

LAW AND THE AMERICAN STATE

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■ **Abstract** Although classical theories of the state and key texts of historical institutionalism and American political development (APD) defined the American state as a fundamentally legal entity, contemporary studies of the American state show a range of roles for law and courts, from no role at all, to a constraint or obstacle, to a positive force for state development. This review maps these varying roles, showing that law and courts are most absent or play negative roles in studies of the growth of the national administrative welfare state. It highlights new studies in this area that show the American state as a legal state and surveys growing numbers of historical institutionalist and APD studies of the state and economic and social regulation, where law and courts are more prominent. It points to the important but mostly neglected subjects of criminal and tort law as areas for future study that unite law and the state. Finally, it concludes by showing how concepts from the sociology of law—legal mobilization, law/court effectiveness, and legal consciousness—can inform state-centered political studies. Portraying the American state as a legal state yields a richer conception, reveals new and important subject matter and explanatory strategies, and can encourage dialogue between scholars of law and scholars of the state.

INTRODUCTION

This review maps the role of law and courts in understandings of the American state, focusing on research in the historical institutionalist and American political development (APD) traditions. The conception of law of interest here is not simply statutes but more broadly legality (including constitutionality) as a factor enabling, constraining, and shaping state actions. Courts are arbiters of legality, but legality is also an element in executive, administrative, and legislative action. This mapping shows variable perspectives that range from no role at all for law and courts, to a negative role of closing out options, to a positive role of fostering specific outcomes and constituting political actors. This review shows that the prominence and role of law and courts vary by subject matter and time period, with law and courts playing the most minimal or negative role in the most prominent area of American state inquiry: the failure to develop a European-style, national administrative welfare state. Partly because of this focus, many of the most central theories and concepts

developed to understand the American state are rarely used with significant legal components, at least in welfare state analyses.

I argue here for increased attention to the positive role of law and courts in policymaking and statebuilding, and thus the reclamation of the classical vision. Classical sociological theorists—Weber in particular but also Tocqueville—put law at the center of their understanding of the modern state. Although many scholars have shown how law and courts are very much political institutions, the focus here is on how the American state—its power, authority, and legitimacy—is fundamentally legal. Obviously, not every question about the American state has a legal component to it, but greater attention to law, the courts, and concepts of legal analysis can yield a richer understanding, enhance understanding of the central subjects of APD, as well as point to significant but currently neglected areas of inquiry. Although much of this review is directed to scholars in historical institutionalist or APD state studies, a secondary goal is to encourage more dialogue between these fields and the sociology of law/law and society, and to spur scholars in the latter fields to turn their attention to the legal state.

The review begins with a brief exposition of the classical vision of the legal state, and then shows that early moves in historical institutionalist and APD state studies had significant legal components. However, the framing of these early moves and the types of research questions asked led to a research agenda that marginalized law or emphasized the negative role of the courts in the development of the national administrative welfare state. The next section surveys these developments, followed by sections discussing work that offers legal interpretations of welfare and administrative state development, and also pointing to new directions for future research along these lines.

The remainder of the review examines some substantive and theoretical law-related areas that are fundamental to understanding the American state, that overlap with historical institutionalist and APD state studies, but that are relatively understudied. Exploration of these topics requires engagement with law and legal concepts. One subject where we can see this engagement is development of the American regulatory state. The survey includes examples of work in the APD or state-centered tradition and from legal or other approaches that focus on regulation of several varieties, much of which can contribute to sociological understandings of the state. I also consider two subject areas currently neglected in historical institutionalist studies of the state that would fruitfully engage legal scholarship: crime control and tort (private injury) law. Finally, I explore some conceptual areas of legal scholarship that can significantly contribute to institutionalist understandings of the American state: the literatures on legal mobilization, law and court effectiveness, and legal consciousness. Insights from this work offer not just additional details to our current understanding of the state, but a reformulation of its central features and behavior in society.

As is always the case with reviews of the field, caveats are in order. First, I focus mostly on the United States because the American state has been the subject of many prominent historical institutionalist state studies and because it

is arguably the site where arguments for the importance of law and the courts have the greatest strength, as I discuss below. The arguments, however, apply to many states with reasonably independent judiciaries and constitutional traditions or rule of law in North America, Europe (Joppke 1998), and increasingly Asia (Ginsburg 2003). Second, the focus here is on law and courts in the understanding of overall state behavior, in interaction with or structuring of other parts of the state, effectively shaping its power, development, and policymaking. This focus on the legal state, as well as space limitations, require me to exclude much excellent work on courts' internal dynamics and the application of institutional theory to understanding courts as an institution (e.g., Smith 1988, Graber 1993, Gillman & Clayton 1999, Whittington 2000). Finally and obviously, even with these foci, space limitations require selectivity in the review. There are many more excellent studies than I can discuss here, but the sampling should adequately represent the understanding of law in studies of the American state.

HISTORICAL INSTITUTIONALISM, AMERICAN POLITICAL DEVELOPMENT, AND THE NATIONAL ADMINISTRATIVE WELFARE STATE

The Classical Vision of the Legal State

Much of the classical theoretical grounding for historical institutionalist state studies is derived from Weber and Tocqueville. Both of these theorists put law at the center of their studies of politics and the state. Contemporary state-centered political studies are rooted in classical scholarship but use as a starting point the portion of Weber's political sociology that understood the state as a distinct set of political structures with a monopoly on the use of force within a given territory and that emphasized the autonomy of the state and its unique interests. But Weber also argued that law was the basis of the legitimacy of modern state domination or authority (*herrschaft*). Weber's conception of the state therefore was fundamentally legal. The ideal-type Western state was a "political association with a rational, written constitution, rationally ordained law, and an administration bound to rational rules or laws, administered by trained officials" (Weber 1930, p. xxxi). As one Weber scholar explained, "For Weber, legal domination is the *essential* foundation of the bureaucratic administration on which not only the modern state but also modern capitalism depends" (Cotterrell 1995, p. 148, emphasis in original). Law in the Weberian formulation may be especially prominent for understanding state domination in a weak state such as that in the United States (Hamilton & Sutton 1989).

Tocqueville also had a legal understanding of the state and specifically the American state. His explanation for the maintenance of democracy with liberty in America rested on three factors: America's geopolitical situation, its moralistic and democratic culture imported by the Puritans, and what he called "the laws."

By this he meant the state structure as created by the Constitution. But he also emphasized the positive functioning of judicial review in maintaining democracy and the role of juries in making good citizens by teaching the spirit of law. In addition, Tocqueville argued that lawyers were a kind of beneficial aristocratic class in America whose legal training taught them respect for order. Finally, one of Tocqueville's most enduring observations, that in America political questions become legal (Tocqueville 1990), is a basic principle for the subfield of legal mobilization studies (see below) in the sociology of law, but had relatively little impact in state-centered political studies.

Recent Theory of the American State

Skowronek's (1982) celebrated analysis made law and courts central to the understanding of state development in the period from the 1870s to 1920. Remarking on the sense of statelessness in America, Skowronek argued that nevertheless the American state "maintained an integrated legal order on a continental scale; it fought wars, expropriated Indians, secured new territories, carried on relations with other states, and aided economic development" (Skowronek 1982, p. 19). He also borrowed Tocqueville's assessment of the importance of lawyers in America, noting that their quasi-aristocratic influence had declined by the 1850s. Skowronek's most influential law-related argument was his conception of the American state in the nineteenth century as a "state of courts and parties." In this view, courts were the only part of the state not dominated by political parties, and the courts played many roles, including shaping intrastate relations and relations between the national and subnational governments and between the subnational governments. Courts were also positive makers of policy and functioned as an administrative government in the area of economic development. In many ways, then, Skowronek's agenda-setting book established a conception of the American state as a legal entity.

However, the legacy of Skowronek's work was a sociology of the American state that de-emphasized law and courts. The comparison with Europe that served as a backdrop for the book highlighted less what the American state had than what it did not have: a significant national executive branch with a civil service system, which Skowronek considered to be a "hallmark of the modern state" (Skowronek 1982, p. 17). Courts in this conception were a starting point, and the real action came later (Clemens 2003). Moreover, he pointed out the weaknesses of courts even while assigning them important roles: They are passive, requiring initiation by other parties in order to act, and tend toward particularism in their decision making (Skowronek 1982, p. 27).

The other major influence on contemporary theory of the American state was an edited collection (Evans et al. 1985) that announced the intention to "bring the state back in" to political analysis that had been overly reliant on interest group and political behavior explanatory strategies. This effort was part of a move away from neo-Marxist, ruling-class-domination conceptions of the state to more Weberian

principles that posit the state as an actor in its own right (Skocpol 1980, Block 1987). Central concerns for the new state-centered analysis were state autonomy, state capacity, and state impacts on “the content and workings of politics” (Skocpol 1985). Skocpol’s influential introductory essay in *Bringing the State Back In* gave significant attention to law. First, there was a discussion of Nettl’s (1968) important article that argued that Americans see sovereignty not in the state as such but in law and the Constitution. Skocpol (1985, p. 22) also quoted extensively from an essay by Katznelson & Prewitt (1979) that developed Nettl’s idea.

Katznelson & Prewitt (1979) argued for the importance of the Constitution in American stateness. Even though it made the American state more easily penetrated by nonstate actors, the Constitution established an independent judiciary, a government of laws and not people, and a political system in which dissent was directed toward establishing more favorable interpretations of the Constitution. Their view was a melding of Weber and Tocqueville: “The United States is a government of legislation and litigation. When the political order is legitimate, as the U.S. Constitution is, politics becomes the struggle to translate social and economic interests into law” (Katznelson & Prewitt 1979, p. 33).

Although both Skowronek’s (1982) and Skocpol’s (1985) foundational texts had law and courts as central to state analysis, a significant part of the field pursued a delegalized study of the American state. The American exceptionalism question that dominated the field led to a focus on the lack of a national administrative welfare state structure and on the historical period—the Progressive era to the New Deal—when Europe developed such state structures and the United States did not. In this period and on these issues, the role of the courts was often negative, using powers of constitutional review to block welfare efforts in the states.

Theoretical development in this vibrant research area thus centered on how only the U.S. state seemed locked into its smaller size and when and where welfare policy development could be found. Weir et al.’s (1988) edited volume on *The Politics of Social Policy in the United States* laid out more specifically many of the concepts that were to dominate the field for the next several years, including the idea of the American state as especially fragmented and lacking in capacity, the notion that policies shape future politics (or the policy feedback), and the idea that interest groups are most successful when their structure mirrors that of the state (in the United States, having a federated structure). Later work built on these concepts and added others to explain America’s failed welfare state, locating the most significant dynamics in historical periods before or during the New Deal. For example, analyzing variations between states within the United States in the New Deal years, Amenta (1998) identified as additional factors the degree of democracy and the nature of the party system to explain the growth of welfare policies. Others worked in this tradition, contributing vastly to our understanding of the development or lack of development of unemployment insurance, old age pensions, and health care, typically finding the answers to these puzzles in variations of state structure and path dependence (Orloff 1993). Weir (1992) showed how

political institutions, ideas (including policy meanings and problem definitions), and policy sequences combined to limit employment policy in the United States from the New Deal through the 1960s. Pierson's (1994) influential theoretical statement brought the analysis up to the 1980s and focused on welfare retrenchment without a legal or constitutional lens.

In many national welfare state studies, the courts are crucial actors but are typically an obstacle to growth and development. Orren (1991) argued that federal court decisions consistently stymied the building of the national administrative welfare state because they declared that new regulations violated constitutional liberties. The state finally broke free from its legal shackles in 1937 when the Supreme Court gave in to New Deal efforts at statebuilding and allowed the national administrative welfare state to grow (also see Forbath 1991, Skocpol 1992, Hattam 1993, Voss 1993).

Many APD scholars have followed the implicit agenda in Skowronek's book, focusing on institutional development in the executive or legislative branches. Studies of the executive growth include analyses of the office of the president (Riley 1999), the bureaucracy (Balogh 1991, Kryder 2000, Carpenter 2001), or party leadership (Shefter 1994, James 2000). Others have emphasized the importance of Congress as the primary actor or source of institutional dynamism (Howard 1997, Schickler 2001). More specifically, some have argued that in the New Deal era southern legislators in Congress carried the key veto power in influencing institutional development at the time, undermining democracy and severely disadvantaging African Americans (Quadagno 1994, Lieberman 1998, Frymer 2004, Farhang & Katznelson 2005, Katznelson 2005). Still others have focused on regional (Bensel 1990) and city political patterns as factors in statebuilding (Bridges 1984, 1997; Reed 1988).

Law and the American Welfare State

There is recent work on welfare state development that emphasizes the role of law and courts. Hacker's (2002) take on American exceptionalism, a study of public and private social provision, includes analysis of what he calls "subterranean politics" (p. 9), a concept that takes account of judicial processes. Although much of the study stresses state fragmentation and path dependence in the larger political system, Hacker's discussion of courts, focusing on litigation regarding the Employee Retirement Income Security Act (ERISA), quotes Tocqueville on the ubiquity of judicial questions in American politics and encourages other APD scholars to pay more attention to law and courts. However, courts in Hacker's account of ERISA are not positive makers of policy but are doing what courts do in studies of nineteenth-century national welfare state building: limiting welfare benefits and safeguarding business/employer control.

Other work on a legal vision of the American welfare state is less squarely in the historical institutionalist or APD traditions but suggests promising avenues for new research and theory building. Political historian Michael Willrich (2003a,b)

breaks new ground when he maintains focus on the Progressive era but turns away from the “why no national administrative welfare state” question. This move brings out significant, constructive local court activity that, he argues, was the basis of later national welfare state growth. Working on a case study of the Municipal Court of Chicago, Willrich argues that activists and judges, part of a giant judicial bureaucracy, remade criminal law while experimenting with progressive, democratic strategies, using the occasion of guilty verdicts to combine progressives’ faith in social science expertise with the zeal for social betterment to fashion far-reaching, court-supervised social policies.

If the pre–New Deal era shows more court- and law-centered welfare state activity at the local level, the post–New Deal period, especially the 1960s and onward, is fertile ground for legal state analysis at the national level. In a field that remains fascinated with crucial turning points and path dependence, historical institutionalist state scholars will likely soon give attention to the welfare rights movement (Piven & Cloward 1977) and court activity of the 1960s and 1970s. Indeed, one could argue that the American welfare state’s crucial failure was in the 1970s (Davies 1996, Steensland 2006), not the Progressive era or New Deal, and that the courts were central players.

Melnick (1994) most clearly shows the leading role of the federal courts in expanding welfare rights in the 1960s and 1970s. Applauded as an exemplar of historical institutionalist studies of intrastate relations (Pierson & Skocpol 2002), Melnick attributes court power to expand eligibility for welfare and nearly establish welfare as a “new property” (Reich 1964) to increasing fragmentation in Congress and divided government. Melnick sees courts as innovators and drivers of welfare expansion, and veto points made rolling back the advances difficult. Teles’s (1996) analysis is more bottom-up—although litigation efforts were funded by the state. Operating in a period of massive expansions in the budget for the Legal Services Corporation [from \$20 million in 1965 to \$321 million in 1981 (Bennett 1983)] and increasing access to the courts for public interest lawyers, the Supreme Court issued a series of decisions granting increased eligibility for Aid to Families with Dependent Children (AFDC). The Court based some decisions on the statute (striking down morality requirements) and others on the Constitution (striking down residency requirements and requiring hearings before benefit termination). But decisions were inconsistent and never solidly established welfare as property along the lines advocated by Reich (1964). By the 1980s a more conservative Congress overruled the statutory decisions (Teles 1996).

Law, APD, and Administrative Statebuilding

There is a strand of APD statebuilding scholarship that shows the value of a law-centered APD. Like Tocqueville, Weber, Nettl, and Katznelson & Prewitt, Sidney Milkis situates APD within its constitutional context and thus interprets all parts of the state as legal as well as political entities. Milkis’s (1993) study of the rise of the strong presidency and decline of political parties describes a

legalistic “programmatically rights” strategy, pioneered by Franklin Roosevelt, as a major tactic to lock in policies and elevate presidential legacies above party politics (also see Milkis 2002). This effort in turn brought courts into a more prominent oversight role. Milkis’s legal approach to APD thus helps to illuminate the origins of the 1980s (and onward) Republican attacks on big government and judicial activism—both of which are unexplained from the perspective of most historical institutionalist scholarship, which often starts analysis with a delegatized vision of the state and then asks why it is so small. His study of the parties from the nation’s founding points out that the Constitution makes no mention of them, and he argues that parties developed as a conscious strategy to reform the constitution by creating a link between local communities and distant governments (Milkis 1999). Along similar lines, Orren & Skowronek’s (2004) analysis of the APD field suggests an intriguing law-centered approach to APD when they explore as an example of development the move in American courts from prescriptive lawmaking (based on precedent) to positive lawmaking (based on present circumstances).

STUDIES OF THE AMERICAN REGULATORY STATE

When scholars turn their attention away from the national administrative welfare state and the politics of social provision to the politics of the regulatory state and rights, the American state as a legal state is more salient. The American state and its subnational units have used powers of regulation to further goals of stability, domination, progress, and justice since the founding of the republic. Although anti-welfare decisions such as *Lochner v. New York* (1905) attract the most scholarly attention, courts much more frequently upheld regulations (Warren 1913). The idea of courts and law as a “sclerotic, anachronistic, formalist impediment to modern political and economic development,” historian William Novak (2002, p. 261) has argued, is a “Progressive-era fantasy.”

Although sometimes less directly in dialogue with historical institutionalism and APD as welfare/administrative state studies, sociologists and like-minded scholars in other disciplines have shown increasing attention to law, courts, and the American regulatory state. This attention has spanned all historical periods, although most attention has centered on the post–World War II period when perhaps the greatest expansion of national regulatory statebuilding in the United States has taken place. Not coincidentally, the number of judges, lawyers, and lawsuits skyrocketed during these years, a flurry of activity around what Burke (2002) calls “litigious policies.”

Studies of social regulation and regulatory politics tend to show the legal state, assigning a greater role to law and courts because of the engagement with the concept of rights. New rights and liberties are established with new regulation, and other rights are curtailed. Questions of the meaning of liberalism and the role and limits of the Constitution are also more prominent in the narrative of these studies regardless of the historical period.

Regulation of the Economy

Skowronek's (1982) account of statebuilding in significant points treats the economy and processes of industrialization as exogenous factors that impact the state (Clemens 2003), but it is state action, through law, that has created the conditions for American economic development (Novak 2002). For decades, Novak notes, legal historians have documented the state's use of law to build the economy (see, for example, Hurst 1956, Horwitz 1977, Scheiber 1981, Sklar 1988).

More recently, sociologists and political scientists have integrated these insights into a legal conception of the American regulatory state and its control of the economy. Explicitly building on the legal historians, Lindberg & Campbell (1991) show the American state's strategies to govern the economy. In their view, the state acts in the economy in two ways: production and allocation of resources and information (including control of monetary, fiscal, and exchange rate policies) and regulation of property rights. The latter is a thoroughly legal endeavor of great consequence; they argue that the U.S. state has great strength from the ability of legislatures and courts to define and enforce property rights because these rights can facilitate and inhibit collective action by business or labor groups. Throughout American history, the legislatures and the courts have defined property rights in ways to spur economic development and large enterprises, and also to discourage cooperative multilateral exchange patterns more characteristic of Europe and Japan. Roy's (1997) analysis of the rise of the American corporation shows the constitutive role of law in creating this new rights-bearing entity, as well as the institutional relations among corporations, including the stock market, investment banks, and interlocking directorships. Jeong (1994) shows how laws and court decisions regarding antitrust and chain stores created relatively open distribution channels in the United States compared with the more closed economy of Japan.

Scholars have also examined the role of the law and courts in developing particular sectors of the economy, with the emergence of the railroads receiving prominent attention. Dobbin (1994) understood the power of the courts in this period and showed their supporting role in railroad policy, although his argument emphasizes the cultural rationality of policymakers. Berk (1994) places law and courts more centrally in the story of the rise of railroad corporations, and more generally in the story of American corporate liberalism. Berk argues that this industrialization path was the result of political struggles in Congress, the courts, and the Interstate Commerce Commission over economic rights, eventually shaping technology and markets. In his account, courts played crucial roles in maintaining railroad corporate power, even when particular corporations overbuilt and collapsed under debt.

Historical institutionalist analyses of contemporary economic regulation are few. Derthick & Quirk (1985), however, offer a model to build on, as they emphasize the importance of ideas and institutions in explaining deregulation in the 1970s and 1980s and note the crucial active role played by federal courts. A federal court, for example, was the first mover in making long distance telephone service more competitive.

Civil Rights Law and Equal Rights for Racial Minorities

Civil rights for racial minorities represent a somewhat different puzzle for theorists of the American state: Rather than a pure case of state growth, these regulations show—at least in the South—a diminution of subnational state power with an accompanying growth in national administrative regulatory capacity. Like *Lochner v. New York*, *Brown v. Board of Education* (1954) struck down law; it told the states they could not do something. The key difference is that a national regulatory effort to guarantee rights and liberties soon followed.

Social scientists have begun a state-centered study of the development of civil rights for racial minorities, although this work has tended to focus on the periods before and after the watershed legislation of the mid-1960s, which remains mostly unexamined from an APD perspective. Examining the decades before 1964, Klinkner & Smith (1999) and Skrentny (1998b, 2002) have followed the lead of historian Dudziak (1988, 2000) to show how national security concerns led to policymakers' support for ensuring equal rights for African Americans. These laws could blunt the USSR's propaganda that highlighted state-supported racism and was aimed at the developing world. National security concerns mobilized the State Department and several White House administrations, but were also invoked in Justice Department briefs and/or important early Supreme Court decisions breaking down the edifice of the separate but equal legal doctrine. Working in the domestic arena, Chen (2006) and Kryder (2000) have illuminated the important role of state- and federal-level civil rights agencies during the 1940s and 1950s, whereas McMahan (2004) shows how Franklin Roosevelt undermined Jim Crow by appointing prights judges to the federal bench.

Although there are no comprehensive APD analyses of the passage of the breakthrough laws for minority rights in the historical institutionalist tradition (Lieberman 2005 comes closest), Graham's (1990) history of the Civil Rights era engages political sociology and historical institutionalist studies while using a prominent law focus. Graham argues that legal institutions were major parts of the American regulatory state's growth, as the old practice of policy made by iron triangles (mutually beneficial relationships between congressional committees, special interest groups, and federal agencies) gave way to iron quadrilaterals, with the courts as the new player exercising oversight.

Scholars using state-centered or institutionalist approaches have given greatest attention to the development of civil rights regulations after the watershed 1960s laws. This work builds on Graham (1990), showing the interplay and progressive influence of federal agencies and the courts after Congress had acted. Skrentny (1996) analyzes the different processes of legitimating affirmative action for African Americans in employment. Administrative agencies, following a cultural logic of administrative pragmatism, implemented Title VII of the 1964 Civil Rights Act and civil rights executive orders in a numbers-oriented, results-based formulation. Courts, in comparison, following their post-1937 roles as guardians of suspect classes and the logic of tradition that is the hallmark of *stare decisis*,

supported the agencies and created [along with White House officials managing racial crisis in the cities or seeking a “politics of preemption” (Skowronek 1993)] the employment affirmative action that we know today.

Frymer (2003, 2004) puts race and labor at the center of the understanding of the modern American state as he examines the national state efforts to integrate labor unions. After creating New Deal labor policy that avoided confrontation over problems of racial discrimination, the state developed new agencies and empowered courts to work toward union integration, creating an unwieldy institutional environment that imposed great costs on and weakened labor unions (Frymer 2004). Courts play a key role in this story, offering access points for civil rights groups and working to integrate labor unions. But in a reflection of the fragmented American state, in which passage of legislation is often prohibitively difficult, elected officials were critical in delegating leading roles to the courts on union integration. Judges and lawyers seized the opportunity, pushing the civil rights agenda far beyond the vision of elected officials to force open the unions (Frymer 2003).

Standing out for its rarity, the work of Pedriana and Stryker has gone the furthest in explicitly uniting concepts from the sociology of law with historical institutionalism to develop theories of the state as a legal entity (Stryker 1990). A key strategy in this work is to show the role of law in institutionalist concepts. In explaining the success of Nixon’s Philadelphia Plan for employment affirmative action for racial minorities, Pedriana and Stryker argue that prior law provided cultural resources with which advocates for legal change could promote their causes. In hearings on the Plan, then, the executive branch justified its new initiative with legal language (Stryker 1994, Pedriana & Stryker 1997). Similarly, Pedriana and Stryker link state capacity to the strictness of statutory interpretation—liberal interpretation leads to greater state capacity as legal limits loosen. The mystery here is how the Equal Employment Opportunity Commission (EEOC) could be so strong and innovative when its founding law (Title VII of the Civil Rights Act of 1964) made it so weak. Skrentny (1996, 1998a) emphasizes legitimacy concerns and bureaucratic rationality to explain EEOC innovation, pointing out that bureaucrats developed the same results-oriented civil rights models in the 1950s when civil rights groups were weaker, and bureaucrats also included in their efforts minority groups that were very weakly mobilized. In contrast, Pedriana & Stryker (2004) argue that the EEOC was pressured by civil rights groups practicing legal mobilization (see below), which led to the liberal legal interpretation and expanded state capacity. Lieberman’s (2005) analysis adds a comparative perspective, combining the study of race and welfare policy with race discrimination law and assigning a prominent role to the courts. In his account, the EEOC’s uncanny strength was the result of both bureaucratic initiative and pressures from below, as civil rights group organization mirrored the structure of the state, with agency innovation aided by institutional fragmentation that so often limits policy development in other policy areas (Lieberman 2005). In all these accounts, courts and legal interpretation play central roles in understanding the development of affirmative action.

Skrentny (2002) extends this analysis to the development of other rights for ethnic and racial groups. A prominent case is language accommodation in the schools (primarily for Latinos), which shows a common pattern in regulatory politics also found in affirmative action law in which courts and administrative agencies build policy on the other's moves, incrementally advancing policy and building state power (also see Melnick 1994). Lower court decisions and a Supreme Court ruling regarding Asian American students (*Lau v. Nichols* 1974) in support of the Office for Civil Rights and Nixon administration regulatory efforts further emboldened activists in the state (sometimes in anticipation of court rulings) as well as social movement advocates for Latinos, leading to stronger moves to bilingual education (also see Davies 2002). Advocates for white ethnics, on the other hand, applied pressure to the Nixon White House, civil rights agencies, Congress, and the Supreme Court in an amicus brief for the *Regents of the University of California v. Bakke* (1978) decision, seeking inclusion in civil rights enforcement efforts. But they failed because policy elites saw this group as undeserving and too different (unlike included minority groups) from African Americans to justify similar treatment.

Housing discrimination policy shows the complex ways courts can play a role in policy development (Schuck 2003). Bonastia's (2000, 2006) institutionalist analysis shows the importance of "institutional homes" of policies and the key role of public interest lawyers suing the government for failing to implement housing discrimination law. Unlike other civil rights policies, which were enforced at least in part by stand-alone civil rights mission agencies (EEOC, Office for Civil Rights, Office of Federal Contract Compliance Programs within the Department of Labor), housing discrimination law was to be enforced by the Department of Housing and Urban Development (HUD), which had missions and responsibilities that took it away from civil rights concerns. HUD did try, with little success, to foster economic and racial desegregation through subsidized housing. Yet it was the federal courts that filled the void and in several cases ordered integrated housing plans that extended across metropolitan areas and rezoned racially exclusionary residential areas, setting up a fight with Nixon's White House on housing desegregation.

Although extensively covered by legal scholars, major civil rights developments, including school desegregation and voting rights (majority-minority districting), have not received comprehensive institutionalist accounts. With some exceptions, including a promising theoretical effort by Hochschild (1999), few historical institutionalist or APD scholars have sought to explain the broad range of development of African American civil rights policy in all spheres (employment, schooling, voting, housing).

Citizenship and Immigration

Another body of work brings institutional analysis to the development of citizenship and immigration policy. Regarding citizenship, scholars show courts and law in their restrictive roles, similar to the stifling of welfare development. Smith

(1997) put the Constitution and court decisions at the center of his analysis of how American political elites continually enacted traditions far outside American liberalism but nevertheless central to American history and white male political and legal domination. For King (2000), the courts' role is also restrictive, as courts interpreted a 1790 law that limited naturalization rights to whites to apply almost exclusively only to those with pure European ancestry (also see Haney-Lopez 1996). Restrictive action in the area of immigration, unlike restriction in welfare, requires growth in state power and administrative structure. In the history of national origin and other restrictions, many scholars (King 1999, 2000; Tichenor 2002; Lee 2003) see the courts as minor players owing to the plenary power doctrine, under which the Supreme Court defers to the other branches on matters of immigration (Schuck 1998). Tichenor's (2002) comprehensive analysis of American immigration policy uses historical institutionalist independent variables of fragmented state structures, shifting political coalitions, exogenous shocks and crises, and experts variously privileged by the state. Tichenor shows that national immigration controls were created after courts struck down state-level restrictions, beginning with the Chinese Exclusion Act in 1882. In his account, court restrictions of subnational actors led to growth in national administrative capacity, and the courts handed more power to the executive and legislature when it shaped the plenary power doctrine in response to challenges from Chinese immigrants. The story of the end of national origin restrictions is also mostly a political one, impacted by Cold War propaganda concerns, ethnic group lobbying, and new cultural rules shaped by the black Civil Rights movement (Skrentny 2002, Tichenor 2002).

Future scholars studying immigration from a historical institutionalist perspective would do well to follow Joppke's (1998, 1999, 2005) comparative studies in putting courts and rights at the center of the analysis of understanding state capacity or incapacity to limit immigration, state protection or social provision for immigrants, and degrees and types of preference and discrimination in policies related to immigrant selection. For example, *Plyler v. Doe* (1982), which struck down a Texas statute denying public education to undocumented children, had great implications for guaranteed social provision while also highlighting an incapacity to control immigration, a weakness that the U.S. state shares with other industrialized states (Cornelius et al. 2004).

Gender and Women's Equality

There are many fine analyses of gender, law, and women's rights by legal scholars and historians (e.g., Rhode 1989, Gordon 1990, Hoff 1991), and scholars of the American state are increasingly giving attention to the development of women's rights. Skocpol & Ritter (1991) and Skocpol (1992) show the courts offering important support for legislative efforts to protect women qua mothers during the Progressive era, including both social provision and regulations, and creating opportunities for protection (not rights) for women that were unavailable to men—though the courts placed clear limits here, especially on minimum wage laws

(Clemens 1997). Novkov's (2001) extensive analysis finds considerably more judicial support for protective laws for women than for all laborers between 1873 to 1937. Protective legislation was the result of the complex, contradictory ways that policymakers defined women. Women were both privileged and excluded from the polity; their most significant legal tie was to their husbands and not to the state (Kerber 1998). Mettler's (1998) historical institutionalist approach integrates legal concepts into her account of the same period in creative ways. In an interesting contrast to Novak's (1996) discussion, she shows how the Constitution gave the states police powers, defined by the Supreme Court to include efforts to foster the health, safety, and "good order" of the people. Unlike Novak, Mettler emphasizes the negative implications of the state's police power. It allowed states to incorporate women into the polity in a manner that institutionalized their marginal status, creating a contrast with the more liberal style of citizen incorporation exhibited by the federal state.

There is a less extensive but growing attention to post–New Deal development. O'Connor et al. (1999) offer a comprehensive examination of gender and the welfare states in Australia, the United Kingdom, Canada, and the United States. Their analysis, which goes beyond social provision, includes discrimination law, affirmative action, and reproductive rights. Finding significant variations between different states that are all liberal, they argue for a gendered interpretation of social policy. Obviously, including abortion in the study engages constitutional visions and court rulings in a very direct way. This broader vision of welfare state thus brings the analysis closer to the classical, legal vision of the state.

Mansbridge's (1986) study of the failure of the Equal Rights Amendment (ERA) offers lessons to state-centered scholars by showing the complex interactions between the Supreme Court and social movements. On the one hand, the Court's failure to apply the equal protection clause of the Fourteenth Amendment created the demand for the ERA in the first place. On the other hand, once that movement got underway and Congress ratified the amendment, the Supreme Court began to strike down some gender classifications in the law (though stopping short of equating sex with race discrimination), which in turn affected the movement by taking away key arguments regarding the ERA's immediate impact. Skrentny (2002) finds a similar policy-feedback effect in which congressional support for the ERA eased the passage of other laws, including Title IX of the Education Amendments of 1972, which became very controversial at the implementation stage owing to its revolutionary impact on schools and athletics.

Writing in sociology of law and cultural sociology traditions, Saguy's (2003) comparative analysis of sexual harassment law in the United States and France offers powerful evidence of both the leading role of the courts (sexual harassment law was essentially a creation of the courts in the United States) as well as legal culture and path dependence. In both countries, the approach arose out of prior but different policies—discrimination law in the United States and criminal law in France.

Social Regulation: Environment, Consumer Protection, Health

As with work on minority rights, scholars studying “the new social regulation” (Vogel 1981) and its antecedents have also assigned major roles to law and courts in the analysis. Novak’s (1996) study of pre–Civil War state and local regulation shows that cities and states were zealously seeking control of nearly all aspects of life in fine detail. They were guided by a public philosophy that directed regulation of commerce, public health, and the workplace to advance the people’s welfare even if that endeavor trampled individual rights. Courts upheld this extensive regulation based on an expansive constitutional interpretation of the state’s police power. This regulatory regime ended after the Civil War, but Novak’s analysis shows the power of the subnational state through law and the courts (Novak 1996).

There are studies in the institutionalist tradition of the more litigious post-1965 period that also give substantial roles to law and courts in social regulation. Vogel’s (1986) comparative analysis of U.S. and British environmental regulation explained the American style, which was rigid and legalistic, on the basis of widespread mistrust of government administration and business, but also made a powerful point on state structures: The fragmentation of the U.S. state, rather than creating veto points that block the growth of the state, allows opportunities through courts and litigation for nonindustry groups to win new regulatory controls (Vogel 1986). Harris & Milkis’s (1989) study of regulatory change in the 1970s and 1980s returns to the classical vision of state behavior. They place environmental and consumer regulatory politics in a malleable but not completely elastic constitutional regime context. In the United States, this creates a kind of inertia in which incremental and very deliberate policymaking is the norm owing to separation of powers, divided sovereignty, and rights protection. Harris & Milkis agree with Graham (1990) that courts had become important players, joining the iron triangles to form “subgovernments” on specific policy issues, watching over agency actions, and being pushed along by public interest lobbies.

Still, social regulation and the benefits and costs of litigation and court-directed regulatory statebuilding have remained more the province of legal scholars than of institutionalist scholars. McCann (1986) sees the new regulatory state as mostly a bottom-up story of reformers with a new vision of participation, including participation in the courts, although this strategy lacked organizational cohesion and the moral authority of democratic politics. Rabkin (1989) also sees the public interest litigation on social regulation as the driving force, but the courts, in violation of their constitutional role as umpires and not players/advocates, went along and (in his view, ineptly) pushed the new causes. Melnick’s (1983) study of social and especially environmental regulation argues that the courts were very active and the leading force in the new regulation, working to increase government power rather than check it. Melnick describes the new social regulation as different from previous regulations, such as antitrust, as it promoted quality and well-being rather than fair rules, with wider scope and new detail, with new mission agencies and more opportunities for judicial review.

There is work to be done here on why state fragmentation and court access points are obstacles to social provision but a boon to social regulation. However, although he does not acknowledge it in his work on adversarial legalism, Kagan (2001) may be describing a return to the APD vision of American courts as obstacles to political development even in the area of social regulation: By the 1990s, Kagan argues, the openness of the courts and their unpredictability were leading to policy incoherence and stalemate on many regulatory issues and policy areas. Who is sitting in the courtroom likely also matters—Graham (1997) and Skrentny (2001) show that Republicans have successfully pursued a strategy of appointing conservative judges to retrench regulations. And the impact of court access points on state growth and development since the New Deal may simply be related to which forces are mobilized to use them. For example, Teles (2006) shows the successes of conservative public interest organizations and think tanks, which often use a litigation strategy to achieve their goals.

HIDDEN WELFARE STATES? ANTI-WELFARE STATES? NEGLECTED STATE ACTIVITIES IN LAW

Although historical institutionalist and APD scholars studying the American state have thoroughly explored national administrative and social welfare provision and are discovering the importance of the regulatory state, at least two substantive areas of state development have been left mostly to legal scholars, despite their centrality to politics and political development: crime control and tort litigation.

States and Crime Control

One of the more glaring areas of neglect by historical institutionalists is the role of the state in crime control. Despite Weber's emphasis on the state in maintaining order, few outside of legal studies have explored the rise of the American penal state, a development with tremendous implications for American politics and society. Some political sociologists not working in the state-centered tradition have noted this phenomenon, focusing particularly on its racial effects. Manza & Uggen (2006) point out that the political consequences of the racial effects of crime control are significant: 1 in 40 voting age adults cannot vote because they are in prison or are former felons, 1 in 4 black men cannot vote for these reasons, and the disenfranchisement of felons—even if they have served their sentences—likely was the difference in Bush's victory in 2000. By age 40, more than 26% of African American men and 12% of Latino men have been in jail (Western 2002). In historical institutionalist studies, in which state capacity and the development of bureaucracy and welfare policies are dominant subjects, the ability of the American state to provide food, clothing, and shelter for 2.1 million incarcerated citizens and aliens (Bur. Justice Stat. 2004), at an annual cost of \$29.5 billion (Bur. Justice Stat. 2001), would seem an obvious topic of interest.

The crime control role of the state, including the massive state development of penal institutions, is the province of legal scholars and other social theorists who show what the state-centered researchers are missing, how they can contribute to understandings of the state and crime control, and how this project may be related to prevailing concerns of welfare state development. Sutton's (2000, 2004) quantitative analyses of imprisonment rates in advanced industrial societies show that, although economic explanations dominate the field, politics matters. In his study of Australia, Canada, New Zealand, the United Kingdom, and the United States, Sutton found that, although there are important economic effects (imprisonment goes down as job opportunities go up), there are more important political effects. One relates to welfare spending: States engage in trade-offs when they lower welfare spending, as declines in this area are associated with increases in imprisonment rates. In addition, right-party rule is associated with higher imprisonment rates, an effect that trumps labor market factors. Sutton also finds evidence of American exceptionalism, as these political effects are stronger in the United States than elsewhere. His interpretation directly engages historical institutionalist research on the American state; citing research on state fragmentation, he argues that moral order is especially precarious in the United States. The dispersed nature of policymaking, the local control of police, and the politicization of the judiciary and prosecutorial state functions (judges and prosecutors are often elected) make the American polity vulnerable to moral panics (Sutton 2000).

Garland's (2001) explanation for the great rise in incarceration rates and the larger, reactionary culture of control in the United States and the United Kingdom also shows that one cannot understand welfare policy in isolation from crime policy. Neither state, he points out, developed a preventative model of crime control based on shared responsibility and tight regulation. Instead, both states became criminal justice states, relying on highly professionalized expert bodies engaged in crime control that targeted specific populations with high criminal potential. By the early 1970s, both also added a more specific dimension to criminal justice, becoming penal-welfare states that were rehabilitative rather than punitive, involving the state in care, reform, and public provision to prevent crime from criminal elements. Garland's explanation for the ensuing reaction in the 1980s and the new focus on incarceration is complex, emphasizing economic, political, and cultural similarities between the United Kingdom and the United States as late modern states, and he strongly links this new focus to welfare state retrenchment in both states: Crime and welfare dependency were both attributable to cultural or character flaws calling for more control of discrete populations. Garland also argues that prisons satisfy "the need for a 'civilized' and 'constitutional' means of segregating the problem populations created by today's economic and social arrangements" (Garland 2001, p. 199). State-centered, historical institutionalist accounts, stressing factors such as path dependency or state capacity, as well as key court decisions on criminal justice, will contribute much to these debates.

The State and the Common Law: Tort Litigation in America

The common law is the language of the courts' most basic social regulation in the United States and in the United Kingdom and other commonwealth countries. Although APD scholars have examined the role of nineteenth-century common law in thwarting the labor movement or welfare (e.g., Orren 1991, Skocpol 1992), the subject is mostly ignored in other periods and contexts. Especially ripe for analysis is the law of torts. Common law assigns to persons a duty of care when they are in relationships with others, and a breach of this duty, resulting in injuries or heightened risks of injuries, makes one liable to tort claims. Despite the ubiquity of tort law and its salience in American politics [at least in the past few decades, when tort reform has become a major cause for Republicans and conservative organizations (Schuck 1991, Burke 2002, Haltom & McCann 2004)], tort law is usually absent from state-centered studies of recent politics and APD.

Legal scholars have given considerable attention to judge-made tort law and its role in economic development (Friedman & Ladinsky 1967, Horwitz 1977, Schwartz 1989). More recently, some have argued that out-of-control judges reshaping American tort law (Huber 1990) or incoherent state institutions combined with new tort principles have begun to stifle industry through unpredictability and the possibility, even if small, of massive awards (Kagan 2001). Of particular interest to the sociology of the state is that the allowance of punitive damages, even if rare, can have powerful impacts on industry, thus adding a new legal dimension to state autonomy debates. Vogel's (1986) study of environmental regulation shows that Britain's style, less adversarial and rigid than the American, is rooted in the common law principle of the duty of care rather than command-and-control regulations as in the United States, where the common law approach was jettisoned by the 1960s.

Without engaging historical institutionalism, legal scholars have begun to draw connections between the American exceptionalism of unpredictable tort law and the American exceptionalism of no European-style welfare state. Tort law in the United States is unique in many respects, including the use of juries, the allowance of contingency fees for lawyers, and the awarding of punitive damages. Some legal scholars have noted that tort law may be playing such expansive roles in the United States because of the lack of universal health care; injured persons have incentives to litigate that do not exist in other states. Tort law is supposed to fill the gaps left by the incompleteness of America's health and other policies—an alternative to social or health insurance (Litan et al. 1988, Litan & Winston 1988, Kagan 2001). Another possibility reverses the causal arrow: Rather than the lack of welfare state leading to tort litigation, tort litigation may be leading to the lack of a welfare state. The tort option may siphon off some of the pressure that would otherwise push for universal health coverage. Although Quadagno (2005) devotes some attention to the question of whether HMOs can be sued for denying coverage, the role of tort law in the American health care crisis remains little examined by historical institutionalists.

FROM SOCIOLOGY OF LAW THEORY TO STATE THEORY: UNREALIZED CONTRIBUTIONS?

Theoretical and conceptual advances in the sociology of law/law and society have applicability to understanding the state but have been little explored by either legal scholars or historical institutionalists. These advances reach the intersection of the state with political interest groups or movements, the impacts of the state's legal institutions, and the legal culture of the state.

Legal Mobilization

Although Tocqueville's point that Americans turn political questions into legal questions has made little impact on state-centered political studies, it is the basis for the subfield of legal scholarship on legal mobilization, or the process of translating a want into a right or lawful claim (Zemans 1983). As McCann (1998) notes, this means reconstructing "legal dimensions of inherited social relations" and/or turning "official but ignored legal norms against existing practices." Pedriana (2004, 2006) combines legal mobilization's insights with social movement theory in his finding that law is a master frame that constitutes the grievances, identities, and objectives of challenging groups, or that law can serve as a resource for these struggles. McCann's (1994) study of the struggle for wage equity shows that a legal mobilization strategy could have direct effects (relief for victims of injustice, building precedents for long-term institutional change) and indirect effects (aid in building a movement, getting public support, leverage for other political tactics) that can benefit challenging groups. With a comparative case study design, Epp (1998) (using essentially a resource mobilization framework from social movement theory) shows that the existence of a support structure (consisting of rights advocacy lawyers, rights advocacy organizations, and money) in different state settings best explained whether or not there was a growth of constitutional rights in that state. Ernst's (1995) story of the legal efforts of the American Anti-Boycott Association shows that not only were judges working against unions, but active forces were also committed to using courts against them.

Although not writing in the legal mobilization tradition, Galanter's (1974) celebrated work on the courts as an institution emphasizes the importance of legal mobilization for disadvantaged groups. Courts give advantages to repeat players (typically big business and the government) who can use the courts often, have little riding on any particular case, and can work for incremental change in legal rules. On the other side are one-shotters, or individuals who use the courts rarely at best, have much riding on the case, and cannot hold long-term plans for legal change and social reform. One-shotters, Galanter argues, could in fact gain the advantages of repeat players by becoming repeat players themselves through organization and planned legal reform. Galanter's work has been extended by scholars such as Harris (1999), who showed how lawyers advocating for the poor could effect policy change through legal mobilization, wielding favorable judicial decisions

as symbolic resources and negotiating decisions or consent decrees that gave the courts—or assigned the lawyers themselves—significant roles in oversight or implementation of poverty policy.

All this work has clear synergies with historical institutionalist studies of the state. Legal mobilization takes advantage of state fragmentation and courts as access points. The availability of courts as access points, as identified by several scholars already mentioned but especially by those working on social regulation, varies across polities and over time in ways yet to be explained.

Court/Law Effectiveness

Since the work of Sumner (1959), a major focus of legal scholarship has been whether laws can change behavior or, as he put it, whether stateways can change folkways. This question is the essence of state domination as emphasized by Weber—a state's ability to have its commands followed without resort to coercion—and one that is rarely part of state scholarship. Other scholars have focused more clearly on the question of the effectiveness of courts in producing social change or whether they can make good policy. The focus in legal scholarship on the ability of law and courts to bring about social change has clear links with historical institutionalist concepts of state capacity, state fragmentation, and veto and access points.

Sumner (1959) himself argued that law could not change custom, and others followed with similar claims (Massell 1968, Schwartz & Skolnick 1970). But sometimes there is compliance, and key factors influencing compliance are the social organization of enforcement (including risks, costs, and incentives) and the culture of enforcement (or the values attached to the regulated practice) (Zimring & Hawkins 1971). Emphasizing the culture of enforcement, for example, Kagan & Skolnick's (1993) study of the effectiveness of antismoking law points to the moral authority of the law and the redefinition of nonsmoking spaces as a health and rights issue.

Because of the tragic history of race discrimination in the United States, discrimination law has been a major focus of studies of legal and court effectiveness. The field currently holds several contradictory arguments about the effectiveness or impacts of discrimination law, including the propositions that the Civil Rights Act of 1964 and the *Brown v. Board of Education* decision were glorious achievements, that they were tragic events, that they had no effect on the economic situation of African Americans, that they are meant to be a legitimating cover for a racist system, and that the law actually hurts African Americans (Donohue 1998). This lively field will remain unsettled until new and better evidence is available (Sutton 2001).

However, there are other areas where there is less controversy. The impact (as opposed to effectiveness) of discrimination law has been the subject of numerous studies in the area of law and organizations, showing the complex outcomes of discrimination law in the face of legal ambiguity (Edelman & Suchman 1997, Sutton

2001). These include the rapid adoption of structural markers of legal compliance, which entails copying the actions of early adopters (Edelman 1992, Dobbin et al. 1993). Although symbolic compliance is a major theme in this literature, there have also been significant changes in the employer/employee relationship, including the widespread creation of affirmative action or compliance offices within organizations, disciplinary hearings for employees charged with some infraction, grievance procedures, internal labor market mechanisms, and maternity leave policies (Edelman 1990, 1992; Dobbin et al. 1993; Sutton et al. 1994; Sutton & Dobbin 1996; Kelly & Dobbin 1999). The original impetus was the law, but firms developed economic rationales for many of these policies (Dobbin & Sutton 1998, Kelly & Dobbin 2001).

An even larger literature examines the effectiveness and impacts of courts. Rosenberg (1991) took the strong position of saying the courts cannot achieve their objectives because they lack the means to implement their decisions. His argument, though frequently cited, is limited by an exclusive focus on constitutional law decisions, where the court tries to go it alone. Although this strategy would seem flatly to deny the moral or cultural authority of the court (Brigham 1987), it specifically leaves out of the analysis the vastly larger set of cases in which courts expand statutory or common law, as described above.

Feeley & Rubin's (1998) thorough study of judicial policymaking in prison reform recaptures the classical vision of situating state action within its constitutional context. Part of their innovation is to show that the American state structure has drifted far from that outlined in the Constitution. They point out that although judicial remaking of America's prisons is a violation of traditional understandings of federalism, separation of powers, and rule of law, these judge-policymakers were not radicals. "[T]he entire structure of modern government violates these principles" (p. 20), as the purpose of national administration is to create a mini-government that standardizes policy across the nation. In Feeley & Rubin's view, judges were motivated by public morality and were free to act because constitutional constraints had become antiquated and eroded. In contrast to scholars who critique court policymaking capacity, Feeley & Rubin argue that (at least in the prison reform context) courts can competently plan and make policy that has significant impacts.

Others are more critical of the courts' suitability to make policy or capacity to implement their decisions (Horowitz 1977a; Melnick 1983, 1994; McCann 1986; Rabkin 1989). Horowitz (1977a) argues that (among other points) the trial format is a poor one for weighing alternatives and assessing costs, that judges cannot raise and spend tax revenue for their orders, and that they do not properly assess the consequences of their orders. Others build on these critiques. Judges, more than any other government officials, are generalists working on sometimes highly technical issues, without the benefit of specialized staffmembers to aid them (Melnick 1983). They must rely instead on the information gleaned from the adversarial process, which is ill-suited for fact finding [a practice that one legal scholar compared to a surgeon working while someone throws pepper in his eyes (Frank 1950)].

Because they depend on litigants for issues, they cannot plan. Moreover, because of the decentralization of the court system, conflicting rules can last for years (Melnick 1983). The crucial points for theorists of the American state are that a considerable amount of policymaking (good or bad) comes from the courts, the courts make policy whether they are dominated by liberals or conservatives, and their efforts have substantial impact.

As McCann (1999) argues, asking whether courts succeed at their objectives may be the wrong question; any branch or institution of government will have difficulty achieving goals by itself. Instead, as with law, he argues that we should show the effects, rather than the effectiveness, of the courts. In his view, there are two dimensions of court effects. The first is that they affect the strategies of other political actors. This happens in several ways, including, most directly, that courts “act when elected officials won’t” (Frymer 2003), stepping into divisive issues, sometimes removing them from the political agenda (Graber 1993). Courts can also proactively put issues on the agenda, inviting other types of political action. An example is the rise of economic regulation, after the Supreme Court changed its stance on the constitutionality of such laws. Finally, courts through their decisions can give leverage to some arguments or positions, put constraints or limits on others, and stimulate counter-mobilization.

McCann’s second dimension of court effects is that courts have a constitutive power, shaping the way reality is perceived, including social categorizations and statuses of different actors. This includes, for example, American courts’ defining of sexual harassment as a discrimination issue, whereas in France sexual harassment is categorized as criminal violence against women (Saguy 2003). The constitutive power of law is, in the language of historical institutionalism, a path-dependence or policy-feedback effect, as political actors become enmeshed in a prior discourse and set of meanings (Stryker 2003; also see Novak 2002).

Legal Consciousness

Another of the major areas of legal scholarship with important implications for studies of the state is the work on legal consciousness. This research agenda emerged over several decades from several strands of law and society scholarship (Engel 1998, McCann 2006), including studies of how lower classes viewed the legal process and lawyers, legal meanings as perceived by ordinary people (Nader 1969), and legal culture and the links between legal discourse and broader political culture (Friedman 1985). Legal scholars working in critical legal studies, critical race theory, and feminist jurisprudence were important precursors to more recent legal consciousness work through their focus on the ideology of law, false consciousness, and how law reproduces hierarchy in everyday life (Scheppelle 1994). In McCann’s (2006) formulation, the legal consciousness field now typically emphasizes several points, some of which may be very important for understanding the state. First, law saturates social interaction and is a part of everyday life in many ways, often unnoticed. Second, legal consciousness is indeterminate; because legal

systems themselves are hybrids, legal consciousness is fluid and polyvalent, and within each person there can be contradictory legal principles. Third, legal consciousness varies with different social contexts. Fourth, legal consciousness is constitutive in that it shapes our ability to imagine options in action and to choose among them. One exemplar of this tradition is the work of Ewick & Silbey (1998), who identify three states of legal consciousness. These include “before the law,” when people treat law as a transcendent and as structuring reality; “with the law,” when people consider legal institutions as tools for accomplishing other ends or as a game to be played; and “against the law,” when people see law as an adversary to be defeated.

There is much here for sociologists of the state if we consider that actors in the executive and legislative branches have, just like common citizens, a legal consciousness that saturates their interactions. Although legal consciousness may not be neat and is context-dependent, it is nevertheless a factor shaping their legislative, administrative, and executive choices. Indeed, the emphasis on context shaping strategic choice that comes from this literature fits well with historical institutionalism. It only adds a new and important dimension for understanding choices: legality.

This approach has much in common with the approaches to the state used by Katznelson & Prewitt (1979) as well as Milkis (1993, 1999), who situate state actors in their constitutional context (“before the law” in Ewick & Silbey’s formulation), and Milkis’s attention to the legal implications of Roosevelt’s rights-based liberalism, in which rights were intended to shield his policies from partisan attacks (“with the law”). Milkis’s description of the Roosevelt strategy in fact parallels Scheingold’s (1974) formulation of the myth of rights, which encourages legal rather than political mobilization. The most important implication of this research for understanding legislative or executive action may be understanding the constitutional consciousness of these lawmakers. This includes the meanings they perceive in the words of the Constitution and how these meanings structure political conflict (Bybee 1998, Whittington 1999). But using legal consciousness concepts fully would have scholars examine how constitutional or legal consciousness affects what possibilities can even be considered; this would likely vary considerably across time and between states. Understanding legal and constitutional consciousness would have important contributions to understanding state capacity (Pedriana & Stryker 2004) and policy feedbacks or legacies (Pedriana & Stryker 1997), favorite concepts of historical institutionalists.

Another area of research for the understanding of state behavior and development involves intrastate criminal or ethics investigations. This may be the area of study where the gap is greatest between activity in the real political world and attention from academic researchers. Anyone who follows the news in the United States, especially in the last quarter century, knows that the effort, money, and time spent on political investigation are considerable. Although investigation dramatically pits state institutions against each other, there is strikingly little research on the state that seeks to explain corruption investigation. Investigations

are likely crucial in understanding political development, e.g., interrupting Republican domination of the White House in the case of Watergate and limiting Clinton's efforts to claim a new progressivism in the 1990s. Public policies and state development continually founder on the rocks of corruption scandals. With a few exceptions, such as Mayhew's (1991) study of divided government, this topic remains strangely off limits to scholars of the state and law. The legal consciousness of partisan leaders and investigating prosecutors may be a fertile ground for research: When the state attacks itself, do actors use the law instrumentally ("with the law")? Is it simply a partisan tool? How is law used to undermine executive, legislative, or court projects? Does it vary over time and across states, and why does it vary? Are there limits on the use of law for these purposes, and if so what accounts for the limits?

Finally, the richest area of inquiry for understanding the legal consciousness of state actors may be in the area of administration. Legal consciousness would be helpful for studies of implementation, which are no longer as numerous as in the 1970s, although we are possibly seeing a renaissance (Kagan & Axelrad 2000, Kagan 2001). In implementation, law serves as a background constraint and resource of varying importance. Again, there are clear links to state capacity here, which are implicit in some recent work on civil rights law (Blumrosen 1993) and explicit in others (Skrentny 1998a, Pedriana & Stryker 2004). All agency administrators have some conceptions of their founding law that may vary in their expansiveness. From a legal consciousness perspective, this is only possible if the administrators do not see themselves as bound by the letter of the law, but are instead motivated by its mission, a concept used by Amenta and colleagues (1999) but not developed theoretically or linked to legal scholarship. A more direct approach to understanding legal consciousness in the state is suggested by Horowitz (1977b), who examined where government lawyers were housed in the American state, how their tasks were divided, and the effects this had on their orientations and ultimately on how different departments behaved. A similar point is made by Bonastia's (2000, 2006) concept of institutional homes for policies that greatly impact implementation. Golden's (2000) case study of the Civil Rights Division of the Justice Department during the Reagan administration also suggests possibilities of legal consciousness in the state, dramatically revealed in this instance when many of Justice's lawyers actively resisted and many left in the face of the Reagan program, which they saw as outside the spirit or against the law (as one explained, "[Our] ultimate boss is not Reagan. . .but the courts. They set the law" [Golden 2000, p. 91]).

CONCLUSION

As Weber and Tocqueville argued, modern liberal states, especially the American state, are fundamentally legal entities. Founding texts in historical institutionalism and APD emphasized the importance of the legal. Not every aspect of state action

and development has a significant legal component, but much is lost when for some topics or historical periods law and courts are consigned to the sidelines or cast in a purely limiting role.

Scholars would do well to recapture the classical vision of a state constituted by and immersed in law and legality. The American state is a legal state. Scholars can situate political actors in their constitutional contexts and show how they use law and courts to secure political ends. Studying the legal and rights aspects of welfare can open up whole areas of study and show paths not (but almost) taken in the United States. Moving attention beyond the New Deal and into areas of government regulation opens up new areas that both reveal the extent of the state's reach and make intelligible counter-moves by those ideologically opposed to an expansive state.

Studying the growing state role in punitive criminal law can illuminate a chilling development with great political implications. Studying criminal as well as tort law can allow new insights into the American welfare state. Finally, using theories and concepts of legal sociology can offer new windows to view state actions and new understanding of historical institutionalists' theoretical concepts, especially state fragmentation, state capacity, and policy feedbacks.

Although much of this review is directed to scholars of the state, these same points can have force in the sociology of law. Ceding the law's functioning within the state to the fields of political sociology and APD cedes too much. A common project, bringing law to understandings of the state, is true to sociology's classical foundations and can greatly benefit both fields.

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