

or that the extra-legal weapon will serve the right revolution rather than tyranny. In this book, the space outside of law is a rare place of romantic radical heroism, of a kind not attainable by legal actors. Aron of Titus Andronicus who longs for the armed camp the better to carry out the slaughter of those who have so bitterly oppressed him; Lincoln's choice to bring America into its most terrible war. God help us if these are our models for action.

It can hardly stand as criticism, however, that a historian has not told all stories that there are to tell, much less that he does not provide us with sufficient guidance for action. And it should certainly stand as high praise that this important book requires us to reflect further on our actions; that it tells a complex, powerful, and necessary story; and that it tells it well.

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

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By any accounting, Christopher Tomlins's *Freedom Bound* is a remarkable work. Tomlins offers a new understanding of the relationship of law, labor, and colonization in the structuring of the American polity and society from the sixteenth through the nineteenth centuries. He meticulously analyzes the practices, rules, and relationships that shaped the colonizing process in the political imagination and on the ground; he makes clear that the material construction and reconstruction of colonial societies and populations took precedence over any plans set down in London. In the process, he also deconstructs any retroactive fantasies about early America as a realm of golden opportunity for all.

But as even a cursory attention to the baroque writing and dispersive structure of *Freedom Bound* will suggest, Tomlins aims at something more than a reinterpretation of British America's colonizing past. *Freedom Bound* presents itself as a model for a new sort of historical materialist legal history, one simultaneously reductionist and fantastical, overwhelming in its attention of law's detail yet dismissive of law's autonomy, sensitive to the political frame of societies yet ultimately skeptical that they make much difference at

all. In all of these philosophical and methodological transgressions, Tomlins writes under the sign of Walter Benjamin whose essays and *Arcades Project* serve as provocation for Tomlins' efforts. As Tomlins has indicated elsewhere, he is seeking to re-imagine the history of the law; to examine it under the microscope of justice while detailing its complex inter-penetrations (not intersections) with other structures of human experience (Tomlins 2010).

And yet, in the end, there is a fracture at the heart of *Freedom Bound*. For the historical story that Tomlins tells, and the theoretical vision that he seeks to instill, do not, ultimately, cohere. Benjamin wrote, in an essay crucial to Tomlins' conception of the history of law, "The historical materialist blasts the epoch out of its reified 'historical continuity,' and thereby the life out of the epoch, and the work out of the lifework. Yet this construct results in the simultaneous preservation and sublation [*Aufhebung*] of the lifework *in* the work, of the epoch *in* the lifework, and of the course of history *in* the epoch" (Benjamin 2002: 262). This project is political at its core; it aims ultimately at making history work as a corrosive against the taken-for granted present. But, Tomlins fails, I would argue, to achieve that simultaneous "preservation and sublation." In his relentless tracking down of the legal apparatus of coercion his era becomes covered in an endless sameness. We are left in the end with the epoch far more than the lifework or the work; history blurs and emptiness reigns. Indeed by his conclusion Roger Taney has replaced Walter Benjamin as the theorist of the story—and with that displacement comes a story of "empty time" (Benjamin 2003: 395).

Almost immediately, *Freedom Bound* begins developing a series of revisionist claims. First, Tomlins plots a story driven by a demographic determinism—in this story demographic drivers and crises almost always drive crucial transformations. Yet, second, these demographic drivers are articulated in the highest forms of Euro-American civilization—not simply law but philosophy, literature, and religion. Third, Tomlins introduces and multiplies an almost endless process of division: of forms of labor, points of geographic departure, legal statutes, and populations in motion. But, and this is the fourth and final point I want to stress, this overwhelming division and specificity is presented in the service of a background monotony. The reader is, and I think by design, overwhelmed by the degree of detail till it merges into what Benjamin would have called the "empty time" of history. Tomlins goes far down the road of allying himself with two key claims of Benjamin's "On the Concept of History." The first is Benjamin's famous declaration that "there is no document of culture which is not at the same time a document of barbarism" while the second, deriving from Benjamin's meditation on the image of an angel driven against its will by the storm of history: "while the pile of

debris before him grows toward the sky. What we call progress is *this storm*" (Benjamin 2003: 392).

These themes and approaches recur throughout the text. Take the issue of demography. Tomlins begins with a detailed analysis of the structures and numbers of actual colonization: who went where, in what number, and under what condition. This opening introduces two of the central and repeated arguments of Tomlins' analysis—that colonization was not some abstract intellectual project but rooted in actual labor and that for English America labor and its conditions were not uniform but elaborately and aggressively diverse. Significantly for Tomlins' characterization of the trajectories of American labor, he argues that indentured servitude was simply one of many forms of labor in early America and by no means as central as we might think (64–66). There was, to put it clearly, no single starting point for labor and law, no origin from which all of subsequent history could depart. Whatever history would follow from early plantations it would not be a uniform trajectory. But the power of demography persists far beyond this opening: the Statute of Labourers (1351) was "conceived in the reaction to the trauma of the Black Death" (78–79); Virginia's slave law of 1705 "explained by the particularly rapid increase in resort to slave imports in the face of the renewed shutdown of the servant trade after 1705" (272); *Dred Scott* shaped by "the ceaseless flow of population migrating into the immense trances of land" of the republic "and from the changes that the movement of population had wrought in the sectional balance of power within the republic" (516).

But this demographic determinism is conjoined to the aesthetic and the philosophical. In sixteenth-century Humanism and sixteenth and seventeenth-century English labor law, Tomlins finds the "high" and "civic" vision that underlay the planting and settling of the colonies. Aristocratic Humanism, in Tomlins' telling, not only imagined a utopian space in the "New World" (most famously in More) but constructed an actual colonizing process in the name of civility and social regulation. These twin themes allowed colonial promoters to mobilize the entire range of legal discipline over unfree labor and to justify the seizure of land from the Native Americans in the name of an emerging Natural Law tradition that—despite its universalist pretensions—served to legitimate European empire under an early guise of the "civilizing process."

Mediating between this high and this low were both the movement of social forms and the elaboration of legal structures and strictures. Drawing on David Hackett Fisher's anatomy of English migrations to America with its depiction of streams of ethnic settlements (Fischer 1989), Tomlins is able to show a distinct set of different socio-legal orders making their way to British America. In

Tomlins' hands, these different streams brought with them different legal borrowings from England; the multiplicity of demography led to the multiplicity of social forms themselves anchored in multiple legal structures and institutions. But then something quite odd happens: Having set up a series of matrices of organization and law, and having stressed the variety of these systems, Tomlins' narrative collapses into a picture of sameness across time. If geography matters a great deal, time matters little: in Chapter 7, for instance, when a legal case occurred appears to carry no significance.

Tomlins repeats this movement from dispersion to sameness in his treatment of slavery. The leap into slavery is perhaps the most fundamental transition of the book. And its absolute centrality to Tomlins' story is driven home through his fascinating and powerful demonstration of the ubiquity and consistency of slave codes across the eighteenth and nineteenth centuries. But as with the driving force of origin in the shaping of settlements, the effect of Tomlins' narrative is to turn the history of North American slavery into a single dark night, to reduce it to the empty and monotonous time of a uniform oppression. That slavery was oppression no one doubts; but that it was the same oppression regardless of time and place is another matter. Tomlins distinguishes his project from that of the social historians (506–508) in justification of this monotony. This claim is true enough. But it doesn't get to the heart of the matter.

Freedom Bound culminates with *Dred Scott*. As with the rest of the book, Tomlins offers a careful deconstruction and reconstruction of the contexts, arguments, histories, and meanings of the case. Concluding with *Dred Scott* powerfully sums up Tomlins' contention (echoed in his demonstration of the increasingly coercive nature of labor law in the nineteenth-century) that labor's freedom was increasingly bound by law across the first 250 years of American settlement. But Tomlins' treatment of *Dred Scott* not only gives it a weight it cannot bear, it also fails to achieve the Benjaminian project of preserving the life, the life-work, and the epoch.

Tomlins is concerned to show that Taney's reasoning in *Dred Scott* cannot be dismissed on Constitutional grounds. In taking this position, he follows Mark Graber's *Dred Scott and Problem of Constitutional Evil* (Graber 2008). Graber, like Tomlins, argues that Taney's opinion was a perfectly defensible one in Constitutional terms. Graber does so as to raise the problem of what evils should be accepted in order to benefit from a stable constitutional order. Graber's argument is complex and controversial and I do not want to engage it here. But I do want to point to two aspects of the argument that, once acknowledged, demonstrate the problematic character of Tomlins' reliance on Taney. First, it is essential to recognize that, for Graber, what gives Taney's argument its weight is the idea that Taney was

defending a constitutional order conceived not in legal terms but in political ones. It was Taney's understanding that the bi-sectional political compromise (where the South could not have its institutions undermined without its consent) lay at the heart of the Constitutional order that, according to Graber, legitimates his constitutional understanding. The relevant precedents for Taney were not specific juridical traditions (which on a variety of issues were far more unstable than either Taney or Graber acknowledge) but a political understanding of the Constitutional structure. The second point is simpler—Taney was defending a particular constitutional order. He might have, as he did, seek to ground that order in a set of historical claims that exceeded that order, but these claims were ideological projections backward.

These two points are crucial for Tomlins' claims because *Freedom Bound* repeats Taney's gesture of conflating a specific constitutional order with a larger historical epoch. Doing so blinds Tomlins to the genuine effects of revolutionary moments. In seeking to undermine a notion that Anglo-American revolutions were emancipatory moments, he misses their true significance to his story: as crucial moments in the construction of the slave regime that he wants to analyze. It was, after all, the revolutionary settlement of 1688–1689 that opened up the slave trade to an expanding and increasingly rapacious merchant fleet, and it was the American Revolutionaries, acting against what David Waldstreicher has termed the "Mansfieldian moment" that created a constitutional order based on slavery (Waldstreicher 2009: 40–41). Instead of a monotonous empty time of slavery, there was a discontinuous history in which transformations were accomplished not by the demands of demography but by a conscious set of political decisions. Without that politics the "life" and the "life-work" cannot be preserved.

Freedom Bound, then, offers a powerful analysis of the place of labor and law in the structuring of American society. But its particular offering of a materialist history of law cannot quite reach its ambitions to be, as Benjamin put it, "the subject of a construction whose site is not homogenous, empty time, but time filled full by now-time" (Benjamin 2003: 395).

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I am indebted to Holly Brewer, Michelle McKinley, Kinch Hoekstra, and Michael Meranze for their considered assessments of *Freedom Bound*. I thank them of course for their kind words, but also, more importantly, for the questions they have raised. Above all I thank them for the care with which they have approached my work. Taking nothing for granted, their comments dive deeply into the book and engage with it as critically as any I have seen.¹ Unsurprisingly, given their own interests (and this forum) they interrogate the book not simply as history but as *legal* history—indeed as an attempt to undertake a historicized theorization of law. The result is four commentaries that, collectively, address not only particular details and points of argument, but raise questions at the highest level of scholarly representation and purpose.

To facilitate a response I have chosen to arrange their commentaries on a gradient, as it were, that will move the discussion precisely along a line ascending from legal history as an exercise in socio-cultural inquiry, to history as a means of apprehending law, thence to the theorization of law that history may enable, and finally to the theory that informs *this* history. I do so in the hope that this will assist me in explaining why *Freedom Bound* assumed the form I chose for it. Whether I am successful in that larger purpose

¹ To date, other lengthy critical interrogations of the book have been published by Julia Adams (2011), Stuart Banner (2011), Paul Eiss (2011) Peter Onuf (2011), Tamar Herzog and Richard J. Ross (2011), and Richard White (2011). I have replied to Adams, Banner, Eiss, Ross and Herzog, and White in Tomlins (2011b).