

I N T R O D U C T I O N

This book reconstructs the history of American government from its democratic, liberal, and federal beginnings in the eighteenth century to the Leviathan it has become in the twenty-first century. The story it tells is one of remarkable growth, innovation, and in the case of the states themselves, survival. It is a story full of contestation and contradiction, paradox and unintended consequence. It is also a story of how, since the 1930s, the federal government's efforts to solve economic, social, and political problems have been repeatedly subject to challenge and censure by Republicans charging that the central state had exceeded its constitutional authority, and with its regulations and prohibitions, threatened the very liberty that Americans fought a revolution to secure. Today the split between Democrats and Republicans about the proper scope of government constitutes a nearly unbridgeable divide. It is the source of many of the country's current discontents and has paralyzed politics at the federal level. It may portend the nation's decline. This book attempts to explain how the United States got to this point.

Unlike most efforts to explain America's troubled state, this one begins not in the twentieth century but at the moment of the country's founding, and it looks at two contradictory principles of governance that have shaped and confounded the deployment of public power ever since. The first principle, woven through the US Constitution, emphasizes the importance of limiting the federal government's reach by carefully enumerating and fragmenting its powers. The Constitution authorized the federal government to

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assume only those duties expressly given to it; unenumerated tasks were left to the states. It also split the power of the federal state among three branches of government—the executive, legislative, and judiciary—and granted individuals rights that no president, Congress, or supreme court would be allowed to abrogate. This determination to limit central government power is best understood as “liberal,” in the classical sense of that term. Those who subscribed to this creed believed that the greatest threat to liberty lay in government tyranny and coercion. It was not enough to throw off the yoke of George III and his imperial British state. Citizens of the new republic had to be vigilant about identifying postindependence efforts to reestablish overbearing central state authority, and to expose and defeat all such efforts. This animus to concentrated federal government power runs like a red thread through the entire history of the nation, from the revolt against Great Britain itself to Andrew Jackson’s attack on the “Monster Bank” in the 1830s to the Tea Party’s assault on “Obamacare” in the 2010s.

The durable nature of this animus makes the second principle of American governance difficult to comprehend, for it gave individual states broad powers to shape public and private life and to engage in precisely the kinds of coercion forbidden to the central government itself. That states are dynamic players in American politics is indisputable. In the twenty-first century, states have vigorously pushed agendas on an array of issues, including immigration, gay marriage, the minimum wage, abortion, marijuana, global warming, and the right of public workers to organize. This activity, it turns out, is but a faint echo of the vast power that once inhered in these miniature Leviathans.

Consider these actions in which states engaged from the late eighteenth century to the mid-twentieth century. From the 1780s to 1860s, southern states stripped Africans and their descendants of legal and human rights; from the 1890s to 1950s, these same states denied African American citizens access to residential areas, jobs, parks, restaurants, water fountains, and toilets marked as white. In the early twentieth century, western states denied East Asian immigrants the right to own land. Various states denied people of all colors the opportunity to drink. Countless state laws regulated

sexual behavior, forbade homosexual sex and many forms of contraception, and outlawed literature judged to be obscene, most famously James Joyce's *Ulysses*. As many as half the states forbade marriage across the color line. So-called blue laws ordered the closing of stores and the shutting down of commerce on the Sabbath. As late as 1928, Massachusetts was using a 1640 blasphemy statute to prosecute individuals who had allegedly taken the name of Jesus Christ in vain. So much for free speech in the place where the American Revolution began and that had always considered itself the cradle of American liberty.¹

Why were these violations of free speech and other rights allowed to stand in a society in which the Bill of Rights had been part of the Constitution since 1791? As it turns out, state governments were largely exempt from having to observe the federal Bill of Rights from the early years of the republic until the middle decades of the twentieth century. This was the First Congress' intent. James Madison was almost alone in foreseeing that the federal Bill of Rights would be compromised if it offered citizens no protection against the tyranny of their state governments. States adopted their own bills of rights, but some of these documents were poorly crafted, and too easy to amend and violate. As a consequence, democratic voting majorities in the states working through their legislatures could intervene in and regulate the lives of citizens far more systematically than could the federal government itself, and many such legislatures proceeded to do so across multiple realms—economic, cultural, and moral.

States thus operated not in line with classical liberalism but according to the principle of “police power” that jurists set forth in the early nineteenth century. This power was grounded in an eighteenth-century British doctrine known as the “public police,” which endowed the king with the authority and duty to look after the good and welfare of his subjects. Even as the American revolutionaries jettisoned kingship, they imported this royalist doctrine into state constitutions and state legislatures, thereby giving states a broad scope of action. Nineteenth-century judges made this linkage explicit, which explains the closeness in nomenclature between the American “police power” and the British “public police.” Those

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who noticed this continuity were by and large untroubled by it. State legislatures, in their eyes, were nothing like the British Crown, for they expressed the democratic will of the people in ways that a monarchy governing by divine right never could. And the people, as a rule, would not use the democratic forum made available by state legislatures to tyrannize themselves. It was therefore acceptable for these state legislatures to wield power as broad as that exercised by the British Crown. Many Americans were blind to, or chose not to see, the coercion inherent in state governments that made too little provision for protecting the rights of minorities from the will of the majority.

That jurists in a polity consecrated to liberty would sanction an intrusive theory of rule and call it “the police power” is indicative of the paradoxes of governance in America. Liberty and coercion were bound together from the earliest days of the republic. Today, the police power doctrine is much weaker than it once was and largely unknown beyond legal circles. Many who argue for getting the federal government off their backs don’t think much about what the consequences of restoring power to the states might be. Or they are surprisingly comfortable taking a libertarian stand with regard to federal government policies while supporting initiatives in their states that are plainly coercive in intent and effect. These latter initiatives have included mandating prayer in public schools, outlawing Sharia (the code by which observant Muslims live), designating homosexual sex as sodomy, denying gays the right to marry, and stripping women of their reproductive freedom. Those who have supported these campaigns while simultaneously taking strong stances against the exercise of federal government power in all its forms are living exemplars of how easily attitudes toward liberty and coercion still cohabit in the minds of single individuals. This cohabitation runs so deep and is so widespread that it deserves to be regarded as a core element of the American way. This book seeks not only to make sense of this phenomenon but also to trace its roots back to the founding of the republic. In the process, it tracks the history of the states’ police power, from its emergence in the early nineteenth century through its remarkable resurrection after the Civil War to the all-out assault on it during the fiery 1960s.²

The story of the scope and durability of the power wielded by the states remains largely unknown. The story of how America's central state shed its roots as a government limited in its power and became today's Leviathan is more familiar but not well enough understood. Scholars tend to tell this story through the high-profile reform movements that sought to turn the federal government into a highly centralized, administratively capacious, and redistributionist instrument of reform. Those who led these efforts, including presidents Theodore Roosevelt, Woodrow Wilson, Franklin Delano Roosevelt, and Lyndon Baines Johnson, occupy outsize roles in American history, as do the programs of comprehensive reform with which their names became associated: the Square Deal, Progressivism, the New Deal, and the Great Society. What sometimes gets lost in underscoring the transformative influence of these individuals and their reform programs is this: that ambitious central state-building dreams often depended, for enduring success, on strategies to legally expand the capacity and power of the American central state beyond its constitutionally imposed limits. As a result, the ability to improvise often became as important to central state-building efforts as the ability to find and implement the right master plan. Indeed, this book argues that an emphasis on improvisation rather than transformation provides a better guide to understanding the manner in which the US central state grew as well as the techniques that Congress and the president employed to meet the nation's governing challenges.

Three strategies in particular powered the improvisational central state-building project in the United States: *exemption*, *surrogacy*, and *privatization*. Exemption entailed turning to the courts for permission to exempt certain central state activities from constitutional constraints. Activities of this sort, if they were carefully delimited in space and time, would strengthen the federal government's ability to pursue important objectives without formally compromising its liberal character. These activities involved either matters defined as beyond the polity's formal borders (war, international trade, colonial administration, and immigration) and thus judged beyond the Constitution's reach, or domestic emergencies, in the form of civil unrest, rebellions, and natural disasters that

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were thought to justify a temporary suspension of constitutional limits on central government power.

The second strategy, surrogacy, involved the federal government using a power explicitly granted by the Constitution to expand its authority into forbidden legislative terrain. Hence, for example, in the late nineteenth and early twentieth centuries, central state builders devised a way to police morality (an area of governance the Constitution reserved for the states) by creatively applying the federal government's power to supervise the mails and regulate interstate commerce. With the concurrence of the federal courts, Congress passed one law that forbade the post office from delivering "obscene" literature and another that criminalized the activities of those who were "polluting" interstate commerce by transporting female prostitutes across state lines. Neither law was as effective as blanket national bans on obscene literature or prostitution might have been. But each nevertheless permitted the central state to significantly expand its authority and power into areas where it possessed little of either. Over the course of the twentieth century, the central state would repeatedly use surrogacy to circumvent formal limits on the scope of its authority.

The third strategy, privatization, entailed persuading private groups to do work that the central state was not authorized or willing to undertake. The US government turned again and again to the private sector for assistance on a wide range of matters, such as building railroads, dams, and other forms of infrastructure; mobilizing the home front, economically and ideologically, for war; putting political dissenters under surveillance and sometimes in jail; staffing diplomatic missions and expanding American influence overseas; moralizing the poor and constructing welfare programs for those unable to help themselves; and contracting out a broad range of mundane government services. No one has ever quantified the number of Americans involved in the zone of governance defined by public-private interpenetration; even such a partial list as this of the kinds of activities that it encompassed suggests that the numbers and resources were vast.

Pressing this repertoire of improvisational techniques into service, America's central state builders found ways to make the fed-

eral government energetic. The repertoire offered those who wanted to expand the central state the authority to sustain projects that would otherwise have been hard to set in motion. The federal government grew substantially as a result, widening its area of authority and stoking its policymaking power. By the early twentieth century, those building this edifice were confident they had the tools necessary to establish the powerful central government that was the ticket of entry into the first rank of industrial nations. Improvisation appeared to be working.

But improvisation also had its limitations. A liberal central state that created an area of exemption that was too large or that lasted too long would ultimately cease to be liberal. Surrogacy could harm the reputation of a central state through overuse or overextension. At some point, critics might legitimately claim that the federal government had overreached by, say, using the post office to promote too many projects extraneous to delivering the mail, or the commerce clause to sanction reforms such as morals regulation that were not at their core about buying and selling commodities across state lines. The privatization strategy, meanwhile, risked putting too much public money and power in the hands of private individuals, groups, and corporations. Congressional leaders who turned to private corporations to provide vital services might claim that these institutions were publicly spirited, but too frequently these arrangements plainly became occasions for privileged private interests to feed at the public trough. This was as true of the building of the transcontinental railroad in the 1860s as it has been of the twenty-first-century delegation of nation building in Iraq for the likes of Halliburton and Blackwater.

Given the limits of improvisation, dreams of a more thoroughgoing transformation of government lived on in the minds of many Americans, both those who occupied the highest levels of the federal government and those, such as farmers and workers, mobilizing movements for change at the grass roots. Those dreams appeared close to realization in three convulsive decades, from the 1930s to 1960s, when a trio of crises—the Great Depression, a condition of near-permanent war arising from World War II and the Cold War, and the civil rights revolution—cumulatively overwhelmed

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existing structures of governance. These were the years in which the American central government grew into a Leviathan, amassing resources and power unprecedented in scope, scale, and permanency. In these decades, the federal government built a national welfare apparatus, regulated industrial relations and other economic matters, invested heavily in universities and science, and launched a Second Reconstruction to root out racial inequality. It also for the first time in American history stripped the states of their authority, undercut their police power, and made the Bill of Rights the law of the entire land. These changes were momentous. The thoroughgoing transformation of American government, so long envisioned, seemed finally to be at hand.

Yet this federal government was still burdened by its past. The enormous expansion in the central state's domestic reach after World War II took place without the benefit of a constitutional amendment transferring a portion of the power now denied the states to the federal government. This nonevent was hardly surprising; amending the Constitution has almost always been a notoriously difficult process. In the absence of such a potentially legitimating amendment, however, central state builders perforce relied on nineteenth-century strategies of improvisation to justify the expansion of federal power. But invoking these strategies was not sufficient to bestow on the federal government constitutional authority commensurate with its vastly expanded power. The central state's vulnerability grew alongside its reach. Indeed in the late twentieth century, conservative Republicans, led by Ronald Reagan, made the assault on "big government" the most forceful movement in American politics. From the 1980s to the present, the American Leviathan has been under constant siege.

The federal government did acquire one new tool for its state-building arsenal after 1945: "national security." In the 1940s and 1950s, liberals began to invoke this phrase not simply to battle Communism but also to strengthen their case for expanding the education, welfare, and infrastructural reach of the federal state. This form of surrogacy, like those built on the postal, tax, and commerce powers of the federal government, came with costs. The imperatives of national security justified an expensive and oligopolistic

military-industrial complex. They gave rise to a largely clandestine national security apparatus in the 1950s and 1960s with the capacity, and often authority, to put large swaths of the American population under surveillance. At the very moment when the Supreme Court was securing for minorities access to their rights as Americans and for women powerful new protections for reproductive freedom, it was allowing for the rise of an imperial presidency with vast, often-unchecked power. In retrospect, it appears that the coercive power that was being drained away from the states was re-pooling in vital areas of the federal government, even as other parts of this government were championing Bill of Rights' liberties as they had never been defended before. The United States, thus, was still burdened by the paradox of liberty and coercion commingled that had bedeviled the exercise of governmental power since the republic's birth. This paradox continues to this present day, manifest in a dramatic expansion of liberty, the core achievement of the twenty-first-century movement for gay rights and gay marriage, and an equally dramatic expansion in reach of the national security state, the consequence of the never-ending War on Terror.

Writing the history of how liberty and coercion have shaped American government across 240 years of history is a complex task. Affairs of state were multitudinous; activities and agencies proliferated over time. I have attempted to be comprehensive in my approach while acknowledging that no one account can do it all.

I have organized my account chronologically. Part I, "Foundations, 1780s–1860s," looks at the contrasting theories of power underlying the central government and the states, and analyzes the successes and limitations of their deployment in the early decades of the republic. Part II, "Improvisations, 1860s–1920s," examines the improvisational initiatives of the central state during this time, covering a vast array of activities ranging from immigration regulation, morals control, and the acquisition of colonies, on the one hand, to the building of the transcontinental railroad, suppressing dissent in World War I, and managing a privatized system of electioneering, on the other. Part III, "Compromises, 1920s–1940s,"

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analyzes the popular struggle to transform the central government in ways more fundamental than what improvisation allowed. Movements of farmers and workers spearheaded these struggles; they mostly met resistance until the Great Depression permitted a breakthrough in the form of Franklin Roosevelt's regime of positive liberty, known to us as the New Deal. Even then, however, opposition was strong enough to compromise the broader social democratic transformation sought by agrarian and labor insurgents.

Part IV, "American Leviathan, 1940s–2010s," shows how recently the nation acquired an enduringly large and powerful central state, and how this state was a product more of the Cold War than of the New Deal. It also reconstructs the success of this federal government in breaking the power of the states in the 1960s, and the fury that its ambitions elicited from conservatives who, since the 1970s and 1980s, have viewed them as a betrayal of the Constitution and the most important threat to their liberty. A conclusion assesses the condition of American governance today.

Throughout the book I have sought to enliven this history of political principles and structures with stories of individuals and groups whose activities influenced the shape as well as character of government power in America. Some of those individuals will be well known to readers but appear here in a new light. Their ranks include James Madison, Andrew Jackson, John Marshall, Herbert Hoover, J. Edgar Hoover, Franklin Roosevelt, Louis Brandeis, Dwight D. Eisenhower, Earl Warren, Hugo Black, Ronald Reagan, Lewis Powell, Sandra Day O'Connor, and Grover Norquist. Others are little known, yet through their social movements, the cases they brought before federal courts, and their struggles for influence in a range of government agencies (including the post office, Department of Agriculture, National Labor Relations Board, and Great Society's Community Action Program) had a measurable impact on the development of government in America.

This book is a work of synthetic interpretation, made possible by the superb work produced by historians, social scientists, and legal scholars over the last forty years. By and large, I have decided against discussing the many historical debates and controversies that have had a bearing on the interpretation that emerges in

the pages to come. Readers wishing to learn more about my views on these matters can glean them from the commentary threaded through the endnotes. Nevertheless, it may be useful to indicate the three most important ways in which the interpretation offered in this book is distinctive. Two have already been mentioned. First, historians of the “American state” have generally ignored the states, and have had little to say about the theory of power animating the latter’s actions. There are understandable reasons for overlooking the states. How, most immediately, does one take the measure of an institution that comes in fifty varieties? Nonetheless, the states are simply too crucial a part of America’s governing edifice to ignore. They must be brought back into the conversation if we are to understand government power and its limits in the United States. This book offers one way of doing so.

Second, I steer the discussion about how the American central state changed over time away from a stress on crisis and transformation, and toward one focused on improvisation and incremental change. In so doing, I do not seek to minimize the significance of crisis in American history nor attempts at thoroughgoing transformation. There have been plenty of both.³ I do argue, though, that efforts at transforming the central state have succeeded only in partial ways, and insist that the history of transformation must reckon not only with the forces propelling fundamental change but also with efforts to roll those forces back. Opponents of federal government power have regularly invoked the Constitution, both jurisprudentially and metaphorically, to make their case for a central state that ought to have limits on its reach restored.

Finally, I take a view of the Constitution and its influence on the shape of government in the United States that is different from interpretations of these matters circulating through the twenty-first-century Left and Right. The extraordinary buildup in the military and surveillance power of the US state across the decades of the Cold War and War on Terror has prompted some on the Left to trace the origins of that power to the earliest days of the republic. The Constitution, in this view, did not seek to limit the central state’s power but to expand it across the North American continent, giving it the resources to expel or subdue whatever antagonists

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were in its way. From this perspective, which sees this early central state as all powerful, the word “liberal,” in either its classic “hands-off” or modern meaning, is the wrong term to describe its character.

America’s central state was, to be sure, an important instrument for those who wanted to sanction slavery and claim the entire continent for the United States. That this government promoted racialized conceptions of democracy and made war on Indians does not mean, however, that it constituted an American Leviathan from the moment of its foundation.⁴ As I demonstrate in chapter 1, the army that Andrew Jackson took into battle to war on Indians, the British, and the Spanish between 1813 and 1819 was in fact small in light of the millions of square acres it was to defend and the number of enemies it was expected to vanquish. Jackson succeeded despite these limitations, with his army holding the United States together at a time when smart money was wagering that the new nation had overreached and was going to break apart. How did he do it? Was his military success a model for central state actions of any kind? Recognizing that America’s central state faced formal limits on its powers helps us to pose—and then answer—these key questions.

Many on the Right, such as those who thrust the Tea Party into prominence in 2010, take a different view of the Constitution. For them, the ideal of limited government is sacrosanct, foundational, and constitutionally mandated. They revere the Constitution and tend to deify the men who wrote it. There is much to admire in the Constitution. Its concern with government as a source of tyranny was prescient in light of the totalitarianism that would disfigure politics in the twentieth century. The Bill of Rights pioneered a new way of thinking about personhood and its inviolability. But the Constitution was not perfect. It sanctioned slavery; it mandated electioneering practices, such as the electoral college, meant to limit popular sovereignty; and it did not anticipate—indeed could not have anticipated—many of the issues, from birth control and abortion, on the one hand, to the exorbitant (and corrupting) cost of elections, on the other, on which twentieth- and twenty-first-century courts have been called to adjudicate. And in deciding to

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exempt the states from an obligation to abide by the federal Bill of Rights, those who designed and ratified these first ten amendments generated an area of ambiguity regarding personal liberty that took more than 150 years to clarify and correct.

Because of these imperfections, we need to interrogate the framing of the Constitution in a way that is frequently missing from contemporary conservative discourse. As part of that interrogation, it is critical that we pry open the black box of the US government—that which contains the particulars about the powers originally given the states—and examine its contents. Such an exploration may well give some conservatives, or at least the libertarians in their ranks, pause about the virtues of originalism when it comes to constitutional interpretation. More important, it will give individuals of all political persuasions a fuller understanding of how governance in the United States has worked; what in this system has been strong, and what has been weak; and what needs to be fixed as America heads into its uncertain future.