
The Myth of the “Weak” American State

WILLIAM J. NOVAK

THE AMERICAN PRESENT IS AT ODDS with representations of the American past. The American present witnesses the steady aggrandizement of executive, administrative, emergency, penal, military, and war powers as contemporary commentators such as Michael Hardt, Antonio Negri, and Giorgio Agamben contemplate the contours of American hegemony and superpower in a new era of empire.¹ The global impact of present American politics, political economy, and foreign policy is obvious to any casual observer of current affairs. The story of the American past, on the other hand, continues to be told in narratives that seem to be heading off somewhere else. In place of the growth of power, the history that America most frequently tells itself highlights a story of relative powerlessness—a usually benign tale of legal-political self-abnegation, emphasizing constitutional restraints such as federalism, checks and balances, the separation of powers, limited government, the rule of law, and laissez-faire. When presented more positively, American history is usually framed as a quest for freedom—the struggle for political liberty, emancipation from bondage, the rise of civil, economic, and social rights. Property, contract, and freedom of speech, press, and association form the constitutional backbone of a free market, a vigorous civil society, and a democratic polity—hallmarks of a free people. Oddly, key elements of this tale are kept alive in both older political histories of the liberal tradition in America and newer histories highlighting the rights and agency of particular cultural communities. Coming to terms with the historical rise of the mechanisms of legal, political, economic, corporate, and technological power that currently shape so much of the globe is thus a more difficult task than it should be. A true philosophical and political history of the American present continues to elude historians.²

The author would like to thank Alain Chatriot, Jane Dailey, Colleen Dunlavy, Gary Gerstle, Richard John, Jim Kloppenberg, Ajay Mehrotra, Margaret Novak, Steve Pincus, Gautham Rao, Pierre Rosanvallon, Steve Sawyer, Stephen Smith, Jim Sparrow, and Michael Willrich, as well as the anonymous reviewers for the *AHR*, for their readings and suggestions. Earlier versions of this essay were presented to very helpful audiences at the École des hautes études en sciences sociales, the University of Michigan, the New York University Law School, the University of Pennsylvania Law School, the University of Chicago Law School, the American Politics Workshop at Yale, and the annual meeting of the American Political Science Association.

¹ Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass., 2000); Giorgio Agamben, *State of Exception* (Chicago, 2005).

² For some diverse examples of American history as a freedom narrative, see Eric Foner, *The Story of American Freedom* (New York, 1999); Sara M. Evans, *Born for Liberty: A History of Women in America* (New York, 1997); Melvin I. Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States* (New York, 2001); David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas* (New York, 2004); James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York, 2003); David M. Kennedy, *Freedom from Fear: The American People in Depression and*

This disjunction between historical perception and political reality is not an entirely new phenomenon in the United States. As early as 1887, in a penetrating essay titled “The American State and the American Man,” Albert Shaw chided Americans for their laissez-faire fantasy: “The average American has an unequaled capacity for the entertainment of legal fictions and kindred delusions. He lives in one world of theory and in another world of practice . . . Never for a moment relinquishing their theory [of laissez-faire], the people of the United States have assiduously pursued and cherished a practical policy utterly inconsistent with that theory, and have not perceived the discrepancy.” Surveying thousands of regulatory laws passed by state legislatures in the late nineteenth century, Shaw concluded that “the one common and striking characteristic of this huge collection of new statutes is its utter disregard of the laissez-faire principle . . . They deal with the citizen in every conceivable relation. They seem to have left nothing for future Legislatures to regulate.” One hundred years later, in the middle of Ronald Reagan’s America, Senator Ernest “Fritz” Hollings (D-SC) similarly observed the powerful role of government in the construction of modern life and its renunciation in the American historical self-conception. Seeking the 1984 Democratic nomination for president, Hollings delivered a stump speech deploying several different versions of a story about “a guy who came home from the Korean War, went to college on a form of the GI Bill, opened a business with a Small Business Administration loan, made sure his parents’ farm was adequately wired through Rural Electrification and irrigated with assistance from the Army Corps of Engineers, saw his kids get subsidized school lunches at a school that received lab equipment from a National Science Foundation grant, got his mortgage from the FHA and hurricane disaster relief from FEMA, and one day, took AMTRAK to Washington to complain to his congressman about getting big government off people’s backs.” Like many Americans, “the guy” never saw the role of collective power in the creation of his individual declaration of independence.³

Shaw and Hollings reveal a disconnect at the heart of the American experi-

War, 1929–1945 (New York, 2001). Historians who have advocated an analytical history of the present include James Harvey Robinson, *The New History: Essays Illustrating the Modern Historical Outlook* (New York, 1912); Richard Hofstadter, “History and the Social Sciences,” in Fritz Stern, ed., *The Varieties of History: From Voltaire to the Present* (New York, 1956), 359–370; Thomas Bender, “In Retrospect: The New History—Then and Now,” *Reviews in American History* 12 (1984): 612–622; and Bender, “Wholes and Parts: The Need for Synthesis in American History,” *Journal of American History* 73 (1986): 120–136. Such a perspective also animates the work of James T. Kloppenberg, *The Virtues of Liberalism* (New York, 1998); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, 2001); and Pierre Rosanvallon, *Democracy Past and Future*, ed. Samuel Moyn (New York, 2007).

³ Albert Shaw, “The American State and the American Man,” *Contemporary Review* 51 (1887): 696; E. J. Dionne, Jr., *Why Americans Hate Politics*, reprint ed. (New York, 2004), back cover. I am grateful to my colleague Jim Sparrow for bringing the Hollings story to my attention. It echoes the rhetorical point made by Sidney Webb in “Socialism in England,” *Publications of the American Economic Association* 4 (April 1889): 7–73, 65: “The Individualist City Councillor will walk along the municipal pavement, lit by municipal gas and cleansed by municipal brooms with municipal water, and seeing by the municipal clock in the municipal market, that he is too early to meet his children coming from the municipal school hard by the county lunatic asylum and municipal hospital, will use the national telegraph system to tell them not to walk through the municipal park but to come by the municipal tramway, to meet him in the municipal reading room, by the municipal art gallery, museum and library, where he intends to consult some of the national publications in order to prepare his next speech in the municipal town-hall in favor of the nationalization of canals and the increase of the government control over the railway system. ‘Socialism, sir,’ he will say, ‘don’t waste the time of a practical man by your fantastic absurdities. Self help, sir, individual self-help, that’s what’s made our city what it is.’”

ence—a tension between the story that Americans themselves like to tell themselves about individualism, self-reliance, voluntarism, associationalism, free labor, and the free market and the actual history of the “concrete national institutions,” as Shaw put it, that have been capable of wielding such broad interventionist, coercive, and regulatory power at home as well as abroad. Samuel Huntington once dubbed this yawning gap between facts and norms “cognitive dissonance”—an almost pathological tendency to confuse a fictional American ideal with historical political reality. From Thomas Jefferson’s elision of slavery in the Declaration of Independence to Ronald Reagan’s anachronistic invocation of John Winthrop’s shining “city upon a hill,” examples are obvious and legion and not always merely rhetorical. At the turn of the last century, Roscoe Pound surveyed the damage done when the United States Supreme Court took a “long step into the past” and imposed the fallacy of “liberty of contract” on modern industrial labor relations, as if the parties were still individual “farmers haggling over the sale of a horse.” As Pound’s example suggests, the problem is one not so much of psychology as of political economy. Shaw and Hollings foreground a particular American version of the tension at the center of social and political thought—the relationship between liberty and power, freedom and authority, contract and coercion, and law and violence.⁴

A crucial aspect of this fraught American self-presentation concerns the nature, power, and reach of the American state. While much of modern history deals with the actions of powerful nation-states and the consequences of their rise, expansion, and sometimes fall, discussion of the American state (arguably one of the more influential in recent times) remains trapped in a different past and a peculiar idiom. The phrase “the American state” is seen as something of an oxymoron in a land of alleged “anti-statism” and “statelessness.” When acknowledged at all, the American version of a state is viewed as something not quite fully formed—something less, something laggard, something underdeveloped compared to the mature governmental regimes that dominate modern European history. An enduring and exceptional tendency to view the American state throughout its history as distinctively “weak” continues to frustrate a reckoning with American power in the twenty-first century. The making and unmaking of this historical anachronism—the myth of the “weak” American state—requires further explanation.

THE TIRED MYTH OF THE “WEAK” AMERICAN STATE is to the history of American politics what the *Lochner* court is to American constitutional law and what laissez-faire is to American political economy. Like the myths of *Lochner* and laissez-faire, the idea of a weak American state is the product of a larger tendency to read American history as exceptional—as the history of the making of a “new world” specially outside the historical currents and corruptions of “old” Europe. It is part of the myth of America as a place of rebirth—of American Adam emerging fresh from a veritable state of nature. As John Locke mused with almost biblical cadence, “Thus in the beginning all the World was *America*.”⁵ The myth overemphasizes the so-called “natural” de-

⁴ Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge, Mass., 1981), 3, 62; Roscoe Pound, “Liberty of Contract,” *Yale Law Journal* 18 (May 1909): 454–487, 454.

⁵ John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1988), 301. Or as J. Hector St. John Crèvecoeur unpacked the image in Letter III of his *Letters from an American Farmer*, “What

velopment of individualism, private rights, civil society, free labor, and a free economy in American history. And consequently, it downplays the more historical and "artificial" role of collective decision-making, public law, government, and regulation in American political-economic development. In this mythical narrative, the state itself is seen as something of a menacing European contrivance that never really finds a place in a free, unregulated, and stateless America.

The idea of a weak American state originated in some classic sources and analyses. Alexis de Tocqueville's comparative emphasis on individualism, associationalism, localism, and administrative decentralization led him to underestimate the power of the state in America. Although many of Tocqueville's prophecies concerning democratic and despotic trends have relevance today, his forecast concerning American state development was largely inaccurate. "Unless I am strangely mistaken," he hedged in 1835, "the federal government of the United States is tending to get daily weaker; stage by stage it withdraws from public affairs, continually narrowing its sphere of action. Being naturally weak, it gives up even the appearance of strength." G. W. F. Hegel continued the comparative European tradition of seeing in the American state something not wholly realized. Reflecting on what he perceived to be an "entire immunity from public burdens," Hegel questioned whether the United States was a "real State" at all: "The general object of the existence of this State is not yet fixed and determined, and the necessity for a firm combination does not yet exist; for a real State and a real Government arise only after a distinction of classes has arisen." But even after the socioeconomic transformations of the late nineteenth century—when class distinctions and public burdens were clearly accelerating—a wide variety of commentators continued to find the answer to Werner Sombart's classic question "Why is there no socialism in the United States?" in an exceptional American political culture displaying a characteristic anti-statism.⁶

But ironically, the heyday for the popular expansion of the notion of the weak American state was the mid-twentieth century—in the heart of Henry Luce's "American Century." In the midst of brutal conflicts with totalitarian states, American scholars hesitated to draw direct comparisons between American politics and European statist regimes. On the contrary, a proliferation of "American studies" placed

then is the American, this new man? . . . He is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds." Crevecoeur, *Letters from an American Farmer and Sketches of Eighteenth-Century America* (1782; repr., New York, 1982), 38. For more contemporary commentaries on this theme, see R. W. B. Lewis, *The American Adam: Innocence, Tragedy, and Tradition in the Nineteenth Century* (Chicago, 1955); and Arthur M. Schlesinger, "What Then Is the American, This New Man?" in Schlesinger, *Paths to the Present* (Boston, 1964), 3–23.

⁶ Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (New York, 1988), 394–395. Like any aspiring prophet, Tocqueville tried to have it both ways. After making the case for the weak state, he forecasted the possibility of an opposite development: "When men come to notice that the weakness of the federal government hazards the Union's existence, I have no doubt that one will see a reaction spring up in favor of strength . . . A change of opinion, an internal crisis, or a war could all at once restore the vigor it needs." Which way would it turn out? Tocqueville wisely concluded, "That is hidden in the future, and I cannot pretend to be able to lift the veil." Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, trans. J. Sibree (New York, 1956), 85–86; Werner Sombart, *Why Is There No Socialism in the United States?* trans. Patricia M. Hocking and C. T. Husbands (White Plains, N.Y., 1976). For the most current presentation of this recurring theme, see Seymour Martin Lipset and Gary Marks, *It Didn't Happen Here: Why Socialism Failed in the United States* (New York, 2001); and Lipset, *American Exceptionalism: A Double-Edged Sword* (New York, 1997).

renewed emphasis on an exceptional national historical trajectory—an alternative American *Sonderweg*—rooted in negative liberty, voluntarism, self-interested liberalism, and a self-regulating market, all limiting the role of the state in America's social and economic progress. In intense political times, historians such as Arthur M. Schlesinger, Sr., Daniel J. Boorstin, and, to a lesser extent, Louis Hartz fashioned a compelling and remarkably consistent national narrative that explained America's special path as the product of a persistent preference for society over polity, individual initiative over collective action, and private competition and voluntarism over public regulation and state direction. Within this ideologically charged interpretive template, the history of the American state (and its public policies and purposes) almost disappeared. Even radical governmental and regulatory interventions dissolved in the unbearably light miasma of national cultural mythology. Schlesinger's defanging of progressive reform was typical: "After the American fashion it was a doctrineless conviction, the product of an adjustment to new times for the sake of preserving the traditional spirit of self-reliance and free competition."⁷

But perhaps the most remarkable testament to the resilience of the myth of the weak American state is the degree to which this Cold War fiction has only been reinvigorated by post-Cold War fascination with neoliberalism, deregulation, and privatization. Despite an impressive social scientific effort in the 1980s and 1990s "to bring the state back in" to the study of American history, led by pioneering historical sociologists such as Theda Skocpol and political scientists such as Stephen Skowronek, the myth of the weak American state persists. The overarching tendency to characterize the American state as something of a false pretender to Hegel's notion of a "real State" continues unabated despite the proliferation of state-centered analyses of American political development. As Skowronek characteristically concluded, "One anomaly begets another. American exceptionalism has not been transcended by twentieth-century state-building, it has only taken on a new form." That new form has generated a series of odd adjectives that dot the bibliographic landscape as scholars strain to measure and gauge American state power with instruments and models seemingly devised for another time and place. The modern American state is still routinely described as "exceptional," "laggard," "incomplete," "backward," "uneasy," "maternalist," "reluctant," and "divided," reflecting the hold of historical typologies and teleologies first devised by European social theorists in the second half of the nineteenth century.⁸ The tendency to talk about the American state using the explicit terminology of "weak" vs. "strong" has never been more prevalent. And for

⁷ Schlesinger, *Paths to the Present*, 22; Daniel J. Boorstin, *The Genius of American Politics* (Chicago, 1958); Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York, 1955); John Higham, "Changing Paradigms: The Collapse of Consensus History," *Journal of American History* 76 (September 1989): 460–466.

⁸ Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (New York, 1985); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass., 1992); Skocpol, *Social Policy in the United States* (Princeton, N.J., 1995); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York, 1982). These adjectives are taken from Skowronek, *Building a New American State*, 5, 288; Skocpol, *Social Policy*, 12; as well as Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago, 1983); Bruce S. Jansson, *The Reluctant Welfare State: A History of American Social Welfare Policies* (Belmont, Calif., 1988); Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge, 2002); and Seth Koven and Sonya Michel, *Mothers of a New World: Maternalist Politics and the Origins of the Welfare State* (New York, 1993).

most commentators, the feeble side of that polarity (in an improbable tortoise-and-hare kind of twist) still appears to be winning. The American state remains in some of the most influential historical and theoretical accounts "a patchwork," "a hapless giant," "a weakened spring," "an incomplete conquest," and "a Tudor polity"—in a word, an anachronism.⁹

But of course, the modern American state is anything but an anachronism, and its special force in the twenty-first century has already sparked a burgeoning historical revision. This revision builds directly on the contributions of an impressive number of senior scholars—Morton Keller, Harry Scheiber, Samuel Hays, Ellis Hawley, Barry Karl, Louis Galambos, Theodore Lowi, David Mayhew, Otis Graham, Thomas McCraw, Martha Derthick, William Brock, and Elliot Brownlee, among others—who resisted the trend and investigated the actual power and policies of the American state in some detail.¹⁰ Moreover, this reconsideration would have been unimaginable but for the new energy and insight thrust into state studies by Theda Skocpol, Stephen Skowronek, Karen Orren, their collaborators, and early contributors to such influential journals as *Studies in American Political Development* and the *Journal of Policy History*. But this revision has really taken on a life and agenda of its own among a somewhat junior group of scholars—historians and political scientists who have come of age in an era when European state regimes have appeared comparatively less threatening and more contained, while the American form of legal and economic order is being aggressively extended across the globe. The obvious present reality of American state power in the early twenty-first century is

⁹ Frank Dobbin and John R. Sutton, "The Strength of the Weak State: The Employment Rights Revolution and the Rise of Human Resource Management Divisions," *American Journal of Sociology* 104 (1998): 441–476; Gary G. Hamilton and John R. Sutton, "The Problem of Control in the Weak State: Domination in the United States, 1880–1920," *Theory and Society* 18 (1989): 1–46; Robert C. Lieberman, "Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France," *Studies in American Political Development* 16 (2002): 138–161. As J. P. Nettl summed up this stateless tradition in American social thought, "The relative 'statelessness' of American social science coincides with the relative statelessness of the United States, with the long period during which the egalitarian and pluralistic society predicted with sensitive fingertips by Tocqueville was becoming institutionalized over a vast continent. One has only to read [Seymour Martin] Lipset or [William C.] Mitchell to see that an American sociopolitical self-examination simply leaves no room for any valid notion of the state." Nettl, "The State as a Conceptual Variable," *World Politics* 20 (July 1968): 559–592, 561; Skowronek, *Building a New American State*, 37, 290; Wallace D. Farnham, "'The Weakened Spring of Government': A Study in Nineteenth-Century American History," *American Historical Review* 68, no. 3 (April 1963): 662–680; Bertrand Badie and Pierre Birnbaum, *The Sociology of the State* (Chicago, 1983), 130; Theodore J. Lowi, *American Government: Incomplete Conquest* (Hinsdale, Ill., 1976); Samuel P. Huntington, "Political Modernization: America vs. Europe," *World Politics* 18 (1966): 378–414, 382.

¹⁰ For a sampling from these prolific authors, see Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass., 1977); Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820–1861* (Athens, Ohio, 1969); Samuel P. Hays, *American Political History as Social Analysis* (Knoxville, Tenn., 1980); Ellis Hawley, *The New Deal and the Problem of Monopoly* (Princeton, N.J., 1966); Barry Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago, 1983); Louis Galambos, ed., *The New American State: Bureaucracies and Policies since World War II* (Baltimore, Md., 1987); Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York, 1969); David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (New Haven, Conn., 1991); Otis L. Graham, *Toward a Planned Society: From Roosevelt to Nixon* (New York, 1976); Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Mass., 1984); Martha Derthick, ed., *Dilemmas of Scale in America's Federal Democracy* (New York, 1999); William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States, 1865–1900* (New York, 1984); W. Elliot Brownlee, ed., *Funding the Modern American State, 1941–1995: The Rise and Fall of the Era of Easy Finance* (New York, 1993).

forcing a much-needed reconsideration of the history of the rise of a global leviathan.¹¹

The most significant and lasting tenet of this revisionism is that the American state is and always has been more powerful, capacious, tenacious, interventionist, and redistributive than was recognized in earlier accounts of U.S. history. New histories of the American state strive to grasp one of the fundamental facts about modern American history—the development of a legal-economic and geopolitical hegemon. That is what contemporary American historians need to explain. Amid the torrent of exceptionalist analyses of the limits, weakness, and backwardness of the American state, American history has overlooked the elephant in the room—the steadily aggrandizing authority of one of the most powerful nation-states in world history.

Reoriented toward explaining that forceful reality, American history reveals ample evidence of the construction of American state power from the earliest days of the republic to the very recent past. Max Edling, for example, has recently re-centered the history of the American founding around the creation of a strong “fiscal-military” state, corroborating Hannah Arendt’s observation that “the true objective of the American Constitution was not to limit but to create more power, actually to establish and duly constitute an entirely new power center.” If there ever was a weak state in the United States, it might have been under the Articles of Confederation—a government quickly overturned in a most conspicuous act of state-building. Jerry Mashaw has similarly traced the origins of a powerful and centralizing national administrative law to the first days of the republic, challenging the historical fiction that a national bureaucracy and administrative regulatory authority awaited the invention of the Interstate Commerce Commission. Richard John has almost single-handedly revised notions of the lack of central government direction in the nineteenth century through his meticulous reconstructions of the ubiquitous role of the state in the promotion and regulation of communications infrastructure, from the post office to the telegraph and telephone. Richard White has placed federal government power at the center of the new western history of Indian removal, military and commercial development, and westward expansion. As the work of a generation of social and cultural historians makes clear, Indian removal, slavery, immigration restriction, and racial, ethnic, religious, and gender-based forms of segregation and discrimination were not the products of laissez-faire or a hesitancy to draw on the powers of the state or a public preference for leaving people alone. The trail of the state is over all.¹²

¹¹ The bibliography in Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York, 2004), offers an excellent guide to the first wave of political science studies. For recent assessments in line with the direction of this article, see Desmond King and Robert C. Lieberman, “Ironies of State Building: A Comparative Perspective on the American State” (forthcoming, 2008); Peter Baldwin, “Beyond Weak and Strong: Rethinking the State in Comparative Policy History,” *Journal of Policy History* 17 (November 2005): 12–33; and Richard R. John, ed., *Ruling Passions: Political Economy in Nineteenth Century America* (University Park, Pa., 2006).

¹² Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York, 2003); Hannah Arendt, *On Revolution* (New York, 1963), 152; Jerry L. Mashaw, “Recovering American Administrative Law: Federalist Foundations, 1787–1801,” *Yale Law Journal* 115 (2006): 1256–1344; Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, Mass., 1995); John, “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835,” *Studies in American Political Development* 11 (Fall 1997): 347–380; John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill,

The powerful role of the American state in policing labor has been the dominant theme of a cottage industry of work on “the state and the unions.” Richard Bense, among others, has refocused attention on the role of economic policymaking in the creation of a truly national (and later international) commercial marketplace in the United States. And police power regulation was no less present in the social arena, from temporary experiments such as Prohibition to more sustained developments in criminal justice and penal policy. It is worth remembering in this context that John Stuart Mill’s classic examples of governmental overreaching in *On Liberty* came from the United States, not Europe: Sunday laws, liquor regulation, and the persecution of the Mormons.¹³

The formative powers of American fiscal, tax, price, and monetary policies are also attracting new attention. David Moss has documented the long history of active American state regulation of risk. Michele Landis Dauber has charted the equally long history of national emergency and disaster relief. And a host of new histories from Christopher Howard, Jacob Hacker, Jennifer Klein, John Witt, and James Wooten have begun to reevaluate the powerful redistributive effects of America’s “hidden” social welfare and social insurance state. The explosive growth of federal administration and bureaucracy in the twentieth century has taken on new significance in the histories of Sidney Milkis, Daniel Carpenter, and Brian Balogh. One can hardly explain the rise of American military might or national and international commercial development—let alone the role of the prison or the death penalty or racial segregation or executive emergency and war-making powers in American public life—by continued reference to a weak state tradition. The idea of American state weakness, statelessness, or anti-statism is quickly being abandoned. Such formulations no longer explain the past, and they certainly cannot account for the present.¹⁴

N.C., 2000); Mark R. Wilson, *The Business of Civil War: Military Mobilization and the State, 1861–1865* (Baltimore, Md., 2006); Richard White, *“It’s Your Misfortune and None of My Own”: A New History of the American West* (Norman, Okla., 1991); Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* (New York, 2001); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J., 2005); Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* (Princeton, N.J., 2002); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco’s Chinatown* (Berkeley, Calif., 2001); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, N.C., 2002); Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution* (New York, 2001).

¹³ Christopher L. Tomlins, *The State and the Unions: Law and the Organized Labor Movement in America, 1880–1960* (New York, 1985); Nelson Lichtenstein and Howell John Harris, eds., *Industrial Democracy in America: The Ambiguous Promise* (New York, 1993); William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass., 1991); Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana, Ill., 1995); Ernst, “Law and American Political Development, 1877–1938,” *Reviews in American History* 26 (March 1998): 205–219; Richard Franklin Bense, *The Political Economy of American Industrialization, 1877–1900* (New York, 2000); Colleen A. Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton, N.J., 1994); Richard Sylla, “The Progressive Era and the Political Economy of Big Government,” *Critical Review* 5 (1992): 531–557; Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* (Chapel Hill, N.C., 1995); Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York, 2003); David S. Tanenhaus, *Juvenile Justice in the Making* (New York, 2005); Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State* (New York, 2008); Markus Dirk Dubber and Mariana Valverde, eds., *The New Police Science: The Police Power in Domestic and International Governance* (Palo Alto, Calif., 2006); John Stuart Mill, *“On Liberty” and Other Writings* (Cambridge, 1989), 89–91.

¹⁴ Julian E. Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945–1975* (New York,

Especially in our present neoliberal moment, we should not be lulled into thinking that the American state is somehow retreating (after the New Deal and World War II, after the Great Society and Vietnam) to a more familiar pattern of privatization, deregulation, and laissez-faire. Despite the rising rhetoric, the power of the U.S. government to regulate, study, order, discipline, and punish its citizens—as well as other nations' citizens—has never been greater. As we confront contemporary neoliberalism, we should be attuned to what Sheldon Wolin calls the “paradox of power” in late modernity—that “power is simultaneously concentrated and disaggregated.”¹⁵

In contrast to the myth of the weak American state, the historical revision already well under way attempts to document the conscious and continuous construction of new forms of state power throughout American history. This story of state development does not fit into established categories such as classical liberalism vs. modern social democracy or Gilded Age conservatism vs. Progressive Era reform. And it bears not the slightest resemblance to ideas about American laissez-faire, voluntarism, or anti-statism. Instead, it is the story of the creation of extraordinarily powerful modern mechanisms of American governance. Liberalism and the rule of law were crucial parts of this new state regime. But as Frankfurt School social theorist Franz Neumann warned, one should not “fall victim to a historical fallacy” of associating liberal and legal elements with weakness: “The liberal state has always been as strong as the political and social situation and the interests of society demanded. It has conducted warfare and crushed strikes; with the help of strong navies it has protected its investment, with the help of strong armies it has defended and extended its boundaries, with the help of the police it has restored ‘peace and order.’ It . . .

2000); Ajay K. Mehrotra, “Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax,” *UCLA Law Review* 52 (August 2005): 1793–1866; Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton, N.J., 2005); David A. Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Cambridge, Mass., 2002); Michele Landis Dauber, “Fate, Responsibility, and ‘Natural’ Disaster Relief: Narrating the American Welfare State,” *Law and Society Review* 33 (1999): 257–318; Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton, N.J., 1997); Hacker, *The Divided Welfare State*; Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America’s Public-Private Welfare State* (Princeton, N.J., 2003); John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass., 2004); James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (Berkeley, Calif., 2004); Michael B. Katz, *The Price of Citizenship: Redefining the American Welfare State* (New York, 2001); Edward D. Berkowitz, *America’s Welfare State: From Roosevelt to Reagan* (Baltimore, Md., 1991); Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System since the New Deal* (New York, 1993); Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, N.J., 2001); Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945–1975* (New York, 1991); Joanna Lynn Grisinger, “Reforming the State: Reorganization and the Federal Government, 1937–1964” (Ph.D. diss., University of Chicago, 2005); David Garland, “Capital Punishment and American Culture,” *Punishment & Society* 7 (2005): 347–376; Bartholomew H. Sparrow, *From the Outside In: World War II and the American State* (Princeton, N.J., 1996); Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945–1954* (New York, 2000); James T. Sparrow, “Americanism and Entitlement: Authorizing Big Government in an Age of Total War” (unpublished ms.); Ira Katznelson and Martin Shefter, eds., *Shaped by War and Trade: International Influences on American Political Development* (Princeton, N.J., 2002).

¹⁵ Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, expanded ed. (Princeton, N.J., 2004), xxi; David Harvey, *A Brief History of Neoliberalism* (New York, 2005); John L. Comaroff and Jean Comaroff, eds., *Millennial Capitalism and the Culture of Neoliberalism* (Durham, N.C., 2001).

has rested upon force and law, upon sovereignty and freedom.” This complex character of the American liberal state—embracing both force and law, sovereignty and freedom, contract and compulsion—demands new methods of historical evaluation.¹⁶

IN A PROVOCATIVE REVIEW OF A RECENT SURVEY of historical sociology and political development, sociologist Andrew Abbott drew attention to the overwhelming bibliographical dominance of “the mainline European tradition” of classic social theory (Hegel, Marx, Weber, Durkheim, and their progeny) in thinking about the social and political conditions of modernity and the almost total neglect of American social theory (James, Peirce, Ward, Dewey, Cooley, Mead, and Thomas). Abbott’s observation is even more apposite when we consider models of modern state development. The major problem plaguing historical investigations of the American state is the tendency to force American experience into a theoretical frame designed around the emergence of modern European nation-states more than a century ago. In particular, the ideal types of Max Weber thoroughly dominate these assessments. Governmental organization and policymaking are routinely measured against Weber’s chief characteristics of modern statecraft: (1) a rationalized and generalized legal and administrative order amenable to legislative change; (2) a bureaucratic apparatus of officers conducting official business with reference to an impersonal order of administrative regulations; (3) the power to bind—to rule and regulate—all persons (national citizens) and all actions within the state’s official jurisdiction via its laws; and (4) the legitimate authority to use force, violence, and coercion within the prescribed territory as prescribed by the duly constituted government. Unification, centralization, rationalization, organization, administration, and bureaucratization have become the theoretical hallmarks of fully developed, essentially modern states. Any departures or anomalies from this European model come to be seen as signs of underdevelopment—of backwardness or lag—usually chalked up to the peculiarities of the English or the Americans. In the social-theoretic teleology emanating from continental Europe, the American state is almost predetermined to fall short—predestined for perpetual weak state status.¹⁷

But is there an alternative model of state development? Is there a way of looking at the American state differently—afresh—from within rather than from without? Are there other methods of assessing the special techniques, functions, and processes

¹⁶ Franz L. Neumann, “The Change in the Function of Law in Modern Society,” in William E. Scheuerman, ed., *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley, Calif., 1996), 101–141, 101. See also Paul Starr, *Freedom’s Power: The True Force of Liberalism* (New York, 2007).

¹⁷ Andrew Abbott, “A Brief Note on Pasturization,” *International Journal of Comparative Sociology* 47 (2006): 343–348. Abbott attributed this dominance of European over American social theory to “the long, long shadow of Talcott Parsons.” Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*, 2 vols. (New York, 1937); Charles Camic, “Reputation and Predecessor Selection: Parsons and the Institutionalists,” *American Sociological Review* 57 (August 1992): 421–445. Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York, 1947), 154–156; Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, 2 vols. (Berkeley, Calif., 1978), 1: 217–220; Anthony Giddens, *Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Max Weber* (Cambridge, 1971); Bob Jessop, *State Theory: Putting the Capitalist State in Its Place* (Cambridge, 1990).

of American government without reducing differences to defects or shortcomings? Are there other explanatory tools that better account for the distinctive power of the American machinery of governance? Can we make more interpretive room for the American state?

The historical revision under way makes some progress in this direction of seeing and demystifying the American state. Indeed, in the interstices of these new histories, we can begin to detect the outlines of an American model of state development. Five themes are particularly salient: first, a simple growing appreciation of the historic strength of some theoretically designated “weak” states; second, a pragmatic approach to the problem of power; third, a recognition of the significance of distribution in American state-building; fourth, a realistic account of the power of the American rule of law; and fifth, a critical interrogation of the public-private distinction.

Weak states as strong states. There certainly was a time when it made perfect sense to celebrate the European and Weberian attributes of centralization, rationalization, and bureaucratization as models of state strength and the epitome of political modernity. In the early twentieth century, such states dominated the world stage, and the future seemed to be unfolding along lines anticipated by classic social theory. But things look remarkably different from the perspective of the early twenty-first century. Highly centralized and bureaucratized state apparatuses now appear antiquated rather than modern, reflecting a bricks-and-mortar conception of the political rendered increasingly obsolete by globalization, flexible specialization, outsourcing, networking, and open-source modes of organization and governance. Given the changing scale and social geography of the twenty-first century, the ideal-typical state of classic social theory looks more like a remnant of the past than a harbinger of the future. Moreover, the degree to which some highly centralized and bureaucratized authoritarian states have proved short-lived and surprisingly fragile when compared to their English and American counterparts suggests that “strong” and “weak” might not map particularly well onto the classic typologies. Indeed, recently a number of scholars have begun exploring the extraordinary “strength” of historically designated “weak” states—especially the United States.¹⁸

But in the end, the topsy-turvy exercise of showing weak states to be strong and vice versa only further demonstrates the limits of the existing theoretical framework and the imprecision of the interpretive language. After all, what do we mean when we talk about a state as weak or strong? Are we talking about the organization of officialdom or the reach of public authority? Are we talking structure or function, process or substance, inputs or outputs, scale or scope, law-making or law enforcement, people or policies? At precisely the point where an interesting substantive discussion of the multifaceted nature of governance should begin, the weak vs. strong state debate usually devolves into a rather vapid (and endless) discussion of the proper unit of measurement.

¹⁸ On the interrelationship of issues of scale, social geography, and statecraft, see Benjamin Constant, *Political Writings* (Cambridge, 1988); Craig Calhoun, “The Infrastructure of Modernity: Indirect Social Relationships, Information Technology, and Social Integration,” in Hans Haferkamp and Neil J. Smelser, eds., *Social Change and Modernity* (Berkeley, Calif., 1992), 205–236; and Manuel Castells, *The Rise of the Network Society* (Oxford, 2000). Dobbin and Sutton, “The Strength of the Weak State”; Lieberman, “Weak State, Strong Policy.”

The sociologist Michael Mann offers a way out here with his helpful distinction between two different meanings of state power—*despotic* power and *infrastructural* power. By despotic power, Mann refers to the organizational capacity of state elites to rule unchecked by other centers of power or by civil society. Infrastructural power, in contrast, refers to the positive capacity of the state to “penetrate civil society” and implement policies throughout a given territory. Mann’s distinction nicely accounts for some of the confusion surrounding the power of the American state. The American state (like the American Revolution that produced it) is organized against despotic power. It is obsessive about separating and distributing powers and creating checks, balances, and offsets within the formal constitutional organization of government: federal vs. state vs. local; executive vs. legislative vs. judicial; popularly elected vs. appointed officials; short terms vs. life tenures; big states vs. small states; the creation of a fourth branch of government (administrative agencies) and an independent fourth estate (the press). It is no doubt this divided and dispersed organization of governance that most have in mind when they talk too loosely about American anti-statism or statelessness. Legal historian Willard Hurst defined American constitutionalism precisely by this anti-despotic penchant for balancing power and for reining in the autonomous authority of state elites: “Any kind of organized power ought to be measured against criteria of ends and means which are not defined or enforced by the immediate power holders themselves. It is as simple as that: We don’t want to trust any group of power holders to be their own judges upon the ends for which they use the power or the ways in which they use it.”¹⁹

But while the *despotic* power of the American state (until recent times) might have been limited, the scale and scope of its *infrastructural* power is and always has been extensive. From the founding of the first national governing institutions to the conquest of western lands; from the creation of a vast public infrastructure for the promotion of commerce to the construction of a powerful defense and military establishment; from the expansion of governmental powers of police, regulation, administration, and redistribution to the invention of new ways of policing citizens, aliens, races, morals, and gender relations in the production of national culture, the infrastructural power of the American state seems at times boundless, even borderless, as American legal, corporate, economic, and cultural forms spread across the globe. It is this power—infrastructural power—that renders commentary about American state weakness or statelessness unintelligible. And it raises the intriguing interpretive possibility that the very anti-despotic organization of the American state might actually increase its infrastructural capacity.

It is hard to imagine better models to measure and compare despotic state power than the ones developed by classic European social theory. After all, despotism was the chief problem of European political thought for most of its history. But for understanding infrastructural power—the actual power of state policies in action to have real effects on population—American social theory offers some advantages.

¹⁹ Michael Mann, “The Autonomous Power of the State: Its Origins, Mechanisms, and Results,” in John A. Hall, ed., *States in History* (Oxford, 1986), 109–136; James Willard Hurst, “Problems of Legitimacy in the Contemporary Legal Order,” *Oklahoma Law Review* 24 (1971): 224–238, 225; Hurst, *Justice Holmes on Legal History* (New York, 1964), 29, 31. For further discussion of this point, see William J. Novak, “Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst,” *Law and History Review* 18 (2000): 97–145.

The problem of a distinctly new kind of coercive power emerging within popular sovereignties, democratic societies, and modern economies—a power more diffuse, less visible, less clearly identified with a single individual (i.e., the king) or institution (i.e., the church), sometimes private as well as public, woven into the everyday sub-structure of modern social and economic organization—was exactly the problem of early American social science. The pragmatism of William James and John Dewey, the institutional economics of Richard T. Ely and John R. Commons, the sociology of Lester Frank Ward and Charles Horton Cooley, and the functional jurisprudence of Roscoe Pound and Robert Lee Hale provide an alternative template for examining modern state development.²⁰

Pragmatism. One of the great achievements of the pragmatism of William James, John Dewey, and their followers was to forge a workaday skepticism about the ability of abstract theories, formal definitions, ideal typologies, and metaphysical generalities of all sorts (what legal realist Felix Cohen would later deride as “transcendental nonsense”) to accurately reflect the real world. In place of evaluating the practical world according to ideal theoretical models, pragmatism advocated a more bottom-up approach—examining how ideas and institutions actually functioned in the real world. Pragmatism endorsed an anti-formalist, realistic, pluralistic, and instrumental approach to knowledge and investigation. It measured truth claims by studying outcomes—the actual effects and consequences of ideas and institutions in practice. As James so provocatively put it, truth was something that “happens to an idea”—its “cash-value”—its ability to carry us usefully from one place to another and to make common sense out of human and historical experience. In place of endless metaphysical debates about definitions, essences, norms, formulas, models, and first principles, pragmatism promoted the actual social investigation of an idea’s real-world consequences for living human beings.²¹

The influence of the pragmatic method resounded well beyond philosophy. In law, economics, sociology, political science, and history, pragmatic approaches defined American social theory and social science in the early twentieth century. In law, governance, and statecraft, pragmatism yielded an impatience with technical discussions of the formal attributes of “the state” or the essence of the “rule of law” or the definition of “sovereignty,” and a quest for a more sociological investigation of state policies and practices in action. John R. Commons, for example, dismissed the intellectual surplusage spent debating the nature of the state or sovereignty in favor of a more realistic examination of the everyday activities of governance. Commons approached the state simply as a “going concern,” best grasped by looking at

²⁰ For a sampling, see William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (New York, 1907); John Dewey, *Liberalism and Social Action* (New York, 1935); Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth*, 2 vols. (New York, 1914); John R. Commons, *Institutional Economics: Its Place in Political Economy* (New York, 1934); Lester Frank Ward, *Dynamic Sociology; or, Applied Social Science* (New York, 1898); Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York, 1909); Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence,” 3 pts., *Harvard Law Review* 24 (1911): 591–619; 25 (1912): 140–168, 489–516; Robert Lee Hale, “Coercion and Distribution in a Supposedly Non-Coercive State,” *Political Science Quarterly* 38 (1923): 470–494.

²¹ Felix Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35 (1935): 809–849; James, *Pragmatism*, 74, 201. For the best treatment of American pragmatism, see James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Social Thought* (New York, 1986).

what it actually did in the real world. For Commons, "the state in reality" was no more than its "officials in action." In law, legal realist Karl Llewellyn charted a similar detour around the "myth, folderol, and claptrap" of normative debate about law's nature and toward the direct examination of law-in-action rather than law-in-theory. He echoed Commons's realistic, matter-of-fact, action-oriented approach: "The doing of something about disputes is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is to my mind, the law itself.* And rules through all of this are important so far as they help you see or predict what officials will do. That is all their importance, except as pretty playthings."²²

The American pragmatic and realist approach to the state, in other words, eschewed the kind of abstract, formal definitions and typologies that dominate state theory—the "pretty playthings" that routinely underestimate American state power. It recommended instead that one look in detail at what state officials of all kinds (not just state elites, but mayors, councilors, clerks, regulators, tax collectors, administrative court judges, police, jailers, grand juries, etc.) actually did. The pragmatic perspective aimed at action-oriented "how" questions—how officials acted, how policy was made, how government functioned—as opposed to more essentialist questions about the nature or essence of law or the state. Pragmatists viewed the state through the "technologies of public action" that affected the day-to-day conduct and practices of real people in the real world. This active, sociological conception of public power—power is as power does—stands a much better chance of taking the full measure of the American state.²³

The distribution of power. A primary reason that American state power remains so hidden is that it is so widely distributed among an exceedingly complex welter of institutions, jurisdictions, branches, offices, programs, rules, customs, laws, and regulations. There are more than 89,000 separate governmental units operating in the United States. Beneath the national government and 50 state governments, 3,033 counties, 19,492 municipal governments, 16,519 town or township governments, 37,381 special district governments, and 13,051 school districts all function with differing self-governing powers and further official subdivisions. Within the national government itself, the division, separation, and distribution of power can be overwhelming. The legislative branch includes 2 houses, 435 congressional districts, and more than 200 committees and subcommittees. The judicial branch encompasses 94 separate federal judicial districts as well as a host of special courts. The executive bureaucracy reaches across 15 separate departments and more than 137 federal agencies and commissions that in 2006 alone printed almost 80,000 pages of proposed rules, regulations, and orders in the Federal Register.

One gets an even better sense of the extraordinary breadth and diversity of American state organization by looking at a single area of policymaking such as criminal law enforcement. In 2004, almost 18,000 local and state police agencies employed

²² John R. Commons, *The Legal Foundations of Capitalism* (Madison, Wis., 1957), 367; Commons, *A Sociological View of Sovereignty, 1899–1900* (New York, 1965); Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York, 1930), 3–5.

²³ Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Public Law, 1730–1870* (Chapel Hill, N.C., 1983), 66.

731,903 full-time law enforcement officers. Another 106,000 officers were employed by federal agencies such as the FBI, the Federal Bureau of Prisons, and U.S. Customs and Immigration. The 1995 and 1999 censuses of corrections and jails document a vast carceral network that continues to grow: 3,365 local jails housing 605,943 inmates, 1,375 state correctional facilities with 941,642 inmates, and 125 federal prisons with 81,930 inmates. The American corrections system employs more than half a million people. The State's Attorney's Office in Cook County, Illinois, alone employs more than 900 prosecutors. And this hulking criminal justice system is dwarfed by the vast American military and national security apparatus. This extraordinary distribution of officialdom is certainly not the product of a weak state. Nor is it a wholly recent invention. Looked at pragmatically, this vast proliferation of American governmental offices and official activities is something of a behemoth.²⁴

The characteristic sprawl of the American state is key to both its distinctive strength and its elusive nature. In classic European social theory, the state is integrated vertically through an organized hierarchy of offices with clear lines of rationalized authority, supervision, and appeal. The American state, in contrast, is organized more horizontally. Power is separated and divided rather than integrated. Jurisdictions frequently overlap, and authority is routinely delegated downward to relatively autonomous sub-units of government. Examples include the historic power of local school boards in the United States as well as the self-governing powers of home-rule municipalities. The police power—the open-ended power of government to regulate in the interest of public health, safety, and welfare—remains formally in the hands of states rather than the national government. Under the dual federalist terms of the U.S. Constitution, the national government has only specifically delegated powers. The 10th Amendment reserves all non-delegated power for the states or (more problematic for classic state theory) for the people. Thus, to try to gauge the power of the American state or the reach of American public policy by looking simply at the national center or the federal bureaucracy is to miss where much of the action is—at the local and state levels—on the periphery. As Jack Greene noted, American government started on the periphery, developing powers of self-rule far removed from the imperial metropole. This American state grew by developing effective mechanisms for policing an ever-expanding and diverse territory. Coming to terms with the American state requires a better understanding of this power on the periphery.²⁵

²⁴ United States Department of Commerce, *Census of Governments* (Washington, D.C., 2007); United States Department of Justice, *Census of State and Local Law Enforcement Agencies* (Washington, D.C., 2004); United States Department of Justice, *Census of Federal Law Enforcement Officers* (Washington, D.C., 2004); United States Department of Justice, *Census of State and Federal Correctional Facilities* (Washington, D.C., 1995); United States Department of Justice, *Census of Jails* (Washington, D.C., 1999).

²⁵ Thomas J. Sugrue, "All Politics Is Local: The Persistence of Localism in Twentieth-Century America," in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton, N.J., 2003), 301–326; David Barron, "Reclaiming Home Rule," *Harvard Law Review* 116 (2003): 2255–2386; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, N.C., 1996); Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (1950): 1–24; Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System," *Law & Society Review* 14 (1980): 663–722; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (Athens, Ohio, 1986).

While classic state theory concentrates on assessing state power at the center, it is not so effective at measuring the extension of power to the borderlands. Peripheral power is by definition infrastructural power—the reach of the state to the furthest limits of the realm. The techniques of effective infrastructural and peripheral government are different from the tactics of central despotisms of old—as different as the task of defending the majesty of the crown at the center is from policing the everyday practices of the people on the frontier. Indeed, anti-despotic governmental structures are frequently prerequisites for effective infrastructural governance and peripheral expansion. Techniques of diffusion, distribution, delegation, incorporation, shared power, open and democratic processes, popular oversight, and local self-government, therefore, are not necessarily signs of state weakness. On the contrary, in many cases they are the foundation of infrastructural governmental strength. The American system of government, with its peculiar array of distributive technologies of state action—divided sovereignty, separation of powers, federalism, delegation, incorporation, and the rule of law—allows for an extraordinary penetration of the state through civil society to the periphery. It also allows for a popular and legal legitimation of rule that has evaded some of the most centralized despotisms.

The rule of law. A pragmatic approach to American state power thus requires an examination of the state in action rather than in theory, from the bottom up rather than the top down, taking account of the periphery as much as the center, horizontal organization as much as vertical consolidation, and the distribution, separation, and delegation of power as much as its centralization, rationalization, and integration. There is another element without which it is impossible to fully account for state power in the United States, and that is the rule of law. One of the distinctive attributes of American governance is the central place of law in state formation and policy development. From the pivotal role of the Constitution in the creation of the nation to the pervasiveness of law, courts, judges, lawyers, and legal standards in everyday policymaking, the United States is distinctly a legal or jural state.

But as with the distribution and separation of powers, the legality of the American state has also been a constant source of confusion and misinterpretation. Emphasizing primarily the naysaying function of constitutional judicial review, the rule of law is too often portrayed simply as a limit or check on American state power—an obstacle to the development of modern administrative or regulatory authority. From the progressive histories of Charles Beard to the enduring mythology surrounding the *Lochner* court, law has been continually represented as something of a conservative roadblock to liberal reform—part of a reactionary and exceptional American juridical tradition that continually frustrates the development of a proper American welfare state.²⁶

But as sociological jurists, legal realists, and legal historians have been pointing

²⁶ See, for example, Charles A. Beard, *Contemporary American History, 1877–1913* (New York, 1914); J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York, 1930); Frank J. Goodnow, *Social Reform and the Constitution* (New York, 1911); Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton, N.J., 1942); Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895* (Ithaca, N.Y., 1960). For a critical discussion of this literature, see William J. Novak, "The Legal Origins of the Modern American State," in Bryant Garth, Robert Kagan, and Austin Sarat, eds., *Looking Back at Law's Century: Time, Memory, Change* (Ithaca, N.Y., 2002), 249–283.

out for some time now, American law has functioned as far more than a constitutional limitation on state development. Rather, law has long been an indispensable and creative source of expanding political and economic power, playing a uniquely positive rather than negative role in the creation of the modern American state. Willard Hurst has been the foremost exponent of such a realistic and positivist view of law's power, noting that in place of a "series of Thou Shalt Nots addressed to power holders," law should be understood as "the application of politically organized compulsion upon men's wills." Hurst's pioneering histories documented the constant involvement of law in state policymaking, from the instrumental transformation of contract, property, and tort, giving legally protected scope to market action in the nineteenth century, to the no less radical expansion of the police power and administrative and regulatory law in the twentieth century.²⁷ One can hardly begin to account for the rise of a modern state in the United States without examining crucial changes in police and criminal law; tort and contract law; labor and immigration law; corporation law; tax, finance, and securities law; regulation and administration; transportation and the law of public utilities; and laws involving health, education, and welfare. American state power is a product of legal processes of extraordinary depth, diversity, and durability. The output of those processes—whether as executive order, federal statute, judicial interpretation, statutory interpretation, administrative rulemaking, state legislation, municipal ordinance, or even everyday police action—must be taken into account. Without a thorough examination of state action through law, courts, judges, and other legal officials, the power of the American state will remain elusive.

Recently scholars such as John Skrentny, Robert Lieberman, Desmond King, Paul Frymer, and Sean Farhang have been reexamining law as an important source of American state power.²⁸ Even private litigation is coming to be seen as but another distinctive American technology for achieving state objectives through alternative means. Indeed, four of the most far-reaching policy initiatives in recent American history—civil rights, environmental protection, workplace and consumer safety, and the Americans with Disabilities Act—have all relied on private litigation as a strategy of public law enforcement. And the radical reach and relative effectiveness of such policies should quickly dispel the suggestion that law, courts, and litigation are somewhat "lesser" or "weaker" forms of state action. On the contrary, such examples demonstrate the extraordinary infrastructural power of law: litigation's ability to generate a citizen enforcement mechanism (so-called private attorneys general) extending deep into civil society and all the way to the periphery—well beyond the capabilities of the largest central bureaucracy. When we add to this extensive reach law's unique ability to generate its own internal standards of normative legitimacy, we have an effective tool of American state power indeed.

²⁷ Hurst, "Problems of Legitimacy," 228; James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, Mass., 1964), 109.

²⁸ John D. Skrentny, "Law and the American State," *Annual Review of Sociology* 32 (2006): 213–244; Lieberman, "Weak State, Strong Policy"; Desmond King, "The American State and Social Engineering: Policy Instruments in Affirmative Action," *Governance* 20 (2007): 109–126; Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97 (2003): 483–499; Sean Farhang, "The Litigation State: Public Regulation and Private Lawsuits in the American Separation of Powers System" (Ph.D. diss., Columbia University, 2005).

Public and private. The private attorneys general concept suggests a final crucial component in an American model of state development: the public-private distinction. The degree to which American state power penetrates the boundaries of civil society is perhaps best reflected in the way in which it defines and utilizes the private sphere. This cuts two ways. First, the American state historically has consistently used the private sector to accomplish public objectives. The private enforcement of public law through private prosecution, nuisance law, the *posse comitatus*, and privately collected fines and fees is but one example. The use of the state's powers of incorporation to promote the development of a national infrastructure through the delegation of special powers such as eminent domain to bridge companies, canals, and railroads is another. Private associations, including New York City's Committee of Fifteen, the American Social Hygiene Association, and the American Protective League, continued to play a role in criminal law enforcement, social and moral vigilance, and collective self-defense into the twentieth century. Rather than monopolize power, property, and policy in the hands of a central public sovereign, the American state less visibly distributed public goods and powers widely through the private sector—enforcing its public capabilities, expanding its jurisdiction, and enhancing its legitimacy in the process.²⁹

While the history of private policing, government subsidies, and other delegations of public power to the private sphere is fairly well documented, the other side of the public-private distinction—the role of the American state in the very creation of the private sphere—is less routinely acknowledged. From the role of state charters in the establishment of associations and corporations to the role of law in the policing of property, the family, the market, and cultural life, the public powers of the jural state were crucial to the formation and sustenance of American civil society. As Karl Polanyi observed about the market, "Economic history reveals that the emergence of national markets was in no way the result of the gradual and spontaneous emancipation of the economic sphere from governmental control. On the contrary, the market has been the outcome of a conscious and often violent intervention on the part of government." More recently, social and cultural historians have been making a similar case about the public construction of family, gender, and race relations.³⁰

The most compelling analyses of American power have always refused to split the

²⁹ See, for example, Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800–1880* (Chapel Hill, N.C., 1989); Gautham Rao, "The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America," *Law and History Review* 26 (Spring 2008): 1–56; Scheiber, *Ohio Canal Era*; Paul Wallace Gates, *History of Public Land Law Development* (Washington, D.C., 1968); Committee of Fifteen, *The Social Evil* (New York, 1900); Allan M. Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States since 1880* (New York, 1985); Christopher Capozzola, "The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America," *Journal of American History* 88 (March 2002): 1354–1382; William J. Novak, "Public-Private Governance: A Historical Introduction," in Jody Freeman and Martha L. Minow, eds., *Governance by Contract* (Cambridge, Mass., forthcoming).

³⁰ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, 1944), 258; James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (Charlottesville, Va., 1970); Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly*, 3rd ser., 50 (1993): 51–84; William J. Novak, "The American Law of Association: The Legal-Political Construction of Civil Society," *Studies in American Political Development* 15 (2001): 163–188; Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass., 2000); George Chauncey, *Gay New York: Gender, Urban Culture, and the Makings of the Gay Male World, 1890–1940* (New York, 1994); Welke, *Recasting American Liberty*.

problem along a single either-or, public-private binary (e.g., the people vs. the interests; public good vs. private right; the state vs. the individual; regulation vs. the market). Instead, realistic and pragmatic approaches to American state development emphasize the interpenetration of public and private spheres—the convergence of public and private authority in everyday policymaking. Central to this perspective is the recognition that American power has long been distributed among a series of individuals, groups, parties, associations, organizations, and institutions not readily designated as wholly *either public or private*. Think, for instance, of the hybrid public-private roles of the American Bar Association, the American Medical Association, Fannie Mae, the American Stock Exchange, the American Farm Bureau, the Federal Reserve, Underwriters Laboratories, the Ad Council, the American Legion, the American Red Cross, the YMCA, the East Bay Municipal Utility District, and the National Rifle Association. The ambiguous public-private power at the core of these institutions is emblematic of the larger distribution of public and private authority in the United States. By emphasizing the everyday intersection of the legal-political and the socioeconomic, the realist perspective reveals the continuous public-private interplay of forces too often separated out in more polemical arguments: right and power, contract and coercion, autonomy and solidarity.³¹

The critical potential of such a perspective is suggested by the original projects of American socio-legal theorists such as Wesley Newcomb Hohfeld, Morris Cohen, Walton Hale Hamilton, and Robert Lee Hale. The work of these scholars was focused directly on deconstructing the naturalistic pretensions of rights talk, property, contract, and the market to belong to the higher plane of exclusively private freedom. In a series of influential articles and treatises, these theorists catalogued the role of law and the state in establishing and enforcing property and contract rights. Exploding the fiction of the invisible hand, they implicated the visible state directly in the legal-political structuring of the market. In the revealingly entitled “Property and Sovereignty,” Cohen explored the fusion of private right and public power that generated “the character of property as sovereign power compelling service and obedience.” He reminded students of property that the ideal of “*laissez-faire* has never in fact been completely operative.” In *Freedom through Law: Public Control of Private Governing Power*, Hale further unmasked the public powers behind seemingly private organizations and action. He contended that the public-private distinction obscured the role of the state in constructing the exchanges that determined so much of the distribution of wealth and power in American history.³²

³¹ See, for example, Gail Radford, “From Municipal Socialism to Public Authorities: Institutional Factors in the Shaping of American Public Enterprise,” *Journal of American History* 90 (December 2003): 862–890; Elisabeth S. Clemens, “Lineages of the Rube Goldberg State: Building and Blurring Public Programs, 1900–1940,” in Ian Shapiro, Stephen Skowronek, and Daniel Galvin, eds., *Rethinking Political Institutions: The Art of the State* (New York, 2006), 380–443; Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York, 1968); V. O. Key, *Politics, Parties, and Pressure Groups* (New York, 1942); Grant McConnell, *Private Power and American Democracy* (New York, 1966); Lowi, *The End of Liberalism*; Keller, *Affairs of State*.

³² Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *Yale Law Journal* 26 (June 1917): 710–770; Morris R. Cohen, “Property and Sovereignty,” *Cornell Law Quarterly* 13 (1927): 8–30, 12, 22; Walton Hale Hamilton, *The Politics of Industry* (New York, 1957); Robert Lee Hale, *Freedom through Law: Public Control of Private Governing Power* (New York, 1952). For incisive analysis, see Joseph William Singer, “Legal Realism Now,” *California Law Review* 76 (March 1988): 465–544.

Focusing on the convergence of public and private power in the actual output of the American state has two interpretive implications. First, it draws attention to the strong side of so-called weak state technologies, exposing the public delegation to private groups of the state's monopoly power over the legitimate use of force (to use Max Weber's terminology). Second, the realist perspective calls attention to the normative implications of such redistributions of power. As Cohen and Hale argued, the distribution of wealth in the United States cannot be viewed as the innocent by-product of supposedly natural, essentially private market forces. Indeed, that market was itself the product of public law and historic political choices. Distributive claims are notoriously difficult to make from the perspective of "private" economics alone. But by exposing the "public" underwriting of property, contract, and enterprise in law and politics, the realist critique relates the distribution of wealth directly to the allocation of power in a democratic republic. When we are simultaneously talking about the public as well as the private—democracy as well as economy—distributional concerns must be taken more seriously. As Morris Cohen concluded, "It would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed."³³

IN HIS ESSAY "OF THE FIRST PRINCIPLES OF GOVERNMENT," David Hume famously reflected on the ever-present role of fictions and opinion in the support of governmental power, despotic as well as democratic. "Nothing appears more surprising to those, who consider human affairs with a philosophical eye," he noted, "than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as force is always on the side of the governed, the governors have nothing to support them but opinion."³⁴ From the divine right of kings to popular sovereignty to the idea of a government of laws rather than men, opiate fictions, national mythologies, and historical fables of origins, promise, and destiny have continually kept the great mass of public opinion from inquiring too closely into the changing nature and extent of modern governing power.

The myth of the "weak" American state is such a fiction—a product of both reason and interest, perhaps even need. In an era dominated by both European states and European state theory, the story of an exceptional and weaker version of that state in the United States was predictable, perhaps even necessary. But given the dramatic changes in history, politics, and global statecraft during the last generation, the idea of the American state as weak is no longer reasonable or even interesting. It should be rejected. The extraordinary aggrandizement of power within the American regime demands critical attention and historical explanation, as do old as well as new patterns of international policymaking and legal-economic influence. Classic

³³ Cohen, "Property and Sovereignty," 16. For a compelling recent statement of this theme, see Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton, N.J., 2008).

³⁴ David Hume, "Of the First Principles of Government," in Hume, *Essays: Moral, Political, and Literary* (1742; repr., Indianapolis, 1985), 32.

models of state theory forged amid the constant threat of centralized despotism might not be the best templates for apprehending the new forms of distended power that predominate in twenty-first-century global political economy.

There is an alternative. In the early twentieth century, amid a first wave of nation-state and economic consolidation and assertiveness, American social science generated some fresh ways of looking at power in all its guises—social, economic, political, and legal. Overshadowed to some extent by exuberant bursts of American exceptionalism that greeted confrontations with totalitarianism and then terrorism, the pragmatic, critical, and realistic appraisal of American power is worth recovering. From Lester Frank Ward and John Dewey to Ernst Freund and John Commons to Morris Cohen and Robert Lee Hale, early American socioeconomic theorists developed a critique of a thin, private, and individualistic conception of American liberalism and interrogated the location, organization, and distribution of power in a modernizing United States. All understood the problem of power in America as complex and multifaceted, not simple or one-dimensional, especially as it concerned the relationship of state and civil society. Rather than spend endless time debating the proper definition of law or the correct empirical measure of the state, they concentrated instead on detailed investigations of power in action in the everyday practices and policies that constituted American public life. Rather than confine the examination of power to the abstract realm of political theory or the official political acts of elites, electorates, interest groups, or social movements, these analysts instead embraced a more capacious conception of governance as “an activity which is apt to appear whenever men are associated together.”³⁵ More significantly, these political and legal realists never forgot, amid the rhetoric of law and the pious platitudes that routinely flow from American political life, the very real, concrete consequences of the deployment of legal and political power. They never forgot the brutal fact that Robert Cover would later state so provocatively at the start of his article “Violence and the Word” that legal and political interpretation take place “in a field of pain and death.”³⁶ The real consequences of American state power are all around us. In a democratic republic, where force should always be on the side of the governed, writing the history of that power has never been more urgent.

³⁵ Michael Oakeshott, *Morality and Politics in Modern Europe: The Harvard Lectures* (New Haven, Conn., 1993), 7. For different but equally capacious conceptions of governance, see Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago, 1991); Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (New York, 1999).

³⁶ Robert M. Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601–1629.

William J. Novak is Associate Professor of History at the University of Chicago and Research Professor at the American Bar Foundation. His books include *The People's Welfare: Law and Regulation in Nineteenth-Century America* (University of North Carolina Press, 1996) and a co-edited collection, *The Democratic Experiment: New Directions in American Political History* (Princeton University Press, 2003). He is currently working on a legal history of the American state from the Civil War to the New Deal.