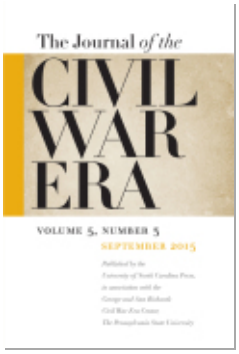
A New Birth of Regulation: The State of the State after the Civil War



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REVIEW ESSAY

A New Birth of Regulation

The State of the State after the Civil War

SUSAN J. PEARSON

When they talk about the years between the Civil War and World War I, historians tell two stories that move on parallel—and largely regional—tracks. The first takes place in the South and centers on civil and political rights and race: it is the story of Reconstruction and Jim Crow. In this narrative, a triumphant, expanded national government emerged from the war and committed itself, through civil rights acts and constitutional amendments, to enforcing free labor, national citizenship, and civil and political equality. Freedmen and women embraced such ideals eagerly and saw both local politics and the national government as critical to the creation of freedom on the ground in the South. However, this was a short-lived phenomenon. The federal government withdrew troops from the South, its commitment to civil and political equality shriveled up, and Democratic state legislatures set about creating de jure segregation and disfranchising the African American electorate. For a federal commitment to civil and political rights, African Americans would have to wait nearly a century.

The second narrative is set in the North and centers on political economy: it is the story of Gilded Age laissez-faire and progressivism. In this story, the end of slavery meant that free labor—and with it, the ideological commitment to both the autonomous individual and to liberty of contract—was now hegemonic. The economic liberalism of the radical Republicans hardened into the laissez-faire ideology of the Gilded Age. As corporate capitalism seized the nation in its grip, a new breed of "liberal" Republicans, claims Eric Foner, "retreated not only from the Civil War's broad assertion of nationalism and egalitarianism, but from democracy itself."[1] This intellectual and political reorientation rested on the belief that individual freedom was expressed in contract, plain and simple. Such reasoning found its apogee in the U.S. Supreme Court's 1905 *Lochner v. New York* decision, which struck down a state law regulating the hours of bakers. For "modern liberalism"—effective regulation, coherent social

provision, and a positive commitment to the state as an instrument—working-class Americans would have to wait until the Progressive Era (if not the New Deal).

In recent years, some historians have attempted to make the parallel tracks intersect. Scholars such as Heather Cox Richardson have reminded us that the same Republicans who were willing to abandon freedpeople to the Democratically-controlled South were doing so as a part of a larger rejection of an activist state. If the government was going to act as the steward of African American civil rights and protect freedpeople from violence and economic injustice, Republicans might also have to admit that the state had a role to play in mitigating the harshest effects of industrial capitalism. And as free labor ideology gelled into liberty of contract, that was not an attractive proposition.[2] From this perspective, the two main narratives intersect at their declensionist endpoint. Between *Lochner* and the federal government's blind eye toward the ostensibly race-neutral laws that disfranchised black male voters in the South and segregated public accommodations, the liberal commitment to individual rights and equal protection were, by the end of the nineteenth century, formal rather than substantive and allowed little positive role for the state in redressing the realities of white supremacy and class inequality. However much the waging of the war and its aftermath might have amplified the American state, such narratives portray these changes as temporary and tepid—both Reconstruction and regulatory legislation foundered on the same shoal: laissez-faire.

But uniting the racial and class politics of the late nineteenth century under the banner of laissez-faire obscures as much as it explains. For one thing, it allows us to ignore the tremendous flurry of state activity that followed on the heels of the Civil War. During the last third of the nineteenth century, local governments established health and safety standards in building construction, created municipal health organizations, installed sewer systems, and increased public ownership of utilities. And state legislatures were even busier. Not only did they continue their long-standing practice of promoting the development of infrastructure such as roads and railroads, manufacturing, and agriculture, but most also began to regulate the conduct of business. States enacted laws ensuring the purity of foods, liquors, and medicines; promoting or requiring vaccination; establishing minimum requirements for certain professions (such as teaching, medicine, pharmacy, dentistry, and law); requiring public inspection of the accounts of banks, insurance companies, mutual aid organizations, and railroad companies; and prohibiting monopolies. States also tackled the "labor question," mandating inspection of factories,

regulating wages and work contracts, and restricting the working hours and conditions of children, women, and, in some cases, men. Before 1897, state legislatures passed more than sixteen hundred laws regulating the terms of labor.[3] State courts upheld the vast majority of regulatory and protective legislation.[4] As the courts recognized, under their police powers, states and the federal government had the authority to enact regulations so long as they could be justified as necessary to protect the public's health and welfare. The manifold regulations enacted under the police power both sprang from and spawned the institutional growth of municipal and state governments, increasing their size, power, and bureaucratic complexity.

We need, therefore, to develop a more complex story of governance in the postbellum years. This essay will argue that we should characterize the years after the Civil War as a period of statebuilding. A federal administrative state is widely considered both a hallmark of "modern" liberalism in the United States and a product of twentieth-century reforms initiated by Progressives and continued in the social programs of the New Deal years and beyond. Most historical accounts that identify statebuilding with social welfare provision focus on the federal government because they are implicitly built on a comparison between the United States and the "advanced" social democracies of Western Europe.[5] But like the interpretive lens of laissez-faire, such narratives prevent us from seeing that between 1865 and 1900 state regulation expanded dramatically and a language of "protection" was used to justify the expansion of state power at all levels. Indeed, a considerable cluster of recent scholarship demonstrates that politicians and organized citizens alike vigorously urged the federal government and the states to pursue policies that, far from distinguishing between public and private interests in the name of laissez-faire, reached deep into the most intimate spheres of social and personal life in order to shape a social order organized around Protestant morals and hierarchies of race and gender. If we turn our eyes from the arenas usually privileged in stories of statebuilding—social welfare provision and labor regulations—and look to the regulation of morals, sexuality, marriage, and race relations, then the postbellum years appear as an era of expanded government. Often these efforts blurred the lines between public and private authority as organized interest groups assumed enforcement powers and extended the reach of government beyond its official bureaucracies or officers. During these years, statebuilders traversed the scales of government from the states to the federal government and built a state based less on equal protection or individual rights than on police powers.

■ For moral reformers, the years after Appomattox were a boom time. Previous generations of historians have discussed both ante- and postbellum moral reform in terms of social control or as an expression of women's organizational and political power, but more recent scholarship makes it clear that we should consider crusaders against vice, obscenity, drink, and gambling as statebuilders. In *Moral Reconstruction*, Gaines Foster makes a powerful case that postbellum moral reformers "campaigned to expand the moral powers of the federal government and to establish the religious authority of the state." Their efforts are an important part of "the reconstruction of the American state in the years between the Civil War and World War I." Well past the death of Reconstruction, moral reformers in the United States clung to the idea that the Civil War had been a grand demonstration of the power of coercive government action to purge the nation of sin. For such men and women, the lesson of the war had less to do with the triumph of freedom and individual rights over slavery and subjection than with the triumph of morality over sin. Opponents of alcohol, gambling, Sunday mail delivery, and obscenity began to seek federal legislation as early as the late 1860s and early 1870s. Inspired by the Thirteenth Amendment's use of federal power to abolish an odious institution that had been a creature of state law, reformers sought to overturn the assumption that morals legislation was solely within the purview of the states.[6]

For temperance advocates in particular, the example of federal action proved appealing. Founded in 1865, the National Temperance Society (NTS) began in 1869 to lobby Congress to prohibit the sale of alcohol in the District of Columbia and establish a federal commission to investigate the liquor trade. Both proposals failed to gain much traction in Congress, but the NTS's efforts did succeed in placing federal prohibition legislation high on the priority list of temperance organizations. When the Women's Christian Temperance Union (WCTU) held its first convention in 1874, it resolved, like the NTS, to prevail upon Congress to use federal power to investigate and prohibit the liquor trade. Frances Willard, the WCTU's leader, was an unabashed advocate of using the power of government—at the federal, state, and local levels—to enforce moral behavior upon those for whom suasion was ineffective. Willard's commitments were institutionalized in the WCTU's legislative department and its decision, in the 1880s, to install a full-time lobbyist in Washington, D.C., to advocate for the organization's causes: prohibition in the District of Columbia, mandatory temperance education in schools, and a prohibition amendment to the Constitution. As Margaret Dye Ellis, the WCTU's Washington lobbyist

beginning in the 1890s explained, "We found that there must be law back of sentiment."[7]

Though national prohibition was not achieved for decades, temperance advocates were quite successful in achieving legislation at the state and local level. By 1902, every state had a law mandating temperance education in school; many states extracted heavy taxes from liquor sellers, forbade the sale of alcohol to minors, created state-owned liquor stores, gave towns and cities a "local option" to pursue liquor prohibition or regulation, forbade the sale of liquor in rooms where music was played, and more. "Everywhere," Morton Keller observes, "statutory regulations abounded." And courts, it is worth noting, were sympathetic to such regulations.[8] For temperance forces, the Civil War had transformed the nation-state in permanent ways. Indeed, they lobbied hard and with eventual success to make certain that federal power over sin was written into law.

The willingness of temperance advocates to target the federal government not simply for total prohibition, their ultimate goal, but also for incremental measures such as temperance education, a congressional investigative commission, or geographically bounded prohibition in D.C. is evidence that moral reformers were adopting a new approach to the law and to state power in the postbellum years. Reformers were more willing to turn to government to effect moral change not only because of the inspiring example of the Civil War, but also because they began to adopt what Ann-Marie Szymanski calls a "pragmatic conception of the law," a belief that they could use law incrementally to achieve partial rather than total victory. According to Massachusetts prohibitionist L. Edwin Dudley, "every law on the statute books which tends to suppress or repress the liquor traffic is a weapon in the hands of the forces of reform, which, if used will hasten the day of permanent victory." As Dudley's assertion suggests, not only did "drys" view the state with increasing interest, but they also saw the law as a tool they could manipulate with their own "hands." Temperance advocates employed this conception not only at the national level but also in states and municipalities, where they focused both on winning legislation to restrict the liquor trade and on law enforcement. In the late 1870s and 1880s, state and local branches of the Citizens Law and Order League (CLOL) gathered evidence to compel state prosecution of saloons that operated illegally under existing laws. CLOL branches also exploited state legislation that permitted suits for civil damage when individuals were harmed by the illegal sale of alcohol to minors and "inebriates." In some states, they even obtained state charters of incorporation that delegated them police powers to make arrests of those in violation of state liquor laws. Between the end of the Civil War and the turn of the

twentieth century, temperance advocates promoted the idea that government at all levels should regulate both morality and commerce. To this end, they sought not just new legislation but the effective use of state enforcement power to shape a well-ordered, moral polity.[9]

The same was true of those men and women who labored to suppress the distribution of what they deemed "obscenity." Inspired by the U.S. Post Office's wartime efforts to stem the tide of obscene material in army camps, post–Civil War reformers continued to see the government as an ally in moral purification. The most famous example of the alliance between purity reform and government is, of course, Anthony Comstock's vigorous enforcement of the so-called Comstock Law of 1873. Using its power over the postal service, Congress banned the use of the U.S. mails to distribute obscene materials, including information about birth control and abortion. Funded in his efforts by the New York Society for the Suppression of Vice (NYSSV), Comstock was appointed as a special postmaster to enforce the new laws.[10] And though some historians have considered the efforts of Comstock and the SSVs as a privatization of public authority, anti-vice crusaders were similar to temperance forces in combining public and private authority and steering their efforts toward law enforcement.[11]

SSVs in many states succeeded in persuading legislatures to enact "Little Comstock Acts" that outlawed the sale (and not just the distribution through the mails) of contraceptives and obscene literature. Some states went further. Kansas forbade newspapers from featuring stories of illicit relationships; Michigan told its citizens they could not use "obscene or immoral language" near women and children. In 1883, the WCTU created a Department for the Suppression of Impure Literature. As Alison Parker argues, the WCTU's antiobscenity stance was part of the organization's commitment to "reform programs that required governmental intervention at the national as well as the state, municipal, and county level." Working with a broad alliance of organizations, the WCTU successfully lobbied many state legislatures to pass laws regulating the sale of "pernicious literature" such as the sensational *Police Gazette*. As in the case of temperance, local WCTUs often took it upon themselves to monitor whether laws were enforced and made routine visits to shops to check up on what magazines and other "literature" were for sale. Thus while it is tempting to view Comstock as an extremist and an outlier, the proliferation of antiobscenity laws suggests otherwise. Indeed, government-sponsored censorship enjoyed wide popular support among middle-class Americans. Courts too reacted favorably to obscenity regulations and, as they did in the case of temperance restrictions, upheld them when they were challenged.[12]

All of this suggests that not only public opinion but also city councils, state legislatures, the U.S. Congress, state courts, and the U.S. Supreme Court were receptive to regulatory legislation in the years between the Civil War and the turn of the century—at least when it came to the regulation of morals. In part, this can be understood as an extension of the old commonwealth tradition described by William Novak in his classic *The People's Welfare:* the use of the state to circumscribe private interests to create a well-regulated society. But morals regulation after the Civil War was also different; it was pursued by organized interest groups, it viewed the federal government as an important (though not the exclusive) arena for regulatory action, and it was focused on not only securing new legislation but also extending the reach of the state through hybrid public-private law-enforcement efforts. Normally, when historians tell the story of the state in the postbellum years, they concentrate on the fate of civil rights and labor legislation and see a state and a judiciary committed to drawing a bright line to distinguish public interests from private (business) interests. By contrast, morals regulation advanced social order rather than civil or political rights; it was abundant, popular, and constitutionally supported, and it helped to increase the power and capacity of government at all levels.

■ Imbibing drink and obscenity were not the only forms of personal behavior touched by legislative regulation in the postbellum years. A growing body of scholarship focuses on how Congress used its powers to regulate marriage during the 1860s and after by promoting the institution among former slaves, suppressing polygamy among Mormons, and allotting tribal land among Native Americans west of the Mississippi. Julie Novkov argues that these campaigns were part of a singular project that "reconfigured the national state's posture toward the legal regulation of private individuals' lives, and established a national-state interest in families and their construction as civic institutions."[13] The widespread scholarly attention to marriage is part of a growing tendency to analyze it as, in the words of Peggy Pascoe, "an institution of singular importance to the state." Both state and federal government regulation of marriage are part of the story of state-building in the United States not only because marriage is a major topic of public policy but also because marriage regulation is used to "do the work of the state," to define citizenship and inclusion or exclusion from the polity.[14]

Among the benefits of ending slavery, many Republican congressmen believed, was that freedmen would now secure, in the words of one senator, "the hallowed family relations of husband and wife." Like the ability to

contract for work, freedom meant the ability to contract for marriage, and yet it also entailed what Priscilla Yamin calls "a new regulatory relationship to the state." Indeed, even as Congress was debating the Thirteenth Amendment, it also passed a measure granting freedom to the wives of all former slaves who had enlisted in the Union army. As soon as the Union army established contraband camps to house the thousands of men, women, and children who fled slavery during the Civil War, officers developed marriage rules for the camps and required men and women who wished to live together to have their relationships solemnized. This kind of marriage promotion continued under the Freedmen's Bureau. Just as Bureau agents sought to educate freedpeople about free labor and to impress upon them the duty to work, so too did they believe they must encourage freedmen and -women to marry. Beginning in 1865, Bureau officials issued rules for marriage, performed marriage ceremonies, refused to allow unmarried men and women to live together, adjudicated disputes when a man or woman was claimed by more than one spouse, proselytized about the benefits of marriage, and brought unmarried cohabitators to the attention of local law enforcement, who might arrest them on charges of adultery. Bureau agents believed they were supplying a new moral foundation to the lives of former slaves, but they linked this to a gendered conception of citizenship. Marriage made freedmen free not only because it expressed the right to make contracts but also because it established the freedman as the head of a household—as such he could not only exercise political rights but was also obligated to support his dependents. Southern legislatures, eager to relieve themselves of the burden of caring for freedpeople by enforcing familial obligations, adopted the Freedman's Bureau's coercive pro-marriage stance. While state regulation of marriage was hardly novel, new southern statutes included provisions that gave former slaves strict time frames within which to marry or face criminal charges of illegal cohabitation, adultery, or fornication.[15]

Southern states also used police powers to construct race itself. Miscegenation law provided an important heuristic for this process. Though many states had criminalized interracial sex and, in some cases, interracial marriage, before the Civil War, after the end of slavery southern legislatures wrote new, harsher codes against interracial marriage and stepped up their prosecution of such "crimes." As Peggy Pascoe argues, post–Civil War miscegenation laws were not so much a denial of rights based on race as "a kind of legal factory for the defining, producing, and reproducing of the racial categories of the state."[16] Litigants challenged such laws as a denial of equal protection, but courts upheld the laws as a valid exercise of the police powers of the state. On one hand, the rise of

miscegenation and other race-based laws in the postbellum South appears as an absence of the state—in particular the absence of federal guarantees of equal protection. But on the other, as Pascoe interprets such laws, they are evidence of the efflorescence of the "protective" state that produced its subjects through regulation.[17] By encouraging intraracial marriage and punishing interracial sex and cohabitation, both the federal government, through the Freedmen's Bureau, and the states, through miscegenation laws, used marriage policy to construct a racially divided and stratified postbellum polity.

Even as the federal government was urging freedpeople to marry, it was waging war against Mormon polygamy in the Utah territory. Federal efforts to promote marriage among former slaves and to insist on Mormon monogamy were joined by a civilizational rhetoric. Monogamous marriage was a lynchpin of civilization and social order; as such, it was within the purview of the state to regulate. Indeed, the Republican Party platform of 1860 had identified slavery and polygamy as "twin relics of barbarism" that must be overthrown. Before the Civil War, the congressional regulation of both slavery and polygamy were stymied by southern politicians who argued that Congress had no power to interfere with "domestic" institutions, even in the federal territories. The 1862 Morrill Act had made bigamy a federal crime, but the legislation went unenforced. Congress tried to address the problems in 1874 with the Poland Act, which sought to bypass territorial law enforcement by allowing federal courts to try federal crimes and changing the rules for jury selection. With such favorable terms, federal prosecutors successfully prosecuted several polygamists. Because Mormons believed that plural marriage was a divinely sanctioned religious duty, the Church challenged the prohibition of polygamy on First Amendment grounds. In its 1879 decision in *Reynolds v. the United States*, however, the U.S. Supreme Court rejected the argument of religious freedom, declaring, "It is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." Congress could not prohibit religious belief, the Court held, but it could act to restrain religious rites—whether plural marriage or cannibalism—that would undermine the foundations of social and political order.[18] In the words of Sarah Barringer Gordon, the federal campaign in Utah was a "second reconstruction."[19] In the first Reconstruction, the U.S. government had substituted a regime of free labor for the "half slave, half free" nation and made contract the hegemonic model of social relations; in the second, it made monogamy and legal marriage the single standard for family life in the United States.

As the case of the Mormons makes clear, the federal government was not reluctant to deploy its power to win the West. What scholars have too rarely recognized is how far this went beyond military acquisition of territory, assertions of federal sovereignty, or even management of land. Regulation of marriage and the reshaping of Native American gender relations were also part of conquest. It should hardly surprise us that Indian policy was a major arena for the expression of federal power after the Civil War, since, as Stephen J. Rockwell has recently argued, the management of territorial expansion formed the core of the administrative structure of the nation-state throughout the nineteenth century.[20] Though the practice of allotting land held by Indian tribes has often been regarded as a simple land grab in response to the pressures of white settlement, Rose Stremlau has demonstrated that the Indian agents, reformers, and congressmen who advocated allotment and shepherded the 1887 Dawes Act through Congress were as concerned with reshaping Indian gender roles as they were with reconfiguring land tenure. For them, "the allotment debates were not about land; they were about the kinds of societies created by different systems of property ownership." In the view of allotment's advocates, communal land ownership supported tribalism, weak-to-nonexistent marital ties, female-headed households, and encouraged laziness and infidelity in men. By allotting tribal land and turning Indians into property owners, proponents of the Dawes Act hoped that they would reorder Indian gender roles and marital customs. Indian men would become property-owning heads of household; they, not their wives, would till the soil; they, not their wives, would transmit property. Indian women, by contrast, would be "free" to act as wives and mothers.[21] Just as was the case with the federal government's encouragement of freedpeople's marriages, in the case of allotment, reform of gender roles and the promotion of marriage were linked to readiness for citizenship and, not coincidentally, had the benefit of relieving the government of the duty to materially support Indian men and their dependents.

■ The multipronged use of federal and state power to shape morality and marriage demonstrates how the laissez-faire story occludes the government's pervasive willingness to use law to structure social relations. What is more, even as the Supreme Court was inching toward its anti-protective-labor-legislation decision in *Lochner*, legislatures and courts across the United States were only too happy to use their power to offer protection to women, children, and other dependent classes. Historians have noted that courts often upheld protective labor legislation for women and children, even as they struck it down when it applied to able-bodied white men, but

they have viewed these as the exception to the *Lochner*-era rule. In vast arenas of politics, legislation, and discourse, however, "protection" was the byword. Indeed, many of the regulations I have already described were made in the name of protection. The WCTU claimed it acted for "home protection," while censorship of obscenity was designed to protect children from moral corruption; ending polygamy would protect plural wives, the victims of Mormon men's lust, while allotment would protect Native Americans from the depredations of tribal life and give Native children the protection of nuclear families. Clearly, protection could shade into paternalism and provide cover for coercive policies. But the postbellum recourse to the language of protection was also a part of what John Fabian Witt calls a "crisis of free labor" that, strangely, accompanied its triumph.[22] Even as northern victory in the Civil War spelled the hegemony of free labor, the emergence of corporate capitalism and heavy industrialization undermined the structural conditions that supported its ideals. As freedom shrank to self-ownership in a wage-labor economy, antebellum ideals of independence, individualism, and autonomy were under attack. Recent scholarship demonstrates that, in its pervasiveness, the language of protection was not merely an alternative, or a supplement, to liberal individualism but a fundamentally transformative force.

As the Civil War ended, it became apparent that a new relationship between rights and protection was being forged. Republican politicians and Freedmen's Bureau agents believed freedpeople should be granted civil rights but also that they were too vulnerable to exercise those rights—in other words, freedom would require protection. So Freedmen's Bureau agents stepped into contract negotiations between landowners and black laborers across the South, creating a complex legal relationship in which the formally free parties to a contract were often represented by another party. Such arrangements departed from the "standard legal model of the arms-length agreement between self interested and independent agents," and when such triangular contacts made their way into southern courtrooms, jurists struggled to determine whether Freedmen's Bureau agents were legitimate parties to the negotiations. In a case that reached the Tennessee Supreme Court, the court found that the bureau agent who filed the suit as a legal "next friend" to the plaintiffs was acting within the bounds of the law. Though the former slaves in the case were "under no disability to sue" and had, in fact, full legal rights, they "belong[ed] to a race which have but recently been emancipated from slavery" and thus could not fully understand "the complicated relations of business life."[23] The decision suggests the complex tangle of rights and protection created by the postwar situation. Whether they attributed the need for protection to

the depredations of slavery, the greed of former plantation owners, or the inherent disabilities of race, both northern and southern whites assumed that former bondmen could not exercise their rights without assistance from the agency granting those rights: the federal government.

The intercession of the Freedmen's Bureau and the acquiescence of some southern courts to such protective intervention were not the result of simple paternalism or racist assumptions about the incapacity of African Americans. Instead they were part of a politics of dependence that Gregory Downs calls "patronalism." Surveying the politics of North Carolina between the Civil War and the turn of the century, Downs finds a persistent "vernacular vocabulary of dependence." North Carolinians, black and white, appealed to authorities—from the local Freedmen's Bureau agent all the way up to the governor—in letters and petitions. In these, they presented themselves not as citizens seeking recognition of their rights but as humble dependents in need of protection or favor from a powerful friend. They viewed their rights, and the recognition of those rights, not in abstract but in highly personal and intensely local terms. The state was not distant but embodied in the person who could deliver food, protection from violence, a job. Rather than viewing this as the persistence of an ancient politics, Downs argues that we should see patronalism as the product of the Civil War. The war not only created a vacuum of power that left many desperate but it transferred "many previously private obligations onto the state" and "trained people to believe government could and would intervene in all sorts of intimate arrangements." And though much about the personalistic, protective politics of patronalism was undone by Progressive reformers who sought to usher in a modern, rational liberal state, Downs argues that patronalism was a "moment . . . in the development of liberal politics" because it was a way of voicing and responding to people's increased expectation that the state could, and should, play a role in managing the most basic features of human life. "American liberalism," he writes, "was not inherently as programmatic, individualistic, or expert-driven as both its celebrators and its critics have claimed."[24]

Protectionist policies ranged far beyond the turbulent South in the postwar years. As Barbara Welke argued in *Recasting Liberty*, the "railroad revolution" fundamentally changed "the conditions of individual liberty" in the late nineteenth century and forced ordinary Americans, and the courts, to recognize "that modern life had made Americans something less than 'free men.'" Increasing mechanization, especially the emergence of new technologies of labor and transportation, was a harbinger not simply of modernization or progress but also accident and injury on an unprecedented scale. Injuries sustained by workers and by railroad and streetcar

passengers were accompanied by a flood of personal-injury lawsuits in which men and women told courts of grievous pain and bodily damage. Initially, courts responded by applying common-law doctrines of personal injury, which had often assigned liability and responsibility to the injured party. But the tide of injury lawsuits from 1870 forward prompted new legislative and regulatory regimes to prevent and compensate accidents and also created new understandings of personal responsibility, liberty, and independence.

As Welke demonstrates, the new legal rules that increased corporate responsibility for injury were initially crafted in response to female litigants, who, as women, were less likely than men to be expected to assume responsibility for themselves. Eventually, however, rules made for women were applied to men as litigants, courts, and state agencies designed to regulate modern industries came to believe that modern liberty entailed not autonomy but protection. In short, Americans came to realize that "dependence rather than autonomy was a hallmark of modern life," and they came to expect their wounds would be both publicly recognized and compensated. When one railroad company executive protested that new tort laws "reduced all individuals to the level of prattling babe," he recognized a simple truth. In an interdependent world, the meanings of liberal keywords would have to change. So too might the model citizen. No longer the independent man of free-labor mythology, the paradigmatic American might as easily be helpless and dependent, like a woman.[25]

Post–Civil War claims of powerlessness and suffering—and pleas for protection—helped create the foundation for the twentieth-century state. In *The Sympathetic State*, Michelle Landis Dauber demonstrates that beginning in 1789 Congress used its power to tax and appropriate under the Constitution's general welfare clause (which granted the federal government police powers) to provide relief for victims of disaster. Though disaster relief began with the provision of individual relief through individual bills, by 1825 Congress was already crafting general relief bills that applied to all victims of a particular catastrophe, such as a fire or flood in a particular location. Between 1860 and 1930, Congress provided disaster relief more than ninety separate times, roughly twice as many times as it had between 1789 and 1860. "Rather than a state defined by rugged individualism or the free play of market forces," Dauber writes, "we can glimpse instead the emergence of a state based on a deeply popular and settled practice of redistribution to those in need 'through no fault of their own.'"[26]

By the eve of the Civil War, federal disaster relief was a well-established practice, and its provision followed a well-worn formula: recipients of relief

had to show that they bore no responsibility for their destitution and need, that it was the result of a powerful, external force. The formula was restrictive, but it was also flexible. Republicans justified the Freedmen's Bureau, for example, as a form of disaster relief. To congressional Democrats who argued that the power to care for the destitute was reserved for the states, and thus that a federal relief bureau had no constitutional basis, Republicans argued that the federal government had never failed to use its power to provide for the general welfare to aid a "helpless population that must starve and die but for its care." Following the Civil War, the idea that Congress could appropriate funds under the general welfare clause became orthodox in law schools and courts throughout the United States. The task required to build the "modern" welfare state was, then, not to overturn the laissez-faire constitutionalism of the late-nineteenth century and find new foundations upon which to lay regulation and redistribution, but instead, to craft a social or economic problem as a "disaster" like a flood, a fire, or a tornado.[27]

■ The example of federal disaster aid is a powerful, but by no means atypical, example of an interventionist postwar state acting in the name of protection. Considered alongside the federal and state ordering of marriage and the proliferation of morals regulations, a different picture of states, the federal government, and of the courts begins to emerge. Barbara Welke has recently argued that though historians usually depict the birth of the administrative state as a response to industrialization and point to the Interstate Commerce Commission (ICC) as the first regulatory agency, it makes more sense to locate the origins of the administrative state in erecting what she terms the "borders of belonging." Most state policy and most regulation served to define the limits of citizenship and reinforce the power and privilege of white, able-bodied men. "In the nineteenth century," she writes, "Americans embraced the apparatus and enforcement mechanisms that characterized the modern administrative state as tools in defense of the borders of belonging." Dispossession of Native Americans created the Indian Office, one of the first federal administrative agencies; the Fugitive Slave Act created some of the first administrative courts; the Freedmen's Bureau was the first federal "welfare" agency; provision of veterans benefits created the template for the gendered welfare state and its control and surveillance of women's sexuality; states and the federal government used the criminalization of abortion, obscenity, interracial marriage, Chinese immigration, and certain kinds of labor to manage and define the polyglot polity in ways that created advantage for some and exclusion for others. For Welke, the state's creation of ascriptive hierarchies was the object

rather than the byproduct of regulation. Viewed through this lens, the nineteenth-century state was robust, not weak.[28]

Welke argues for continuity across the nineteenth century and does not think the Civil War fundamentally changed how the state functioned in the United States. I agree with her claim that we need to look beyond political economy for the "state," but I am arguing that the Civil War made a difference. The "new birth of freedom" that Abraham Lincoln promised brought with it a new birth of regulation. Under the common law, municipalities and states had long used police powers to make rules governing public safety, markets, public conveyances, morals, and public health. Rather than destroying this "commonwealth tradition" and replacing it with a regime of individual rights, equal protection, and national citizenship, the Civil War amplified the role of police powers and regulation in ordering the citizenry.[29] This was in part because the war gave inspiration to moral reformers who saw the abolition of slavery as an example of how the government could be used to combat sin. It was in part a reaction to industrialization, reformers' response to which not only generated thousands of laws but also began to chip away at the antebellum ideal of the "free man" and to craft a discourse of dependence and protection. The growth of an elaborate regime of legalized racial segregation in the South can also be understood in this context; white southerners generated hundreds of laws, hoping to construct a new racial order in the wake of slavery.

Laissez-faire was, if anything, honored in the breach. As the English student of American politics James Bryce commented in his 1888 *American Commonwealth*, Americans liked the idea of freedom more than its practice. In the late nineteenth century, he argued, Americans were "eager for state interference" and passed legislation "tending not only to lengthen the arms of government, but to make its touch quicker and firmer."[30] As we seek to understand how the end of slavery, the death of Reconstruction, and the birth of Jim Crow intersected with the path of the industrializing North and the incorporation of the West, it is time that we attend carefully to those lengthening arms: where they reach, whom they touch, how firmly they press.

NOTES

1. Eric Foner, *The Story of American Freedom* (New York: Norton, 1998), 119. For the general narrative of retreat from the nationalism and egalitarianism of the Civil War toward laissez-faire, see David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–1872* (New York: Knopf, 1967); Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Belknap

Press of Harvard University Press, 1977), chap. 5; Richard Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (New York: Cambridge University Press, 1990); Heather Cox Richardson, *To Make Men Free: A History of the Republican Party* (Basic Books, 2014); Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009), chap. 8; Walter Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America*, 6th ed. (New York: Free Press, 1999), chap. 5.

2. Heather Cox Richardson, *The Death of Reconstruction: Race, Labor and Politics in the Post–Civil War North, 1865–1901* (Cambridge, Mass.: Harvard University Press, 2001).

3. For accounts that stress government activism at the state level after the Civil War, see Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1977); William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States, 1865–1900* (Cambridge: Cambridge University Press, 1984); Ballard C. Campbell, *The Growth of American Government: Governance from the Cleveland Era to the Present* (Bloomington: Indiana University Press, 1995); Ballard C. Campbell, "Public Policy and State Government," in *The Gilded Age: Perspectives on the Origins of Modern America*, ed. Charles W. Calhoun (New York: Rowman & Littlefield, 2007), 353–71.

4. Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History* 72 (June 1985): 63–91.

5. William Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (June 2008): 752–72.

6. Gaines M. Foster, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865–1920* (Chapel Hill: University of North Carolina Press, 2002), 4, 6. David Sehat also makes the case that Protestant moral reformers were intertwined with the federal government through the interlocking relationship between the American Missionary Association (AMA) and the Freedmen's Bureau. Members of the AMA saw the end of slavery as an opportunity to bring true Christianity and, with it, moral elevation and the work ethic, to the benighted former slaves. They worked through and with the Bureau, sometimes overlapping directly in personnel. David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011), 111–20.

7. Alison M. Parker, *Purifying America: Women, Cultural Reform, and Pro-Censorship Activism, 1873–1933* (Champaign: University of Illinois Press, 1997), 32.

8. Foster, *Moral Reconstruction,* 30–46; Keller, *Affairs of State,* 513.

9. Ann-Marie Szymanski, "Dry Compulsions: Prohibition and the Creation of State-Level Enforcement Agencies," *Journal of Policy History* 11 (April 1999): 115–46. Dudley quote is from Ann-Marie Szymanski, *Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes* (Durham, N.C.: Duke University Press, 2003), 3–4; See also Alison M. Parker, *Articulating Rights: Nineteenth-Century American Women on Race, Reform, and the State* (DeKalb: Northern Illinois University Press, 2010), 151–58.

10. Foster, *Moral Reconstruction*, 48–54.

11. Timothy J. Gilfoyle makes the privatization claim in *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790–1920* (New York: Norton, 1992), 188–96.

12. Parker, *Purifying America*, 56–65, 6; Keller, *Affairs of State*, 515–16.

13. Julie Novkov, "Making Citizens of Freedmen and Polygamists," in *Statebuilding from the Margins: Between Reconstruction and the New Deal*, ed. Carol Nackenoff and Julie Novkov (Philadelphia: University of Pennsylvania Press, 2014), 34.

14. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009), 23; Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), 2; Priscilla Yamin, *American Marriage: A Political Institution* (Philadelphia: University of Pennsylvania Press, 2012), 5–7, 26. See also Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002).

15. Amy Dru Stanley, "Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights," *American Historical Review* 115 (June 2010): 732–65; Laura Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation," *Law and History Review* 14 (Spring 1996): 81–124; Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Emancipation* (New York: Cambridge University Press, 1998), 139–48; Katherine Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law & Humanities* 11, no. 2 (1999): 251–309; Cott, *Public Vows*, 77–104; Yamin, *American Marriage* 25–36.

16. Pascoe, *What Comes Naturally*, 9.

17. There is some historiographic precedent for the idea that the postbellum racial order should be understood as the product of a positive state rather than as the retreat of state (read: federal) power. This idea is represented most clearly in the work of scholars who identify segregation and disfranchisement as part of the modern, liberal South or, more specifically, of southern progressivism. See, for example, C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974); Jack Temple Kirby, *Darkness at the Dawning: Race and Reform in the Progressive South* (Philadelphia: Lippincott, 1972); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven: Yale University Press, 1974); Grace Elizabeth Hale, *Making Whiteness: The Culture of Segregation in the South, 1890–1940* (New York: Pantheon, 1998); Gregory P. Downs, "University Men, Social Science, and White Supremacy in North Carolina," *Journal of Southern History* 75 (May 2009): 267–304.

18. *Reynolds v. United States*, 1878 U.S. LEXIS 1374

19. Bruce Burgett, "On the Mormon Question: Race, Sex, and Polygamy in the 1850s and the 1990s," *American Quarterly* 57, no. 1 (2005): 75–102; Cott, *Public Vows*, 112–20; Foster, *Moral Reconstruction*, 55–68; Sarah Barringer Gordon, *The Mormon*

Question: Polygamy and Constitutional Conflict in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 2002), 14.

20. Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York: Cambridge University Press, 2010). This is a powerful rebuke to the notion that before the twentieth century the United States had a weak federal state. Rockwell analyzes federal Indian policy and management to demonstrate that civil administration rather than military force was the key to managing U.S. expansion.

21. Rose Stremlau, "To Domesticate and Civilize Wild Indians," *Journal of Family History* 30 (July 2005): 276; Rose Stremlau, *Sustaining the Cherokee Family: Kinship and the Allotment of an Indigenous Nation* (Chapel Hill: University of North Carolina Press, 2011), chap. 3.

22. John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004), 22.

23. Novkov, "Making Citizens," 37–39;

24. Gregory P. Downs, *Declarations of Dependence: The Long Reconstruction of Popular Politics in the South, 1861–1908* (Chapel Hill: University of North Carolina Press, 2011), 1, 4, 6, 11.

25. Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution* (Cambridge: Cambridge University Press, 2001), xi, 43–57, 70, 83–101, 126–36; "Brief of Appellant," quoted in Welke, *Recasting American Liberty*, 121. John Fabian Witt also traces the decline of the ideal free man in the law of workplace accidents; see *Accidental Republic.* See also Susan J. Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (Chicago: University of Chicago Press, 2011).

26. Michele Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (Chicago: University of Chicago Press, 2013), 33-34; Christopher Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to *Lochner*," in *Police and the Liberal State,* ed. Marcus D. Dubber and Mariana Valverde (Stanford, Calif.: Stanford University Press, 2008), 33–53.

27. Dauber, *Sympathetic State*, 39.

28. Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010).

29. Though this essay has focused on the work of statebuilders who sought legislative and policy changes at the state and federal levels, a robust tradition of municipal regulation continued well into the twentieth century. See, for example, Gail Radford, "From Municipal Socialism to Public Authorities: Institutional Factors in the Shaping of American Public Enterprise," *Journal of American History* 90 (December 2003): 863–90.

30. James Bryce, *The American Commonwealth*, 2 vols. (London: Macmillan and Co., 1888), 407, 409.