William E. Nelson's *The Roots of American Bureaucracy* and the Resuscitation of the Early American State

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It has become trite to observe that the state is “back in.” Since the 1980s, when political scientists led by Theda Skocpol enjoined scholars to take seriously the concept and significance of the state in American history, politics, and society, an enormous outpouring of work on the design and meaning of the American state has colored the pages of law reviews and scholarly journals. Legal historians have been important, and particularly attuned, to this statist turn. Taking upon themselves the difficult task of explaining the beginnings of contemporary expansions or contractions of the American state’s capacity, legal historians have unearthed innumerable contests over regulatory power, the location of public authority, and the social foundations of the family—sex, marriage, and childhood. To some extent, this turn is a result of the inherent importance of history in marking...
the limits and possibilities of constitutional doctrine. Also, generations of scholars trained by history departments in the thralls of a broad embrace of social and cultural history have located the functioning of legal doctrine and mechanisms in areas once thought peripheral, if at all connected, to the inner workings of high courts.

William E. Nelson’s *Roots of American Bureaucracy*, though, does not quite fit in this historiographical trajectory. In this, his fourth book, Nelson did not focus upon whether there existed a significant American state. Rather, Nelson assumed that there was, and to a great extent, that there always had been. Nelson’s chief inquiry in *Roots of American Bureaucracy* was how and when a certain means of governance captured the American state—“why the bureaucratic state was born in America when it was—in the late nineteenth century.” For Nelson, the “bureaucratic state” meant a state in which “the power of government is generally brought to bear upon individuals by bureaucrats whose edicts are backed by police and ultimately military units capable of using physical force.” The “bureaucrats” are expert, “salaried,” members of the civil service. In a society ruled by the bureaucratic state, offices are distinct from the persons who occupy them. “Professional groups” determine “normative standards” that become the measures of enforcement.

A plausible case can be made that all of Nelson’s scholarship revolves around war and governance. For Nelson, wars radically restructure society and necessitate reformations or revolutions in public power. His studies of how the common law worked, what it worked upon, and for whom it worked, bring us to the point of conflict and other interactions between the individual and the state in the aftermath of the American Revolution.

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7. *Id.* at 2.

8. *Id.*

9. *Id.* at 2-4.

10. *See Making Legal History, supra note 5, at 5-6.*

studies of New York present the “legalist reform” ideology and institutions that, when taken together, momentously transformed municipal governance in New York and, by implication, well beyond, in the epoch of World War. But even at this broad comparative level, The Roots of American Bureaucracy functions on a different analytical register than Nelson’s other works. Nelson’s scholarship on the common law teaches of transformations over time. The New York studies are more classically narrative histories of shifting governmental power. The Roots of American Bureaucracy traces the somewhat unlikely emergence and victory of the bureaucratic model in American political and legal thought.

For anyone who has been lucky enough to have Nelson as a mentor, the Roots of American Bureaucracy is undoubtedly a surprising book. For one thing, Nelson, the consummate historian, is notoriously skeptical of the unwanted intrusion of theory into good history. Many a young scholar—and this one is no different—has doubtless received the same lecture from Nelson about the dangers of dating one’s work by writing in reference to theoretical debates and constructs. To a small degree, Nelson’s interest in mapping out the rise of the bureaucratic state does associate his work with the statist historiographical turn described at the outset of this paper. Written at the high tide of the Reagan Revolution, the Roots of American Bureaucracy offers an unqualified defense of the promise of a bureaucratic state that was created chiefly to dismantle a dangerous tradition of American majoritarianism, as well as to functionally protect the minority in politics, economy, and society.

However, as I seek to argue in the first part of this article, excessive scrutiny of the political stakes of The Roots of American Bureaucracy detracts from a substantive and important text. The book’s sweeping argument remains an important account of the bureaucratization of the American state before the New Deal. Even more importantly, the book drew compelling connections between the story of statecraft and main themes in nineteenth-century American history long thought to have little, 


13. See Nelson, Americanization, supra note 11; Nelson, Colonial, supra note 11.


15. Nelson, supra note 6, at vii–viii.

or nothing, to do with the development of state power, especially antislavery ideology and the market. 17 The rise of the bureaucratic state becomes a nineteenth-century story that deserves extended discussion. In stark contrast to studies that emphasized the anti-statism of nineteenth-century law and politics—for instance, Madisonian and Jacksonian political philosophy, the laggardly arrested development of federal governance, and the synthesis of the so-called Lochner Era—Nelson confidently locates the crucible of American bureaucracy in the nineteenth-century. 18 Finally, as a matter of method, Nelson traffics in contingency and irony, which serve as an effective antidote to the monocausality that detracts from many histories of political institutions.

Most importantly, Nelson’s broad and ambitious argument provides a skeletal structure for making sense of the state that subsequent historians have filled in. Indeed, the book’s critical reception suggests that it came before its time. 19 Several reviewers were befuddled at the very same aspects of the book’s argument that now appear as its main strengths. More recently, though, several generations of scholars have picked up where The Roots of American Bureaucracy left off. 20 As governance has become the watchword of new legal and political histories, it is worthwhile to consider the enduring legacy and contribution of Nelson’s book.

It would not be a proper comment on Nelson’s work, without the airing of an alternate thesis. In the final section, I offer a brief critique of the Roots of American Bureaucracy—in a book interested in central, bureaucratic government, Nelson spends vast amounts of time discussing ideas and meanings, but almost no time at all with the actual institutions and governance that was unfolding in the United States. But at the level of everyday governance, a substantial shift occurred simultaneously as the emergence and victory of the idea of bureaucratic government. I argue that over the course of the nineteenth-century, and particularly in the domain of the federal government, bureaus struggled to rid themselves of the vestiges of republican office-holding that had initially established the federal state along the lines of its predecessor, the British Empire. By the late nineteenth-century, the reconstitution of the federal government would be complete. The bureaucratic state would thusly come into existence and, if we are to take Nelson at his word, remain ever more. 21

17. NELSON, supra note 6.
20. See discussion infra pp. 1115-17.
21. NELSON, supra note 6, at 159-61.
I. THE ROOTS OF AMERICAN BUREAUCRACY

In *The Roots of American Bureaucracy, 1830—1900*, Nelson argues that American bureaucracy emerged out of a shift from majoritarian governance by political parties in the age of Jackson to governance by reformers and experts within governmental institutions at the turn of the twentieth century.\(^\text{22}\) The bureaucratic turn in American governance resulted primarily from the actions of antislavery moralists during the era of the Civil War who sought to protect minority rights that fell outside of the platforms of the major political parties.\(^\text{23}\) The failure of these antislavery reformers, as seen most vividly in the collapse of reconstruction, propelled government reformers to pursue a pluralistic state that was responsive to the rights of individuals and minorities.\(^\text{24}\) In identifying these scholars, Nelson attempted a historiographical resuscitation of the “mugwump.”\(^\text{25}\) The mugwumps were a middle-upper class faction of the Republican Party who had carried the antislavery banner before the Civil War, now turned *en masse* to the problem of the state at the end of the nineteenth-century.\(^\text{26}\) For American historians writing since the mid twentieth-century, mugwump lectures about the moral crises corrupting American politics had come to appear as nothing more than self-interested ideological rhetoric.\(^\text{27}\) Nelson, however, found no justification for this historiographical trope.\(^\text{28}\) The administrative state was a result of the profound economic, political, and moral changes that dominated nineteenth-century America, and the mugwumps were prime movers in creating those changes.

The early American state that became recognizable in the Jacksonian era revolved around the problems of consent and majoritarianism.\(^\text{29}\) The elite rule of the colonial era had given way, after the American Revolution, to the principle of a government built on popular consent. But the emergence of new institutions and individual free agency—at least for white, propertied men—fractured and enervated the regulatory reach of municipal, state, and federal governments.\(^\text{30}\) Simultaneously, economic and cultural

\(^\text{22.}\) NELSON, supra note 6.
\(^\text{23.}\) Id. at 41-68.
\(^\text{24.}\) Id. at 69-112.
\(^\text{25.}\) Id. at 5, 160.
\(^\text{26.}\) Id. at 82-112.
\(^\text{28.}\) NELSON, supra note 6, at 5-7.
\(^\text{29.}\) Id. at 9-40.
\(^\text{30.}\) See id. at 22-30.
changes wrought regional differences that obviated political unanimity.31 Instead, “something less—the approval of a majority—would have to suffice.”32 Majoritarianism thus rose to prominence in American governance between 1820 and 1860.33 In Congress, majority caucuses and majority-controlled committees slanted the lawmaking process to transparently favor their majority.34 From Jackson through Lincoln, Presidents used their authority to move the federal government away from elite control and, simultaneously, through the patronage, as a new institutional foundation to curry allegiance among the new, broadened voter base.35 Political spoils and favoritism were the *modus operandi* of federal governance.36 Limited as the post office, customs service, and land offices might be in comparison to the organs of the modern administrative state then, they became enormously important for the continuity of majoritarian political rule and the political economy that undergirded it.37 Revenue, communication, and westward expansion grew the state’s capacity while also cementing the people’s ties to the nation.38 Judicial instrumentalism, particularly in favor of economic development, and judicial review, particularly targeted against popular political movements, reflected the politicized nature of the judiciary.39

It was the political problem posed by slavery, or rather the antislavery critique of the slave power, that began chipping away at the Jacksonian, majoritarian state.40 Slavery thus set in motion “a circuitous process” that resulted “in the emergence of bureaucratic institutions” in the early twentieth-century.41 That process began in the ideological foundry of antislavery discourse. Radical evangelicalism, transcendentalism, and eighteenth-century “human rights” literature converged in northeastern antislavery ideology during the 1850s to establish the principle that government must act according to a “higher law.”42 The unseemly excesses of proslavery ideology, resulting as it did in the silencing of political speech, mobbing against abolitionists, pushed antislavery partisans to refocus their “higher law” on the basic principle of the necessity of protecting inalienable indi-

31. *Id.* at 15.
32. *Id.* at 16.
33. *Id.* at 40.
34. *Id.* at 16, 17.
35. *Id.* at 29.
36. *Id.*
37. See *id.*
38. *Id.* at 23-29.
39. *Id.* at 34, 35.
40. *Id.* at 41-46.
41. *Id.* at 42.
42. *Id.* at 42-45.
vidual rights. Only a short intellectual leap was necessary before this philosophical dedication to individual rights became the foundational framework of the Republican Party in the late 1850s.

In terms of governance, the era of the Civil War and Reconstruction amounted to nothing less than the experimental application of “antislavery moral precepts to political life.” There was no better embodiment of this experiment than the Reconstruction amendments: the abolition of slavery in the Thirteenth Amendment, the promise of equality toward citizens inherent in the Fourteenth Amendment, and the protection of voting rights in the Fifteenth Amendment. Beyond the Amendments, however, a great deal of governing would occur. Nelson makes sense of this great mass of lawmaking by developing a recurrent tension between Congress and the Supreme Court. As Congress sought to expand the Federal Government’s authority to enforce the principles of antislavery morality, the Supreme Court sought to check it to preserve federalism and curb congressional overreaching. Ultimately, the Supreme Court emerged victorious. For Nelson, the Court of the Civil Rights Cases, long reviled as a conservative retreat from antislavery ideology and an embrace of institutionalized racism, was nothing more than a realization that the principles of high liberalism, especially limited central government, took priority over the already vanquished shibboleth of slavery. In so doing, the Court aimed to illustrate that antislavery politics had become that which it once abhorred. The radical Republicans and their allies had turned to the institutions of the federal government to protect a minority—the freedmen—endangered by a dangerous majority of white supremacists. Yet, the Supreme Court established that the Republicans’ activist governance endangered the architecture of federalism. In other words, in seeking to undo the corrosive power of

43. Id. at 42-43.
44. Id. at 51.
45. Id. at 64.
46. Nelson expands this thesis on the meaning of the Fourteenth Amendment in a subsequent work: “Those who adopted the Fourteenth Amendment did not design it to provide judges with a determinative text for resolving this conflict [between ‘individual rights and state legislative freedom’] in a narrow doctrinal fashion. They wrote the amendment . . . to reaffirm the lay public’s longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule.” WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 8 (1988).
47. NELSON, supra note 6, at 66-67.
48. Id. at 65-70.
49. Id. at 70-71. “It was equally possible, when the Civil Rights Cases demonstrated how intrusively governmental power would need to be used to legislate equality, for men like [Justices] Field and Bradley to conclude that classical liberal values were at least as important as a specific antislavery result.” Id. at 71.
50. Id. at 73.
southern white racists, the Republican Party anointed itself an empowered majority.\textsuperscript{51} As the Court warned in the \textit{Civil Rights Cases}, and in the \textit{Legal Tender Cases} and \textit{Hepburn v. Griswold} before them, the tyranny of one majority was poised to replace its predecessor.\textsuperscript{52}

By the late nineteenth-century, then, the problem of majoritarianism remained. A new class of reformers now turned to the emerging discourse of scientific rationality and social politics to reconstitute the institutional foundation of American governance in such a way as to protect minorities from the tyranny of majorities.\textsuperscript{53} Their method was to resuscitate a moral foundation for American politics on one hand, and to create institutions and classificatory systems to translate that morality into policy to protect endangered minorities.\textsuperscript{54} The former task was simple. In the Jacksonian political universe, conveniently shorn of any traces to slavery and cronyism, reformers such as E.L. Godkin and Woodrow Wilson found their model for the polity. Virtuous, democratic, and constitutional—these traditional values again became watchwords of the new science of American politics.\textsuperscript{55} Science, or rather, the classificatory and institutional movements within the broad intellectual embrace of scientific method that unfolded in these years, offered the means by which to bring the nation’s traditional values to bear on politics.\textsuperscript{56} Each social problem had a social solution—for example, the labor problem would dissipate under a managed redistribution of wealth, the perfection of principles of contract, and scientifically justified protective legislation.\textsuperscript{57} The reformers repeatedly sliced and diced American society into manageable cross-sections by classifying, managing, and differentiating. The university, the corporation, and the regulatory agency represented the culmination of this brand of thought.\textsuperscript{58}

\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 68-81. \textit{Civil Rights Cases}, 109 U.S. 3 (1883); \textit{Legal Tender Cases}, 79 U.S. 457 (1871); \textit{Hepburn v. Griswold}, 75 U.S. 603 (1870).
\textsuperscript{53} NELSON, supra note 6, at 82-83.
\textsuperscript{54} \textit{Id.} at 87.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 89.
\textsuperscript{57} \textit{Id.} at 89-112.
Majoritarianism, antislavery moralism, nostalgic republicanism, and scientific rationalism, converged at the turn of the twentieth-century to produce the beginnings of American bureaucracy. It was first necessary to reform the problematic institutions that had constrained the possibilities of American governance since the 1830s. While political parties continued to dominate Congress, long-standing, all-powerful, omnibus Congressional committees gave way to new internal organizational schemes, such as the seniority system and the proliferation of specifically tasked committees. In the executive branch, Congress “depoliticized” the civil service through measures such as the Tenure of Office Act. These reforms had mixed results. The Bureau of Indian Affairs was one of several executive agencies that operated much as it had for most of the nineteenth-century, along the axes of political spoils and favoritism. Federal regulation and police authority, too, failed to overcome old ways, as seen most clearly in Congress’ lukewarm handling of railroad rates. Yet, through the pitched battle to control the cost of rail travel, the “reformers” advocating scientifically administered governmental institutions became a formidable and unmistakable force.

In the judiciary, this same turn-of-the-century reform movement “attained its fullest development” in legal formalism. For the formalists, the law was a science, not merely a language with which to make sense of policy. They influenced the curriculum of the nation’s leading law schools to reflect this new scientific mentality, and reorganized communities of lawyers into professionalized bar associations. Doctrinally, the judiciary deployed substantive due process “to prevent conflict within the political process between groups that were competing for wealth and power in late nineteenth-century America.” In short, substantive due process would protect minority populations—capitalists in *Lochner v. New York*, peddlers and small merchants in *People v. Gillson*, and the poor in

59. Nelson, supra note 6, at 113.
60. Id. at 114-19.
61. Id. at 119-25.
62. Id. at 125-27.
63. Id. at 130-33.
64. Id. Notably, Nelson hesitates to name these “reformers,” in stark contrast to his more detailed description of the scientific rationalist “reformers” enumerated in supra note 11.
65. Nelson, supra note 6, at 133.
66. Id.
67. Id. at 140-46.
68. Id. at 153.
Allgeyer—from moralistic legislative majorities increasingly cognizant of their institutional means of effecting change.69

Bureaucracies would rule American governance thereafter—up to and beyond the moment Nelson set out to write The Roots of American Bureaucracy. Twentieth-century social change, Nelson contends, has been constrained by a bureaucratic apparatus unwilling to allow a radical transformation of political and, by implication, social and economic life.70 At best, the American political system, working as it does through bureaucracy, can increase equality of access to resources and opportunities, explains Nelson, undoubtedly thinking about the multiple and overlapping rights revolutions of the twentieth-century and beyond.71 For Nelson, then, bureaucracy is to modern politics what faction was to the Madisonian theory of republican politics in the founding era: a bulwark against the imposition of radical, or as Nelson calls them, “utopian,” solutions to social problems.72

Within the vast sweep of Nelson’s argument are several moving parts that merit discussion. First, Nelson offers an essentially materialist argument in which the interwoven, almost unitary world of law and politics reflect an economic world in constant crisis. The problem of majoritarianism in the Jacksonian era blossomed against the backdrop of profound economic change that unleashed the world of mechanization on the North and accelerated the plantation kingdom in the South.73 Central economic planning—the role of the state in the marketplace—was thus the great boogeyman of Jacksonian politics.74 During and after the Civil War, antislavery moralists’ successes and failures shaped, and were shaped, by a marketplace transformed by slave emancipation. The mugwumps’ scientific rationalism and the institutions they happened upon, such as the Pullman-style company town, occurred as interconnected discourses of scientific management, such as Taylorism and actuarial logic, revolutionized the

70. NELSON, supra note 6, at 160.
71. Id.
72. Id. at 161.
corporate world. Nelson seems to hint at in the end of the *Roots of American Bureaucracy*, has to do with the great many "injustices" requiring action.

Second, Nelson privileges contingency and unintended consequences as a matter of methodology. No single group of historical actors, save for perhaps the mugwumps Nelson rescues from historiographical ridicule, pushes the narrative arc of the story of bureaucratic development. In many, if not most cases, the historical actors' consciousness and reform agenda winds up producing a result altogether unforeseen and unintended. The Jacksonian movement to empower majorities ends up problematizing majorities: antislavery moralists' attempts at reconstituting the federal state to protect endangered minorities further problematizes majority rule; the mugwumps and scientific rationalists, seeking to produce institutions to prevent utopian change, ensconce the only institutional mechanisms that could possibly create massive social change.

Third, for Nelson, at least in this study, the law is inherently political, and the political is inherently legal. The prominent space provided to judicial formalism and substantive due process as the "constitutional glue" in the emerging logic of bureaucracy is a testament to this feature of Nelson's work. The formalist bench that promulgated substantive due process decisions saw itself as an obstacle, perhaps the only obstacle, to majority misrule. Likewise, the great social problems of the so-called Gilded Age, such as emancipation, protective legislation, and relations between capital and labor, were sustained, technical inquiries into legal and constitutional meaning.

However, the complexity of Nelson's method and argument leads to grounds for criticism. First, the connections between the Jacksonians, the antislavery moralists, the mugwumps, the rationalists, and the formalists are unclear. The "roots" of bureaucracy, as Nelson labels them, thus function like the sinews of republicanism in his advisor, Bernard Bailyn's, *Ideological Origins of the American Revolution*—tidily progressing, easily accessible, and ultimately perfectly interlocking. Nelson also manages to
flatten his cast of characters a bit. Other than the judicial formalists, who reify the logic of bureaucracy at the end of the story, little is said about the relative impact and importance of the main actors in the story, as if to suggest that they were all, somehow, equally important.

One might also wonder whether Nelson relies excessively on the elements of contingency that make the book so fascinating. After all, Nelson’s protagonists are all unlikely, none more so than the judicial formalists. Similar to more recent work about the interpretive possibilities of substantive due process doctrine, Nelson argues that the formalists’ use of doctrine to strike down majoritarian legislation simultaneously protected minorities and accelerated society’s embrace of bureaucracy. 81 Missing, though, is discussion of how formalist doctrine, whether aimed at organized labor or protective legislation, took aim at a regulatory regime that was trying to protect minority groups from undue oppression. The historical fascination with *Lochner*, Nelson is right to argue, does detract from a remarkably dynamic moment in American legal history when it seemed as if nothing less than the pillars of American life—the state and the marketplace—were up for grabs. 82 Yet, the same problems that sparked protective legislation in the first place would persist through the mid-twentieth century and directly prod the rise of the bureaucratic institutions that serve as a capstone to Nelson’s story, such as the Department of Labor and National Labor Relations Board. 83 One gets the sense that Nelson is determined to make heroes of the formalists—in outlier decisions where they rule against monied interests or freedmen, for instance, they advanced an important rationale requiring institutionalization for the protection of American political life. When the formalists rule for organized industry, though, they achieved the same substantial result. This treatment unduly elevates statecraft from the morass of politics and unnecessarily obscures the fact that the creation of bureaucratic institutions produced few winners, mostly among the propertied elite, and many more who were less fortunate, mostly among freedmen and the working class.

The final ground of criticism opened by Nelson’s themes and methods is that a book about the beginnings of bureaucracy spends very little time

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82. NELSON, supra note 6, at 161.

on bureaucracy. Nelson’s exclusive focus on the federal government and national politics ignores the remarkable transformation of bureaucratic institutions subject to municipal and state control. Second, Nelson’s dogged pursuit of ideology, across this highest of intellectual and political plains, and in the hands of an unlikely group of protagonists, leaves little room for the actual goings on at early bureaucratic institutions. Nelson thus forecloses the possibility that some element of the bureaucratic transformation of American politics emerged from governing problems experienced within early bureaucratic institutions. Congress’ almost unending quest for reforming regulatory institutions in the late nineteenth century, together with the legal community’s preoccupation with the limits and possibilities of federal power in these same years, suggests that drastic change within administrative politics may well already have been afoot within the government.

For such a slender, elegant volume to illuminate so many new themes in the story of the American state, and to bring together so many seemingly disparate strands of reform, however, attests to the incredible intellectual importance of the *Roots of American Bureaucracy*. Until its publication, the American state had no intellectual history. Why this was so is a matter for a different discussion, but I suspect that the answer has to do with the pesky persistence of several ideologies that, as Nelson makes clear, had a great deal to do with the problem of majoritarianism in nineteenth-century America—liberal individualism, American exceptionalism, and anti-statism. Indeed, the broad history of American government had, for too long, epiphenomenally reflected any number of supposedly more foundational developments, such as social anxiety and market forces. Meanwhile, other scholars had burrowed deep within specific administrations and agencies, particularly under the influence of the bureaucratic change that Nelson has uncovered.


86. See Novak, supra note 18.


88. In the Progressive Era, the Institute for Government Research advocated for bureaucratic reform by funding teleological histories of government that began in the purportedly stateless early
however, Nelson took seriously the history of governance as its own field, shorn of the ideological baggage of the Progressives. 89

Nelson’s broad, provocative argument was a remarkable achievement in its own right. Yet, one can only truly appreciate the book’s value by situating it within the scholarly waters in which the book first made a splash and continues to roll.

II. RECEPTION AND SCHOLARLY LEGACY

Nelson’s creative and original argument cost him with reviewers, who struggled to make sense of The Roots of American Bureaucracy. Though political scientist, Thomas Vocino, and historians, Morton Keller and Bruce Mann, lavished praise on the volume, the Wilson Quarterly published a short review that misstated the book’s main argument. 90 Historian Ari Hoogenboom condemned the book as “flawed” because Nelson supposedly wrongly cast civil service reform as a means to the end of protecting minorities from majoritarian excesses instead of its more immediate purpose of checking the spoils system—as if the two ends of majoritarian excess and the spoils system were somehow impossibly unrelated. 91 One breezy dismissal of the book hinged on the fact that Nelson did not share the author’s ideas that the United States has always been dominated by “individualism and economic liberalism” and that the Jacksonians effectively created bureaucracy. 92

republic and culminated in the rise of bureaucratic agencies in the early twentieth-century. On the Institute’s agenda, see William F. Willoughby, The Institute for Government Research, 12 AM. POL. SCI. REV. 49 (1918). The incredible depth of the Institute’s research is suggested in the 1923 synthesis of governmental history. LLOYD M. SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES (1923).

89. See NELSON, supra note 6, at 7.


The reviewers’ difficulty with *The Roots of American Bureaucracy* also reflected Nelson’s dogged commitment to avoid popular historiographical consensus on any of his main themes and arguments. The mugwumps were not self-interested reformers, or if they were, their true importance lay in their unintended recasting of the potentialities of organized central government. The federal judiciary was not merely a screen for elite capitalists opposed to government and regulation, but rather was thinking its way through a necessary reform of the organs of government. Outside the judiciary, government reformers were not acolytes of modernization, but rather genuinely consumed with solving the problem of democracy. Perhaps not coincidentally, a book that set out to illustrate the spectacular transformation of governance to protect minority rights buffeted uncomfortably upon the main currents of contemporary historiography.

Above all, *The Roots of American Bureaucracy* was ahead of its time, not simply in eschewing the historiographical trends of its own time, but in anticipating the statist revival. In the thirty years since the book’s publication, scholars have followed Nelson’s lead in important areas: establishing the nineteenth-century as the main topos for the development of the federal state, identifying the problem of emancipation as a flashpoint of statecraft, and rethinking the role of Progressives in the burgeoning of modern governance. Below, I focus on one of these examples, the functions of the early American state, in order to demonstrate just how significant Nelson’s conclusions were in *Roots of American Bureaucracy*.

Nelson had brought our attention to the Jacksonian era to understand how majoritarianism became the ruling principle of the American political system. This was a significant rupture with the dominant view of the Jack-

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93. HOFSTADTER, supra note 87.
94. Morton Horwitz would later echo Nelson’s position and, in so doing, describe the persistent historiographical power of the idea that the *Lochner* Court was in the clutches of industrial capital: The New Deal’s constitutional revolution of 1937 was justified not as a powerful break with the old order but as a conservative restoration of neutral constitutional principles that had supposedly been thrown overboard by the *Lochner* Court. The result has been to buttress historical interpretations that, for example, continue to treat the late-nineteenth-century judiciary as having capitulated to big business. In fact . . . the *Lochner* Court was strongly representative of the old conservative view that big business was unnatural and illegitimate. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 7 (1992).
95. See, e.g., WIEBE, supra note 87.
97. See discussion infra pp. 1113-17.
sonians as either forward-looking creators of bureaucracy or entirely corrupt party hacks. Nelson conceded both that the Jacksonians developed "new structure[s]" of governmental authority and that political party ties were their central means of power. Yet he also cleared a more nuanced middle ground. The Jacksonians, he argued, used patronage to build allegiance within the electorate and they used that allegiance to govern. Federal governance in the early republic was to be understood in the operations of the federal agencies: the United States Postal Service, the United States Customs Service, and the General Land Office. This move was in itself somewhat groundbreaking, for the early federal agencies had long since been consigned to the scarcely travelled path of administrative history. It was true that administrative historian, Leonard D. White, had published important roadmaps of the early federal agencies in his early to mid-twentieth century trilogy, The Federalists, The Jeffersonians, and The Jacksonians. One must also acknowledge the contributions of scores of historians seeking to understand the political culture of Jacksonian America. But Nelson suggests something altogether different: that the Jacksonians built a state that did important things.

The significance of Nelson’s claims regarding the early American state are brought into relief when compared with those of political scientist, Stephen Skowronek, in his locus classicus, Building a New American State: The Expansion of National Administrative Capacities, 1877—1920, which was published a year before Roots of American Bureaucracy. Skowronek argued that the federal state in the early republic was a state of "courts and parties," since courts and political parties did a great deal of governing. Nelson would agree on this basic story, but he would diverge

100. See id. at 29.
101. Id. at 24-28.
104. See Nelson, supra note 6, at 29.
sharply from Skowronek in other foundational inquires. Most importantly, Skowronek’s state of “courts and parties” did not take seriously the role of the federal agencies until after the Civil War. Skowronek thus characterizes the federal state of the early republic as “innocuous” and “evanescent.”

Nelson, too, uses the word “weak” to describe the early federal government, but would likely reject the “distant” moniker. After all, what made political authority work for the Jacksonians was the circulation of contracts and screeds through society. “In sum,” concluded Nelson, “the Jacksonians commenced a reconstruction of the executive branch that was based on the willingness of the people to enforce the will of a political majority in return for access to wealth and power.” This state functioned in significant ways for many of the nation’s citizens.

While Skowronek’s text has enjoyed great popularity among political scientists—and specifically, with the “American Political Development” school of thought—it has come under fire by historians who, like Nelson in 1983, argue that, the early American state was an important actor in the life of the early republic. To be sure, several historians have turned their attention to the institutions of state and local government to discover such a powerful state at work. William Novak’s, *People’s Welfare: Law and Regulation in Nineteenth-Century America*, for instance, identifies state judiciaries and legislatures’ use of the police power as a driver of political and economic change. Robin Einhorn’s, *Property Rules: Political Economy in Chicago, 1833-1872*, tells a similar story through the institutions of municipal government. Jeffrey Pasley’s impressive, *Tyranny of Printers*, studies the forging of political culture through the local press.

The organs of the federal government, that Nelson turned to in *Roots of American Bureaucracy*, have become the foundation of a federal government that was not only active and energetic, but also “strong” in its own right. Max M. Edling’s, *Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State*, argues that the
Constitutional settlement of 1787-1788 was, in fact, a victory for the Federalist vision of a strong central government.113 Indeed, the state Edling discovers is not so different from the impressive “tax” or “fiscal-military state” that historians Patrick O’Brien and John Brewer have found in England around the time of the Glorious Revolution.114 Edling claims that the strength of the American state resulted chiefly from the durability of its taxing mechanisms. The steady flow of revenue guaranteed that the United States would be able to establish its political legitimacy and defend itself in warfare.115 Edling’s position is likely too extreme for the Nelson of Roots of American Bureaucracy. But Nelson and Edling agree that the early federal state was active and significant on one hand, and that it brought great stability to domestic affairs on the other.

The interpretive distance between Nelson’s “weak” but significant early American state, and Edling’s “strong” and significant early American state, is bridged by historian Brian Balogh’s synthesis, A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America. Balogh surveys the sum total of federal operations in the early republic and concludes that historians debating the strength or weakness of the state have been asking the wrong questions. For Balogh, the federal government did indeed do a great many things, but it did so most effectively “when it was hidden in plain sight.”116 Through contracting, market-based activity, and other tactics that ultimately obscured the governmental hand at work, the federal government was incredibly powerful in “the day-to-day lives of Americans,” but often times, was obscured behind self-cultivated myths of rugged individualism.117 Balogh’s subtle formulation is remarkably similar to Nelson’s understanding of an active Jacksonian-era government that remained nonetheless “weak.” What might have once appeared to be an internal contradiction in Nelson’s argument now comes to appear, through the prism of Balogh’s work, like a penetrating insight about the early American state.118

115. EDLING, supra note 113, at 40, 220.
117. Id.
Historians have also expanded on Nelson’s brief discussion of specific federal agencies in *Roots of American Bureaucracy* to uncover a stunning landscape of central governmentality in the early republic. Nelson’s hunch that the United States Postal Service was a main driver of political order has been borne out by historian Richard R. John in his splendid, *Spreading the News: The American Postal System from Franklin to Morse*. For John, the postal system “provided ordinary Americans with information about the wider world,” especially commercial and political notices that would undergird Americans market and political activities. In so doing, the Postal Service helped unite the nation itself. Through the activities of the federal post offices, Americans came to appreciate “the boundaries of the community in which they lived” that “extended well beyond the confines of their individual locality, state, or region,” as well as the fact that “the central government might come to shape the pattern of everyday life.” Undoubtedly, John goes much further than Nelson in identifying the post office as “a powerful agent of change” in the early republic. Nelson, however, was right to see the significance of the postal service as essentially circulatory by “manipulating news and opinion.”

Nelson also identified the General Land Office as “politically significant in the newly emerging states of the West” through its activities of surveying and selling the public domain. This was already clear through the work of Malcolm Rohrbough’s, *Land Office Business: The Settlement and Administration of American Public Lands, 1789—1836*. As Rohrbough argued, the federal government managed a “flood” of settlement that “brought new states into the Union, redrew the economic and political map of the nation, and led to unparalleled sales of the public domain.” Daniel Feller’s fine study of the political contest over the General Land Office between the Articles of Confederation and the late 1830s adds yet more importance to this arena of federal activity. For Feller, as for Nelson in his brief discussion, the significance of the land offices lies, not in the enormous federal revenues that resulted from land sales—as several historians

120. *Id.* at 7.
121. *Id.*
122. *Id.*
123. *Id.*
had assumed—but rather in the nationally directed project of western settlement.125

Despite the significance Nelson accords to the General Land Office and the national program of westward expansion, he has little to say about the role of plantation slavery in the story of the early state. Here is one area where Nelson was unable to anticipate a substantial historiographical turn. For historians such as Walter Johnson, Brian Schoen, Adam Rothman, Robin Einhorn, and Don E. Fehrenbacher, federal policy in the early republic was subject to, if not captured by, the slave power.126 Perhaps no other interest group exerted such power over the outcome and interpretation of federal laws. Johnson’s, River of Dark Dreams, explains the indissolubility of Andrew Jackson’s dual initiatives of westward expansion and a slavery-based political economy. “National security and white supremacy were synthesized into state policy and military violence,” concludes Johnson.127

The third area of activity of the early federal state Nelson identified is the United States Customs Service, which Nelson sees as rife with political intrigue and corruption by the era of the Civil War.128 “In the classification and appraisal of goods,” writes Nelson, “customs agents had significant discretion.”129 In the use of their discretion, as well as in the “speed with which” they entered and cleared vessels, customs officials had great power in local politics and commerce.130 This brief but suggestive discussion is precisely correct, and it has been confirmed and elaborated by recent studies.131 Two legal historians, Jerry Mashaw and Nicholas Parrillo, have illustrated how administration of the customhouses was pivotal to the forging of federal administrative law in the nineteenth-century.132 My own work on federal customhouses in the early republic argues that officeholders’ discre-
tion originally allowed customs agents the flexibility to enforce federal regulations under adverse conditions. This same discretion, however, became problematic as the Americans sought to wall off their liberal state from the seemingly corrosive forces of the capitalist marketplace.\footnote{GAUTHAM RAO, AT THE WATER’S EDGE: CUSTOMHOUSES, GOVERNANCE, AND THE ORIGINS OF THE EARLY AMERICAN STATE (forthcoming 2016).}

Post offices, land offices, custom houses, tariffs, and slavery, then, were the business of the early American state at the federal level. With the exception of slavery, Nelson provocatively identified the significance of these discrete elements of governance.\footnote{NELSON, supra note 6, at 22-30.} However, it would take a conscious misreading of the \textit{Roots of American Bureaucracy} to argue that Nelson predicted all of the historiographical twists and turns that have brought historians and others scholars to the conclusion that the early American state was agile, formidable, and potent. Indeed, Nelson insists on the “fragmented” nature of government power in the era prior to the Civil War.\footnote{Id. at 15.} Nonetheless, the historiographical shift that has occurred since the publication of \textit{Roots of American Bureaucracy} has borne out Nelson’s emphasis on the importance of the early federal government, while emphasizing its power and capability.\footnote{See BALOGH, supra note 116; William J. Novak, \textit{The Myth of the “Weak” American State}, 113 AM. HIST. REV. 752 (2008); Mark R. Wilson, \textit{Law and the American State, From the Revolution to the Civil War, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA} (Christopher Tomlins & Michael Grossberg eds., 2008).}

\section*{Conclusion}

However, as I have sought to make clear, a more important factor in the book’s continued relevance is Nelson’s impressive, detailed breakdown of the central components of federal governance over the course of the long nineteenth-century. American historians, political scientists, and historical sociologists have built upon Nelson’s brief, but prescient, sketch to offer an increasingly complex understanding of the nature and role of the state in the American past. As a new generation of scholars further investigates the inner workings of governmental institutions in nineteenth-century America, *The Roots of American Bureaucracy* will undoubtedly remain a pivotal point of reference, both for the statist turn in American historiography and as a foundational substantive investigation of the early American state.