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Excerpt

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I

LAW AND THE AMERICAN STATE, FROM THE
REVOLUTION TO THE CIVIL WAR: INSTITUTIONAL
GROWTH AND STRUCTURAL CHANGE

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From Tocqueville in the 1830s to scholars in the twenty-first century, most observers have found the state in the antebellum American republic elusive and complex. As any student of American history knows, the new nation that emerged from the Revolutionary War was not ruled by uniformed national officials. In place of a king the United States had popular sovereignty and the law; instead of strong central authorities it had federalism and local autonomy; lacking administrative bureaucracy, it relied on democratic party politics. In the Constitution, the new nation wrote a blueprint for government that called for separation rather than conglomeration of powers. It would prove remarkably successful in endowing the American state with both flexibility and durability, as Madison and other founders had desired.

The state in the early United States did not look like an entity approaching the Weberian ideal-type of the modern state: an organization capable of enforcing a successful monopoly of violence over a given territory, ruled through a legal-administrative order. But for all its apparent distinctiveness, the state in the early United States, no less than its counterparts in Europe and Asia, performed the fundamental tasks of any state: managing its population, economy, and territory. The history of how it did so suggests that the American state in the early nineteenth century was more substantial and energetic, especially at the national level, than many have suggested.

As Tom Paine famously put it, the Revolution created a new America, in which law was king. But we should be wary of overemphasizing the importance of the law in early American governance. We should instead embrace a broad conception of the law, in which the Constitution, statute law, and judge-made law all figure as parts of a larger legal order that also included coercive law enforcement and administration. Certainly, we cannot understand the state in the early United States without considering the Constitution and the courts, as well as federalism and party politics. But these institutions did not alone comprehend the American state between the Revolution

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and the Civil War. Along with the structural characteristics that made it distinctive from a global perspective, the early American state – like other states – performed major administrative feats that required guns and even bureaucracy. Often overlooked by students of comparative politics, history, and law, these less exceptional dimensions of the early American state were crucial in the formation of the new nation and its survival through the Civil War.

Generalizing about the early American state poses special challenges, but also promises significant rewards. As recent political theorists have emphasized, writing in general terms about any state tends to exaggerate its coherence. In the case of the United States in particular, any general discussion of “the state” must recognize the complexities induced by the occurrence of state action at three levels of governance: not just national, but state and local too. Here I attempt to avoid confusing these different levels of state authority by treating them as distinct subjects whose relationships and relative powers changed over time. Nevertheless, one should not be deterred from considering what broad conclusions one can reach by examining the general character of the work of public authorities (whether national, state, or local) as such. Complexity for its own sake does not get us very far. While necessarily crude, broader claims may be unusually fruitful when it comes to the state in the early United States, precisely because its complexity is already so well understood.

Whereas the conventions of historical and social-scientific writing may have imbued many states with an artificial coherence, in the case of the early United States we face the opposite problem. That is, the early American state is understood to have been so exceptionally weak, decentralized, or otherwise unusual that it defies the conventions of analysis applied to contemporary European states. One finds this “exceptionalist” paradigm of American distinctiveness promoted assiduously after World War II, most obviously by Louis Hartz in *The Liberal Tradition in America* (1955). A more refined version of the argument was advanced by James Willard Hurst in his *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956). Hurst explained that the early United States was remarkable not for any “jealous limitation of the power of the state,” but rather because it was a new kind of state that worked in positive fashion to achieve “the release of individual creative energy.”¹ Hurst comprehended Tocqueville’s most astute observations about the paradoxical capacity of liberal states to do more with less better than did Hartz, indeed better than many others since. But like Tocqueville, Hurst implied that the American state was abnormal.

¹ James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956), 7.

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Decades after Hurst, more recent authorities on the early American state have broken much new ground, but mostly they still accept American distinctiveness. Above all, the decentralization of early U.S. political authority, described (and praised) at such great length by Tocqueville, continues to figure centrally. Before the late nineteenth century, the United States was a state of “courts and parties”: those two institutions alone served to coordinate a radically decentralized political and economic system. Some of the best new histories of the early American state have outdone Tocqueville in their assumptions about the hypersignificance of local governance. In the history of American political economy, meanwhile, the several states continue to figure as the central subjects, just as they did in the classic monographs on Pennsylvania and Massachusetts written by Hartz and the Handlins in the mid-twentieth century. The leading legal historian Lawrence Friedman summarized the message of a half-century of scholarship on state institutions and political economy in the antebellum United States as follows: “Nobody expected much out of the national government – or wanted much.” The national government “was like the brain of a dinosaur: an insignificant mass of neurons inside a gigantic body.”

The impotence of national authority and incoherence of state action in the United States through the Civil War era are part of a well-established story. But that does not make them correct. Here I take a different direction. In doing so, I build on the work of a handful of scholars – among them Richard R. John, Ira Katznelson, and Bartholomew Sparrow – whose research recommends reconsideration. In their effort to chart the dynamics of the complex American political system, I argue, students of the early American state have overlooked the most important single characteristic of the early United States: its astounding growth. In comparison with European states, the early American state was confronted with problems arising from unusually rapid demographic, economic, and territorial expansion. Between 1790 and 1870, the national population increased from 4 million people to 40 million. The economy grew roughly twice as fast: between 1820 and 1870 alone, national product increased by a factor of eight. Perhaps most remarkable of all, the territory over which the early American state presided expanded from 864,000 square miles in 1800 to nearly 3 million square miles in 1850. From a gaggle of colonies hugging the Eastern seaboard in 1776, by the time of the Civil War – less than ninety years later – the United States had become the peer in population, economic output, and territorial reach of France, Britain, and Russia.

The early American state was less top-heavy than those others. In 1860, when all three states had similar numbers of inhabitants, central state expenditures in Britain and France were roughly five times what they were in the United States. Nonetheless, along with its tremendous growth in

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population, economy, and territory, the early United States saw a remarkable expansion of state institutions. By 1870, twenty-four new states had joined the original thirteen, and hundreds of new towns and counties had been created. National government had undergone significant expansion and specialization. By 1849, the original executive departments of State, War, and Treasury had been joined by three more cabinet-level departments: Navy, Post Office, and Interior. In Congress, a variety of specialized standing committees had appeared in both houses by the 1810s; the number of House members had tripled between the 1790s and the 1870s, from 102 to 292. In 1836, Congress reorganized the patent system by establishing a new Patent Office, which became an important arbiter of technological innovation. Even the federal judiciary, set in its structure for the most part in 1789, saw a newcomer by the end of this era: the Court of Claims, established in 1855 and empowered during the Civil War.

Institutional expansion allowed the early American state to manage its population, economy, and territory – the three fields of greatest concern to all modern states. Here I use these three related fields as the means to organize a multidimensional account of the early American state. My account confirms some long-established notions and extends – or challenges – others. For example, students of American history will not be surprised to learn that early American governmental institutions failed to deliver on the most radical and egalitarian promises of the Revolution. But what happens when we probe beyond the obvious racial and sexual inequalities of early America to consider matters of causation and chronology? In its symbolic and legal construction of the national population, the early American state deliberately segmented its population along a color line. Furthermore, state construction of whiteness and its cognates became more energetic over time.

In the field of political economy, the pattern of chronological change was more complex. Here, a non-linear narrative, which considers the activities of various levels of American government, helps us reconcile a basic dispute among political and legal historians of the early United States. Both sides in this dispute have managed to assemble powerful evidence: on the one hand, of considerable state promotion and regulation; on the other, of impressive growth – not only in America, but around the Atlantic world – in capitalist enterprise. But we rely too heavily on evidence from the 1830s and early 1840s for broad characterizations of the development of the market economy during the whole antebellum era. If we consider more carefully the final years of the antebellum period and if we look beyond the various states to both local and national initiatives, we find that the oft-discussed trend toward private enterprise during the latter part of this era was actually quite weak.

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In the governance of population and economy, the national state shared the stage with the various states and localities. In the governance of territory, on the other hand, the national state – which contemporaries frequently called “the General Government,” if not “the Union” or simply “the United States” – was the leading player. It was the national state, through treaties and military operations, which claimed vast new territories during this period. And it was the national state that created and administered the laws and policies that transformed much of this territory into land. The country’s greatest landowner and realtor, the national state transformed the landscape and the lives of the millions of people who settled beyond the original thirteen states by extending the common law of property over the continent and creating administrative agencies necessary to divide vast spaces into manageable commodities. By the middle of the nineteenth century, territorial governance and consolidation stood as the early American state’s central accomplishment and central problem. That this field of governance touched the lives of the entire population, and not only a minority in the far West, became especially evident by the end of this period, when disastrous new territorial policies in the 1850s led directly to the Civil War.

Taking fuller measure of the early American state leads us to an unexpected conclusion: that the early national state, dismissed by many observers then and since as extraordinarily weak and irrelevant, was in fact the most innovative and influential level of governance in the multitiered American political and legal order. Between 1861 and 1865, the national state extended its influence significantly, but this extension was built on an already considerable foundation. The emergence of a powerful national state in America did not occur during or after the Civil War, but before.

I. POPULATION

Historians and legal scholars lead us to consider the early American state’s management of its population in terms of two hypotheses. First, a variety of state institutions worked to individualize the populace; over time the state came to recognize and have a more direct relationship with the individual human beings residing in its territory, including those who lacked full citizenship rights. Second, the early American state increasingly sorted the population according to discriminatory racial categories, which simultaneously expanded the boundaries of a favored social class identified as white and increasingly denigrated those persons who fell outside the boundaries of this category.

Any discussion of the early American state’s activities in the field of population may logically begin with a consideration of the Constitution and

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the census. Although the racialization of the population had certainly been proceeding for decades in British North America before the Revolution, the language of the Constitution suggests that the infant American state was not yet devoted to full-blown white supremacy. The Constitution's most direct sorting of the population is found in Article I, in which it describes the rules for determining the apportionment of the House. Here, the Constitution differentiates among three social categories: "free persons," "Indians not taxed," and "all other persons." For apportionment purposes, as is well known, the number of people in the last of these categories – a euphemism for slaves – was multiplied by three-fifths; members of the second category were excluded altogether. The Constitution refers to neither sex nor color. Thus, while it certainly provides tacit recognition and even support for slavery, the basic blueprint for the new national state uses condition of servitude, rather than race, as a social sorting device.

By contrast, the census, which should be understood as one of the institutions of the early American state with the greatest symbolic power, used the term "white" from the beginning. The first U.S. national census, required by the Constitution, was conducted in 1790, a decade before the first national censuses of Britain and France (although after the pioneering efforts of Sweden). It divided the population into "white," "other free," and "slave." The white population was further divided into three categories: females, and males over and under the age of 16. By 1820, the census had dropped the adjective "other" for "colored." In subsequent decades, increasingly complex census schedules would continue to divide the population according to the same handful of basic variables: color, sex, age, condition of servitude, and place of residence. In 1830, it began to enumerate persons described as deaf, dumb, and blind; in 1840, it counted "insane and idiots" as well. In 1850, the census added a new racial subcategory, "mulatto," which was left to field enumerators to interpret. (In 1850, more than 11 percent of the people falling under the larger category of "colored" were placed in this new subcategory.)

As sectional tensions increased, census regional and racial data were paraded for a variety of political purposes. When poorly designed 1840 census forms led enumerators in some Northern states to register hundreds of non-existent "insane and idiot" African Americans, some Southerners seized on the false data as evidence of the salutary effects of slavery. Another wrongheaded interpretive leap, which spoke to the increasing dedication to the idea of white supremacy within the boundaries of the state during this period, came from the census itself. In 1864, as he presented the final official population report from 1860, long-time census chief Joseph Kennedy hailed figures showing that the nation's free white population had grown 38 percent over the preceding decade, in contrast to 22 percent growth

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among slaves and 12 percent for free blacks. Disregarding the inconvenient fact that the free black population was on a pace to double in size over the next century, Kennedy announced that the data indicated an ongoing “gradual extinction” of “the colored race.”

Along with this apparently increasing emphasis on racial hierarchy and difference, the development of the census over time suggested a more general shift in the relationship between state and population in antebellum America, toward individualization. As we shall see, this was evident in the development of family law across the various states. At the census, the key innovation occurred during a massive expansion of data collection in 1850, when enumerators first recorded the names of individuals other than household heads. Pushing toward a new level of social knowledge, the census forged a direct relationship with named individuals, including women and children. Here, as elsewhere, the state’s willingness to have its relationship to persons mediated by a patriarchal or corporate head was declining. At the same time, there was necessarily a corresponding increase in bureaucratic capacity. While the 1840 census was processed in Washington by a clerical force of only about 20, the 1850 tally required 170 clerks. According to its leading historian, this made the Census Office, at its peak, “the largest centralized clerical operation of the federal government at the time.” There were no comparable operations in the private sector during this era.

More important than its bureaucratic achievements was the symbolic work that the census did. Again, racial sorting had been going on throughout the colonial period (both in popular culture and in law); it was certainly not pioneered by the census or any other post-Revolutionary state institution. But through its administrative and legal institutions, the early American state encouraged the reproduction of a national social order in which racial hierarchies became more important over time, rather than less. Through the census and other legal and administrative institutions, the early American state encouraged its populace to think in terms of whiteness and non-whiteness in a way that the Constitution did not.

While colonial developments made it likely that the new national state would continue to emphasize racial categories in the definition of its population, other available categories were eschewed. Most important among these was religion. Here, in contrast to its operation with regard to race, the symbolic power of early national state institutions was used against the entrenchment of poisonous social divisions. The census that so diligently classified according to sex and race avoided interrogation of religious identity, even in its detailed, individualized schedules of 1850. This need not have been the case. Before the Revolution, seven of the thirteen colonies had state-supported churches; in Europe, of course, established religion was the rule. But the immediate post-Revolutionary period proved one in which

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disestablishment was especially attractive. Many American leaders were true Enlightenment men whose qualifications as Christians were dubious. Many members of fast-growing non-established churches, such as Baptists and Presbyterians, found the end of established Congregationalist and Anglican churches an attractive prospect. Virginia led the way with a 1786 law “for Establishing Religious Freedom” that banned government assistance to any church and established a policy of tolerance toward non-Christians. Soon after, the Constitution, which made no reference to a deity at all, proscribed religious tests for federal officeholders; the First Amendment, of course, prohibited the federal government from religious establishment. By 1802, when President Jefferson wrote a letter to a Baptist congregation in Danbury, Connecticut, referring to “a wall of separation between Church and State” erected by the Constitution, the national state’s refusal to define its population according to religious categories was clear.

Over time, and despite a marked rise in popular Christian enthusiasm during the first decades of the nineteenth century, the early American state moved further away from the religious sphere. To be sure, the Constitution had never banned state-supported churches or religious tests at the state level.² Massachusetts did not abandon establishment until 1833. The early national state lent indirect assistance to religious authorities in a number of ways, such as offering tax exemptions for churches and providing military chaplains – two measures opposed by the strictest of disestablishmentarians, including James Madison. And in *People v. Ruggles* (1811), a New York case, leading American jurist James Kent upheld the blasphemy conviction of the defendant, who had reportedly said, “Jesus Christ was a bastard and his mother must be a whore.” Such speech, Kent ruled, was “in gross violation of decency and good order.”³

The generation that followed Kent, however, was less willing to use state power to defend Christianity. By the 1840s, when one Pennsylvania judge mocked the idea of a “Christian state” in America, blasphemy convictions were exceedingly rare. The direction of change was clear: the whole country moved steadily toward the standard established first by proto-secular colonies like Pennsylvania and then by the new national state and state governments such as Virginia in the immediate post-Revolutionary period. Certainly, churches and their members could have great political influence, and they often lobbied successfully for legal change to support

² In a 1947 case involving the use of state funds to transport children to parochial schools, the Supreme Court approved such use in a 5–4 decision, but Justice Hugo Black’s majority opinion claimed – erroneously, it seems clear – that the establishment clause applied to the various states, as well as the federal government. *Everson v. Board of Education*, 330 U.S. 1 (1947).

³ *People v. Ruggles*, 8 Johns. (N.Y.) 290 (1811).

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temperance or other reform causes. But even when it came to public policy decisions in which Christians might have been expected to prevail easily via democratic politics, the effective secularism of the state – rooted, it is worth noting again, at least as much in anti-establishment and anti-clerical sentiment as in what might be called modern secular thought – proved surprisingly robust. In 1830, Congress failed to satisfy hundreds of petitioners who demanded the end of Sunday mail deliveries, which caused many post offices to remain open on Sundays. In the vigorous debates on this issue, Senator Richard M. Johnson of Kentucky, a post office committee chair and future U.S. vice president, not only defended the Sunday mails as a necessary element of an efficient national communications system, but went so far as to refer to the equal rights of Jews and pagans. He warned that his opponents were flirting with “religious despotism.” Although some Sunday mail routes disappeared in the coming years (the last post office open on Sunday was closed in 1912), Johnson’s victory over the petitioners in 1830 stands as a notable example of the early national state’s unwillingness to protect favored segments of the population according to religion.

When it came to race, the reverse was true. From the beginning, but increasingly over time, statutes, constitutions, and court decisions promoted the formation of a privileged class of white men. In some areas, at least, early actions by the national state encouraged the subsequent extension of white privilege by state lawmakers. Unlike the Constitution, early Congressional statutes encouraged Americans to associate whiteness with full citizenship. In its 1790 Naturalization Act, Congress offered full citizenship to “all free white persons” with two years of residence in the United States. The Militia Act of 1792 required every “free able-bodied white male citizen” to participate in military service. In the coming decades, as new state constitutions denied suffrage and other civil rights to free blacks, some proponents of these measures would justify the racial discrimination by claiming that their absence from the ranks of the militia demonstrated that blacks were never full citizens.

The rising legal inequalities between white and black developed simultaneously with growing egalitarianism among whites. During the first half of the nineteenth century, tax or property requirements for suffrage disappeared in state after state. Decades ahead of England, the United States experienced the rise of a popular politics. The presidential election of 1840 saw a total of 2.4 million votes cast; just sixteen years earlier, John Quincy Adams had managed to become president with fewer than 109,000 votes. Well before the Civil War, then, universal white male suffrage had become the rule. Full citizenship was now a function of race and sex; it did not depend on birth, wealth, religion, or nationality.

Some would have had it otherwise. Throughout the period, there was plenty of popular anti-Catholicism, from the published diatribes of the

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inventor Samuel Morse to major mob actions in Boston and Philadelphia. From the heyday of the Federalists to the rise of the Know Nothings in the 1850s, political nativism was easy to find and sometimes succeeded in creating new legislation. But all in all, U.S. immigration and citizenship law remained remarkably open to European men. With the Naturalization Act of 1790, Congress provided for citizenship after two years' residence, an inclusive and open system that at least indirectly challenged the sovereignty of European states by encouraging their subjects to depart. Although the residential standard soon became five years, efforts to establish much more restrictive systems were defeated on several occasions. Throughout the period, the national government and the various states both regulated immigration through a variety of laws, including the federal Passenger Acts that limited the numbers of arrivals by setting tonnage requirements and the states' efforts to force shipmasters to accept liability for potential social welfare spending on the newcomers. But these rules did not prevent some 2.5 million people, mostly Irish and German, from coming to the United States during the decade starting in 1845 – one of the largest waves of immigration in all of American history. Overall, the governmental institutions that these people encountered in the United States tended to promote white solidarity, rather than divisions among Europeans. Even as the Know Nothings won short-term victories in New England, for example, many Midwestern and Western states were allowing non-naturalized white aliens to vote.

While the circle of white citizenship expanded, the legal denigration of those outside it also increased. This was true even for slaves, in the sense that the well-established institution of slavery, which seemed in the immediate post-Revolutionary period to be on the defensive, became more legally entrenched over time. Before the 1810s, proponents of emancipation had reason for optimism. In 1782, the Virginia legislature legalized manumission, which had been banned in the colony earlier in the century; other Southern states also allowed masters to free their slaves. Meanwhile, in the North from 1790 to 1804 the states abolished slavery altogether, though often with gradual emancipation plans. In 1807, when Congress banned slave imports, the vote in the House was 113 to 5. During the first quarter-century after the Revolution, then, the early American state did relatively little to promote slavery in an active way, although Southern slave owners were always extraordinarily well represented in all three branches of the national government.

By the antebellum years, by contrast, many Americans became convinced that a variety of governmental organizations, including Congress and the federal courts, were acting positively in favor of slavery. To be sure, there was some evidence to the contrary. For much of the 1840s and 1850s, the U.S.