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THE UNDERENFORCEMENT OF FEDERAL CUSTOMS LAW IN THE EARLY AMERICAN REPUBLIC

Eric Lomazoff*

GAUTHAM RAO, *NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE* (UNIVERSITY OF CHICAGO PRESS 2016). Pp. 272. HARDCOVER \$45.00.

In *Worcester v. Georgia*, the Supreme Court held that because the federal government had exclusive authority to deal with Indian nations, a Georgia law which prohibited white persons “from residing within that part of the chartered limits of [the state] occupied by the Cherokee Indians” without a license or permit was unconstitutional.¹ As such, Georgia was obliged to release Samuel Worcester, a Christian missionary and informal legal advisor to the Cherokees (on the question of removal from their lands), who had been convicted of violating the law and was being held in the state penitentiary.²

I open this review of Gautham Rao’s *National Duties: Custom Houses and the Making of the American State*³ by recalling *Worcester* for two related reasons. First, according to George N. Briggs, a member of the Twenty-Second Congress (1831-33) from Massachusetts, President Andrew Jackson — an advocate of Indian removal⁴ and thus no fan of efforts to educate Native Americans about their rights under federal law — responded to the *Worcester* decision by remarking that Chief Justice “John Marshall has made his decision, now let him enforce it.”⁵ Second, the best way to capture the essence of Professor Rao’s argument may be to imagine the Early American Republic’s merchants suggesting that “the Treasury Department has received Congress’ customs laws, now let it enforce them.”

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1. 31 U.S. 515, 521, 531 (1832).

2. See Philip J. Schwarz, *Samuel Worcester: The Fight for Cherokee Rights*, in 100 AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY 209–11 (Melvin I. Urofsky ed., 2004).

3. See GAUTHAM RAO, *NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE* (2016).

4. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 504 (1969).

5. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1821-1855*, at 1, 219 (1922). On invocations of Briggs’ account between 1864 and 1922, see note 1 on the same page.

I. CIRCUMSCRIBED AUTHORITY

National Duties is a book about the “weakness” of the early American central state, albeit not in the conventional sense of the term.⁶ A number of scholars have assessed that state *as a whole*, either by (1) characterizing it as a “midget institution in a giant land,”⁷ (2) acknowledging its weakness but stressing that significant 19th-century governing took place at the sub-national level,⁸ or (3) suggesting that the early federal government was robust but relatively “out of sight.”⁹ Rao does not get into this assessment game. By contrast, he starts from a relatively uncontroversial premise about the central state in the Early American Republic, one captured by Stephen Skowronek: “Land offices, post offices, and customhouses were the most important of [our early] national institutions[.]”¹⁰ Rao then proceeds to demonstrate that notwithstanding its reputation as an early locus of federal authority, the customhouse — at least down to the mid-1810s — actually exercised less power *than it might have*.¹¹ Otherwise put, early customs officials *underenforced* federal law.

Beyond documenting this phenomenon, Rao offers us accounts of (1) why the early exercise of customhouse power was less vigorous than that permitted (or even demanded)¹² by various Acts of Congress, and (2) why and how that changed in the years following the War of 1812. With respect to the former, he argues that American merchants — the natural subjects of “customhouse governance”¹³ — successfully pressured federal customs personnel to enforce something less than the letter of the law. While customs statutes as written reflected Congress’ desire to fund current federal operations and establish the government’s creditworthiness by servicing and paying down existing debts, custom statutes *as enforced* reflected the presence of a countervailing desire among the merchant class: protecting the “rhythms and institutions of Atlantic commerce[.]”¹⁴ For Rao, the result was a system in which early customs officers effectively “negotiate[d] their authority” with merchants.¹⁵ I find the language of “negotiation” unconvincing in this context — Rao presents little evidence of it, at least in the colloquial sense of the term — but there is ample empirical support in *National Duties* for his claim that society was “circumscribing the state from below.”¹⁶

6. See RAO, *supra* note 3.

7. John M. Murrin, *The Great Inversion, or Court versus Country: A Comparison of the Revolution Settlements in England (1688-1721) and America (1776-1816)*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 368, 425, 368–453 (J.G.A. Pocock, ed., 1980); see generally STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982).

8. See WILLIAM NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

9. BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH CENTURY AMERICA (2009).

10. SKOWRONEK, *supra* note 7, at 23.

11. See generally RAO *supra* note 3.

12. *Id.* at 50 (on discretion as having “no foundation in the law”).

13. *Id.* at 40.

14. *Id.* at 90.

15. *Id.* at 11–12.

16. RAO, *supra* note 3, at 86. Insofar as Rao moves beyond the simple documentation of underenforcement to an account of what it represented for both federal officials and merchants, there is room to argue that *National Duties* represents an exercise in “thick description.” Clifford Geertz, *Thick Description: Toward an Interpretive*

As for the latter, Rao argues that the year 1816 inaugurated a new era in customs law enforcement, one marked not simply by merchant resistance to Congress' "revenue and regulatory demands"¹⁷ — that had been a veritable constant since 1789 — but by *failed* resistance to the same. Not only did merchants up and down the Atlantic seaboard increasingly encounter customs officers who lacked "special ties"¹⁸ to (and thus sympathy for) the commercial communities they were policing, but those same officers enjoyed markedly less discretion than their predecessors in enforcing federal law.¹⁹ I speak below to Rao's account of *why* customs enforcement underwent such a dramatic transformation when it did, as that account furnishes (to my mind) the book's most important takeaway for students of American political and legal development.

II. THE LIFE AND DEATH OF A GOVERNING TRADITION

While I would not feel comfortable categorizing *National Duties* as a work of pure administrative history — Rao's narrative is far too attentive to shifting constitutional, statutory, and even military circumstances (and their effects upon the work of customs officials) to be pigeonholed in that way — I am comfortable predicting that it will earn well-deserved attention from both (1) historians of various stripes and (2) historically-oriented political scientists and scholars of administrative law. *National Duties* has numerous virtues, though I have space to enumerate but a few.

Not only does Rao demonstrate that early federal customs law was underenforced, but he convincingly argues that the system of "negotiated" or "circumscribed" authority which produced this result actually represented the *extension* of a governing tradition that began with British efforts in the eighteenth century to extract revenue from its North American colonies.²⁰ Much of Chapter 1, which focuses on the various difficulties encountered by imperial officials in putting Britain's acts of trade in force²¹ between 1704 and 1776, thus functions for Rao as a veritable preview of the challenges to be faced by federal customs officers starting in 1789.²²

I find his argument for an extended (and transatlantic) governing tradition between 1704 and 1815 convincing for three reasons. First, Rao notes that pressure from London to extract revenue from North America rose after 1756, when the outbreak of the French-Indian War imposed new fiscal demands upon the British Empire.²³ Second, he stresses that London's newfound "zeal for custom-house enforcement" hardly sounded the death knell for successful efforts by American merchants to evade strict enforcement of Parliament's revenue-seeking measures.²⁴ In other words, long after London brought this pressure to bear upon its colonial customs officials, merchants *continued* to possess a

Theory of Culture, in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 3, 6–7 (1973).

17. RAO, *supra* note 3, at 168.

18. *Id.* at 179.

19. *Id.* at 186–88 (on the Appraisalment Act of 1818).

20. *See id.*

21. *Id.* at 19–28.

22. *See* RAO, *supra* note 3.

23. *Id.* at 34–35.

24. *Id.* at 168.

“remarkable ability to shape. . . governance at the custom house.”²⁵ Finally, Rao offers evidence suggesting that not only did concerns over the federal government’s ability to successfully collect customs revenue color the deliberations of the 1st Congress (1789-1791)²⁶, but at least one member of the same — Representative Fisher Ames of Massachusetts — agonized over the shadow that Britain’s post-1756 difficulties might cast over the new government’s efforts to tax importing merchants: “If the same opinion is entertained with respect to our ordinances. . . they will be defeated in a similar manner.”²⁷ Insofar as the evidence presented in Chapters 3, 4, and 5 — the heart of *National Duties* — suggests that Ames’ anxiety was well-founded, Rao has made the case that federal customs affairs between 1789 and 1815 deserve to be viewed as the extension of a much longer tradition of underenforcement.²⁸

The wide range of evidence presented in the book’s central chapters — evidence that customs officials, short of enforcing the letter of the law, responded to merchant pressure by “decid[ing] when and where to seize [ships or goods], how to enforce [laws], and whom to trust” — represents another virtue of *National Duties*.²⁹ In short, Rao establishes that discretion in customs law enforcement took many forms. For example, the customs system was barely up and running before officials began betraying the letter of federal law — which was designed to permit a ten percent discount on duties if they were paid in cash — by “generously interpreting what a ‘prompt’ payment meant.”³⁰ In the late 1790s, a customs official reconciled (1) statutory and administrative rules prohibiting the arming of vessels in American ports with (2) the desire of merchants to nevertheless arm their vessels by explaining that he had “no business” judging whether or not a particular vessel had been armed.³¹ And throughout the 1789-1815 period, customhouse officers — contrary to federal law — continued to extend merchants credit (i.e., offer them new bonds for new duties owed) even if they had fallen “into arrears on [old] bond payments[.]”³² These three examples, I hasten to add, hardly exhaust the various species of the genus that Rao labels “discretion.”

One final element of *National Duties* warrants both attention and praise. Rao not only documents the federal government’s post-1815 turn toward full enforcement of its customs laws, but also offers a compelling two-prong account of *why* that calendar year furnished the precise turning point.³³ That account points to both a decreased merchant demand for, and a decreased governmental supply of, customs law underenforcement (though I must stress that the language of “supply” and “demand” here represents *my* analytic imposition rather than Rao’s own rendering of the postwar environment).³⁴ On the

25. *Id.* at 42.

26. *Id.* at 63.

27. *See* RAO, *supra* note 3, at 63.

28. *Id.* at 75–76.

29. *Id.* at 141. Rao is speaking specifically to the 1806-1809 period, though the language seems applicable to the entirety of the 1789-1815 period.

30. *Id.* at 83.

31. *Id.* at 114.

32. *See* RAO, *supra* note 3, at 174.

33. *Id.* at 176–77.

34. *Id.* at 176–77.

supply side, he posits that difficulties funding the War of 1812 — which added millions to a national debt that had been shrinking³⁵ — left postwar lawmakers eager to both collect on unpaid customs bonds from the past and ensure that future duties were collected in full compliance with federal law.³⁶ As for the demand side, Rao argues that the War of 1812 was not the only conflict to end in 1815.³⁷ That year also saw the conclusion of an Anglo-French conflict that had raged off and on since 1793 (and had, by virtue of each belligerent’s badgering of neutral American merchants, helped bring about the War of 1812). According to Rao, the “restoration of peace in Europe” greatly reduced the need for merchants to pressure customs officers in the first place; eliminating a conflict that had produced “scarcity, embargoes, blockades, privateering, and trading with the enemy” also meant eliminating opportunities to profit from the same.³⁸

III. MINOR INFELICITIES AND MAJOR IMPORT

National Duties is largely devoid of major infelicities, but all of its minor ones do seem to share a common theme: pushing a good idea too far. A few examples here should suffice, and do so without compromising my appreciation for Rao’s narrative as a whole. First, readers cannot escape the first page of the book without learning that merchants did “much to shoulder the burden of building a new American state.”³⁹ And lest those same readers fail to take Rao’s claim seriously, he later affirms that “merchants executed crucial functions for the state.”⁴⁰ While there is ample empirical support for the idea that merchants supplied the lion’s share of early federal revenue, that does not render them public functionaries; households with \$150,000 or more in annual income now supply over half of the federal government’s revenue⁴¹, but we do not speak of them as “execut[ing] crucial functions for the [modern American] state.”⁴² Second, Rao concludes his chapter on the British imperial custom house by asserting that “at almost no juncture [in the 1760s and 1770s] did Americans protest the idea of customs duties on their commerce. . . [their protests] were expressions of discontent, not about the existence of coercive central governmental laws, but about the manner in which those laws were enforced.”⁴³ It is fine to suggest that colonial merchants bristled at strict enforcement of London’s revenue-seeking measures; Rao brings the goods on this point.⁴⁴ That bristling, however, simply does not undercut the reality that colonists in this period *also* protested the very “existence of coercive central governmental laws[,]” namely taxation imposed by a legislature in

35. *Id.* at 176; see also MAX EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867*, at 108–44 (2014); ERIC LOMAZOFF, *RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC* 98–104 (2018).

36. RAO, *supra* note 3, at 177 (“With the call for new revenues came a push to make sure customs officials properly collected old revenues.”).

37. *Id.* at 170.

38. *Id.*

39. *Id.* at 1.

40. *Id.* at 11.

41. Laura Sanders, *Top 20% of Americans Will Pay 87% of Income Tax*, WALL ST. J. (Apr. 6, 2018), <https://www.wsj.com/articles/top-20-of-americans-will-pay-87-of-income-tax-1523007001>.

42. RAO, *supra* note 3, at 11.

43. *Id.* at 45.

44. *See id.*

which they enjoyed no representation.⁴⁵ Finally, Rao contends that Treasury Secretary Alexander Hamilton gathered revenue information in ways that “made it possible to produce knowledge about the United States’ newly forged legitimacy” — that is, reports that demonstrated the central state’s creditworthiness to “[c]itizens, creditors, and foreign powers alike[.]”⁴⁶ While there is certainly value in describing the origins and development of Hamilton’s accounting system — a task undertaken by Rao early in Chapter 3 — there is no evidence presented that links its existence to greater “confidence in the new federal government.”⁴⁷ All told, Rao appears to be periodically guilty of overenthusiasm with respect to the implications of his findings — hardly the worst sin in the academic world.

I consider the flaws in Rao’s narrative to be more than outweighed by its virtues, as should now be clear to the reader of this essay. One final virtue of *National Duties* remains to be discussed, however. While Rao wrote this book as a historian, I read it as a political scientist, and more specifically, as a political scientist interested in identifying patterns in how and why American politics has developed over time as it has. One of the most important (and contested) concepts within the organized study of American politics is that of the “critical” or “realigning” election: a contest that fundamentally alters the nation’s political trajectory by displacing a long-dominant party or governing coalition in favor of an alternative.⁴⁸ Especially of late, the idea of ascendant parties or governing coalitions exercising power in ways that advance their ideological commitments has influenced scholarship on the development of American constitutional law and politics.⁴⁹ *National Duties* is not, to be clear, a study of constitutional development, but Rao’s focus on both statutory and administrative change within early American customs renders it something comparable: a study of legal development. Far more importantly, the crucial juncture in his developmental chronicle — the calendar year 1815 — is *not* associated with a critical or realigning election. Thomas Jefferson’s Republicans had seized power following the Election of 1800, and they remained in power as of 1815.⁵⁰ In Rao’s account, *war* — both the protracted Anglo-French conflict (1793-1815) and the Anglo-American conflict (1812-1815) to which it gave rise — represents the crucial developmental force, not a critical or realigning election.⁵¹ The idea that war can powerfully shape American political

45. *Id.*

46. *Id.* at 80–81.

47. RAO, *supra* note 3, at 77. *But see* Richard Sylla, Robert E. Wright, & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management during the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 67, 70 (2009) for evidence that links the December 14, 1790 submission of Hamilton’s Report on a National Bank to a steep rise in federal securities prices over the next ten days.

48. *See* V.O. Key, *A Theory of Critical Elections*, 17 J. OF POL. 3 (1955); *see also* WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970). For a critical appraisal, *see* DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* (2004).

49. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUB. L. 279 (1957); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1964); *cf.* Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY, at 511, 514–18 (2007) (reviewing and critiquing work that describes constitutional development through 2006).

50. RAO, *supra* note 3, at 117 (noting that with respect to customhouses, the Election of 1800 — the first critical or realigning election — actually *failed* to “revolution in federal governance” that it seemed to promise).

51. *See id.* at 176–77.

2019] *UNDERENFORCEMENT OF FEDERAL CUSTOMS LAW* 269

development is hardly a new one,⁵² but *National Duties* offers us an important reminder of it.

52. See, e.g., David R. Mayhew, *Wars and American Politics*, 3 PERSP. ON POL. 473 (2005); SHELDON POLLACK, *WAR, REVENUE, AND STATE BUILDING: FINANCING THE DEVELOPMENT OF THE AMERICAN STATE* (2009).