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Constitutionalization as Statecraft: *Vagrant Nation* and the Modern American State

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GOLUBOFF, RISA. *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*. New York: Oxford University Press, 2016.

This essay showcases the contribution of Risa Goluboff's Vagrant Nation *(2016) to one field of scholarship that the book scarcely mentions: the historical literature on the American state. In Goluboff's account of the fall of the "vagrancy law regime" in the "long 1960s" I see vital questions about the nature of the modern American state and the endurance of older, seemingly antithetical modes of governance. Given the trends that state-focused scholars have illuminated—for example, toward centralization of power and the protection of individual rights—what allowed for vague, locally enforced vagrancy laws to survive so late into the twentieth century? What ultimately triggered their demise? In mining* Vagrant Nation *for answers, this essay also urges scholars to contemplate "constitutionalization" as a form of statecraft. In giving a constitutional law framing to the grievances of "vagrants," federal courts reinforced key tenets of the modern American state, including the supremacy of national law over competing legal orders and the desirability of being a rights-bearing member of the nation-state. Simultaneously, these court decisions left open other, more "modern" possibilities for regulating the kinds of people (poor, nonwhite, unpopular) whom vagrancy laws once ensnared.*

Constitutional history is now a vital field, and Risa Goluboff has played a significant role in making it so. Goluboff's first book, *The Lost Promise of Civil Rights* (2007), offered a bold reinterpretation of one of the most famous stories in US constitutional history, the path toward *Brown v. Board of Education* (1954). Rather than starting from *Brown* and looking back, as many previous scholars had done, Goluboff anchored the book in the 1940s and re-created a world in which civil rights law had a potential capaciousness that it would lack two decades later. Most notably, Goluboff documented an openness, now lost to us, to claims for economic justice. Simultaneously, Goluboff offered historians a new template for researching constitutional change—one that included non-elite, non-lawyer actors and that found value in legal imagination as much as legal success (Goluboff 2007). Her 2013 review essay on "the new civil rights history" synthesized trends in the field and exposed fertile ground for future constitutional-historical research (Goluboff 2013). Now comes *Vagrant Nation*, in which Goluboff collects dozens of federal appellate court cases, pairs them with their complex social histories, and assembles a fresh and original story (Goluboff 2016). Whereas *The Lost Promise of Civil Rights* was a revisionist history, *Vagrant*

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Nation offers a first cut of something new—something for the next generation to grapple with and build upon.

The heart of this new story is the destruction of "the vagrancy law regime," a term Goluboff uses to describe both a particular set of laws and the law enforcement practices those laws enabled (Goluboff 2016, 336–37). At the laws' core was the criminalization of the mere appearance of socially objectionable habits of life—of being "idle," "suspicious," or "dissolute." Local officials used these laws to arrest and detain people who seemed somehow "out of place," even if they had done no harm. Over the span of just two decades, Goluboff shows, such laws and practices went from unquestioned and ubiquitous to dubious and, ultimately, illegitimate. No less than the US Supreme Court declared them so, in a cluster of cases that were linked in the justices' minds, if not always in the official record.

Goluboff offers compelling reasons to care about this history. For the reader with a general interest in US history, it helps cohere the seemingly fragmented social, cultural, and political challenges of "the Sixties." Local officials' often desperate application of vagrancy laws to these diverse challenges suggests what, fundamentally, was at stake in this tumultuous period. Judicial rebukes to these tactics, in turn, show the emergence of a new legal and cultural baseline in which the forces of "law and order" prevailed, but also made concessions to dissidents and disruptors. Throughout the book, meanwhile, Goluboff engages more specialized readers, including scholars of civil rights, civil liberties, modern policing, and law and social change.

This essay argues for *Vagrant Nation*'s importance for still another historiography, albeit one that Goluboff scarcely mentions. As I read *Vagrant Nation*, I see the formal de-legitimization of a crucially important tool and style of governance and the validation of a different paradigm—the one we now know as "the modern American state." After introducing and critiquing the literature on the American state, I make this case. More generally, I suggest the fruitfulness of connecting Goluboff's socio-legal style of constitutional history to a parallel body of historical work on law and governance. To be gained, I argue, is a theory of "constitionalization" as statecraft—a theory that might offer fresh insights into the practical injustices accompanying today's formal legal equality.

GETTING TO "MODERNITY": THE HISTORY AND HISTORIOGRAPHY OF THE AMERICAN STATE

The American state is a topic that has long occupied political scientists and sociologists, particularly in the subfield of American political development (King and Lieberman 2016). In recent decades, buoyed by a more general renewal of political history in history departments, droves of historians have joined them (Novak 2008, 2015; Sparrow, Novak and Sawyer 2015). Constitutional historians like Goluboff, however, have not yet entered the fray—a point to which I will return.

Across disciplines and individuals, disagreements abound, but scholars generally agree on certain features of the "modern American state," the governmental regime believed to have been ensconced by the mid-twentieth century. Such agreed-upon features include the centralization of power at the national level and the development

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of the federal government's "capacities"—for example, to raise and spend money, to administer complex policies, to define and secure borders, to police territory, and to inspire national feeling (Tani 2016, 17). A shared project among generations of state scholars has been to document the strengthening of these capacities across space and time, a process dubbed "state-building" in many studies (Skowronek 1982; Nackenoff and Novkov 2014).

A shortcoming of the literature—one that *Vagrant Nation* nicely exposes, I will argue—is its forward-looking tendency: its desire to see the kind of state that we are certain is coming. (The very term "state-building" seems to embody that assumption.) This is a shortcoming because it has led many scholars to sidestep coherent regimes of governance that existed prior to the twentieth century, most notably the nineteenth-century regime that historian William Novak has dubbed "the well-regulated society" (Novak 1996).[1] That regime entailed vigorous regulation, Novak argues, of everything from what citizens could buy and sell, to how they could use their property, to what they could do for work and leisure. In a very real sense, it was "the state"—just not the one we think of today (Novak 1996, 239).

The difference between that system of governance and today's modern American state comes down to where authority resided, how Americans conceived of the proper subjects and limits of government, and what set of laws and methods enforced order. In the "well-regulated society," Novak explains, much of the work of governance occurred at the community level, via technologies that placed vast discretion in the hands of local officials. These technologies included licensing, regulatory inspections, and a penal code "replete with morals restrictions." They also included common law jurisdiction over "nuisances," which ranged from noxious smells to immoral trades (Novak 1996, 44–45, 155, 157–70). Rights—so crucial to our modern paradigm—were part of the landscape, but did not function as they do today. In general, rights were understood as relative rather than absolute and social rather individual. In practice, this meant that rights were always subordinate to a localized understanding of the public good and placed few limits on the substance of government regulation (Novak 1996, 11).

This is all in sharp contrast to the modern American state, as currently understood. In that paradigm, power is centralized and the concept of the nation (as opposed to the community) dominates the frame. Regulation remains robust, but now routinely traverses state and local boundaries and involves federal government administrative machinery. Statutory and constitutional law are hugely important—arguably much more salient than the local application of the common law (Novak 1996, 235–48; 2002, 249–83, 264–66). And the concept of rights has transformed, in ways that make it central to the entire enterprise. No longer does the content of rights depend on intra-community relationships and local understandings of the public good; rather, rights function as the connective tissue between individuals and the nation-state. Rights forge a relationship of affinity and protection, including protection from government actors. They purport to provide clear lines: thresholds that the state promises not to cross, levels of protection that the state promises to give, irrespective

1. There are important exceptions to this statement, including the work of Susan Pearson (2015) and Tracy Steffes (2011).

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of the individual's precise location within the state's territorial jurisdiction (Novak 1996, 244–45; 2002, 265; Sparrow 2011, 2–4, 259; Tani 2012).

For reasons that I will explain, *Vagrant Nation* reminds us to ponder the relationship between these two paradigms—these two iterations of the American state. With the distance of time, their distinct features seem obvious, and yet how and when did one give way to another? The Civil War and Reconstruction offer obvious landmarks, but as recent scholarship emphasizes, the implications of these great legal and political ruptures unfolded slowly, over the course of many decades (Downs and Masur 2015; Edwards 2015). How did people on the ground experience the transition from one framework of governance to another? And was that shift ever actually as complete as our theories suggest?[2]

Exploring such questions is vital, for in doing so we both insist on seeing the state—that is, on describing and naming the particular set of rules and practices that channel public power—and we call attention to the state's vulnerability and changeability. We simultaneously illuminate the logic animating our political order and we take power from that logic, by remembering and imagining others.[3]

VAGRANCY LAW AS STATECRAFT

Vagrant Nation offers rich fodder for this discussion because, if we read between the lines, this is a story not only about evolving protections for individual civil rights and liberties, but also about the changing ways and means of the state. After all, what unites *Vagrant Nation*'s cast of characters—the hippies, sex workers, casual laborers, and civil rights organizers—is that they violated local norms and then found themselves ensnared by a very old technology of governance. Laws that criminalized being "out of place" had roots in sixteenth-century England, Goluboff notes, and "were built for hierarchy and social order" (Goluboff 2016, 2).

These observations also support a slightly different interpretation: vagrancy laws were part and parcel of a particular iteration of the American state—of a regime in which local understandings of the "public good" were the touchstone of legitimate governance; in which people accepted that their access to public benefits and services depended on staying in place and knowing one's place; in which many forms of hierarchy and inequality were considered natural and benign; and in which the federal government but remained decidedly "out of sight," even as it accumulated significant power (Novak 1996, 167–69; Balogh 2009).

Herein lies a challenge to scholars of the state. Given what the literature tells us about the rise of the modern American state and its clear ascendancy by the end of World War II, what were vagrancy laws even doing on the books in the mid-twentieth century, much less in widespread operation?

2. I have raised these questions elsewhere (Tani 2017, 246). William Novak offers answers in a forthcoming sequel (2018) to *The People's Welfare* (1996). So does Brian Balogh, in his synthetic history of American governance in the twentieth century (2015).

3. This kind of remembering and reimagining was one of the signature accomplishments of Goluboff's first book (2007).

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The question speaks to a phenomenon that political scientists Karen Orren and Stephen Skowronek call "intercurrence": the "simultaneous operation" of multiple "political orders"(Orren and Skowronek 2004, 16–17) (By "orders," they mean simply "constellations of rules, practices, institutions, and ideas that hold together over time" [Oren and Skowronek 2004, 16].) To Orren and Skowronek, intercurrence is a feature, not a bug, in US history, so the endurance of vagrancy laws in the mid-twentieth century would likely not surprise them. Still, scholars of the state have some explaining to do. Our current body of research focuses so heavily on the "making," or arrival, of the modern American state that, when looking at the post–World War II period, we tend to presume its total supremacy.[4] We have not grappled enough with the messy realities of governance, including the way that new paradigms layer on top of older ones and the frictions that result.[5]

A second question that *Vagrant Nation* prompts is why vagrancy laws finally disappeared, given their proven stickiness and obvious utility (to some). Goluboff makes a compelling argument about the vulnerability that came from visibility. Starting around the 1950s, Goluboff argues, vagrancy laws and law enforcement practices went from being "largely hidden" to "visible and visibly problematic" (Goluboff 2016, 6).[6] The main reason, Goluboff contends, is that local government officials were deploying these old laws in new contexts, including coordinated challenges to Jim Crow. As organizations such as the Congress of Racial Equality sent activists streaming into communities in the South, local officials turned to vague charges like vagrancy and loitering to suppress their work around voting rights and integration. Activists, in turn, fought back against such charges, including in the courts and the media (Goluboff 2016, 114). The application of vagrancy laws to "hippies" in the late 1960s produced a similar dynamic and garnered more negative attention. Arrestees were often white, middle-class young people, and their "offenses" could seem utterly innocuous—baking pies in a private residence, in one famous example (Goluboff 2016, 239–47).

But what exactly was problematic here? My state-focused gloss on Goluboff's interpretation is that these applications of vagrancy laws clashed markedly with now widespread (albeit still contested) understandings of the basic premises of US governance. Thanks to the Civil War and Reconstruction, large-scale war mobilizations, and a nationwide economic depression, among other factors, those premises had come to include the following: the most important level of government was the federal government; the most important body of law was US constitutional law, as interpreted by the federal judiciary; the most salient political community was the national; and the basic unit of American governance was the individual (not the family or the

4. There are important exceptions to this characterization. For example, Mae Ngai (2004) and Margot Canaday (2009) have illuminated particular problems that persistently vexed the state and exposed its contradictions deep into the twentieth century.

5. My thinking on this point has benefited from a generative series of conversations with Laura Edwards and her synthetic view of governance in the nineteenth-century United States (Edwards 2018).

6. These laws and practices were, of course, never hidden to the people who lived directly in their shadows, as Goluboff's larger body of work demonstrates (Goluboff 1999).

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community) (Novak 1996, 235–48). Last, but not least, rights structured the individual's relationship with public power—both the right to be free from government interference and the right to demand government action and beneficence (Novak 1996, 243–45; Tani 2012).

As enforced in the 1950s and 1960s, vagrancy laws were inconsistent with this way of thinking. At a time when Americans often heard messages about the supremacy and power of the national government, vagrancy laws suggested the unbridled authority of local officials. In an age when the national government had forged many and varied direct connections to individuals—for example, through taxation, the draft, Social Security numbers, and intimate presidential radio "chats"—vagrancy laws implied that local officials always enjoyed stronger and sharper hooks into American lives. And in the face of decades of rights-expanding pronouncements from the federal government, vagrancy laws confirmed that some US citizens had fewer rights than others—perhaps no rights at all.[7]

All these observations suggest a productive way of reframing *Vagrant Nation*. In telling the story of how vagrancy laws went from unproblematic, to newly visible, to formally illegitimate, Goluboff is also telling the story of how a subordinate group of Americans at last appeared to gain what the modern American state had long promised: the protection of the US Constitution and the federal government; the right to be ruled by a fair and rational body of law, uniformly applied; and detachment from local status hierarchies and their enforcers. By extension, it is the story of why and how powerful actors within the modern American state at last delegitimized a stubborn vestige of an older governing order.

"CONSTITUTIONALIZATION" AS STATECRAFT

I have already sketched an answer to *why* people with power finally eviscerated vagrancy laws. Examining *how* they did so offers an opportunity to reflect on *Vagrant Nation*'s building blocks and the importance of constitutional history to broader understandings of US governance.

Like many legal histories, this is a book anchored in the pronouncements of federal appellate courts. The Supreme Court case *Papachristou v. Jacksonville*, in particular, is central. Although Goluboff's archive extends well beyond the judiciary, court cases structure the book and drive its argument.

This approach has limits, as Goluboff concedes. Supreme Court pronouncements capture merely one moment in the long life of vagrancy laws (Goluboff 2016, 338). If we want a full picture of vagrancy law's decline, we need to look earlier than even the "long 1960s" and well beyond the courts. For instance, we would want to consider the previous half-century of efforts by policymakers, administrators, and public welfare professionals to chip away at the "old poor law" and construct in its place a modern

7. In discussing the way that many Americans had come to think about public power, this paragraph draws generally on work by Christopher Capozzola (2010), James Sparrow (2011), Molly C. Michelmore (2012), Michele Landis Dauber (2012), and Ajay K. Mehrotra (2013). I also draw on my own previous work (Tani 2016).

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welfare state. Along the way, such actors not only undermined local authority over the poor, but also loosened the conceptual links between poverty and morality and between deservingness and "staying in place" (Goluboff 2016, 179, quoting *King v. Smith*, 392 U.S. 309 [1968]). In the wake of these efforts, it was not so difficult for federal court judges in the late 1960s to scoff at "the 'worthy-person' concept" undergirding the criminalization of idle poverty (Goluboff 2016, 338). In some sense, such statements merely confirmed what people on the ground already knew: a centralized, legal-bureaucratic welfare state had supplanted the old "overseer of the poor" (Tani 2016).

But in one important regard, the focus on litigation and the resulting case law is just right. To borrow Goluboff's phrasing, this case law "constitutionalized" an issue that had not previously been thought of in constitutional terms (Goluboff 2016, 338), and to powerful and influential people at the time, constitutionalization was crucially important. Through this process, the public face of the nation-state welcomed dissidents, racial minorities, and poor people under the protective umbrella of national law. Court decisions ostensibly transformed "vagrants" into rights-bearing individuals—and in doing so, made clear that a person's status as a US citizen trumped all other forms of belonging.

Goluboff also demonstrates that beyond the level of rhetoric, constitutionalization did matter—even if court decisions did not "immediately or completely change every vagrancy law everywhere," and even if we might now imagine stronger doctrinal foundations for judicial decisions (Goluboff 2016, 338). In the wake of these decisions, state laws changed, and with them, the toolkits of law enforcers. A half-century later, Goluboff observes, "[i]t is hard to recall that a beard, or a date, or a guitar [once] made a person a criminal" (Goluboff 2016, 337).

It is also hard, in our own time, to gain distance from "constitutionalization," a process that involves someone "making a federal case" out of an issue and then convincing a court that the *Constitution* governs it. That process now seems natural, even inevitable—as if part of what the Reconstruction Amendments did was decree the eventual constitutionalization of everything worth fighting over. To many people, constitutionalization also seems normatively good, owing to its association with political gains for oppressed and marginalized groups.

A state-focused reading of *Vagrant Nation* encourages us to treat constitutionalization as the historical artifact that it is and suggests a different way of making sense of it. In my reading, *Vagrant Nation* raises the possibility of constitutionalization as a powerful tool of the modern American state, even as it was also a strategy of savvy social movement activists and a product of sincere federal court judges.[8] In practice,

8. I have touched on this idea in prior work—specifically, in discussing how, why, and when poor Americans came under the protective umbrella of the US Constitution (Tani 2016, 245–73). This paragraph also draws generally on forthcoming work by William Novak, including his discussion of "constitutional nationalism" as a "vehicle for the construction of generality" (Novak forthcoming) and on Gary Gerstle's state-focused analysis of the incorporation of the Bill of Rights (Gerstle 2015, 275–97). I see these arguments as distinct from the more conventional observation of the Supreme Court's role in legitimating the New Deal, a program that many scholars see as the epitome of modern American statecraft. Within political science, and specifically the "law and American political development (APD)" subfield, there has been more attention to the interplay between constitutional law and the modern American

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after all, constitutionalization was not so different from federal-to-state grants-in-aid, a common policy device by the turn of the twentieth century and, from today's vantage point, an obvious vehicle for modernization (Johnson 2007; Tani 2016). Both constitutionalization and grants-in-aid summoned and asserted central-state power. Both sent messages about the priorities and values of the national government. (In fact, constitutionalization went a full step further, signaling that these priorities and values governed the entire realm.[9]) And last, both could be used to undermine political orders that threatened the modern American state. In Goluboff's vagrancy example, constitutionalization literally took a resource away.[10]

This perspectival shift opens up an exciting vista. Taking a state- or governance-focused approach to the phenomenon of constitutionalization, historians might go on to make variations on the move that Goluboff executed so effectively in her first book: complicating celebratory narratives by asking why certain issues were constitutionalized and others were not, why constitutionalization worked at one moment and not another, and what alternative governing arrangements constitutionalization obscured or foreclosed. Scholars should also explore the aftereffects of constitutionalization, as Goluboff herself suggests. In terms of the actual practices of governance, what difference did constitutionalization make on the ground and over time?[11]

Last, but not least, this perspective invites us to think critically and unromantically about the workings of the modern American state, including its liberal, rights-protecting face. After all—as Goluboff is careful to note—it is not as if the decline of vagrancy laws brought with it the withdrawal of public power from the lives of vagrancy laws' targets, especially not from the lives of African Americans and the poor.

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state, but critics within that discipline continue to allege an overly simplistic understanding of courts and judges (Skrentny 2006; Frymer 2008) and an overemphasis on judges' negative or obstructionist relationship to state-building (Whittington 2016, 318). For an overview of APD scholarship focusing specifically on constitutional law and constitutional change, see Julie Novkov's recent review essay in this journal (2015). APD scholar Ken Kersch has also explored the relationship between constitutional rights and the modern American state (2004). Unfortunately, insights from "law and APD" do not appear to have made much headway among socio-legal historians, or vice versa (Frymer 2008, 783–84; Novkov 2015, 820). Separately, Daniel Ernst (1998) and Reuel Schiller (2005) have encouraged more work at the intersection of APD and legal history. This essay echoes their call.

9. This was especially so after the Supreme Court's decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which held that the Court's interpretation of the Constitution had the same legal status as the Constitution itself—that is, it was the supreme law of the land.

10. The concept of resources comes directly from Goluboff, although she mobilizes it differently. She writes about how the Supreme Court gave to so-called vagrants a "constitutional resource in future conflicts over state authority" and simultaneously took a resource from "police departments and state legislators" (Goluboff 2016, 338).

11. Again, political scientists have already opened up some of these questions. Examples that are particularly salient to this discussion include Ken Kersch's work on labor rights (2006); Carol Nackenoff's work on Native American citizenship (2006); Megan Ming Francis's work on civil rights (2014); and Daniel Kato's work on lynching (2015).

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Goluboff opens up this conversation with thoughtful observations on the responses of the state and local officials on the losing end of Supreme Court case law. Hobbled by the loss of vagrancy laws, Goluboff argues, these officials attempted to reconstruct their previous capabilities. The resulting laws and practices are now implicated in some of today's most pressing problems, including mass incarceration and racial bias within the justice system (Goluboff 2016, 339–44; Agee 2018).

A fruitful next step would be to think about all the other ways—apart from the criminal law and its enforcers—that the modern American state regulates the kinds of people whom vagrancy laws once ensnared. Charles Reich famously surfaced some of these technologies in the mid-1960s when he wrote about the conditions attached to welfare benefits, government jobs, licenses, and other forms of state-created "property" (1964). (He hoped that constitutionalization could put a stop to the practices he disliked, and mostly he was disappointed [Reich 1990].) Frances Fox Piven and Richard Cloward drew attention to others in a now-classic Marxist critique of the public welfare system (1971).

Contemporary scholars of poverty law and policy continue to illuminate this arena. They have documented the tolls to privacy and dignity that generally accompany receipt of need-based aid (Smith 2002; Nice, 2008; Gilliom 2001; Bridges 2017); the rules and requirements that bind poor people to the norm of workforce participation (Handler and Hasenfeld 2006); and the many ways in which accessing public aid brings recipients into dangerous proximity to the state's carceral machinery (Gustafson 2011; Ocen 2012; Bach 2014, 2017). Poverty and its burdens, meanwhile, remain unevenly distributed across the population, in ways that echo the racial and gender disparities that vagrancy laws once maintained (University of Wisconsin Institute for Research on Poverty 2016; Bach 2017).

What is the relationship between the "constitutionalization" of vagrancy and these more modern techniques for regulating "people out of place"? What might historians see if we thought of constitutionalization as not only a necessary response to certain historical abuses of power, but as an affirmative empowerment of an emergent governing regime? And—to borrow a theme from Goluboff's first book (2007)—what should we make of the fact that even after poor people secured major constitutional victories, the promise of redressing economic injustice has yet to shift from "lost" to found (Failinger and Rosser 2016)? These are the questions I see lurking in the pages of *Vagrant Nation*. I hope they will motivate other scholars for years to come.

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