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## Introduction: The Making of a Canonical Legal Historian

Felice Batlan  
*IIT Chicago-Kent College of Law*

R. B. Bernstein

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THE MAKING OF A LEGAL  
HISTORIAN: REASSESSING THE  
WORK OF WILLIAM E. NELSON

Felice Batlan and R.B. Bernstein  
Symposium Editors



## INTRODUCTION: THE MAKING OF A CANONICAL LEGAL HISTORIAN

FELICE BATLAN\* AND R. B. BERNSTEIN\*\*

William E. Nelson is one of the most prolific of modern American legal historians; his scholarship ranges from the early colonial period through the 1980s. Along with that of a handful of other legal historians of his generation, Nelson's work has become part of the canon of legal history; whether or not we agree with him, we write in the wide shadow of his work. Nelson has framed many of the questions that legal historians ask and the methodologies that they use. Perhaps equally important, the NYU Legal History Colloquium, under his leadership and mentorship, has met on a weekly basis for over thirty years. Not only is it open to all who want to attend, but a tremendous number of legal historians, historians, law professors, scholars, and students have spent time in the Colloquium and listened to Nelson's sometimes gentle (and sometimes not so gentle) critiques of their work.

It would be easy for this symposium to become a *festschrift*—a rightly glorious celebration of Nelson's many accomplishments—but it is not. Nelson, along with the editors of this volume, vigorously agreed that this symposium would examine and assess the large body of scholarship that Nelson has produced in his almost fifty years as a historian. We wanted the symposium's authors to challenge themselves, us, Nelson, and their readers with such questions as: What is the long-term significance of Nelson's work? What themes emerge from his scholarship? How has his work been foundational to U.S. legal history? How does it fit into the larger historiography of legal history and of American history, and how might we understand each of Nelson's works as part of a larger synthetic, even holistic oeuvre?

We arranged the symposium so that one author would write about each of Nelson's major books or articles, or about clusters of books or articles sharing major themes. As all editors assume when assembling a collec-

\* Felice Batlan, Professor of Law, IIT/Chicago-Kent College of Law.

\*\* Lecturer in Political Science, Skadden Arps Honors Program in Legal Studies, Colin Powell School of Civic and Global Leadership, City College of New York, CUNY, and Distinguished Adjunct Professor of Law, New York Law School.

tion of writings, not every scholar invited to participate will accept, and we had a long list of exceptional potential participants. We could not, however, have been more wrong about the planning process. Evidencing scholars' profound respect for Nelson and his work, every person whom we initially invited accepted immediately. Had time and space permitted, we could have doubled the number of participants. The authors whose articles appear in this volume are some of the leading scholars in the field, each possessing an expertise in the area on which he or she writes. Our authors also span generations, including renowned senior scholars as well as more junior scholars.

We gave the authors a great deal of leeway in terms of what they chose to focus on and how they addressed their assignments. Our only caveat was that they think critically about Nelson's work and say something new and generative. This, of course, is no easy task. A number of authors chose to write in the historiographical mode, situating Nelson's writings within the literature of legal history and asking what scholarship and ideas influenced Nelson's work and then how Nelson's scholarship contributed to and shaped the agenda for later scholars. For example, David T. Konig views Nelson's *Americanization of the Common Law*<sup>1</sup> as heavily influenced by a rich social science literature about the formation, success, longevity, and dissolution of different types of communities as well as a thick literature on New England colonial towns.<sup>2</sup> Much of this literature had adopted a strong declension narrative. In part, Nelson's genius was to take this scholarship, which primarily did not address law, and ask what role the law played in creating and maintaining such communities. Nelson concluded that the role of law became increasingly important as the homogeneous New England Puritan town disintegrated. Likewise, Gautham Rao historically situates Nelson's *The Roots of American Bureaucracy, 1830-1900*<sup>3</sup> and views it as providing an important bird's-eye sketch of the growth of the nineteenth-century federal administrative state.<sup>4</sup> Other scholars, he explains, have spent decades filling in and adding specificity and elaboration to Nelson's story.

1. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (Univ. of Georgia Press, 1994) (1975) [hereinafter NELSON, *AMERICANIZATION OF THE COMMON LAW*].

2. David T. Konig, *Americanization of the Common Law: The Intellectual Migration Meets the Great Migration*, 89 CHI.-KENT L. REV. 917 (2014).

3. WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1983).

4. Gautham Rao, *William E. Nelson's The Roots of American Bureaucracy and the Resuscitation of the Early American State*, 89 CHI.-KENT L. REV. 997 (2014).

Instead of looking at how Nelson's work fits into past scholarship, Laurie Benton and Kathryn Walker show how Nelson's four-volume history of law in colonial America (of which volumes one and two have appeared)<sup>5</sup> resonates with a larger, newly emergent school of history that studies law and imperialism comparatively and in a global context.<sup>6</sup> Such current scholarship looks for fluidity and dialogue not just between the metropole and the periphery but also between different peripheries. These newer works identify the intellectual, cultural, legal, and material currents that ran through and connected global imperial networks. Benton and Walker query how Nelson's current and future scholarship might be part of this new school and subtly urge him further to think about, even theorize, the nexus of colonial relationships in the original thirteen colonies in a more global, even interactive, context.

As some of these articles are historiographical, others ask what school of twentieth-century jurisprudence Nelson's work fits into and how we can historicize that question. That is, these scholars treat Nelson as a product of his time, education, experiences, mentors, colleagues, where he resided and worked, and the intellectual currents of the day. Framed slightly differently, these articles present a micro-case-study of how a successful scholar was produced in the mid-to-late twentieth century United States. For instance, Konig spends considerable time examining the intellectual influence that certain scholars and schools of thought exerted on Nelson's mentors and then the influence of such mentors on Nelson's early work on law and ideas of community in colonial New England. Likewise, Brad Snyder discusses Nelson's scholarship on the role of Supreme Court clerks, Nelson's own clerkship with Judge Edward Weinfeld and Justice Byron White, and his articles on Justice White and his biography of Judge Weinfeld.<sup>7</sup> Snyder understands Nelson as rejecting the mid-century legal process school of thought while also maintaining a continued skepticism towards late twentieth-century critical legal theory. Continuing the attempt to understand where Nelson's work fits, Edward A. Purcell Jr. writes that Nelson has no patience with constitutional originalism, believing that constitutional deci-

5. 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660* (2008); 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660-1730* (2013). Two more volumes are projected.

6. Lauren Benton & Kathryn Walker, *Law of the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 CHI.-KENT L. REV. 937 (2014).

7. Brad Snyder, *Rejecting the Legal Process Theory Joker: Bill Nelson's Scholarship on Judge Edward Weinfeld and Justice Byron White*, 89 CHI.-KENT L. REV. 1065 (2014).

sion-making always has been the product of a host of social, cultural, religious, political, and economic forces.<sup>8</sup>

Yet certain tensions emerge that may be due to Nelson being both a lawyer and a historian situated in a law school. For example, Nelson himself does not subscribe to the gospel of determining cases by looking at the original intent of the framers of the Constitution, but he does believe that showing how Justices historically attempted to situate the Supreme Court as standing outside politics produced a norm relevant to the modern world. But, for the historian who traffics in change and contingency, does the early nineteenth century really tell us much about the late twentieth century? Paul Finkelman comments on the problem of this dual role of historian and jurist, finding the first two-thirds of Nelson's prize-winning study, *The Fourteenth Amendment*, to be a carefully constructed work of history that deeply grounds the Fourteenth Amendment in its historical context.<sup>9</sup> By contrast, Finkelman sees the last part of the book as less critical and the more doctrinal work of a lawyer seeking to justify some of the worst Supreme Court decisions from charges of racism and judicial indifference to the plight of free African-Americans following Reconstruction.<sup>10</sup>

Another thorny question emerging from these essays focuses on the relationship between politics and law in Nelson's scholarship. How does Nelson conceptualize the difference, if any, between law and politics, and does he view law as having any autonomy from politics? Here lies the essence of Nelson's disagreement with critical legal theory—which, reduced to its most simplistic form, views law as inevitably bound to politics and sees both law and politics as driven by class interests and by the reproduction of various hierarchies. Several symposium authors point out that Nelson, writing as a historian, does not pretend that law and politics are actually separate. Rather, he understands that law and politics are intertwined and that law is an ideology produced by a host of societal understandings, including those of various interest groups driven by various self-interests—economic and otherwise. Simultaneously, we find that, when Nelson addresses his normative deductions from the history that he writes, he asserts a distinction between law and politics. Mark McGarvie notes in his examination of Nelson's scholarship on Chief Justice John Marshall and *Marbury v. Madison* that Nelson sees Marshall's greatest legacy as his

8. Edward A. Purcell, Jr., *Semi-Wonderful Town, Semi-Wonderful State: Bill Nelson's New York*, 89 CHI.-KENT L. REV. 1085 (2014).

9. Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019 (2014).

10. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); see *infra* notes 22-24 and accompanying text.

insistence that law should be removed from and separate from politics.<sup>11</sup> In part, this belief leads Nelson to conclude that courts should not be involved in or respond to socially divisive issues on which a larger social consensus has not emerged. Such questions are political and therefore matters best left to the legislative and executive branches. At the same time, Nelson embraces a protected space for individual rights that courts must protect. Yet how does one distinguish a protected right from a social issue?

The symposium's authors, including Nelson himself, recognize the centrality to Nelson's methodology of his gathering and synthesizing vast amounts of archival material.<sup>12</sup> However, it would be wrong to believe that Nelson does not also engage in creating meta-narratives. Both Edward A. Purcell Jr., writing on Nelson's two books on twentieth century New York,<sup>13</sup> and Gautham Rao<sup>14</sup> point out that Nelson portrays and analyzes a changing complex social, legal, and political economy in both the nineteenth and twentieth centuries. These conditions and the ideologies that they generated created a series of fundamental contradictions that echoed across nineteenth and twentieth century America and, in part, remain with us today. Such conditions allowed for upward mobility while ensnaring people in a bureaucratic state that provided political stability and made the fundamental redistribution of wealth impossible. Likewise, Americans long had embraced the ideas of majoritarian consent, protection of individual rights, and some form of equality. Such ideals and the multiple contradictions that they produced collided repeatedly and worked themselves out (and continue to do so) in the political and legal arena.

Two scholars surprisingly do not make more than fleeting appearances in the following articles, yet both played vital roles in the evolution of Bill Nelson's scholarly career. The first is John Phillip Reid, who in decades of teaching and scholarship at NYU Law School encouraged Nelson's developing interest in legal and constitutional history while also serving as a foil and gadfly in creative tension with Nelson, in particular in the meetings of the NYU Legal History Colloquium. Reid's resolute commitment to investigating and elucidating law-mindedness as an American cultural value has helped to shape Nelson's work on law within American culture and history. Reid's equally resolute commitment to stay firmly before the twentieth

11. Mark McGarvie, *That Elusive Consensus: The Historiographic Significance of William E. Nelson's Works on Judicial Review*, 89 CHI.-KENT L. REV. 957, 960-61 (2014).

12. William E. Nelson, *Court Records as Sources for Historical Writing*, in LAW IN COLONIAL MASSACHUSETTS 1630-1800, 62 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 499-518 (Daniel R. Coquillette ed., 1984).

13. Purcell, Jr., *supra* note 8, at 1086-87.

14. Rao, *supra* note 4, at 998-99.

century in his scholarly endeavors resonates with his formidable skepticism about the rhetoric of transformation and Americanization in the writing of American legal history—developments with which Nelson has been closely associated.

The second scholar is Morton J. Horwitz, who in the late 1970s joined with Nelson in writing influential monographs on the transformation or Americanization of law that drew Reid's satirical ire. It is well-known that Horwitz was writing his *The Transformation of American Law, 1780-1860*<sup>15</sup> at the same time that Nelson was completing his *Americanization of the Common Law; The Impact of Legal Change on Massachusetts Society, 1760-1830*.<sup>16</sup> Indeed, for many scholars the appearance almost in tandem of Nelson's and Horwitz's books, and in the same influential series (Studies in Legal History), represented a seismic reshaping of the field of American legal history. And yet, the two scholars began to move in different directions that in retrospect were readily discernible in their major books' differing visions of American legal history and American law. Whereas Horwitz's version of that history stressed a self-conscious legal instrumentalism by which certain legal actors sought to shape law to advance their own interests at the expense of other sectors of American society, Nelson, by contrast, told a tale of the erosion of legal community under the influence of social, political, and military change brought by the American Revolution. Their distinct methodologies, environments, and interests have through the years produced two very different legal historians.

A highlight of this symposium volume is Nelson's essay.<sup>17</sup> Although we expected that Nelson would want to write a short response, the essay that he produced is far more than that. Forever intellectually curious and productive, Nelson has taken the opportunity presented by this symposium to discern the meta-narratives in his own work and why and how he wrote what he did at particular moments in time. This reflective self-analysis beautifully synthesizes who Nelson is as a scholar and a person. Shining through Nelson's response is his profound belief in the American ideals of liberty, freedom, equality, and individual rights. Although as a historian he is fully aware of how often the American state and Americans have failed to live up to these aspirations, he insists upon their importance—that they

15. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (University Press, 1992) (1977); see also Morton J. Horwitz, *Foreword: Making Legal History*, in *MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON* vii-ix (Daniel J. Hulsebosch & R. B. Bernstein, eds., 2013)

16. NELSON, *AMERICANIZATION OF THE COMMON LAW*, *supra* note 1.

17. William E. Nelson, *A Response: The Impact of War on Justice in the History of American Law*, 89 Chi.-Kent L. Rev. 1109 (2014).

are real, that they have content, that they are more than imaginary and fleeting figments or convenient self-delusions and alibis.

Nelson emerges from his response as a pragmatist, an idealist, and an optimist. Underlying Nelson's oeuvre is his belief in the possibility of American exceptionalism, in the very best sense of the word. For him, John Winthrop's shining city upon a hill<sup>18</sup> and Rev. Dr. Martin Luther King Jr.'s mountaintop<sup>19</sup> have remarkable moral force—not as places that ever existed in reality, but rather as ideals for which America and Americans might strive, no matter how many times they fail. Nelson's idealism is marked by pragmatism.<sup>20</sup> Change has and will come, but it will do so slowly, reasonably, rationally, and incrementally. Throughout Nelson's scholarship, we see how law, courts, and the American political system have developed in ways that forestall radicalism and preclude utopian solutions. As Purcell writes, Nelson's heroes are often those lawyers, judges, and reformers who seek to find a middle way between extremes. Time and time again in Nelson's work, American society, whether in the colonial era or in New York of the 1920s, flounders, but eventually is able to right itself. As Purcell points out, even when it looks as if all is doomed, Nelson is able to find the light—things do get better.<sup>21</sup>

Occasionally Nelson does accentuate the positive, perhaps unduly so, in the view of some of his readers. Writing about the Fourteenth Amendment, Finkelman criticizes Nelson for his failure to recognize fully the catastrophic impact on African Americans of Supreme Court decisions of the 1870s and 1880s that interpreted narrowly the Fourteenth Amendment, or the invidious intent of those Justices who reached and wrote those decisions. Finkelman writes that Nelson is "too kind" to the Supreme Court Justices who issued such decisions as the Slaughterhouse Cases and the Civil Rights Cases.<sup>22</sup> So, too, Snyder sees Nelson as being too gentle in his work on his Supreme Court mentor, Justice Byron R. White.<sup>23</sup> It is indeed

18. Gov. John Winthrop, A Model of Christian Charity (1630 on board the Arbella), <http://religiousfreedom.lib.virginia.edu/sacred/charity.html> (last visited Apr. 16, 2014).

19. Rev. Dr. Martin Luther King, Jr., Speech in Memphis, TN: "I've Been to the Mountaintop" (Apr. 3, 1968), [http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/ive\\_been\\_to\\_the\\_mountaintop/](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/ive_been_to_the_mountaintop/) (last visited Apr. 16, 2014)

20. In this view of exceptionalism, as a matter of opportunity and aspiration rather than of inherent difference, Nelson resembles John Adams, who spelled out a pragmatic, opportunistic, and aspirational vision of American exceptionalism in his 1776 pamphlet *Thoughts on Government*. John Adams, *III. Thoughts on Government*, in 4 PAPERS OF JOHN ADAMS, FEBRUARY–AUGUST 1776, at 86–93 (Robert J. Taylor ed., Harvard Univ. Press 1979) (1776), available at <http://founders.archives.gov/documents/Adams/06-04-02-0026-0004>.

21. Purcell, Jr., *supra* note 8, at 1106.

22. Finkelman, *supra* note 9, at 1024.

23. Snyder, *supra* note 7, at 1074–80.

possible to read Nelson this way, and to conclude that his careful attention to doctrinal analysis might obscure or even eclipse the human consequences of the doctrines that he is analyzing, or the moral culpability of the Justices and judges who wrote those opinions and shaped or invoked those doctrines. And yet, perhaps, in an ironic reversal, Nelson might claim that he is following the counsel of the late, eminent radical historian E. P. Thompson, only for a significantly different class of historical thinkers and actors. Just as Thompson, in his classic 1963 study *The Making of the English Working Class*, sought “to rescue the poor stockinger, the Luddite cropper, the ‘obsolete’ hand-loom weaver, the ‘utopian’ artisan, and even the deluded follower of Joanna Southcott, from the enormous condescension of posterity,” so, too, Nelson seeks to understand jurists who handed down opinions the substance of which has attracted the condescension and derision of posterity.<sup>24</sup>

We may well reach an illuminating understanding of Bill Nelson’s work as a whole if we view him, at least in part, as a consensus historian. Emerging during the first decade of the Cold War, consensus historians stressed societal agreement rather than conflict and argued that there was and is something that could be labeled American values. Mark McGarvie, who uses “consensus” in his article’s title, explains the consensus school of history, its various offshoots, and its influence on Nelson’s scholarship.<sup>25</sup> Nelson’s form of consensus history is much more sophisticated than that offered by leading members of the consensus school. At the center of much of Nelson’s work is a careful examination of the role of consensus itself, how it is created, what happens on its erosion or evaporation, and how law is produced from, reaffirms, and defends consensus. David Konig points out in his discussion of Nelson’s earliest thesis on jury systems in colonial Massachusetts that the enormous discretion conferred on juries could occur only if there was significant societal consensus.<sup>26</sup> By the outbreak of the American Revolution, such consensus evaporated and the law changed, shifting significant power in determining the outcome of cases from juries to judges. Consider Nelson’s observation on colonial New England law:

24. E. P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 12 (1963). In an ironic twist, Thompson, in his 1978 study of the origins of the 1723 English statute known as the Black Act (1 George I c. 22 [1723]), found, to his surprise, that the ideology of the rule of law actually meant something to the judges he was writing about, and deserved respect from a historian who ordinarily might have dismissed invocations of the rule of law as screens for the self-interest of the landed governing class. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 258-69 (1978). In this way, perhaps, Thompson’s attitude toward the judges he was examining parallels that brought by Bill Nelson to the judges whom he was writing about.

25. McGarvie, *supra* note 11.

26. Konig, *supra* note 2, at 930.

“Consensus was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily.”<sup>27</sup>

On a slightly different note, in his response to this symposium, Nelson sees war as a major theme in his work. War of course is the polar opposite of consensus. Yet, it appears that, for Nelson, certain wars—the American Revolution, the Civil War, and World War II—served to create new and more progressive, forms of national consensus. Nelson, as a person, is drawn to the idea of consensus, agreement, and social harmony, and significantly dislikes discord and conflict. This set of likes and dislikes is most noticeable in Nelson’s treatment of the late 1960s and early 1970s in *The Legalist Reformation* and his decision in that book barely to mention radical left-wing activity and revolutionary ferment and disorder.<sup>28</sup> We can almost hear him wondering why there should ever be such discord, as reasonable, rational people should be able to find common ground.

We hope that this symposium can be read in a multitude of ways. For some, it will be an introduction to William E. Nelson’s work. For others, it will provide an intellectual history of the growth and development of a canonical late twentieth-century legal historian. For still others, it will help to synthesize Nelson’s large body of scholarship in ways that illuminate the writing of legal and constitutional history and the shaping of a pivotal historian and master of his craft who continues to surprise, enlighten, and challenge us.

27. NELSON, AMERICANIZATION OF THE COMMON LAW, *supra* note 1, at 4.

28. WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY* (2001).