

Race, Class and the Building of an American Empire, 1789-1860

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After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the union, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world.

Alexander Hamilton, *Federalist* 1

No constitution was ever before so well calculated as ours for extensive empire.

Thomas Jefferson, 1809

From the Bush Administration's military engagement in the Middle East to American corporate and media dominance in the global economy, pundits and theorists alike are awash in a politically charged debate over the concept and phenomenon of American empire.¹ "Empire" has been defined broadly and narrowly, but the vast majority of definitions refer in some form to the notion of an imperial nation-state that dominates terrain outside of its sovereign borders through a combination of military violence,

¹ See e.g., Niall Ferguson, *Colossus: The Rise and Fall of the American Empire* (New York: Penguin, 2005); Aaron L. Friedberg, *In the Shadow of the Garrison State* (Princeton: Princeton University Press, 2000); Michael Hart and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2001); David Harvey, *The New Imperialism* (New York: Oxford University Press, 2003); Amy Kaplan, *The Anarchy of Empire in the Making of U.S. Culture* (Cambridge: Harvard University Press, 2002); Daniel H. Nexon and Thomas Wright, "What's at Stake in the American Empire Debate," *American Political Science Review* 101 (May, 2007); Neil Smith, *American Empire: Roosevelt's Geographer and the Prelude to Globalization* (Berkeley: University of California Press, 2003); Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* (Princeton: Princeton University Press, 1998).

political sovereignty, economic power, and cultural hegemony.²The term has been used to explain activity by the United States typically in terms of its overseas military claims, from the Philippines on the eve of the twentieth century to Iraq at the turn of the Millennium.

Scholars interested in empire have been increasingly employing theories of state and institutional development to understand the particular timing and form of America's expanding influence in world politics.³ Scholars argue that the United States' empire ambitions would only be acted upon and become successful in the late 19th century, after post-Civil War Reconstruction, because only then were national leaders able to assert authority through the enhanced capacity of a powerful state able to fight wars, control foreign economies, and extend global influence: prior to this time, America's institutions "suffered from commitment incapacity," leaving national power to "lay dormant beneath a weak state, one that was decentralized, diffuse, and divided."⁴

My goal in this paper is to broaden the definition and contours of American empire to see how political elites in the nation's earliest years both thought about, and exerted the authority and harness the capacity, to build an empire despite the burdens of a seemingly small and limited central government. As the above quotations from

² This definition is influenced by Michael Doyle, *Empires* (Ithaca: Cornell University Press, 1986); and Peter J. Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca: Cornell University Press, 2005), who defines "imperium" as power exercised over both sovereign territory and nonterritory, often manifesting "itself in hybrid identities, flexible hierarchies, multiple exchanges, and the production of new forms of authority and coercion across boundaries" (4).

³ Two recent works by American political development scholars are exemplary of the implicit sense of time-line. See Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Lawrence: University of Kansas Press, 2006); and Colin Moore. Though see Stefan Heuman....

⁴ The first quotation is from Robert O. Keohane, "International Commitments and American Political Institutions in the Nineteenth Century," in Ira Katznelson and Martin Shefter, eds., *Shaped by War and Trade* (Princeton: Princeton University Press, 2002), 58. The second quotation is Zakaria, *From Wealth to Power*, 11. For a different, yet compatible claim about the rise of America as a superpower, see Friedberg, *In the Shadow of the Garrison State*.

Alexander Hamilton and Thomas Jefferson suggest, empire was consistently on the mind of early American state builders.⁵Writes Daniel Hulsebosch, when the founders looked both to the past and the present in the writing of the Constitution, “in both directions they saw empire.”⁶

How the nation proceeded to expand the empire in these early years despite limited state capacity is the question of the paper, and to offer at least an initial answer, I examine three features of American politics that all had wide-ranging implications for empire building: territorial expansion into lands occupied and owned by Native Americans;the protection of slavery and the slave trade, particularly with regards to threats emanating from the West Indies; and the expansion of interstate and global capital as well as the counter-response from laborers to these developments. Any understanding of American empire needs to begin with the government’s first concerted effort at empire building: “the long and contested incorporation of continental territory based on settlement colonialism”that led the nation into the south and southwest across the Mississippi river in the first half century after the Declaration of Independence, and the concurrent conquest and removal of Native Americans from their land.⁷The first phase of

⁵ See Andy Doolen, *Fugitive Empire: Locating Early American Imperialism* (Minneapolis: University Of Minnesota Press, 2004); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill, University of North Carolina Press, 2005); Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven: Yale University Press, 2004).

⁶ Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 4. See also, Andy Doolen, *Fugitive Empire: Locating Early American Imperialism* (Minneapolis: University Of Minnesota Press, 2004);

⁷ See Paul A. Kramer, “Empires, Exceptions, and Anglo-Saxons: Race and Rule between the British and United States Empires, 1880-1910,” *Journal of American History* 88 (4), 1316. See too, Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York: Hill and Wang, 2007).

empire building in America involved expansion into and violent expropriation of Native Americans from their land. Many millions of people, perhaps as many as 16 to 18 million, lived in the Continental United States before the beginning of European conquest, and even by 1800 these numbers stood at between 600,000 to 1.8 million (compared to roughly 5 million American citizens).⁸ Native Americans lived on key areas of land where white Americans wanted to settle and build cities and transportation centers and help drive the channels of interstate and international commerce. Territorial expansion and Native American removal involved military might and extreme violence, unprecedented commercial acquisitions and land-taking, the movement of more than a hundred thousand people from one home to concentration camps to new homes, and eventual colonization. As Tocqueville wrote of these acts: “never has such a prodigious development been seen among the nations, nor a destruction so rapid.”⁹

The politics of slavery was both connected to and separate from territorial expansion. On the one hand, much of the expansion into Native American lands that was most hotly contested, such as in the territories of Georgia, Florida, Louisiana, were areas where slavery was legal and flourishing. Territorial expansion brought the United States continually into confrontation with the growth of slavery into new territories.

Alternatively, slavery demanded the United States defend itself from slave rebellions, the first of which appeared in the West Indies at the end of the 18th century, necessitating the

⁸ See Paul Stuart, *Nations Within a Nation: Historical Statistics of American Indians* (Greenwood Press, 1987); Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman: University of Oklahoma Press, 1990).

⁹ Alexis de Tocqueville, *Democracy in America*, ed., J.P. Mayer (New York: Perennial, 2000), 321.

beginnings of a U.S. foreign policy and assertion of dominion with regards to Central and Latin America.

Finally, territorial expansion was driven by and furthered the expansion of capital and capitalism. In turn, it created classes of people and led to the beginnings of labor activism in the United States. The state was intimately involved in these three realms at every stage and in a myriad of ways. But this assertion demands an explanation because, as many scholars have argued, this is a period of time when the national government's authority, at least in terms of bureaucratic and executive power was fairly weak. Prior to the Civil War, America is thought to have had a "nascent" state, an "evanescent" state, a "feeble" state of "courts and parties;" only with the Civil War was the government provided "with vast powers" that transformed it into an entity that "emerged as the unchallenged sovereign power within the American republic."¹⁰

But the form of state power is more notable for its alternative forms than for its involvement in the traditional roles of bureaucracies and weaponry. In this paper, I focus in particular on the ways in which the national government shaped private actions in a manner that worked towards and better enabled empire building, emphasizing the relationship between state and society that enabled activism and the importance of law in legitimating sovereign and territorial expansion.

¹⁰ "Nascent" and "vast powers" comes from Richard Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990), 1 and 2; "state of courts and parties" and "evanescent" comes from Skowronek, *Building a New American State*, 24-29; "feeble" comes from Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001), 38.

So, how ought we explain this initial period of empire building within the context of a weak American state? One explanation, that of Stephen Skowronek, who asserts that the state was strong enough to do what it had to do in these early years—fight wars with Indians. Of course, he’s right; and as we’ll see, the state of “courts and parties” plays a critical role in carrying out Indian expulsion. The party system played a critical role in mobilizing electoral coalitions around land acquisition and Indian fighting. Andrew Jackson, a critical supporter of Native American removal, was the first president elected in the second party system, one that emphasized national coalitions that reflected issues that seemingly all Americans would find uncontroversial. The courts played an even more critical role. The Supreme Court authorized Native American removal in a series of decisions that denied Indian’s title to land and legitimated territorial expansion with decisions that enhanced the power of capitalist enterprise. State and local courts further authorized land removal through property and contract laws biased towards western understandings of capitalism, ownership, and citizenship. The American legal system, through courts interpreting the Constitution and common law, confronted new territories, demanded compliance with state structures, and created an “objective,” network of procedures that overwhelmingly biased outcomes in favor of American interests. Furthermore, courts empowered a national economy and authorized the structural properties of state power such as property and contract laws enabling economic and territorial expansion. As a result, Americans “conquered the continent less with violence than with the confidence with which they carried forward their notions of constitutional liberty, notions forged in the matrix of empire.”¹¹ [Tocqueville quote?]

¹¹ Hulsebosch, *Constituting Empire*, 11.

A second explanation also captures an important component of this historical process. Ira Katznelson argues that a weak state was able to achieve surprising results because of its “flexibility.”¹² Katznelson in particular emphasizes the degree to which the government was able to harness military power in times of need.

A third model, Lieberman and Skrentny...role of culture and ideology as they intersect with institutional dynamics.

Alternatively, scholars have made links between liberalism’s emphasis on freedom and empire. Michael Rogin...Uday Mehta argues that imperialism, far from contradicting liberal tenets, in fact stemmed from liberal assumptions about reason and historical progress. Confronted with unfamiliar cultures such as India, British liberals could only see them as backward or infantile. In this, liberals manifested a narrow conception of human experience and ways of being in the world.¹³

But to date, our discussion of empire has tended to be limited around certain core themes involving the state and the military in conquering territory and expanding sovereignty. In this paper, I want to add the role of race and class to this discussion. Both complicate our understandings of empire and the possibilities and limits of its expansion. Race played a multi-faceted role. Racial ideologies, such as social Darwinism and the belief in a “white man’s burden” often drove and legitimized conquest of territories habited by non-whites. Racism often energized white empire builders, inspiring them with a sense of entitlement, pride, and moral duty.¹⁴ Moreover,

¹² Ira Katznelson

¹³ Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought* (Chicago: University of Chicago Press, 1999).

¹⁴ Michael Rogin,

the desire to protect slavery interests necessitated frequent national intervention into the West Indies to try and reign in slave revolts and protect the profitable slave trade. But race also dampened aspects of empire building. Racial ideologies, for instance, also served in the United States to minimize empire and maximizing conquest and removal. As Eric Love argues, U.S. empire is delayed because of American fears of incorporating non-whites into American sovereignty.¹⁵ Love's particular focus is on the delayed efforts of Hawaiian statehood and the halted efforts in the Dominican Republic and the Philippines. But similar situations exist with U.S. confrontations with Indians—the U.S. was not looking for empire in the sense of gaining sovereignty over new peoples and nations so much as they wanted those nations to disappear. Indian nations were, after some initial failed efforts, not places of colonization where the U.S. exploited labor and resources. This was not a model of core-periphery.¹⁶ Americans, in fact, often thought of themselves as expanding over an empty terrain.¹⁷ Instead, Americans took Indian resources and land and forced the removal of Indian populations.¹⁸

Class also plays an important role, both in terms of capitalist expansion and in terms of laborer efforts to participate in the process in a manner of their own choosing. Karl Marx's writings in this period are filled with...

¹⁵ Eric T. L. Love, *Race over Empire: Racism and U.S. Imperialism, 1865-1900* (Chapel Hill: University of North Carolina Press, 2004).

¹⁶ E.g., Immanuel Wallerstein, *The Politics of the World-Economy: The States, the Movements, and the Civilizations* (New York: Cambridge University Press, 1984).

¹⁷ Jeffrey Ostler, *The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee* (New York: Cambridge University Press, 2004), 17.

¹⁸ Although it is certainly true that Americans expropriated ideas from the existence of Native Americans, places where masculinity and whiteness could be given expression. See Rogin; Ann Laura Stoller, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham: Duke University Press, 1995).

But there are also important features that none of the models capture—features that reflect state power, but do so through a different understanding of the state, notable less for its traditional roles of bureaucracies and weaponry, and more for its alternative forms....The standard of the state in much APD work is a European standard, one equally derived from Hegel, Tocqueville, and Weber, and defines it as a centralized and professionalized bureaucratic institutional structure that has the authority to regulate capital and provide social welfare benefits to the broadest possible constituency. A revised understanding of the state needs to incorporate the ways in which governing structures impact society without the vehicle of government agencies, deputies, and armies. Constitutional structures such as the Commerce Clause and Electoral College consistently lend legitimacy and authority to some interests while silencing and marginalizing others. Structures do not necessarily need bureaucracies and armies for enforcement—they provide authority and legitimation through law, procedure, and the establishment of norms. This reconceptualization, then, attempts to switch our understanding of the state from one grounded in formal governing authority and control to a more expansive notion that includes situations where state structures actively construct, enable, and approve of sources of power that in turn provide increased resources and capacity to the state. I will argue that the state's role in the creation of empire relies less on traditional notions of state building and more on the degree of authority that comes from less visible features, including those from the outer regions of the state—or to borrow the language of Foucault—authority that comes from the

“extremities” of the state, “at its outer limits at the point where it becomes capillary.”¹⁹

Actors outside the center but who are enabled if not directed by state authority are critical in empowering the nation and fueling its expansion. (Add Hardt and Negri?)

By looking outside the center, we can find forms of state power that are critical to enhancing the state, the nation, and expanding empire.... We have not paid enough attention to the inherent authority that the law has fostered in American political development; we also have not granted the degree to which the underlying authority of courts and law in America has been radical and critical to the rise of a stronger and more powerful state.

Law, Structures, and the State

States represent and exert power.²⁰ Both who is represented and how power is exerted have been subject to great debate. State representation has been understood broadly as a set of geographic borders, a majority of voters, a racial, ethnic or religious

¹⁹ Michel Foucault, “*Society Must be Defended*”: *Lectures at the Collège de France 1975-1976*, (New York: Picador, 2003), 27. Foucault has famously said that in order to understand power, “we need to cut off the king’s head;” meaning, that we need to move beyond an understanding of leaders and administrators to see power’s impact more broadly in society. Michel Foucault, “Truth and Power,” in *Power*, ed. by James D. Fearon (New York: New Press, 2000), 123.

²⁰ Max Weber has famously defined the state as having “a monopoly on the legitimate use of physical force within a given territory.” Max Weber, “Politics as a Vocation.” Also see, Immanuel Wallerstein, *The Politics of the World Economy: The States, The Movements, and the Civilizations* (New York: Cambridge University Press, 1984); Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), 46-47; Foucault, *Society Must be Defended*.

group, and more narrowly in terms of a minority economic class, or a governing bureaucracy with interests that are distinctive from broader society. The exertion of power has also been understood in multiple ways, though more narrow definitions have dominated the field. The state's authority and exertions can be based on brute force, charisma, or, as Weber has discussed, a more broadly rational-legal source coming from impersonal rules that attain legitimacy and work to constrain power either through consent or hegemony.²¹ J.P. Nettl defines the state as "a collectivity that summates a set of functions and structures in order to generalize their applicability."²² The most acceptable exertions are fairly direct; the state wields power and gains compliance from those who are otherwise opposed. In turn, once states have authority, politicians create rules and institutions to further cooperation between actors. State scholars have shown some of the ways in which this power is exerted more expansively—through agenda setting, for instance, where one actor or set of actors denies opportunities to others by using rules and institutions to steer opponents away from opportunities.²³ Marxist scholars inspired by the work of Antonio Gramsci have taken this further, understanding the state as creating a hegemony that makes subjects complicit; further still is a Foucaultian approach where there is no state acting directly, but instead, a notion of power (or "biopower") and norms that permeate society so completely that it controls life itself.

²¹ Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990).

²² J.P. Nettl, "The State as a Conceptual Variable," *World Politics* 20 (July 1968), 559-92, at .

²³ Peter Bachrach and Morton S. Baratz, "The Two Faces of Power," *American Political Science Review* 56 (December 1962), 947-52.

American political development scholars have intentionally proffered a specific and fairly narrow view of the state, one that emphasizes a notion of a bureaucratic and professionalized class who create an institutional independence from society.²⁴ This was intentional in that initial APD work sought to distance itself from both pluralist and Marxist understandings of politics that saw relationships between state and society as being functional.²⁵ Instead, APD scholars sought to highlight the incongruities between democratic interests and national policy outcomes by emphasizing the independent interests and contingencies of state institutions. APD understandings of state power are drawn from a Hegelian and Weberian notion of state authority that sees a distinction between formal government actors and offices that are meaningfully independent from private society. It is in the halls of this formal government where power and authority are exerted.

Drawing from this conception of the state, it is not surprising that APD scholars have concluded that the American state is comparatively weak. Our social welfare system is relatively small and limited, and our Constitution is antiquated and buttressed by individual rights more than marked governmental authorities.²⁶ Constitutionally, the powers provided to state actors are rigorously defined, and thus limited, checked, countered, and divided among other actors. No one has full authority over a specific area of policy, and even “We, the people” are checked in asserting power by numerous

²⁴ Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, *Bringing the State Back In* (New York: Cambridge University Press, 1985); Max Weber, “Politics as a Vocation,” in H.H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958).

²⁵ See, Evans, et al., *Bringing the State Back In*.

²⁶ Tocqueville, *Democracy in America*; Skowronek, *Building a New American State*.

provisions that provide veto points against the possibility of “tyranny of the majority.” Veto points also provide opportunities for iron triangles and other forms of entrenched interests that can resist popular will—more generally the will of any individual government actor no matter what interests he or she is representing. Ideologically, the United States is thought to be composed of individuals who are skeptical of government power. This strong belief in freedom has allowed private economic interests to flourish.

Accordingly, APD scholars confronted the American state differently than they would the centralized states of Europe. But even a “weak” state that is decentralized and full of veto points can still wield power.²⁷ Stephen Skowronek perhaps goes furthest in arguing that America has a meaningful “state” even in its earliest of years. But Skowronek and other APD scholars do not expand upon this notion of state power; instead, they return to the Hegelian model that views state actors through the formal lens of governing institutions and authority, and to the Weberian model that views these actors as having independent interests from society. Thus, for the state to be authoritative in taking steps to tame economic freedom, it had to be built through regulatory agencies that were “insulated from the people.”²⁸ Skowronek critiques Tocqueville and Hegel for missing the existence of a state, but at the same time argues that this state was merely “serviceable but unassuming national government” that provided “basic services” such as land offices and postal offices.²⁹ Because the old state was “weak”—it equipped actors with few institutional weapons and fewer constitutional and intellectual warrants—

²⁷ Lieberman, *Shifting the Colorline*; Theda Skocpol, *Protecting Soldiers and Mothers* (Cambridge: Harvard University Press, 1992).

²⁸ Skowronek, *Building a New American State*, 9.

²⁹ Skowronek, *Building a New American State*. 23.

bureaucrats and other government officials had to create a new state out of a hodgepodge of weakly tied together powers and authority.

The early 1800s “state of courts and parties” is emblematic of the state’s weakness because this state allowed private economic power to flourish against the wishes of voters and elected politicians. Parties only represented “the most general policy preferences,” served to do little more than move people through the electoral box without substantive agendas, and were ill-equipped to make substantive decisions about the future of the state.³⁰ Courts, “procedural institutions par excellence,” were more important to state building in that they shaped the boundaries of inter-governmental relations and relations between state and society; nonetheless, judges were ill-equipped to do much beyond theorize about law, politics, and the economy. Judges were quite antiquated institutionally, and unable to handle the needs of a modernizing America, and thus ill-suited to represent the state as a regulatory and modernizing power. Even at the strongest, courts were nothing better than a poor “surrogate for a more fully developed administrative apparatus;” courts were “innocuous enough to make it seem as if there was no state in America at all.”³¹

For Skowronek and others, the rise of an American state is defined as the rise of bureaucracies that have regulatory power to respond to crises in society, particularly those exacerbated by industrialism and the resulting class divisions. Consciously or not, APD scholars quickly created a hierarchy of state institutions—powerful and democratic actors empowered by the people, and an archaic and limited court that thrives on

³⁰ Skowronek, *Building a New American State*, 26.

³¹ Skowronek, *Building a New American State*, 28-35.

legitimizing natural law and restricting the majority. Because the focus of their questions were on the development of a social welfare state, any recognition of court authority was restricted to a “problem” in their research for “why no socialism?”; and less an answer for explaining state development.

Richard Bense, for instance, focuses less on a notion of a procedural state than a differentiation between an electorally-generated state that wanted a strong government and a structural state that did not. Even more so than Skowronek, Bense emphasizes the important role that courts and structures like the Commerce Clause played in the development of American capitalism: “no other branch of the government could have reached the individual states” to stop regulation of the economy. “Given the nature of the American polity, the construction of the national market could only be a project centered in the courts.”³² Court activism is not a minimal achievement. Indeed, Bense argues that courts were critical to constructing a political economy dominated around free market principles; he calls the court’s role in creating a national market free from regulation a “truly stupendous accomplishment.”³³ But, like Skowronek, he sees this as limiting state development. Economic expansion, even though it is a political process affirmed and enabled by courts and the Constitution, is seen as a limit on state power. The state ultimately fails to transform itself into a powerful force because it is defeated by outside capital and its alliance with the courts. State actors failed to achieve their goals because business interests maintained superiority in realms less accountable to

³² Bense, *American Industrialism*, 518-19.

³³ Bense, *American Industrialization*, 526.

democratic influence.³⁴ Karen Orren and William Forbath similarly situate courts at the center of preventing a more democratic and vibrant welfare state. In both of their works, courts enforce precedents that are detrimental to workers, whether in the workplace (Orren) or in the course of developing a labor movement (Forbath).³⁵ For Forbath, in particular, courts are absolutely critical in determining the strategies and development of the labor movement, and by consequence labor policy in America. But both scholars further the tradition of courts playing the role of veto player, and both perceive that role to be an archaic form of political power, and antithetical to a modern democratic state.

To the degree that these canonical works of APD saw the law both in terms of power and veto, recent law and APD scholars—in an understandable eagerness to counter law professors who see judges as Hercules—have gone even further in stripping the importance of law to a new form that emphasizes not only that courts lack the ability to be assertive and independent as state actors. Courts are increasingly in danger in the APD literature of becoming bit part players in state development because their authority rests almost entirely on the wishes of electoral actors.³⁶ The law itself has little sense of independence; it is either a form of limited power from the Constitution or is politically constructed by electoral officials. And given the normative dimensions that favor politics through the elected branches to that of the courts, recent scholarship has shown a

³⁴ Bensel, *American Industrialization*, 518.

³⁵ Forbath, *Law and the Making of the American Labor Movement*; Orren, *Belated Feudalism*.

³⁶ Mark A. Graber, “The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993); Keith E. Whittington, *The Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007).

dedication to showing the limits of law in all its variants, as opposed to the ways in which it is active—even if that means reactive or destructive.

Law in the Creation of a Strong State

Recent work in APD has begun to examine the ways in which law and courts empower state development. Legal historians William Novak and John Witt, both of whom examine the expansion of common law and tort law in the absence of state regulation of the workplace during the late nineteenth century, illuminate the myriad of ways in which courts have worked as bulwarks of the state by providing workers protections by passing laws against employers and corporations that the national government refused to pass.³⁷ Legal scholars of the post-New Deal era, particularly the civil rights movement of the 1950s and 60s, have chronicled how courts were emphatically positioned at the center of national policy-making realms from school desegregation and illegal race classifications to affirmative action, criminal justice, employment, welfare, and voting rights.³⁸ Courts have become a critical form of government enforcement in a whole host of arenas in the modern state, as legislators now commonly provide courts with both explicit and implicit authority to enforce and interpret large provinces of national policy making. It also demonstrates the power of

³⁷ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill, University of North Carolina Press, 1996); John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2004).

³⁸ Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton: Princeton University Press, 2008); R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: Brookings Institute, 1994); John D. Skrentny, *The Minority Rights Revolution* (Cambridge: Harvard University Press, 2002).

law to infiltrate societal norms—especially in the case of civil rights enforcement where legal procedures, empowered by lawyers bringing suits, transformed wide swaths of American society, from the work place to the public swimming pool.

As a long-standing force of American political development, however, and particularly with regards to the development of American empire, I wish to emphasize the importance of the law and of courts in enforcing structures and procedures. By emphasizing structures over regulatory institutions, I am referring to the rules and procedures in the Constitution that create authority without the need of a government agency to enforce it; those provisions in the Constitution that are both relatively static³⁹ and need relatively little manpower for enforcement. For example, we tend to think of the Commerce Clause as becoming a state weapon in the New Deal era when the Supreme Court cedes control to electoral branches in order to allow newly created agencies to regulate the economy. A focus on structures allows us to see the meaningful ways that the state has been important in shaping both governing and societal interests without actively manifesting itself. In this regard, the Commerce Clause had some of its greatest influence in the era prior to the New Deal—starting with *Gibbons v. Ogden* in the Marshall Court—a decision that enabled private capital to flourish unregulated, but did so underneath the clear warrant of state authority.⁴⁰ What APD scholars have missed

³⁹ Although I recognize that even structures are politically contested and altered in form and concept throughout American history by those actors who engage with them. See e.g., Adam D. Sheingate, “Political Entrepreneurship, Institutional Change, and American Political Development,” *Studies in American Political Development* 17:185 (fall, 2003); Keith E. Whittington, *Constitutional Construction: Divided Powers and Political Meaning* (Cambridge: Harvard University Press, 1999).

⁴⁰ Which is not to say that I do not hold the role of the judge and constitutional interpretation to play a meaningful role in the development of the Commerce Clause; but it is to say that the early years of Court jurisprudence on the Clause was hardly controversial or exaggerated, and yet reflected a great deal of authoritative exertion on behalf of the judicial branch.

is the independent power and influence of these structures. Particularly when we try to understand American empire, and the distinctive combination of economic, military, and racial hegemony (to use Immanuel Wallerstein's language), we can see the importance of structures in these realms.

A reorientation of the state in terms of structural powers provides two revisions to our current understanding of the American state. First, I am interested in the structural weapons of the Constitution that have energized private capital and necessitated that the state incorporate such interests in its political dealings. Structural rules in the Constitution form a backdrop for behavior easily overlooked because there is often little to no public discussion of such rules or even a conscious understanding of how these rules are important.⁴¹ This is in contrast to much APD scholarship that emphasizes institutional development—the effort of the national government to create agencies that in turn provide manpower over a specific sphere of economy and society—and how this development has been historically impeded. Scholars haven't ignored structures, but they have tended to consider such structures mere backdrops and limits to institution building that is where the “real” work of state development and power is thought to take place. Structures are thought to enable the fragmentation and decentralization of government power that in turn allows private economic interests to ignore state directives.⁴² But there are additional structural features that reflect not just the failure of the American state to *stop* private capitalism, but reflect actual engines of economic and subsequent state

⁴¹ For example, the Electoral College structures national debate in a myriad of forms that denies opportunities to some political interests while championing others. And yet, the structural foundation of the Electoral College itself is rarely discussed, and to the degree that it is, it is only in exceptional moments when everyone seems to “suddenly” realize its existence and significance.

⁴² See e.g., Krasner, “United States Commercial and Monetary Policy.”

growth. Many of these engines of economic growth are rooted in the Constitution: the Commerce Clause, Full Faith and Credit, contract, copyright, coinage, and export clauses, as well as features such as individual state authority over corporate charters. These engines, I wish to argue, did not merely create a powerful American economy; they meaningfully gave the American state further authority over economy and society, both domestically and ultimately in the international realm.

If structures matter as a profound source of state power—in energizing and legitimating political actors—then the judiciary matters as the primary enforcer of these structures and as an important enabler of state strength. Courts are meaningful in a number of ways. First, their authority is not simply contingent on Supreme Court decision-making and judicial review. Courts by their very nature are not neutral, and as defenders of constitutional structures, American courts exerted authority by setting the terms of the debate, the rules of victory, and legitimates those who play by its rules. Legal norms were as pervasive in the early American state as in the modern one and Tocqueville was one of the first to recognize the importance of law in legitimating the democratic progress. Tocqueville wrote repeatedly of law’s importance to the new American nation. Americans borrow “legal phraseology and conceptions” in their controversies, ideas, and language;⁴³ “democratic government favors the political power of lawyers;”⁴⁴ “lawyers constitute a power which is little dreaded and hardly noticed...but it enwraps the whole of society, penetrating each component class and

⁴³ Tocqueville, *Democracy in America*, 270.

⁴⁴ Tocqueville, *Democracy in America*, 266.

constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire.”⁴⁵

Tocqueville clearly uncovered a form of power—one that was barely visible and difficult to even identify. It was clearly merged with democratic practices, clearly involved in some of the most powerful and important tasks of the time including economic and territorial expansion. But, biased by European understandings of state authority, he was never entirely clear what he was witnessing. He argues, for instance, that “when the American people let themselves get intoxicated by their passions or carried away by their ideas, the lawyers apply an almost invisible brake which slows them down and halts them.”⁴⁶ This is a fairly common understanding of law in that its formality and impersonal nature necessitates (with requisite complications) that people in power are slowed down, held to task, and made accountable to a certain amount of structural procedure.⁴⁷ But he recognized without developing how the law also radically enhanced the power of the sovereign nation-state when confronting alternative communities.

Despite the bloodshed and military activism, what is striking to Tocqueville about Native American removal is how little there was given the mass undertaking. “The dispossession of the Indians is accomplished in a regular and, so to say, quite legal manner.”⁴⁸ He writes, “The Spaniards, by unparalleled atrocities which brand them with

⁴⁵ Tocqueville, *Democracy in America*, 270.

⁴⁶ Tocqueville, *Democracy in America*, 268.

⁴⁷ See too Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976), chapter 3.

⁴⁸ Tocqueville, *Democracy in America*, 324.

indelible shame, did not succeed in exterminating the Indian race.” In contrast, Americans attained this result “with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity.”⁴⁹ Tocqueville was consistently awestruck at how Americans manipulated legal language with ease of consequence and conscience: “one is astonished at the facility and ease with which, from the very first words, the author disposes of arguments founded on natural right and reason, which he calls abstract and theoretical principles. The more I think about it, the more I feel that the only difference between civilized and uncivilized man with regard to justice is this: the former contests the justice of rights, the latter simply violates them.”⁵⁰

Americans consistently used law and legal language and procedures to extend their models of democracy, capitalism, and property rights. The links between law as protecting and structuring economic expansion, how economic decision-making and transactions are embedded in legal procedures and protections, and how the law was used to handle Native American land removal needs greater connections.⁵¹ While classic state theory concentrates on assessing state power at the center, it is not so effective at measuring the extension of power to the outskirts of society. The power to expand

⁴⁹ Tocqueville, *Democracy in America*, 339.

⁵⁰ Tocqueville, *Democracy in America*, 339, fn 29. A similar argument is made more recently by Eric Kades, “The Dark Side of Efficiency: *Johnson v. McIntosh* and the Expropriation of American Indian Lands,” *University of Pennsylvania Law Review* 148 (4) (2000), 1065-1190, 1071.

⁵¹ Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge: Belknap Press, 1964). Unfortunately, this excellent work on fusing economic and legal history makes almost no mention of Native American land removal.

territory, to gain authority over borderlands, is where the state's authority is most directly challenged. The law was consistently used, even when it was arguably "made up" to enforce this expansion. As David Langum observes of American mercantilists on the borders between California and Mexico in the 1840s, the American capitalists were so frustrated with Mexican law, and so in need of contractual and property protections that they drafted "contracts" and informally enforced them without jurisdiction or court.⁵² This construction of legal formality and neutrality consistently served as a powerful weapon in American confrontations with people at its borders, especially as those borders continually changed due to economic expansion.

The Beginnings of American Empire: Native American Removal

In the first half of the nineteenth century, the territory of the United States more than tripled in size. The Louisiana Purchase of 1803, with more than 500 million acres of land, just about doubled the size of the United States alone; another 43 million acres came with the acquisition of Florida, followed by nearly 250 million acres with the addition of Texas, 180 million acres with the Oregon country, and another 330 million acres with the California region in 1848.

[PHOTOCOPY PAGE 76 OF GATES—MAP OF US TERRITORIAL ACQUISITION]

⁵² David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman: University of Oklahoma Press, 1987), 186.

None of these lands were empty. Substantial populations of Native Americans lived on these lands. The Office of Indian Affairs placed the number of Native Americans living on American soil at 600,000 in 1800, decreasing by half three decades later.⁵³ The government passed almost yearly land ordinances, regulating the assessment of land to settlers. Negotiation and conflict was continuous as the United States attempted to expand westward. National policy towards Indians changed frequently during these times. (view by GW; later...)

In the earliest years of the nation, the central government was too weak to oversee the process of land negotiation, and squatters raced out throughout the new territories to claim lands. An effort by the government to remove squatters from Indian lands north of the Ohio River failed in 1785.⁵⁴ The rage of land speculation at this time, as George Washington—a notable speculator himself—wrote, “scarce a valuable spot within any tolerable distance of it, is left without a claimant....In defiance of the proclamation of Congress, they roam over the Country on the Indian side of Ohio, mark out lands, Survey, and even settle them.”⁵⁵

⁵³ See Paul Stuart, *Nations Within a Nation: Historical Statistics of American Indians* (New York: Greenwood Press, 1987), 52.

⁵⁴ Paul W. Gates, *History of Public Land Law Development* (Washington D.C.: Public Land Law Review Commission, 1968), 67.

⁵⁵ Washington to Jacob Read, November 3, 1784. Quoted in Gates, *History of Public Land Law*, 70.

Relations during early decades of the United States with Indian nations were governed by the constitutional treaty and war powers, as befitting relations with a foreign nation. President George Washington, with the Fort Mifflin Treaty of 1763, established that Indian treaties required formal ratification in the same manner as European treaties.⁵⁶ Land acquisition was centralized under the federal government within the first years of the Washington presidency, with boundary lines to be enforced by federal troops.⁵⁷

The United States government subsequently conquered and vanquished huge numbers of people, relying on military force, economic expansion, racial other-ness, and ideological hegemony. The general history of this era—the amount of blood shed, the swindling and stealing of Native lands by American settlers, and the role of certain political figures, most notably President Andrew Jackson—is fairly well known, if from movies and high school history textbooks if not sustained study. The Indian Removal Act of 1830 led roughly 20,000 Cherokee Indians to leave their homes, embarking on a “trail of tears” that led to an estimated four to five thousand deaths. As many as 150,000 Indians were removed from their land during these years, and those who survived were forced to relocate well west of the Mississippi River. By 1842, all major Native American tribes had been removed from the southeast, and estimates of a quarter to as much as a half of the population of the Cherokees, Creek, and Seminole populations died

⁵⁶ Sarah Cleveland, “Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs,” *Texas Law Review* 81 (2002), 1-284, at 30.

⁵⁷ Reginald Horsman, “The Indian Policy of an ‘Empire for Liberty,’” in Frederick E. Hoxie, Ronald Hoffman, and Peter J. Albert, eds., *Native Americans and the Early Republic* (Charlottesville, VA: University Press of Virginia, 1999), 37-61, 45.

in the process.⁵⁸The American state conquered more than 25 million acres of land—much of it extremely economically strategic along the Mississippi River.

WEAK NATIONAL GOVERNMENT

At first glance, the federal government seems to play only a small role in this process. The Department of Indian Affairs was not the recipient of much money, and had low expenditures (PAGE 134).

The military also was quite small. Ira Katznelson has suggested that this was a reflection of flexibility more than than a lack of strength: “The country’s lean, very mobile, ‘expansible’ military produced a remarkable, and relatively low-cost, extension to the country’s sovereign capacity and international reach.”⁵⁹

The Weak State and Land Grab:

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The politics of this land grab, however, suggests both a powerful state, and a wielding of power that is different than our normal understanding of state authority through bureaucracies. Much of the authority was through land politics.

⁵⁸ Government records indicate that as of 1838, 81,000 Indians had been moved west of the Mississippi during the decade. See *Annual Report of the Commissioner of Indian Affairs*, (1838), 470.

⁵⁹ Katznelson, “Flexible Capacity,” 98.

⁶⁰ Terry L. Anderson and Fred S. McChesney, “Raid or Trade? An Economic Model of Indian-White Relations,” *Journal of Law and Economics* 39 (1994), 37.

The United States purchased 419 million acres between 1795 and 1838, paying \$81 million.⁶¹

Preemption laws were passed repeatedly by Congress that gave the authority of the General Land Office to grant settlers and squatters land. In 1830, Congress gave squatters limited preemption rights; they provided full preemption rights in the Preemptive Act of 1841.

Military Bounties and the Armed Occupation Act of 1842:

One method of enhancing state power was to use its land resources as a substitute for its absence of money. The government consistently passed laws providing war veterans with land for their military service in fights against Indian nations. Numerous states provided military bounties during and after the Revolutionary War, and the state of Georgia provided 100 acres for merely four months of service fighting Native Americans. With land far more abundant a resource than people or money, Georgia offered further bounties during the Creek War of 1787, promising 640 to 1000 acres of Creek land assuming the successful conclusion of the war.⁶² The Federal government passed the Federal Military Tract so that the nation could secure land north of the Ohio River.⁶³ Also in 1842, in the same month (August) that the government ended the Second Seminole War, Congress passed the Armed Occupation Act, providing 160 acres of land to those

⁶¹ Secretary of War, "Indians Removed to West Mississippi From 1789," (February 5, 1839), 25th Congress, 3rd Session, *House Documents* 147, serial 347, 9.

⁶² See Milton S. Heath, *Constructive Liberalism in Economic Development in Georgia to 1860* (Cambridge: Harvard University Press, 1954), 94-95.

⁶³ Gates, *History of Public Land Law Development*, 254.

settlers who were armed and willing to occupy land south of Gainesville Florida, land at the time still dangerous and controlled by Native Americans. Proposed by Senator Thomas Hart Benton of Missouri, Chair of the Committee on Military Affairs, it required settlers to reside on land that was more than two miles of a military fort for seven years, building a house, and being responsible for protecting the land from Indians. When fights broke out between settlers and Indians, communications between settlers and army made clear that the government had no plans to help the settlers. Between 1789 and 1834, Congress passed 375 land laws that dealt with prices, land size, and preemption rights.⁶⁴ The 1842 Act was the first to explicitly induce settlements on public domains in dangerous or distant portions of the nation.⁶⁵ The motivation was a cheaper way to take territory from Indians. Benton wrote at the end of 1838 that he had “arrived at the conclusion that the war with the Seminole Indians can be terminated in a shorter time, and at less cost, by an armed occupation of the country, than by the continuance of a regular mode of warfare. Our armies have been for years engaged in hunting up, pursuing, and killing a few Indians in each campaign: and judging from the success we have already had, it will take five or ten years longer to kill off those that still remain, and seem determined to remain, in the country. The establishment of military colonies, on the other hand, will change the system of warfare. Instead of the white men fighting the Indians in the natural fortresses, the Indians will have to come out and attack the whites within *their* lines of defense, and where the skill and intelligence of the civilized man can

⁶⁴ Limerick, *Legacy of Conquest*, 61.

⁶⁵ The bill in the Senate (S. 160) was proposed “to provide for the armed occupation and settlement of that part of Florida that is now overrun and infested by marauding bands of hostile Indians.” General Joseph M. Hernandez, commander of the East Florida Militia, referred to the land in 1839, as “now overrun by the Indians.” Hernandez to Thomas Benton, January 17, 1839, published in 25th Congress, 3rd Session, 93.

have its influence.”⁶⁶In proposing the bill, he stated on the House floor: “The United States is bound to protect these inhabitants. It owes every citizen protection. The military force has done what it can: it has driven the Indians out of the field--reduced them to a small number; and the rest must chiefly be done by armed settlers, attracted to the country by the inducements which are offered.” “The principle of the bill was residence and defence.” “Residence on the land itself is not required, because the very nature of the case will require settlers to live together, in stations or block-houses, for mutual defence.”⁶⁷

Senator Linn: Similar bill for his Oregon bill: government had long granted bounty in land to the soldiers who defended the country during the last war. This was the same in principle. The settlers would go there under the inducement held out by the bill--a bounty in land--and fight for the soil, and save the blood of regular military forces that had been withdrawn from the region. The government (according to Linn) would have to either do one or the other--hold out an inducement for necessitous, enterprising, and bold men to go to Florida, and save the defenceless women and children from the knife of the savage; or speedily enlist another body of men, and give them this bounty, and pay them from the treasury a heavy sum of money, to fight until the last Indian was driven from the Territory. “If the bill would encourage men to go to Florida, and conquer and destroy these Indians, I would vote for it with pleasure.” Senator Preston: “the bill would encourage poor and destitute, but vigorous, energetic, and hardy men, who were filled with enterprise, to go there and grapple with the Indian, and root him out for the sake of the bounty.” “these men would go there with their knives, and a willingness to fight for their lands--and they would have the lands.”⁶⁸

⁶⁶ Thomas H. Benton to Surgeon General’s Office, December 30, 1838, published in 25th Congress, 3rd Session, 42. He added later, “No force employed against them; either in the former or the present Seminole war, no matter by whom commanded, has ever been able to catch them....Let them be crowded by settlers, and that which has invariably occurred throughout the whole history of our settlements will occur again, they will not only consent to remove, but will desire it as the greatest benefit the nation can confer upon them.” Benton to Adjutant General’s Office, January 28, 1839, published in 25th Congress, 3rd Session, 163.

⁶⁷ *Congressional Globe*, 27th Congress, 2nd Session, June 13, 1842, at 619.

⁶⁸ *Congressional Globe*, 27th Congress, 2nd Session, August 2, 1842, at 802.

The Act resulted in the patenting of 1317 claims acquiring a total of 210,720 acres of land.⁶⁹ The Oregon Donation Act followed this in 1850, providing 320 acres per land to men, and 640 to married couples who ventured into dangerous territories in Oregon. Residence and cultivation of land for four consecutive years was necessary to insure a patent from the government; this act resulted in more than 2.5 million acres of land going to 7317 patents.⁷⁰ Another 290,000 acres went to nearly 1000 patents in the Washington Territory Donation Act of 1853, and New Mexico settlers received another 160 acres for settling there before 1858, amounting to more than 50,000 acres settled. All of these donation acts were designed to grant “land to settlers in these territories where they might help to reduce the Indian menace.”⁷¹ As the economist Doug Allen argues, the “land policies were efforts to ‘hire’ settlers to reduce the costs of enforcement”: government “restricted the choices of settlers by providing an incentive to rush one area. The sudden arrival of tens of thousands of people into a given territory destroyed much of the Indian way of life and forced the Indian tribes to accept reservation life...(and) reduced the cost of defending any given settlement.”⁷²

Military Bounty Land Grants were numerous during this time, passed in 1847, 1850, 1852, and 1855. These grants led to more than 100 million acres of land given to ex-military officers. (PAGE 237--

⁶⁹ Public Land Commission, “The Public Doman,” (Washington D.C.: Government Printing Office, 1881), 295.

⁷⁰ Public Land Commission, “The Public Doman,” (Washington D.C.: Government Printing Office, 1881), 296.

⁷¹ Gates, *History of Public Land Law Development*, 390.

⁷² Doug W. Allen, “Homesteading and Property Rights; or ‘How the West Was Really Won,’” *Journal of Law and Economics* 34 (1991), 2 and 5.

Expansion required that the government provide both subsidies for entrepreneurs to speculate, and a legal network to allow for the transfer of land to capitalist entrepreneurs. Because expansion also brought Americans and their government into conflict with those people who already lived there, the government was charged with securing sovereignty and maintaining the peace in these areas, particularly those areas important to the channels of commerce. Some of this involved securing the high seas from pirates, and opening channels for future trade; many of the earliest expeditions were assisted by navy and army patrols.⁷³ The federal government assisted this movement actively through legislation such as Land Ordinance Acts and the U.S. Land Office (which regulated property dispersal), and through the use of military personnel to protect capitalists and their property from outsiders. As settlers moved into the regions of what would become Georgia, Kentucky, and Tennessee, violence broke out frequently between whites and Native Americans. Secretary of War Henry Knox found this frontier to be a Hobbesian world where “the sword of the republic only, is adequate to guard a due administration of justice, and the preservation of peace.”⁷⁴ Hundreds of squatters living on Indian land in the region petitioned the federal government to expel the Chickasaws from the area, requesting military assistance.⁷⁵

The military quickly assumed great importance in maintaining the safety of settlers as well as the safety of their interests, personal and economic. In particular, as

⁷³ William Earl Weeks, *Building the Continental Empire: American Expansion from the Revolution to the Civil War* (Chicago: Ivan R. Dee, 1996), 73-80.

⁷⁴ Quoted in Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge, MA: Harvard University Press, 2005), 12.

⁷⁵ See Douglas W. Allen, “Homesteading and Property Rights, or, How the West Was Really Won,” *Journal of Law and Economics* 34 (1) (1991), 1-23.

Adam Rothman notes, Native American violence threatened both channels of commerce and the most prized possession of settlers in the southern frontier—slaves.⁷⁶ The military quickly became active in protecting slave property, both from Native American attacks and in protecting slave owners from rebellions.⁷⁷ With the purchase of mass territory surrounding the Mississippi river in 1803, the U.S. government began a policy of moving Native Americans to the western side of the river. The South, writes David Adams, “was an armed camp” to enforce slavery during these years. There were at least 250 slave revolts, and eleven federal military companies were involved in preventing Nat Turner’s rebellion in Virginia. In fights and outright wars between settlers, state-sponsored expansion, and federal programs, the military was used often and forcefully to protect the interests of capitalists. Americans moved to the South to expand the cotton industry and find fertile lands. In the Black Hawk War of 1832, 10,000 U.S. troops were involved.⁷⁸

It is in the realm of law and courts, however, that we see state power exerted in its most complete and penetrating manner. Most famously, the Supreme Court ruled in a series of famous cases about the scope of Indian authority, land privilege... I will begin with a discussion of those cases. But what I think is more interesting is how Native American land removal fit into a broader legal enterprise of promoting capitalist expansion. At base, the simple assertion of legal jurisdiction into territories on the boundaries of American sovereignty expanded American control. The law was used to unify disparate territories by providing a basis for capitalist exchange and a legitimacy

⁷⁶ Rothman, *Slave Country*, 13.

⁷⁷ David Adams, “Internal Military Intervention in the U.S.,” *Journal of Peace Research* 32 (2) 1995, 197-211.

⁷⁸ Adams, 199.

for territorial conquest. Robert Cover has argued that legal decision-making is violent,⁷⁹ but the importance of the law in Native American conquest is less an exertion of violence than a coordination and unification of power. The law expanded the patterns of social control, knowledge, and documentation for institutionally useful ends. Simply extending jurisdiction and enforcing economic contracts and property rights, as well as broader norms of a liberal-procedural democracy, created boundaries between legitimate insiders and outsiders.

In the process, courts asserted national dominance over Indian tribes and justified American expansion. The Court did this in numerous ways: by reifying the Commerce Clause and the law of contracts to enable capitalist expansion into Indian territory; interpreting property laws that encouraged settlers to squat on Native American land (particularly land that was not “settled” by Native Americans—property law encouraged squatting because it enabled those who were not forcefully removed from land to gain legal tenancy); interpreting federal criminal law that imposed U.S. law on Indian soil; and interpreting the sovereignty of Native American tribes in a flexible manner that both allowed the U.S. to sign contracts and treaties with Native Americans and avoid having to treat tribes with the legal customary respect accorded foreign nations. The role of law, however, takes numerous turns—reflecting a combination of law as its own form of legitimacy and law as a *tool* of legitimacy. Over the course of four decades, treaties and judicial declarations would take dramatic turns. Politicians and courts never developed a consistent theory for understanding Native Americans vis-à-vis American sovereignty. In the rest of this section, I will just begin to sample the role of law to give a sense of how

⁷⁹ Robert M. Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601–1629.

the Supreme Court importantly enabled American empire in these early years. I will focus on two distinct aspects—the role of the Supreme Court (and lower courts) in enforcing property and contract rights. As I continue my research I will expand my analysis at the state level, where I suspect we will find the most striking assertions of state power, (indeed, I have already found a bit of this, as I will relay below).

The Northwest Ordinance in 1787 declared that Congress would never take land away from Indians “without their consent.” Indians held title to the land and Congress would pay for any land they appropriated.⁸⁰ This was counter to previous policy that had claimed land through principles of discovery. Now, no non-federal entity, including states, could bargain with Indian nations over land rights. But legal thinkers in the early 1800s began to argue that Native Americans did not occupy land sufficiently to legitimate title. Indians did not farm the land, they did not reside on the land.⁸¹ Some of this thinking was motivated by ignorance (the Cherokees in particular were farming and residing on the land), racism which took the form of treating Indians as savages, and self-interest in that it provided a defense of territorial acquisition. At the turn of the century, many Americans started to buy land owned by Indians preemptively—as capitalists debated the prospects for whether the U.S. would some day own the land (and later sell to these speculators), the prices of the land would rise and fall based entirely on speculation. States during this time sold parcels of land that they did not own, in part because they believed that they did own it, and in part because they believed that they (or the federal government) would soon own it. Lawyers versed in property law seized on these

⁸⁰ Banner, *Indians Lost their Land*, 132-3.

⁸¹ Banner, *Indians Lost their Land*, chapter 5.

opportunities of pre-emption; as long as Indian land was a title in *fee simple*, they could draw up contracts that provided a transfer of the land in the event of a future transaction.

In 1801, President John Adams and a Federalist majority in Congress signed the Judiciary Act that gave 16 new judges to the federal branch and John Marshall was named Chief Justice of the Supreme Court. The Federalist Party had actively encouraged economic expansion and the acquisition of new property on the nation's frontier.

Decisions under Justice Marshall continually reinforced the authority of contract and property law, and private entrepreneurs worked to get land deals approved by federal courts. Marshall's nationalist interpretation on economic matters intersected with land speculators attempting to preemptively buy land that was owned by Native Americans in *Fletcher v. Peck*. The case is known for the New England Mississippi Land Company's successful appeal of its claim to a contract provided them by the Georgia state legislature—a contract that had been fueled with bribery money.⁸² The case is most famous for the Court's declaration that it could invalidate a decision by a state legislature; in this case, the state legislature had itself tried to invalidate its previous decision on account of bribery and scandal. But the Court here was also forced to address the fact that some of the land had been occupied by Indian nations at the time of the sale.

Georgia had proclaimed the lands “vacant” and assumed dominion.⁸³ The Supreme Court largely skirted the issue—“the nature of the Indian title...is not such as to be absolutely repugnant to seisin in fee on the part of the state”—but allowed the selling of the lands by the Georgia legislature (despite Native Americans owning the land) by

⁸² 10 U.S. 87, 142 (1810).

⁸³ Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005), 67.

claiming the ownership was not “absolutely repugnant to” ownership of the title. Native Americans, then, held title to the land and a right to occupy it; but Georgia was the long-term owner of the land and could offer it away in speculation of a future transaction.

The case was followed by the notorious decision of *Johnson v. M’Intosh*, a case that involved military claims to Native lands and allowed the Court to be more explicit in its understanding of Native American land.⁸⁴ Again, the case involved a title dispute between private land speculators and a state entity, this time the U.S. government, over lands that had formerly (presently) been owned by Native American tribes. The legal question at hand here was whether Indian tribes were sovereign; if they were, the tribes could legally sell their land and if not, the land was owned by the United States. Here, Marshall wrote for the Court that a discovering sovereign has the exclusive right to extinguish Native Americans’ claims to their lands, either by purchase or just war. “Conquest gives a title which the Courts of the conqueror cannot deny....The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them....It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”⁸⁵ Thus, American conquerors were entitled to ownership over the land they

⁸⁴ 21 U.S. 543 (1823)

⁸⁵ At 588-89. He added, “When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power. But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible,

seize. *Johnson* established that U.S. authority over tribes, or at least the United States' exclusive right to acquire Indian property, originated from two sources: colonial prerogatives deriving from discovery, and the nature of Indians as savages and incomplete sovereigns.

Soon after the *Johnson* opinion, Georgia passed a law to remove Cherokee Indians from their lands within charter limits. The Georgia state legislature annexed Cherokee land, abolishing the Native American tribe's court and legislature. Congress passed the Indian Removal Act of 1830, following a close vote in the House in which supporters consistently referred to the *Johnson* decision for legitimacy and justification of the law.⁸⁶ The Act gave President Andrew Jackson the authority to negotiate removal treaties with the tribes, and Jackson moved quickly to order federal officials to negotiate such treaties. The Supreme Court furthered the doctrine in *Cherokee Nation v. Georgia*. Here, the Cherokees sued as a foreign state, claiming that as such, it could only be dealt with through a federal treaty. The Court here declared that Native tribes did not have jurisdiction because it was not a foreign state, but instead, "may, more correctly, perhaps, be denominated domestic, dependent nation."⁸⁷ The discovery doctrine was initially repudiated by the Court in *Worcester v. Georgia* where Justice Marshall wrote that Georgia's attempt to rule over the Cherokee nation was in violation of federal law.⁸⁸ Here,

because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." (at 589-90).

⁸⁶ *Congressional Debates*, 21st Congress, 1st Session, 1830, 1005-1135. Broadly, see Phillip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993) 381; Gerard N. Magliocca, "The Cherokee Removal and the Fourteenth Amendment," *Duke Law Journal* 53 (3) (2003), 873;

⁸⁷ 30 U.S 1, 17 (1830).

⁸⁸ 31 U.S. 515 (1832).

in a case involving four missionaries contesting their arrest by the Georgian government on Cherokee land, the Court suggested that Native Americans were sovereign nations akin to small countries in Europe: “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power.”⁸⁹ As a result, Marshall held that “All intercourse, shall be carried on exclusively by the government of the union.”⁹⁰ State law, Marshall declared, is preempted by federal law and treaties between the national government and the Cherokees. President Jackson actively ignored the decision, and with additional appointments to the Court, had the decision overturned—once again re-establishing the right of discovery for a conquering nation.⁹¹ All of these decisions involved the acquisition of Native American land, involving Florida, parts of New Jersey, and parts of Virginia.

In political lore, these cases are famous for being ignored; but more was going on. These *Cherokee* cases attempted to change expansive court doctrine, doctrine not only created by the Supreme Court, but coming from state courts as well. Numerous states ignored these cases, and they did so by citing precedents of earlier Marshall court decisions.⁹²

⁸⁹ 31 U.S. 515, 559.

⁹⁰ 31 U.S. 515, 561.

⁹¹ See *Mitchel v. United States*, 34 U.S. 711 (1835); *United States v. Fernandez*, 35 U.S. 303 (1836); *Mitchel v. United States*, 40 U.S. 52 (1841), and *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). Moreover, lower federal court judges repeatedly ignored *Worcester*. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 239-40.

⁹² Garrison, *Legal Ideology of Removal*, 10.

In *United States v. Rogers*, The Court furthered its territorial expansion by using criminal law. In 1834, Congress adopted under the Indian Commerce and Territory Clauses, which granted U.S. criminal jurisdiction over all crimes committed in Indian country except “crimes committed by one Indian against the person or property of another Indian.” A little more than a decade later, William Rogers, a white man who had lived with the Cherokee Nation for a decade and was recognized as a member by the tribe, was indicted under the 1834 Act in the federal district court of Arkansas for murdering another Cherokee. The crime had occurred in Indian country, on lands over which the tribe possessed nearly exclusive internal jurisdiction by treaty. Rogers objected to federal jurisdiction on the grounds that both he and the victim were citizens of the Cherokee Nation. In the opinion, Chief Justice Taney relied on the discovery doctrine, asserting that Congress exercised authority over the Indian tribes: “The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, ... and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied.” As such, the fact that Rogers's crime occurred in Cherokee territory was irrelevant and Chief Justice Taney carved out a much broader authority for the United States over Indians in the territories than Congress had ever claimed.

The Supreme Court never clearly defined the nature of authority between the federal government, state governments, the Constitution, and Native American tribal rights. As a result, state courts also were active in determining these contours, often without referring to specific doctrines of federal law. Local governments focused on doctrines of federalism and relied more on U.S. Supreme Court case law that defended state rights to control property than on a notion of federal sovereignty over Native American tribes.⁹³ State judges relied on the body of federal law that set out standards of commerce and tenth amendment rights. State judges argued that if governance of Native American tribes involved matters beyond the regulation of commerce, states had authority.⁹⁴ Similarly, when Indian tribes were small enough to be surrounded by state land, state judges ruled that the Commerce clause did not apply.⁹⁵ This principle was extended to the question of whether federal laws applied regarding contracts and trade: once a tribe was “surrounded by settlements,” and federal law ceased to apply.⁹⁶

Some of these developments brought questions of citizenship to attention, namely whether or not Native Americans would be allowed to enter into state defined notions of community.⁹⁷ State judges argued that state legislatures were sovereign in determining

⁹³ Tim Alan Garrison, *The Legal Ideology of Removal: the Southern Judiciary and the Sovereignty of Native American Nations* (Athens: University of Georgia Press, 2002); Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994); Deborah A. Rosen, “Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790-1880,” *American Journal of Legal History* 46 (January 2004), 26-54

⁹⁴ Rosen, 31.

⁹⁵ Rosen, 32. See too, *United States v. Cisna*, 25 F.Cas. 422 (1835). (Federal laws inoperative in Ohio because reservation was so small and surrounded by state populations.)

⁹⁶ Rosen, 33.

⁹⁷ Smith, *Civic Ideals*.

the appropriate forum for determining claims and debates over authority. State courts also were active in determining whether Native American's right to sell land to whites and whites' right to purchase the land, whether such contracts were enforceable, and whether Native Americans could participate in litigation.⁹⁸ Finally, states regulated criminal jurisdiction, whether on matters of violence, stealing, or trespass. New York and numerous New England state laws claimed jurisdiction over Indian lands in criminal cases, and in the 1820s, southern states such as Alabama, Georgia, and Mississippi used state criminal law to expand state jurisdiction through Indian land, claiming that states and not the federal government have the authority through the commerce clause to regulate affairs internal to state sovereignty.⁹⁹

What is critical here is to see how the law was used, not through big Supreme Court decisions, but through individual cases that slowly moved state—and by at least indirect extension, U.S. authority—further and further into lands once owned by Native Americans. Viewed from the perspective of a centralized state, these cases reflect a lack of authority; from the perspective of broader power at land-taking and expansion, this diversity of powers reflects an enormous power grab. As Stuart Banner points out, “whites always acquired land within a legal framework of their own construction.”¹⁰⁰ Property law, as discussed above, was a critical way in which whites acquired Native American land. Indians were thought to be in constant motion and thus could not claim attachment to a specific area of land to legitimate a right to property. The power of eminent domain

⁹⁸ Rosen, “Colonization Through Law,” 28.

⁹⁹ Haring, *Crow Dog's Case*, 36-44.

¹⁰⁰ Stuart Banner, *How the Indians Lost Their Land*, (Cambridge: Harvard University Press, 2005), 4.

was defended as a legitimate reason for why the American government should be entitled to take the land with “just compensation.” Southern politicians argued that whites were entitled to take land from Native Americans because the Indian tribes were not using the land properly. As Tim Garrison makes clear, many of the argument made had no use for constitutional or legal legitimacy.¹⁰¹ But in need of a legal justification, southern jurists provided a powerful one, relying on states’ rights arguments that southern states retained police power privileges over Native American rights. Southern jurists relied on Marshall decisions, such as Fletcher and Johnson

I do not wish to argue that the law was so clearly hegemonic that Native Americans had no opportunities or rights within it. As some scholars have argued, in fact, Native Americans should have done better under constitutional and property law than they did; this argument claims that racism, economic self-interest, and imperialism were more important features of Native American removal than the actual role of law. I don’t entirely disagree, but I think there is further complexity here. Native Americans did try at different times to fight these legal matters in court. Often, they were excluded on grounds of lacking jurisdiction. Often, because they faced a “neutral” procedural system that was new and not of their own making, they made massive mistakes, leading them to lose cases, lose land, and establish unwanted precedents. Furthermore, as Jill Norgen has shown, when groups like the Cherokees went to court, they had to rely on American lawyers—lawyers who often pushed arguments based on pre-existing legal precedents that the Indian nation had never agreed to.¹⁰²

¹⁰¹ Garrison, *The Legal Ideology of Removal*, 7.

¹⁰² Jill Norgen, “Lawyers and the Legal Business of the Cherokee Republic in the Courts of the United States, 1829-1835,” *Law and History Review* 10 (1992), 274.

1871: Congress votes to end making treaties with Native Americans.¹⁰³

Conclusion

The current findings of the paper are only an initial survey. With more time, I will delve far further into the archives to locate the various ways in which the state was involved in Native American removal during the earliest stages of empire. And, in the process, I hope to show how a variety of state components located both in and outside the center of regulatory government worked to create an American state powerful and strong enough to quite quickly become referenced as an empire. It is here where I will also go into further detail as to the implications of the structural-private economy state for American democracy.

Although it is too soon to say, I expect that the findings of this paper will also offer an alternative understanding of how power is embedded in the state. New institutional scholars have conceived of the state as a site where power and authority is fractured in such a way that no one group has control and no interest gets what it wants—all groups are shaped in their battles over interest politics by a pre-set of rules and institutions that structure their behavior. The state in important ways maintains an autonomous space that restricts all agents, and maintains an agenda that is independent of class and other societal interests. Empire, at least at first glance, strikes me as something potentially more concerted, and the question that I will continue to ask is how power is refracted through this new understanding of the state and whether such refractions dispersed power widely, or concentrates it in specific forms. My expectation is that as I

¹⁰³ Anderson and McChesney, “Raid or Trade?” 58.

enter into increasingly modern periods of empire building, especially in the twentieth century, that American legal standards will continue to weigh heavily in commercial and property transactions and acquisitions. Modernization—American style—wields significant power with courts as their weapon.¹⁰⁴

Finally, in making an argument that expands our understanding of the state, I consequentially raise questions about how we understand democracy and democratic control in America. APD scholars have kept their definition of democracy narrow and based on the exertion of authority by elected government actors who have either been formally elected or formally delegated authority. Private power has been excluded, as has the judiciary, both for being anti-democratic and having an elite and pro-business bias at critical junctures of state building. Although I recognize that distinctions between a directly democratic state and an alternative vision of the state have normative importance, I wish to argue that this normative vision is more complicated than usually offered in the APD literature. APD scholars too readily ignore democracy's xenophobic, racist, and exploitative history, lumping workers against elites as if "working class" and "majority" are terms that can be utilized independent of fractures within them. Although the version of democracy I discuss here—American empire—is also problematic for numerous normative reasons—the populist empowered state proposed by the likes of Richard Bense, Elizabeth Sanders, Karen Orren and so on, may be a more formally democratic state, but is one that must be addressed for its own limits and contradictions.¹⁰⁵

Otherwise, we are falsely providing a caricature of democracy—an artificial dichotomy

¹⁰⁴ See Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004), chapter 5; Sparrow, *Insular Cases*.

¹⁰⁵ I make this argument with much greater length in Frymer, *Black and Blue*.

between a positive electoral democracy and a lawless-capitalist society that lies outside formal bounds of the state. The alternative vision I propose is one that sees the state as a product of contradictions often settled by institutional conflict; and for this reason, America's place in the world is not simply bad or good, but a combination of ideals and exploitations that distinctly represent the American state and American democracy.

American political development scholars (APD) are late-comers to the debate,¹⁰⁶ although they have dealt extensively with matters peripheral to the subject of empire, whether by examining the political dimensions of the rise of American industrialism and corporate power,¹⁰⁷ the use of executive war-making powers as a political strategy,¹⁰⁸ and the importance of race and ideology as motivating capitalist expansion and international intervention.¹⁰⁹ Given the emphasis in the literature on the importance of states and institutions in politics and policy-making, APD scholars ought to have an alternative

¹⁰⁶ For exceptions, see Desmond King, "When an Empire is not an Empire: The US Case," *Government and Opposition* 41 (2), 2006, 163-96; Sanford Levinson and Bartholomew H. Sparrow, *The Louisiana Purchase and American Expansion, 1803-1898* (Rowman and Littlefield, 2005);

¹⁰⁷ Richard Franklin Bense, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000); Gerald Burke, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917* (Baltimore: The Johns Hopkins University Press, 1997); Stephen D. Krasner, "United States Commercial and Monetary Policy: Unraveling the Paradox between External Strength and Internal Weakness," in Peter Katzenstein, *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States* (Madison: University of Wisconsin Press, 1978).

¹⁰⁸ Theodore J. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca NY: Cornell University Press, 1986); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities 1877-1920* (New York: Cambridge University Press, 1982). More broadly on the matter of war making and American political development, see David R. Mayhew, "Wars and American Politics," *Perspectives on Politics* 3:3 (2005), 473-93.

¹⁰⁹ Gary Gerstle, *American Crucible* (Princeton: Princeton University Press, 2001); Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, 1955); Michael P. Rogin, *Ronald Reagan the Movie* (Berkeley: University of California Press, 1987).

perspective.¹¹⁰ But it is not clear whether their views on empire would meaningfully diverge, or whether they would agree that the development of national hegemony on the world stage is largely a product of factors beyond the control of state actors. Although APD scholars see political outcomes as constructed through the state, they consistently suggest that the American state has not been strong enough to counter the power of private capital. As such, the history of American state development is generally a history of failed (or at best, deeply-flawed) attempts to expand and exert authority.

But even post-1865, the development of the state has been largely deemed a failure by APD scholars because of its inability to control free market capitalism and develop a modern social welfare state and protect all of its citizens from the pitfalls of capitalism. In the latter years of the 19th century, *Lochner* era courts ensured that both the engines (a labor movement) and outcomes (a strong federal bureaucracy) of a welfare state fail to culminate.¹¹¹ The twentieth century version of the state became more pronounced, particularly through the New Deal era of a national regulatory regime, but this too is seen by APD scholars as a weak and fractured state, full of contradictions that enable private power to dominate and defeat government efforts at further social welfare reform.¹¹² All

¹¹⁰ Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004).

¹¹¹ See, e.g., Bense, *The Political Economy of American Industrialism*; William E. Forbath, *Law and the Shaping of the American Labor Movement* (New York: Cambridge University Press, 1991); Howard Gillman, *The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).

¹¹² Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge: Cambridge University Press, 2002); Robert S. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Harvard University Press, 1998).

of this led Stephen Skowronek to conclude in his seminal study of American state building efforts at the tail end of the New Deal era, “one anomaly begets another. American exceptionalism has not been transcended by twentieth-century state building; it has only taken a new form.”¹¹³

Why, then, has the experience of Native Americans been subject to little more than a footnote in the APD literature?¹¹⁴ In part, the subject matter with which we commonly associate “APD scholarship”, which emphasizes relationships between state and economy, tends to overlook other aspects of state activities, such as those involving violence and conquest, race and gender, the home, the prison, and hospital.¹¹⁵

¹¹³ Skowronek, *Building a New American State*, 288.

¹¹⁴ The important exception is Michael Paul Rogin, *Father and Children: Andrew Jackson and the Subjugation of the American Indian* (New York: Vintage, 1975). But even sweeping historical accounts of the place of race and American state-building have tended to overlook the conquest of Native Americans. See, e.g., Philip Klinkner and Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999); Anthony W. Marx, *Making Race and Nation: A Comparison of the United States, South Africa, and Brazil* (New York: Cambridge University Press, 1998). Patricia Nelson Limerick writes, Unlike slavery, “conquest took another route into national memory. In the popular imagination, the reality of conquest dissolved into stereotypes of noble savages and noble pioneers struggling quaintly in the wilderness.” *The Legacy of Conquest: The Unbroken Past of the American West* (New York: Norton, 1987), 19.

¹¹⁵ See e.g., Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006); Desmond King and Rogers M. Smith, “Racial Orders in American Political Development,” *American Political Science Review* 99 (2005); Julie Novkov, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* (Ann Arbor: University of Michigan Press, 2008).