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## A Thousand American Flowers

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## A THOUSAND AMERICAN FLOWERS

Amy Bridges\*

EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (PRINCETON UNIVERSITY 2013). PP. 234. HARDCOVER \$ 41.98. PAPERBACK \$ 32.95.

CAROL NACKENOFF AND JULIE NOVKOV, *STATEBUILDING FROM THE MARGINS: BETWEEN RECONSTRUCTION AND THE NEW DEAL* (UNIVERSITY OF PENNSYLVANIA PRESS 2014). PP. 311. HARDCOVER \$ 59.95.

The two books reviewed in this essay are about laws and policies initiated by the many rather than the few. These laws and policies are found in state constitutions in Emily Zackin's *Looking for Rights*, and in state politics in Carol Nackenoff and Julie Novkov's edited volume, *Statebuilding from the Margins*.<sup>1</sup> The research presented in the books is revealing and important, and the stories related in them as well as the authors' arguments, are contributions to constitutional studies, American political development, and the study of politics and history. Academic readers should not be surprised by the stories and arguments presented here, or that the activism studied was aimed at state government. For more than a generation, scholars of constitutionalism in the United States have insisted that the federal document is not the whole of our constitutional history; state constitutions too are part of U.S. constitutionalism, and state constitutions loom large in our constitutional practice. For their part, scholars of the Progressive Era have forsaken George Mowry's intelligentsia and Richard Hofstadter's blue bloods to argue that in the first two decades of the twentieth century there was widespread recognition that something, or several things, were

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1. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES, WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013); CAROL NACKENOFF AND JULIE NOVKOV, *STATEBUILDING FROM THE MARGINS: BETWEEN RECONSTRUCTION AND THE NEW DEAL* 3 (Carol Nackenoff & Julie Nackenoff eds., 2014).

wrong in U.S. society. There were many sources of proposals and campaigns for remedies.

The reasons reform activism is found in the states are straightforward. State governments are, compared to the federal government, close and accessible, more permeable by popular sentiment. Even in the presence of a greatly expanded federal government, many issues of popular concern continue to be the province of state governments, among them, criminal law and its enforcement, the management of animals, public health, sale of alcoholic drinks, education, family law, housing, and labor law. State constitutional powers are much broader than those granted to the federal government; all powers not delegated to the federal government, plenary powers, remain in the states. Absent specific constitutional prohibitions—the poll tax, for example—and granting the supremacy of federal laws, states may engage in a broad range of activities, and their constitutions embrace a wide field of law. Moreover, state constitutions are more easily amended and state constitutional conventions were privileged venues for popular input. Finally, as Madison reassured doubters, citizens have a continuing fealty to their states.

I begin with Emily Zackin's *Looking for Rights in All the Wrong Places*.<sup>2</sup> Scholars of the thirteen colonies and the early U.S. republic have long argued that eighteenth century citizens shared the conviction that rulers ever lusted after power and dominion. One result of that belief was that the Federal Constitution created a central government of only specific powers delegated to it by the people. Even so, not secure that institutional design was sufficient to preserve their God-given liberties, citizens insisted on the addition of a Bill of Rights. The sections of the Bill of Rights list activities forbidden to government, hence *negative* rights. The Federal Constitution has so dominated our understanding of U.S. legal traditions and our political culture that it has long been argued that both tradition and a persistent anti-government culture explain the absence of positive rights in the United States.

Emily Zackin challenges this understanding. First, Zackin insists that Americans do have positive rights; they have been written into state constitutions.<sup>3</sup> Positive rights protect citizens from injuries from sources other than government. Positive rights also mandate that the government provide protection from those injuries. Positive rights serve as entitlements for benefits state governments must provide.<sup>4</sup> Second, Zackin argues that positive rights are the product of social movements that have mobilized in support of specific constitutional provisions. In support of this argument, Zackin provides three case studies: rights to public education, workers' rights, and environmental rights.

Although Thomas Jefferson proposed universal public education in his Notes on Virginia (1785), as late as “the beginning of the nineteenth century, the [idea] of statewide and state-sponsored education was highly controversial.”<sup>5</sup> The idea had its champions. For antebellum citizens it was an article of faith that the intelligence, character, and the inde-

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2. ZACKIN, *supra* note 1.

3. *Id.* at 2-3.

4. *Id.* at 41-42.

5. *Id.* at 68.

pendent thinking of the people were the foundation of republican government, and advocates for public schools then and later “justified their support . . . by arguing that education is necessary to maintain a republican government.”<sup>6</sup> Supporters argued as well that education was a “moral right.”<sup>7</sup> By 1865, seventeen of the thirty-six states had constitutional provisions for public school systems; twelve of these were created in their states’ initial constitutions.<sup>8</sup> Central to Zackin’s argument, education is a positive right because constitutional provisions mandate state governments to provide education.<sup>9</sup>

Zackin also examines workers’ rights.<sup>10</sup> Nineteenth century workers voiced their need for governmental protection from dangerous working conditions, from militias hired to discipline them, and from legal doctrines (or contracts) that precluded receiving compensation from their employers for injuries suffered on the job.<sup>11</sup> Organized workers petitioned legislatures and also mobilized to be represented at constitutional conventions. In these efforts, their sizable presence in the electorate was an important asset. Workers themselves explained that they needed additional, *different* rights than those already written into state constitutions.<sup>12</sup> Debates about mining safety at the Illinois Constitutional Convention [1875-76], Zackin reports, reflect a clear distinction between positive and negative rights.<sup>13</sup> Arguing for the inclusion of a mining safety provision, one delegate noted that miners did not ask the convention for more traditional property rights because:

[T]hat . . . sort of protection was largely irrelevant to the laborer, who often had little in the way of property. . . . The class it affects come not before us asking that their property or their material interests be protected at our hands. . . . They come to ask that . . . we protect their all—made up of their lives, their limbs, and their health.<sup>14</sup>

Similarly, at Virginia’s 1901 convention, a delegate explained,

Surely, if it is necessary to put in the Constitution some provision to protect a man’s property, if you find the whole tendency or doctrine of the courts is to allow a man’s life to be taken without due compensation, it is necessary to have a Constitutional protection to stop that evil also.<sup>15</sup>

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6. *Id.* at 73.

7. ZACKIN, *supra* note 1, at 69.

8. *Id.* at 71 tbl.5.1.

9. *Id.* at 72.

10. *Id.* at 106.

11. *Id.* at 110.

12. ZACKIN, *supra* note 1, at 116.

13. *Id.* at 113.

14. *Id.* at 116 (internal quotation marks omitted).

15. *Id.* at 117.

Workers voiced their demands for constitutional changes not only to make their work lives better but also to stop courts from declaring laws on workers' behalf unconstitutional. Zackin reinforces her claims about laws for the protection of workers by providing charts showing every labor provision in state constitutions.<sup>16</sup> In addition to supporting her central argument, Zackin's discussion of workers' rights demonstrates that workers in the United States did not simply "reward their friends and punish their enemies."<sup>17</sup> Workers were politically active on many fronts, asking governments for protective legislation and opposing longstanding legal doctrine that worked against them.<sup>18</sup>

Protection of the natural environment, and provisions for a healthy environment, are also positive rights, benefits state governments are required to provide to residents.<sup>19</sup> These have a long history. Scholars have denigrated state constitutions; among the virtues of Zackin's text is her care to disabuse readers of trivializing accounts of state constitutional provisions. The environmental protections in New York State's 1894 Constitution provide the perfect example.<sup>20</sup> In 1894, as Convention delegates revised the earlier text, they added the "Forever Wild" provision.<sup>21</sup> Forever Wild was quite detailed, and specified that no trees be removed from the state forests.<sup>22</sup> As often happened in the states in the second half of the nineteenth century, New York's citizens believed that neither the state legislature nor the state's Forest Commission were trustworthy guardians of New York's remaining wilderness. The Forever Wild provision has in fact preserved state forests.<sup>23</sup> For one example, when some desired to construct a bobsled track for the 1932 Olympics, the court ruled that "to yield to the seductive influence of outdoor sports," would be "to open a door that would allow abuses as well as benefits."<sup>24</sup> Any exceptions to the constitutional rule required an amendment, for the good and sufficient reason that the natural forests of the state are irreplaceable, and valued by its residents.

The Environmental Protection Agency was created in 1970, yet activists continued to make demands that state governments attend to the environment. Activism in the states made sense because, from the nation's inception, state governments have borne responsibility for their natural resources and, along with cities and counties, for public health. Between 1964 and 1978, fourteen state constitutions added provisions about the environment; six declared either that these were citizen rights, or that it was the state's duty to attend to a healthy environment. New Mexico's provision was that "the legislature . . . provide for control of pollution and control despoilment of the air, water, and other natural resources of the state," and eight other constitutions had comparable provisions.<sup>25</sup>

Over the course of the nineteenth century, state bills of rights grew longer and longer.

16. *Id.* at 111 tbl. 6.1, 6.2.

17. *See* Barack Obama, President of the United States, Interview with Univision (Oct. 25, 2010).

18. ZACKIN, *supra* note 1, at 143.

19. *Id.* at 189.

20. *Id.* at 155.

21. *Id.*

22. *Id.*

23. ZACKIN, *supra* note 1, at 155.

24. *Id.* at 31.

25. *Id.* at 150-51 (internal quotation marks omitted).

Some of the additions were elaborations of provisions in the Federal Bill of Rights. For example, the First Amendment to the Federal Constitution guarantees freedom of religion; the same guarantee appears as seven sections of the Bill of Rights in Indiana's Constitution of 1851.<sup>26</sup> Although one might assume these elaborations followed naturally from the original text, many nineteenth century citizens were not so trusting. Other provisions were entirely new, and some of them involved positive rights, for example, prisoners' rights.<sup>27</sup> Colorado outlawed employment contracts that required employees to agree not to claim that their employers pay compensation for injuries on the job, even if the employer was manifestly at fault; the provision appeared in the article on labor.<sup>28</sup> In 1912, Arizona's Constitution declared that the "fellow servant doctrine is forever abrogated" in the state of Arizona.<sup>29</sup> There were also sweeping injunctions to state governments to support the general welfare.<sup>30</sup>

Authors of these longer bills of rights were proud of their work, and insisted that they had carried out their responsibility, as authors of state constitutions, to include policies that accumulated experience had shown were wise. Colorado's delegates boasted that the constitution they put before the people for ratification included "not only all of the primitive rights guaranteed in [the] National Constitution, but most of those reformatory measures which the experience of the past century have proven to be wise and judicious."<sup>31</sup> In the twentieth century as well, state constitutions have evolved in response to citizen demands and concerns, and reflected popular consensus by enacting positive rights.

Despite a generation of scholarly work on state constitutions, skeptics remain. "Where," they seem to ask, "is the beef?" Emily Zackin provides an answer. Her work demonstrates that foremost among the contributions of state constitutions is a broad array of positive rights.

Carol Nackenoff and Julie Novkov introduce *Statebuilding from the Margins* by summoning Elizabeth Clemens' evocative image of the Rube Goldberg state.<sup>32</sup> Scanning the range of their cases in cities and states—including all sorts of shared public-private efforts, as well as a strong appearance from the third estate—these five cases show how common *ad hoc* and half-manageable arrangements have been. Another two cases examine federal efforts. The first of the federal initiatives is the sometimes tentative and sometimes determined federal effort, in the nineteenth century, to shape the character of citizens.<sup>33</sup> The second federal initiative, in the twentieth century, was setting parameters for housing policy that secured redlining in housing construction and sales.<sup>34</sup>

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26. U.S. CONST. amend. 1; IND. CONST. art. 1, §§ 1-7.

27. IND. CONST. art. 1, sec. 15 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor.")

28. BRIDGES, *supra* note 1.

29. ARIZ. CONST. art. XVIII, § 4.

30. BRIDGES, *supra* note 1.

31. *Proceedings of the Constitutional Convention: To Frame a Constitution for the State of Colorado* (Dec. 20, 1875).

32. Carol Nackenoff & Julie Novkov, *Introduction*, in *STATEBUILDING*, *supra* note 1, at 3.

33. *Id.* at 12-13.

34. *Id.* at 17.

Students of politics and history tend to highlight the role of institutions in shaping policy. In this collection, although institutions make appearances, the roles of individuals are key determinants of policy proposals, outcomes, and implementation. In case after case, committed individuals, like Henry Bergh of the American Society for the Prevention of Cruelty to Animals (ASPCA), or the progressives who supported the juvenile courts, drove both new policies and institutional innovation.<sup>35</sup> And in matters of federal policy, the personal commitments of the individuals in powerful institutional positions were determinants of state policies and outcomes, outweighing institutions in creating state capacity.<sup>36</sup> I begin with state and local politics.

Marek Steedman studies the powerful influence and rhetorical power of the press on politics in Georgia.<sup>37</sup> It is not too much to say that in the first years of the 1900s, Georgia's major newspapers *choreographed* the creation of a majority in support of statewide prohibition.<sup>38</sup> They did this by creating a narrative that linked prohibition of alcohol, white supremacy, and southern manhood to the new Jim Crow order of the South. Georgia and the other southern states were not natural candidates for statewide prohibition; many southerners loved their drink. Moreover, Georgia had a local option system for prohibition that accommodated preferences for, as well as aversion to, prohibition. "[T]he rhetorical achievement of prohibition's advocates in Georgia," Steedman explains, was "to embed the politics of alcohol within the terms of a larger, progressive and reforming, white supremacist statebuilding project."<sup>39</sup> An opportunity was provided by a series of violent cross-race events, portrayed by the press as black riots. Steedman comments that "racial massacres might be a better term."<sup>40</sup> In every case, whites visited punishing violence on African-Americans. In publicizing these "riots," the press characterized them as part of a "crime wave."<sup>41</sup> "The crime wave was fictitious in every detail. The story was fabricated that African American men, after patronizing the city's dives and saloons more than they should have, perpetrated all sorts of crimes, including assaults on white women. White southern men were called upon by these events to rise to the standard of southern chivalry and protect their women. In that project, the *Pensacola Journal* promised its readers that if they were to "[r]un the saloons out of the South . . . the Race Problem will be practically solved."<sup>42</sup>

The epigraph for this chapter is a quote from Max Weber, who wrote, "the political publicist, and above all the journalist, is nowadays the most important representative of the demagogic species."<sup>43</sup> Steedman claims that "Prohibition was propelled from the mar-

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35. *Id.* at 122-23.

36. *Id.* at 19.

37. Gareth Steedman, *Demagogues and the Demon Drink: Newspapers and the Revival of Prohibition in Georgia*, in STATEBUILDING, *supra* note 1, at 65-94, 132.

38. *Id.* at 21.

39. *Id.* at 73.

40. *Id.* at 77.

41. *Id.* at 76.

42. STATEBUILDING, *supra* note 1, at 92 (internal quotation marks omitted).

43. *Id.* at 65 (internal quotation marks omitted).

gins to the mainstream of southern . . . politics . . . by the four major newspapers in Atlanta between 1905 and 1907.”<sup>44</sup> Not only did the rhetorical coup of the press shape Georgia politics, but also echoed across the South, where state after state read the same or parallel narratives in the press and adopted prohibition.<sup>45</sup> Steedman sees this accomplishment as the product of circumstances peculiar to the early twentieth century South.<sup>46</sup> Yet Weber was exactly right; the power of the press was hardly confined to the turn of the century South. Across the nineteenth century, newspapers and their editors likewise exercised tremendous political power in U.S. state politics. Newspapers were openly partisan in the nineteenth century and into the twentieth.<sup>47</sup> Politicians or their parties often purchased papers to assist them in political campaigns. What was peculiar to the South was its one-partyism, and the region’s project, in the years surrounding 1900, of dotting the I’s and crossing the T’s of the white supremacist, authoritarian states they were constructing.<sup>48</sup> In this the press was a tremendous asset.

City government has also been the target and province of reformers. As Kathleen Sullivan and Patricia Strach explain, in the years just before 1900, U.S. cities faced a garbage crisis.<sup>49</sup> The crisis was the natural consequence of population growth. Cities were full of garbage, enormous amounts of it. It stank. It also posed the most serious imaginable health problems, especially in the southern states, which suffered repeated epidemics. The garbage overwhelmed longstanding methods of the disposal, burial, and feeding of farm animals that continued to live in cities. A new and expensive technology, reduction facilities, promised to solve these problems.<sup>50</sup> Sullivan and Strach study two cities that tried to construct reduction facilities and exhibited very different outcomes, Pittsburgh and New Orleans. Both cities were corrupt; both were governed by political machines.<sup>51</sup>

Sullivan and Strach argue the difference in outcomes is attributable to the cities’ different organization of party government.<sup>52</sup> Mercifully, the authors do not fall into the tempting trap of assuming the political machines and party government in U.S. cities was always poor government. Rather, they make a distinction between governance or more

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44. *Id.* at 93.

45. *Id.* at 67.

46. *Id.*

47. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF ONE PARTY POLITICS, 1880-1910* (1974).

48. *See id.* For one-party authoritarian regimes, see ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF THE AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944-1972* (2015). For the beginnings of constructing those regimes between the civil war 1900 see PAUL HERRON, *STATE CONSTITUTIONAL DEVELOPMENT IN THE AMERICAN SOUTH, 1860-1902* (2014). I have no doubt Steedman is correct. In my own research on Houston in the 1920s, and several southwestern cities in the 1950s, it became clear to me that the average Anglo reader likely believed a portrait of their city’s society as peaceful and its politics as democratic, even-handed, and efficient put forward by the city’s major newspapers, while African-American newspapers in Houston, Austin, and Phoenix reported altogether different realities. AMY BRIDGES, *MORNING GLORIES, MUNICIPAL REFORM IN THE SOUTHWEST* 24 (1997).

49. Kathleen S. Sullivan & Patricia Strach, *Statebuilding Through Corruption: Graft and Trash in Pittsburgh and New Orleans*, *STATEBUILDING*, *supra* note 1, at 95, 98-103.

50. *Id.* at 105.

51. *Id.* at 95-97.

52. *Id.* at 97.



precisely, *administration*, on one hand, and machine or reform government on the other.<sup>53</sup> There have been cities well governed under regimes of noncompetitive party politics, replete with patronage employees, peopled with residents who would “vote for the devil himself” if he were nominated by their preferred party. And there have been cities badly administered by reform regimes that claimed to be clean and selfless. In this instance, the administrative prowess of individuals, or their clumsy management—the Flinn brothers in Pittsburgh, and the Hart brothers in New Orleans—determined the legitimacy and capacity of their governments.<sup>54</sup>

Pittsburgh, with its centralized political parties and well-ordered public administration, built its reduction plant. There, Sullivan and Strach argue, the political machine, corrupt as it was, enabled city government to meet its goals.<sup>55</sup> Corruption was to be found in the tightly knit family of party boss William Flinn. It was his brother Charles Flinn, who managed the old fashioned system of garbage disposal, who also, as CEO of the American Reduction Company, was charged with building the reduction plant (without competitive bidding!).<sup>56</sup> And importantly, of course—because performance was critical to public approval of the new system—Charles Flinn’s firm did a pretty good, or at least good enough, job of it.<sup>57</sup> There were a variety of public complaints about garbage collection, but the authors argue its performance was as good as was common in its time.<sup>58</sup> William Flinn, moreover, was careful to cultivate the approval of the city’s major industrialists. Altogether, it may be said that Pittsburgh in the early 1900s, like Chicago under Richard J. Daley in the 1970s, was “the city that works.”

New Orleans, by contrast, hardly worked at all.<sup>59</sup> Among machine politicians, led by John “Honey Fitz” Fitzpatrick, power and responsibility were widely dispersed. Party politicians were not secure; they were in constant and close competition with the city’s municipal reformers.<sup>60</sup> Maurice Hart, a private sector counterpart to Fitzpatrick, was a businessman soon to be indicted who, one reform mayor complained, had “full power over the City Council which I do not understand.”<sup>61</sup> Much of the city council was indicted with Hart for “perjury and fraudulent representation and ‘corrupt practices.’”<sup>62</sup> In the meantime, when New Orleans sought to build a reduction plant, Hart’s Southern Chemical and Fertilizer was granted the contract. “After a few months of unsuccessful efforts the reduction contract was abandoned at great loss to the investors.”<sup>63</sup> No small wonder, New Orleans was unable to sustain the “enormous investment” required to solve its garbage disposal problems. The election of 1896 removed Fitzpatrick’s machine from power. Among the

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53. *Id.* at 112.

54. *Id.* at 113.

55. STATEBUILDING, *supra* note 1, at 97.

56. *Id.* at 107.

57. *Id.* at 107-08.

58. *Id.* at 109-10.

59. *Id.* at 95.

60. STATEBUILDING, *supra* note 1, at 99-100.

61. *Id.* at 111.

62. *Id.* at 111-12.

63. *Id.* at 112.

reasons was Fitzpatrick's role in the garbage scandal. Reduction never came to New Orleans.<sup>64</sup>

In the Gilded Age and Progressive Era, the well-being of animals was also a goal of citizen activists. In their case study, Susan Pearson and Kimberly Smith address the development of the Animal Welfare State.<sup>65</sup> Animals pose threats to public health, and are property, workers, public nuisances, objects of our affections, and—as we have created them—bearers of rights.<sup>66</sup> Pearson and Smith show that animal protection and regulation as public functions were the product of activists' agendas and their precedent-setting efforts to implement the rules they sought.<sup>67</sup>

Cities were the primary sites of animal welfare activity because animals and people lived in close proximity and increasing numbers, posing threats to both animal and human residents.<sup>68</sup> The provision of animal welfare provides examples of the importance of individual effort and the transitional empowerment of NGOs in the execution of public policy. In 1835, London was the first city hosting a Society for the Prevention of Cruelty to Animals.<sup>69</sup> Henry Bergh, who was “the principle force” behind anticruelty legislation to protect animals in the U.S., founded the ASPCA in the 1860s.<sup>70</sup> The ASPCA was granted enforcement power under the law, and Bergh proceeded to examine the horses of New York City's stagecoaches and carts.<sup>71</sup> The laws were justified not only by the protection they provided to animals, but also as guardians of the character of the citizenry by broadcasting public condemnation of cruelty to animals and punishing those who engaged in it.<sup>72</sup> To the greater credit of the organization, once witnesses were produced the law empowered the ASPCA's entry into a private home where a servant was being mistreated by her employer. It was the ASPCA that came to her rescue.<sup>73</sup> In the creation of an animal welfare regime, as in the juvenile courts, administrative authority was exercised by private parties for a time. Similarly, in at least four states, Humane Societies simply became state bureaus.<sup>74</sup>

Ann-Marie Szymanski brings the focus on animal welfare to efforts to preserve the natural environment and protect wildlife.<sup>75</sup> It is striking how diverse supporters were; sportsmen, officials (e.g., game wardens), ordinary citizens who might report violations (e.g., hunting without a license), commercial fishermen, women's clubs, the Audubon Society, female consumers who participated in boycotts of hats with plumes, and eventually

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64. *Id.* at 116-17.

65. Susan J. Pearson & Kimberly K. Smith, *Developing the Animal Welfare State*, in STATEBUILDING, *supra* note 1, at 118-39.

66. *Id.* at 118-19.

67. *Id.*

68. *Id.* at 119.

69. *Id.* at 122.

70. STATEBUILDING, *supra* note 1, at 122.

71. *Id.* at 123.

72. *Id.* at 126-27.

73. *Id.* at 132.

74. *Id.* at 133.

75. Ann-Marie Szymanski, *Wildlife Protection and the Development of Centralized Governance in the Progressive Era*, in STATEBUILDING, *supra* note 1, at 140.

Remington Repeating Arms and other arms manufacturers.<sup>76</sup> There were several partial solutions for the protection of wildlife: trespass laws; requiring licenses for hunting and fishing; setting quotas for recreational hunters.<sup>77</sup> There were problems with enforcement. For one thing, the closer the enforcer was to their community, the more resistant they were to enforcing the law. And the constraints the laws contained were opposed, sometimes violently, against enforcers.<sup>78</sup> Generally speaking, these initiatives were ineffective. The most important achievement of advocates for wildlife protection was the Migratory Bird Treaty Act.<sup>79</sup> The Act (1918), signed with Britain (acting for Canada) and later Mexico, was the first law granting the federal government full authority over wildlife.<sup>80</sup> The Department of Agriculture was empowered to establish hunting periods for migratory birds, and the shooting of almost all game birds was prohibited.<sup>81</sup> The United States, nevertheless, continued to lose great numbers, and sometimes entire species, of birds and wild animals. Those outcomes powered support for and passage of the Endangered Species Act in 1973.<sup>82</sup> Although Szymanski makes a strong case for the advantages of national administration of animal welfare, it might have been worthwhile for both Szymanski and Pearson and Smith to investigate state parks and wildlife refuges, places where states have successfully preserved wild flora and fauna populations.

Carol Nackenoff and Kathleen Sullivan write about the founding of the first Juvenile Court in the United States, in Chicago.<sup>83</sup> The creation of juvenile courts is a prime example of the importance of committed and talented individuals and the presence of private and public collaboration both in legislation and implementation. The court was a project of a group of reformers, mostly women, several already active in social welfare and progressive reform, and the organizations they belonged to.<sup>84</sup> Julia Lathrop, Jane Addams, Florence Kelley, and Lucy Flower were among the colleagues in this effort.<sup>85</sup> Lathrop took the lead in the movement for a juvenile court and later was named the first chief of the Federal Children's Bureau (established 1912).<sup>86</sup> Addams, of course, was the founder of Hull House and had a long career of political activism.<sup>87</sup> Kelley campaigned for better working conditions, including the eight-hour day and, working with W. E. B. DuBois, was a co-founder of the NAACP. The supporting organizations included the Chicago Woman's Club, Hull House, the Illinois Humane Society, the Children's Aid Society, and the National Council of Jewish Women.<sup>88</sup>

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76. *Id.* at 140, 160.

77. *Id.* at 140.

78. *Id.* at 142.

79. *Id.* at 140-41.

80. STATEBUILDING, *supra* note 1, at 140-41.

81. *Id.*

82. *Id.* at 140

83. Carol Nackenoff & Kathleen S. Sullivan, *The House that Julia (and friends) Built: Networking the Chicago Juvenile Court*, in STATEBUILDING, *supra* note 1, at 171-202.

84. *Id.* at 172-73.

85. STATEBUILDING, *supra* note 1, at 179-80.

86. *Id.* at 200.

87. *Id.* at 178-79.

88. *Id.* at 173-82.

For the authors, the importance of the story lies in two observations. First, the Juvenile Courts were a major achievement of progressive reform in U.S. cities and states. Second, the women's prowess at networking was key to the success of their efforts, first in Chicago and then nationally. The authors also present the many steps beyond legislation required for the courts to function. Most striking is the appearance of a long list of necessary personnel in job titles that were effectively new for activities previously untried. The resourcefulness, intelligence, political savvy, and—not incidentally—affluence of the women and men at the heart of this effort down the long road of implementation were critical to creating the court. Nackenoff and Sullivan conclude by declaring “there is every reason to cast serious doubt on the idea that this pattern is exceptional.”<sup>89</sup>

My own view is that we do not know how exceptional Chicago was or was not, and there are reasons to think it was unusual. First, the leaders in Chicago's effort, especially the women, were exceptionally talented. Second, they seem to have encountered little resistance; the few instances of resistance reported by the authors seem mere bumps in the road. Who would possibly have opposed the creation of a more sympathetic and just court system for children and adolescents? Benjamin Barr Lindsey, founder of Denver's Juvenile Court, learned the answer on the job.<sup>90</sup> In Denver, the juvenile justice status quo was supported by the city's powerful machine. By agreement with other judges, Lindsey was sent all cases where children were the defendants, making his a *de facto* juvenile court in 1900. Lindsey saw many evils in the court system in Denver. First, the prosecutors worked on commission; they were paid for every conviction. Second, as in Chicago, children were not only tried in the same courts, but also jailed in the same facilities as adults convicted of crimes.<sup>91</sup> Lindsey learned from the accused the consequences of those shared venues. Third, Denver's most successful elected politicians, and many powerful appointees, had a financial stake in continuing a system that corrupted and abused the young as well as punishing adults.<sup>92</sup> For example, the president of the Police Board, Frank Adams, supplied the city's saloons and wine rooms with ice, and asked them to pay the police board for protection, which was granted.<sup>93</sup> The wine rooms were sites where many young women were ruined, and Lindsey sponsored a contributory juvenile delinquency statute to prosecute their owners.<sup>94</sup> Billy Adams, Frank's brother, served in the state senate for twenty years.<sup>95</sup> There he could sabotage any reform legislation before it made an appearance on the floor, as happened with the contributory juvenile delinquency statute.

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89. *Id.* at 202.

90. BENJAMIN BARR LINDSEY & HARVEY J. O'HIGGINS, *THE BEAST* 79-112 (1910). As a young man Lindsey was recruited by Notre Dame, but was unable to complete his education because the death of his father required him to return to his family. Later he was admitted to the bar after reading law, and was elected to Denver's county court. His interest in juvenile justice began when hearing a case of a boy being prosecuted for stealing a rabbit. Lindsey was startled to recognize the complainant; Lindsey himself as a boy had very nearly stolen a rabbit from the same man, hindered not by principle but by cowardice (*loc. cit.*).

91. *Id.* at 96.

92. *Id.* at 95.

93. *Id.* at 98.

94. *Id.* at 97-98.

95. LINDSEY & O'HIGGINS, *supra* note 90, at 103.

For his efforts to publicize the evils of the system, Lindsey was denounced as “crazy,” “and the testimony of young defendants about their treatment was denounced as fabrication.”<sup>96</sup> Lindsey organized a hearing with Governor Peabody, Mayor Wright, selected city officials, and members of the clergy.<sup>97</sup> The press was excluded. A young man who had been arrested and imprisoned many times rounded up, at Lindsey’s request, about twenty children to testify.<sup>98</sup> The “worst lot of little jailbirds that ever saw the inside of a county court” told their stories to the assembled gentlemen.<sup>99</sup> Governor Peabody’s response was:

[N]othing . . . I can do in my administration can be of more importance—nothing I can do will I do more gladly than sign those bills Judge Lindsey is trying to get through the Legislature to do away with these terrible conditions. . . . And if . . . Judge Lindsey is *crazy*, I want my name written under his, as one of the *crazy* people.<sup>100</sup>

As a consequence, a list of laws proposed by Lindsey and others were passed by the Colorado legislature.<sup>101</sup> These included a contributory juvenile delinquency law, a system of probation officers, and a detention home and school.<sup>102</sup> Efforts to sabotage Lindsey’s efforts on behalf of children continued. Nevertheless, children’s lives were better.

In 1919, Sophonisba Breckenridge and Helen Jeter surveyed states to find how many had adopted a separate system of juvenile justice.<sup>103</sup> The movement for juvenile justice enjoyed widespread success: forty-five of the forty-eight states passed some legislation towards that end.<sup>104</sup> Contributing to the spread of juvenile justice reform, we can imagine there were hundreds of well-educated, affluent, dedicated child welfare advocates who, with their energy, intelligence, and money brought these improvements to fruition. There were, moreover, likely hundreds of public servants and politicians who labored mightily against great odds to the same ends. Learning how often this happened from inside the system, and how often from outside of it, how often their efforts met substantial resistance and how well reforms were institutionalized and effective they were, requires the exploration of many cases in addition to those of Chicago and Denver.

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96. *Id.* at 110.

97. *Id.* at 104.

98. *Id.* at 107.

99. *Id.*

100. LINDSEY & O’HIGGINS, *supra* note 90, at 110 (emphasis in original) (internal quotation marks omitted).

101. *Id.* at 110.

102. *Id.* at 110-11.

103. SOPHONISBA BRECKENRIDGE & HELEN RANKIN JETER, A SUMMARY OF JUVENILE-COURT LEGISLATION IN THE UNITED STATES (1920).

104. *Id.* at 9.

Two essays in *Statebuilding from the Margins* are about federal policies.<sup>105</sup> Julie Novkov writes about parallel interventions after the Civil War: first, support for rights for African Americans and efforts to shape their home lives to be like the model U.S. household; and, second, a campaign to abolish polygamy and bring Mormons into the predominant U.S. style of marriage.<sup>106</sup> In both cases we see that the power and capacity of the federal government are enormous. One lesson of the stories is that political will easily overpowers law or legal precedent in the creation of state capacity. African-Americans' own agenda for postbellum equality had four planks: voting rights, contract rights, and the expansion of fair wage labor, education, and land reform.<sup>107</sup> President Johnson opposed land reform, and it was quickly abandoned.<sup>108</sup> Among the tasks of the Freedman's Bureau was negotiation and enforcement of labor contracts for black workers, especially black men. This was extremely difficult, because state courts found reasons not to implement the clear intent of the federal government, one of many forms of resistance to the federal agenda.<sup>109</sup> Freedman's Bureau agents were also attentive to regularizing relationships between black men and women in legal marriages.<sup>110</sup> In this, state courts were usually supportive. There was in addition an effort to secure black voting rights. For this effort in particular, Ku Klux Klan resistance was fierce.<sup>111</sup> Klansmen terrorized black families. "Klansmen would forcibly enter black homes, question the male head of household about his political activities, demand that he foreswear political engagement, search his house for weapons and remove them, and administer severe whippings," sometimes committing murder.<sup>112</sup> In 1870, the Department of Justice was created; Amos Akerman was appointed Attorney General.<sup>113</sup> Akerman was committed to prosecution of Klan members, and worked with the U.S. attorney for South Carolina, David Corbin, to that end.<sup>114</sup> Corbin succeeded in gaining convictions of four Klansmen for violent intimidation of black voters; as Corbin's effort moved to South Carolina's Supreme Court, Akerman resigned as Attorney General, and was replaced by a man who blocked review of Klan convictions by the state Supreme Court.<sup>115</sup> So concluded the federal campaign against Klan violence in South Carolina. Efforts on behalf of African-Americans were met by tremendous resistance in the South, and their resistance was echoed by northern Republicans. Among the federal agents Novkov describes were many who labored in good conscience on behalf of the government's agenda and beyond that to embrace the agenda African-Americans

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105. STATEBUILDING, *supra* note 1.

106. Julie Novkov, *Making Citizens of Freedmen and Polygamists*, in STATEBUILDING, *supra* note 1, at 32-64.

107. *Id.* at 36.

108. *Id.* at 37.

109. *Id.*

110. STATEBUILDING, *supra* note 1, at 40.

111. *Id.* at 44-45.

112. *Id.* at 45.

113. *Id.* at 45-6.

114. *Id.* at 46.

115. STATEBUILDING, *supra* note 1, at 47-48.

set for themselves. We learn from Novkov's essay that the disappointing outcomes followed from the opposition of their superiors. As individuals were critical to successful progressive reform, so too individuals could be key actors in its failures.

The federal government was more committed to converting Mormons from polygamy to monogamous marriage than it was to pursuing relief for African Americans.<sup>116</sup> Polygamy, although objectionable, was not the whole story. For the federal government, the commitment of the Mormon establishment in Utah to polygamy was representative of its insistence on autonomy from federal law.<sup>117</sup> Efforts to prosecute men for polygamy reinforced the status of married women "as a protected and supported citizen, with duties and rights that complemented those of the individual male heads of household responsible for her and their mutual. . . children."<sup>118</sup> Prosecuting polygamists also "situated the national state as the appropriate overseer and enforcer of . . . conventional" marriage as a requisite of civic belonging.<sup>119</sup> It was quite out of the ordinary, and possibly illegal, for the federal government to involve itself in the law of marriage, traditionally the province of states. Utah's status as a territory provided an escape hatch; since Utah was only a territory, of course the responsibility for appropriate conduct by Mormons fell to the federal government. Mormons had to forsake polygamy for Utah to become a state. In September 1890, the leader of the Latter Day Saints renounced the practice, effectively abandoning the dream of a Kingdom of Deseret.<sup>120</sup> To this, unlike the creation of a black citizenry, the federal government was fully committed and as a result, successful. The greater impact of the two initiatives was, Novkov writes, that despite the government's default on its agenda for the South, "the expansion they wrought in national-state capacity and in the sense of what constituted a legitimate interest for the national government to address" were successful.<sup>121</sup>

James Greer writes about the effort, during the first administration of Franklin Roosevelt, to alleviate the massive shortage of housing in the United States.<sup>122</sup> An important step in that project was to stimulate mortgage lending by banks.<sup>123</sup> In 1934, Congress created the Federal Housing Authority (FHA).<sup>124</sup> The FHA invented the standard thirty-year fixed rate mortgage. Prior to that, mortgages were interest only, with a balloon payment—the whole amount of the loan—due after four or five years. Since the great majority of would-be homeowners defaulted on the balloon payment, the mortgage did not facilitate home ownership. The thirty-year fixed-rate mortgage, with a twenty percent down payment, made home ownership possible for many more families. It also, however, posed substantial risks to the lender, since the terms meant most of the principal was loaned for

116. *Id.* at 51.

117. *Id.* at 51-52.

118. *Id.* at 54.

119. *Id.* at 55.

120. STATEBUILDING, *supra* note 1, at 60-61.

121. *Id.* at 63.

122. James L. Greer, *Housing Reform and the Origins of Mortgage Redlining in the United States*, in STATEBUILDING, *supra* note 1, at 203-36.

123. *Id.* at 203.

124. *Id.* at 203-04.

decades. In addition to designing the mortgage, the FHA was to insure it.<sup>125</sup> Equal in importance to the mortgage terms were the underwriting standards established to qualify mortgages for insurance.<sup>126</sup> The underwriting standards set the parameters of housing built for decades to come: standards for construction, the public and private amenities of the neighborhood, the characteristics of its residents (income, race, ethnicity), and the health of the economy of the metropolitan area in which the neighborhood was situated.<sup>127</sup> A key consideration was whether people of color were or might be present in the neighborhood.<sup>128</sup> The same standards suggested the characteristics of applicants who would be granted mortgages. The prospect of residents of color moving into a Caucasian neighborhood was sufficient to deny a mortgage.<sup>129</sup> The Agency's earliest underwriting manuals required racially restrictive covenants to protect neighborhoods, and mortgages, from the deterioration of the built environment and property values inevitable when residents were not homogeneous and white (and frequently, not Jewish).<sup>130</sup> In 1948, in *Shelley v. Kraemer*, the Supreme Court ruled that judicial enforcement of racially restrictive covenants was unconstitutional.<sup>131</sup> Failure to meet FHA standards meant homes were not qualified for mortgage insurance and neighborhoods were redlined.<sup>132</sup> Historian Kenneth Jackson wrote that the FHA was unequalled in its "pervasive and powerful impact on the American people" over the fifty years following its creation.<sup>133</sup> Even without restrictive covenants, the powerful forces Jackson identified "were premised on the considered opinions of innumerable experts."<sup>134</sup> Government support for racial segregation in housing remained.

The government's effort to promote homeownership was bolstered by a publicity campaign conducted by Better Homes for America (BHA).<sup>135</sup> BHA was the idea of Marie Meloney, editor of the *Delineator*, a women's magazine with a circulation of more than a million readers.<sup>136</sup> Herbert Hoover, then Secretary of Commerce, joined her in that effort.<sup>137</sup> The two leaders shared a strong preference for private sector solutions to the housing shortage.<sup>138</sup> Meloney and Hoover were also of one mind about the central role of the family, and especially women, in society.<sup>139</sup> Meloney was "worried about the state of the American family . . . she wished to restore traditional family values and promote the image

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125. *Id.* at 204.

126. *Id.* at 205.

127. STATEBUILDING, *supra* note 1, at 205.

128. *Id.*

129. *Id.* at 204.

130. *Id.* at 204-05.

131. 34 U.S. 1 (1948). The holding in this case affected state court action enforcing a private covenant. Until *Jones v. Maher* and the Fair Housing 20 years later, private parties could still make these restrictive covenants, but courts could not enforce them.

132. *Id.* at 206-07.

133. *Id.* at 204.

134. *Id.* at 218.

135. *Id.* at 205-06.

136. STATEBUILDING, *supra* note 1, at 206.

137. *Id.*

138. *Id.*

139. *Id.* at 216-18.



of the wife as an “efficient technocrat’ within the home.”<sup>140</sup> Hoover “wished to promote home ownership for its ‘spiritual’ impact on American society.”<sup>141</sup>

To promote homeownership, Better Homes for America, in partnership with the General Federation of Women’s Clubs, organized demonstrations of model homes across the United States.<sup>142</sup> The first was in Washington D.C. in 1922.<sup>143</sup> The exhibit drew 40,000 visitors.<sup>144</sup> Local BHA chapters were encouraged to create their own model home demonstrations in which, “ideally, the . . . chapter [would] . . . locate, renovate, or build a demonstration home that they then furnished.”<sup>145</sup> A more important effort was conducted by the GFWC, which conducted a national survey to determine how widespread were homes that met the building and neighborhood standards of FHA and Better Homes for America.<sup>146</sup> The survey influenced the design of the Real Property Inventory conducted by the Works Progress Administration.<sup>147</sup> The Inventory in 1934 showed 16.8 percent of urban homes were overcrowded, 13.5 percent had no indoor private toilet, 20.6 percent had no private bath or showers, and 8.1 percent were not connected to public gas or electricity utilities.<sup>148</sup> These numbers were considerably greater among rural households; for example, 69.6 percent of rural households had no indoor running water.<sup>149</sup> The Real Property Inventories, in turn, were used by the FHA to assign mortgage risks to individual city blocks.<sup>150</sup> In this way the Better Homes for America model of the desirable home for median American families informed FHA standards for insurable homes.<sup>151</sup> The National Housing Act was passed in 1934; Title II created the FHA and the mortgage insurance program.<sup>152</sup> BHA concluded its operations in the same year.<sup>153</sup> The BHA laid the foundation for its mission to promote homeownership of a particular sort for American families.

## SUMMARY

The essays in *Statebuilding from the Margins* add to our appreciation of the variety of issues raised by political activists, especially in the Progressive years. In addition, they draw our attention to clear, but less prominently retold, determinants of policies and their outcomes, especially and persuasively, the importance of the initiative and effort of individuals, both in government and outside of it. Together with *Looking for Rights in All the*

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140. *Id.* at 216.

141. STATEBUILDING, *supra* note 1, at 218.

142. *Id.* at 219.

143. *Id.*

144. *Id.*

145. *Id.* at 220.

146. STATEBUILDING, *supra* note 1, at 221.

147. *Id.* at 223.

148. *Id.*

149. *Id.*

150. *Id.* at 224.

151. STATEBUILDING, *supra* note 1, at 225.

152. *Id.* at 230.

153. *Id.*

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*A THOUSAND AMERICAN FLOWERS*

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*Wrong Places*, readers will be reassured that ordinary and extraordinary citizens effectively seized or created opportunities for progressive reform in the first two decades of the twentieth century.