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

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Introduction: The Making of a Canonical Legal Historian
Felice Batlan and R.B. Bernstein

Americanization of the Common Law: The Intellectual Migration Meets the Great Migration
David Thomas Konig

This essay is an appreciation of William E. Nelson’s Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1975) and the complementary study published six years later as Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825 (1981). The essay places Nelson’s research project in the immediate context of historical writing on colonial New England at the time of their publication but steps back from that narrow context to identify the significance of the book in the long trajectory of great legal historical writing on the Anglo-American legal tradition.

Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity
Lauren Benton and Kathryn Walker

In laboring to uncover the legal origins of the American Revolution, historians of law in early America often separated the field from the comparative legal history of empires. William E. Nelson does not explicitly set out to place American colonial legal history in a global context in The Common Law in Colonial America. But in analyzing legal diversity and identifying elements of early legal convergence, Nelson does address key questions within the comparative history of empire and law. This article surveys Nelson’s contributions and places them alongside two other approaches to the study of colonial legal diversity and the constitution of empires. We argue that Nelson’s methodology of comparing colonial legal systems rather than contrasting them to poorly understood trends in English law represents an essential complement to two other novel approaches in the literature on law and empire: the study of processes spanning colonies and the analysis of metropolitan attempts to design an imperial legal order. Taken
together, these methods promise to integrate fully the history of colonial Ameri-
can law within a global and comparative history of empire and law. The article
thus describes Nelson’s The Common Law in Colonial America as an important
contribution to this larger historiographic project.

THAT ELUSIVE CONSENSUS:
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This essay provides a historiographical context for Nelson’s work on judicial
review. It argues that Nelson’s integration of intellectual and legal history not
only rebutted the instrumentalist historiography that prevailed when he under-
took his work on Marshall and judicial review, but also fostered an appreciation
of the need to place legal actors in the intellectual context in which they acted.
Highlighting the influence of Bernard Bailyn’s pathfinding work on popular sov-
ereignty upon Nelson’s development of his consensus theory, the essay contends
that Nelson’s work changed the course of academic readings of Marshall’s juris-
prudence to be consistent with a broader acceptance of intellectual history. Nel-
son’s work retains special significance in the twenty-first century as a basis for
considering restrictions on judicial review without the overt politicization of the
arguments on the topic that have surfaced since the Bush v. Gore decision in
2000.

WILLIAM E. NELSON’S THE ROOTS OF
AMERICAN BUREAUCRACY AND THE
RESUSCITATION OF THE EARLY
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Gautham Rao
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In 1983, William E. Nelson published The Roots of American Bureaucracy,
1830-1900. Nelson traced the somewhat unlikely emergence and victory of the
bureaucratic model in American political and legal thought. This article summa-
rizes the book’s argument and describes its reception. It also seeks to assess the
scholarly legacy of The Roots of American Bureaucracy. I argue that the book
was ahead of its time because it contradicted prevailing scholarly trends in iden-
tifying a significant federal state in nineteenth-century America. In particular,
during the past two decades, historians and political scientists have built on Nel-
son’s insights to develop a consensus about an early federal government of lim-
ited capacity but significant capability. Nelson’s Roots of American Bureaucracy
deserves appreciation for drawing scholarly attention to the construction and ad-
ministration of the American state previous to the New Deal administrative
revolution.

ORIGINAL INTENT AND THE FOURTEENTH
AMENDMENT: INTO THE BLACK HOLE
OF CONSTITUTIONAL LAW

Paul Finkelman
1019

This article explores and examines William E. Nelson’s masterful study of
the origins and adoption of the Fourteenth Amendment, The Fourteenth
Amendment: From Political Principal to Judicial Doctrine (1988). The article
explains that a quarter of a century after he wrote this book, Nelson’s study of the
origins and adoption of the Amendment remains the best exploration of these
issues. His book illustrates the difficulties of determining the “original intent” of
the framers of this complicated and complex Amendment. At the same time,
however, Nelson demonstrates that for many issues we can come to a strong
understanding of the goals of the framers and ratifiers, even as we cannot reach
such firm conclusions for other aspects of the Amendment. This article takes
issue with the last part of Nelson’s book, arguing that he should have looked
more closely at the Supreme Court’s jurisprudence on race, and offered a more
critical analysis of this jurisprudence. The article suggests that in his analysis of these cases Nelson was too lawyerly, and thus ignores the pernicious results of these cases and also ignores the fact that a contrary jurisprudence of equality was available to the Court, had the Justices chosen to favor equality over inequality. This article ends by arguing that the Court did not have to take this direction because at the very time the Court’s majority supported segregation, most northern states passed laws to protect civil rights. This forgotten history of northern civil rights legislation suggests that there was significant support in the nation for rejecting segregation in favor of equality. Unfortunately, the Supreme Court rejected the equality supported by a majority of the nation in favor of segregations and racism, which commanded the support of a minority of the nation—southern whites.

**REJECTING THE LEGAL PROCESS THEORY**

**JOKER: BILL NELSON’S SCHOLARSHIP ON JUDGE EDWARD WEINFELD AND JUSTICE BYRON WHITE**

Brad Snyder

My contribution to this tribute places Bill Nelson’s scholarship about Judge Edward Weinfeld and Justice Byron White within several contexts. It is a personal history of Nelson the law student, law clerk, and young scholar; an intellectual history of legal theory since the 1960s; an examination of the influence of legal theory on Nelson’s scholarship based on his writings about Weinfeld and White; and an example of how legal historians contend with the subject of judicial reputation. Nelson was one of many former Warren Court and Burger Court clerks who joined the professoriate and rejected the legal process theory that they had learned as law students. Instead of process theory, Nelson and this upstart generation of scholars gravitated to one of five competing theories: (1) Rights protectors; (2) Post-realism; (3) Law and economics; (4) Originalism; and (5) Judicial restraint holdouts. Nelson’s scholarship about Weinfeld and White represents a case study about a scholar struggling to fit two judges whom he clerked for and greatly admired into one of these five schools of thought. Nelson tries hard to turn them into rights protectors, to draw similarities between their jurisprudence and Justice Brennan’s jurisprudence that Nelson so obviously admires. Nelson also reframes Weinfeld’s and White’s judicial restraint so that it looks nothing like the pretentious process theory that Nelson had rejected at N.Y.U. Law School and at Harvard.

**SEMI-WONDERFUL TOWN, SEMI-WONDERFUL STATE: BILL NELSON’S NEW YORK**

Edward A. Purcell, Jr.

This article examines Bill Nelson’s two major books on the history of New York law and politics, The Legalist Reformation (2001) and Fighting for the City (2008). The former deals with developments in New York State from the late nineteenth to the late twentieth century; the latter with New York City starting somewhat earlier but concentrating on the same later period. The Legalist Reformation argues that the election of Alfred E. Smith as Governor of New York in 1922 began a transformation of the state’s legal and political culture that brought new and more egalitarian social policies to the state and eventually inspired what became post-New Deal liberalism with its commitment to both greater economic equality and the protection of civil liberties and minority rights. Fighting for the City focuses more narrowly on New York City and its office of Corporation Counsel, exploring the challenges of governing under law in a complex urban environment marked by changing economic conditions and sharp political conflicts rooted in ethnic, racial, religious, and class differences. From their contrasting perspectives both trace the rise of “legalist reform” in the early twentieth century, the emergence of post-New Deal liberalism in the decades around World War II, and ultimately the decline of both in the last third of the twentieth century. The article discusses the author’s normative views on the nature and values of “legalist reform,” and it concludes by identifying seven sig-
significant contributions that the two books make to our understanding of New York history, the operation of the American legal system, and the nation’s fundamental ideas about law and democracy.

A RESPONSE: THE IMPACT OF WAR ON JUSTICE IN THE HISTORY OF AMERICAN LAW
William E. Nelson 1109

The foundational claim of this essay is that judges at most points in time should act with restraint and should not attempt to resolve contested issues of policy. They should incorporate new policies into the law only when the polity as a whole has already adopted a particular policy or when it is in the process of adopting one. The essay then maintains that there have been three periods in American history—the Revolution and the subsequent decades of constitution-making, the Civil War and Reconstruction, and World War II and its aftermath—when the American public as an entity did adopt policies of liberty, equality, majoritarian democracy, and protection of minority rights. The essay concludes that judges are not only free but indeed are obligated to give operative effect to those policies in deciding cases.

STUDENT NOTES

THE “MORAL HAZARDS” OF TITLE VII’S RELIGIOUS ACCOMMODATION DOCTRINE
Stephen Gee 1131

Freedom of religion in the workplace has recently become a hot topic with regards to whether U.S. or state laws (mainly contraceptive care and treatment of same-sex, married employees’ spouses) must accommodate certain employer’s religious beliefs or else violate the employer’s constitutional right. However, before this recent employer-centric topic came to light, the main focus was on employees and to what extent employers must accommodate an employee’s religion via Title VII. Most, if not all, academic literature has argued an employer’s duty to accommodate employee’s religion is too weak under Title VII and should thus be increased to the significant employer burden to accommodate an employee’s disability under the ADA. However, courts have consistently held an employer only has a de minimis burden to accommodate its employee’s religion. This article serves as a devil’s advocate argument for why the legal commentators are wrong and why the current Title VII religious accommodation standards are correct. Issues such as “choice,” constitutionality, and judicial efficiency are covered in-depth. Ultimately, the main counterargument this article makes is how raising the Title VII burden on employer’s will create a “moral hazard” for employees to pick and choose a religion to avoid compliance with neutral employer rules.

ASSESSING THE BOARD OF IMMIGRATION APPEAL’S SOCIAL VISIBILITY DOCTRINE IN THE CONTEXT OF HUMAN TRAFFICKING
Kathleen M. Mallon 1169

United States asylum law provides individuals who have been persecuted in their country of origin with residency in the United States. Membership in a “particular social group” (PSG) confers refugee status on individuals applying for asylum in the United States. The Board of Immigration Appeals (BIA) initially defined a PSG as a group composed of members who all share an immutable characteristic, that is, an unchangeable characteristic or one so fundamental to an individual’s identity that they should not be required to change it. This test functioned well for over a decade; however, the BIA added an additional requirement to the analysis: “social visibility.” “Social visibility” requires that
members possess characteristics visible and recognizable by others in the native country. Today, all but two circuits require “social visibility.”

This note argues that this widespread acceptance of the “social visibility” requirement is problematic, particularly for victims of human trafficking. First, it is incredibly difficult to define public perception; therefore, it is impossible to identify when a society has confirmed the existence of a PSG. Second, “social visibility” operates to exclude deserving applicants because persecuted groups will take pains to avoid becoming socially visible. Part I presents an overview of international and domestic refugee law. Part II analyzes the current circuit split between immutable characteristic and social visibility. Part III details the problems with requiring “social visibility” and “particularity” generally and specifically for victims of human trafficking, and Part IV concludes that “immutable characteristic” strikes the proper balance between the interests of applicants and the United States legal system.

ABSTENTION DOCTRINE AND THE FAIR DEBT COLLECTION PRACTICES ACT

Michael J. Wood

A survey of cases where federal courts abstain from hearing cases related to existing state court cases under the Fair Debt Collection Practices Act (FDCPA) reveals varying approaches and theories underlying those courts’ abstentions. This article attempts to distinguish FDCPA claims related to the validity of the underlying debt from claims arising out of debt collectors’ conduct in collecting a debt, and recommends that federal courts avoid abstaining from the latter. When Congress passed the FDCPA, it intended to provide access to a forum of the consumer’s choice to enforce their rights under the Act by serving as “private attorneys general.” Therefore, consumers must have the option to bring their FDCPA claims in federal court even when there is a pending state court action involving the underlying debt if the state action will not necessarily dispose of the FDCPA claim. The FDCPA bans such practices as making false and deceptive statements, using unconscionable means to collect a debt, and, for example, calling a consumer at her place of employment after being informed that the consumer is not permitted to take personal calls at work. State court litigation over the validity of a debt (e.g., a foreclosure case) does not necessarily impact a dispute over the debt collection activity itself. On the other hand, where a potential FDCPA claim arises out of a debt collector’s prosecution of state court litigation (i.e., consumer never owed a debt at all), federal courts should stay their hand pending the resolution of that claim in order to avoid piecemeal litigation and inconsistent results. This article attempts to more clearly define that line and recommends a consistent approach to abstention doctrine in FDCPA actions.
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