

Law, Labor, and Ideology
in the
Early American Republic

CHRISTOPHER L. TOMLINS



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Law: the modality of rule

Men generally set up the most solid embankments against open tyranny, but do not see the imperceptible insect that gnaws at them and opens to the flooding stream a way that is more secure because more hidden.

Cesare Beccaria, *Dei Delitti e delle Pene* (trans. Henry Paolucci)

In conceptualizing social institutions and the action they envelop, recent trends in contemporary social theory have tended to reinforce the historian's more intuitive proclivity to take nothing for granted. The relationship between human activity and its context, we are warned, is problematic and indeterminate. Society and its cognates – economic processes, cultural traditions, values, and mores – are ultimately contingent upon the epistemological speculations in which all human beings must engage in order to establish sufficient common ground to enable each other's actions to be observed, described, categorized, debated, and, ultimately, understood. Contemporary social theory does not deny that the relationship between human action and social context is amenable to explanation, but it does seek to restore the contingency attendant upon an appreciation of human agency to that task of explanation. Society must be understood as the expression neither of an all-pervading underlying natural order nor of irresistible material forces. Rather, society "is made and imagined . . . a human artifact."¹

¹ Roberto Mangabeira Unger, *Social Theory: Its Situation and Task* (New York and Cambridge, 1987), 1. See also John Dunn, "Social Theory, Social Understanding, and Political Action," in his *Rethinking Modern Political Theory: Essays, 1979–83* (Cambridge, 1985), 119–38. According to Antonio Gramsci, "most men [*sic*] are philosophers in as much as they operate on the practical level and in their practice (in the controlling pattern of their conduct) have a conception of the world, a philosophy that is implicit" (as quoted in James Henretta, "Social History as Lived and Written," *American Historical Review*, 84, 5 [Dec. 1979], 1309). See T. J. Jackson Lears, "The Concept of Cultural Hegemony: Problems and Possibilities," *American Historical Review*, 90, 3 (June 1985), 570.

The antideterminism of contemporary social theory surely comes as a relief to intellectual historians such as Thomas L. Haskell, who feared some years ago for the impact of "radical contextualism" on assessments of the potential for voluntarism in human action. See his "Deterministic Implications of Intellectual History," in John Higham and Paul K. Conkin, eds., *New Directions in American Intellectual History* (Baltimore, 1977), 132–48. To his credit, however, Haskell also observed at that time that to present human action as absolutely voluntaristic and the actor as wholly accountable would be as misleading as the determinism which he fears. Indeed, "if intellectual historians tend toward a comparatively

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Thus apprehended, human activity recaptures dynamic qualities of unruliness and unpredictability from the necessitarian constraints of yesteryear, while at the same time due recognition is given to the way in which humans, most of the time, are motivated to avoid or at least finesse that unruliness through theorizing the meaning of human activity. Our theorizing encourages the appearance and informs the development of conceptual structures-in-common, or paradigmatic discourses, which furnish the institutional and imaginative contexts that give meaning to human action and thereby establish what I will refer to here, with intentional irony, as "the facts of life."²

It is important that we recognize these facts of life as conditional statements, albeit conditionals of considerable authority, for "occasionally . . . we push the given contexts of thought, desire, and practical or passionate relations aside."³ Instances in which transformative change is actually accomplished may well be exceptional. "A conceptual or social context may remain relatively immunized against activities that bring it into question and that open it up to revision and conflict."⁴ Contrary to classic theories of revolution,⁵ however, transformative action does not need to be qualitatively distinct from the normal or routine activities which reinforce contexts. "Pushed far enough, the small-scale adjustments and revisions that accompany all our routines may turn into chances for subversion."⁶ Those who disregard this potential in everyday life risk turning conditional contexts into absolutes and "established modes of thought and human association" into "natural forms of reason or relationship."⁷

deterministic view of human affairs, that may be no defect but an advantage if it lends balance to a profession otherwise inclined toward voluntarism. One might on that account even welcome a broader alliance under the rubric of 'social and intellectual history' of all those historians whose curiosity centers not on events but on the circumstances underlying and shaping events, regardless of whether the circumstances are social or intellectual in character" (145).

² Unger, *Social Theory*, 18–25. See also, generally, Anthony Giddens, *New Rules of Sociological Method: A Positive Critique of Interpretative Sociologies* (London, 1976); and idem, *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (London, 1979); John B. Thompson, *Studies in the Theory of Ideology* (Berkeley, 1984), 148–72. There are similarities here with Durkheim's theory of "social facts." For Durkheim, however, the relationship of social fact to human action was that of an independently existing exogenous constraint (Emile Durkheim, *The Rules of Sociological Method* [New York, 1964], 1–13). See also Joyce Appleby, "Value and Society," in Jack P. Greene and J. R. Pole, eds., *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore, 1984), 290–316.

³ Unger, *Social Theory*, 18. ⁴ *Ibid.*, 21.

⁵ E.g., V. I. Lenin, *What Is to Be Done? Burning Questions of Our Movement* (Peking, 1973), 122–188.

⁶ Unger, *Social Theory*, 21, 152–3. And see Robert W. Gordon, "New Directions in Legal Theory," in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York, 1982), 286–92.

⁷ Unger, *Social Theory*, 18–25. For critiques of Unger's theory of formative contexts see John Dunn, "Unger's *Politics* and the Appraisal of Political Possibility," and David Van Zandt, "Commonsense Reasoning, Social Change, and the Law," both in *Northwestern University Law Review*, 81, 4 (Summer 1987), 732–50 and 894–940. Dunn argues that, like Barrington Moore, Unger sees "the human imagination as the site where human history is finally determined," a view he sustains "while attending to the heavy weight of power and the raw urgency of material need" (739). Van Zandt's appraisal is more negative. Arguing that Unger portrays formative contexts as restraints "external to and alien from individual interaction" (905), Van Zandt proposes instead that formative contexts "are individuals' own products whose pragmatic utility is constantly reaffirmed through daily use" (921). Differential outcomes in this pragmatic search for utility maximization, says Van Zandt, explain the incidence of inertia and change in social formations.

LAW'S REVOLUTION

Between the Revolution and the beginning of the nineteenth century, law became *the* paradigmatic discourse explaining life in America, the principal source of life's "facts."⁸ Only gradually during the first half of the eighteenth century but with increasing rapidity thereafter, law moved from an essentially peripheral position as little more than one among a number of authoritative discourses through which the social relations of a locality were reproduced – religion, family, community, clientage⁹ – to most of which it was effectively subsidiary in influence and standing¹⁰ and from which it derived most of its normative content, to a position of supreme imaginative authority from which, by the end of the century, its sphere of institutional and normative influence appeared unbounded.¹¹ The features by which this move may be recognized were shifts in law's internal intellectual organization, from a series of discrete and loosely connected discourses to one holistic, "scientific," Anglocentric

⁸ See, e.g., A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill, 1981). See also Richard D. Brown, *Knowledge Is Power: The Diffusion of Information in Early America, 1700–1865* (New York, 1989), 82–109, 116–22.

⁹ *Ibid.*, esp. 73–111. See also Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill, 1982); William E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725–1825* (Chapel Hill, 1981); *idem*, "The Eighteenth Century Constitution as a Basis for Protecting Personal Liberty," in William E. Nelson and Robert C. Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* (New York, 1987), 15–53; Stephen C. Innes, *Labor in a New Land: Economy and Society in Seventeenth Century Springfield* (Princeton, 1983); Christine L. Heyrman, *Commerce and Culture: The Maritime Communities of Colonial Massachusetts, 1690–1750* (New York, 1984). In 1821 Joseph Story told his colleagues that before the Revolution, "the resources of the country were small, the population was scattered, the business of the courts was limited, the compensation for professional services was moderate, and the judges were not generally selected from those, who were learned in the law." As a result, "our progress in the law was slow" ("An Address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821, at Boston," in *American Jurist*, 1, 1 [Jan. 1829], 12).

¹⁰ Some years ago, e.g., Alan Heimert noted that "in pre-revolutionary America, lawyers seemed, as they certainly were, of mere secondary importance as spokesmen for the elements of American society whom the Liberal [Old Light] clergy otherwise so well represented" (*Religion and the American Mind: From the Great Awakening to the Revolution* [Cambridge, 1966], 182–3).

¹¹ Controversy over the precise timing of the beginnings of this change (which of course has implications for causal argument) has heightened recently as a result of Bruce Mann's excellent book, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, 1987). In contrast to the earlier arguments of William Nelson in *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass., 1976), and Morton Horwitz in *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977), both of whom find little alteration in an essentially static and communitarian legal system prior to the 1780s, Mann finds that by the middle of the eighteenth century, a system "that allowed litigants to address their grievances in ways that were essentially communal" was already being replaced, at least in Connecticut, by one "that elevated predictability and uniformity of legal relations over responsiveness to individual communities" (*Neighbors and Strangers*, 9–10). On the relationship between law and communitarian strategies of social discipline see Alfred F. Young, "English Plebeian Culture and Eighteenth Century American Radicalism," in Margaret Jacob and James Jacob, eds., *The Origins of Anglo-American Radicalism* (London, 1984), 185–212, at 191. For one example of the imaginative authority attained by legal discourse by the late eighteenth century, see Rhys Isaac, "The Rage of Malice of the Old Serpent Devil: The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom," in Merrill D. Peterson and Robert C. Vaughan, eds., *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History* (New York and Cambridge, 1988), 139–69.

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discourse;¹² in its social focus and resonance, from the parochial particularities of landed property and debt litigation to the sweeping, courtroom-transcending metaphysics of contract;¹³ in its geographical and institutional focus, from local to translocal;¹⁴ in the standing of its exponents, from a certain shabby notoriety to the social authority of an intellectual elite;¹⁵ and, among those exponents, from unself-conscious disorganization to professional self-awareness.¹⁶ The clearest manifestation of this enhanced authority was the restatement of the new republic's institutional and imaginative life in terms of a superordinate ideology of "the rule of law."

Whig history notwithstanding, law's achievement and retention of this preeminence were not straightforward.¹⁷ First, law's rise to prominence was socially controversial. It remained so. Evidence of the persistence of antilegalism in American culture cautions us against assuming too readily a general popular acceptance of the rule of law as "an unqualified human good."¹⁸

¹² R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, 1985), xiv; Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, 28, 2 (Spring 1979), 205-382. According to Kennedy, Blackstone's "is the only systematic attempt that has been made to present a theory of the whole common law system" aside from Kent's *Commentaries*. Kennedy continues that Blackstone's treatise (published between 1765 and 1769 and with numerous American editions thereafter) was "the single most important source on English legal thinking in the 18th century, and . . . has had as much (or more) influence on American legal thought as it has had on British" (209).

¹³ Compare Mann, *Neighbors and Strangers*, 11-46, with Horwitz, *Transformation of American Law*, particularly 160-210. See also Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), esp. 102-12.

¹⁴ See Mann, *Neighbors and Strangers*, 47-66; Stephen Botein, *Early American Law and Society: Essays and Documents* (New York, 1980), 42-67; David G. Allen, *In English Ways: The Movement of Societies and the Transfer of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill, 1981); Nelson, *Americanization of the Common Law*, 3-10; G. Edward White, *The Marshall Court and Cultural Change, 1815-35* (New York, 1988), vol. 3-4 of *History of the Supreme Court of the United States*, 11-156.

¹⁵ See, generally, Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, Mass., 1984).

¹⁶ Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (Westport, Conn., 1979); Roeber, *Faithful Magistrates and Republican Lawyers*. See also Stephen Botein, "The Legal Profession in Colonial North America," in Wilfrid Prest, ed., *Lawyers in Early Modern Europe and America* (New York, 1981), 129-46; John Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth Century Massachusetts," in Stanley N. Katz, ed., *Colonial America: Essays in Politics and Social Development* (Boston, 1971), esp. 417-31; Charles R. McKirby, "Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession," in Daniel R. Coquillette, ed., *Law in Colonial Massachusetts, 1630-1800* (Boston, 1984), 313-58; Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley, 1977), 111. Bruce Mann finds that by the middle of the eighteenth century, a "fledgling legal profession" in Connecticut was beginning to approach law "as an autonomous system rather than as a contingent social process" (*Neighbors and Strangers*, 9).

¹⁷ The teleological smoothness of law's ascension is one of the main themes of nineteenth- and early twentieth-century evolutionary-functional legal historiography. See Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge, 1980); Robert W. Gordon, "Historicism in Legal Scholarship," *Yale Law Journal*, 90, (1981), 1017-56. On the later twentieth-century reception of this tradition in legal history, and on reactions to it, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review*, 36, 1-2 (Jan. 1984), 57-125.

¹⁸ For the affirmation of the rule of law as "an unqualified human good" see E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1975), 266, and generally 258-69. In the course of an otherwise unexceptionable critique of instrumentalism, Thompson wrote of the law as "a genuine forum" within which "certain kinds of class conflict" could take place and which, because it elaborated rules and procedures and an ideology ("the rule of law") that regulated and reconciled those conflicts, therefore could, and should, be seen as a categorical benefit. This judgment both trivializes antilegalism and, more

Second, insofar as the revolutionary commitment to "life, liberty, and the pursuit of happiness" disclosed serious ambitions for a new and distinctively American and positive constitutionalism, the rule of law was hardly the obvious vehicle for its realization. The eighteenth century's Anglocentric common law tradition implied a constitutionalism which "could not contemplate the use of government to work for equality in the form of social or economic justice, because it could not trust government."¹⁹ Law's rise was therefore conditional upon either a transformation of that common law tradition into something radically different or the adjustment of such revolutionary goals as contradicted it. Adjustment duly took place.²⁰ As the writings of William Manning and the Charlestown "social Democrats" signal, however, adjustment was not uncontested. An alternative oppositional constitutionalism was articulated both during the revolutionary era and again, with much vigor, in the late 1820s and 1930s.²¹

important, treats law as a metanarrative. For critiques of Thompson see Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal*, 86, 3 (Jan. 1977), 561-66; Karl Klare, "Law-Making as Praxis," *Telos*, 40 (1979), 133-4; Adrian Merritt, "The Nature and Function of Law," *British Journal of Law and Society*, 7, 2 (1980), 194-214. On antilegalism, see Christopher Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (New York, 1972), 216-22. On the English antinomian tradition ("a wide movement that questioned all kinds of authority: of the law, of the King, of Scripture, of property, of patriarchy") and its Atlantic diaspora, see Peter Linebaugh, "All the Atlantic Mountains Shook," in Geoff Eley and William Hunt, eds., *Reviving the English Revolution: Reflections and Elaborations on the Work of Christopher Hill* (London, 1988), 193-219. On American antilegalism see Heimert, *Religion and the American Mind*, 179-82; Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York, 1965), 99-265; Gerard W. Gawalt, "Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840," *American Journal of Legal History*, 14 (Oct. 1970), 283-307; Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, Mass., 1976), 32-90; Robert W. Gordon, "Review: The American Codification Movement," *Vanderbilt Law Review*, 36, 2 (Mar. 1983), 431-58.

¹⁹ John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago, 1988), 114.

²⁰ For a celebration of the postrevolutionary assimilation of the American system of judicature "to that of England" see Isaac Parker, "A Sketch of the Character of the Late Chief Justice Parsons, Delivered at the Opening of the Supreme Judicial Court at Boston, on the Twenty-Third Day of November, 1813," in Theophilus Parsons [Jr.], *Memoir of Theophilus Parsons* (Boston, 1859), 403-22, at 411.

²¹ On these points see, generally, J. R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978), 11; Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton, 1990); Christopher L. Tomlins, "Law, Police, and the Pursuit of Happiness in the New American Republic," *Studies in American Political Development*, 4 (1990), 1-34; Joyce Appleby, "The American Heritage: The Heirs and the Disinherited," *Journal of American History*, 74, 3 (Dec. 1987), 798-806; Gary B. Nash, "Also There at the Creation: Going beyond Gordon S. Wood," *William and Mary Quarterly*, 3d ser., 44, 3 (July 1987), 602-11; Steven Rosswurm, "'As a Lyen Out of His Den': Philadelphia's Popular Movement, 1776-80," in Jacob and Jacob, eds., *Origins of Anglo-American Radicalism*, 300-23; Ruth Bogin, "Petitioning and the New Moral Economy of Post-Revolutionary America," *William and Mary Quarterly*, 3d ser., 45, 3 (July 1988), 391-425. For the adjustment of American constitutionalism toward a common law paradigm see Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities," *Yale Journal of Law and Feminism*, 1, 1 (Spring 1989), 15-19, and idem, "Law, Boundaries, and the Bounded Self," *Representations*, 30 (Spring 1990), 163-7, each of which foreshadows arguments developed more fully in her *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago, 1990). For hints of continued openings toward a subordinated "positive" American constitutionalism see Harry Scheiber, "Public Rights and the Rule of Law in American Legal History," *California Law Review*, 72, 2 (Mar. 1984), 217-51; William J. Novak, "Intellectual Origins of the State Police Power: The Common Law Vision of a Well-Regulated Society," *Legal History Program Working Papers* (Madison), ser. 3, no. 2 (June 1989). The issues adverted to in this paragraph and the next are pursued at length in Chapters 2 and 3.

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That this alternative existed underlines the importance of recognizing that for much of the latter half of the eighteenth century the complex of common law ideas and institutions associated with the rule of law lived in competition with other potentially paradigmatic political discourses – of republicanism, of evangelical Christianity, of commerce or political economy, and, above all, of “police” – all of which can themselves be considered candidates for ideocultural hegemony. To understand the circumstances of the rise of the rule of law, and its significance, one must therefore consider the relationship between law and these other discourses, and their fate.

The burden of that inquiry will be picked up during the remainder of Part 1. Here we should simply note, as a preliminary, that the basic point of departure was an increasing consciousness, at the dawning of the eighteenth century, of the world’s accessibility. This prompted a proliferation of theorizing – at first predominantly religious and scientific, later increasingly political and economic – about the relationship of human action to context and the means by which that relationship might be managed. “At the opening of the modern era,” writes Gordon Wood, Protestant reformers had “invoked divine providence and the omnipotence of God in order to stamp out the traditional popular reliance on luck and magic and to renew a sense of design and moral purpose in the world.” Subsequently natural philosophers like Newton effected the diminution of this absolute (and therefore necessarily arbitrary) divine authority by positing invariant natural laws of mechanism. Fear of chaos and contingency gradually ebbed. “The world lost some of its mystery.” In particular the world of human affairs became manipulable, the new science promising human beings “the capacity to predict and control not only nature but [their] own society.”²²

Scientific thinking having “created a new world of laws, measurements, predictions, and constancies or regularities of behavior” that enabled human comprehension and governance of social no less than physical phenomena, finding these laws “became the consuming passion of the Enlightenment.” At the same time, because in human affairs scientific thinking’s mechanistic approach to causation was corrosive of the very notion of human capacity for self-determination which it had helped to popularize, the moral status of action became an all-consuming preoccupation. “If human affairs were really the consequence of one thing repeatedly and predictably following upon another, the social world would become as determined as the physical world seemed to be.” In these circumstances investigation of the extent and limits of human agency – voluntarism and free will – moved to the forefront of philosophical inquiry. The result was a denial of the possibility of unintended consequences. All action, it was argued, was the product of intention. “Only by identifying causes with motives was any sort of human science and predictability possible, and only then could morality be preserved in the new, mechanistic causal world.” Never before or since in Western history, says Wood, had human

²² Gordon S. Wood, “Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century,” *William and Mary Quarterly*, 3d ser., 39, 3 (July 1982), 412–13.

beings "been held so directly and morally responsible for the events of [their] world."²³

In the Atlantic world, classical republicanism, evangelical Christianity, police, and political economy all emerged during the course of the eighteenth century (roughly in that order) as viable modes of discourse addressing this problematic relationship between human action and context.²⁴ Simplifying for the moment, and ignoring for the sake of clarity their interrelationships,²⁵ one may distinguish these modes of discourse principally by their conceptions of how, now handed the opportunity, human action should be moderated and how the capacity to moderate should be sustained. Thus, classical republicanism proposed the moderation of action by a secular civic-minded virtue, sustained by propertied independence;²⁶ evangelical Christianity proposed moderation by the individual's redemptive commitment to a transcendent Christian morality – "enthusiasm" – sustained by strict new codes of self-conduct;²⁷ political economy proposed moderation by the pursuit of individual self-interest, sustained by the equilibrating effects of the market;²⁸ and police proposed moderation by the pursuit of safety and happiness – individual and communal welfare – sustained (in America) by the promise of "free" governments embodying the sovereignty of the people.²⁹

Although the degree of influence enjoyed by each of these modes of discourse in the colonies can be explained, at least in part, by their capacity to articulate established routines of colonial culture, each also stood for a route to be followed in realization of or reaction to an unfolding process of context *transformation*.³⁰ Each, that is, also offered a distinctive perception of the deficiencies of established institutions and routines, and of their inability to provide clear explanations of and maps

²³ *Ibid.*, 413–17.

²⁴ Kramnick, "The 'Great National Discussion,'" 3–32; Ruth H. Bloch, "The Constitution and Culture," and John Howe, "Gordon S. Wood and the Analysis of Political Culture in the American Revolutionary Era," both in *William and Mary Quarterly*, 3d ser., 44, 3 (July 1987), 550–5 and 569–75; James T. Kloppenberg, "The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse," *Journal of American History*, 74, 1 (June 1987), 9–33; Tomlins, "Law, Police, and the Pursuit of Happiness," 3–16.

²⁵ On the relationship between political economy and police, e.g., see the sensitive discussion of Michael Ignatieff and Istvan Hont, "Needs and Justice in the *Wealth of Nations*: An Introductory Essay," in Michael Ignatieff and Istvan Hont, eds., *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge, 1983), 1–44. See also, Chapter 2, this volume.

²⁶ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975), 184.

²⁷ Heimert, *Religion and the American Mind*, 27–58. See also David Lovejoy, "'Desperate Enthusiasm': Early Signs of American Radicalism," Patricia U. Bonomi, "'A Just Opposition': The Great Awakening as a Radical Model," and Rhys Isaac, "Radicalized Religion and Changing Lifestyles: Virginia in the Period of the American Revolution," all in Jacob and Jacob, eds., *Origins of Anglo-American Radicalism*, 230–42, 243–56, and 257–67. On the evangelical contribution to revolutionary and postrevolutionary politics see Ruth H. Bloch, *Visionary Republic: Millennial Themes in American Thought, 1756–1800* (New York and Cambridge, 1985).

²⁸ Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York, 1984), 25–50.

²⁹ Tomlins, "Law, Police, and the Pursuit of Happiness," 16–20; and Chapter 2, this volume.

³⁰ See, generally, Kloppenberg, "Virtues of Liberalism," 11–24.

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for human action. As the process of transformation intensified in the late eighteenth century, lent extraordinary focus first by the political and social pressures of imperial crisis, then by revolution and war, and finally by the process of creating new frames of government, so competition among these different routes intensified, culminating in a period of acute ideological strife whose reverberations extended well into the nineteenth century. The eventual outcome was the efflorescence of a new institutional and imaginative context, normally denominated "liberal," which eclipsed (where it did not absorb and rearrange) most aspects of the previous half-century's competing alternatives and which simultaneously spawned a new series of reinforcing routines constitutive of a market society with, however, distinctly asymmetrical social relations: social and economic individualism, the protection of property, a filtered democracy, and a hobbled state.³¹

LAW'S REPUBLIC

Law was central to the efflorescence of this new institutional and imaginative context during the early republic. By the early nineteenth century the rule of law had assumed a vital role as the integral constituting element of the society that had come into being over the previous seventy-odd years, a role that it had not previously played in American society and politics.³² Subsequent chapters will demonstrate this by filling in the outlines of processes simply alluded to here, all the time using the experience of labor and the social relations of employment as the point of reference.

Right at the beginning, however, it is worth pointing out that the hypothesis here on display, that during the revolutionary and postrevolutionary epochs law gained a particular centrality in American life that it had not enjoyed before, is hardly novel. Over the years, historians of American law have voted with their feet in dedicating almost all their considerable energy to the period starting with the

³¹ See, e.g., Joyce Appleby, "The Radical Double-Entendre in the Right to Self-Government," in Jacob and Jacob, eds., *Origins of Anglo-American Radicalism*, 275–83; idem, *Capitalism and a New Social Order*, passim; idem, "The Heirs and the Disinherited," 803–6. See also Steven J. Watts, *The Republic Reborn: War and the Making of Liberal America* (Baltimore, 1987); Cathy Matson and Peter Onuf, "Toward a Republican Empire: Interest and Ideology in Revolutionary America," *American Quarterly*, 37, 4 (Fall 1985), 496–531; Morton J. Horwitz, "Republicanism and Liberalism in American Constitutional Thought," *William and Mary Law Review*, 29, 1 (Fall 1987), 57–74; Nedelsky, "Reconceiving Autonomy," 15–19.

³² See e.g., Allan C. Hutchinson and Patrick Monahan, "Democracy and the Rule of Law," in Hutchinson and Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto, 1987), 97–123, at 104–5. Gordon Wood's recent description of the carving out of "an exclusive sphere of activity for the judiciary" during the 1780s and 1790s as "the most dramatic institutional transformation in the early Republic" – the high point of a "remarkable process by which the judiciary in America suddenly emerged out of its colonial insignificance to become by 1800 the principal means by which popular legislatures were controlled and limited" – is also noteworthy (*The Radicalism of the American Revolution* [New York, 1992], 323). Given these conclusions, it is puzzling that Wood's account of the politics and culture of the early republic in fact has almost nothing to say about law.

Revolution.³³ Clearly implicit in their accounts of the prominent role of law in molding the new nation's civic consciousness has been a judgment of its lesser previous importance.³⁴ Take, as a recent example, the opening paragraph of the first chapter of Robert Ferguson's elegant *Law and Letters in American Culture*:

The centrality of law in the birth of the republic is a matter of national lore. "In America the law is king," Thomas Paine the prophet of revolution proclaimed in 1776, and so it has remained ever since in the political rhetoric and governmental councils of the nation. Revolutionary orators and pamphleteers like John Dickinson, James Otis, John and Samuel Adams, Patrick Henry, Thomas Jefferson, James Wilson and Arthur Lee were members of the profession. Their writings were heavily scored with the citations and doctrines of legal study and contributed decisively to what historians have called the conceptualization of American life. Twenty-five of the fifty-six signers of the Declaration of Independence, thirty-one of the fifty-five members of the Constitutional Convention, and thirteen of the first sixteen presidents were lawyers. All of our formative documents – the Declaration of Independence, the Constitution, the Federalist Papers and the seminal decisions of the Supreme Court under John Marshall – were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England* (1765–1769). So much was this the case that the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions.³⁵

What, though, was to be the substantive significance of law's centrality in the politics of the early republic? That is, what difference was it to make that this would be a law-centered polity? One could argue, after all, that what Ferguson is describing here is simply a somewhat amplified version of the role of providing a language for rule that law always seems to perform whatever interpretation of human action dominates society; or in other words that the key characteristic of legal discourse is

³³ This focus has been strongly criticized by colonial historians. See, e.g., Mann, *Neighbors and Strangers*; Botein, *Early American Law and Society*, 1–5; Katz, "The Problem of a Colonial Legal History," 457–89, esp. 470–4. Its persistence is nevertheless attested to in the continuity in emphasis accorded the postcolonial era in both of the major syntheses of American legal history to be published in the last twenty years: Lawrence M. Friedman, *A History of American Law* (New York, 1973; 2d ed., 1985); and Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989).

³⁴ As we have already noted, two of the most important interpretive texts of the 1970s – Nelson's *Americanization of the Common Law* and Horwitz's *Transformation of American Law* – both treat colonial and early national law as discontinuous, using the Revolution as a benchmark. In Horwitz's case the Revolution does not have causal significance, change being instead the consequence of a burgeoning judicial-commercial alliance under way from the 1780s. Nelson, in contrast, sees the revolutionary upheaval as the causal key to all of the changes in the role of law that both he and Horwitz see occurring over the following fifty years (*Americanization*, 5). See also Katz, "The Problem of a Colonial Legal History," 472–4.

³⁵ Ferguson, *Law and Letters in American Culture*, 11. As should be clear from the preceding section, although the position I take here adopts in broad outline the traditional chronological parameters which have focused our attention on the Revolution and early republic, I find very persuasive Bruce Mann's argument that (at least in New England) by the 1750s law was in the ascendancy as the technology of first resort in matters of dispute resolution. I do not believe, however, that ascendancy in itself can explain the discursive dominance that law was later to achieve as the postrevolutionary epoch's paradigmatic modality of rule. Evidence of law gaining its own agenda is a necessary but not a sufficient condition of its later supremacy. (The distinction I have in mind here is not dissimilar to Robert Ferguson's distinction between law as a means to social order and legal thought as a supplier of ideological coherence [*Law and Letters*, 10].) It is noteworthy that Mann himself alludes to, but does not attempt to grapple with, this issue [*Neighbors and Strangers*, 168].) This dominance, I argue in Chapter 2, was not ensured until the postrevolutionary period and was an outcome of postrevolutionary political debates.

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its instrumental utility in assisting the task of penetrating and reorganizing the detail of social practice to bring action into conformity with current ruling ideas. Law does serve such a facilitative function, as we shall see later in this book.³⁶ But to see in law nothing more than a medium in which other-derived ideologies of rule or social values may be expressed would be to confine unduly one's comprehension of law³⁷ and, in the American case, thereby to miss one of the most important points of distinction between the postrevolutionary era and that which preceded it. Thus, to see law's prominence in the new order created after much conflict in the wake of the Revolution as nothing more than a consequence of technical facility in designing the appropriate institutional and imaginative structures for a new ruling "liberal" ideology does not give sufficient weight to the additional biases built into the design both explicitly and piecemeal by the increasingly self-conscious discourse and practices characteristic of *common law* personnel and institutions in themselves, biases which helped steer the early republic's unfolding new order in a particular direction: toward an ever more pronounced conceptual distinction between public and private realms of activity; toward confinement of legislative and administrative power and a vision of the legislative and administrative agencies of the state as threats to individual rights; toward a highly particularized meaning for such key general terms in revolutionary and immediately postrevolutionary political discourse as *democracy*, *sovereignty*, or *citizenship*; and above all toward an ascendant role in the American polity for the discourse and institutions of the common law itself.³⁸ Imaginatively and institutionally this was indeed to become, in Frank Michelman's memorable but distinctly double-edged phrase, "Law's Republic."³⁹

In the past, some of the most influential explanations for this transformative rise of legal discourse to its position as *the* agency of rule of the postrevolutionary era have tended toward instrumentalism, most commonly taking commerce, social and economic development, or, most specifically, "the needs of capitalism," as their primary point of departure and viewing legal developments either as essentially epiphenomenal or functional consequences of activities occurring in society's engine room or – more sophisticatedly – as autonomously designed reforms initiated to facilitate those activities.⁴⁰ Thus law becomes of transcendent importance in

³⁶ Indeed, my interpretation of law's social significance in colonial American life, at least until the mid-eighteenth century, is very much that of law as largely a reflective, facilitative, nonautonomous discourse.

³⁷ See Richard A. Epstein, "Beyond the Rule of Law: Civic Virtue and Constitutional Structure," *George Washington Law Review*, 56, 1 (Nov. 1987), 149–71.

³⁸ These points are developed in Chapters 2 and 3. On the last point see, in addition, Horwitz, *Transformation of American Law*, xiii, 1–2; Nedelsky, "Reconceiving Autonomy," 17–18.

³⁹ Michelman, "Law's Republic." See also Reid, *The Concept of Liberty in the Age of the American Revolution*.

⁴⁰ As I hope this paragraph conveys, it is important to stress that instrumentalism and functionalism come wearing a variety of political colors. See J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison, 1956), esp. 3–32; idem, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Madison, 1964); Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass., 1957), esp. 166–82; Friedman, *A History of*

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modern society because the growth of commerce/economic change and expansion/capitalist development “requires legal improvements that increase the certainty and predictability of exchange relationships.”⁴¹ In fact, that base proposition is not at all certain;⁴² and as Robert Gordon has argued, even were it indisputable one would still have considerable difficulty in demonstrating that law had actually responded in any specifiable developmentally significant way.⁴³ Looser versions of the same argument are more defensible: for example, that whether there was a detectable functional outcome or not, legal elites were ambitious to create an accommodative environment for commercial/capitalist enterprise;⁴⁴ or (different again) that an essential systemic identity between law and capitalism can be inferred logically from the equivalent status accorded in each discourse to the primary unit of attention (in law, individuals; in capitalism, commodities) as objects of exchange relationships, guaranteeing law a central role in the reproduction of the overall conditions that make capitalism possible.⁴⁵ The cost of these qualified departures from reductionism, however, is heightened difficulty in making causal statements about the relationship between context and action. In the first version, for example, dysfunctional outcomes simply cease to prove anything; in the second version they can actually be recycled as system reinforcing in that by rendering mysterious in fact the law–capitalism relationship that logic tells us exists, they legitimate “law” by lending it the appearance of autonomy and thus enable it to continue to serve its inferred systemic purpose.⁴⁶ Nor does the latter leave any role for historical analysis – the imputed homology of legal and commodity forms simply *is* – except as a medium for illustration of the contention.

LEGAL DOMINATION

The chief problem with reductionist or protoreductionist explanatory strategies is not that they seek to uncover a relationship between law and economy where none exists but rather that the relationship which is uncovered tends to be unilinear and founded in the economy. More fruitful are analyses which concentrate upon law as first and foremost a modality of rule, whose particular practices at any one time will

American Law, 2d ed., 12, 114; Horwitz, *Transformation of American Law*; Michael E. Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism* (New York, 1979); Hall, *Magic Mirror*; Charles Sellers, *The Market Revolution: Jacksonian America, 1815–1846* (New York, 1991), 47–59.

⁴¹ This summary evaluation is Robert Gordon's. See his “Critical Legal Histories,” 64, 78.

⁴² See, e.g., Robert B. Ferguson, “Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes,” *British Journal of Law and Society*, 4 (1977), 18–38.

⁴³ Gordon, “Critical Legal Histories,” 78–81, and see generally 63–87.

⁴⁴ See, e.g., Horwitz, *Transformation of American Law*, 1–30; Ferguson, “Legal Ideology and Commercial Interests,” 22–32.

⁴⁵ Isaac Balbus, “Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law,” *Law and Society Review*, 11 (Winter 1977), 571–88.

⁴⁶ *Ibid.*, 585.