

Book Review

Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865*. Cambridge and New York: Cambridge University Press, 2010, pp. 636, \$36.99.

Reviewed by Peter Onuf

Christopher Tomlins's important new book explores and illuminates a paradox, beginning with its title. Freedom, the central, self-defining characteristic in American national mythology, was bound to slavery and the dispossession of indigenous peoples by the very process of colonization itself. European settlers were not bound for freedom, to be liberated from the shackles of Old World tyranny and despotism in a free land. Far from being a terra nullius or empty space, the North American mainland was already possessed by natives. English colonizers deployed the "technology" of law to impose a new, European order on the American landscape and on the colonists themselves. Law furnished "the institutional capacities to establish migration and settlement overseas as legitimate, organized processes" (5). Neither law nor the land itself made settlers "free." Instead, "freedom and unfreedom come together" in the process of colonization: they were "conditions of each other's existence" (16).

American historians have long since distanced themselves from the exceptionalism of Frederick Jackson Turner's democratizing frontier, where free land gave rise to self-government, or of Louis Hartz's notion that the English colonies, in the absence of the thick social relations and institutional infrastructure of the European old regime, were born liberal.¹ By now, thanks to Edmund Morgan's *American Slavery, American Freedom: The Ordeal of Colonial Virginia*,² it is well understood that freedom in colonial Virginia—and, by extension, British-America generally—was inextricably linked to the rise of racial slavery. Yet Morgan's revisionist account of the new nation's misbegotten birth and the neo-progressive historiography that it has since inspired still betrays strong exceptionalist tendencies. If slavery was the American revolutionaries' legacy, so too was the freedom that they boldly claimed in the name of

1. *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt, Brace, and World, Inc. 1955).
2. Edmund Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (W.W. Norton 1975).

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their own natural rights—a freedom that ultimately could not be denied to subsequent claimants. Law-minded founders thus issued manifestoes—like the Declaration of Independence—and drafted constitutions and bills of rights that articulated an irresistible logic of liberty. Freedom and slavery may have shared a common genealogy, but they now clearly stood opposed to one another and this fundamental tension was reflected in the hypocritical professions of freedom-loving slave-owners. That tension provides much of the energy for contemporary historical writing on the belated, never quite realized fulfillment of American democracy’s promise. The law plays a critical freedom-making role in this redemptive meta-narrative. By bringing oppressed and excluded groups into its liberating embrace, the law overcomes its inertial, regressive tendencies to support vested interests and the powers that be. Law had created the “conditions of freedom” for enterprising white men, as legal historian James Willard Hurst famously wrote; as the rights of citizenship were extended to other groups, unfettered access to the law and its protections would extend the ambit of freedom.³

Tomlins, one of our very best legal historians, is less impressed with the immanently progressive tendencies of the law than most mainstream historians or many colleagues in his own field. This is not to say that he out-revises the revisionists, leaving us with a hopeless, irredeemable national narrative, but rather that he puts law in its place—that is, everywhere, as a “technology of and for colonizing” that explains practically everything in the extended era of Anglo-American colonization—without succumbing to romantic conceptions of the rule of law that animated Whiggish constitutionalists and their progressive progeny (506). Tomlins’s chronology is crucial, for the Revolution and the founding do not represent for him “a primal enactment of foundation in a moment of purity and human invention,” the birth or rebirth of “freedom,” only one—if by far the most important—of “an eternal succession of beginnings” (543). Tomlins instead looks forward to the abolition of slavery as the end of the great colonizing project that bound freedom to unfreedom and thus established a fundamental continuity between British America and the independent United States. After 250 years, Tomlins concludes, a “time for choice” had finally arrived, “and the instant was recognized, too, in all its gaunt and brilliant clarity.” In unleashing the force of the union against the Confederacy, Abraham Lincoln presided over a war that juxtaposed slavery to freedom: “if only for a moment, freedom was unbound” (569).

Tomlins does not mean to suggest that this “new birth of freedom” would shape the course of subsequent American history, for the postcolonial nation would reunite, consolidate and extend its governing capacity under the aegis of a reconstituted rule of law and a myth of constitutional continuity. Instead,

3. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Univ. of Wisconsin Press 1984).

Lincoln could see—and we can see with him—that law was the problem, not the solution to the American dilemma of slavery and freedom. In his legal reasoning, Chief Justice Roger Taney was not wrong in *Dred Scott v. Sandford* (1857) when he remained faithful to what legal historian Mark Graber calls “constitutional bisectionalism” (522, citing Graber⁴). The American federal union, like the English and British colonies that preceded it, was a product of the law, not a temporizing compromise of its fundamental principles. Freedom and unfreedom had been conjoined by law in the colonizing project, “a conjunction that manned, planted, and secured the mainland for settler colonists, first against its existing inhabitants, later against the metropolitan imperial state” (524). This was the conjunction that the lawyer Lincoln sundered in a visionary moment, despite his fealty to the union and to the principles of compromise he imbibed from his idol Henry Clay. For freedom to be unbound, the law that had sustained slavery in North America for a quarter of a millennium had to be silenced. And so, “the war came,” and with it not only the destruction of the antebellum union but the end of the great epoch of Anglo-American colonizing.

Tomlins has a great deal to say to historians about the stories they tell. The most misleading one is the narrative that takes us from slavery to freedom, and that insists that the peculiar institution is an archaism, ultimately incompatible with capitalism or “liberal modernity” more generally. Yet it is striking that liberal modernity, as Tomlins writes, “actually coexists with innovations—disciplined service, gendered subalternship, and racialized enslavement—that seem to contradict it” (343). “Seemed” is the critical word here, for modernity’s test for “modern” people is whether we see these “innovations” as incompatible with the way we see our world. But that does not tell us what “modern” people in the past—in their own present—could see as necessary, natural, and even moral, thus authorizing their own innovations. This larger point about anachronism has specific implications throughout *Freedom Bound* as Tomlins demonstrates the centrality of law to a colonizing process that was central to the making of the modern world. We need to overcome our own reflexive reverence for the law in order to grasp the way the law worked in and through this process. To help us do so, Tomlins resorts to insightful readings of literary works such as Shakespeare’s *Tempest* that enable us to see how law operates at the onset of colonization. Prospero reduces Caliban, his island’s original possessor, to a condition of servility: “[V]iolence begins law and completes it. As a modality of rule, of well ordering, law is extortion” (561). Taney and Prospero speak the same legal language: “Prospero’s seductive epilogue as clearly assures Caliban’s continued subalternship as Taney’s bisectional constitutionalism would guarantee the slaveholder’s indefinite veto” (569). The law would not destroy slavery, for the slave—like Caliban—was law’s creature.

Tomlins’s bold and eloquent indictment of law comes at the end of a very long book, and should be taken for its heuristic value, to shake us out of our

4. Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge Univ. Press 2006).

benumbed, law-bound complacency. Law, after all, is only a “technology,” not the incarnation of all that is evil in the world before or after Lincoln’s visionary moment, when freedom was unbound. And Tomlins is careful to avoid the reductive binary oppositions—slavery against freedom, Old World against New—that sustain conventional exceptionalist misreadings of the American past. It is crucially important that Tomlins does not begin his study, as I have done this review, with his discussion of Lincoln’s moment, when the essential meaning of colonization “flashed up in an instant” (569). If, at this moment of truth, law had to be jettisoned in a foundational “new birth of freedom,” law is all we have to work with when that moment passes and we return to work. So too, it was only through the operations of the law that Europeans could forge a “bridge that bore them across the ocean,” moving vast numbers of people “from one jurisdiction to another” and securing “permanent occupation” (69, 77–78). Tomlins offers a comprehensive study of the way English America was peopled, under the aegis of the law, and how settlers—even in the Chesapeake—enjoyed considerable freedom. If he deflates the Revolution and founding as critical nation-making moments in the land of the free, he also recognizes the ways colonization enabled colonists to enjoy unprecedented freedoms under a plurality of colonial legal regimes.

This essay cannot do justice to the richness of Tomlins’s analytical narrative. Suffice it to say, as the following discussion is intended to demonstrate, that *Freedom Bound* should—and I very much hope—will revolutionize the way we think about the history of American law and American history generally.

Tomlins begins with a comprehensive discussion of the great movement of people across the Atlantic, challenging the conventional view that this movement was largely coerced and involuntary. A first, rough calculation does indeed seem to suggest that “unfreedom” was the default: 320,000 (40 percent) of 800,000 migrants during the colonial era were enslaved Africans (21 percent); another 54,500 (7 percent) were convicts or prisoners of war; and about half (48–50 percent) of the remaining, supposedly “voluntary” migrants “were committed to an initial period of servitude by indenture or similar arrangement” (35). The conventional conclusion would be that the unfree condition of more than 70 percent of migrants set the terms for labor: Unfreedom was the default. But Tomlins argues convincingly that the indentures that served to recruit and transport large numbers of laborers did not determine the character of work more generally. At any given time, and in stark and increasingly conspicuous comparison to their enslaved African counterparts, the large majority of European workers were free. Most white workers were contained within households, and most “unfree” servants—particularly in New England and the middle colonies—were recruited into the family workforce to make up for temporary or permanent labor shortages. But

there were also significant numbers of detached workers, and their relative scarcity enabled them to command high wages and considerable autonomy under emerging colonial legal regimes.

Free labor was well established in law everywhere on the mainland, even in the Chesapeake where indentured servants were brutally exploited for the duration of their terms and the colonial “state” offered them few protections. Freedom, not unfreedom, was the default. The “supposition of a radical transformation” from unfreedom to freedom is therefore untenable, however much it resonates with the “discourse of progress that has animated modern American history and simultaneously distances modern America from its colonial origins” (30).

If “American identities, free and bound,” emerged out of the colonizing process itself, then the American Revolution could not be the “decisive point of transition from unfreedom to freedom” (65). That such a transition took place, with the Patriots turning their world upside down, is of course the nation’s foundational myth. Tomlins makes it clear that “freedom” antedated the break with Britain and that—despite grand rhetorical flourishes and a few modest local steps toward amelioration and emancipation—slavery flourished in the new nation. “In Anglo America,” he concludes, “modernity’s hopes and slavery’s brute facts come wrapped together as one” (409). In short, the expansive, dynamic, law-driven process of colonizing did not stop with American independence. To the contrary, as the expropriation of Indian country and the expansion of slavery on the cotton frontier would demonstrate, colonizing was about to enter its most dynamic phase.

Tomlins’s colonial period thus extends from 1580 to 1865. Colonizing began with the projection of legal claims in a competition of the European powers to establish sovereignty and dominion in the extra-European world. Tomlins shows how the law of nature and nations and the justifications it offered for making war on indigenous “sovereigns” were deployed in this competition, thus establishing the legal foundations of new American commonwealths.

Charters transformed claims into commonwealths. Just as his discussion of indentured servitude illuminates the legal technology of migration and therefore the broader narrative of American history, Tomlins’s brilliant reading of the colonial charters overturns the conventional wisdom. Usually seen as exercises in wishful thinking that were utterly inappropriate for new world conditions, these charters were in fact the founding documents of the Anglo-American colonizing regime. By delegating sovereign authority and setting the limits of new colonies, charters simultaneously preempted European competitors and established “possession of territory *to the exclusion* of its [indigenous] inhabitants” (132, emphasis in the original). Under the forms of law, Indians were displaced “to the edges of conceptually emptied spaces” (177).

Charters “licensed departures” of migrants and “established jurisdictions to manage arrivals,” moving people and controlling labor in order to effect permanent occupation (77). Unlike the Spanish, the English had little interest in or capacity for managing and exploiting indigenous peoples—beyond early trafficking in Indian slaves—and instead created commonwealths “to be inhabited by one’s own migrants” (142). Charters were “catalogs of intense creative activity that emphasize systematic transformative action on the land” (159), providing the legal framework for migration, settlement, and development. “Manning, planting, and keeping were interdependent processes” requiring “long-term investment” (165). It is too often assumed that charters would prove irrelevant to the relatively autonomous legal and economic development of settlement societies. To the contrary, they provided the legal framework for ongoing negotiation and contestation both between imperial center and provincial periphery and within the new provinces themselves.

The charters’ “discourse of territorial appropriation, occupation, and improvement” was embraced everywhere in Anglo-America, most notably by settlers themselves (184). When, during the run-up to the Revolution, American patriots invoked their charters—even those, like Virginia’s, that had long been vacated or superseded—as “constitutions,” they reaffirmed their fealty to the fundamental principles of the empire’s colonizing regime. Indeed, it could be argued, colonists’ anxieties about how imperial reform efforts might restrain future colonization—by curbing land acquisition, protecting indigenous clients, and perhaps even by threatening planters’ property in slaves—drove them out of the British Empire. Imagining a postcolonial empire that would subvert their liberties and constitutional rights as colonizers, Anglo-Americans declared their independence in order to sustain colonization.

With the displacement of indigenous peoples, English colonizing became “more and more a self-colonization; no longer, that is, primarily a visitation of power upon strangers” (189). Through the “colonizing impulse,” a “plurality of representations of Englishness and plural modalities of rule” emerged on the North American mainland (188). Focusing on the sources and destinations of English migration, Tomlins illuminates the complexity of colonizing. “Poly-Olbion, not Albion”—a single, homogenous England—“was what went overseas to inhabit the colonies” (194). Settlers had experienced different forms of rule in different parts of England, from the domination of manor lordships in the arable South and Southwest to “weak manorialism” in pastoral regions (206), and would be subject to distinctive regimes in America. There was an elective affinity between specific regions in England and the colonies: “[S]elf-government...developed naturally in lordless environments.” If, at one extreme, “New England’s lordlessness was complete,” the “legal culture of the Chesapeake” imitated “downland arable England” with planters crudely mimicking their lordly counterparts (222, 224–25). In between, the middle

colonies combined characteristics of the two extremes: The Pennsylvania proprietary sought to impose a manorial regime, but settlers from pastoral areas and Quaker sectarians proved recalcitrant subjects.

Tomlins's analysis of the "self-colonizing" process emphasizes the "variety of systems of work and labor regulation" that emerged from the "local contextualizing of legal processes" (230, 228). On first reading, Tomlins's survey of colonial legal regimes strikes familiar chords in the conventional interregional comparisons that dominate colonial history. His larger point, however, is that "local statutory regulation established interstitial zones of freedom in each region of colonial settlement" (294): Free labor was a creation of the law, even in pseudo-manorial Virginia. Free labor was neither the primal condition of free people in a state of nature, nor did it "arise in the course of a unidirectional eighteenth-century transformation of Anglo-American polis and society from rule by traditions of patriarchal magistracy to the rule of individuality and consent" (342). Freedom, in short, was a function of the colonizing process itself, not the natural state of man before history or at the endpoint of his progressive development through history.

By locating freedom in history and free labor in a plurality of colonizing regimes, Tomlins avoids the temptations of exceptionalism. "Freedom cannot be thought of as an absolute state" outside of history, "but as one subject to fundamental limit conditions, or liabilities, obedient to legal-cultural demarcations: age, gender, and race" (233). But even free white males exercised their "rights" under the law; their freedom was an historical construction, subject to the kinds of legal redefinitions that reduced free workers to "servants" in nineteenth-century labor law and "criminalized discipline in the employment relation" (349). Having banished the idea of freedom as an ahistorical absolute, Tomlins is not simply substituting a narrative of decline for the "rise of free labor" narrative. His point instead is that the notion of "consent" could be radically circumscribed in labor law even as its ambit expanded—albeit more in celebratory rhetoric than in practical reality—in the new nation's civic and political life. If consent, like freedom, was a contingent historical-legal construction, the degradation of labor in master-servant law was certainly reversible.

Tomlins brilliantly deconstructs Henry Sumner Maine's influential formulation that patriarchy—the legal and cultural foundation of the hierarchical old regime—gave way to a new, liberal politics based on consent, with a fundamental shift in law "from status to contract" (360, quoting Maine). Perhaps "the birth of liberal modernity" is better characterized as "a movement from lordship to consent," with incipiently democratic notions of "equality" subverting traditional status distinctions and corporate identities in the political domain (361). Tomlins thus concedes that "'status to contract' is not a meaningless formulation," but insists that its meanings were not universally equal. If freedom of contract shifted the balance of power to employers, the

extrication of patriarchy from polity reinforced patriarchal authority in the household. Hierarchy was ostensibly banished from public while “vertical and sexual divisions of labor” gave the domestic domain a “hierarchical structure... which is male in authorship and ultimate benefit” (381). Though contract theorists anticipated Maine in positing a fundamental shift from patriarchy to consent—from a vertical to a horizontal conception of social order—historians of political thought have shown that “patriarchal and contractual accounts of association rose together,” not in sequence (362).

This displacement of patriarchal authority to a supposedly autonomous household in turn authorized a new “conception of the economic sphere’s autonomy,” now conceived as “private,” in contradistinction “to the polis’s ‘public’ sphere” (381). Liberalism’s reconstruction undoubtedly expanded civic and political opportunity for white men, but their freedom was contingent and limited, notwithstanding the natural rights rhetoric that justified the break with Britain. Revolutionaries could delude themselves about the absoluteness and universality of their rights, deploying law as the liberating instrument of a free people. But their freedom was a product of law. “Both in England and on the American mainland, the English colonized barbarous others and simultaneously the rude parts of themselves,” and they would continue to do so after independence. “Coercive legalities disciplined contracts, patriarchy underpinned politics. The empire of the father shaped the empire the fathers founded” (398). If self-colonized Anglo-Americans made themselves “free” through law, and by resisting reforms in the imperial constitution, they also used law to enslave Africans.

Historians tend to juxtapose freedom and slavery, as if they had distinctive genealogies. The distinction enables modern Americans to distance themselves from the peculiar institution. If racial slavery and its legacies constitute the “American dilemma,” it is precisely because slavery was an archaic and alien institution, properly belonging to another time and place. In Tomlins’s words, “American historical orthodoxy has seized upon the social and political modernity colonizing made possible and has lashed it to an idealized temporality of progress that leaves...the premodern in its wake” (398). But slavery and freedom were inextricably linked: “[O]ne can think of the statute law of slavery precisely as an exercise in the employment of law as a technology of and for colonizing” (506).

For the colonizing powers, nature “sanctioned wars against barbarians and savages, criminals and beasts, and the punishment (enslavement) that accompanied such wars” (423). Beginning in the 1660s, settlers took matters into their own, whip-wielding hands, “fashioning slavery both as a culture of work and as a culture of absolute subjugation” (431). The development of these slave codes through innovative adaptations of the common law makes for dreary, dispiriting reading. Eighteenth-century legislators, sensitive to metropolitan critics and seeking to bolster their own self-esteem, dressed slavery

in the “garb of legality and humanity” (451). In doing so, they participated in “colonizing’s ‘civilizing process,’ its declaration of war on brutes” (507).

Tomlins’s comprehensive survey of colonial slave law sets the stage for his powerful concluding chapters, when the colonizing project that made America modern came to a bloody denouement in the Civil War, and freedom became unbound, if only for a brief, clarifying moment. The long epoch of North American colonizing has left us a tangled legacy that Christopher Tomlins’s magisterial *Freedom Bound* enables us to unravel.