
LAW AND ORDER ON THE COLORADO FRONTIER:
THE BASES OF PUBLIC AND PRIVATE GOVERNMENT

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Abstract

This paper relates versions of "law and order" in Nineteenth Century Colorado to the modes of production which characterize different frontier industries. Independent producers who control the means and absorb the costs of production participate in the Carnival of public government, maintaining the independent economic control of producer and merchant. Non-producers who finance the production process and who require political authority to control production rely on private government, the Caucus. The mining and cattle industries of the Colorado frontier provide examples of the modes of production reflected in Carnival and Caucus and offer evidence of the dynamic process of political and economic struggle within the ecological and institutional confines of the American frontier, suggesting considerable room for specification and re-evaluation of theoretical models which offer macro-institutional structure as the determining factor in social change.

Defining "Law and Order"

"Law and order" consists of a concentrated means of coercion, a set of proscriptive or prescriptive statements and the employment of the former in the defense of the latter. In this analysis, any set of proscriptive or prescriptive statements which are publicly recorded as pertaining to a population of actors and actions and are regularly defended by some collectively controlled concentrated means of coercion will be considered a version of "law and order". Only those versions which are collectively promoted (by three or more persons) will be the object of study.

This definition excludes legislation without enforcement, and, in this sense, it is faithful to classical definitions of "law". Weber defines "law" as "...norms which are directly guaranteed by legal coercion" (page 314). Similarly, he states, "A 'legal order' shall...be said to exist wherever coercive means...are available" (page 317). Morton Fried, in his definition of the state, also relies on the concept of coercive power. "The state is an organization of the power of society" (page 230). "The state must establish and maintain sovereignty, which may be considered the identification and monopoly of paramount control over a population and an area" (page 237).

Both Weber and Fried restrict the definition of law to a greater degree than I have. Both include the presence of an enforcement staff as part of their definition. Weber states, "An order will be called...law if it is externally guaranteed by the probability that...coercion will be applied by a staff of people in order to bring about compliance or avenge violation"...

"the concept 'law' will be made to turn on the presence of a staff engaged in enforcement" (page 34). Fried defines law as "...a rule of conduct enforced by sanctions administered by a determinate locus of power, whether by the sovereign itself or by a surrogate" (page 20). "The state, then, is a collection of specialized institutions and agencies, some formal and others informal, that maintains an order of stratification" (page 235).

Aside from these definitional differences, both Weber and Fried maintain that the stability of a government, or any form of political domination, depends on its legitimacy in the eyes of the subject population. Weber writes, "...any authority guaranteeing a legal order depends, in some way, upon the consensual action of the constitutive social groups" (page 334). "(A) 'legal order' is empirically 'valid' owing not so much to the availability of coercive guarantees as to its habituation as 'usage' and its 'routinization'" (page 333). Similarly, Fried, quoting Austin, writes, "Now the permanence of every government depends on the habitual obedience which it receives from the bulk of the community" (page 25).

Clearly then, my definition of "law and order" is both more and less restrictive than one might wish. It excludes government without enforcement, but requires neither the consent of the governed nor the claim to legitimate authority. Furthermore, "law and order" does not require a monopoly on the use of coercive violence; more than one version of "law and order" may be said to rule a particular population.

The benefit of my definition is that it allows for considerable variation in terms of formal structure, including vigilance committees and bureaucratic

governments, and allows for both public and private versions of "law and order". Nevertheless, it does not include the rules imposed on family members or employees unless these are collectively imposed by a group of patriarchs or employers. The cattlemen's law of the open range would qualify to the extent that it is publicly recorded and collectively defended. The law of Judge Roy Bean would not qualify unless it could be shown that he acted with a group of interested parties. Historical accounts suggest that this was not the case.

II. Why "Law and Order"?

The anarchist tells us that government fetters economy and society with a dominant party which tramples the interests of subordinates in its quest for control. However, neither historians nor sociologists have seriously considered the possibility that the frontier might remain ungoverned.

On the one hand, the consensus school argues that government represents the common interests of the members, serves to reinforce their commitment to shared beliefs and values and defends their way of life from the threats of anti-social behavior. The establishment of government reflects the instincts or habits of the governed and the need to defend society from the intrusion of outsiders or the disruptive influence of alienated members. It is assumed that government is required for either the psychological well-being of the members or the viability of the collective endeavor.

On the other hand, the conflict school argues that government is the executive committee for the affairs of the ruling class. The organization of production is the basis of social inequality; it is the means of effecting the hegemony of the dominant class. Each mode of production is maintained through the coercive power of government, so government reflects the mode of production. It is shaped by the needs of the dominant class and legitimated by their political theory. Monarchy defends family and land along with the traditional rights and obligations that are inherited with one's social position. Republicanism defends capital and its accumulation along with the rights to life, liberty and the pursuit of happiness. Communism defends the productive powers of the society and the power of the state to collect and distribute the gross national product. The state insures the contribution of each, according to his ability, and it distributes

the product, to each according to his need.

While the consensus and conflict schools differ in their analyses of the causes and effects of government, they agree that government is essential to the continued existence of economy and society. It is ironic that these opposing schools converge in their millennial visions of the government of the people. The consensus school views the bourgeois revolution as the struggle to establish a limited government which protects the rights of individuals and defends equality of opportunity as the collective interest. The conflict school views the communist revolution as the struggle to create a powerful central state which controls the production and distribution of commodities and defends the collectivity in the interest of the membership. While communism and republicanism differ in many important respects (although the extant versions show signs of convergence), both reflect the notion that the government of the people (individually or collectively) can resolve the conflicts inherent in social inequality.

I offer no such hope to the architects of political economy. The creation and destruction of economy and society characterizes human history - testifies to the inherent instability of political domination. Governments do not emerge out of anarchy; they are nurtured by their predecessors and they, in turn, provide the means for their displacement. Neither communism nor republicanism will escape their common fate, but their proponents offer the elements for a comprehensive theory of the origins of the state. Borrowing selectively, one may approach the issues of how and why "law and order" came to Colorado.

The consensus school offers two important insights: emerging forms of government are rooted in the political tradition of the society, and they correspond to the extant forms of social and economic life. People do not construct their government from whole cloth; they are limited by the examples which history has provided and the resources which they control. Also, governments are not created as a form of diversion. They are expensive and potentially dangerous, so they are established and maintained only in light of the function they might serve. In short, governments are established within the constraints of what is available and useful; in this sense they reflect culture and society, the past and the present.

The conflict school offers a dynamic force which propels the process of social change. Class conflict, as reflected in the organization of production, results in the imposition of government by the class which establishes its hegemony. Hegemony is established in the economic arena through the imposition of the mode of production which recreates the inequality that serves as the basis for the domination of a particular class. However, the ability to reorganize production is predicated on the capacity to dominate the extant political economy despite the fact that it has been established to maintain the hegemony of a different class. One must endure the fetters of the extant political economy and achieve domination in terms of that system before one can reorganize the means of production and establish government on the basis of that reorganization.

In tying together these disparate threads of political theory, I offer the following propositions regarding the emergence of "law and order" in Colorado.

1. The forms of "law and order" which emerge on the Colorado frontier resemble the various versions of republican government that have been previously adopted.

2. The version of "law and order" which is adopted in a particular locality will reflect the predominant mode of production in terms of the relative power of the interested classes and the nature and extent of dominant class control of the production process.

3. The reconstitution of "law and order" will mirror the reorganization of production; the latter depends on the capacity of an emerging class to achieve hegemony within the confines of the extant political economy.

In short, the establishment of "law and order" results from the conflict surrounding the attempt to institutionalize the basis of economic inequality and the process of reproducing that inequality through the mode of production. "Law and order" is reconstituted as production is reorganized, reflecting the hegemony of a new class. For example, the mining court emerges from the conflict between those who control and those who seek to control mining claims. In specifying the means of establishing a claim, the distinction between mine-owner and miner is institutionalized and the domination of the former is defended by law. The artisanal mode of production is maintained by the regulation of the process of acquiring and exploiting mining claims. Nevertheless, in distinguishing the mine-owner from the miner, mining court law provides the basis for the intrusion of the capitalist. To defend property, in terms of the means of production, is to defend capital. With the accumulation of capital and the profitability of the capitalist mode of production, comes the hegemony of the capitalist class, the new mine-owners, who reorganize production and reconstitute law and order on that basis.

III. Versions of "Law and Order"

In attempting to distinguish versions of "law and order" and associate these with modes of production, one experiences an embarrassment of riches. There are innumerable variations on the theme of republican government, hence a classification in terms of form or content leaves one with an enormous matrix of possible versions and an insufficient sample of cases to classify. With this in mind, the focus of this analysis will be the distinction between private and public versions of "law and order" and the modes of production which are generally associated with each.

The Caucus is an ideal type which represents versions of private "law and order". It is characterized by irregular, small, private meetings (behind closed doors) with discussion of pressing matters and planning for general strategies. It takes its name from the party caucus, developed by the Jeffersonian Republican leaders as a means of maintaining party unity in the nomination of officials and the opposition or support of legislation. Landowners' clubs of the early 19th century are perhaps the most familiar example of private "law and order", the Caucus. In Colorado, the cattlemen's associations, particularly in their early form, provide an example of "law and order" as Caucus.

The Carnival is the ideal type which represents public versions of "law and order". Characterized by periodic, public events with widespread popular participation, rhetorical flourish and symbolic mass-appeals, the carnival resembles the New England Town Meeting or the Virginia District Court, whose sessions provided the opportunity for political speeches, outdoor markets and various forms of public entertainment. In Colorado, the

early mining supply-towns provide an example of "law and order" as Carnival.

Both the Caucus and the Carnival are rooted in the tradition of American republican government. The Caucus emerged under Jeffersonian rule as a vehicle for coordinating the activities of like-minded persons, and the Carnival is older than the Constitution. The Carnival was institutionalized as the means of integrating popular government and the politics of deference; it was the modal means of generating support for the patriot cause. Thus both forms were available as versions of republican government and their emergence on the Colorado frontier is less than surprising. The important question is: why did some communities adopt the Caucus while others adopted the Carnival?

IV. Analysis

The Caucus is basically an executive committee of the ruling class. It emerges from the desire to repress the subordinate class in light of the difficulty of maintaining control through purely economic means and the relative weakness of the subordinate class, in terms of their potential for mobilization and influence. In particular, the Caucus is likely to emerge when the subordinate class lacks incentives to increase their productivity, i.e. when rewards do not reflect productivity, and when the dominant class is at risk in production, i.e. finances the production process. However, it is difficult to impose rule by Caucus when the subordinate class has independent economic resources, i.e. the ability to produce for subsistence without relations to dominant class, and enjoys the opportunity for mobility, i.e. does not depend on a dominant-class sponsor for social or geographic mobility.

The early Colorado cattle industry is an excellent example of rule by Caucus and the mode of production which provides the basis for private "law and order". Although there were some attempts to share the risks of driving cattle to market by charging the traildriver a fixed amount per head and allowing him to pocket the surplus or absorb the loss when the cattle were sold, this strategy proved unacceptable because the traildriver lacked the capital to absorb heavy losses and the rancher lost the opportunity to capitalize on the potential for profit.

Generally, the traildriver and the trailhands were paid on a fee-for-service basis and received the same fee whether they delivered the bulk of the original herd, thereby enriching the rancher, or lost all but a few of the cows and virtually bankrupt the rancher. The problem for the rancher

was simply this. How could one send a group of temporary employees across miles of hostile territory with a large number of animals whose ultimate value depended on their condition upon delivery? Since the cowboys could not absorb the potential losses, it would have been difficult to provide economic incentives for a job well done. While the cowboys would probably enjoy receiving bonuses, it seems unlikely that they would work for less than the going wage. This being the case, it makes little sense to pay higher wages if one must absorb the losses in any event.

Given that the cowboys lacked the capital to buy the cows and absorb the risks of the cattle drive, they depended on the ranchers for employment. The ranchers had a common interest in cheap cowboy labor, since the transport costs represented a fixed cost which had to be subtracted from profits or added to losses regardless of the profitability of the drive. It made little sense to inflate artificially the cost of transport by bidding for the cowboys, particularly since the profitability of the drive could not be insured by offering a larger share to labor. The ranchers found it more profitable to sponsor a cowboy elite, the traildrivers, who were relatively well paid and were frequently able, with the help of their employer, to establish themselves as ranchers when they became too old and tired to chase cowboys and cows.

The organization of the traildrive allowed the rancher to control the cowboys politically, relying on the authority of the traildriver to assure the safe passage of the cattle and the full cooperation of the trailhands. The traildriver, or trail boss as he was called, was a relatively cheap means of maintaining control, since only one employee was rewarded

economically for protecting the rancher's interest and since the cost of transport was fixed, although one might share some of the profits with the traildriver. In any case, it was cheaper to provide economic incentives to the boss and rely on his authority to spur cowboy commitment to a job well done.

In addition, the traildriver was highly effective as a supervisor. In general, he was the toughest, most experienced and most dedicated cowboy on the trail. He commanded respect as the epitome of the trailhand yet his loyalties were clearly tied to the rancher, since his economic future could rise or fall as he gained the rancher's esteem or disapproval. Beyond this, the traildriver stood as a constant reminder that cowboys could raise their status and increase their wealth by doing the rancher's bidding.

However, the viability of this economic system depends on the authority of the rancher class. The Caucus is adopted because the absolute authority of the traildriver, being politically rather than economically based, rests ultimately on the political power of the rancher whom the traildriver represents. The private government of the ranchers testifies to their ultimate authority, maintaining the right of the traildriver to rule in their name and securing the loyalty of the driver by emphasizing the superior status of a position that he might earn with his loyalty. The Caucus also provided the ranchers with an opportunity to determine the going wage for trailboss and trailhand and the rules which govern the drive. The Caucus provides the ranchers with the political power to control the cattle trail and, more generally, the cattle industry. The Caucus is needed because the organization of the cattle industry does not provide the rancher with

sufficient economic control over cowhands. The rancher requires political control to insure the appropriation of surplus labor value and the accumulation of capital.

The Carnival is a different animal altogether. It reflects a distinctive set of political and economic realities. Basically, it is a popular or representative government, founded on principles of liberty and equality and dedicated to maintaining the status quo. While the Caucus is a quiet means of doing much, the Carnival is a noisy means of doing little or nothing. It serves best when the subordinate class controls independent economic resources and absorbs the risk of production; it fails miserably when the subordinate class lacks the incentive to produce and it thrives on the appearance of achieved mobility, since this articulates well with the notions of liberty and equality of opportunity and it reinforces commitment to the status quo. In short, the Carnival does nothing more than protect the basis of economic inequality and the process of production which reproduces that inequality. It does not interfere with the production process, since producers have economic incentives to increase production and nonproducers are able to appropriate surplus value and accumulate capital on the basis of their economic relations with producers.

Early mining supply-towns are an example of law and order as Carnival; the initial organization of the mining industry is reflected in the public ritual of supply-town justice. Unlike the cowboys, the miners of early Colorado were able to absorb the costs of production and control the production process with a relatively small capital investment and the application of their own labor power. As independent producers, they had incentives for maximizing production, but they could not eat their gold, and they depended

on the merchant to buy gold and sell food as well as mining equipment. The merchant was similarly interested in the miner's productivity, but was not required to provide incentives or in any way attempt to control the process of production. So long as there was gold and food, with miners to dig and merchants to sell, there was no need to impose political control on the routine operation of the mining economy. "Law and order" was basically a means of protecting the mining industry from outside interference. The participants had their independent bases of economic control, production and marketing, and they had economic incentives for increasing productivity and consuming or accumulating capital. The miner had his gold and the merchant had the means of trading food and equipment for gold. So long as the merchant bought and sold at a fair price, which is to say that the miner was not induced to pay the cost of establishing alternative commercial relations, the industry could be maintained without the necessity of political repression for economic control.

Conclusion

Both conflict and consensus theories tend to homogeneous versions of republican government. This stems from their tendency to take the hegemony of the dominant class or the shared political tradition of a polity as the necessary and sufficient determinants of political structure.

History offers us a wealth of materials for the analysis of political institutions and provides the materials for a dynamic analysis of the process of statebuilding.

The American frontier is an appropriate case for the study of political process. While embedded within the confines of American republican capitalism, it is a land yet to be conquered. Ecological and institutional constraints combine with familiar social, economic and political forms to limit the possible means of effecting economic and political control.

Nevertheless, within these confines, one may observe the various attempts to impose order and institutionalize procedures for productive enterprise sufficient to attract labor and capital to the newly settled region.

Macro-theoretical models may be specified and compared in an analysis of what is attempted, what endures and how the succession of attempts effects the path to membership in the national polity.

The analysis of governing strategies, even in the general terms here offered, suggests that the macro-institutional determinants of frontier government might be more fruitfully offered as constraints on a dynamic process of economic and political struggle.

The path to republican government is not determined; nor is the institution of republican government a final step in the process of statebuilding. The political struggle surrounding the establishment of various forms of "law and order" continue under republican government. The struggle never ends; it is merely confined anew. Clearly, the struggle and not merely the confines deserve our attention.

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