analyses of Hamilton's accomplishments. Yet, the first Treasury Secretary achieved the restoration and maintenance of the public credit just as much by legal strategy as by policy proposal. Both his lawmaking and lawyering strategies had a lasting effect, but, as *Collector* and *Pollock* demonstrate, Hamilton's legal principles outlasted his proposed taxes, his funded national debt, and his central bank.

Alexander Hamilton's defense of the federal fiscal powers also helps us to understand how constitutional law developed during the early national period. Hamilton offered specific legal arguments that the Marshall Court adapted into its adjudication of federal-state questions, and Hamiltonian concurrence became the legal framework undergirding discussions of federalism in state and federal courts, for both national and states-oriented litigants. The ubiquity of Hamiltonian concurrence can seem to be a puzzling reality, however; if Hamilton was perceived, then and now, as "the most nationalist of all nationalists," and if Marshall

[130] 158 U.S. 601, 630 (1895). Also see Dennis Zimmerman, *The Private Use of Tax-Exempt Bonds: Controlling Public Subsidy of Private Activity* (Washington, D.C.: The Urban Institute Press, 1991), 41-43.

followed his lead, then why did Hamilton's articulation of concurrence become the standard authority on both sides of the aisle for resolving federal-state conflicts?[131]

Because Secretary Hamilton set key precedents, he became the natural expert on the matter. Hamilton was the first to articulate a widely-disseminated explanation of concurrence and he was the first administrator to give it meaning and scope through practice. Crucially, however, Hamilton's emphasis on preserving federal power persisted in law, even when the nature of the challenges arising from the American federal system changed over time. Hamilton's emphasis on the defense and preservation of federal power suggests why he had such a long-lasting influence on questions of federalism: Hamilton did not advocate for overly-aggressive federal power, but for the constitutionally authorized federal power contemplated by the Framers and ratified by the people in convention. Hamiltonian concurrence did not aim to trump the states, but to balance a newly vigorous federal power with the pre-existing vigor of the states.

Therefore, Hamilton's legal strategy was inherently defensive, rather than offensive, in its contemplation of national authority, and this had implications for the subsequent jurisprudence built from Hamiltonian foundations. When a seemingly aggressive decision like *McCulloch v. Maryland* is considered in its larger jurisprudential context—that is, by recognizing how *McCulloch* relates to Hamiltonian concurrence, *Hylton*, *Fisher*, and *Weston*— the decision becomes less an assertion of "aggressive nationalism," and more a statement of Hamiltonian defensive federalism.[132]

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[131] Rossiter, *Alexander Hamilton and the Constitution,* 199. Erik M. Jensen also referred to Hamilton as "that most nationalistic of nationalists." (See, *The Taxing Power*, 8.)

[132] Richard E. Ellis deemed Marshall's nationalistic jurisprudence in *McCulloch* an "aggressive nationalism." My interpretation comports, instead, with Charles F. Hobson's argument that the Marshall Court "endors[ed] a limited, essentially defensive form of constitutional nationalism that left ample room for the exercise of state sovereignty." Hobson applied the same interpretation to Marshall's opinion in *Weston,* arguing that the decision would "enable the general government to freely exercise its limited powers and to resist state encroachment on its jurisdiction." See,

Like any judge trained in the common law, Marshall built his opinions in *Fisher*, *McCulloch*, and *Weston* from the legal principles and decisions preceding them: the Court's adoption of broad construction in *Hylton*, the learned commentary of Publius, and Hamilton's brief on the constitutionality of a central bank. But because these cases directly involved or contemplated a novel twist—the collision between federal and state fiscal powers—Marshall applied past precedent with the added element of federal supremacy to defend the federal government's taxing and borrowing powers and to result the impasse. The seeds of this defensive federalism came directly from Hamilton, and by applying the Secretary's legal arguments, the Marshall Court embedded Hamilton's defense of the federal fiscal powers even deeper into American constitutional law. If Alexander Hamilton developed his defense of the federal fiscal powers to restore the nation's creditworthiness, then the Marshall Court thus ensured that the public credit could always be maintained.

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generally, Ellis, *Aggressive Nationalism* and Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), xiii, 122.

CHAPTER FIVE

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LITIGATION, LIBERTY, AND THE LAW: ALEXANDER HAMILTON'S COMMON-LAW RIGHTS STRATEGY

Over the past four chapters, I have demonstrated how Alexander Hamilton created substantive American jurisprudence, influenced and guided by principles of English law. Hamilton also used the law as an instrument to achieve his preferred statecraft, and by defining his policies through law, Hamilton legitimized his own programs. Still, one of Hamilton's career-long legal pursuits has been absent from this examination; in addition to the constitutional, fiscal, and commercial law influenced by the first Treasury Secretary, Hamilton also demonstrated a consistent, indefatigable rights-consciousness. His critics have long ignored Hamilton's respect for liberty under law by alleging that he was an anti-democratic, closet-monarchist. Yet, Hamilton dedicated his legal practice to crafting strategies based in English common law in order to preserve and to expand English liberties in the American courts. Throughout his career, Alexander Hamilton worked to ensure that crucial civil and political rights remained robust for inhabitants of the new republic.

Hamilton's legacy has been tarnished by charges levied against him by his contemporary political opponents, as well as nearly two centuries of censure from historians. Critics accused him of making unholy alliances with money men and the propertied class, favoring the establishment of an American monarchy, and being contemptuously elitist, all the while harboring a deep suspicion of democracy.[1] These charges mischaracterize Hamilton's genuine

[1] Hamilton's distrust of pure democracy and populist mobs, his tendency to suspect the common man as unfit to govern himself, and his arguments against a civil jury clause and a bill of rights in the U.S. Constitution have not helped his historical reputation as a rights-conscious Framer. But twentieth-century scholars including Richard Hofstadter, Louis Hartz, and Adrienne Koch have incorrectly characterized Hamilton as villainous, power-hungry, or harmful to the American republic. Hartz even referred to Hamilton's absolute "hatred of the people." See Hartz,

concern for the fate of America's experiment in republican government, and his favored formulation of American political science. Hamilton was not a villainous monarchist, nor did he have complete disdain for ordinary Americans; to the contrary, as we will see, Hamilton built his fledgling legal practice by defending a broad spectrum of common and powerful clients alike, including persecuted rich, poor, and widowed Loyalists in the aftermath of the Revolutionary War. Throughout his career, Hamilton also represented feuding New York landowners, argued on behalf of sea-faring traders suing insurance firms for claims on damaged or lost property, and successfully defended New York City's notorious carpenter Levi Weeks in his 1800 murder trial.[2] Hamilton ended his career by championing a robust conception of the freedom of the press, by representing the convicted partisan printer Harry Croswell who dared to criticize the

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The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution (New York: Harcourt, Brace, and Company, 1955), 111. For examples of other unflattering assessments of Hamilton, see Hofstadter et. al., *The United States: The History of a Republic* (Englewood Cliffs, NJ: Prentice-Hall, 1957), 130, 147-48, 153-54, and Koch, "Hamilton, Adams, and the Pursuit of Power," *The Review of Politics* 16 (1954): 37-66, particularly pages 46-47.

In contrast, Stephen F. Knott offered a historiographical survey of the waxing and waning of Hamilton's legacy over time. Almost immediately after Hamilton's death, his Jeffersonian, and later Jacksonian critics, began to perpetrate the myth that Hamilton was a monarchist and un-American. While the Civil War and Gilded Age tended to laud Hamilton's nationalism and commercial/economic acumen, Knott saw Cold-War era scholars as generally giving too little credit to Hamilton's positive contributions to the American republic. (See Knott, *Alexander Hamilton and the Persistence of Myth* (Lawrence: University Press of Kansas, 2002).

More recent historians have offered more nuanced perspectives on Hamilton. On Hamilton's suspicions of "the people's" ability to govern themselves, see Robert W. T. Martin's insightful article reconciling Hamilton's distrust of democracy with his conception of republican citizenship and a free press ("Reforming Republicanism: Alexander Hamilton's Theory of Republican Citizenship and Press Freedom," *Journal of the Early Republic* 25 (2005): 21-46). On Hamilton's skepticism of juries, particularly civil juries, see Hamilton's *Federalist* No. 83 and Akil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 89-92. Amar labeled Hamilton as "hardly a jury worshipper" (114), but he correctly observed that Hamilton did not argue against common-law rights protection, he merely disagreed with the need for a separate declaration or bill of rights.

[2] Although Hamilton gained prominence in the late 1790s representing trader Louis Le Guen's commercial interests in extended litigation involving New York's chancery and common law courts, as well as in the Court of Errors, he was also involved in marine insurance disputes. In these cases, Hamilton represented insurance firms/partnerships and carriers equally. For the infamous murder case of Levi Weeks, see People v. Weeks (Court of Oyer and Terminer and General Gaol Delivery for the City and County of New York, 1800), see "The Manhattan Well Mystery: *People v. Weeks*" section in Julius Goebel Jr. and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964-81), 1: 693-774 [hereafter, *LPAH*], as well as Paul Collins, *Duel with the Devil: The True Story of How Alexander Hamilton and Aaron Burr Teamed Up to Take on America's First Sensational Murder Mystery* (New York: Crown Publishing Group, 2013).

Jefferson-Republicans in power. Despite these efforts, American iconography and historiography insists that other Founders like Thomas Jefferson—but never Hamilton—wear the mantle of liberty.[3] On closer inspection of his public rhetoric and, most importantly, his legal practice, however, Alexander Hamilton rivals even Jefferson as a rights-conscious statesman. We should not be surprised that Hamilton paid close attention to the preservation of American liberty. After all, like other radical American Whigs, a college-aged Hamilton publicly spoke out against King George and Parliament's tyranny before the outbreak of hostilities. During the war, Captain-turned-Lieutenant Colonel Hamilton fought for American independence both in battle and at General Washington's side. But most importantly, after the war, Hamilton trained as a common-lawyer, just as Jefferson, John Adams, James Madison, James Wilson, John Marshall, and Andrew Jackson did. And, it is from this common-law instruction that Alexander Hamilton developed a successful legal strategy to use to enforce his rights-consciousness in court. Hamilton became a staunch advocate of due process and freedom of the press liberties that protected Americans from governmental overreaching.

The key to Hamilton's rights-strategy was the distinction he made between a "strict" versus an "extensive" conception of the common law. Under their new constitutions, the states received, in various forms, English common law—but these reception provisions created ambiguity and legal uncertainty.[4] Determining what parts of the common law applied in state

[3] Hamilton's concern for the protection of common-law rights has been hinted at biographer John C. Miller, but otherwise, his rights-consciousness goes largely unacknowledged by scholars. (*Alexander Hamilton: Portrait in Paradox* (New York: Harper & Brown, 1959) 101-105.)

[4] This exploration of Hamilton's litigation strategies, and in particular the discussion of the continued reception of common law in *People v. Croswell*, below, builds upon generations of scholarship that have been mostly, though not exclusively, focused on the reception of common law into the American colonies. I have posited that New York's leading lawyers and judges accepted the broadest possible conception of "common law" as received under New York's reception clause, and that Americans continued to rely on the entire English constitution as a vast body of legal rules and precedents to inform, but not to control, the substance of their republican law. For the scholarship on common-law reception, see William B. Stoebuck, "Reception of English Common Law in the American Colonies," *William and Mary Law Review* 10 (1968): 393-426; Paul Samuel Reinsch,"The English Common Law in the Early

jurisprudence proved to be a tricky endeavor, as seemingly basic questions uncovered uncertain and complicated answers. Under New York's reception clause, for example, what authorities provided definitive evidence of the common law?[5] Only the central English courts at Westminster? What about "ancient" English statutes, or Parliament, or—after the adoption of the federal constitution—Congress?

While serving in the New York Assembly in 1787, Hamilton identified the key ambiguity in New York's reception clause and asked aloud: "what is meant in the constitution, by this phrase 'the common law'?"[6] He then went on to describe the important common-law distinction animating his legal and constitutional thought:

> These words have in a legal view two senses, one more *extensive*, the other more *strict*. In their most extensive sense, they comprehend the [British] constitution, of all those courts which were established by memorial custom, such as the court of chancery, the ecclesiastical court, &c. though these courts proceed according to a peculiar law. In their more strict sense, they are confined to the course of proceedings in the courts of Westminster in England, or in the supreme court of this state.[7]

After suggesting that the state constitution's reference to "common law" encompassed more than just the case reports generated by the central courts in Westminster, Hamilton thus determined, "I view it as a delicate and difficult question; yet, I am inclined to think that the more *extensive sense* may be fairly adopted." Although Hamilton referred here only to a particular intestacy bill

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American Colonies," in *Select Essays in Anglo-American Legal History*, 3 vols. (Boston: Little, Brown, and Company, 1907-9) , 1:367-415; Julius Goebel Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review* 31 (1931): 416-48, and "The Common Law and the Constitution," in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones (Ithaca: Cornell University Press, 1956), 101-23; Elizabeth Gaspar Brown, *British Statutes in American Law, 1776-1836* (Ann Arbor: University of Michigan Law School, 1964).

[5] See Section 35 of New York state's 1777 constitution.

[6] Remarks on an Act for settling Intestate Estates, Proving Wills, and Granting Administrations, made in the New York Assembly February 14, 1787, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961-87), 4:69-70. [Hereafter *PAH*.]

[7] *PAH*, 4: 69.

under consideration, this distinction between a "strict" and an "extensive" common law would pervade Hamilton's litigation strategies for the rest of his career.[8]

For Hamilton, then, the "extensive" common law was an enormous corpus of law—understood by him as synonymous with the entire English constitution—that offered strategic flexibility, as well as a vast body of legal precedents from which to draw in order to make arguments about the substance of law in the American republic. When Hamilton wanted to make a rights-claim for his client, he drew from this expansive body of common-law principles and precedent to make his argument. And, as we will see, the strategic flexibility allowed by his "extensive" common law approach meant that Hamilton looked to principles and practices beyond English case-law in order to effectively represent his client. English common law—that is, the English constitution itself—became a tool for Hamilton to instrumentally apply to promote his client's interests, while simultaneously furthering his own political goals.

Hamilton's extensive common law strategy proved to be effective for two reasons. First, Hamilton was, by all accounts, a brilliant lawyer, with an encyclopedic mind, a disciplined work-ethic, and an innate forensic talent that allowed him to piece together and recall winning arguments from the annals of English legal history. Yet, Hamilton's litigation strategy also succeeded because it so perfectly fit the legal uncertainty characterizing his time at the bar: Hamilton and his lawyer colleagues practiced law when much of the substantive law of New York was unsettled and still up for grabs. When thinking back to these post-war decades, Chancellor James Kent explained the uncertainty at the New York bar: "We had no precedents

[8] When referring to differing interpretation of the common law as "strict" versus "extensive" below, I borrow Hamilton's 1787 distinction as a helpful analytical label. Neither Hamilton nor his lawyer-colleagues used the terms "strict" or "extensive" to describe their conceptions of the common law.

of our own to guide us. . . Nothing was settled in our courts. Every point of practice had to be investigated, and its application to our courts and institutions questioned and tested."[9]

In these first, early years of the American republic, the state of American law was thus highly contingent. For Hamilton, the best way to take advantage of this opportunity was to maximize the legal options available to the court to consider—and his "extensive" conception of the common law provided those options. Hamilton devised and applied this strategy when arguing for expansive conceptions of due process and freedom of the press liberties, and in doing so, he permanently changed the substance of New York state, and the course of American, law.

PHOCION'S PROCESS: HAMILTON'S DEFENSE OF THE LOYALISTS

"[L]egislative folly has afforded so plentiful a harvest to us lawyers that we have scarcely a moment to spare from the substantial business of reaping."[10] In 1787, Hamilton could boast about the number of Loyalist defendants retaining his legal services, but not about the ease of winning their cases. This "legislative folly"—that is, the anti-Loyalist statutes passed by New York state during and after the Revolutionary War, including the Confiscation, Citation, and Trespass Acts—deprived Hamilton's Tory clients of their rights and property, and challenged Hamilton to creatively circumvent statutory law in order to craft a successful defense. These discriminatory statutes remained in effect after the official end to hostilities, thus making it difficult for sympathetic attorneys to be effective advocates for their Loyalist and British clients.

[9] James Kent to Elizabeth Hamilton ("Chancellor Kent's Memories of Alexander Hamilton"), December 10, 1832, in William Kent, *Memoirs and Letters of James Kent* (Boston: Little, Brown, and Company, 1898), 290.
[10] Alexander Hamilton to Gouverneur Morris (February 21, 1784), *PAH* 3: 512.

The persecution and exile of Loyalists in New York has been well documented.[11] America's break with England, coupled with the British occupation of New York City, caused irrevocable divisions across New York communities, forcing families to choose either to leave behind their homes and property or to be branded as traitors for remaining behind enemy lines. The war exposed the depth of Patriots' hatred and fear of the British and their sympathizers—but also the extent of Patriots' wrath against those whom they once considered fellow subjects and now reckoned foes. Yet, while Loyalist scholarship describes, in detail, the hardships endured by American Tories, it gives little account of how Loyalists and their lawyers attempted to resist such persecution through the law. The efforts of Loyalist attorneys, like Hamilton, to shield their clients from legal persecution have been largely overlooked.[12]

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[11] See Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Alfred A. Knopt, 2011); Philip Ranlet, *The New York Loyalists* (Knoxville: University of Tennessee Press, 1986); E. Wilder Spaulding, *New York in the Critical Period, 1783-1789* (New York: Columbia University Press, 1932); Claude Halstead Van Tyne, *The Loyalists in the American Revolution* (New York: Macmillan Company, 1929).

[12] Julius Goebel provided the most extensive commentary on Loyalist lawyers' efforts, with a primary focus on Hamilton. I draw from his commentary as I reconstruct Hamilton's defense strategies. See, "The War Cases" section in Julius Goebel Jr., ed., *LPAH* 1: 197-544. Maxwell Bloomfield described a different kind of Loyalist legal perspective: the protests of an exiled Loyalist lawyer, Peter Van Schaack, who eventually returned to New York after the Revolution. Like Hamilton, Van Schaack argued against what he considered to be unjust violations of his and other Loyalists' due process rights by New York's anti-Loyalist statutes. See "Peter Van Schaack and the Problem of Allegiance" in *American Lawyers in a Changing Society, 1776-1876* (Cambridge: Harvard University Press, 1976), 16.

Alexander Hamilton's efforts on behalf of Loyalists have not been ignored, but historians consider Hamilton's defense of a British subject in *Rutgers v. Waddington* solely within the context of developing American judicial power and the origins of judicial review. In much of this historiography, *Rutgers* represents a significant milestone along a teleological path that leads to the courts' unhindered exercise of judicial review. *Rutgers* exemplified the clash, so goes this account, between judicial magistracy and legislative supremacy, even though New York's Mayor's Court did not go so far as to declare the Trespass Act unconstitutional and void. Historians pursuing this "origins" narrative of judicial review agreed that the court's strategy of equitable interpretation, as well as Hamilton's arguments for the defense, came close enough to signal an important step toward the development of judicial review. (See, Elizabeth Rutgers v. Joshua Waddington (N.Y. Mayors Ct., 1784)).

For selections from the enormous scholarship on judicial review, See Gordon S. Wood's two chapters "Law and an Independent Judiciary" and "The Origins of Judicial Review" in *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009). Also, Matthew P. Harrington, for example, argued that multiple state courts inched toward judicial review in response to legislative supremacy gone too far. In Harrington's view, the *Rutgers* decision reflected a broad, growing concern that "legislative capriciousness and excess" had gotten out of hand, particularly in response to legislatures' unjust treatment of Loyalists after the war. (Harrington, "Judicial Review Before John Marshall." *George Washington Law Review* 72 (2003): 53.) Daniel J. Hulsebosch reached a similar conclusion about the significance of "anti-antiloyalism" as an inspirational force behind early precedents for judicial review. Hulsebosch noted that creative lawyers like Hamilton "argued in and out of court that the problem with [the] systematic abuse of the loyalist minority was that it

While Hamilton found the persecution of Loyalists and their subsequent flight from the state to be unjust and alarming—their exodus was a serious detriment to commerce and an impediment to New York state's economic growth—he did not simply advocate for judicial review as the remedy to the Loyalist problem. Indeed, historians have generally put too much analytic weight on the development of judicial review—and the Mayor Court's opinion in *Rutgers v. Waddington*—as Hamilton's solution to the Loyalist problem in New York, as well as to explain the judiciary's ascendancy in the early republic. Judicial review was an extraordinary act and it occurred too infrequently to explain why and how Americans embraced their formerly monarchical magistrates as republican judges. Alexander Hamilton's defense of Loyalists, however, offers an alternative insight into how this change may have occurred. Hamilton attempted to revise the courts' image and function in the eyes of the New York public in order to win favorable results for his clients. As a part of this strategy he suggested that it was the judiciary's essential purpose to safeguard the people's liberty by providing due process of law in ordinary, everyday legal matters. To Hamilton, then, judicial process was crucial for sustaining America's republican experiment.

By examining Alexander Hamilton's defense of Loyalists and British subjects in court, in the press, and ultimately in the state assembly, it becomes clear that the guarantees of the due process of law were fundamental to both Hamilton's litigation strategy, as well as to his simultaneous attempt to convince New Yorkers to repeal the anti-Loyalist statutes. Rescinding

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threatened the states' ability to reintegrate into the Atlantic world." (Hulsebosch, "A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review," (2006), page 102. *New York University Public Law and Legal Theory Working Papers*. Paper 36. http://lsr.nellco.org/nyu_plltwp/36). For *Rutgers* in other judicial review "origins" narratives, see William Michael Treanor, "Judicial Review Before Marbury." *Stanford Law Review* 58 (2005): 483; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005) 189-202 [hereafter, *Constituting Empire*]; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 65-67;Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 16-22; Edwin S. Corwin, "Establishment of Judicial Review." *Michigan Law Review*, Vol. 9, Issue 2 (1910-1911): 115-116.

anti-Loyalist laws benefited even Patriots according to Hamilton, because denying legal process to the Loyalist few imperiled the rights and liberty of everyone.

Hamilton equated the protection of the rights and liberties of the state constitution with the guarantee of due process that judicial courts provided. To defend his clients against litigation arising from anti-Loyalist legislation, Hamilton employed various legal strategies derived from his extensive conception of inherited English common law to circumvent the limitations on due process written into these statutes. Having to maneuver around statutorily imposed constraints on judicial process gave Hamilton a profound appreciation for the protections afforded by the due process of law and the court's role in enforcing and guarding it. Thus, when Hamilton made his case to the public in his first and second *Letters from Phocion*, he argued that common-law due process was a constitutionally guaranteed right, and that this process protected everyone from arbitrary confiscation, banishment, disfranchisement, and punishment. Anti-Loyalist statutes set a precedent for the persecution of *anyone* through legislative fiat, as statutes denied British sympathizers their rights to traditional judicial process, including presentment, review of errors, and a fair defense.

Considering the entirety of Hamilton use of a broad conception of common law to defend Loyalists also provides a fresh perspective into his early formulation of the nature of republican judicial power. [13] He emphasized the courts' responsibility to provide guarantees of due process, which derived from the common law, and thus, to Hamilton's mind, should temper, if not

[13] Hamilton's conception of judicial power conformed to the eighteenth-century conception of "judicial duty." Philip Hamburger defined "judicial duty" as the duty of English and American judges to decide in accordance with the law of the land. This duty included the power to determine the constitutionality of laws, but not necessarily; judges could equitably interpret conflicting laws to resolve their incompatibility or apply the superior law in the case at hand (without declaring the other law unconstitutional). Hamburger described this more moderate judicial power and responsibility as "both more general and more mundane than what has come to be understood as judicial review, and it therefore had greater authority and more balanced implications." Hamilton, then, considered the courts to have the power to declare constitutionality, but when defending Loyalists, he did not advocate for courts to exercise this review component of judicial duty. Regarding judicial duty, see Philip Hamburger, *Law and Judicial Duty* (Cambridge: Harvard University Press, 2008); quotation on page 17.

override, the procedural restrictions in New York's anti-Loyalist statutes. Moreover, since the common law provided due process, ensuring that no person would be divested of life, liberty, property, or the franchise without a complete and fair judicial prosecution, Hamilton also argued that New Yorkers should look to the common-law courts, and not to the legislature, to protect their liberty. As Hamilton learned through practice, even with statutory limitations on legal process in place, the common law proved flexible enough for him to win some degree of justice and relief for his clients. For Alexander Hamilton, then, the broadly conceived common law, and therefore the courts which ensured its due process guarantees, protected the American people not simply through the extraordinary act of judicial review, but through the everyday guarantee of the due process of law.

Statutory Limitations on Common-Law Due Process

During the course of American Revolution, New York passed over thirty statutes aimed at persecuting those who sympathized with the British or resided behind enemy lines, yet only three of these statutes figured prominently in postwar litigation.[14] While Trespass Act litigation would consume most of Hamilton's law practice in the 1780s, he also litigated cases involving the Confiscation Act and the Citation Act. Each act denied defendant Loyalists some of the traditional forms of judicial process.

The Trespass Act authorized transitory trespass litigation (that is, trespass actions prosecuted in courts beyond the vicinity where the offense occurred), which gave Patriot plaintiffs their pick of favorable local courts. Crucially, the act forbade Loyalists from justifying their trespass by military permission, and it stipulated that not only the defendant, but also his

[14] A London pamphlet published in 1786 and titled "Laws of the Legislature of the State of New York, in force against the Loyalists, and affecting the trade of Great Britain, and British Merchants, and others having property in that state" listed 32 laws against British sympathizers in New York state.

representatives, executors, and heirs, were subject to prosecution.[15] In addition, the act made the first court to hear a case also the final court of record, thus denying removal to a higher court or appellate review.

The New York legislature modeled the Confiscation Act after English law regarding high treason, but added broader language and fewer procedural safeguards.[16] The Confiscation Act attainted some well-known British subjects by name, but also provided that anyone found "adhering to the enemies of the people of this State" were subject to the forfeiture and confiscation of their real and personal property. [17] English treason prosecutions required trials in the vicinity of the offense, the testimony of two witnesses, and an overt action to constitute treason. Under the Confiscation Act, however, indictment could be brought in any county (not necessarily the county of the offense), with the testimony of only one witness, on general suspicion of adherence to the enemy. If the accused failed to appear to traverse the indictment, the Supreme Court of New York would automatically adjudge them guilty and their property forfeited and confiscated.[18]

The Citation Act stayed all suits initiated by Loyalists to collect on debts owed them by Patriots. The Act also coerced Loyalist creditors to settle with their Patriot debtors on more favorable terms than their original contracts stipulated. The act allowed Patriots to secure abatements on the amounts they owed and to pay back their remaining debt in paper currency instead of sterling. After the British withdrew from New York, the act stipulated that any Patriot

[15] Passed March 17, 1783. *Laws of the State of New York* 6 Sess. 1783, c. 31.
[16] Passed October 22, 1779. *Laws of the State of New York* 3 Sess. 1779, c.25.
[17] Those attainted by name, including John Murray, the earl of Dunmore, and Governor William Tryon, were also banished (on penalty of death) and faced the automatic forfeiture and confiscation of their real and personal property.
[18] *LPAH*, 1:198-199.

debtor could "cite" his Loyalist creditor to fulfill the debt on these terms, and if the Loyalist creditor refused to settle, he would be permanently barred from recovering the debt. [19]

These acts placed limits on the legal process available to Loyalist defendants by preventing removal to superior judicial courts, by prohibiting military command as a justifiable defense, by creating hardships and alternative procedures for collecting debts, and by making it difficult for Loyalist defendants to travel to or obtain notice of actions pending against them in transitory courts located in Patriot-friendly counties. Legislative restrictions impeded the normal course of judicial process and forced Hamilton to be creative when crafting a defense litigation strategy for his Loyalist clientele. The limits of New York anti-Loyalist legislation made it almost impossible to successfully defend British subjects and Loyalists after the war, and so Hamilton worked to mitigate, as much as possible, the unjust effects of the Trespass, Citation, and Confiscation Acts.

Circumventing Statutory Limitations on Due Process: Defense Strategies

The majority of Hamilton's Loyalist practice came from trespass lawsuits, brought under the Trespass Act or common-law trespass actions, which allowed Hamilton to try alternative defense theories depending on the circumstances of the trespass.[20] When first preparing for lawsuits arising from the Trespass Act, Hamilton posited two defenses: a plea of the law of nations and a plea of the Treaty of Peace (1783).

The Trespass Act forbade defendants to plead any military justification for the use and occupation of Patriot's property located behind enemy lines during the war. This restriction

[19] Passed July 12, 1782. *Laws of the State of New York* 6 Sess. 1782, c. 1.
[20] Julius Goebel Jr. estimated that Hamilton was involved in 45 cases involving the Trespass Act and 9 cases involving the Citation Act (*LPAH*, 1: 419, 265). Because of the scarcity of extant records dealing with Confiscation Act litigation, Goebel cited Hamilton's involvement in only one Confiscation Act case, *People v. Nicholas Hoffman*; however, Hamilton provided a number of opinions on the Confiscation Act for Loyalist clients and he submitted petitions to the NY legislature on their behalf as well.

severely hampered possible defenses because during the British occupation of New York, British military personnel granted permission to those residing in the city to use otherwise vacant buildings (usually owned by Patriots who had fled the city). In addition, defendants paid rent to the British for their use of these vacant dwelling houses, storerooms, and workhouses. Military justification was, then, the actual reason for the defendants' use of the plaintiff's property. The law of nations, a constituent part of the broadly conceived English common law, accepted this justification for the use of vacant buildings (when permitted by an occupying force). To Hamilton, the universal law of nations, as part of the "extensive common law" received under New York's 1777 constitution, trumped the Trespass Act's restriction on a military justification plea.[21]

For those defendants who considered themselves to be British subjects during and after the War, Hamilton added the "plea of the Treaty," along with the "plea of the law of nations" to a Trespass Act defense. Once the treaty was ratified by Congress on January 14, 1784, Hamilton argued that the language of the treaty granted a general amnesty to any further prosecutions of wartime offenses committed by British subjects.[22] When pleading in court, Hamilton planned to submit both theories on behalf of British clients, like Joshua Waddington, or limited the plea to a law of nations justification for Loyalists, whom he considered members of New York state.

Rutgers v. Waddington has long been considered a pivotal case in the development of the distinctly American concept of judicial review, but when placed in the context of Hamilton's other Trespass Act litigation, *Rutgers* represents Hamilton's splashy introduction of a novel

[21] Notes from Hamilton's *Rutgers* Brief No. 6 (undated): "That our constitution adopts the common law of which the *law of nations is a part*...The enemy having a right to the use of the Plaintiffs property & having exercised their right through the Defendant & for valuable consideration he cannot be made answerable to another without injustice and a violation of the law of Universal society." (*LPAH,* 1: 368, 373)

[22] Hamilton inferred general amnesty to those identifying themselves as British subjects from Article VI of the Treaty of Peace.

defense, and not an overt attempt to persuade the Mayor's Court to declare the Trespass Act unconstitutional and void.[23] By citing the law of nations—which Hamilton considered as part of the law of the land via the New York constitution's common-law reception clause—and the Treaty of Peace as the basis of Waddington's defense, Hamilton argued that both were superior laws when compared to a mere statute in their application to Waddington, a British subject.[24] Accordingly, as judges determined how to reconcile these conflicting superior and inferior laws, they could equitably interpret the statute to conform to the superior law (as Judge James Duane did in *Rutgers*) or apply the highest-ranking law to the case at hand.[25] Hamilton did not attempt to persuade the Mayor's Court to declare the Trespass Act void; instead, he argued that military justification derived from higher-ranking laws of the land and thus should be admitted as a plausible defense. In *Rutgers*, and subsequently in other Trespass Act litigation, Hamilton aimed to expand upon and take advantage of any viable defenses for his clients. He intended to use the common law to challenge and to override the effects of statutory law for his client, but not to outright nullify the law with an exercise of judicial review.

[23] Elizabeth Rutgers v. Joshua Waddington (N.Y. Mayors Court, 1784).

[24] Notes from Hamilton's *Rutgers* Brief No. 6 (undated): "To make the Defendant answerable would be a breach of the Treaty of Peace...[and the Treaty is] a law Paramount to that of any particular state...The judges of each state must of necessity be judges of the United States—And they must take notice of the law of Congress as part of the law of the land—Though it should be admitted that [judges] would be absolutely concluded by a law of the state in respect to its own citizens, in respect to foreigners they must judge according to that law which alone the constitution knows as regulating their concerns...When Statutes contradict the essential policy and maxims of the common law, the common law shall be preferred—...The present case goes no farther than to require the court to say that British subjects are not within the [Trespass] act—...the act may still operate upon all the Citizens of the state of New York." Contrary to this statement, in Trespass Act cases concerning Loyalists—whom he considered to be American citizens—Hamilton used the plea of the law of nations as a defense. (*LPAH*, 1: 377, 380, 383, 388)

[25] See, in general, Hamburger, *Law and Judicial Duty*. Hamilton described this "judicial duty" as a delegate in the tenth session of the New York assembly (1787): "Cicero...lays it down as a rule, that when two laws clash, that which relates to the most important matters ought to be preferred. If this rule prevails, who can doubt what would be the conduct of the judges, should any laws exist inconsistent with the treaty of peace [?]" (*PAH*, 4: 152). He also referred to Cicero's "rule" in his *Rutgers* Brief No. 6 (*LPAH*, 1: 381).

Judge Duane accepted Hamilton's law of nations plea and agreed with the defense counsel that the *ius gentium* became part of the law of the land under the state constitution.[26] To this end, Duane equitably interpreted the Trespass Act so as to smooth over the edges of conflicting laws: the New York legislature did not explicitly say in the text of the Trespass Act that it wished to violate the laws of nations or to supplant the common law, and so the court would assume that contravening this law was not the legislature's intent. Therefore, when construing the Trespass Act and applying it to *Rutgers*, the court applied the Trespass Act without breaching the law of nations.[27] From this, the Mayor's Court determined that a plea of the law of nations was admissible, but for only the time periods that Waddington had permission to dwell in and use Rutger's property from the British Commander-in-Chief (but not permission from the Commissary General).[28]

Duane did not accept Hamilton's plea of the Treaty. Rather, he ruled that the text of the Treaty bestowed no express amnesty for the defendant, and thus gave no further benefit than what the law of nations already provided.[29] Hamilton planned to use the plea of the Treaty in other lawsuits, including *Tucker v. Thompson*, but he subsequently dropped the plea after the

[26] "Opinion of the Mayor's Court" (August 27, 1784), *LPAH*, 1: 402.
[27] *LPAH*, 1: 415, 417.
[28] *LPAH*, 1: 411, 419. Some contemporary New Yorkers interpreted Duane's equitable construction as a power-play by the Mayor's court to exercise legislative power, but equitable interpretation was a traditional way for courts to deal with two conflicting laws without pronouncing one void. (See Hamburger, *Law and Judicial Duty*, 344-357.) And, as Hamilton would later note as a representative in the N.Y. Assembly, "it would be impolitic to leave [the courts] to the dilemma, either of infringing the treaty to enforce the particular laws of the state, or to explain away the laws of the state to give effect to the treaty." In other words, if the legislature did not want courts making these decisions, then it should have written statutes more carefully (or it should rescind the "impolitic" ones on the books) to avoid conflict with the existing laws of the land. ("NY Assembly: Remarks on an Act Repealing Laws Inconsistent with the Treaty of Peace" (April 17, 1787), *PAH*, 4: 152.)
[29] "Opinion of the Mayor's Court" (August 27, 1784), *LPAH*, 1: 412; also, *LPAH*, 1: 308-309.

Rutgers decision (see, for example, *Gomez v. Maule,* a Trespass Act case in which Hamilton relied solely on the plea of the law of nations).[30]

Hamilton's partial victory in *Rutgers* gave him a viable defense for his British and Loyalist clients, and he employed this law of nations plea in subsequent Trespass Act actions such as *Quackenbos v. Underhill* and *Morton v. Seton*.[31] To Hamilton, this legal leeway came as a welcome reprieve from an otherwise dire situation where seemingly no Trespass Act defense could be made. Reflecting back on this scene of general despair among Loyalist attorneys, Hamilton recounted to George Washington in 1795 his search for an effective defense:

> The fact is that from the very express terms of the [Trespass] Act a general opinion was entertained embracing almost our whole bar as well as the public that it was useless to attempt a defence—and accordingly many suits were brought and many judgments given without the point being regularly raised and many compromises were made and large sums paid under the despair of a successful defence—I was for a long time the only practicer who pursued a different course and opposed the Treaty to the Act.[32]

Although Hamilton's comments refer only to his plea of the Treaty, pleading the law of nations proved to be a more viable defense. In fact, extant in Hamilton's law papers is a law of nations plea drafted by Hamilton for use by another attorney in *Shaw v. Stevenson* (1784), indicating that Hamilton's strategy circulated among other defense attorneys as a potentially effective remedy to counter the "extensive operation" of the Trespass Act.[33]

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[30] Thomas Tucker v. Henry Thompson (N.Y. Mayor's Ct., 1784-1785), Plea (May 29, 1784), Ibid., 1: 432-447; Moses Gomez v. Thomas Maule (N.Y. Sup. Ct., unknown date), Plea (April 7), *LPAH*., 1: 449-453; also see *LPAH*., 1: 419-420.

[31] Walter Quackenbos v. Thomas Underhill (N. Y. Mayor's Ct., 1784-1785), Plea (undated), *LPAH*., 1: 465-467; Jacob Morton and Mary S. Morton, Administrator and Administratrix of John Morton v. William Seton (N.Y. Sup. Ct., 1785-1786), Plea by John Lawrence, attorney for the plaintiff (undated), *LPAH*., 1: 468-474.

[32] "Alexander Hamilton's Remarks on Trespass act Litigation in Connection with the Ratification of the Jay Treaty," extract from a letter from Hamilton to George Washington, July 3-10, 1795, *LPAH*, 1: 540-541.

[33] Daniel Shaw v. John Stevenson (N.Y. Mayor's Ct., 1784), Plea, drafted by Hamilton for use by George Bond, attorney for defendant (April 6, 1784), *LPAH*, 1: 459-464. Quotation from *LPAH*, 1:535.

Hamilton's Loyalist clients also faced common-law trespass actions that encompassed the destruction of property, instead of or in addition to the mere use and occupation of property, and were not always prosecuted under the Trespass Act. To answer both common-law trespass and Trespass Act lawsuits, Hamilton pleaded other defenses such as duress inflicted by military authority (as in *Lloyd v. Williams,* where the defendant was impressed by the British military to harvest the plaintiff's wheat to be used by British forces); military orders to destroy the plaintiff's property (the defendant in *Lloyd v. Hewlett* had been a member of the Loyalist militia); citing the "customs and usages of war" (similar to invoking the plea of the law of nations under Trespass Act actions and used in *Hendrickson v. Cornwell*); and pleading the general issue, or general denial, to the trespass (*Lloyd v. Sneathen*).[34]

Loyalists and British subjects found themselves facing statutory and common law trespass actions without clearly admissible or effective defense options available to them, and so it became Hamilton's challenge to devise workable defenses to present in court. Although he was not always successful in winning these lawsuits, Hamilton found that certain pleas could be used to counteract the seemingly oppressive limitations of the Trespass Act. Justice could be served to his British and Loyalist clients in court, even when legislatures tried to make it impossible.

Settlement Strategies

Coupled with his novel defense strategies, Hamilton held out hope that settling a case out of court (or removing to a superior court) would ensure that his client would have to pay a

[34] John Lloyd Jr. Executor of Joseph Lloyd v. John Williams (N.Y. Sup. Ct., 1784-1785), *LPAH,* 1: 475-478; John Lloyd Jr. Executor of Joseph Lloyd v. Charles Hewlett (N.Y. Sup. Ct., 1784-1790), *LPAH*, 1: 478-488; Isaac Hendrickson v. Whitehead Cornwell (Queens County Common Pleas, 1786; N.Y. Sup.Ct., 1787-1788), *LPAH*, 1: 499-504; John Lloyd Jr. Executor of Joseph Lloyd v. Barrack Sneathen (N.Y. Sup. Ct., 1784-1788), *LPAH*, 1: 488-494.

smaller amount to Patriot plaintiffs than would be the case if lower court decisions were final. While the Trespass Act prohibited removal to superior courts, common-law trespass cases could be removed to superior courts, as could Confiscation or Citation Act cases. Hamilton thus added the possibilities of removal and settlement to his overall strategy.

Hamilton's first tactic toward settlement was to delay proceedings, for as long as possible, in the hope that during the delay, statutory law would be amended or rescinded in his client's favor. In February 1784, for instance, Abraham Cuyler asked Hamilton for an opinion on whether the Treaty of Peace might be used to challenge the forfeiture and confiscation of Cuyler's property under the Confiscation Act (Cuyler was attainted by name in the act). Advocating patience and delay, Hamilton cautioned Cuyler against bringing any challenges in court at the time because "There has not hitherto been any judicial decision upon this point, and in the present temper of this Country it would be very unadvisable for Mr. Cuyler to hazard an experiment—"[35] Similarly, when reflecting on past Trespass Act litigation, Hamilton wrote that "I effected many easy compromises to my clients...& produced delays till the exceptionable part of the Act was repealed—"[36] Delay could either encourage settlement or prevent judgments from being issued during the height of anti-Loyalist fervor in New York.

Removal to a superior court (or the threat of removal) also helped to broker settlements out of court.[37] To some degree, Hamilton was wary of removal to New York's Supreme Court out of a concern that his successful pleadings would be found inadmissible by the superior court; yet at the same time, opposing counsel also feared removal because, in the wake of *Rutgers*, a

[35] "Opinion on the Application of Abraham Cuyler" (February 13, 1784), *LPAH*, 1: 250.
[36] "Alexander Hamilton's Remarks on Trespass act Litigation in Connection with the Ratification of the Jay Treaty," extract from a letter from Hamilton to George Washington (July 3-10, 1795), *LPAH*, 1: 541.
[37] Although I have focused on the Trespass Act here, Hamilton also used a removal strategy in Citation Act litigation. See Abel Belknap v. Elizabeth Van Cortlandt, et al., (N.Y. Mayor's Ct., 1784; N.Y. Sup. Ct., 1786), *LPAH*, 1: 274.

superior court decision might work against the plaintiff's interests.[38] Since the Trespass Act provided that the inferior court which first took cognizance of a case would be the final court to adjudge it, removal was not an option under the act. This stipulation benefitted Patriot plaintiffs because it denied Loyalist defendants the writ of error, a judicial safeguard which allowed superior courts to review lower court decisions for errors in law (not in fact). Also, the provision made it more likely that plaintiff-friendly judgments would be handed down from the more informal, inferior courts (lower courts were not as finicky about the technicalities of pleading, for example, as superior courts).[39]

With the Trespass Act's restriction of removal on the books, it would seem, then, that plaintiffs would lack incentive for settling a Trespass Act action. It turned out, however, that Hamilton's partial victory in *Rutgers* had the effect of making removal an option in Trespass Act cases, despite the statute. After the decision, Rutgers' astonished and outraged counsel contemplated, then set into motion, the "people's writ of error" to force review of the Mayor's Court decision in the Supreme Court. In July 1785, their writ of error was still pending when Rutgers and Waddington reached a settlement out of court for an undisclosed amount. Given that Waddington ultimately settled after a jury of inquiry awarded Rutgers only £791 (instead of the £8000 for which the suit was instituted), Julius Goebel Jr. believed that the settlement amount was much closer to the jury award than Rutgers' original request for damages.[40] The *Rutgers* decision and the admissibility of Hamilton's law of nations plea cast widespread doubt that plaintiffs would inevitably succeed in their Trespass Act lawsuits.

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[38] Hamilton stated to Washington that he was "afraid myself of the event in the Supreme Court"—that the pleas of the law of nations and of the Treaty would be ruled contrary to the Trespass Act and thus inadmissible. ("Alexander Hamilton's Remarks on Trespass act Litigation in Connection with the Ratification of the Jay Treaty," extract from a letter from Hamilton to George Washington (July 3-10, 1795), *LPAH*, 1: 541.)
[39] *LPAH*, 1: 201-202.
[40] *LPAH*, 1: 310-311.

The Trespass Act's stipulation against removal also seems to have been generally disregarded by New Yorkers during the mid-1780s, especially after the *Rutgers* decision. *Rutgers* incited the New York assembly to declare the judgment to be "subversive of all law and good order, and leads directly to anarchy and confusion," and provoked a committee of nine men to denounce the Mayor's Court for having "assumed and exercised a power to set aside an act of the state."[41] And yet, commentators still assumed that unfavorable outcomes in Trespass Act lawsuits could have judicial remedies. After the immediate *Rutgers* controversy, for example, Hamilton participated in at least one other Trespass Act action that originated in the Queens County Justice's Court in 1785 and was removed on certiorari to the Supreme Court in 1786 (*Birdsall v. Valentine*).[42]

Petitions and Procedural Technicalities

Hamilton used the judicial options available to him—alternative defenses, removal, delay, and settlement—to mitigate the limited due process imposed by statute. In addition to these tactics, Hamilton sought remedies for his clients through extra-judicial petitions to the legislature and through the exploitation of procedural technicalities in court.

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[41] For the quote, see the N.Y. Assembly Proceedings, as reported in *The Pennsylvania Packet and Daily Advertiser*, November 20, 1784, Issue 1807, Page, 3; Melacton Smith, Peter Riker, Thomas Tucker, Daniel Shaw, Jonathan Lawrence, Anthony Rutgers, Peter T. Curtenius, Adam Gilchrist Jr., and John Wiley, "To the People of the State of New York," *The New York Packet and the American Advertiser*, November 4, 1784, Issue 434, Page 1.

[42] Benjamin Birdsall v. Obadiah Valentine, *LPAH*, 1: 495-499. Other New Yorkers assumed that higher tribunals could review Trespass-Act litigation arising from the lower courts. In September 1784, in *The New York Packet*, one anonymous author contemplating the *Rutgers* decision asked: "But let it be admitted, that those who think the determination of the Court wrong, are in the right; does it follow that the citizens are to be called together to rectify it? ...If [the Mayor's Court] has erred in a point of law, is there not a natural and easy remedy—an appeal to the Supreme Court by writ of error?" (Anonymous, "To the Citizens of New York," *The New York Packet and the American Advertiser*, September 9, 1784, Issue 419, Page 2).

In addition, the address written by nine Patriot New Yorkers (including Hamilton's opposing plaintiff Thomas Tucker, of *Tucker v. Thompson*), assumed the possibility of review by the Supreme Court or the Court for the Trial of Impeachments and the Correction of Errors. (Melacton Smith, et al., "To the People of the State of New York," *The New York Packet and the American Advertiser*, November 4, 1784, Issue 434, Page 1.)

Occasionally Hamilton submitted petitions to the assembly when he thought that a private act—a quasi-judicial adjudication handed down by the legislature—could serve his clients' interests. The Executors of John Aspinwall's estate encountered problems executing Aspinwall's will because of the Citation Act: Aspinwall died with personal debts owed and debts due him from Patriots, but the Citation Act impeded the estate's executors from collecting on the debts owed to Aspinwall to pay back the debts owed by the estate. Hamilton's petition requested that the legislature grant the executors the power to sell real property to meet the estate's debts (Aspinwall's will did not empower the executors to sell real property). In this case, the Citation Act proved an insurmountable impediment to the execution of the will and legislative action could provide relief by allowing the executors to meet the obligations of the estate and to free up the remaining assets for Aspinwall's heirs.[43]

During the war, Phoebe Ward's husband was convicted under the Confiscation Act and his real estate was sold. After the judgment, but before the sale, the state forcibly evicted Phoebe and her children from the property. Phoebe then wrote a petition and gave it to Hamilton to submit to the legislature claiming that "notwithstandg. my inoffensive Conduct [during the war] I am Dispossessed of all my Living & am brought almost to Desperation."[44] Although her petition did not specifically ask that her former property to be restored to her, Phoebe sought—most likely after seeking Hamilton's counsel—any relief the legislature could offer to her.

Nonetheless, because petitions relied on the mercy of Patriot-controlled legislatures, Hamilton preferred to seek justice for his clients through the courts. His final strategy was to use any procedural technicalities available to him to lessen the oppressive effects of anti-Loyalist statutes.

[43] "Petition of the Executors of John Aspinwall to the New York Legislature" (undated), *LPAH*, 1: 169-170.
[44] "Petition of Phoebe Ward to the Governor and the General Assembly of New York" (August 11, 1789), *LPAH*, 1: 262.

In *People v. Nicholas Hoffman*, Hoffman had previously been indicted and convicted under the Confiscation act in 1782, but the name on the indictment and judgment misspelled Hoffman's name as *Huffman*. Consequently, in 1783, Hoffman was again indicted, as the court did not have a record of a Nicholas *Hoffman*'s indictment in the past. Hamilton's defense attempted to capitalize on this error as the basis of a sort of "double jeopardy" defense.[45]

In his plea of autrefois attaint ("previously attainted") most likely submitted by Hamilton to the court, Nicholas Hoffman "says that the judgment aforesaid [from 1782] still remains and exists in full force and effect in no wise revoked reversed annulled or pardoned," indicating that the real and personal property confiscated under the 1782 judgment would still be owed to the state.[46] But if Hamilton could convince the court that the 1782 judgment fulfilled Hoffman's prosecution under the Confiscation Act, and that, because of the misspelling the 1783 indictment did not apply, then the real and personal property acquired by Hoffman since the first judgment issued against him would not be subject to any further confiscation. Hamilton would thus argue that Hoffman was once attainted and thus always attainted, and the state had no claim to any property acquired after the attainder.

To make his case, Hamilton contemplated a number of different tactics. He questioned, but rejected, whether the first judgment could be overturned (through abatement or reversal); he then considered whether the second indictment could be quashed.[47] To this end, Hamilton contemplated using the plea of the Treaty so that Hoffman could claim an express amnesty from the second indictment. Yet because the Treaty was provisional at the time, Hamilton instead pursued the plea of autrefois attaint, claiming that Hoffman's first judgment still stood, thus

[45] *LPAH*, 1: 226.
[46] People v. Nicolas Hoffman (N.Y. Sup. Ct., 1783-1784), Plea (undated), *LPAH.*, 1: 249.
[47] *LPAH*, 1: 227-230, 232, 235-237.

invalidating the second indictment.[48] While it is unknown how the *Hoffman* case resolved in court, Hamilton's argument that property acquired after a Confiscation Act judgment was not subject to further confiscation was upheld in *Leonard v. Post*.[49]

Defending Loyalists to the Public

New York's legislature passed the Trespass, Citation, and Confiscation Acts before the Treaty of Peace ended official hostilities, but these statutes remained part of the law of the land after the formal end of the War. As we have seen, Alexander Hamilton worked to circumvent, as much as possible, the limitations on process that Loyalists faced in court after the War, but he considered it a gross violation of the New York constitution, the state's "received" body of common law, and the Treaty that Loyalists and British subjects should even have to contend with such restrictions. Hamilton thought that since the Treaty had been signed and ratified, it was time for New York to come to terms with the fact that the War was over, independence had been won, and the British threat was gone. More importantly, New Yorkers had to abide by the legal realities that accompanied the end of War: the Treaty protected British subjects from further confiscations and prosecutions and everyone else—no matter their sympathies before the war—became an inhabitant of New York state.

Given the prolonged British occupation of New York's southern district during the war, and Patriots' lasting fears and hatreds of the British after evacuation, it is not surprising that editorialists warned Tories that "we are not disposed to admit you as fellow citizens."[50] But in response to this widely shared, vindictive sentiment, Hamilton penned the first *Letter from*

[48] *LPAH*, 1: 228.
[49] Jackson ex dem James Leonard v. John Stiles, Anthony Post (N.Y. Sup. Ct., 1784-1786), an ejectment action, *LPAH*, 1: 228-230.
[50] Brutus, "To All Adherents to the British Government and Followers of the British Army, Commonly Called Tories, Who are at Present within the City and County of New-York," *The New-York Gazetteer or Northern Intelligencer*, October 27, 1783, Vol. II, Issue 74, Page 2.

Phocion in January 1784, aiming to convince Patriots that the security of their rights and liberties depended on the restoration of these privileges to Loyalists. By arguing that former Loyalists who, after the war, identified themselves as Americans were bona fide New York citizens, Hamilton associated the intentionally spiteful due process violations endured by Loyalists with America's tenuous republican experiment.[51] The legislature's denial of legal process to an unpopular few posed a looming threat to the rights and liberties enjoyed by *everyone*—even Patriots. In making this claim, Hamilton also gave the judiciary—the overseers of due process—a necessary institutional role in the new republic: as a counterweight to legislative tyranny.

Implicit in Hamilton's first and second *Phocion* essays is the premise that by denying or limiting due process in civil litigation prosecuted after the war (like trespass actions), the legislature punished a whole class of people for treasonous behavior without legally convicting them for their individually committed, overt acts of treason. By classifying all Loyalists as "adhering to the enemies of this State" without conducting individual treason prosecutions to demonstrate, by law, that each Loyalist was actually an enemy of the state, the New York legislature violated, post-bellum, the constitutional rights and privileges accorded to all. Becoming a traitor required presentment, indictment, prosecution, and determination by a jury according to law. Thus any statutory penalties incurred from general *legislative* indictments of treason did not constitute the required *judicial* prosecution at law, and could not justify any revocation or diminution of rights or privileges enjoyed through citizenship.

[51] James H. Kettner argued that in the period after the Revolution, Americans began to consider citizenship as a status voluntarily chosen. Increasingly, Americans thought of citizenship in contractual terms "by which civil and political rights in the community were to be exchanged for support for republican principles." In the aftermath of the war, some British sympathizers in America chose to remain British subjects; yet others chose to switch their allegiance to the new American nation. I refer to these former British sympathizers who chose to remain in the states and remake themselves as Americans as "Loyalists" throughout, and Hamilton argued that they had become bona fide citizens and "member[s]" of New York state. See Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978), 213-47. Quote at 247.

To begin his case, Hamilton reminded his Patriot brethren of the "spirit of Whiggism" that "cherishes legal liberty, holds the rights of every individual sacred, condemns or punishes no man without regular trial and conviction of some crime declared by antecedent laws, [and] reprobates equally the punishment of the citizen by arbitrary acts of legislature."[52] And yet, Phocion noted, despite this ardent Whiggism that animated the Revolution, arbitrary legislatures had "[expelled] a large number of their fellow-citizens unheard [and] untried"—a frightening thought to liberty-loving citizens because "if [the legislature] may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe."[53]

Yet, under New York's 1777 constitution, all "members of this state" *should* be safe because legal process was guaranteed:

> The 13th article of the constitution declares, "that no member of this state shall be *disfranchised* or *defrauded of any of the rights or privileges* sacred to the subjects of this state by the constitution, unless *by the law of the land or the judgment of his peers*." If we enquire what is meant by the law of the land, the best commentators will tell us, that it means *due process of law, that is, by indictment or presentment of good and lawful men,* and trial and conviction in consequence.[54]

After citing this constitutional guarantee of judicial due process, Hamilton focused on its implications. Regarding those "obnoxious" Tories, they were all safe from any further prosecutions: the Treaty expressly protected those who considered themselves to be British

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[52] A *Letter from Phocion to the Considerate Citizens of New York* [hereafter, *Letter from Phocion*], *PAH*, 3: 484, 485.
[53] *PAH*, 3: 484.
[54] Hamilton's emphasis. Hamilton cited "Coke upon Magna Charta, Chap. 29, Page 50" in a footnote to this passage. (*PAH*., 3: 485.) He similarly defined due process when remarking on an "Act for Regulating Elections" in the New York Assembly on February 6, 1787. During that debate Hamilton added, "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." This has implications for my larger argument that Hamilton emphasized the judiciary's guarantee of due process instead of suggesting a power of judicial review. Hamilton did not see the New York constitution's due process principle as a constitutional limitation on substantive legislative output; instead, the clause pertained to the courts' responsibility to guarantee due process. If due process was somehow limited or infringed, the offending statutes would have to be changed via the legislature; Hamilton did not think that New York courts could use the constitutional guarantee of due process to nullify statutory encroachments on judicial process. (*PAH*, 4: 35.)

subjects and the rest, the Loyalists who not chose to be Americas, were already genuine citizens of New York and enjoyed protections under the constitution (as well as residual benefits from the Treaty's prohibitions of further war-time prosecutions).[55] And again, as Hamilton was keen to emphasize, imperiling any person's right to the due process of law imperiled everyone's rights and liberties protected by law.

After publication, the first *Letter* met with various criticism in the New York press, but the most notable responses came from "a Mechanic" and "Mentor" (Isaac Ledyard). "A Mechanic" flung knowing, nasty personal insults at Phocion—"Your pedigree is of the *bastard* and *degenerate* kind"—and condemned Hamilton's advocacy of "an impure nest of Vipers. . . the very blood-hounds and blood-suckers of our lives and liberties!" The Mechanic could not hide his outrage that to such "inveterate and intestine enemies—vipers," Phocion "would wish to introduce and restore to the rights of citizenship!"[56] Mentor's response, however, was more legalistic and levelheaded because he based his denial of Loyalist citizenship on the language of the Treaty of Peace (though he too could not resist inserting some personal and professional digs at Hamilton). Mentor assessed all Loyalists as traitors, and by the Treaty, they either remained British subjects or became British subjects—but either way, all British sympathizers were aliens in New York. Moreover, Mentor denied that any judicial prosecutions were necessary to legally determine treasonous acts because the Treaty's language provided the necessary legal stipulations.[57]

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[55] "No citizen can be deprived of any right which the citizens in general are entitled to, unless forfeited by some offence. It has been seen that the regular and constitutional mode of ascertaining whether this forfeiture has been incurred, is by legal process, trial and conviction. This *ex vi termini*, supposes prosecution for any thing done on account of the war. Can we then do by act of legislature, what the treaty disables us from doing by due course of law?" *Letter from Phocion, PAH*, 3: 488.

[56] Mechanic, "An Address from a Mechanic to Phocion," *The New-York Journal and State Gazette,* March 25, 1784, Issue 1951, Page 3 and "Conclusion of the Mechanic's Address to Phocion," *The New York Journal and State Gazette,* April 4, 1784, Issue 1952, Page 2.

[57] Isaac Ledyard, "Mentor's Reply to Phocion's Letter," (New York: printed by Shepard Kollock, 1784), 7-9.

Knowing that his claims concerning Loyalist citizenship had not fully resonated with New Yorkers, Hamilton wrote again in April 1784 and this time, his *Second Letter from Phocion* put forth a more legalistic argument that denied Mentor's interpretation of the Treaty and more precisely established—rather than just asserted—the Loyalists' legal status as citizens.[58]

The *Second Letter* built upon and enhanced Hamilton's previous arguments concerning the interdependence of Loyalist citizenship, due process, and the rights and liberties guaranteed to a "member[s] of this state." Hamilton first defined five premises undergirding these larger arguments, each describing a fundamental aspect of due process according to the law of the land.[59] Next, he set the date for determining citizenship as July 9, 1776—the date New York acceded to the Declaration of Independence—thus firmly demarcating the moment in time when any person remaining on New York soil was a member of the state and owed allegiance to the state. British sympathies did not renounce this allegiance, nor did peacefully residing behind enemy lines during the occupation of New York City. Neither circumstance could legally revoke the privileges of citizenship, nor a citizens' requisite allegiance to New York.[60]

Furthermore, if legitimate treason was suspected of a Loyalist, then such an accusation presumed two things. First, for a legally valid charge of treason to stand, the treasonous actor *must be presumed a citizen*, for aliens could not, by definition, commit treason against a

[58] For details on how Hamilton dismissed Mentor's interpretation of the Treaty, see *Second Letter from Phocion*, *PAH*, 3: 535-540.
[59] "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 offences, without having an opportunity of making his defence. Thirdly, That a crime is *an act* committed or omitted, in violation of a public law, either forbidding or commanding it. 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; or in other words, that a man cannot be a *citizen* for the purpose of punishment, and not a *citizen* for the purpose of privilege." *PAH*, 3: 532-533.
[60] *PAH*, 3: 533-535, 541-547.

government to which they are alien, and thus have no allegiance.[61] Also, as emphatically indicated in the first *Letter*, citizens were constitutionally entitled to the due process of law to indict, prosecute, and legally adjudge their treasonous acts *before* any punishments could forfeit their legal rights and privileges. Hamilton made it clear that Patriots could not have it both ways: either Loyalists were aliens, and thus protected by the Treaty and not subject to further prosecutions under anti-Loyalist statutes, or they were bona fide members of New York state and were legally entitled to the due process of law before any further punishments, forfeitures, banishments, confiscations, or discriminatory limitations to civil process could be inflicted upon them. Anything less would be a "barefaced tyranny" perpetrated by arbitrary legislatures acting against the true nature of republican governments.[62]

Hamilton addressed these *Letters* to the people of New York to persuade them that it was the legislature, and not the British nor their sympathizers, that posed the most imminent threat to the people; the elected assembly threatened the rights of all—not just the rights of the "obnoxious" few. By addressing the public, Hamilton hoped that their subsequent outcry would demand that representatives change the existing law that limited the legal process available to Loyalists.[63] Just as Hamilton did not attempt to persuade the Mayor's Court to void the Trespass Act, Hamilton did not suggest in his public commentary that courts could or should void the anti-Loyalist statutes that threatened the rights of New York citizens. Instead, by insisting that the privileges of citizenship were protected through judicial process, Hamilton defined the particularly important role of the judiciary in republican government: as guardians of the

[61] *PAH*, 3: 534.
[62] Hamilton asked: "Shall the Legislature take the map and make a geographical delineation of the rights and disqualifications of its citizens? This would be to measure innocence and guilt by latitude and longitude. It would be to *condemn* and *punish*, not one man, but thousands for *supposed offences*, without giving them an opportunity of making their defence. God forbid that such an act of barefaced tyranny should ever disgrace our history!" (*PAH*, 3:535.)
[63] Recall that as part of his settlement strategy, Hamilton tried to delay prosecutions in the hope that a more moderate legislature would rescind or modify the existing anti-Loyalist statutes.

people's rights and liberty through the due process of law. The courts had a constitutional mandate to provide the process that prevented a citizen from arbitrarily losing his civic and political rights.

By invoking Whig rhetoric and by demonstrating how post-bellum treatment of Loyalists endangered the privileges of citizenship, Hamilton positioned the common-law courts as serving a crucial role in republican government because they provided the legal safeguards necessary to protect "member[s] of this state" against the asserted supremacy of the legislature. Moreover, Hamilton made it clear that when any legislature imposed statutory indictments and forfeitures on its inhabitants without allowing proper prosecutions under the due process requirements, such a legislature effectively usurped judicial powers and rendered itself a tyrant.[64] To resist this unauthorized seizure of power, Phocion called upon the people to demand change in the existing law, and ultimately, to preserve the republic that they had just created.

DECLARING THE COMMON LAW: ALEXANDER HAMILTON AND THE FREEDOM OF THE PRESS

From the outset of his law practice, Hamilton relied on his "extensive" conception of common law to combat anti-Loyalist discrimination by arguing that New York had received the law of nations into the law of the land, by attempting to use writ of error review to circumvent statutory law, and by appealing to the due process rights provided by the common law as a privilege of English, and now American, citizenship. Although Hamilton devised this rights-

[64] "If the constitution declares that the legislative power of the state shall be vested in one set of men and the judiciary power in another; and those who are appointed to act in a legislative capacity undertake the office of judges, if, instead of confining themselves to passing laws, with proper sanctions to enforce their observance, they go out of their province to decide who are the violators of those laws, they subvert the constitution and erect a tyranny." (*PAH*, 3: 548.)

strategy in the 1780s, he returned to it throughout his legal career, including his final, famous defense of Federalist printer Harry Croswell and the freedom of the press.

In *People v. Croswell,* a criminal libel prosecution initiated in 1803 and decided the following year, Hamilton argued Croswell's motion for a new trial based on his "extensive" interpretation of "common law" in the New York constitution.[65] During post-trial arguments, the question at hand was decidedly a constitutional one: what exactly was the common law of criminal libel, as received by New York's 1777 constitution? Despite the lawyers' voluminous arguments directed at constitutional interpretation, with only a few exceptions, the constitutional question at the center of *Croswell* has been ignored by historians.[66]

Croswell is most often considered in the context of an emerging free press doctrine—that is, historians are usually interested in the case for how it fits within a developing narrative of a

[65] People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct., 1804). Harry Croswell published two libelous remarks about President Thomas Jefferson: that he was hostile to the U. S. Constitution and that he paid scandalmonger James Callender to attack former Presidents John Adams (calling him a "hoary headed incendiary") and to posthumously libel George Washington (as a "traitor, a robber, and a perjurer"). For these assertions, the Republican powers in New York brought Croswell to court on criminal libel charges and he was indicted on January 10, 1803. For a complete narrative of the case's background, including excerpts of Croswell's libelous article and the resulting indictment, as well as pretrial and trial arguments, motions, delays, and changes of venue, see *LPAH* 1: 775-90. Hamilton was only involved in the arguments for retrial.

[66] The exceptions are Julius Goebel Jr. and Daniel J. Hulsebosch who each described *Croswell's* significance as a common law "reception" problem. Goebel discussed common law reception at length in *Antecedents and Beginnings to 1801.* He identified the crucial issue in *Croswell*--that the court must declare the law in force—but he considered the prosecution and defense to be offering two sets of competing common-law rules. In this way, Goebel did not see past a "strict" interpretation of common law (The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, vol. 1 (New York: The MacMillan Company, 1971), 116-18). Hulsebosch paid only passing attention to the case in footnotes. Citing Goebel's chapter on the *Croswell* case in the first volume of *The Law Practice of Alexander Hamilton,* Hulsebosch noted that "there were great debates over which rules represented the true common law. A good example is the prosecution of New York Federalist editor Harry Croswell..." Hulsebosch, like Goebel, thought only in terms of judicial "rules." See *Constituting Empire,* 398, n. 60.

Unlike Goebel and Hulsebosch, most scholars have missed the constitutional question at the heart of *Croswell* because they have relied primarily on Johnson's case reports and its condensed summary of arguments. George Caines, representing the state in *Croswell,* published a more complete account of the attorneys' speeches in 1804. These published speeches reveal the constitutional uncertainty undergirding the attorneys' arguments. When referring to Van Ness', Caines', Spencer's, and Harison's arguments, I cite this publication instead of the Johnson reports. See *The Speeches of at Full Length of Mr. Van Ness, Mr. Caines, The Attorney-General, Mr. Harrison, and General Hamilton, in the Great Cause of the People, against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States* (New York: G. &. R. Waite, 1804). [Hereafter, *Speeches at Full Length.*] When I refer to Hamilton's arguments I cite a reprinted excerpt of *Speeches at Full Length* that can be found in *LPAH* 1: 808-33. Goebel's printed excerpt of Hamilton's address in *Speeches at Full Length* is lengthier than the version printed in the *Early American Imprints* collection of Waite's *Speeches at Full Length*.

free press.[67] While Hamilton can seem a hero of sorts in these accounts for arguing in favor of truth as a viable defense to libel prosecutions, some legal scholars take the opposite approach: because Hamilton openly praised the Sedition Act in *Croswell,* and because he instigated criminal libel suits of his own, *Croswell* is viewed as a missed opportunity, or a stagnation of free press doctrine. Hamilton even has been cast as a historical villain for his failure to move legal practice farther along from politically motivated sedition prosecutions and the Blackstonian doctrine of "no prior restraint."[68]

Yet the lawyers arguing for and against Harry Croswell's motion for retrial were not asking the court to change the law of criminal libel. Instead, they were concerned with establishing what the law of criminal libel was in the first place. Hamilton and his colleagues asked the court to declare, but not to change, the law of criminal libel as received by the 1777 constitution.[69]

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[67] Leonard W. Levy cited *Croswell* in his chapter entitled "The Emergence of an American Libertarian Theory," in *Emergence of a Free Press* (New York: Oxford University Press, 1985), 338-40. Also see Walter Berns' argument in "Freedom of the Press and the Alien and Sedition Laws: A Reappraisal" that Alexander Hamilton and James Kent were "the men principally responsible for the development of a liberal law of free speech and press—for fashioning a remedy for the deprivation of the constitutional rights of freedom of speech and press" during the early republic (*Supreme Court Review* 1970 (1970): 111). Like Berns, Michael Kent Curtis acknowledged Federalists Alexander Hamilton and James Kent for invoking "a more liberal vision of the law of sedition than the common law" and even "a Federalist vision of free speech." See *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham: Duke University Press, 2000), 112-15. And though Robert W. T. Martin recognized the competing ideas and ambiguities in seventeenth-and eighteenth-century free press doctrine, he also credited Hamilton's defense of Harry Croswell as part of "the emergence of a recognizably modern concept of democratic press liberty." (155) See *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800* (New York: New York University Press, 2001), 160.

[68] James Morton Smith has been critical of Hamilton in particular, but also of the general "suppression" of the press in this period. See, in general, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956). Smith portrayed Hamilton as a leading suppressor of the press in "Alexander Hamilton, the Alien Law, and Seditious Libels," particularly for Hamilton's failure to come out strongly against the Sedition Act and for his complicity in the 1799 trial of David Frothingham (*The Review of Politics* 16 (1954): 305-33.)

[69] There could be a fine line between "declaring" the law and "changing" the law. Yet in *Croswell*, the court's duty to declare the law resulted from the opposing premises adopted by each side. The defense assumed that the law of criminal libel was never settled in New York state, so no matter what outcome the judges selected, the court would not be "legislating," or actively changing what they acknowledged to be existing law; instead the court would be determining criminal libel law's official, doctrinal starting point on the New York record. In this way, a new legal outcome could be generated within the boundaries of a "proper" judicial adjudication. The prosecution adopted the opposite premise; the law had been already in force in New York and to deviate from King's Bench and colonial

Croswell thus marked a pivotal moment of constitutional uncertainty in New York law, and sparked a high-profile debate over the meaning of common law in the early republic. New York's preeminent lawyers used arguments about the nature and scope of the "common law" received by New York's constitution as a way to answer a pressing question facing the state: what was the law of seditious libel in the American republic?

Hamilton led the defense's argument for an extensive interpretation: the defense argued that the "common law," as received by the New York constitution, encompassed much more than just the decisions of the justices in Westminster.[70] The jurisprudential circumstances surrounding *People v. Croswell* provided the defense with a particularly ideal opportunity to invoke Hamilton's "extensive" common law. First, though the prosecution cited Lord Mansfield as stating what they claimed to be a clear, unassailable statement of the law of seditious libel, in reality, the law in England was muddled, and the defense leveraged this imprecision and confusion by advancing a broad and historical approach to English precedent.[71]

Next, the defense's adoption of the broadest possible conception of common law and their historical methodology—that is, their strategy of sifting through the entire history of English constitutionalism in order to make their argument—had particular resonance under New York law. The state's 1777 constitution had modeled New York's highest court after the House of Lords, one of England's oldest and most distinctive institutions. By creating the Court for the

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precedent (Peter Zenger's case) would be to inappropriately alter the law by judicial judgment. Thus, neither side asked the *Croswell* court to change the existing law.

[70] Adding complexity to this "reception" problem was a "repugnancy" problem: Section 35 voided any elements of the common law that were repugnant to the constitution. As the prosecution and defense argued that their version of the common law was the true account of the law (and that their opponents' version was incorrect or even repugnant to the constitution), the lawyers fused political concerns with the constitutional question. The counselors brought up a particularly timely topic--the universal desire to mitigate "the spirit of faction" in republican government—in support of their strict or extensive interpretations of the "common law" clause.

[71] See below, as well as Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, c. 1770-1820," *Oxford Journal of Legal Studies* 10 (1990): 307-52. [Hereafter, "From Seditious Libel to Unlawful Assembly."]

Trial of Impeachments and the Correction of Errors, the state constitution retained a Parliament-like body: a combined upper legislative house and highest judicial court that predisposed its members—which included the justices of the New York Supreme Court who presided over the *Croswell* case—to be responsive to past and current Parliamentary precedent as part of or relevant to the law of seditious libel upheld by New York law.

Finally, like Hamilton did when defending his Loyalist clients, both the defense and the prosecution recognized the opportunity to insist that the common law, as their side defined it, provided the ultimate bulwark for individual liberty in a republic.[72] The attorneys enhanced this argument by associating their version of common-law libel doctrine with certain legal rights—for instance, a right to protect one's reputation or a right to equal treatment under the law—which in turn, they claimed, helped thwart partisanship, the unsavory unintended consequence of American republicanism. The lawyers positioned their opponents' version of common law, on the other hand, as undercutting common-law rights, enabling partisanship, and producing legal outcomes that were repugnant to republican government and to the New York constitution.

Determining the Law of Seditious Libel in New York State

Harry Croswell's appellate counsel placed its motion for a new trial on two grounds, both of which disputed the common-law doctrine declared by trial judge Chief Justice Morgan Lewis.[73] First, the defense attorneys insisted that the jury had been misdirected by Lewis. The Chief Justice had stated that the common law of criminal libel restricted the jury to consider only the fact of publication and whether the publication's innuendos meant what the prosecution said

[72] Attorney General Ambrose Spencer, for example, referred to the common law's distinction between law and fact—which were usually considered the separate provinces of judge and jury—as "the bulwark of legal security" in *Speeches at Full Length*, 49.
[73] Lewis presided over the trial, which proceeded at the Circuit Court convened at Claverack, New York on July 7, 1803.

they meant (that they referred to President Thomas Jefferson). The defense's second ground for retrial was that the common law allowed evidence of truth to be proffered, making it necessary that the original trial should have been put off until the next circuit so that the defense could round up those witnesses who would testify to the truth of the publication. At trial, Lewis had instructed the jury not to consider the truth or falsity of the publication, nor Croswell's intent.[74]

After re-assembling their respective legal teams for oral argument, the prosecution and the defense met in the Supreme Court at Albany on February 13-15, 1804.[75] Chief Justice Lewis presided, along with Justices James Kent, Brockholst Livingston, and Smith Thompson, to resolve the question: what was the law of criminal libel in New York? William W. Van Ness opened for the defense, and he was followed by both of the state's attorneys, George Caines and Attorney General Ambrose Spencer. Arguments concluded with Richard Harison and Alexander Hamilton for Croswell.

Caines and Spencer agreed with Chief Justice's Lewis's understanding of common-law doctrine, which comported with the law declared in Peter Zenger's case (New York, 1735) and most recently by Lord Mansfield in *Rex v. Shipley*, more commonly known as the *Dean of St. Asaph's Case* (King's Bench, 1784). In the *Dean of St. Asaph's Case*, Mansfield made clear that the law of criminal libel differed from other types of criminal prosecutions; that is, the jury did not decide on the general issue—whether the defendant was guilty or innocent of criminal libel—but rather it deliberated only on the narrow factual question of whether or not the accused published the libelous piece. Mansfield cited a string of King's Bench cases—including, among others, *Rex v. Tutchin* (1704), *Rex v. Franklin* (1731), *Rex v. Owen* (1752) and *Rex v. Nutt*

[74] *LPAH*, 1: 789-90.
[75] Both the prosecution and the defense retained different combinations of legal counsel at each stage of the *Croswell* proceedings. Only Ambrose Spencer and William Van Ness appeared consistently. For details, see *LPAH*, 1: 779-93.

(1755)—to support this position.[76] According to England's former Chief Justice, if the jury determined guilt based on the publisher's intent, this would permit the jury to determine law, rather than fact, which would invite a dangerous instability into English law.[77] The *Croswell* prosecution echoed this warning against inviting "chaos" into the law, should the defense's version of common law libel be adopted by the court.[78] Mansfield's account of criminal libel law conformed to Chief Justice's Lewis's jury instructions at trial.

Lord Mansfield's statement of the law of criminal libel constituted the core of the prosecution's position in *Croswell*: the common law adopted in New York reflected only what the judges in Westminster said it was. And with few exceptions—notably the *Seven Bishop's Case* (1688)—the King's Bench had ruled that juries did not decide on both law and fact in criminal libel actions. Also, for actions of criminal libel, truth was never a viable defense.[79]

Yet, the English law of seditious libel had been changing over the course of the late eighteenth century—a development obscured by Mansfield's declaration of the law of seditious libel in the *Dean of St. Asaph's Case*. Beginning after 1770, prosecutions for politically motivated, criminal libels emphasized the seditious effects of the publication in question (that is,

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[76] James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004) 228-29. Note that each *Croswell* attorney also addressed one or more of these King Bench cases throughout their speeches.

[77] Ibid., 229. Mansfield suggested that jurymen, who were subject to bias and prejudice, would disrupt the staid course of the law if they could rule on law—in this case, on the intent of publication.

[78] George Caines asked, "Was the law to receive its construction from Jury exposition, what a chaos would our books of reports present? It is only by giving to the Court exclusively, the right to determine on points of law, that the stream of Justice is made to flow in one regular and even channel." *Speeches at Full Length*, 28.

[79] While this has been generally true for criminal libel actions, the larger story of English prosecutions against seditious publications suggests a more complex story behind English libel law. According to Philip Hamburger, the doctrine of criminal libel described by Mansfield only developed around 1700, and prior to the mid-1690s, criminal libel actions were not regularly used as a means to restrain the press. The English Crown used other legal actions and statutes to prosecute libel, some of which—like *Scandalum Magnatum*—allowed truth as a defense to the publication of libelous news. Hamburger's findings lend historical support to the *Croswell* defense's argument that King's Bench libel doctrine could be considered as a relatively new legal position, and not evidence of the true common law. (Note, however, that while the *Seven Bishops Case* allowed truth as a defense, due to the political nature of the decision, Hamburger considered the case to be an exception from the developing doctrine of criminal libel law which did not allow truth as a defense.) ("The Development of the Law of Seditious Libel and the Control of the Press," *Stanford Law Review* 37 (1985): 663, 668-69, 699. [Hereafter, "Development of the Law of Seditious Libel."])

the potentially deleterious effect of the words on society) rather than the text's unlawful nature. The lawyers involved in late eighteenth-century English libel trials began to frame their arguments around the question of whether the effect of the publication was seditious (an increasingly contextual, and thus factual, matter for the jury to decide) rather than the question of whether the words were libelous (a point of law for the judge to determine).[80] Mansfield's assertion that the jury could decide only the narrow question of publication thus proved unworkable. Consequently, before Parliament passed Fox's Libel Act to allow the jury to decide on the general issue, the English law of seditious libel had already begun blurring together the questions of libel and sedition (law and fact) such that both matters had to be left to the jury.[81]

This muddled, transitory state of English criminal libel law could work to Croswell's advantage, however: if Mansfield's pronouncement of criminal libel law did not even match the true state of the law in England, how could it be an authority for the law in New York? The defense's "extensive" conception of the common law allowed them to mine other sources of English law in order to present a more advantageous (and more accurate) description of the English law of seditious libel to the New York Supreme Court.

Because the *Croswell* court was familiar with Mansfield's ruling on criminal libel law, the prosecution moved on to deflecting critiques of its "strict" version of common law and to elaborating the benefits of King's Bench doctrine. For example, both sides suggested that the infamous Star Chamber Court, a prerogative court abolished in 1641, originated the doctrine of

[80] Michael Lobban,"From Seditious Libel to Unlawful Assembly," 307-22.

[81] This outline of late-eighteenth century developments in English seditious libel law comes directly from Lobban's "From Seditious Libel to Unlawful Assembly," 307-22, 349-52.

Fox's Libel Act, or The Libel Act (1792) 32 Geo. III, c. 60, declared that juries should determine the general issue of guilt or innocence for criminal libel actions, but it did not mention truth as a defense. Yet, even if Parliament did not declare truth to be a viable defense to criminal libel prosecutions, under the Libel Act the jury had more discretion to consider truth and intent of publication as part of its general verdict. As Lord Mansfield's experience made clear, English juries resisted the narrow question of the fact of publication and would welcome the opportunity to decide under the general issue. (Oldham, *English Common Law in the Age of Mansfield*, 218-19.)

libel law embraced by eighteenth-century King's Bench justices. But to the defense, libel law coming from the Star Chamber was tainted. Van Ness called the Star Chamber "despotic," and Hamilton dramatically described it as "one of the most oppressive institutions that ever existed" whose "horrid judgments cannot be read without freezing the blood in one's veins."[82] In response to and in anticipation of these sentiments, Caines reassured the *Croswell* court that the Star Chamber's reputation was tarnished only by the fact that it did not use juries in its oftentimes "ex-parte" operations. Those legal principles handed down from the Star Chamber court were not only good law, but represented law that was in accordance with the true common law of criminal libel.[83] Furthermore, the prosecution added, the ancient statutes and supposedly "common law" proceedings presented by the defense did not even hint at true common-law doctrine.[84]

The prosecution attempted to demonstrate to the court how their strict conception of common law comported with (and thus was not repugnant to) New York's constitution. To meet this end, the prosecution connected the particularities of the "course of settled law" to republican purposes.[85]

Caines anticipated possible criticism of the "strict" approach by pointing out that King's Bench doctrine was not just a set of rules. Behind those formalistic rules rested an important substantive concern: criminal libel law had developed to protect the public against breaches of the peace.[86] Moreover, if incendiary speech went unpunished, this would facilitate not only

[82] Van Ness, *Speeches at Full Length*, 9; Hamilton, *LPAH*, 1: 820.
[83] Caines, *Speeches at Full Length*, 33.
[84] Ibid., 35, 48.
[85] Ibid., 41.
[86] Ibid., 22. Some scholars seem to doubt Caines' assertion that the law developed to protect against breaches of the peace. Hamburger, in particular, noted how criminal libel doctrine became as a way for the King to prosecute seditious subjects when other legal remedies—licensing laws, treason, *Scandalum Magnatum*, various Tudor felony statutes, heresy—fell into obsolescence for varied reasons. While the Crown used criminal libel law, in part, to keep the peace, political motivations seemed to be the more dominant reason for the development of criminal libel law in

breaches of the peace, but political partisanship. With this in mind, Caines refuted the defense's contention that true, but libelous, publications were necessary for republican elections:

> In a republic, it is not a spirit of liberty which we have to keep alive,—it is a spirit of faction that we have to repress: and this right [the purported "power of libeling" for a better informed electorate], thus contended for, without benefiting the first, begets the second; the only enemy of our real liberty. It creates the calumniator; that civil incendiary, who uses as firebrands, scandal, slander, and invective...with these he kindles the flame of party spirit.[87]

In seeking to avoid the "inevitable consequences of a factious spirit," Caines reminded the court that Lord Mansfield had already provided New Yorkers with the appropriate solution. And so, "to prevent these deleterious results," Caines proclaimed, "the strong corrective of common law principles. . . is the only remedy."[88] By this, of course, he meant King's Bench principles of common law.[89]

By introducing political partisanship as a substantive concern of criminal libel law, Caines opened up an opportunity to discuss certain rights protected by their "strict" version of common law in connection with the evils of political faction. He first suggested that criminal libel law provided for the legal protection of a person's reputation, and later in his speech, he

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the late seventeenth century. (Hamburger, "Development of the Law of Seditious Libel," 664-65, 692, 697-714.) In New York, the *Croswell* case divided along political lines, strongly suggesting that political motivations lurked behind Croswell's indictment for criminal libel. Still, it was understandable that in the American republic, where political partisanship was considered a poison to the republican experiment, politically charged, seditious speech might incite party passions and lead to a breach of a community's peace. Political motivations and the breaking of the peace were intertwined in America, as they were in England.

[87] Caines, *Speeches at Full Length*, 42.

[88] Caines, referring to the *Dean of St. Asaph's Case*, in Ibid., 43.

[89] As counsel for the defense in *Rex v. Shipley* (or, the *Dean of St. Asaph's Case*), Thomas Erskine would have turned Caines' argument back around on the *Croswell* prosecution. To Erskine, precisely because seditious publications could incite discord, determining the seditious nature of the words necessarily relied on the context of the publication, and thus was a fact (and not a question of law) for the jury to decide. (Context was difficult to capture on the written record, and yet, according to common-law rules, the judge could only base his decision on the law from the information and evidence captured on the record.) Thus, when placed in the changing context of the late eighteenth-century law of seditious libel, Caines' point about protecting against breaches of the peace would serve to aid Croswell's argument that under New York law, the jury should decide the general issue. (See Lobban, "From Seditious Libel to Unlawful Assembly," 316-17.)

openly declared that the common law protected the "rights of reputation," which were "as sacred as those of property."[90] As a corollary to this point, Caines skeptically questioned whether a right to vote in republican elections also conferred the right to abuse other Americans—be they magistrates or private citizens seeking elected office.[91] Through this comment, Caines attacked the defense's contention that true, but libelous, information about a candidate or public officer was crucial and relevant to preserving republican elections.[92]

Finally, Caines asserted that to allow truthful libels to be protected under New York law was to invite a double standard into the law, which would be repugnant to the constitution. To this end, Caines presumed a right to equal treatment under the law: if the court declared that truth was a viable defense in criminal libel law, then a double standard would be set for magistrates and private citizens. The law would protect the private citizen from any sort of published libels (under an action of private libel), but the magistrate would not receive the same treatment under the law, for true libels aimed at him would be afforded no legal protection.[93] Moreover, the damage wrought by unpunished libels of a public official's reputation would

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[90] Caines, *Speeches at Full Length*, 20, 38, 44. Considering the "right of reputation" as a form of property right to be enforced by a libel prosecution was common in England (Lobban, "From Seditious Libel to Unlawful Assembly," 311). It also made sense in the context of prevailing Anglo-American cultural norms—namely, the honor culture of the late eighteenth century (See, generally, Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2001)).

[91] Caines, *Speeches at Full Length*, 40.

[92] Van Ness, *Speeches at Full Length*, 10.

[93] Caines claimed that to ease the severity of King's Bench criminal libel law would be to allow a form of unfair, extra-legal proceedings: "A man may be a worshiper of God or of fire; he may be a Hindoo, a Manichean, or a Copt: he may believe in all the Gods of antient mythology, or the materialism of Spinosa, and neither by *our* Constitution, nor that of the United States, will one, or all of these circumstances affect his eligibility to any of the various offices in our system. Yet, if he fail in what any *printer* shall please to think a moral obligation; if he avail himself of any limitation, or other act against the opinion any fellow, who has credit or friends to procure ink, types, and a press; he is, to the endangering that peace, the Constitution is so desirous to preserve, to be arraigned before a tribunal unknown to the law of the land. A self-erected jurisdiction, where the accuser, judge, jury and executioner, may be united in one malignant wretch."

He went on to underscore the inherent unfairness of the defense's suggested legal double standard: "But on what principle of Justice is there to be one law for the reputation of the private man, and another, or none for that of the magistrate? Why is not the name of the latter as much entitled to protection as that of the former?" (*Speeches at Full Length*, 39-40, 40-41.)

affect not only his peace of mind and his character, but also his property and the peace of mind of his family.[94]

Attorney General Spencer reinforced Caines's arguments about these rights protected by the King's Bench account of criminal libel law. Spencer reminded the court that since the law of New York state was concerned with the protection of an individual's rights and liberties, it followed that no judge could allow one person to infringe on the rights, property, and happiness of another, when acting in accordance with his prescribed judicial duty.[95] But for the most part, Spencer left all talk of rights protected at law to Caines, and focused instead on eking away at the defense's interpretation of a broadly-conceived common law.

When Van Ness, Harison, and Hamilton outlined the defense's arguments in favor of a new trial, they built their case on a conception of the common law as more than just the judicial output of the central courts at Westminster. The common law, as received by the New York constitution, included King's Bench and Common Pleas' judgments and their rules of procedure and substance, but the reception went much further than that. As Hamilton noted in 1787, the common law was the sum-total of all the courts in the English realm, and in *Croswell*, Harison looked to "the whole of English law" for guidance on question of criminal libel.[96] This "extensive" notion of common law encompassed the entire English constitution, and meant that the substantive law, rules, and processes of equity, ecclesiastical, and admiralty courts—to name only a few of many English jurisdictions—combined with those narrowly defined, and more commonly known "common law" courts (held at Westminster, in county quarter sessions, and on assize) to form a broadly-conceived common law shared by Englishmen. Sometimes process

[94] Caines did not specify how, in fact, unpunished libels would affect a person's property, real or chattel, unless he was referring to the public man's reputation as property. (Ibid., 44.)
[95] Spencer, *Speeches at Full Length,* 53.
[96] Harison, *Speeches at Full Length,* 55.

and doctrine from these other types of courts conflicted with the output of the King's Bench or Common Pleas, but this circumstance only made it necessary for the New York bench to sift through the sources of common law to declare the particular law in force under New York's constitution.

Parliament, the highest court of the realm, figured prominently in the defense's "extensive" conception of the common law because its output regularly constituted the truly *common*, shared law of England.[97] Parliamentary output blurred any formal distinction between legislation and judicial determinations: historically and theoretically, its statutes were decisions of a court, either decreed retrospectively for particular petitioners, or aimed prospectively for all subjects of the realm. In their broad conception of common law, the defense considered Parliament's statutes to be authoritative, declaratory evidence of the common law and relevant for New York's bench to consider.[98]

Particularly relevant was Fox's Libel Act of 1792, the Parliamentary statute declaring that in cases of criminal libel, the jury could decide on the general issue, and it should not be confined only to determining the fact of publication.[99] The defense championed Fox's Act as a

[97] It may seem surprising that members of a generation who protested Parliamentary legislation during the Anglo-American imperial crisis would be willing to admit to Parliament, the institution that passed the "tyrannical" Declaratory Act of 1766, the status of highest court. Yet, even the revolutionary generation understood Parliament to be the highest court of the English realm, if not the highest court of her colonies (Americans maintained that the highest legislature and court in each colony was the combined authority of the King presiding in his colonial legislatures). Thus, Croswell's defense counsel and the New York bench would have thought nothing of admitting that Parliament had the power to declare what the common law was in England, even if the American revolutionaries would not have granted Parliament the power over the customary rights and common law that her colonies claimed. For the best treatment of the legal and constitutional disputes between the American colonies, Parliament, and the King, John Phillip Reid, *Constitutional History of the American Revolution,* Abridged Edition (Madison: The University of Wisconsin Press, 1995).

[98] Matthew Hale described Parliament as "the high and supreme court of this kingdom." Hale elaborated on the dual nature of Parliament's adjudicatory and law making powers: "Touching the power of parliament, either it respects things done or things to be done. In respect of things already done. This is the judicative power of parliament, which is the supreme judicature...in respect of things to be done, wherein it acts under a double notion, *viz.* either by way of council or by way of law...As touching the legislative power...this power of law making is exercised: (1) in imposing charges as subsidies &c. (2) in enacting new laws, (3) in declaring laws..." (Sir Matthew Hale, *The Prerogatives of the King,* ed. D.E.C. Yale (London: The Selden Society, 1976), 135, 140-41.)

[99] The Libel Act (1792) 32 Geo. III, c. 60.

judicial determination handed down by the highest court of the realm to declare and clarify the actual substance of common law. Hamilton argued that the act did not alter the existing law espoused by Lord Mansfield, but it instead restored the true, time-out-of-mind law of criminal libel. Late seventeenth and eighteenth-century King's Bench doctrine had muddied the law, and with Fox's Act, Parliament declared that the common law as embodied in ancient statutes—and in line with the legal spirit of *Scandalum Magnatum*, which allowed truth as a defense—reflected the real substance of criminal libel law. The Act was not a modification to the law, but a *declaration* of the law—the true legal doctrine of criminal libel—as it had always been. (And, as discussed above, Fox's Act formally pronounced the already-occurring transition in late eighteenth-century English libel law as well). Crucially, given that the New York constitution only adopted common law dating from before April 19, 1775, the defense argued that Fox's Libel Act simply provided evidence of the true criminal libel doctrine *already in place* in 1775, but had been confused by the King's Bench version of the law.[100]

During this portion of his arguments, Hamilton also raised a technical question of law for the court to consider: what constituted a valid precedent? He suggested a rubric for determining a true legal precedent: first, nothing but a uniform course of judicial conduct on a legal matter formed a precedent, and if this uniform course was not in place, then the substance of the now questionable precedent must be considered in relation to "principles of general law." If the questionable precedent did not conform to these principles then the court was free to disregard the judicial conduct that was heretofore erroneously considered to be binding precedent and to assume instead that the law had never been settled.[101]

[100] Hamilton, *LPAH*, 1:826.
[101] Ibid.

According to Hamilton, this was the exact circumstance of Harry Croswell's case: ancient statutes pointed to truth as a defense and the general principles of criminal common law allowed juries to determine not only the general issue, but intent as well.[102] Criminal intent, as Hamilton elaborated earlier in his speech, was an inseparable mixture of law and fact--the one legitimate and indisputable exception to the English judge's duty to decide only on law, and the jury's duty to decide only on fact.[103] The King's Bench judges had developed a criminal libel doctrine that denied truth as a defense and limited the law to a narrow question of the fact of publication, thus denying the jury its power to determine the general issue and the publisher's intent. This meant that the law of England and the law of New York consisted of only "a mere floating of litigated questions" on criminal libel.[104]

Yet England had already taken care of this problem. With Fox's Libel Act, the "highest branch of the judicature of that country" confirmed and—for Hamilton's argument—settled the common law of criminal libel in England. Hamilton continued, "It is in evidence that what we [the defense] contend for was and had been the law, and never was otherwise settled" until Fox's Act.[105] Now, Hamilton and his colleagues looked to the Supreme Court sitting at Albany to resolve New York's problem of unsettled law.

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[102] Van Ness cited four statutes, passed between 1275 and 1554 AD, which suggested that the law of England only punished false or malicious publications. (*Speeches at Full Length*, 7.)

[103] Hamilton, *LPAH*, 1: 814-15. Van Ness also raised this point, rhetorically asking why it was that, in English criminal law, only criminal libel law set a different standard for juries to find only the fact of publication and not the publisher's intent--especially when intent constituted the crucial element of *criminal* acts. (Van Ness, *Speeches at Full Length*, 10, 11.)

[104] Hamilton, *LPAH*, 1: 826.

[105] Hamilton, *LPAH*, 1: 827. Hamilton looked to Fox's Libel Act as a declaration, or confirmation, of the law of seditious libel, but a declaration that had the imprimatur of the highest court in the realm. Fox's Libel Act did not "come up" to Parliament on appeal—and so in this sense, the act was not perfectly analogous to a judicial decision handed down on a specific case. Yet, New York's constitution borrowed the House of Lord's example, and vested simultaneous legislative and judicial powers in the Senate (the senators and the lieutenant-governor acting as President of the Senate, along with the Chancellor and judges of the Supreme Court constituted the highest court of New York, the Court for the Trial of Impeachments and the Correction of Errors). Therefore, Hamilton did not have to label Fox's Libel Act as *either* a legislative or judicial declaration of the law because inherently in the act, as a statute of Parliament, it was both. The English constitution had developed such that Parliamentary output was

Hamilton argued last, but Attorney General Spencer anticipated these claims and preemptively attempted to mitigate their effects on the prosecution's case. Spencer underscored that English judges and their American counterparts shared a solemn judicial duty to separate the question of law from fact—because under the English constitution, the jury "ought not to decide the question of law."[106] The defense's motions for retrial thus stood in contrast to both English and American judges' judicial duty. Furthermore, Spencer resisted the defense's claims that any law originating outside of the courts at Westminster—and especially not the ancient laws cited by Van Ness—constituted the common law of England.[107] He also warned the *Croswell* court that it should deny what amounted to the defense's prodding to change the prosecution's version of the existing law of England—that of Zenger's case and Mansfield's ruling in the *Dean of St. Asaph's Case*—because it fell only to the New York legislature, and not to the courts, to make new law or to modify this existing law. Spencer lectured the court, "let us not, in a Court of Justice, attempt, by altering the law, to usurp the power of the legislature."[108] Again, he argued that the English judge served as an example for the American judge: American courts inherited the maxim *jus dicere non jus dare* which, when further bound by uniquely American notions of separated departmental powers, did not give the court any authority to "usurp" legislative power and change the law of libel. The legislature altered the law, but it did not declare the law—only the courts did.

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simultaneously legislative and judicial in nature, and because the New York constitution recreated a similar mixture of legislative and judicial powers in its upper house, the New York bench would have understood the complexity behind Hamilton's statement that the "highest branch of the judicature" of England had determined the true doctrine of criminal libel law.

[106] Spencer, *Speeches at Full Length*, 50.

[107] Ibid., 48; Caines had previously made a similar point (35).

[108] Ibid., 47. Fox's Libel Act did not declare "truth" to be a defense to criminal libel actions, so even if the prosecution granted that the 1792 Libel Act was declaratory of common law, argued Spencer, the court could not apply the act to Croswell's second ground for retrial.

In addition, the Attorney General denied the defense's contention that Parliament provided contrary evidence to the King's Bench version of criminal libel law. He argued that Parliament's libel act was not evidence of New York's common law because Fox's Act *innovated* on Mansfield's version of criminal libel law, rather than *declaring* the law as it existed in 1775.[109]

The defense's argument ultimately revolved around the idea that because various elements of the English constitution, including centuries-old statutes, "principles of general law," Parliament, *and* King's Bench determinations *together* formed the broadly defined, common law of England, all of it gave evidence as to the common law adopted under New York's constitution. Yet, the defense did not stop there in its application of an extensive notion of common law to New York state. The defense also suggested that American institutions—namely, Congress and the New York legislature—operated similarly to Parliament and shared a Parliament-like authority to give evidence as to what constituted common law. In republican legislatures, as in Parliament, a fine line separated the power to make the law and the capacity to declare the law.[110]

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[109] Ibid., 49.

[110] Evolving and uniquely American ideas of separating judicial from legislative power hinged on the common-law notion that judges only "declared" the law rather than "made" the law. Even in England, however, this distinction, though important, was somewhat of a legal fiction; it served the purpose of reminding judges to be conservative, rather than innovative, and to apply existing principles to new cases at hand as much as possible. American judges inherited the same notion, but endured the extra pressure brought on by the demands of American theories of separating governmental powers. American judges could be accused of inappropriately "usurping" legislative power (and, depending on when and where the "usurpation" occurred, could be punished by the legislature) if they were perceived as innovating on the law. It is significant to note, then, that Hamilton's strategy allowed American judges to declare alternative legal doctrines without improperly becoming "innovators" or "legislators." Hamilton offered a way for American judges to reconcile their judicial duty to "declare" new legal outcomes through his conception of an extensive common law. For a discussion of America's eighteenth-century, common-law legal culture, see Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 33-46. Also, to understand how Americans inherited and adapted the common-law concept of "judicial duty" from English jurisprudence, see, generally, Parts IV-VII in Hamburger, *Law and Judicial Duty*.

On the other hand, republican legislatures at both the state and federal levels routinely blurred the boundaries between legislative and judicial power during this period. The line between "making" law and "declaring" the law in many state legislatures, and under certain state constitutions, was so fine as to occasionally

The defense never argued that American judges could make law, and in this way, the defense and prosecution agreed that the English conception of judicial duty applied to American judges. But the defense looked to Congress to give evidence of the law (the New York legislature had not yet "declared" the law on criminal libel, but they would do so after the *Croswell* court divided and failed to grant the new trial). Referring to Congress's Sedition Act of 1798—which declared truth to be a valid defense against federal sedition (criminal libel) prosecutions—William Van Ness declared:

> The supreme legislature of the union has declared, that by law, truth is a justification. . . by a recurrence to the statute [the Sedition Act], it will be found, that *that* part of it which permits the truth to be given in evidence is *declaratory*, and the other parts remedial. Ought this Court to doubt after this solemn declaration of the nation on this point? And is it not bound to regard it as conclusive on this subject? . . . This is an authority pure and unadulterated; above all, it is American.[111]

Hamilton agreed. He affirmed "I say, the highest legislative body in this country, ha[s] declared that the common law is, that the truth shall be given in evidence, and this I urge as a proof of

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appear to be non-existent. In New York, for example, the state constitution did not provide for the separation of the judiciary from the legislature and the executive, and, in fact, these powers blended in New York's Council of Revision, as well as the Court for the Trial of Impeachments and the Correction of Errors (modeled, as mentioned above, after the English House of Lords; see *LPAH*, 1: 17-18, 178.) Connecticut retained its 1662 colonial charter (purged of monarchical elements) and under this constitutional arrangement, the legislature acted as the high court of the state. (The U.S. Supreme Court discussed the Connecticut legislature's Parliament-like capacity at length in their 1798 *Calder v. Bull* decision.) New Hampshire's legislature restored litigants to their law—effectively overturning court decisions—and it actively legislated state judges out of office when it disagreed with court decisions. (See John Phillip Reid, *Legislating the Courts: Judicial Dependence in Early National New Hampshire* (DeKalb: Northern Illinois University Press, 2009), 7-13.) The pre-Marshall Supreme Court acknowledged these blurry boundaries of state legislative and judicial powers in decisions like *Chisholm v. Georgia* (1793, James Iredell's opinion in particular), *Calder v. Bull* (1798), and *Cooper v. Telfair* (1800). Finally, even Congress (along with various state assemblies) regularly adjudicated claims made on state debts and contracts. (See Christine A. Desan, "Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in *Chisholm v. Georgia*," in *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development*, eds. Kenneth R. Bowling and Donald R. Kennon (Athens: Ohio University Press, 2002), 178-233.)

[111] Van Ness, *Speeches at Full Length*, 9.

what that common law is."[112] Congress, they implied, imitated Parliament's capacity to declare the common law.

Through these arguments the defense advanced an important claim about the nature of governmental power in the early republic. By implicitly analogizing a Congressional power to declare the law to that of Parliament, the defense suggested that while state legislatures were generally fashioned as separate and independent departments from the courts of law, the legislatures' powers oftentimes included the capacity to make certain quasi-judicial determinations, like confirming what exactly comprised the law of the land. Keep in mind, however, that Hamilton and Van Ness intended these remarks to persuade judges who also sat on the highest court in New York state, the Court for the Trial of Impeachments and the Correction of Errors. Analogies between Congress and Parliament would have resonated particularly well with judges who were accustomed to participating in and being overseen by New York's version of the House of Lords.[113] Hamilton was not, therefore, revising his views on the separation of legislative and judicial power, which he articulated most clearly in his *Federalist* essays; instead he merely tailored his legal arguments to influence his audience.

In 1804, just as in 1788, Hamilton remained a staunch advocate for an independent federal judiciary, and would not (and did not) make arguments analogizing Congress to Parliament in order to describe the nature of legislative and judicial power at the federal level. But in the context of New York, where the Court for Trial of Impeachments and the Correction of Errors held a primary place in the state's legal and constitutional apparatus, Hamilton thought

[112] Hamilton, *LPAH*, 1: 830.

[113] See Julius Goebel Jr., *LPAH* 1: 17-18, 78. In addition, see "Collision between the Supreme Court and the Court of Errors of the State of New York," *American Law Magazine* 3 (1844): 317. In *Constituting Empire*, Daniel Hulsebosch discussed how the Court for the Trial of Impeachments and the Correction of Errors fit into New York's late-eighteen-century constitutional fabric (see 180-82). Theodore F. T. Plucknett and Philip Hamburger described how Parliament, as the highest court in the realm, presided as the dernier resort of the English legal system. (See Plucknett, "The House of Lords as a Court of Law, 1784-1837," *Law Quarterly Review* 52 (1936): 189, and Hamburger's chapter, "No Appeal from Parliament," in *Law and Judicial Duty*, 237-54.)

that New York's bench would be willing to accept Congressional law as "proof" of the common law and to adopt his broad conception of the British common-law tradition as part of New York's jurisprudence.

The defense did not imply that either Congress or the New York assembly (the lower house) was actually a high judicial court of their respective federal and state realms; yet their "extensive" common law argument does suggest how American institutions and constitutional law continued to be intimately tied to English constitutionalism. State and federal institutions imitated and relied on British institutions as models, and American jurists and statesmen looked to English law for guidance and precedent.[114] Indeed, the defense's "extensive" conception of the common law was premised on the notion that American courts could answer novel questions about republican law by scouring the corpus of English law. The arguments made in *People v. Croswell*, and especially those devised by Alexander Hamilton, demonstrate how the influence of the English constitution and its broadly conceived, truly *common* law was alive and well, and in operation in America's republican jurisprudence.

Mitigating the Problem of Partisanship: Judges, Juries, and the Motion for New Trials

Harry Croswell's defense team incorporated three of Hamilton's well-worn procedural and rhetorical strategies to mitigate the corrosive influence of politics and partisanship on the parties' rights to a fair and lawful trial. These favored tactics included: arguing that the judicial process and all presiding judges should be as free from political influence as possible; relying on juries to "check" partisan or non-independent judges; and, if the jury was somehow misguided,

[114] Take, for example, Congress relying on Parliamentary precedent as a model to run the trial of Robert Randall and Charles Whitney (see the *Annals of Congress* from Monday, December 28, 1795 to Friday, January 8, 1796). Also, eighteenth-century American statesmen oftentimes consulted George Petyt's *Lex Parliamentaria: A Treatise on the Law and Customs of Parliament* (1689).

biased, or directed to follow incorrect point of law, requesting a motion for a new trial.[115] For Hamilton, these common-law processes worked to safeguard clients' rights and to ensure just proceedings. Recall that when writing as Phocion, Hamilton argued against the pernicious effects of Patriot politics on New Yorkers' due process rights, and he identified the jury trial (as well as appellate writs, indictment, presentment, and common-law pleas) as a key right ensured by judges and judicial process. Then, during the 1780s, Hamilton also pioneered another procedural tactic to produce favorable outcomes for his clients: requesting a motion for a new trial to rehear civil cases. Motioning for new trials provided Hamilton with the opportunity to put his forensic talents, as well as learned arguments drawn from the "extensive" common law, before appellate judges so that his clients could get a second chance at legal success.

Colonial jurists in New York asked for new trials only occasionally, but in the 1780s, Hamilton began to request them regularly in civil disputes. He also provided the New York bench and bar with the first extensive examination of the status of new trial motions in English law, when he employed the tactic in a 1785 land dispute, *Jackson ex dem. Livingston v. Hoffman*.[116] In the 1780s phase of this protracted litigation, Hamilton represented Zacharias Hoffman, a wealthy New York landowner, against patroon and Chancellor Robert R. Livingston over the southern boundary of Livingston's Clermont estate. When the jury convicted Hoffman of trespassing on Livingston's estate, Hamilton moved, albeit unsuccessfully, for a new trial. While he lost his motion on behalf of Hoffman, Hamilton revived the strategy, with more success, when litigating marine insurance disputes in the 1790s.[117]

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[115] See "Note on the Development of the Right of a New Trial in English Law," *LPAH* 3: 117-132.
[116] (N.Y. Sup. Ct., 1783-1785). For an explanation of the phases of litigation, see *LPAH* 3: 51-177.
[117] Some of Hamilton's winning new trial motions included: Silva v. Low, 1 Johns. 184 (N.Y. Sup. Ct, 1799), Barnewall v. Church, 1 Cai. 217 (N.Y. Sup. Ct, 1803), and Blagge v. The New York Insurance Company, 1 Cai. R. 549 (N.Y. Sup. Ct., 1804). See chapter three for a discussion of Hamilton's marine insurance practice.

Hamilton did not see the motion for new trials as simply a winning tactic to further his clients' interests; he also considered it to be a safeguard to ensure fairness and justice for litigants. During oral arguments for the *Hoffman* dispute, for example, Hamilton argued that the motion complemented the jury trial, affording an extra "*Judicial* & not *arbitrary discretion*" for wronged parties.[118] James Kent, who heard Hamilton's remarks before the *Hoffman* court, recorded in his *Memoirs* that Hamilton considered the motion for a new trial to be a crucial safeguard, since "Without such a salutary control, the rights of property would be unsafe."[119] Also, Hamilton suggested in *Federalist* No. 83 that civil litigants benefited from motions for new trials, enjoying what Julius Goebel Jr. later summarized as a "double security" against corrupted juries or judges.[120]

Although *Croswell* was a criminal, rather than civil, action, Hamilton and his co-counsel intended for their motion for a new trial to act as double security for Harry Croswell as well, as he faced politically-motivated sedition charges. By making the motion, Hamilton created an opportunity to influence the law of seditious libel in force in New York, offering a counterargument to the libel doctrine arising from King's Bench case law. He also used the occasion to again underscore the jury trial and the independent judge as crucial common-law protections guaranteed by judicial process.

To Hamilton, the combined principles and process of common law, as provided and adhered to by the courts of justice, provided the ultimate security to individual rights. When the

[118] Robert R. Livingston recorded notes on Hamilton's oral argument in Livingston's "Notes on Hamilton's Argument of Facts and Relevant Law in support of defendant's motion for new trial," (undated), *LPAH* 3:237.
[119] For quote, see James Kent to Elizabeth Hamilton ("Chancellor Kent's Memories of Alexander Hamilton"), December 10, 1832, in William Kent, *Memoirs and Letters of James Kent*, 294-295; and also see Hamilton's "Brief of Facts and Relevant Law for Argument of Motion for New Trial" (undated), *LPAH*, 3: 220-24.
[120] See *LPAH*, 3:115. In *Federalist* No. 83, Hamilton defended the existing civil-jury system against Anti-Federalist criticism, explaining: "As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained."

American people brought a truly independent *federal* judiciary into existence, Hamilton felt comfortable emphasizing that the federal courts could provide the necessary security for individuals.[121] But even if the independent judiciary provided a barrier to rights infringement, the common law practiced inside the courtroom afforded the critical safeguards. In this way, Hamilton conceived of the judiciary and the common law as a two-pronged defense to prevent rights infringement. Independent judges (with their prerogative to grant and rehear motions for now trials) and juries created intra-courtroom checks and balances working in the defendants' or litigants' favor.[122] But, as partisan squabbling began to influence the independence of federal and New York state judges, Hamilton warned against its inevitable, pernicious effects in a series of essays on politics and judicial independence, as well as in his *Croswell* arguments.

During the winter of 1801-1802, Hamilton published eighteen essays, titled "The Examination" in the *New York Evening Post,* under the pseudonym "Lucius Crassus." [123] He intended these articles to be his public response to President Jefferson's First Annual Message to Congress (December 8, 1801), as well as an opportunity to address Hamilton's larger concerns about the state of the nation. To Hamilton, the most pressing of these concerns involved the state of the federal judiciary, which, according to the former Treasury Secretary, had been

[121] When Hamilton considered the place of the federal judiciary under the U.S. Constitution, he showed concern for the rights and liberties of the American people as a whole. He wrote, in *Federalist* No. 78, "It equally proves that though individual oppression may now and then proceed from the courts of justice, the *general liberty of the people* can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive." (Emphasis added.) Hamilton had high hopes for the federal judiciary's ability to safeguard individual liberty because, more so than many of the state governments, including New York, the Framers designed the institutions of the federal government to be distinct and separate entities. Hamilton's *Federalist* essays on the judiciary are thus peppered with references to the security of individual rights and liberty.
[122] Amar, *The Bill of Rights*, 95-104.
[123] Lucius Crassus was a lawyer and politician who supported efforts to reform the Roman courts. His contemporaries considered him to be one of the greatest orators before Cicero, and years after Crassus' death, Cicero featured him in *De oratore* (55 B.C.E.). A brief summary of Crassus' life can be found in the *Encyclopædia Britannica*, 15th ed., s. v. "Lucius Licinius Crassus."

compromised and rendered dependent by the repeal of the 1801 Judiciary Act.[124] With the successful repeal of the act, Congress abolished sixteen federal circuit court judgeships, even though judges had already been selected to fill those positions. Hamilton found this to be an unconstitutional violation of Article III's guarantee that federal judges hold their offices as long as they maintained "good behavior." He argued that to divest the judges of these offices, once created, was to violate the judge's vested right in the office, in addition to violating Article III's good behavior clause.[125] Furthermore, the repeal of the circuit court judgeships meant that the independence of the federal judiciary had been successfully nullified by the national legislature, and that the wisdom and benefits of separating governmental institutions had been abrogated.[126]

In particular, Lucius Crassus lamented that a properly stable and independent judiciary was the "surest guardian of person and property" because "as it regards the security and preservation of civil liberty, it is by far the safest [department]." [127] Judicial independence erected a "precious shield to the rights of persons and property. Safety and liberty are therefore

[124] The Judiciary Act of 1801 (or, "An Act to provide for the more convenient organization of the Courts of the United States," ch. 4, 2 Stat. 89 (1801)) and "An Act for altering the times and places of holding certain Courts therein mentioned, and for other purposes," ch. 32, 2 Stat. 123 (1801), were repealed on March 8, 1802 with "An Act to repeal certain acts respecting the organization of the Courts of the United States; and for other purposes," ch. 8, 2 Stat. 132 (1802). After the repeal, Congress effectively restored the judicial system created under the Judiciary Act of 1789 ("An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73 (1798). The Judiciary Act of 1801 had reduced the number of Supreme Court justices (which would have gone into effect only after a sitting Supreme Court justice retired) and established sixteen circuit-court judgeships. President Adams had already filled those new positions when the repeal became law. After the Republican Congress repealed the 1801 Judiciary Act and abolished the judgeships, Federalists, including Hamilton, lamented Congress' actions as a threat to an independent federal judiciary. The judiciary could not be independent, they argued, if Congress could remove federal judges from their offices at will.

[125] While making a case for a judge's "vested right" in his office, Hamilton described his general approach to interpreting rights: "provisions which profess to confer rights on individuals, are always intitled [sic] to a liberal interpretation in support of the rights, and ought not, without necessity, to receive an interpretation subversive of them." ("The Examination, No. XVII," *PAH*, 25: 573.) Hamilton also discussed a judge's vested right to his office in "The Examination, No. XII" (*PAH*, 25: 533). During this time, however, the notion of a judge's property interest in his office existed in tension with a new administrative model of office-holding, where the office holder held his office at the discretion of executive official. (See William E. Nelson, "Officeholding and Powerwielding: An Analysis of the Relationship between Structure and Style in American Administrative History," *Law and Society Review* 10 (1976): 195, 200, 203.)

[126] Hamilton attempted to make this point in the "Examination" essays Nos. XII-XVII, but he gave a particularly dire forecast of the effects of the 1801 Judiciary Act's repeal in No. XII, *PAH*, 25: 535.

[127] "The Examination, No. XIV," *PAH.*, 25: 551. A similar sentiment can also be found in "The Examination, No. XII," *PAH*, 25: 529.

inseparably connected with the real and substantial independence of the courts and judges."[128] As he had in his *Phocion* and *Federalist* essays, Hamilton equated an independent judiciary with the security of individual rights.[129]

Croswell, however, required Hamilton to refocus his apprehensions about the spread of factionalism and its detrimental effects on the independence of republican courts in New York's political scene. Again, Hamilton revisited the spirit of his *Phocion* essays. A truly independent judiciary was not an option in New York—the state constitution did not attempt to create a wholly independent judiciary—and so, more explicitly than before, Hamilton advocated for common-law principles and process as the ultimate safeguards to individual rights.

Political partisanship had infected New York, just as it had the national political arena, as each of the *Croswell* counselors noted in their speeches. To Hamilton, this concern was particularly relevant because the motion for a new trial required the court to consider institutional questions regarding the respective roles of judge and jury. As Hamilton argued in relation to the federal judiciary, judges were important to the protection of rights. But in New York—and in light of recent events, even at the federal level—complete independence from the legislature could not be assured. Under these circumstances, then, Hamilton argued that it was safer to allow juries, as opposed to judges, more discretion to determine the publisher's intent or the truth

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[128] "The Examination, No. XIV," *PAH*., 25: 551.

[129] Moreover, misguided legislation was not the only problem. The repealing act was no good, but it represented more than just a foolish Congress; the repeal reflected a truly worrisome "tide of faction" and "turbulent humors of party spirit" that had recently plagued the young republic. Judges needed to be protected from partisanship, Lucius Crassus warned, and, judging by the tenor of the current political scene, it seemed that even monarchical Great Britain provided better protection for its judges than the United States did—especially if Congress could unconstitutionally remove judges from their offices. ("The Examination, No. XIV," *PAH*, 25: 549 and "The Examination, No. XVII," *PAH*, 25: 575.)

Hamilton would later echo this sentiment in *Croswell* (*LPAH*, 1: 811). He reasoned that the British monarch cannot attack English judges alone, but he must instead be united with the two houses of Parliament. And if Parliament went after English judges, the monarch could more easily resist Parliament's efforts. In America, on the other hand, executives were too weak to pose a serious threat to judges themselves or to stave off a legislative attack on American courts. And republican legislatures—like Congress—proved to be dangerous to the American judiciary if the courts were not adequately separated and made independent from legislatures.

of a publication involved in a criminal libel action.[130] In giving his reasons for this conclusion, he echoed Lucius Crassus: "the independence of our judges is not so well secured as in England."[131]

Hamilton reasoned that, as civil officers inevitably touched by state politics, the court would be more susceptible to "the View & Spirit of Government"—the prevailing winds of partisanship—than a jury, that "occasional & fluctuating body" to be chosen by lot.[132] Contrary to the bland contract disputes between insurers and insureds or between feuding land-patent holders, criminal libel trials were highly charged affairs, fraught with politics and partisanship. In this era of factional paranoia, and with a seditious libel action before the court, Hamilton trusted the jury more than he trusted the state judges to ensure the liberty of the press. The New York bench could not be fully independent of the legislature, and so they might be susceptible to the influence of partisan politics.[133] And while juries could also bring their politics to the jury box, Hamilton thought that their impermanence provided a surer safeguard. Injustice might be perpetrated once by a politically charged jury, but it would be propagated again and again by permanent, partisan magistrates. Because of this, Hamilton affirmed, "we have more Necessity to cling to the right & Trial *by Jury*, as our greatest Safety."[134]

Regarding the particular points of law—whether the jury should be able to determine the publisher's intent in a criminal libel action—Hamilton referred to the general principles of the

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[130] *LPAH*, 1: 811. Hamilton was quick to praise the court, however, stating that "No man can think more highly of our judges and I may say personally so, of those who now preside, than myself; but I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be." (Ibid., 1:810.)

[131] Ibid., 1: 811.

[132] This quote is taken from James Kent's notes on Hamilton's speech, Ibid., 1: 834. Oftentimes Kent's notes provide more succinct paraphrases of Hamilton's comments than does Waite's published version of Hamilton's speech.

[133] Hamilton proved prescient. In the years after the New York legislature's 1805 declaration of criminal libel law, New York judges, including James Kent, managed to apply libel law instrumentally in order to suppress unfavorable political criticism. See Donald Roper's "James Kent and the Emergence of New York's Libel Law," *American Journal of Legal History* 17 (1973): 223-31.

[134] James Kent's notes, *LPAH*, 1:834.

New York constitution, rather than King's Bench doctrine. He declared, "What then do I conceive to be true doctrine. That in the general distribution of power in our Constitution it is the province of the Jury to speak to fact, yet in criminal cases the consequences and tendency of acts, the law and the fact are always blended. As far as the *safety of the citizen* is concerned, it is necessary that the Jury shall be permitted to speak to both."[135]

This concern for citizen security was also what made Congress' Sedition Act such a "valuable" statute, as the sedition law allowed the jury to consider the truth of the publication as a defense.[136] According to Hamilton, Congress premised the 1798 Sedition Act on "common law principles," and in doing so, it followed the wise example set by the Framers of the U.S. Constitution.[137] Because the U.S. Constitution relied on the common law, it created a strong, but limited, government that could not infringe on individuals' rights. "The Constitution of the U.S.," Hamilton warned, "would have been melted away or borne down by Faction, if the *Com[mo]n law* was not applicable."[138]

Finally, Hamilton attempted to appeal directly to his audience by emphasizing that common-law principles even protected impartial judicial magistrates suffering because of the prevailing political rancor. After noting the "Impeachments of an extraordinary nature [that] have echoed thro' the land,"[139] Hamilton extolled substantive common-law principles as the

[135] *LPAH*, 1: 823-24. (Emphasis added.)
[136] *LPAH*, 1: 829.
[137] *LPAH*, 1: 829-30. Hamilton on the wisdom of reading common-law principles into the U.S. Constitution: "The Habeas Corpus is mentioned, and as to treason, it adopts the very words of the common law. Not even the Legislature of the union can change it. Congress itself can not make constructive, or new treasons. Such is the general tenor of the constitution of the United States, that it evidently looks to antecedent law. What is, on this point, the great body of common law? Natural law and natural reason applied to the purposes of Society."
[138] James Kent's notes, *LPAH*, 1: 838.
[139] Hamilton was most likely referring to the investigation of U.S. Supreme Court Justice Samuel Chase and District Court Judge Richard Peters, along with the impeachment trial of District Judge John Pickering. A few days after his arguments in *People v. Croswell*, Hamilton responded to Robert G. Harper's "letter on the subject of the impeachment of the Judges" Chase and Pickering. Hamilton told Harper, a Federalist lawyer, that he had "very little doubt that [the impeachments] are in prosecution of a deliberate plan to prostrate the independence of the Judicial

protective standard by which even magistrates could benefit: "If then we discharge all evidence of the common law [referring to "treasons, crimes, and misdemeanours"], [judges] may be pronounced guilty ad libitum; and the crime and offence being at once at [Congress'] will, there would be an end of that [U.S.] Constitution." And so, "[b]y analogy a similar construction may be made of our own [New York] Constitution, and our Judges thus got rid of. This may be the most dangerous consequences." Hamilton implored the court to use any arguments against common-law principles with caution, and "To take care how we throw down this barrier"—the common law—"which may secure the men we have placed in power; to guard against a spirit of faction, that great bane to community, that mortal poison to our land."[140] Common-law writs (habeas corpus), crimes (treason), and processes (impeachment) thus informed the federal constitution, and provided explicit protection to federal judges against the whims of party politics. Justices of New York state also benefitted from these common-law concepts as adopted by New York's constitution.

To Alexander Hamilton, English common law provided the best solution to the problems of republican governance: institutional and substantive principles and common-law process formed a crucial barrier between a citizen and their government, as well as between a citizen and the rancorous effects of partisanship. The common law safeguarded an individual's rights and liberties from the executive, the legislature, and even, when necessary, from the judiciary—though Hamilton oftentimes credited truly independent judges as protecting individual rights from the other two departments.[141] Ultimately, if the judiciary was not fully independent of the

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Department, and substitute to the present judges creatures of the reigning party, who will be the supple instruments of oppression and usurpation, under the forms of the Constitution." (*PAH*, 26: 190-91.)

[140] Hamilton, *LPAH*, 1: 830.

[141] In *Federalist* No. 79, Hamilton made his strongest statements about the importance of an independent judiciary. Hamilton praised the federal Constitution for allowing its judges to serve under good behavior and without fear of having their salaries reduced by Congress for any unpopular decisions made from the bench. Unlike in New York, the federal Constitution did not inter-mingle legislative and judicial personnel in a high court or in a Council of

legislature or the executive, or if partisanship corrupted the judges, common-law juries, principles, and process would off a last line of defense to protect the individual. Under his "extensive" conception of the common law, Hamilton argued not only for Harry Croswell's particular rights but, like he did as Phocion, with the rights of all "member[s] of this state" in mind. In his final, great courtroom appearance Hamilton underscored the importance of common-law principles to securing an individual's rights, liberty, and property.

THE "INFLEXIBLE FRIEND OF JUSTICE AND OF NATIONAL CIVIL LIBERTY": HAMILTON'S RIGHTS-STRATEGY AND THE DEVELOPMENT OF AMERICAN LAW

In 1832, Chancellor Kent remembered *People v. Croswell* as Hamilton's finest performance before the New York bench. "I have always considered General Hamilton's argument in that cause the greatest forensic effort that he ever made. . . He had bestowed unusual attention to the case, and he came prepared to discuss the points of law with a perfect mastery of the subject," Kent recounted. "He believed that the rights and liberties of the people were essentially concerned in the vindication and establishment of those rights of the jury and of the press for which he contended. His whole soul was enlisted in the cause, and in contending for the rights of the jury and a free press he considered that he was establishing the finest refuge against oppression."[142] Kent recognized in *Croswell*, as well as in the entirety of Hamilton's career, what historians and biographers seem to have forgotten: that Alexander Hamilton was a

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Revision. Under the 1777 state constitution, New York judges held their tenure under good behavior (though they could not serve past age sixty), and in *Federalist* No. 79, Hamilton remarked that this age restriction was unpopular and that, in general, state constitutions should have done a better job protecting judges' salaries. Therefore, for all of these reasons, Hamilton most likely thought that New York state judges were not ideally independent, yet, he still thought them independent enough to be more willing to safeguard individual rights than either a legislator or executive official.

[142] James Kent to Elizabeth Hamilton ("Chancellor Kent's Memories of Alexander Hamilton"), December 10, 1832, in William Kent, *Memoirs and Letters of James Kent*, 323-24, 326.

rights-conscious statesman. Hamilton devoted himself to becoming, in Kent's words, an "inflexible friend of justice and of national civil liberty."[143]

Kent also recognized Hamilton's profound impact on the substance of New York law. Hamilton's extensive common-law strategy helped to reverse and amend the state's statutory treatment of unpopular Loyalists, for example, when the people of New York county elected Hamilton in 1787 to be a delegate in the tenth state assembly.[144] Moderate Whigs increasingly challenged and oftentimes defeated anti-Loyalist legislation, and during the period from 1786 to 1788 the legislature restored Loyalists to almost complete citizenship.[145] In this increasingly tolerant atmosphere, Hamilton continued to champion the protections of due process in the law.

During his tenure in the state assembly, Hamilton campaigned for, and succeeded in passing, a modified Trespass Act that repealed "that part which was in violation of the public treaty" and put the courts of justice in "a delicate dilemma, obliged either, to explain away a positive law of the state or openly violate the national faith by counteracting the very words and spirit of the treaties *now* in existence."[146] The amended Trespass Act reinstated the defendant's plea to a military order justification (defendants could now plea military command without relying on a law of nations plea) and granted the right of removal and review to superior courts.[147]

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[143] Ibid., 300. When writing to Hamilton's widow, Elizabeth Schuyler Hamilton, in 1832, Kent praised Hamilton because "All his actions and all his writings as a public man show that he was the uniform, ardent, and inflexible friend of justice and of national civil liberty."

[144] Note, also, that during the 1780s, Hamilton was not only concerned with protecting Loyalists' rights. He argued against the New York assembly's proposed requirement that naturally-born Roman Catholics take an oath of abjuration that effectively would have barred them from holding office. (See Remarks on an Act of Regulating Elections, made in the New York assembly on January 24, 1787, *PAH*, 4: 22, as well as, Miller, *Alexander Hamilton: Portrait in Paradox*, 104.)

[145] E. Wilder Spaulding, *New York in the Critical Period, 1783-1789* (New York: Columbia University Press, 1932), 130-131.

[146] Alexander Hamilton's remarks in the NY Assembly, as reported in *The Daily Advertiser: Political, Historical, and Commercia*l, March 23, 1787, Vol. III, Issue 648, Page 2.

[147] Passed April 4, 17871. *Laws of the State of New York* 10 Sess. 1787 c 71.

And, on January 26, 1787, New York's tenth legislature enacted its first statute, "An Act concerning the Rights of the Citizens of this State" into law.[148] This statutory bill of rights originated in the ninth assembly as an attempt by lawmakers to collect and summarize the English law still in effect in New York. [149] Neither Hamilton nor any ninth or tenth session delegate attributed the statutory bill of rights directly to Phocion's influence, yet the specific clauses enumerated in the act, as well as the moderate sentiments pervading the political climate, suggest that Phocion's ideas resonated with the people of New York and their representatives.

The statutory bill of rights addressed many of Hamilton's courtroom and public complaints about the limitations of legal process aimed at Loyalist citizens and British subjects residing in the state. The act affirmed that no *citizen* of the state may be disseized of "his or her freehold or liberties, or free customs, or out-lawed, or exiled, or condemned, or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law."[150] Also, no *person* could be put out of his franchise or freehold without the "due course of law, and if any thing be done contrary to the same, it shall be void in law and holden for none." Furthermore, "that writs and process shall be granted freely and without delay, to *all persons* requiring the same."[151] New Yorkers had regained their common-law liberties.

Loyalist attorneys must have been relieved as well to read the fourth clause in the bill, "That no person shall be put to answer, without presentment before justices, or matter of record, or due process of law, according to the law of the land, and if any thing be done to the contrary it shall be void in law and holden for error."[152] This clause summarized all that was unfair and

[148] Passed January 26, 1787. *Laws of the State of New York* 10 Sess. 1787 c 1.
[149] Robert Emery, "New York's Statutory Bill of Rights: A Constitutional Coelacanth." *Touro Law Review*, Vol. 19, Issue 2 (Winter/Spring, 2003): 369. Lawyers Samuel Jones and Richard Varick assumed control over the project and drew up "An Act concerning the Rights of Citizens" along with nine other sundry bills.
[150] *Laws of the State of New York* 10 Sess. 1787 c 1, clause 2.
[151] *Laws of the State of New York* 10 Sess. 1787 c 1, clauses 5 and 6.
[152] *Laws of the State of New York* 10 Sess. 1787 c 1, clause 4.

unlawful about prosecutions under the Trespass, Citation, and Confiscation Acts. Under these statutes, the necessities of presentment, review of errors, and traditional process accorded by constitutional and customary laws of the land had been rendered unnecessary to prosecutions of British subjects and Loyalists in the years during and after the war. Yet, with the statutory bill of rights in place, the New York legislature and Council of Revision—which passed the law without disagreement or comment—affirmed to themselves, to defense attorneys, to the courts, and mainly to the people of New York that the due process of law was not to be denied to any person residing in the state under any circumstances whatsoever.[153]

Hamilton's impact on American seditious-libel law extended even further. At the end of its term, in May 1804, the *Croswell* court handed down a divided decision, 2-2, thus defeating the motion for Harry Croswell's retrial. However, since the beginning of February 1804, the New York Assembly and Senate had been considering various bills to "declare" the law of criminal libel once and for all. Their legislative efforts became law on April 15, 1805, and provided that in libel actions, the jury had the right to consider both law and fact and the jury did not have to find the defendant guilty based solely on the fact of publication. The law also allowed the defendant to offer truth as a justification for his libelous publication.[154] The New York legislature codified the defense's arguments and changed the law of seditious libel in the state. By the Civil War, most states in the Union had adopted the key provisions of New York's modified libel law, thus extending Hamilton's influence across the United States.[155]

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[153] In the N.Y. Assembly the statutory bill of rights "was unanimously agreed to after a very few alterations." Assembly proceedings, as reported in, *The New-York Journal, and Weekly Register* (January 18, 1787, Vol. XLI, Issue 3, Page 3). The Senate and Council also passed the bill without opposition (Robert Emery, "New York's Statutory Bill of Rights: A Constitutional Coelacanth." *Touro Law Review* 19 (2003): 369).

[154] N.Y. Sess. Laws 1805, ch. 90. James Kent referred to the law as a "declaratory statute," thus underscoring his assumption that the legislature had exercised its Parliament-like capacity to declare the common law in force in New York state. (See Morris D. Forkosch, "Freedom of the Press: Croswell's Case," *Fordham Law Review* 33 (1965): 445-48.)

[155] Levy, *Emergence of a Free Press,* 339-40.

Hamilton's rights-strategy also impacted the nature of judicial power in the American republic, first by transforming the meaning of "common law" into a vast synonym for the entire English legal tradition. This "extensive" interpretation treated common law as nothing less than the entire legal framework that constituted the realm—the English constitution itself—and fit England's various jurisdictions, substantive law, procedures, and institutions into this common law framework.[156] By treating the common law as the expansive, constitutive law of the land, Hamilton turned English law into a grab-bag of potential arguments and examples to use to define relevant, legally valid common-law principles to apply in American courts. [157] This extensive strategy, in turn, positioned New York judges to be in charge of declaring the substantive, non-statutory law of the land. The judiciary, therefore, became the guardians of those guaranteed rights and liberties that constituted the celebrated Anglo-American birthright.

In addition, Hamilton viewed English common law as a methodological opportunity to recombine familiar legal materials to fit new, distinctly American conclusions. His extensive conception of common law also managed an important legal slight-of-hand: Hamilton's arguments allowed the New York courts to declare new legal outcomes while denying that the

[156] The idea that common law constituted the English polity, and regulated the English people along with all of the institutions, jurisdictions, and authorities of the government, derived from sixteenth- and seventeenth-century English common lawyers and their notions of the ancient constitution of England. Glenn Burgess' *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* described the central place of common law in pre-Civil War legal thinking, including the common law's relationship to the ancient constitution (University Park: The Pennsylvania State University Press, 1992), chapters 1-3). Americans of the revolutionary generation also found common law to be the constitutive force of the eighteenth-century British constitution, and a defining feature of the American colonies' relationship to the King and Parliament. (See Reid, *Constitutional History of the American Revolution,* Abridged Edition, 3-25.)

[157] As such, Hamilton's conception of common law directly contradicted Morton Horwitz's later notion that the common law was no more than a set of stifling, strict rules from which nineteenth-century American lawyers and judges sought to break free. I do not deny that some Americans thought of the common law in exactly the way Horwitz described it--as inflexible precedent—but Horwitz did not account for a counter-perspective of common law. The Hamiltonian view of common law allowed for the same transformation in substantive legal doctrines that Horwitz described, but his "extensive" common law did not require judges to become so audaciously assertive. According to Hamilton's argument, judges could analyze rules functionally without causing Horwitz's "fundamental shift in the conception of law." Instead, the "extensive" common law allowed the same economic or social policy ends to be accomplished without departing sharply from traditional practice. (See "The Emergence of an Instrumental Conception of Law," in Horwitz's *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977), 1-30, quote at page 4.)

judges were actually innovating on existing law or improperly legislating. Because the Hamiltonian strategy treated common-law doctrine as part of an expansive legal tradition rather than as only those rules handed down from the Westminster courts, Hamilton's arguments suggested that American judges had a substantial array of valid jurisprudential options available to them to determine the law of the land. The judge remained squarely within his proper judicial duty to "find" the law through other sources—like ancient or declaratory statutes—even if he declared that the law in force differed from Westminster precedent.[158]

Alexander Hamilton thus mapped an alternate route to instrumentality in American law where the common law supplied a corpus of legal arguments, rather than rigid rules. At the same time that Hamilton deeply respected common-law legal traditions—particularly those concerning common-law rights—he simultaneously demonstrated how the common law could be flexible, vast, and capable of adapting to American policy ends when used strategically in court.[159] His strategy allowed for judges to adjudicate new legal doctrines within their traditional authority; it offered a way for the court to resist sudden departures from established legal doctrine, and to enable lawyers and judges to excavate the past in order to meet the legal needs of the present.

In this chapter, I have offered a new perspective on Hamilton as a legal thinker and strategist who considered the entire English common-law tradition to be intimately and integrally tied to American jurisprudence as a source of precedent, process, and substance for republican

[158] Philip Hamburger defined the "judicial duty" of the Anglo-American judge as deciding a case in accordance with the law of the land. Judicial review, he argued, is merely a part of the larger duty of the common-law judge. (See, in general, *Law and Judicial Duty*.)

[159] Bernadette Meyler argued that Americans of the revolutionary generation considered the common law to be flexible and adaptive, but she focused mainly on interpreting references to the common law in the federal Constitution ("Towards a Common Law Originalism," *Stanford Law Review* 59 (2006): 572-80). Michael Lobban also argued that common law was inherently flexible, though his reasoning differed from the Hamiltonian "extensive" common law described here. For Lobban (who writes only with England in mind), the common law was a system designed to provide remedies, and as long as the rigors of pleading remained intact, the outcome of any common-law action—the remedy—was flexible, adaptive, and able to provide different outcomes according to the circumstances of each case. According to Lobban, the typical eighteenth-century common lawyer viewed the common law as an adaptive system and not as a body of rules that could be distinctly defined. (*The Common Law and English Jurisprudence, 1760-1850* (New York: Oxford University Press, 1991), 1-16.)

law. Hamilton's career, which culminated only a few months after his arguments in *Croswell*, demonstrates that defending a client's rights-claim offered the best opportunity for him to invoke the "extensive" common law, and thus to mine English constitutional history for precedent relevant to American legal questions. Hamilton was openly and consistently concerned with the problem of securing individuals' rights under republican government, and to him, common law, in its most expansive sense, provided the last line of defense separating an individual from an overreaching government, from majoritarian despotism, or from the harmful effects of partisan politics. English law thus offered an effective counter to the unfavorable consequences of republican government; because Alexander Hamilton recognized this, he relied on common law to protect his clients' rights to their inherited English liberties.

CONCLUSION

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THE FEDERALIST

Alexander Hamilton's influence permeates American constitutionalism, beginning with the first element of his lasting, legal legacy: the strong and authoritative federal judiciary established during the early republic. It is fitting that the author of the *Federalist* essays on judicial power helped to enhance the authority and prestige of those courts in practice. While Hamilton's constitutional arguments echo loudly through decisions of the U.S. Supreme Court, he did the most to enhance the scope of federal judicial power within the district and circuit courts, particularly by fostering a close working relationship between his energetic Treasury department and district judges. Working alongside Hamilton and his team of customs collectors, these federal magistrates sorted out the day-to-day business of governing by resolving the practical details of everyday administration and by executing the letter and spirit of Congressional statutes.

Even though scholars have emphasized the Treasury Secretary's various "Reports" on economic policy as his decisive contribution to the economic successes of the 1790s, in practice Hamilton's true policy genius was to build a close working relationship with this network of administrators and judges who managed and adjudicated the commercial republic. These executive and judicial officials ensured the success of the nation's economic interests by overseeing the collection of revenue taxes, the remission of penalties, and the prosecution of those who violated customs and neutrality statutes. For Secretary Hamilton, abstract policy recommendations and statutory law could only go so far toward building his vision of a thriving, commercial republic; it fell to those who executed that policy—the combined personnel of the

federal magistracy—to ensure a delicate balance among the conflicting goals of fostering trade, collecting taxes, and enforcing revenue-statutes. In this way, the development and growth of both federal judicial and executive powers were inextricably linked in the early national period.

Throughout the early republic, the combined efforts of state and federal judges, administrators, and lawyers greatly expanded federal judicial power. This development in law occurred from the concerted efforts of key actors, like Hamilton, as well as from the jurists' wide-ranging, uncoordinated efforts to reconcile American law with pressing, political circumstances. As described above, federal court authority developed from within—that is, from the accommodating, magisterial relationship forged among the network of district court judges and administrators who exercised mixtures of executive and judicial powers. Congress also aided the growth of federal judicial authority by granting the U.S. Supreme Court its writ of error review of state supreme court decisions (through section 25 of the 1789 Judiciary Act).[1] Hamilton was the first legal strategist to employ this review process strategically, using it to simultaneously defend his customs collectors while protecting the Treasury's (Hamilton's) interpretation of federal revenue laws.

External political circumstances also hastened the expansion of federal court jurisdiction. Although Article III of the U.S. Constitution bestowed a historically limited admiralty jurisdiction on the federal courts, it took the unanticipated combination of a staunch U.S. neutrality policy plus a carrying-trade boom to empower the U.S. Circuit Court for the District of Massachusetts to greatly widen the scope of federal admiralty jurisdiction to include maritime contracts and tort claims. When delivering this decision in *De Lovio v. Boit*, Justice Joseph Story did not act unilaterally in making this power-grab; instead, he stood on the shoulders of countless litigators and judges, at both the federal and state levels, who, after years of adjudicating

[1] "An Act to establish the Judicial Courts of the United States," ch. 20, 1 Stat. 73, 85 (1789).

neutrality and marine insurance litigation, made it seem natural and even obvious to extend the federal admiralty courts' jurisdiction over most maritime disputes.[2]

Finally, and most familiarly, federal judicial power increased because the justices on the federal court of last resort, the U.S. Supreme Court, routinely handed down nationally oriented decisions that tended not to limit or reduce their authority. But the Marshall and Taney Courts supported their opinions with Hamiltonian arguments. During the early national period, the U.S. Supreme Court, as well as the teams of Federalist, Jeffersonian, and Jacksonian lawyers pleading their causes before the supreme bench, relied heavily on legal arguments first pronounced by Alexander Hamilton to explain and to defend his own policy initiatives. From the proper scope of executive power to the sanctity of the federal fiscal powers, Hamilton articulated legal arguments to accomplish his particular statecraft goals during his lifetime; and yet, after his death, lawyers and judges still cited and repurposed Hamilton's claims and legal reasoning, thus incorporating them into a lasting American corpus of constitutional jurisprudence. As a member of the cadre of litigators, administrators, and magistrates who worked in and out of the federal courts, and as a policymaker, constitutional theorist, and legal strategist who made nation-building his life's work, Alexander Hamilton developed American law by instrumentally expanding the authority and jurisdictional reach of the federal courts.

Perhaps it is no surprise that Alexander Hamilton worked to enhance the power of national institutions like the federal courts and the executive branch. Yet, these accomplishments comprise only part of Hamilton's legal legacy. Indeed, Hamilton cannot be properly understood simply as a staunch nationalist; Hamilton's influence on the development of

[2] 7 F. Cas. 418 (C.C.D. Mass., 1815).

American law demonstrates that he was, instead, a committed *federalist*.[3] Of course, Alexander Hamilton desired that the national government be vested with all the vigorous powers necessary to prevent the absurdities, embarrassments, and impotence that plagued the Confederation Congress. Yet, Hamiltonian jurisprudence was not a jurisprudence of nationalism; it was instead a jurisprudence of federalism. As Hamilton used law to accomplish his policy goals, he articulated key principles that outlined this jurisprudence; therefore, a second element of Hamilton's legal legacy was to define, defend, and exercise both Congress' delegated powers as well as the states' retained authority.

Hamilton's most prominent practical influence over the jurisprudence of federalism was the creation of a strong federal judiciary, but his primary intellectual contribution was his conception of legislative and judicial concurrence. He first sketched out a model for concurrence in his *Federalist* essays Nos. 32 and 82, where he described how the national and state governments could simultaneously exercise their overlapping powers, and still co-exist with minimal interference. Although in practice, Hamiltonian concurrence oftentimes resulted in robust exercises of federal power, his objective was not to enhance the national government's authority beyond its constitutional boundaries, nor at the expense of the states' retained powers. Instead, he aimed primarily to ensure that the federal government could act without interference from the states.

Hamiltonian concurrence thus justified the nation's sovereign sphere of authority in the face of the states' powerful, and occasionally jealous, governments, when the central government was still young and untried. In contrast to the new national government, the states retained and exercised formidable powers, as well as commanded fierce loyalty from their inhabitants. In the

[3] In arguing that Hamilton is best understood as a federalist, I do not mean to refer his political affiliation as leader of the Federalist "party"; instead, I recast Hamilton as a constitutional strategist fully committed to maintaining and to solving the unique legal problems arising from the American federal system.

aftermath of the late 1770s, when most states drafted and ratified new constitutions, Americans looked to their home state as the locus of law and order, civil and political rights, welfare regulation, and good republican government.

Hamilton did not use law to diminish these sovereign state powers. Instead, he viewed the problem of federalism in the early republic as how to establish and maintain national authority when the states posed a potentially formidable threat to the exercise of that federal power. Hamiltonian concurrence thus cast a protective bubble over the exercise of both state and national powers. We have seen how this power dynamic played out, for example, over taxes: Hamilton correctly anticipated that state governments would balk at federal revenue-taxes, and in response, he articulated fiscal-legal arguments within the framework of concurrence. He argued to both New Yorkers and Virginians that federal taxes were not only constitutionally justified, but they did not dilute the states' powers to tax.

The states benefitted too. Because of concurrence, as Hamilton pointed out, New York could not lose its taxing or police powers just because the national government levied particular taxes, or regulated the collection of its revenues. Concurrence also ensured that state courts remained vibrant and powerful throughout the nineteenth century, and New York's courts in particular handed down cutting-edge legal doctrine arising from its commercial docket. As Morton Horwitz demonstrates, state courts generated most of the transformations in contract, tort, eminent domain, and property law that propelled the expansion of the American marketplace throughout the antebellum era.[4]

By actively litigating important legal questions in state courts, Hamilton practiced what he preached: he acknowledged the states' concurrent role in defining the character and

[4] See, in general, Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977).

jurisprudence of the new republic. Where else but in the state courts could Hamilton resolve the finer points of maritime contract law? Or argue that *all* of New York inhabitants enjoyed the protections of the common law, and particularly, the due process of law? Also, in the aftermath of Congress's Sedition Act, the state courts became key battlegrounds for contemplating the meaning of the freedom of the press in a republic—an opportunity to shape the law that Hamilton eagerly seized.[5] New York helped to redefine the meaning of the "freedom of the press" across the nation. Because both the national and state governments concurrently influenced the successes or failures of his statecraft goals, Hamilton looked to shape the law at both levels of the federal system.

Hamilton is best understood as a committed federalist—a legacy recognized by those early national judges and lawyers who incorporated Hamiltonian arguments about concurrence, executive discretion, and judicial power into Jacksonian constitutionalism. Dual federalism, the product of Andrew Jackson and Roger Taney's combined constitutional theories, posited that the state and national governments co-existed in separate, sovereign spheres of authority (borrowing from Hamiltonian concurrence) and that the U.S. Supreme Court presided over them, resolving national-versus-state conflicts like a constitutional umpire. Hamiltonian principles sit at the core of this brand of constitutionalism, as dual federalism embraces Hamilton's robust conception of federal judicial power and his notion of co-existing through concurrence. Even Hamilton's "defensive federalism" anticipates the notion that law and courts would be responsible for strictly policing the boundaries separating the sovereign state and national spheres.

Hamilton's legal influence thus extends over the development of the jurisprudence of American federalism. Acknowledging this legacy is significant in part because it recasts

[5] "An act in addition to the act entitled, 'An act for the punishment of certain crimes against the United States," ch. 74, 1 Stat., 596 (1798).

Hamilton as a dedicated federalist who worked to resolve the unique problems of American federalism, rather than as a one-dimensional, die-hard nationalist. Hamilton's formative influence over the jurisprudence of federalism is also important because negotiating the precise boundaries of the federal system became the dominant constitutional problem of the nineteenth century. During the antebellum era, the exact dimensions of federal authority and state sovereignty spilled over into the interwoven questions of states' rights, slavery, comity, and territorial governance, and eventually erupted into a constitutional crisis and civil war. Yet, even after war restored the Union, the problem of state and national sovereignty persisted, though in altered forms and through different legal questions. After the war, the U.S. Supreme Court still maintained the doctrine of dual federalism, but applied it to novel questions arising from African-Americans' claims to civil and political rights, from the working classes' pleas for workplace reform, and from Congress' still "dormant" commerce powers, which the Court leveraged to establish itself as the "umpire of the nation's free-trade network."[6]

Hamilton's preferred legal toolbox—the corpus of the English common law—offered few solutions to resolve these persistent, shape-shifting problems of federalism and rights in American jurisprudence. During the mid-nineteenth century, American courts slowly abandoned the common-law writ system, while, after Reconstruction, formalist lawyers and judges reduced the remnants of the common-law tradition to a rigid set of rules.[7] Deprived of its flexibility and distinct process, the inherited common law no longer provided lawyers with the viable litigation strategy that Hamilton embraced. Positivism, with its emphasis on the will of the sovereign

[6] Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *The Journal of Economic History* 38 (1978): 648.

[7] See Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992). Also, Michael Lobban argues that the rigors of pleading and writs gave the common law its adaptive flexibility to provide a variety of remedies to claimants. (*The Common Law and English Jurisprudence, 1760-1850* (New York: Oxford University Press, 1991), 1-16.

people expressed through statutory law, reigned as well, further reducing and relegating the common law to the interstices or periphery of American law.

Still, even though references to the King's Bench or to the British constitution largely disappeared from American law by the end of the nineteenth century, the common-law strategies used by Hamilton, and later discarded by subsequent lawyers, have implications for modern constitutional law. With the rise of legal positivism—and then formalism, followed by realism, and finally, originalism—the options and flexibility provided by the founding generation's common-law traditions seem to be far removed from modern judging. Yet, the eighteenth- and early-nineteenth embrace of English legal traditions remains relevant even today because it complicates twentieth and twenty-first century modes of constitutional interpretation.

If, for example, modern "originalist" judges seek to uncover and then adhere to lawmakers' original intentions, what does it mean for modern constitutional law that constitutional framers like Hamilton viewed written constitutions through the prism of the (sometimes unwritten) English common law? Are "activist" judges wrong to rely on "penumbras," substantive due process, or any other extra-textual jurisprudential foundations, when Hamilton and his lawyerly brethren looked to the expansive common-law tradition to give meaning to both state and federal law? Does judging outside the text of the U.S. Constitution repudiate positivism, or can it co-exist by reclaiming an older, revered legal tradition practiced by the "founding fathers" themselves? While these questions await consideration by other legal scholars, they may also persuade historians of Hamilton's contemporaries, like Thomas Jefferson, James Madison, and other lawyer-statesmen of the founding generation, to further

uncover how these men used the common-law tradition to accomplish their own lawmaking or administrative objectives.[8]

But of that generation, Alexander Hamilton remains the preeminent federalist, lawyer, and lawmaker. One posthumous admirer may even be correct to say that the "nation has not yet produced [one] greater." Recovering Hamilton's legal legacy, therefore, is crucial to understanding the development of American law, as well as to recognizing, to an even greater extent, Hamilton's formative influence on the early republic. We do well, then, to think of Alexander Hamilton as a lawyer, first and foremost, and to reflect on this most fitting of epitaphs:

> Alexander Hamilton sleeps in Trinity churchyard, in the heart of the great metropolis. Scores of lawyers may look from their windows upon his grave; thousands more pass it by heedlessly each day. . . Pause a moment, heedless thousands! He who sleeps in this churchyard was a lawyer. . . And how laboriously did he strive, how deep did he delve into the hidden treasures of the right! Great was his victory, and greatly did he deserve it. Pause, hasting thousands! Alexander Hamilton, the lawyer, sleeps here.[9]

And so, we pause.

[8] Historians who have already begun this inquiry include Mary Sarah Bilder, "James Madison, Law Student and Demi-Lawyer," *Law and History Review* 28 (2010): 389-449 and Herbert Alan Johnson, "John Jay: Lawyer in a Time of Transition, 1764-1775," *University of Pennsylvania Law Review* 124 (1976): 1260-92.

[9] All quotes in this paragraph are from Daniel W. E. Burke, "Alexander Hamilton as a Lawyer," in Melvin Gilbert Dodge, ed., *Alexander Hamilton: Thirty-one orations delivered at Hamilton College from 1864 to 1895 upon the prize foundation established by Franklin Harvey Head, A.M.*, (New York: G.P. Putnam's Sons, 1896), 182.