

Spring 1982

# The Law in the American Revolution and the Revolution in the Law: A Collection of Review Essays on American Legal History, edited by Hendrik Hartog

Doyce B. Nunis Jr.

*The University of Southern California*

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## Recommended Citation

Nunis, Doyce B. Jr. (1982) "The Law in the American Revolution and the Revolution in the Law: A Collection of Review Essays on American Legal History, edited by Hendrik Hartog," *Indiana Law Journal*: Vol. 57 : Iss. 2 , Article 3.

Available at: <http://www.repository.law.indiana.edu/ilj/vol57/iss2/3>

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# BOOK REVIEW

THE LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW: A COLLECTION OF REVIEW ESSAYS ON AMERICAN LEGAL HISTORY. Edited by Hendrik Hartog. New York: New York University, 1981, Pp. xiii, 264. \$22.50.

DOYCE B. NUNIS, JR.\*

How does one review a book composed of law journal review essays of some of the most important books relating to various facets of the law prior, during, and immediately after the American Revolution? The problem becomes even more acute since the concluding essay, one of the three original contributions in the book (the others being the introduction and one of the review essays), is really an overview of the essay reviews! Thus one is confronted with an unseemly prospect—magpie history, or should one say magpie reviews? Must one keep piling it on? I think not. (I would hope that no one would write a review of this review. That would be *too* much!)

Putting aside this obvious problem, this reviewer has decided not to write a review essay of the review essays of the books which are reviewed in the review essays, or, as Gertrude Stein might have said, “a review, of a review, of a review.” Instead, this will be an impressionistic summary of one historian’s reading of the review essays themselves.

In his brief but pointed introduction, editor Hartog declares at the outset: “It may be too soon to publish a collection of review essays in American legal history.”<sup>1</sup> Having read the book, I would agree. However, Hartog rationalizes the point: We are told that the book “is not intended to prove a mature and considered reflection on a completed corpus of scholarship. Its purpose is to introduce historians and other non-legal scholars to the kind of historiographical writing that is going on in American law journals.”<sup>2</sup> Considering the number of law journals published in this country, there is little question that few historians delve into their pages. Thus, journal contents lie buried in myriad volumes carefully shelved in our wall-like library stacks. The intent of this volume

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\* B.A. 1947, The University of California at Los Angeles; M.S. 1950, M. Ed. 1952, Ph. D. 1953, The University of Southern California. Professor of History, The University of Southern California.

<sup>1</sup> THE LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW ix (H. Hartog ed. 1981) [hereinafter cited as LAW IN AMERICAN REVOLUTION].

<sup>2</sup> *Id.*

is to open this untapped treasure trove to practicing historians (and I assume practicing barristers, too).

Of the eight essays which constitute the book's contents, six have been previously published—one in the *University of Connecticut Law Review*,<sup>3</sup> one in the *Indiana Law Journal*,<sup>4</sup> and four in the *New York University Law Review*.<sup>5</sup> Only two of the essays are original—a book review essay and an overview of the thrust of the collective contents. The sampling is hardly widespread. It would appear that the real justification for inclusion of the previously published essays, with what I deem to be one notable exception, is that five of the reviews are concerned with books which relate to the American Revolutionary era. The title of the book appears to be an apt description of the contents (again, with one exception).

Six important books published within the last eight years are the focal point of the review essays. Bruce H. Mann treats M.H. Smith's *The Writs of Assistance Case* (1978); John Phillip Reid assays Bernard Bailyn's magisterial work, *The Ordeal of Thomas Hutchinson* (1974); he also contributes an original review of Garry Wills' controversial *Inventing America* (1978) and Morton White's *The Philosophy of the American Revolution* (1978); Robert W. Gordon examines William E. Nelson's *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (1975); Stephen B. Presser dissects Morton J. Horwitz' *The Transformation of American Law 1780-1860* (1977), while Hendrik Hartog and Peter R. Teachout evaluate John P. Reid's *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, The Irish Comparison, and the Coming of the American Revolution* (1977). The concluding essay by Hartog is a second original contribution.

The editor points out that because of the extraordinary number of law journals, "[t]here is no shortage of space in the world of American law review."<sup>6</sup> This is one of the explanations for the length of the book review essays. A second justification given is perhaps more to the point: young lawyers entering teaching ranks in law schools have not had the training afforded other disciplines in respect to research and writing, for example, a doctoral dissertation or another major scholarship effort. The void

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<sup>3</sup> Mann, *A Great Case Makes Law Not Revolution*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 3-19 (reprinted from 11 U. CONN. L. REV. 353 (1979)).

<sup>4</sup> Hartog, *Losing the World of the Massachusetts Whig*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 143-66 (reprinted from 54 IND. L.J. 65 (1978)).

<sup>5</sup> Reid, *The Ordeal by Law of Thomas Hutchinson*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 20-45 (reprinted from 49 N.Y.U.L. REV. 593 (1974)); Gordon, *Accounting for Change in American Legal History*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 93-112 (reprinted from 51 N.Y.U.L. REV. 686 (1976)); Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 113-42 (reprinted from 52 N.Y.U.L. REV. 700 (1977)); Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 167-225 (reprinted from 53 N.Y.U.L. REV. 241 (1978)).

<sup>6</sup> *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at xii.

in training is filled by writing long book reviews. The justification: "A long book review . . . becomes a plausible and available way for a young law teacher to organize his or her thinking about a subject and to prepare for the substantive scholarship which surely must follow."<sup>7</sup> I am unable to verify the latter assumption.

This explains, then, the length of the review essays and the fact that each of them is footnoted, ranging in number from thirty-one (Gordon) to 187 (Reid). However, as a practicing historian with a number of scholarly publications to my credit, I have concluded that some of the footnotes come close to padding. This padding once again raises the spectre of magpie history.

Four elements dominate the book: legal events and change, Massachusetts, the scholarship of John Reid, and the impact of Morton Horwitz on American legal history. Legal events are the foci of Mann's and Reid's reviews<sup>8</sup>, namely, the 1761 Writs of Assistance Case in Boston; the ordeal of Thomas Hutchinson, a native-born son of colonial Massachusetts, in having to face the legal implications of colonial resistance and revolt; and a new interpretation of the Declaration of Independence.

The history of writs of assistance is ably dealt with in Smith's *The Writs of Assistance Case*. Bruce Mann's review is cogent, precise, and well structured. Suffice it to say that the chief protagonists were James Otis for the defense and Thomas Hutchinson, chief justice of the superior court in Massachusetts, for the Crown. Otis argued "that the writ of assistance in England was special rather than general."<sup>9</sup> That argument would mean that in order to obtain a writ of assistance, literally a search warrant, customs enforcement in each individual case would have to obtain the necessary document from a local magistrate. The argument rejected the premise that such writs could be provided by a blanket directive from the Crown. Hutchinson contended that because writs of assistance in England were indeed general, the model which had been used previously in Massachusetts, although a variant, was legal. Otis lost; Hutchinson triumphed. Mann concludes, and I am of like opinion, that "[a]s an ideological issue, writs of assistance played only a small role in the opposition to parliamentary sovereignty,"<sup>10</sup> a view espoused by Bernard Bailyn in his *The Ideological Origins of the American Revolution* (1967).

The ordeal of Thomas Hutchinson begins with the Writs of Assistance Case, which was the first major issue before him after he was appointed chief justice of the superior court of Massachusetts in 1760. His "ordeal by law,"<sup>11</sup> to quote Reid, commenced then and there and reached its climax

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3-19, 20-45.

<sup>9</sup> Mann, *supra* note 3, at 16.

<sup>10</sup> *Id.* at 18.

<sup>11</sup> Reid, *supra* note 5, at 20.

when he became acting governor in 1769 and was commissioned governor in 1771. His tenure lasted until 1774 when he was replaced by General Thomas Gage. Hutchinson then sailed for England where he served as an adviser to George III. He died at Brompton, now a part of London, at age seventy-nine in 1780.

Bailyn's *The Ordeal of Thomas Hutchinson* is a classic study; Reid gives it a classy review.<sup>12</sup> In two sentences, he pinpoints the reasons for Hutchinson's ordeal: "If Thomas Hutchinson was too legal, he was also too law-minded. Everywhere he turned he was confronted by legal arguments, and even when he resolved them he could be troubled."<sup>13</sup> As a final judgment, Reid declares: "Thomas Hutchinson[s] . . . ordeal arose from the fact that he was a dedicated, decent man—a good man for an impossible task. The ordeal was compounded by his law-mindedness, which made him a better man for the protection of [colonial] civil rights than for the service of his king."<sup>14</sup> That view is sustained by superior research on Reid's part; his essay is supported by eighty-eight footnotes.

The same compliment can be doubly paid Reid in his hitherto unpublished review of Garry Wills' *Inventing America* and Morton White's *The Philosophy of the American Revolution*. The narrative exposition is sustained by 187 footnotes! One must remember, however, that Professor Reid has been researching the American Revolutionary era for some time.<sup>15</sup>

Reid's review essay is aptly entitled "The Irrelevance of the Declaration."<sup>16</sup> Ten arguments are used to dismiss the influence of natural law on the framing of the Declaration of Independence, while the dispelling of the aura of myth concerning the influence of John Locke is equally telling. White's book is dismissed as "almost a caricature of the genre of Declaration scholarship"<sup>17</sup> which Reid has critiqued so superbly. Reid concurs with Wills' view: "[T]he Declaration's purpose was to lay the legal foundation for an alliance with France."<sup>18</sup> Further, the Declaration and its preamble were "not regarded as important during the Revolution."<sup>19</sup> Moreover, "the Declaration was not, and was never intended to be, either a statement of philosophy or political theory."<sup>20</sup>

One might ask: What was it then? Reid would respond: American colonials (he uses the word "Whig") "knew about constitutional law. . . . They thought constitutional law not a myth and were at least familiar enough

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<sup>12</sup> *Id.* at 20-45.

<sup>13</sup> *Id.* at 35 (footnotes omitted).

<sup>14</sup> *Id.* at 45.

<sup>15</sup> See, e.g., J. REID, IN A DEFIANT STANCE (1977).

<sup>16</sup> Reid, *The Irrelevance of the Declaration*, in LAW IN AMERICAN REVOLUTION, *supra* note 1, at 46-89.

<sup>17</sup> *Id.* at 78.

<sup>18</sup> *Id.* at 82.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

with the ancient English constitution so that, when they read the Declaration of Independence, they did not think of natural law, John Locke, or Scots philosophy. They recognized constitutional principles relevant to their cause."<sup>21</sup>

Robert W. Gordon gives us a straightforward review of William Nelson's *The Americanization of the Common Law*.<sup>22</sup> In that volume, Nelson surveyed seventy years of Massachusetts law, 1760-1830. Nelson sought "to relate legal change to 'more basic changes in American thought and society.'"<sup>23</sup> In the end, Gordon concludes that it is a "more problematic enterprise, one requiring both much more monographic work on small-scale problems and more sophisticated social theories of law than the field has yet produced."<sup>24</sup> It does succeed on one point: It "exposes very clearly the weaknesses of the mechanical linkages between legal rules and social behavior."<sup>25</sup>

It appears that Nelson "rigidifies the structure of social change."<sup>26</sup> He is prone to draw rigid dichotomies between various elements, for example, "between ethical unity and ethical relativism."<sup>27</sup> There are like examples. The result is that when Nelson begins to feed his evidence through the categories, difficulties appear immediately. The most important is that it "causes him to miss subtleties of interpretation."<sup>28</sup>

Morton J. Horwitz' *The Transformation of American Law 1780-1860* is brilliantly analyzed by Stephen B. Presser.<sup>29</sup> This book, however, has only a marginal relationship to the American Revolutionary era. Its strength, indeed its thrust, is solidly post-Revolution. It is puzzling why it was included. One could argue that it does emphasize a revolution in our previous understanding of the law, thus it qualifies. Certainly, the book is a major revisionist view of early American legal history.

The heart of Horwitz' thesis is that after 1790 the law was gradually transformed to favor economic growth and development. Instead of circumscribing economic competition as the law had in the past, the courts actually stimulated competition. As a result an alliance was struck between the rising merchant class and the legal profession which proved beneficial to both. Together they grew in power and wealth.

Horwitz clearly demonstrates that "diverse forces—moral, political, and economic—go into making the law, and . . . that the law does *not* develop along strictly logical lines."<sup>30</sup> This view is ably supported by Horwitz' ex-

<sup>21</sup> *Id.* at 89.

<sup>22</sup> Gordon, *supra* note 5.

<sup>23</sup> *Id.* at 94.

<sup>24</sup> *Id.* at 112.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 96.

<sup>27</sup> *Id.* at 97.

<sup>28</sup> *Id.* at 102.

<sup>29</sup> Presser, *supra* note 5.

<sup>30</sup> *Id.* at 132.

position of various modes of judicial analysis, inquiry into "judges' intellectual processes in order to explain the inconsistencies of their decisions,"<sup>31</sup> and his description of "substantive legal doctrines."<sup>32</sup>

Professor Presser offers some illuminating challenges to the Horwitzian view. He believes that the book alone "is not enough to support a movement for radical legal reform."<sup>33</sup> Simply put, "the weak and relatively powerless segments of American society were legally overwhelmed by nineteenth-century anti-democratic judges."<sup>34</sup> Horwitz "tells us relatively little about the effects of legislative action, although [he] occasionally hints that state legislatures were pressured into passing legislation antithetical to commercial interests."<sup>35</sup> Moreover, if it is true that merchants and entrepreneurs profited, "it does not necessarily follow that these gains came at the expense of other groups such as farmers and consumers."<sup>36</sup> Furthermore, it may be anachronistic to apply twentieth century social classifications to nineteenth century realities. But there is no question: Horwitz has effectively demonstrated that "the development of American law reflects a continuing struggle between competing economic and social interests."<sup>37</sup>

In a carefully crafted review, Hendrik Hartog discusses John Reid's *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution*.<sup>38</sup> The book's thesis is "that the legal context of the American Revolution was shaped by the unequal conflict between two competing conceptions of law: a Whig [colonial] law of local institutions and an imperial law of parliament and of the provincial agents of the Crown."<sup>39</sup> Again, Massachusetts is the centerpiece. From the colonial view, "the Whig theory of law was grounded both in a perception of the autonomy of local legal institutions as independent recipients of constitutional power and authority, and in a realistic appreciation of the relative ineffectuality of all governmental institutions whether local or central."<sup>40</sup>

Pointedly, Hartog declares that *In a Defiant Stance* is without question a "neo-Whig" book, influenced by the scholarship of Bailyn and others. That view can best be described as follows: "[T]he actions of the revolutionaries were rooted in a consistent and long-lived world view which justified their belief in the corruption and the conspiratorial designs of

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<sup>31</sup> *Id.* at 128.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 136.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 137.

<sup>36</sup> *Id.* at 138.

<sup>37</sup> *Id.*

<sup>38</sup> Hartog, *supra* note 4.

<sup>39</sup> *Id.* at 147.

<sup>40</sup> *Id.* at 152.

the leaders of the British empire."<sup>41</sup> Whigs were serious in their beliefs; their beliefs must therefore be taken seriously. One must believe what they said about themselves and their ideologies. *In a Defiant Stance* does just that. In so doing, it "is in the first instance a discussion of *how* the revolutionaries got away with it, a discussion of the legal technology of rebellion in Massachusetts Bay."<sup>42</sup> The comparison with Ireland merely reinforces rather than detracts from the American view, but it becomes abundantly clear why Ireland was different from America.

Peter R. Teachout looks at *In a Defiant Stance* in a different context.<sup>43</sup> He looks at it through humanistic glasses. He holds that Reid set "out to compare 'the conditions of law' in the American colonies during the years leading up to the Revolution with those in Ireland during roughly the same period."<sup>44</sup> Theoretically governed by the same common law and imperial administration, the conditions of law in these two British possessions were highly divergent. Poor Ireland had no rule of law, only a rule of men; America had a rule of law to which all men were bound.

In a lengthy exposition (actually the longest review essay in the book, fifty-eight pages), documented by 149 footnotes (second only to Reid's treatment of Wills and White), Professor Teachout comes to a critical and restrained judgment, in sharp contrast to that of Professor Hartog. Teachout believes Reid's book is curious and contradictory, although "the insights it provides into law in the American colonies during the revolutionary period are potentially profound; and yet somehow the most important of these seem to be left pressing at the surface, never quite fully realized."<sup>45</sup>

The point of departure between Teachout and Reid appears to be over the difference between law in Ireland and America. Reid holds that it was "not . . . *in the substance of the law*" but in respect for the rule of law itself."<sup>46</sup> Teachout demurs strongly: "We resist this conclusion—this dichotomy between 'substance' and 'rule'—partly because we know it does not faithfully reflect the colonists' own experience, but more importantly, because it runs against the grain of everything we know about the rule of law in history."<sup>47</sup> The argument has yet to be resolved.

It falls to Professor Hartog to try to bring the divergent strands of this book of collected review essays together in an original summary essay, "Distancing Oneself from the Eighteenth Century: A Commentary on

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<sup>41</sup> *Id.* at 154.

<sup>42</sup> *Id.* at 157 (emphasis in original).

<sup>43</sup> Teachout, *supra* note 5.

<sup>44</sup> *Id.* at 176 (footnotes omitted).

<sup>45</sup> *Id.* at 225.

<sup>46</sup> *Id.* at 222 (emphasis in original).

<sup>47</sup> *Id.*



Changing Pictures of Americal Legal History.”<sup>48</sup> In doing so, he strikes out critically against Teachout’s views of the works of Horwitz and Reid. I found myself in strong sympathy with the criticisms voiced. It appears to me that Teachout is excessively either/or. Historical truth is rarely so easily categorized. There are too many shades and colors, too many refractions from too many participants. And there is an awful lot of gray. Much remains in the shadows.

What Professor Hartog argues in concluding this book is that there presently appears to be a dichotomous history of American law. However, if one looks closely and reads carefully, what one discovers is really a new legal history. It is not so new that it does not have historical antecedents; it is firmly rooted in the writings of Roscoe Pound. This new legal history includes historians Horwitz, Nelson, and Reid. These three “are simply reviving the ‘formative era’ thesis championed by Roscoe Pound,”<sup>49</sup> but with a sharp difference: the periodization and the questions posed are markedly different. The new school’s view “is shaped not by the contrast between law and no law, but rather by the contrast between law at one time and law at another.”<sup>50</sup> Nor are these new legal historians interested in the questions of how the common law was received. Rather, they “share a common perception of the legal world of the eighteenth century as both a strange and unfamiliar place, yet also as the product of a demonstrably ‘legal’ culture.”<sup>51</sup>

Hartog closes by detailing what the new school has not told us, and that litany is impressive. Through his model of discontinuity utilized through his closing essay, Professor Hartog recognizes that it “remains a largely empty construct.”<sup>52</sup> It is only through the study of history and law together that we may yet arrive at a genuine understanding of the culture of eighteenth century American law. We have not yet reached that understanding. But there is a beginning in the books reviewed and the review essays encompassed in this work on *The Law in the American Revolution and the Revolution in the Law*. Perhaps there is something valuable in magpie history after all. At least it can help build a nest.

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<sup>48</sup> Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in *LAW IN AMERICAN REVOLUTION*, *supra* note 1, at 229-57.

<sup>49</sup> *Id.* at 243.

<sup>50</sup> *Id.* at 248.

<sup>51</sup> *Id.* at 250.

<sup>52</sup> *Id.* at 256.