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Boundaries of the State in US History

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CONCLUSION

The Concept of the State in American History

WILLIAM J. NOVAK

The State must always be rediscovered.

—John Dewey, *The Public and Its Problems*

Debating the State

Debates about the state rage in contemporary America. On the right, libertarian and tea party rhetoric fulminates about shrinking the state or shutting down the government, frequently in hyperbolic terms like the Americans for Tax Reform notion of “drowning it in a bathtub.” On the left, concern about the fate of the welfare state and an ever-expanding warfare and penal state produces equally impassioned retorts. Discussion of the American state—its nature, its size, and its uncertain future—dominates the political landscape as perhaps never before.

And while more rather than less discussion of the state in America might seem like a good thing, two problems plague popular forms of political debate. First, the character of these discussions is almost entirely polemical. Embedded in deep political commitments and haunted by ever-present ghosts of ideological battles past (e.g., socialism, communism, and fascism), debate about the American state all too frequently turns on the single intellectual axis of whether one is “for it” or “against it,” as commentators compete to take sides as foremost proponent or critic. Unsurprisingly, this polemical quality also exacerbates a second reductionist tendency to talk about the American state in the kind of woefully simplistic terms usually reserved for children’s books: “too big,” “too small,” “too weak,” “too strong.” Considerably less attention is spent thinking about what “it” actually is that partisans and politicians demand be bigger or smaller, stronger or weaker.

It would thus seem like a propitious moment for more historical and social-scientific study of the American state. But while formal scholarly analysis of the American state has been experiencing a welcome renaissance of late, it still lags considerably. Morton Keller complained to William Leuchtenburg as late as 1986, "To say that 'there is much still to be learned about the nature of the State in America' is . . . a major understatement. There is close to everything to be learned about the State."¹ The gap between heated political debate about the state and enlightened scholarly investigation of it continues to expand nationally as well as internationally. As Pierre Rosanvallon lamented in his prescient introduction to *L'État en France*, "The state as a political problem, or as a bureaucratic phenomenon, is at the heart of heightened partisan passions while more important philosophical debates about the nature of the state evade serious historical scrutiny."²

But the problem with existing scholarship on the state is no longer primarily a problem of quantity—that is, not enough of it. On the contrary, over the past thirty years, a proliferation of state studies has risen in direct response to the challenges Leuchtenburg, Keller, and Rosanvallon described.³ The state has indeed been brought "back in," in Theda Skocpol's influential words.⁴ The pioneering texts of Skocpol and Stephen Skowronek (and their students and collaborators), together with the steady stream of monographs produced by the school of social and political scientists working on American political development, have decisively pushed the history of the American state in all its guises (from the fiscal state to the welfare state to the penal state to the warfare state) back to the center of American historical inquiry.⁵ But if quantity is no longer a pressing issue, qualitative problems continue to plague the existing historiography of the American state.

First, somewhat surprisingly, much scholarly discussion of the American state continues to be carried out in terms not entirely dissimilar to those dominating popular partisan debate. That is particularly true of the overweening tendency in American political history to interpret the state primarily through the history of ideas⁶—that is, chronicles of the intellectual or rhetorical positions politicians, publicists, and various publics have taken on the state over time. In the United States, this frequently involves the deployment of a series of handy intellectual reference points that denote specific moments in a seemingly ever-recurring tale of the rise and fall of various forms of "statism" and "antistatism." The history of the American state thus quickly degenerates into endless variations on the single, normatively charged theme of—in Sidney Fine's characterization—*laissez-faire* versus the general welfare state.⁷ From Hamilton versus Jefferson, to Jackson

versus Biddle, to Sumner versus Ward, to Peckham versus Holmes, to FDR versus the Liberty League, to Reagan versus regulation, to red states versus blue states, on ad infinitum, American history gets told and retold through the simple trope of liberal reform versus conservative reaction.⁸ The history of the state itself as a historical problem and artifact is elided in favor of a turn to a general history of ideas repeated with the regularity that perhaps inspired Arthur Schlesinger Sr.'s (and Jr.'s) forays into the "cycles of American history"—historical cycles highlighting the same basic question, the same basic conflict, the same basic idea of the state.⁹ As is perhaps clear in the case of Arthur Schlesinger Jr., this type of history of the state is also highly ideological. Like the popular political debates it quite consciously reflects, such histories at bottom are about *taking sides* "for" or "against" the state—for "better" or for "worse," for "richer" or "poorer."¹⁰ The state thus evades a proper historicization. It grows, it develops, it expands, it ages, it withers, it recycles—like a plant (more on this persistent organic biologism later) it has staunch admirers and strangely passionate detractors, but it lacks a true history.

But if warring liberal and conservative ideological traditions are one major obstacle to a more analytical understanding of the state in America, an even more significant stumbling block is the continued hold on the subject of a narrow rendering of *the political*. For with some notable exceptions of late,¹¹ the subject of "the state" still remains primarily confined within the scholarly jurisdiction of the traditional practices of political science, political sociology, and political history. And for the most part, the recent renaissance of scholarly interest in the state has been carried out within conventional conceptions of politics and within the traditional boundaries of the political.

Now, to some extent, that is not wholly surprising. After all, the very rallying cry "bringing the state back in" that underwrote so much renewed interest in the state in the 1980s and '90s itself hints at some of the limits of the original vision—limits implicit in the idea of "bringing something back"—returning a former priority, reclaiming a lost agenda, rescuing a neglected concept. Part of an effort in sociology and political science to reclaim the high ground for the study of political institutions, the return to the state in the work of scholars like Skocpol and Skowronek did not so much challenge traditional notions of politics as pugnaciously reassert them. J. P. Nettl captured something of this spirit in his opening to "The State as a Conceptual Variable" in 1968: "The concept of the state is *not* much in vogue in the social sciences right now. Yet it retains a skeletal, ghostly existence largely

because, for all the changes in emphasis and interest of research, the *thing* exists and no amount of conceptual restructuring can dissolve it."¹²

In the field of American history, political historians initially greeted this self-proclaimed "return of the state" in the social sciences with some of skepticism—confident from their own continuous record of research and writing that the American state had never actually been sent packing in the first place.¹³ But over time, a happy interdisciplinary rapprochement emerged around general increased enthusiasm for studying the history of the state within the strict bounds of political forms of social science. And for the last twenty-five years or so, this jurisdictional monopoly has no doubt yielded some happy results. The state certainly did move back toward the center of American history, and a plethora of new monographs illuminated ever-new corners of American state policy making. But somewhat predictably, over time, this traditional political approach has grown a bit stale—hitching historical understanding of the American state to an unnecessarily circumscribed scholarly agenda.

Several conventional emphases seem to have outgrown their original critical edge and interpretive usefulness. First and most problematic is the continued predilection of traditional political scholars to separate the state (and politics) from society (and culture). This overdrawn distinction permeated the first-wave revival of social scientific interest in the state, taking the form of a much-hyped methodological confrontation between newer, so-called "state-centered" approaches to the public and its problems (for example, Skocpol, Skowronek, Shefter) versus more traditional "society-centered" explorations (for example, Dahl, Moore, Esping-Andersen).¹⁴ Framing discussion of state and society through this simple, either/or interpretive binary frequently devolved into rather bland warnings against overdeterminism coupled with bold assertions of more-or-less conventional research priorities. Thus the basic thrust of Theda Skocpol's clarion call for polity-centered analysis: "State formation, political institutions, and political processes (understood in non-economically [and non-socially] determinist ways) must move from the penumbra or margins of analysis and toward the center."¹⁵

In addition to frustrating rather than enhancing the possibilities for synthesis, the state *or* society framework exacerbated a couple of other tendencies. One was a rather unhelpful interpretive focus on the "autonomy" of formal state actors (so-called state builders) and state institutions (that is, the bureaucracy—the "administrative, legal, bureaucratic, and coercive organizations" that Skocpol dubbed "the core of any state").¹⁶ As Brian Balogh constructively translated this classic American political development

(APD) perspective for historians, "The state . . . was a central actor in its own right. . . . It was an autonomous force, and one that had to be reckoned with in writing the nation's history."¹⁷ As with popular political debates promoting "the state" alternatively as problem or solution, however, one was again left to wonder just exactly what this "it" was (a thing? a force? a group of persons? a set of institutions? a series of policies?) that could possess such an exquisitely anthropomorphic quality as "autonomy."¹⁸ In the short run within particular academic fields, "state autonomy" was an effective scholarly rallying cry. In the long run, however, rather than clarify or advance discussion of the already thorny concept of "the state," it simply added another level of murk—for what exactly is "autonomy" in complex and increasingly interdependent modern economies, societies, and polities?

The autonomous polity-centered approach to the state was rooted in a troubling reliance on late nineteenth-century Germanic models of state development (most notably those of Max Weber and Otto Hintze), so some of these interpretive limitations are not wholly surprising. Indeed, there was always something potentially atavistic about the "bringing the state back in" formula—something strangely discomfiting about returning to (as distinct from dialectically engaging with) late nineteenth-century state theories to reckon with rapidly changing late twentieth-century forms of power and politics. Indeed, rather than carry discussion into the future by challenging and expanding conventional conceptions of "the state" and "the political" (or "society" and "the social"), some scholars seemed content to *bring the past back in*, reinforcing rather than reimagining the traditional boundaries of politics. In the end, too much of the so-called new study of American political development ended up looking a lot like the old study of American political history—old wine in new bottles—as scholarly interest in the state reverted back to canonical sites of traditional political action: elections, political elites, and the formal institutional apparatus of public policy making.

Now, of course, there is nothing inherently wrong with the traditional study of political elites and institutions. Elites and institutions simply do matter, guaranteeing traditional political analysis a place at the table whenever reckoning with a problem like the state. As William Leuchtenburg wisely counseled, "If, in fact, elites have played a disproportionate role, historians do not diminish that reality by ignoring it."¹⁹

Nonetheless, there is something unsatisfying about restricting the study of the modern state to more traditional aspects of political investigation—something of the unsettling, antidemocratic specter of what G. R. Elton described as "the old-fashioned political historian, on his knees before the

thrones of kings." More recently, Tony Judt amplified this critique, decrying a "traditional political history" that "continues on its untroubled way describing the behaviour of the ruling classes. . . . Divorced from social history, this remains, as ever, a form of historical writing adapted to the preservation of the status quo; it concerns itself with activities peculiar to the ruling group, activities of an apparently rational and self-justifying nature."²⁰ Elton himself admitted the limitations of histories of public affairs as histories of "great men"—the happy few: "Whether it concerns itself with kings and popes, or with political parties and politbureaus, it chronicles the specialized existence of special people, and the charge that it confines itself to a very limited part of the human experience must therefore be admitted to be essentially true."²¹

Now at some point in the distant past, it might have made sense to conceptualize "the political" or "the state" as involving "a very limited part of the human experience" and remain content with the rudimentary tool kit of traditional political history and a stark separation of powers concerning the study of state and society. But after the extraordinary experiences of the twentieth century, it is difficult to find comfort in such a primitive division of labor. For as theorists as diverse as Carl Schmitt and Hannah Arendt have argued at some length, a defining characteristic of recent history and a hallmark of our own modern times is the increasing interpenetration of state and society, the political and the social. As Schmitt put it succinctly:

The equation state = politics becomes erroneous and deceptive at exactly the moment when state and society penetrate each other. What had been up to that point affairs of state become thereby social matters, and vice versa, what had been purely social matters become affairs of state—as must necessarily occur in a democratically organized unit. Heretofore ostensibly neutral domains—religion, culture, education, the economy—then cease to be neutral in the sense that they do not pertain to state and to politics. . . . In such a state, therefore, everything is at least potentially political, and in referring to the state it is no longer possible to assert for it a specifically political character.²²

Although one could, indeed should, contest Schmitt's alternative conception of the political, here he aptly captures the modern sense that traditional notions of politics no longer adequately capture contemporary configurations of state and society. They no longer explain our present.

So there is a distinct need for a reconceptualization of the state in American history. And there is also a shifting horizon and expanding audience

for historical explanation in general.²³ But rather than seize these promising opportunities, traditional political history remains saddled with a crimped and crabbed conception of politics and a thin and impoverished rendering of power. In consequence, two generations of social and cultural historians have essentially voted with their feet—abandoning traditional political preoccupation with elections, elites, and executive policy making. Such classic loci of authority no longer capture the historical explanatory power desired and needed. Indeed, as if to underscore the extent and depth of prevailing dissatisfaction with traditional models of politics and statecraft, two generations of social theorists, including such notables as Michel Foucault, Pierre Bourdieu, Jürgen Habermas, and Giorgio Agamben, basically cut their teeth on new and influential conceptions of power defined by their resistance to confinement within the traditional concept of the political. While prevailing intellectual and political histories remain necessary components in a comprehensive historical and social-scientific account of the state, they are, in short, no longer sufficient. They too closely circumscribe the boundaries of both the political and the state. Alternative models of historical explanation of the state-society relation are urgently needed. Enter legal history.

The Example of Legal History

Once upon a time, the study of the concept of law in America was in a condition not unlike that facing the concept of the state. The history of law, in particular, was dominated by approaches that closely mirrored those just described. Originally, legal history too was pursued as a kind of offshoot of the history of ideas—in this case, the idea of “the rule of law.” In place of close empirical or social-scientific investigations, the history of law was frequently propounded through accounts of an ever-expanding “spirit of the law” in the making of Western civilization. My favorite example of this all-too-common trope comes from Julius Goebel’s opening lines in the first volume of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*. In establishing a point of departure for law’s history in what he labeled the “pristine seaboard communities” of colonial America, Goebel located there “the notion of Montesquieu that independently of the laws made by men, a complex of principles is unceasingly operative that determines their institutions and indeed their legislation . . . the suzerainty of the great fundamentals—the supremacy of law, the prescription of certainty, the orderly determination of controversies and, above all, the dominating concept of due process.”²⁴ Note the autonomy—the

self-genesis—and teleology involved in this idea of a “rule of law” operating “independently of the laws made by men.” This is law supremely abstracted from social reality—law hovering somewhere above humanity and society as a higher “spirit” and “a complex of principles” exuding “suzerainty” and “supremacy.” This is what the political scientist Arthur Bentley (in the spirit of Thorstein Veblen) used to refer to critically as “soul stuff.”²⁵ It is essentially ahistorical and irreducibly ideological.

This history of the idea of law meshed seamlessly with a further predisposition to talk about legality in highly formalist, doctrinal terms. Law was conceptualized as separate and independent from politics as well as society. Its fundamental principles and operations were discoverable by studying axioms and corollaries in the abstract—shorn of surrounding social and political context—as if studying the rules of a book of mathematics or chess.²⁶ Predictably, this formal history of legal ideas grounded in a narrow and autonomous conception of things “legal” produced histories of law focused almost entirely on elite sources and high legal actors: appellate courts, distinguished jurists, treatise writers, and a handful of great—usually constitutional law—cases. Together, these features yielded what Morton Horwitz criticized (in terms not unlike Tony Judt’s critique of traditional political history) as an essentially “conservative tradition” in the writing of “lawyer’s legal history.” Horwitz decried this internalist and “politically conservative” ideology of legalism wherein the “received legal tradition is treated not as itself a contingent and changing product of specific historical struggles, but rather as a kind of meta-historical set of values.”²⁷

But what distinguishes the practice of legal history from political history today is that the “conservative tradition” is now a wholly marginal position. With few exceptions, the narrow nineteenth-century conception of “the legal” described above was thoroughly transformed in one of the most interesting jurisprudential developments of the twentieth century. The results hold some useful lessons for those trying to expand and revitalize concepts of “the state” and “the political” in the twenty-first century.

At the core of the transformation in the concept of law in America was a long-term and broad-gauged effort to modernize legal study in the interest of producing a more disenchanting, nonspeculative, and postmetaphysical jurisprudence. This movement, of course, had many moving parts and almost as many contending voices. Indeed, it has been described with a sometimes-confusing array of competing monikers (e.g., antiformalism, legal positivism, legal functionalism, sociological jurisprudence, legal pragmatism). For the purposes of this essay, I would like to focus attention on two essential interpretive moves. The first I label “critical realism”—a

perspective that preoccupied legal debate in America for the first half of the twentieth century.²⁸ The second is the later but related movement for understanding “law in society”—a perspective that dominates legal scholarship to this very day.

Critical legal realism, broadly construed, is one of the most important and lasting contributions of American jurisprudence. It had its origins in a sustained and distinctive critical sociological jurisprudential tradition that grew up in the early twentieth century in reaction against some of the detached, abstracted, moralistic, and idealistic concepts of law that dominated the previous century.²⁹ In a powerful attempt to de-mythologize and reorient study of the rule of law, realists criticized the notion of law as divinely inspired moral imperative or formally deductive logic or autonomous science. They argued instead that law and rights were distinctly social and political phenomena deeply implicated in the everyday economic and cultural struggles of a rapidly changing society.

The high priest of critical realism in law was Oliver Wendell Holmes Jr., who as early as 1881 threw down the gauntlet and inaugurated a new age in legal thinking with perhaps the most famous line of legal history ever written: “*The life of the law has not been logic: it has been experience.*” The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”³⁰ So much for the “autonomy” let alone the “idea” or “spirit” of the law. As Holmes made even more clear in “*The Path of the Law,*” he was not interested in abstract idealizations of law and rights: “Nothing but confusion of thought [could] result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.” Rather, he was interested in concrete actions and real-world consequences—that is, the real power that was exercised by courts in the name of law—the takings and redistributions and renegotiation of economic and social and political interests that ultimately were the effects of “breaking the law” or of “violating a right.” No rose-colored glasses here about what went on in the name of the law or “due process” or the “suzerainty of the great fundamentals.”³¹

Holmes’s critical legal realism, of course, very much resonated with the more general American intellectual tradition known as pragmatism.³² With formal philosophical insights first honed in the treatises of Charles Peirce, William James, and John Dewey, pragmatism became the lingua franca of professional American social science as practiced at the turn of the century by the likes of Thorstein Veblen, Richard Ely, John Commons,

Charles Horton Cooley, and so many others. John Dewey's philosophy of law perfectly reflected Holmes's early emphasis on social and historical experience rather than logic and abstraction.³³ For Dewey, law was "through and through a social phenomenon; social in origin, in purpose or end, and in application"—"a program for action to be tested in action." It could neither be talked about in isolation from society or history nor judged "on a purely intellectual basis," but could "be discussed only in terms of the social conditions in which it arises and of what it concretely does there." Echoing William James's conception of truth as something that "*happens* to an idea,"³⁴ Dewey argued, "A given legal arrangement is what it does, and what it does lies in the field of modifying and/or maintaining human activities as going concerns." He concluded that without this emphasis on social activity and social application, "there are scraps of paper or voices in the air but nothing that can be called law."³⁵

This critical, realistic, and thoroughly social concept of law only reinforced the new progressive histories of Frederick Jackson Turner and Charles Beard that were also registering impatience with the old celebratory narratives of American founders, presidents, and Supreme Court justices.³⁶ In sympathy with the general muckraking tradition of the times, critical realism urged scholars to dig beneath the surface of high politics and lawmaking—beneath the rhetoric and the conventional sources—so as to expose the more gritty reality and the omnipresent socioeconomic underpinnings of law and statecraft.³⁷ The realist goal was and is to strip legal investigation of the "myth, folderol, and claptrap" that so powerfully obscured insight into the actual functioning of law and politics—metaphysical abstractions like "natural law" or "economic man" or even "we, the people."³⁸ Critical realism urged a more practical and empirical examination of law in terms of who is doing what to whom and how. Realists were interested in law in action rather than law in theory or law on the books—law on the ground rather than in the heaven of legal concepts.³⁹

Critical realism was extraordinarily successful as a deconstructive legal project. It went a long way toward de-mystifying the concept of law and purging legal discussion of a certain penchant for "transcendental nonsense." It thus nicely paved the way for more pragmatic, professional, and social-scientific investigations of the interaction of law and socioeconomic life. But in the end, that more fully reconstructive jurisprudence required a second wave of scholarly innovation and production. That second wave also has a number of permutations and labels, but it can be thought of usefully as the movement for the study of *law in society*.

If one of the main limitations of traditional legal scholarship was an artificial separation of an autonomous law from a complex society, the law in society movement was an attempt to substantively map their deep interdependence and interaction. The scholar who best embodied these new priorities was James Willard Hurst. Hurst basically invented the historical approach that has come to be known as the new sociolegal history.⁴⁰ In a radical departure from the internalist, doctrinal constitutional histories of the past, Hurst urged the study of law "not as self-contained system, but as part of the life of its society"—inextricably connected to larger issues of economy, polity, and society. Hurst gave early voice to the need for a "social history of law"—a contextual history "pursuing law into whatever relations it has had to the whole course of the society."⁴¹ Revealingly, Hurst's own magnum opus was a monumental case study of the interaction of law and economy in the Wisconsin lumber industry—a 950-page (with double column notes and index) exploration of law intricately and fully embedded in everyday society.⁴²

Obviously, a major consequence of the law in society movement was the redirection of attention away from high-classical legal sources and topics—away from Washington, DC, and the clear, oft-quoted opinions of justices and into the thick, unexplored forests of Wisconsin. Hurst confessed an irritation with legal history as a "recital of Great Cases" stringing together literary quotes from past legal luminaries. As he put it metaphorically, "With intelligent diligence and some literary flair anyone can make a good story out of the spotlighted star acts, like the Federal Convention or the Legal Tender Cases or the Court-packing bill. But the spotlighted acts could not go on without stage crew and audience, and without a complicated environing pattern of activity which produced a theater, a city, and an economic surplus to allow the luxury of star performances."⁴³ In contrast, Hurst urged the bottom-up reconstruction of legal history around the thousands of everyday interactions of law and economy and society. Hurst thus followed critical realists in further pushing the boundaries of law well beyond the traditional confines of the formal legalism or the law school. As he put it:

In deciding what to include as "law" I do not find it profitable to distinguish "law" from "government" or from "policy." The heart of the matter is that we formed organizations for collective action characterized by their own distinctive bases of legitimacy. . . . In order to see law in its relations to society as a whole, one must appraise all formal and informal aspects of politically organized power. . . . This definition overruns traditional boundaries dividing study of law from study of political history, political science, and sociology.⁴⁴

By shifting attention to law-in-action among everyday folks rather than law-on-the-books as expounded by judges, jurists, and treatise writers, critical realism and law in society vastly broadened the horizon for legal inquiry. Moving beyond exclusively intellectual or constitutional approaches to law, these critical as well as constructive innovations paved the way for a more comprehensive and synthetic history of American law. Once it became widely recognized that “the legal” was not simply contained in courts, treatises, or natural principles but was implicated in almost all social and historical experience, traditional scholarly concepts, boundaries, and jurisdictions vastly expanded—an unfolding process that continues to this very day. While American political history continues to struggle with traditional concepts and sources and topics (as well as the ongoing clash of state-centered versus society-centered methodologies), American legal history has made great strides in the production of a more diverse, prolific, and synthetic sociolegal history.

But, of course, there is no inherent reason for critical realist and law-in-society perspectives to remain the exclusive property of legal historians, especially given the close interconnections between the law and the state. As Hermann Kantorowicz noted in 1931, “The state is one of the elementary concepts of jurisprudence and is closely related to the highest concept of the legal science, namely the concept of law itself.”⁴⁵ Consequently, applying some of these examples from legal history to the problem of the state makes for some easy analogies. Indeed, critical realism and a more social history of the state (that is, a notion of state in society) seem like useful first steps in the production of a more satisfying history of the political.

Critical Realism and Conservative Histories of the State

The first thing that critical realism brought to the study of law was a fierce skepticism aimed at some of the empty formalism, inapt metaphors, and elusive vocabulary that too frequently surrounded discussions of “the law.” Discussions of “the state,” of course, are not without some of these same chronic problems. And a dose of what realists referred to as their “cynical acids” seems just what the doctor ordered. So like the realist effort in law, it is useful to start first with a deconstructive effort—trying to assess more clearly what the state is not—before attempting a more positive reconstruction.

Indeed, many of the very best conceptual discussions of the state begin with just such a critical perspective. From John Dewey to Michael Mann to Pierre Rosanvallon, the cornerstone of a more realistic approach to the state

has been the simple, negatively framed caveat that *the state is not "a thing."*⁴⁶ It is neither a singular entity nor a particularly consistent phenomenon. And it should not be confused or conflated with its more visible, concrete, and material manifestations—for example, particular persons, groups, offices, or institutions.

Why is it so important to first recognize and underscore that the state is not a thing? Because so much commentary on the American state repeatedly makes this exact mistake. Dewey recognized this problem as early as 1927:

In spite of the fact that diversity of political forms rather than uniformity is the rule, belief in the state as an archetypal entity persists in philosophy and science. Much dialectical ingenuity has been expended in construction of an essence or intrinsic nature in virtue of which any particular association is entitled to have applied to it the concept of statehood. Equal ingenuity has been expended in explaining away all divergencies from this morphological type, and (the favored device) in ranking states in hierarchical order of value as they approach the defining essence.⁴⁷

The idea that there is some kind of essence or structure or template or size or location or trajectory of this thing called "the state" to which modern political forms inevitably tend and through which modern political organization is to be measured, compared, and ultimately ranked is a source of constant confusion and misdirected scholarly energy.

Two forms of this mistake are particularly common and problematic. First is the persistent attempt to take account of the state by measuring it—by counting something (seemingly, almost anything). Again if the state were indeed "some thing," this technique would be invaluable. It is helpful when assessing "things" in the world to use weights and measures—to get some basic account of how much room they take up within the spatial plane of the physical world. But though the state is clearly not such a simple, single, physical thing (with weight or height or circumference), the penchant to quantify it continues unabated. The question of analyzing the problem and nature of the state (that is, trying to figure out what "it" actually is) is subsumed by the priority given to measurement and quantification—as if the "thing" will be ultimately revealed in the numbers. History is displaced by empirics as study after study proceeds statistically—measuring public income and expenditure, tallying public employees and governmental units, polling opinions, scoring elections, listing administrative agencies, and counting statutes or pages of regulations—as if the state could be grasped

only after meticulously filling in all of the numerical columns of a spreadsheet. The turn to quantification certainly avoids the pitfalls of abstract conceptualism, but only by mistaking doing a sum for understanding.⁴⁸

One problematic consequence of this fetishization of measurement is the tendency to equate a history of the state with an accounting of changes in the numbers over time. Biological and evolutionary concepts like “growth” and “development,” “lag” and “decline” are usually mapped onto such quantitative assessments. They provide a narrative frame that looks like history—chronicles of “state development,” “the growth of government,” “the rise and fall of the welfare state.” But too frequently, historical analysis is limited to a handful of simple empirical questions: How big is the state? How much did it grow over time? How does its size and growth compare with other states? What were the key periods of statist expansion? What were the periods of retrenchment or reaction or antistatism? Does the growth of the state mark a departure from original traditions or does it signify a healthy, maturing development? As questions like these make manifest, the growth or development framework still revolves around the single, unproblematic issue of size. Rather than challenging the limited conceptual framework of contemporary political discourse, such social science assessments often simply replicate or reify partisan and ideological debates about growing or reducing the state.

But evolutionary notions of growth and development also feed into a second popular form of the state-as-entity fallacy. That is the anthropomorphic tendency to talk about the state as a kind of person—a living, breathing thing—or to associate it too closely with a particular personality or group of people. Biological metaphors are always misleading ways of reckoning with modern politics. States are not persons. They do not live, they are not really born, they do not speak and act, and they are not easily categorized through anthropocentric qualities like “autonomy,” “strength,” or “character.” Indeed, even the soft evolutionary organicism implicit in overused notions of states growing or developing, flourishing or declining, rising or falling produces more shadows than light. This is an outmoded, primarily symbolic, vocabulary. And it barely masks a latent essentialism—a residuum of the humanistic idea that there is some kind of soul-like essence to stateness that defines the authentic article, guides its development, and can be used in the end to size up its achievements and shortcomings. John Dewey criticized this tendency to portray the state as singular organic essence rather than pluralistic man-made artifice where “growth signified an evolution through regular stages to a predetermined end because of some

intrinsic natus or principle."⁴⁹ Artifice has a human history that invites constant investigation and critique; essence does not.

Anthropomorphism also problematically anchors discussion of the political in an essentially monarchical view of government: looking for the state at the center—in a capitol city or an ornate public building—embodied in a person like a president whose wishes are carried into effect by select ministers. We are still very much in the world of the sun king. It is no accident that American political history so frequently takes the form of serial group biography. Biographical narratives join with biological metaphors to produce not history, but endless iterations of a more-or-less still “presidential” synthesis, from the Jeffersonian period to the Age of Jackson, from Roosevelt’s New Deal to Johnson’s Great Society, and beyond.⁵⁰ In law, Jeremy Waldron criticized the tendency to search for law in a single personalized source—usually the words of an oracular lawgiver.⁵¹ But discussion of the state even more routinely adopts forms more suitable to the investigation of lordship—the king and his court, presidents and administrations—political history still on its knees before some kind of throne. The concerns of Michel Foucault in 1976 continue to resonate: “In political analysis, we have still not cut off the king’s head.”⁵² For the investigation of democratic politics in a modern age, this is a fatal flaw.

So the state should not be confused with (or talked about as) a thing or a person. Much as it was useful in demystifying the law, the perspective of critical realism is helpful in demythologizing the state and cutting through some of the unclear, suggestive language that often envelops it. But how far should we go in this deconstructive enterprise? Is it possible to apply the cynical acid all the way down and do away with an abstract concept of the state altogether? Has the concept outlived its social-scientific usefulness? And might the political scholar be better off abandoning it so as to pay closer attention to underlying realities like economic interest, sociocultural struggle, and more basic contests for office and policy preferences?

The easy answer to questions like these is, “no.” Indeed, one of the great missed opportunities in the study of politics in the United States involved just such a thoroughgoing deconstruction. In the early twentieth century, Arthur F. Bentley consolidated many of the insights and instincts of the critical realism then dominating American social science into something of a new “school” of political inquiry. He thereby launched the so-called behavioralist revolution in political science—a movement impatient with formal political abstractions like “the state” or “the public interest” and eager to more critically and scientifically expose the real individual and group

interests that were increasingly viewed as the underlying sources of actual political behavior.⁵³ In behavioralist studies by midcentury, "the state" basically disappeared or was reduced to a mere site for examining contestation among more fundamental social-economic group interests.

The behavioralist revolution would eventually consume the attention of the leading lights of midcentury American political science, including the likes of Charles Merriam, Harold Lasswell, V. O. Key, Herbert Simon, and David Truman. And the movement yielded some truly extraordinary studies of the American political process *per se*. But behaviorism made the common mistake of simply sacrificing generality on the altar of particularity. Just because the state is not reducible to a particular thing or person or institution does not mean that it does not exist. The state's lack of singular specificity (or Deweyan essence) does make it hard to see (and talk or write about), but it does not and should not therefore disappear. In economic and legal inquiry, "capitalism" and "law" are equally nebulous and difficult concepts, but we cannot ignore them. Political scholars should not make the mistake of some value-theory economists who fixate on preferences, prices, and individual rational choices at the expense of a more thoroughgoing analysis of the history and structures and functions and processes of capitalism. Nor should they follow realism to the reductionist extremes sometimes taken in legal studies, where laws become mere reflections or "servants of some economic or social interest."⁵⁴ Although "law," "capitalism," and "the state" cannot be easily reduced to bills of particulars, they illuminate a wider horizon for generalization about the legal, the economic, and the political. Such concepts call our attention to larger, macroscopic questions and the need for a broad survey of cause and effect. They open a more meaningful interpretive field for explanations of change over time than is obtainable by looking simply at the grass roots for the concrete and the particular. Indeed, they are the very building blocks of a much-needed philosophical, analytical, and conceptual history. That more reconstructive project requires more than critical realism alone can offer.

State in Society

The critical realist perspective effectively exposes a certain one-dimensionality at the core of existing histories of the state. Rooted in outmoded forms of entity theory, a singular conceptualization dominates histories of the state, reducing a myriad of interesting factors, questions, and concerns into variations on the simple theme of size and development. Is the state too big or too small? Is it a weak state or a strong state? Is it developed or underdeveloped?

Is it rising or falling? So impoverished is this discourse that some have suggested dispensing with the concept of the state altogether.

But like the concept of law or the concept of capitalism, the state concept is not going away anytime soon. Indeed, it is the very potential for multidimensionality that keeps scholars coming back to the state. Despite the best efforts of political scientists and political historians to contain the state within traditional notions of politics and administration, it resists just such circumscription. The concept of the state continually draws attention to larger interpretive issues that fall outside ordinary chronicles of elections, politicians, and bureaucracy—issues like sovereignty, borders, identity, citizenship, nationalism, democracy, representation, and legitimacy. So rather than cling to a unitary conception of the state as some kind of single (essential, European, Weberian) thing or abandon the concept altogether, there is a third way forward. And it starts with taking this multidimensionality seriously and trying to envision a more pluralistic and synthetic approach to the state—a reinvigorated concept of the state that could itself serve as a steppingstone to a more comprehensive and analytical political history.

Now behavioral political scientists were right to start their efforts with a critique of wholly abstracted and formal conceptions of the power of the state. That certainly is the crucial first move en route to a more comprehensive sociohistorical perspective. It is the bedrock of a disenchanting, non-speculative theory of the state. But a reconstructed concept of the state needs more than critical realism. Moving forward, the example of legal history once again provides a useful reference point, particularly the postrealist effort to more positively reconstruct a *social* history of law.

The starting point of the law in society movement was the effort to break down the harsh boundary separating the study of law from the study of society more generally. The goal of sociolegal scholars was to pierce the so-called black box of formal, internalist, and principally doctrinal history wherein “the law” was seen as something distinct and autonomous from social life. As Thomas Reed Powell perfectly summed up the classical way of thinking: “If you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind.”⁵⁵ In contrast, rather than confine their inquiries to some kind of imagined, separate sphere of the purely “legal” action, sociolegal scholars emphasized the close intersection and interdependence of law and society, turning attention to “the part played by factors in the total social process which affect the functioning of our law-making institutions. . . . The emphasis is on *law in society*.”⁵⁶

What holds for the study of law here seems even more relevant for the study of the state. The history of the state must escape the hold of a separate sphere of narrowly imagined, autonomous “political” action. Like law, the state is also intimately intertwined with “something else”—that is, society. It cannot continue to be thought about without also thinking seriously about that “something else” with which it is so closely linked. Rather than separate the state from civil society in the pursuit of some kind of false analytical clarity, we need a history of the state that recognizes the interrelationship of state and society and the constant interaction of the political and the social. As the work of Pierre Rosanvallon has made clear, the state is the very crossroads of the political and the civil society.⁵⁷ So the history of the state must also be a social history, a history of *state in society*.

Articulating at a general level what is implicated in this notion of a history of *state in society* is not easy. Indeed, it is perhaps only fully recognizable in practice—in the actual histories produced that illuminate precisely this interdependence and interconnection. But let me make two preliminary attempts to flesh out this idea, first from a negative approach highlighting the differences between this methodology and conventional political history, and then from a more positive (if still necessarily schematic) perspective.

Understanding the state in society focuses historical analysis on the changing interrelationship of state and civil society (in its social, economic, and cultural dimensions) over time rather than the location and isolation of the autonomous activities of a cadre of elite state builders or supposedly self-governing bureaucratic institutions. This is the distinctive point for historians to make against the dominant trend in political science. The idea of a state-centered approach somehow at odds with a society-centered perspective is an impossibility. For unlike “government” or “bureaucracy,” we simply cannot understand the state without taking constant notice of its social components. The interpretive sleight of hand achieved by the vocabulary of state autonomy (or even relative autonomy) is purchased only by confining the jurisdiction of the state to a black box of elite political or governmental or bureaucratic actions and institutions analogous to the black box of the law. Just as such an internalist vision of legality yielded an unconvincing legal history, the autonomous conception of statecraft seems to tie political history to a similar fate.

Much as the history of the state should not be confused with the history of a thing or person, it should also not be mistaken for the history of government per se yet alone the history of bureaucracy or policy making or even politics (elections, office-seeking, party organizing, lobbying, voting, logrolling). The history of the state can never be fully grasped or written

simply in terms of state builders, offices, and administration (yet alone in quantitative terms by charting increases and decreases in voter turnout, taxes, expenditures, government personnel, and the like). Just as the history of law needed to move beyond the jurisdiction of high-court judges, great constitutional cases, and treatise principles, a true history of the state needs to engage the wider society. For that is where the state as distinct from the government is always to be found.

For example, one can write a perfectly adequate history of the Interstate Commerce Commission without leaving the black box of administration: internal reports, budgets, personnel, hearings, rulings, regulations, and such. In contrast, the history of the regulatory state (even on such a limited issue as railroads) resists just such compartmentalization. It requires, instead, as full a reckoning with society in as many dimensions as the historian can incorporate: for example, the economics of railroading; the nature of public opinion; the relationship of city and countryside; the social organization of power among financiers, shippers, farmers, workers, and consumers; changing configurations of citizenship (with crucial cultural determinants like race, gender, ethnicity, sexuality, religion, and identity) that determine just whose voices will (and will not) matter on this issue; conceptions of the nation that prefigure demands for such things as consolidation and growth; existing laws and social patterns of litigation that shape conceptions of property, contract, rights, and police power; the nature of the democracy; the structure of representation; demographics. The list goes on and on. These are the intersections where the state is found—the crossroads of the political and the social. These are the places to look for a history of state in society—on the periphery as much as in the center, in the everyday as much as in high politics, in the local as much as in the national or international, in the social, cultural, and economic as much as in traditional politics. The state is something distinct from government, administration, or politics, and the distinction lies precisely in the fact that, though the state includes all those things, it also incorporates this ineluctably social dimension.

It must also be said, however, that the state cannot be simply reduced to its social (or cultural or economic) components. That was the mistake of behavioralism and other simple and deterministic renderings of the political. For there is an irreducible generality about the state that distinguishes it from more particular forms of social and cultural politics. And it is this generality (as well as multidimensionality) that keeps scholars returning to the state. It is this generality that also necessitates continued conceptual development. A certain level of abstraction and generalization is necessary to apprehend the state in history and society.

Pierre Rosanvallon captured this inherent conceptual element when he identified the state as an especially powerful “form of social representation.”⁵⁸ This is the aspect of the state that is the most difficult (if also the most interesting) to reckon with. For it marks that site of intense mutually constituting interaction between the social and the political, facts and norms, individual and collectivity, interests and ideas. The state as a “form of social representation” highlights that place (or space or forum) where the community, the people, the nation produce and reproduce (in infinitely complex and interactive processes) the rules, institutions, practices, and forms that govern their collective life together. Here we move distinctly from the sphere of the particular and measurable (that is, the sphere of individuals and interests and institutions) to the more abstract and conceptual collective symbolic sphere—the state as a representation of the social body: the “will of the people” or the embodiment of “popular sovereignty.” Here, the concept of the state points directly to the need in history for philosophy and social, political, and legal theory.

Conclusion

Morton Keller is correct. Properly conceptualized, “there is close to everything to be learned about the state” in America. But even a reinvigorated concept of the state is not an end in itself—a final methodological or historiographical destination. Rather, it is a means—a means to a more synthetic understanding of the political and the social and a rapprochement between political and social history. Traditional political history as well as more recent forms of state-centered analysis turn on thin and formalistic conceptions of power (in politics, in official action, in bureaucracy) to which we should not return. But the resultant flight from the state and from politics into more particular moments of economic, social, and/or cultural interest and contest can be equally reductionist—denying history a level of generality, abstraction, and synthesis that is necessary to reckoning with the whole. In contrast to both of these alternatives, the state in society concept encourages historians to think directly about the interconnections of politics, society, culture, and economy, and the complex configurations of political, social, and economic power in modern societies. Although traditional political history has been on the defensive for a generation now, the problem of power in modernity has never been more prominent.

State in society leverages an enlarged field for thinking about power and the political. It highlights the intersection of state and society as that space

where issues like national identity and belonging, democratic participation and exclusion, state building and state resistance, discrimination and equal protection, law and violence, economic expansion and the unequal distribution of wealth are brought into clearer focus and where broad surveys of cause and effect and change over time can gain traction. State in society draws attention to those sites of collective action where the terms of the life in common receive a particularly salient and comprehensive articulation. Only such an enlarged and interdisciplinary concept of the state—where history, law, political science, sociology, economics, and philosophy must meet—seems up to the task of taking the full measure of the kinds of issues that dominate our times as well as our social science: citizenship, capitalism, nationalism, empire, democracy, neoliberalism, and globalization. Identifying the conditions for and the historical causes of some of the great changes involved in issues like these over time is crucial to understanding our past as well as our present.

Notes

1. Quoted in William E. Leuchtenburg, "The Pertinence of Political History: Reflections on the Significance of the State in America," *Journal of American History* 73 (1986): 585–600, 594.
2. Pierre Rosanvallon, *L'État en France de 1789 à nos jours* (Paris: Seuil, 1990), 9 (personal translation). This essay first took form in the process of translating Rosanvallon's field-defining statement.
3. I try to survey and come to terms with much of this extant literature in "The Myth of the Weak American State," *American Historical Review* 113 (June 2008): 752–72.
4. Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (New York: Cambridge University Press, 1985), 3–37.
5. The classics in the American political development tradition are Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992); and Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004). Also see Richard R. John, ed., *Ruling Passions: Political Economy in Nineteenth-Century America* (University Park: Pennsylvania State University Press, 2006).
6. Here I would underscore the need to distinguish the "history of ideas" literature from the more nuanced methodology of modern intellectual history that is very much in sync with the approach to the state endorsed by the end of this essay. See, for example, John Dunn, "The Identity of the History of Ideas," *Philosophy* 43 (1968): 85–104; John Higham and Paul K. Conkin, *New Directions in American Intellectual History* (Baltimore: Johns Hopkins University Press, 1979); James T. Kloppenberg, "Deconstruction and Hermeneutics as Strategies for Intellectual History," *Intellectual History Newsletter* 9 (1987): 4–20.

7. Sidney Fine, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865–1901* (Ann Arbor: University of Michigan Press, 1956).
8. The recent obsession of American historians with charting the recent rise of “antistatism” and the New Right in the postwar period is but the latest manifestation of this trend. See for example, Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton, NJ: Princeton University Press, 2001); Kim Phillips-Fein, *Invisible Hands: The Businessmen’s Crusade against the New Deal* (New York: Norton, 2010); Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (Cambridge, MA: Harvard University Press, 2012).
9. Schlesinger Sr. deduced from this regularity eleven cycles of political change along a single liberal/conservative oscillation: Liberal 1776, followed by Conservative 1787; the Age of Jefferson, followed by retreat after 1812; the Age of Jackson to the rule of slaveholders; radical Reconstruction followed by the Gilded Age; the Progressive Era to Republican normalcy; and the New Deal. He then determined the average length of these regular recurrences to be 16.5 years. Arthur M. Schlesinger, “The Tides of National Politics,” in Schlesinger, *Paths to the Present* (New York: Houghton Mifflin, 1949), 89–103. See also Arthur M. Schlesinger Jr., *The Cycles of American History* (New York: Houghton Mifflin, 1986).
10. Again, this taking of partisan sides can become quite complex and conflicted as the nature of state involvement varies from economic to social policy or from welfare to warfare state. Richard Hofstadter offered the most pointed critique of history as simple morality play when he lashed into “the Progressive historians,” noting that “we may appreciate once again the allure of [their] schematizations, but we can hardly continue to believe in them.” Richard Hofstadter, *The Progressive Historians* (New York: Knopf, 1968), 442. Hofstadter’s most direct attempt to outline a more “analytical” alternative to progressive history is contained in Richard Hofstadter, “History and the Social Sciences,” in *The Varieties of History: From Voltaire to the Present*, ed. Fritz Stern (New York: World Publishing, 1956), 359–70.
11. A few of my favorite examples are Stephen Sawyer, “Foucault and the State,” *The Tocqueville Review/La revue Tocqueville* (forthcoming 2015); James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Cambridge University Press, 2011); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); and Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* (Chapel Hill: University of North Carolina Press, 1983).
12. J. P. Nettl, “The State as a Conceptual Variable,” *World Politics* 20 (1968): 559–92, 559 (emphasis added). I elaborate some of these themes and this critique in more detail in Novak, “Beyond Weber: The Need for a Democratic (Not Aristocratic) Theory of the Modern State,” *The Tocqueville Review/La revue Tocqueville* (forthcoming 2015).
13. See, for example, Morton Keller, “(Jerry-) Building a New American State,” *Reviews in American History* 11 (1983): 248–52; Leuchtenburg, “Pertinence of Political History.”
14. Skocpol, “Bringing the State Back In”; Skowronek, *Building a New American State*; Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton, NJ: Princeton University Press, 1994); Robert A. Dahl, *Who Governs? Democracy and Power in an American City* (New Haven, CT: Yale University Press, 1961); Barrington Moore, *Social Origins of Dictatorship and Democracy* (Boston: Beacon Press, 1966); Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press, 1990). For an excellent overview of this

- dispute, see Sean D. Stryker, "The Rationalization of the Political Field: Beyond the State and Society-Centered Theories of Policy Change," working paper (Berkeley: Center for Culture, Organization and Politics, 1999).
5. Skocpol, *Protecting Soldiers and Mothers*, 40.
 6. Skocpol, "Bringing the State Back In," 7.
 7. Brian Balogh, "The State of the State among Historians," *Social Science History* 27 (2003): 455–63, 455. Beyond the programmatic statements of Skocpol and Skowronek on "state autonomy," also see Eric A. Nordlinger, *On the Autonomy of the Democratic State* (Cambridge, MA: Harvard University Press, 1981); Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms, and Results," *European Journal of Sociology* 25 (1985): 185–213; and Claus Offe, *Contradictions of the Welfare State* (Cambridge, MA: MIT Press, 1984). One of the most sophisticated renderings of the "autonomy" theme in the political science literature is Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001).
 8. The very word "autonomy"—consisting of the conjunction of "auto" and "nomos"—"self-governing" or "self-ruling"—betrays the pretensions behind the concept of "state autonomy," especially in the American case. What American governing body could possibly make its own rules and laws without constant input, interaction, intervention, oversight, review, and such, by a dizzying array of other governing as well as nongoverning bodies? The entirety of American administrative law is predicated upon the denial of any such "autonomy." Indeed, one could argue that American constitutionalism is founded upon a similar denial across the entire governing system—checks and balances, separation of powers, distribution of authority, overlapping jurisdiction, dual federalism, reserved powers, and so on. The American state does not and cannot govern itself. And any such "state autonomy" would seem to violate general principles of democracy and republicanism almost as much as it conflicts with the entire substructure of American administrative law.
 9. Leuchtenburg, "Pertinence of Political History," 596.
 10. Tony Judt, "A Clown in Regal Purple," *History Workshop* 7 (1989): 87–88.
 11. G. R. Elton, *Political History: Principles and Practice* (New York: Basic Books: 1970), 61, 70. I explore some of these themes with Steven Pincus in Pincus and Novak, "Political History after the Cultural Turn," *Perspectives on History* (American Historical Association, May 2011) and elaborate in more detail in Novak, "Beyond Weber."
 12. Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), 22; Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 1951).
 13. See, for example, the historically oriented philosophical investigations of Robert B. Pippin, *Modernism as a Philosophical Problem* (Oxford: Blackwell, 1991); Pippin, *The Persistence of Subjectivity: On the Kantian Aftermath* (Cambridge: Cambridge University Press, 2005).
 14. Julius Goebel Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 2.
 15. Arthur Fisher Bentley, *The Process of Government: A Study of Social Pressures* (Chicago: University of Chicago Press, 1908), 162.
 16. As noted below, this will be the source of some of Oliver Wendell Holmes's most pointed critiques. Oliver Wendell Holmes Jr., *The Common Law*, ed. Mark DeWolfe Howe (1881; Cambridge, MA: Harvard University Press, 1963), 5.
 17. Morton Horowitz, "Conservative Tradition in the Writing of American Legal History," *American Journal of Legal History* 17 (1973): 275–294, 276, 278.

28. For a somewhat more elaborate discussion of critical realism in a different context, see William J. Novak, "Legal Realism and Human Rights," *History of European Ideas* 37 (2011): 168–74.
29. For a useful introduction and bibliography, see William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993).
30. Holmes, *The Common Law*, 5 (emphasis added).
31. Oliver Wendell Holmes Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457–78, 460.
32. See Bruce Kuklick, *The Rise of American Philosophy, 1860–1930* (New Haven, CT: Yale University Press, 1970); James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (New York: Oxford University Press, 1988); Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001).
33. Holmes and Dewey commented on each other's work rather frequently. The best comment goes to Holmes who wrote to Frederick Pollock that Dewey wrote, "as God would have spoken had He been inarticulate but keenly desirous to tell you how it was." Mark DeWolf Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932* (Cambridge, MA: Harvard University Press, 1941), 2: 287.
34. William James, *Pragmatism and the Meaning of Truth* (Cambridge, MA: Harvard University Press, 1975), 169.
35. John Dewey, "My Philosophy of Law," in *My Philosophy of Law: Credo of Sixteen American Scholars*, ed. Julius Rosenthal Foundation for General Law (Boston: Boston Law Book, 1941), 73–85.
36. Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt, 1920); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).
37. For the best overarching discussion of these "progressive" historians, see Richard Hofstadter, *Progressive Historians: Turner, Beard, Parrington* (New York: Knopf, 1968). On this tradition in legal history, see Morton J. Horwitz, "Progressive Legal Historiography," *Oregon Law Review* 63 (1984): 679–87.
38. Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York: Columbia University Press, 1930), 3–5.
39. Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809–49.
40. I discuss Hurst's law in society perspective at some length in Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst," *Law and History Review* 18 (2000): 97–145; Also see Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9–55; Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1970): 744–56; and my own personal favorite, Earl Finbar Murphy, "The Jurisprudence of Legal History," *New York University Law Review* 39 (1964): 900–943.
41. James Willard Hurst, *Justice Holmes on Legal History* (New York: Macmillan, 1964), 55, 89; Hurst, *Law and Social Order in the United States* (Ithaca, NY: Cornell University Press, 1977), 42.

42. James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, MA: Belknap Press of Harvard University Press, 1964).
43. James Willard Hurst, *Law and Social Process in United States History* (Ann Arbor: University of Michigan Press, 1960), 18–19.
44. Hurst, *Law and Social Process*, 25. Hurst's capacious definition of law echoed realists like Llewellyn: "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." Llewellyn, *Bramble Bush*, 3–5.
45. Hermann Kantorowicz, "The Concept of the State," *Economica* 35 (1932): 1–21, 1.
46. John Dewey, *The Public and Its Problems*, in *John Dewey: The Later Works, 1925–1953*, vol. 2, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), 237–350, 264; Michael Mann, *Sources of Social Power*, 2 vols. (New York: Cambridge University Press, 1986, 1993); Rosanvallon, *L'État en France*.
47. Dewey, *Public and Its Problems*, 264.
48. As Oliver Wendell Holmes mused, "Life is painting a picture not doing a sum." Holmes, *Speeches* (Boston: Little, Brown, 1891), 96.
49. Dewey, *Public and Its Problems*, 264.
50. I mean endless almost literally. As long as the United States maintains its current constitution, there will always be another president to add to the synthesis. To create the illusion of progress, political history can simply turn attention to the next leader: Reagan, Clinton, Bush, Obama . . . For an example of this tendency, see Julian E. Zelizer, ed., *The Presidency of George W. Bush: A First Historical Assessment* (Princeton, NJ: Princeton University Press, 2010); or Douglas Brinkley, *The Unfinished Presidency: Jimmy Carter's Journey beyond the White House* (New York: Viking, 1998).
51. Jeremy Waldron, "The Dignity of Legislation," *Maryland Law Review* 54 (1995): 633–65.
52. Quoted in Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), ix.
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