

Spring 2017

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### Recommended Citation

Paul Baumgardner, *Stories of Society, State, and a Severe Shortage of Scientific Rigor*, 52 Tulsa L. Rev. 409 (2017).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/7>

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## STORIES OF SOCIETY, STATE, AND A SEVERE SHORTAGE OF SCIENTIFIC RIGOR

Paul Baumgardner\*

ANDREA FRIEDMAN, *CITIZENSHIP IN COLD WAR AMERICA* (UNIVERSITY OF MASSACHUSETTS PRESS, 2014). PP. 288. HARDCOVER \$80.00. PAPERBACK \$25.95.

GARY GERSTLE, *LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE PRESENT* (PRINCETON & OXFORD: PRINCETON UNIVERSITY PRESS, 2015). PP. 472. HARDCOVER \$35.00.

### I. PROBLEMS, PUZZLES, PROPOSITIONS, PREMISES!

As I recently learned from a group of tenured political science professors who conduct award-winning research into American law and politics, it is of the utmost importance to remain conscious of the sort of research one is actually conducting. For instance, are you engaged in the sort of rigorous, sophisticated, and meaningful research that includes formal theory and/or quantitative methods? Or are you “not too good with the numbers” and, as such, intellectually limited to the less rigorous, yet possibly meaningful—in that adorably niche way—research that is predicated on “storytelling”?

Although this welcome epiphany seems to be spreading within many of the social sciences, I worry that it has not enlightened the benighted discipline of law just yet. I believe that it is essential that we advanced scholars start making disciples of all nations as soon as possible. A good way to begin might be to demonstrate the limitations and intellectual fuzziness that frustrate recent works of legal scholarship, such as Andrea Friedman’s story, *Citizenship in Cold War America: The National Security State and the Possibilities of Dissent*, and Gary Gerstle’s story, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present*.<sup>1</sup>

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1. As for genealogy, this essay is strongly influenced by Keith E. Whittington, *Once More Unto the Breach: Post Behavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY, no. 2, Spring, 2000; Mark Kelman, *Trashing*, 36 STAN. L. REV., no. 1/2, Jan. 1984; Alan David Freeman & John Henry Schlegel, *Sex, Power And Silliness: An Essay On Ackerman’s Reconstructing American Law*, 6 CARDOZO L. REV. 847 (1984-85).

## II. A STORY ABOUT STORIES

Unfortunately, the formal model that I began fashioning last month—with the help of eight graduate researchers, ten undergraduate researchers, and one preternaturally massive brain—was having a difficult time incorporating the literary criticism variable, so I had to go primitive and conduct some of that low-brow qualitative stuff on Friedman and Gerstle. Nevertheless, as you will see, the interview/discussion data was surprisingly useful<sup>2</sup>:

*Author:* Could you summarize the key points from your storytelling documents?

*Friedman:* Sure. I explore the arbitrary, uneven, and altogether contingent development of state power and individual liberty during the early years of the Cold War.<sup>3</sup> I am particularly interested in how individuals and groups highlighted “democracy’s contradictions” in the United States during this period.<sup>4</sup>

*Gerstle:* My book aims to describe and explain state expansions since America’s founding. I emphasize how these developments rebalanced political power in America, establishing new equilibria between national and local actors and between liberal and coercive traditions.<sup>5</sup> Like Professor Friedman, I am interested in the changes to the American state during the Cold War. My work on the Cold War and the beginning of the national security state is nestled between chapters on the New Deal and the turbulent ‘60s and the civil rights movement.

*Author:* Very well, but it seems like both of your stories suffer from nebulous subjects and open-ended terminology. Let’s be clear about these variables. Professor Friedman, I’m still not sure about the ubiquitous terms “citizenship”, “liberty”, and “freedom” in your tale. Can’t we just turn to the operative law during this period, public opinion polls, or even Merriam-Webster to gain a more precise understanding?

*Friedman:* I think that keeping these terms open-ended is one of the cardinal lessons of my research. I hope to show that there was not a coherent and rigid understanding of these terms within the early years of the Cold War; they were always in flux. The American state and society were always adding to these concepts and addressing challenges to these concepts, extemporaneously and instrumentally. Far from the ‘consensus era of politics’ view of the ‘40s and ‘50s, this period—and these prominent political issues—was fertile ground for dissent!

2. Unfortunately, this interview data is fictitious. Neither Andrea Friedman nor Gary Gerstle participated in this vital educational experience (proselytism?). Another important note to keep in mind: due to the flimsy research methodology used here, be prepared for irredeemable bias, data manipulation, and an altogether bush-league academic product.

3. ANDREA FRIEDMAN, *CITIZENSHIP IN COLD WAR AMERICA: THE NATIONAL SECURITY STATE AND THE POSSIBILITIES OF DISSENT* 7, 10, 11, 50 (Univ. of Mass. Press 2014).

4. *Id.* at 13.

5. *See, e.g.*, GARY GERSTLE, *LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE PRESENT* 262, 277-79 (Princeton Univ. Press 2015).

For example, different actors in different fights understood individual liberty in a myriad of ways during the Cold War. Liberty was a metaphor, a symbol, an appearance, and a powerful government tool. It was understood outside the boundaries of a purely legal definition. Instead, it stood as a conceptual arena for an ongoing series of contestations that included state forces, but in which state forces were neither the primary nor determinative actors. As an example, following World War II, the German war bride, Ellen Knauff, wielded an effective PR campaign, public opinion, and conservative family values to challenge the internally divided national government over the liberties of citizens and non-citizens.<sup>6</sup>

If you ask me, that sounds a tad too much like glorying in your own ignorance. If you seek to explain democracy's contradictions in Cold War America and you promise to outline the nature of individual liberty during this period, but all you can tell me is that it was up for grabs—that there were numerous immeasurable forces that jostled for political influence and wanted their voices heard—that's not much of an answer (at least not a very scientific one). So much for consistent, objective, and replicable terms! Unfortunately, this same under-theorizing and under-proofing also corrupts Professor Gerstle's research, I discovered.

*Autor:* Now, this might just be a pitfall of both of your professions,<sup>7</sup> but how could you possibly chart these massive political developments between the 1940s and 1960s without a more expansive and detailed methodology? What are your variables? Where are your regressions?

*Gerstle:* I track the prominent macro-level developments associated with the Cold War in order to describe the changing dimensions of state power in the 1940s, 1950s, and 1960s. I emphasize the changing circumstances during these postwar decades, and the manners in which political and economic institutions responded. The president, the bureaucracy, Congress, and the courts engaged in a great deal of inter-institutional cooperation in building the central state in general, and the security apparatus in particular. In this “era of near-permanent war” the state expanded primarily through military commitments and rationalizations, with social changes following in kind.<sup>8</sup> For instance, I contend that coordinated Cold War policies were responsible for “the shifting locations and foci of American industry; dramatic improvements in the nation's infrastructure; and high levels of federal support for research and education” during the period.<sup>9</sup>

*Friedman:* That is one area where we differ strongly. Your Cold War analysis is predominantly a state-driven one, with disembodied and impersonal institutions setting the terms and conditions of individual liberty and social life.

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6. FRIEDMAN, *supra* note 3, at 48-79.

7. Both reside in the Departments of History at their respective universities.

8. GERSTLE, *supra* note 5, at 251-274.

9. *Id.* at 262-270.

*Gerstle*: True. Mine is a parable of the priests of the state, not the laity. At the risk of overgeneralizing, the American state served as the active entity during this period, while our society was more of a receptive entity. We can see state institutions furnishing the ideas, the ideologies, and the policies for American society. As one of my sub-chapters declares, during this era the state was “reshaping ‘the very structure of our society.’”<sup>10</sup>

*Friedman*: And what of individual liberty? Just a product of the state?

*Gerstle*: Sort of. Individual liberty is under the purview of the American state. The state is charged with cultivating the right environment and enacting the precise policies to bring about liberty within society and preserve that liberty. Alternatively, the state possesses the power to sharply abridge social liberty. In the decades that we’re interested in here, as the national security state is taking shape, the Smith Act, *Dennis v. United States*, and Truman’s Executive Order 9835 seem to be especially relevant state actions that recast individual liberty.<sup>11</sup>

*Author*: Wait, wait, WAIT! Here we are with liberty again? What is this? Not that chimerica that Friedman kept on blindly chasing, I hope. And how are you measuring it?

*Gerstle*: Well, in the American case, I’m relying on the more Lockean conception of negative liberty, which transforms into a more positive conception beginning with the New Deal.<sup>12</sup> Put simply, by the middle of the twentieth century we can observe the American state becoming more involved in the lives of citizens in order to provide the conditions necessary for material well-being, political equality, and personal independence.

*Author*: Well, umm. . .

*Friedman*: I think that describing the contours of individual liberty in the early years of the Cold War requires a more micro-level analysis than you supply in *Liberty and Coercion*. The reason that I give names and faces to the political and legal developments surrounding the national security state is because personal accounts accentuate the paradoxes of life and liberty in America from the 1940s to the 1960s. Understanding Cold War America means depicting the sheer amount of arbitrariness and contingency that was generated from state institutions when dealing with individuals and their claims of personal liberty. We have to uncover the hulking indiscriminateness, overstretching, and inequality of state actors in this period.<sup>13</sup> But this is not to say that the state was somehow the ‘active entity’, and American

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10. *Id.* at 262.

11. *Id.* at 256-259.

12. *Id.* at 185, 213, 247, 348.

13. FRIEDMAN, *supra* note 3, at 7.

society just sat back receptively. The American state was not always unified and cooperative. As I remarked earlier, often it was internally riven, and individuals and collectivities capably exploited the contradictions and disagreements within the state.<sup>14</sup>

*Author:* Ok. Slow down.

At this point in the discussion, I temporary shut down the operation. As you can see, things had gotten out of hand and we were quite far afield from any quantifiable sort of data gathering or advanced observation. To get us back on track, I pushed my two raconteurs towards more robust legal and political analysis.

*Author:* Do either of you have any statistics, models, or tables to bolster these stories?

*Friedman:* No.

*Gerstle:* No. Would you like to see our sources?

*Author:* You guys are really making this hard on yourselves with all of this loosey-goosey behavior. How about just a picture?

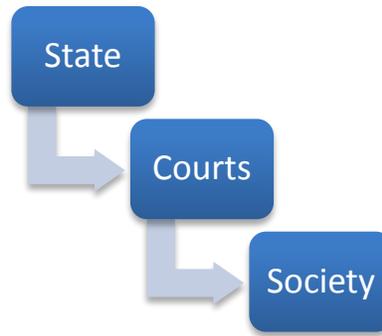
*Friedman:* A picture?

*Author:* Yes. I think that would be a good, rudimentary entry point for the two of you. How about you draw me a simple picture of this liberty disagreement.

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14. *Id.* at 58, 59, 89.

*Gerstle*: I suppose this is how I am framing the state-society relationship in American political development, at least during this period: the American state structured the principal conditions of liberty and coercion; courts often—but not always—mediated state action, serving as a rational and liberal equilibrating force;<sup>15</sup> and society received the parameters set by the state and existed within them.



*Friedman*: No. The laity defined and contested liberty through a diverse array of behaviors, metaphors, psychological states, and discourses. We see newspapers, television programs, the ACLU, civil rights groups, and determined individuals influencing and acting out different ideas of liberty during the early years of the Cold War. Take the story of accused Communist, Annie Lee Moss, an African-American government employee who wedded claims about racial, gender, and economic liberty in her intersectional struggle against McCarthyism.<sup>16</sup>

In my book, I illustrate a much more dialogic relationship between state and social forces over the direction and definition of individual liberty. Sometimes, when the state attempts to circumscribe citizens' liberties, I provide examples of strong pushback for richer and more demanding liberal expectations. And when the state oversells liberty—purporting to stand as the very beacon of individual liberty and personal autonomy—I show examples of powerful social criticism arguing that the state is not presenting an honest view of liberty on the ground.<sup>17</sup>

*Author*: You see! Storytelling gives you such uncertain and opposing answers. Yup—pure subjectivity, with no checks on the model. I guess you can just write the endings however you please when you don't have the type of precision that a healthy model furnishes. Actually, now that I think about it, if this whole liberty squabble just has to do with state and society maneuverings, why don't you just craft a two-party game theoretical sequence?

*Friedman*: Because that would abstract away all of the isolated and idiosyncratic details that explain the historical developments of the national security state, as well as the ongoing contestations concerning individual liberty.

15. GERSTLE, *supra* note 5, at 260.

16. FRIEDMAN, *supra* note 3, at 80-118.

17. *Id.* at 119-191.

*Gerstle:* The complex sequence of interactions between the individual branches of the state would fall out. Professor Friedman and I agree that this period of American history is one of extreme contingency, with constantly changing equilibria between political actors and between ideological traditions. We wouldn't be able to understand the forces behind each stage of historical development without a keen attention to these details.

*Author:* Oh, pish posh! Just structure your model so that the two parties go through a series of repeated games. That should incorporate whatever temporality we need to account for in the equation.

### III. BENEDICTION

It is unclear whether either Professor Gerstle or Professor Friedman took to heart some of my suggestions. For the sake of their future research, I sure hope they did. Nevertheless, my sights are set beyond these two scholars and towards the broader field of American law. We live in a time when the field is at risk of falling into the Dark Ages, struggling behind the methodological innovations and sacramental rituals of surrounding disciplines. But it is important that legal scholars not panic. Formal theory and quantitative methods are on the horizon, promising to add a level of scientific rigor and intellectual backbone to legal scholarship.

And as it usually happens when the sun begins to show his beams, or when after a sharp winter the spring breathes afresh on the earth, all things immediately get a new face, new color, and recover as it were a certain kind of youth again: in like manner by but beholding me you have in an instant gotten another kind of countenance; and so what the otherwise great rhetoricians with their tedious and long-studied orations can hardly effect, to wit, to remove the trouble of the mind, I have done it at once with my single look.<sup>18</sup>

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18. DESIDERIUS ERASMUS, IN PRAISE OF FOLLY 4 (1958).