“A System Entirely Satisfactory to the Country”
Standardizing Labor and the Courts, 1886–1891

After having substantially altered the civil service, debated the Blair bill, provided the first independent regulatory commission in the U.S. government, and created a new agency in the form of a Bureau of Labor, the Congress had begun an important decade in its consideration of how to give concrete form to the ideas of the second state. Rather than being a decade of thwarted goals, inactivity under the label of laissez-faire, and stagnant thinking, the 1880s saw a time of evolution and growth in the U.S. administrative state. The trend continued as the decade came to a close.

The national forum still rang with the clash of raised voices regarding the critical functions of the American state in regulating the rails when the Congress elected to return to the matter of labor’s continuing difficulties, respond to the pressure to reform the federal courts, and elaborate on Morrill’s plan for agricultural and mechanic arts colleges. Each of these initiatives had its own particular demands, but the discussions that surrounded their ultimately successful enactment shared some common characteristics. All three contained the emergent consensus on how to approach governance: information gathering and dissemination, limited means, generalist personnel, and a consistency with American
legal norms. In all three discussions one profession dominated—the law. All three repeated a discourse on the need to avoid bureaucracy while dealing with issues that required immediate national help. In each of the debates the Congress strived to find “a system entirely satisfactory to the country.” The first item was the enhancement of the Bureau of Labor into a department, completing a process and concluding a conversation that had begun several years earlier.

**A Department of Labor at Last**

On March 21, 1888, the House took up H.R. 8560, a bill to establish a department of labor. As the chair of the Committee on Education and Labor, John J. O’Neill was in charge of the debate. There was almost universal support for the measure. Most of the members’ remarks came under the five-minute rule in which a representative could only speak for five minutes on a particular amendment. Some representatives managed to speak on the topic, getting their views into the *Record* in the process, by moving to eliminate a word and, then, after finishing, withdrawing the amendment. The more substantive amendments took two forms: those that reflected concerns about bureaucracies and those that were directly tied to economic policy issues such as the tariff and the currency, the two overriding political questions of the era.

The bureau, under Carroll Wright, was well regarded. Both William C. P. Breckinridge (D-Ky.), a lawyer whose reputation as an orator had few equals, and “Sunset” Cox spoke highly of Wright and his activities. Wright had understood his job. Bringing in reports that could be used by both parties, the Bureau of Labor had perfected what the Department of Agriculture and Eaton’s Bureau of Education had initiated: the gathering, sorting, and release of nationwide data. Even with his open admiration for Wright and the reports, Holman (D-Ind.) could not help but lament the growth of these functions, expenses, and continuing requests: “We are departing rapidly from the old landmarks.”

The second state was the consensus view of the national government. In a series of exchanges over the proposed increase in personnel which would accompany the bureau’s change in status, the representatives explored another facet of the second state mind-set. Whether the issue was one of having two watchmen or two messengers, whether the clerk should be the acting commissioner or there should be a new deputy commissioner, and whether the commissioner should set the travel allowances or the House should leave that to a subsequent appropriation, the matter was worthy of their attention.
sweated the details. That the committee had not perfected the bill so as to be consistent with prior practice is one point. That the congressmen had the time to debate these points, much less care about them, is another. When a measure received this level of scrutiny, one conclusion dwarfs the others: representatives wanted to keep a tight reign on the government.

O’Neill’s remark that Wright himself had helped draft the legislation said a great deal about the intimate associations in Washington, D.C. Moreover, bringing the administrators back into the conversation closed the distance between the agency and Congress while raising the status of the bureaucrats. Representatives might not trust agencies with autonomy in general but now relied on them to help prepare laws that would increase the scale and scope of the administration.

Much of the rest of the discussion that day dealt with the desire to add tariff and currency investigations to the new department. The liveliest argument ensued over the indebtedness of Iowa farmers and just what the specific valuation of their land was. Like every other discussion in the halls of Congress, the debate over whether to create another department involved local concerns as well as broad principles. On April 18, 1888, without further debate and a dissenting vote, the House made eight more amendments to the bill and sent it to the Senate. This cursory discussion was unlikely to be repeated in the upper house.

On May 15, 1888, Henry W. Blair, once again chair of the Committee on Education and Labor, took up a bill to expand the national government. Once again, he remarked that he did not expect much debate and hoped for a vote that evening. Once again, he was wrong. If he had thought that this bill was different because it had passed the House unanimously, he did not know the Senate as well as he should have. The senators proceeded to pick the bill apart, ensuring the need for a conference committee and a delay in its enactment.

Reagan objected to the upgrade of the bureau. His lengthy oration was filled with fierce metaphors and fighting words. He even cast aspersions on the manhood of those who had proposed this legislation: “If the founding fathers and founders of the Republic could have been called back to life and could have witnessed much that has been said in the discussions in Congress on these questions for the last few years, they could hardly have failed to blush for shame on account of the degeneracy and want of manhood of their descendants in dealing with these questions.” He railed against “class legislation” and attributed the bill to “the money power.” His alternative was the already proposed “department of industries,” which would combine a bureau of labor with the Bureau of Sta-
Evidently, despite his rhetoric, Reagan was just as committed to the second state ideas as his opponents. Taking very little time to dispense with Reagan’s substitute, the Senate moved on to consider the bill at length. After the Senate passed its version, the conference report adopted it and recommended that the House concur in the Senate’s changes. Because the changes were “formal in their character, being simply a change in the phraseology of the bill,” the report urged acceptance. The House did so, resulting in the elevation of the Bureau of Labor into a department on June 18, 1888. Including the Department of Education, Congress had fabricated four new departments since 1862. While this was not a massive change in the size of the national government, it constituted as great an accretion as in the previous hundred years in less than half the time. Viewed together with the Pendleton Act, the creation of the Interstate Commerce Commission, and the consideration of the Blair bill, the Congress had laid the intellectual precedents for the administrative state. But this significant decade of discussions about the shape of the U.S. national government had not concluded.

A Government of Courts

The story thus far supports the thesis that portions of the intellectual foundation for the administrative state were conceptualized, if not realized, before the advent of Progressivism and certainly before the turn of the century. In the congressmen’s minds this was no longer the state of “courts and parties” and had not been for years. Instead, a nuanced transformation in words and legislative acts had led them to place their trust in the formulations of second state thinking. The lawyers led the effort, convinced and confident that lawyerly habits of mind, respect for the legal process, and personal training could cope with the problem of creating a larger state without creating a distant and dangerous bureaucracy. In the end the courts, manned by other lawyers, were always there in case an unexpected problem developed. This was the second state mentality.

Properly conceived, therefore, courts were part of the conception of the national government apparatus of the United States as much as any executive branch agency. It is thus difficult to understand why courts have been separated from the conventional description of the growth of the administrative state. True, students of the growth of the U.S. national state divide into those who study the courts, and their attendant issues such as jurisdiction, and those who study Congress and the executive branch. A few legal historians have
crossed the divide, but the two fields remain separate subspecialties. At the very least with the shape of the lower court system, the two areas of concern—Congress’s approach to designing agencies and its approach to the shape of the federal judiciary—overlap to the point of being indistinguishable. Members of Congress spent a great deal of time since the founding of the republic disputing and refashioning the shape, jurisdiction, appointments to, and role of the federal judicial apparatus. But the debates over the structure of the federal courts from 1870 to 1891 took a new turn in the context of second state thinking.

In the aftermath of the Civil War congressional relations with the federal courts, particularly the Supreme Court, played a substantial role in the administration of the conquered South, in particular the enforcement of the Civil Rights acts. In fact, federal judges were the fulcrum of the civil rights program. The open reference to federal courts in the Perce bill, among others, indicates this important aspect of Reconstruction planning. As noted in chapter 3, on the Freedmen’s Bureau, this program came out of a compromise between moderates such as Lyman Trumbull and radicals such as Charles Sumner. Both camps believed that federal courts to be an essential bulwark against the former slaveocracy and wanted the freedmen to have open recourse to them. In addition to the Thirteenth, Fourteenth, and Fifteenth amendments, the Civil Rights acts, the temporary Reconstruction Acts, the Habeas Corpus Act of 1867, and the Freedmen’s Bureau, Republicans vastly expanded the removal power of state cases into federal courts, thus enlarging the jurisdiction of federal courts, most prominently with the Jurisdiction and Removal Act of 1875.

Scholars disagree over whether the vast surge of cases these policies fostered served corporations seeking a more favorable venue for the lawsuits they incurred. Yet the vast surge did exist and proved a crushing burden to the federal judiciary, especially to the highest court, the United States Supreme Court. Its justices still had to ride circuit, journeying from state to state sitting en banc with other federal judges to hear appeals that in ever greater numbers came before the highest court for review. The caseload had become so enormous that justices pleaded with the Congress directly for relief. Many U.S. attorneys general recommended an overhaul, but the Congress was deeply divided, not surprisingly, on several different grounds. Out of this morass of conflict came two proposals. The first, the Davis bill, would have created a secondary layer of courts that would winnow down the number of cases before they reached the Supreme Court. These courts would be located in a single place and exercise authority over a set geographic region. The second proposal came from Repre-
sentative David B. Culberson (Tex.) and would have limited corporate access to the federal courts.\textsuperscript{21}

Under the Judiciary Act of 1789 district courts and circuit courts were both trial courts, with slightly different substantive jurisdictions and personnel. The only appellate courts in the system were the circuit courts and the United States Supreme Court. The Federalists had tried to create an intermediate level of appeals courts in the Judiciary Act of 1801, but it was repealed in 1802 by the Jeffersonians, who were rightly suspicious of the all—Federalist composition of the new tribunals.\textsuperscript{22} This new round of debates about the overloaded federal courts promised to be just as divisive as those a century earlier.

The same questions regarding the proper role of the national government, party politics, Reconstruction’s legacy, approaches to the practice of law, and the impact of economic and technological changes on U.S. government which impinged on education, labor, and the rails were embedded within the dispute about the federal courts. The congressmen had a great deal to resolve if they were to enact legislation in this tumultuous atmosphere. They did have one advantage in their favor. They had already forged a consensus around the ideas of the second state.

Under the heading “United States Courts,” the House of Representatives in the spring of 1890 took another look at the overburdened federal judiciary. Speaking for the Judiciary Committee and the Committee on the Rules, Joseph G. Cannon (R-Ill.) introduced the measure that would form the basis of the discussion.\textsuperscript{23} But there was now a joker in the deck—the “House Rules.” By April 15, 1890, the House had shed the looser procedures of the previous decades for a more structured existence with standing committees governing the course of legislation. The newly elected speaker, Thomas B. Reed (R-Maine), had just started his rise to dominance over the rules with the dismantling of the “vanishing quorum” tactic in February.\textsuperscript{24}

Cannon had studied at Cincinnati Law School, served as a state’s attorney in Illinois from 1861 to 1868, and begun his congressional service in 1873, rising to become chair of the powerful Appropriations Committee in the Fifty-first Congress. Given that members of the House depended on his favor to get pet bills funded, his proposal could not be ignored.\textsuperscript{25} But it could be opposed.

Southern Democrats denounced Reed’s order limiting discussion. The prime contributors to this not-so-loyal opposition, John G. Carlisle (D-Ky.) and William C. Oates (D-Ala.) constituted the rear guard of antibureaucracy advocacy. Carlisle had been speaker of the House until the current Congress, when
the Democrats lost their majority. He was a lawyer with several years in private practice then a long stint in the Kentucky legislature. Throughout his career he had vigorously resisted increases in expenditure because they would have jeopardized his concerted effort to roll back the tariff.

Oates rightly asserted that the bill “revolutionizes our judicial system.” The bill’s alteration of the circuit courts reduced the power of the district courts, making the process of appellate judicial determination, at least in terms of actual location, less local and more hierarchical, with more clerks, more judges, and more expense to follow. Besides implicating the importance of place, Oates’s objections reflected an entire political, social, and cultural conception of how the world should work. The power should reside with the familiar, the accessible, and the near. That this method of allocating responsibility should lend itself to the Democratic domination of the South should come as no surprise. The two fit together so seamlessly that it is futile to discern which produced which.

Richard P. Bland (D-Mo.) joined Oates in expressing these concerns, while David B. Culberson (D-Tex.) and John H. Rogers (D-Ark.) spoke for the bill, with Breckinridge plying them with pointed questions. It was a conversation similar to one in chambers, among sitting justices, akin to a conference on a case. All five men had practiced law before entering politics. The rest of Congress listened. Rogers stressed the need for “reform” in order to relieve the caseload, while Bland preferred to give jurisdiction to the state courts to alleviate the backlog. Rogers introduced the phrase “administration of the law in our courts” to the debate, articulating a telling insight into the courts’ function within U.S. government.

Courts, in his use of this phrase, are the organs in which law is processed. Like some form of political alchemy, ingredients enter, law is applied, and justice is served. In another part of his remarks Rogers referred to the “administration of justice” in the courts. Administration has its basic meaning here: “to carry forth or dole out responsibilities, resources” or “to tend.” What is more, a greater perception that the courts are the administrators of political goods lurks behind these phrases.

Rogers went on to list the values he saw in the measure, including practicality, increased speed, and, “so that the whole system may conform to the requirements of Government,” efficiency in the future development of the country. These “requirements” were actually tautological, for they did not describe the proposal so much as they idealized the operation of the courts. That this list
sounded aspirational rather than practical does not diminish its importance. It was as near a statement of the goals of government as the supporters of a larger national state would make. Values may not seem to have any substantial effect in actual, immediate circumstance, but they do determine the resultant structure of institutions. Rogers’s equation of growth in activity, here the burgeoning dockets of the courts, with development of the government itself bespeaks of a fundamental belief that more is better.31

Breckinridge countered Rogers’s assertion that creating appeals courts was a nonpartisan reform. “Is that not a very great, if not a radical, modification of our present judicial system?” While the use of the word *radical* may be without hidden meaning, its implications were surely prejudicial and intended to cast aspersions on the bill. There were plenty of radicals in the 1880s including labor radicals who had clashed with police throughout the country. It recalled as well the Radical Republicans of Reconstruction, now fallen into disfavor. Breckinridge asserted that he was only trying to get a thorough debate under way on a complex issue, but the tactic could also bog the measure down in order to kill it.32

Cannon fired back: “This bill is the consensus of opinion on the part of the bar throughout the United States, and everybody knows that it is equivalent to a denial of justice to refuse to enact legislation of this character.”33 The opinion of a professional cadre, the federal bar, which might have its own agenda had become an authority that must be accommodated. Cannon suggested that the legislation had to be neutral, for it merely corrected a problem. Reform, after all, does not redistribute, tax, or command; it simply improves. This was the same tactic that the defenders of the Pendleton Act had employed so effectively.

On Cannon’s motion the House voted on the circumscribed timetable for deliberation: 118 yeas, 101 nays, and 108 not voting.34 This was representative government, American style; one-third did not even participate, most likely engaging in the practice of the “dying quorum.” Although Cannon spoke of a neutral reform, both parties could not but have been aware that, with Republican Benjamin Harrison in the White House making the appointments to the new circuit courts of appeals and the Republicans likely to retain control of the Senate even in the face of a Democratic surge in the election of 1890, Republicans would sit in these new judgeships. But, with the Reed rules in place, the Republican majority could dictate the agenda, even with a few defections from its ranks. The Democrats most likely did not want to go on record with a no vote on what the public might have regarded as a much-needed reform.
With these preliminaries completed, the members of Congress could proceed with a discussion on the merits. Both Rogers and Culberson now gave testimonials on behalf of the legislation. Oates had thirty minutes to speak against the measure. Rogers yielded the bulk of his time to Culberson, who argued at length for the bill. His advocacy hammered the central points. The courts overflowed with business and needed relief. The words he chose to carry his cause show a strong desire to neutralize the impact of the addition of a new layer of courts to the judicial apparatus. Only he never used that particular loaded term. He referred to the “judicial machinery,” the “judicial department,” and “our judicial system.” These labels created the impression that the courts embodied not simply another branch of government but the very essence of good administration at the ground level.

Were the federal courts the shock troops of encroaching federal government? Culberson conceded as much when he posited that “the judicial department of the Government performs more labor than either of the other departments of the Government.” He also admitted to the “judicial despotism exercised by circuit and district judges” in cases with more than five thousand dollars at stake. The federal bench could wield enormous influence over society, the economy, and, when so disposed, the process of government itself. The nation needed an intermediate level of appellate courts.

The real need lay less in the courts themselves, however, than in the world they served. Culberson cited the growth of population, the economy, and the railroad networks as the irresistible engine driving judicial administrative expansion. At the time of the first law providing for the federal courts, “railroads were unknown and corporations did not breed litigation.” This was an admission of enormous proportions. Corporate counselors had cleverly used the removal provisions of the Civil Rights Acts to avoid the grasp of local regulations and local juries’ verdicts in tort cases. Federal common law courts, judges, and juries had been more supportive. This forum shopping allowed the litigious large-scale businesses to duck local prejudice (or local conscience) as they pried their entrepreneurial activities.

The aversion of big businesses to local regulations had led to a concerted campaign against one of the primary offenders, the railroads, in several areas of the country. The Interstate Commerce Act, a response to this movement, had only partially calmed the revolt. The People’s, or Populist, Party (formed at the end of 1889) would soon fracture the two-party system in the farming states of the West and South. But Culberson turned the proto-Populist arguments on
their head. He cast aside criticisms of the additional courts as an extension of federal power and portrayed the bill as a benevolent reform. The additional judges would overthrow the “kingly power of district and circuit judges.” The district and circuit judges exercised this authority without appellate review because the Supreme Court was too overburdened with cases to come to the rescue. “Such a system of jurisprudence, such unlimited judicial authority over cases . . . would not be tolerated for a day by any State in the Union.” Thus, Culberson concluded the legislation did not aid powerful and remote corporations, but advanced the cause of the little person, a cunning feat of rhetorical legerdemain. He went on to say that anything else would have been “repulsive to all our ideas of even-handed justice and hostile to the genius and spirit of our institutions.”

Democrats were not entirely content with the prospect of a Republican appellate bench. Roger Q. Mills (D-Tex.), lawyer and several times wounded Civil War veteran, attempted to make the new appointments to the bench evenly divided between the two parties. Like the membership requirements of the Interstate Commerce Commission, the federal judiciary would contain an even number of Democrats and Republicans. He offered the reason that “there could be no greater calamity befall the American people than for the whole body of the people to come to the conclusion that the judgments of the courts were partisan and therefore corrupt.” Courts were political because everything in government was political. His proposal expressed another continuing theme in antibureaucracy reasoning, and it directly confuted Cannon’s depiction of a neutral judiciary, not to mention Reagan’s position on interstate commerce.

Breckinridge endorsed Oates’s proposal on the grounds of excessive expense in the proposed appellate circuits and the preservation of a homogeneous jurisprudence arising from a single intermediate court sitting in the capital. That remark brought Ezra B. Taylor (R-Ohio), lawyer, former judge, veteran, and chair of the Committee on the Judiciary, out of his seat to object to Mills’s amendment. He maintained that Mills’s suggestion would bring politics overtly into the judicial selection process, achieving what Taylor supposedly wanted to avoid. Congress had only recently curbed the spoils system. Few persons were willing to extend the discussion surrounding the corruption of the government by partisan appointments to the judicial branch (even though they all knew that such appointments depended on political affiliation).

Rogers then offered concluding remarks. He lamented that nothing could be done about corporate forum shopping, but he denied that eliminating the “evil”
of circuit riding through permanent circuit courts of appeal would produce disharmony in the law. “That great central power, the Supreme Court of the United States,” would rectify any differences between the circuits, he argued. His favorable reference to a hierarchical and central authority may have been a unique admission (at least in these debates) of the importance of a single, final voice in the governance of a great nation or merely a nod to the older idea that men of character could be trusted with power. But, above all, need justified the administrative novelty. Rogers introduced into the Record the committee report that laid out the bare facts of the matter according to the majority, a judicial system clogged with cases.\textsuperscript{44}

With Rogers’s remarks the House voted against the amendment to limit the jurisdiction of the new courts \textsuperscript{119} to \textsuperscript{94}, with \textsuperscript{114} not voting. The legislation then passed the House, \textsuperscript{131} to \textsuperscript{13}, with \textsuperscript{183} not voting.\textsuperscript{45} The bill could continue its journey on Capitol Hill to the Senate. There the junior senator from New York, William M. Evarts, took the legislation in hand and dictated its course.\textsuperscript{46}

**Courts and the Administration of the Laws**

The House, or Rogers, bill made the circuit courts the appeals courts and added two judges to each circuit court. It eliminated the Supreme Court justices’ circuit riding. The Evarts proposal retained the circuit courts and added only one judge per circuit. In addition, it added an entirely new level of courts, the circuit court of appeals with three judges each, to each circuit. Some matters could go directly to the Supreme Court; others would flow to the appellate courts. It would be up to the Supreme Court whether or not to hear these appeals from the new appellate courts.\textsuperscript{47} The specific provisions for jurisdiction are not relevant here; it is sufficient to say that the proposal’s complications most likely favored the professional lawyer specialist, not to mention the wealthier client who could afford this kind of representation.\textsuperscript{48}

Evarts’s career tracked his proposed changes in the legislation. Born in Boston on February 6, \textsuperscript{1818}, to a lawyer turned Congregationalist preacher, Evarts could trace his lineage back to the founding of the colony and, like Hoar, to whom he was also related, could claim familial links to the Shermans. Although his father’s death in \textsuperscript{1830} left his family in straitened circumstances, he attended the prestigious Boston Latin school, Yale College, and Harvard Law School.\textsuperscript{49}

With these credentials and connections Evarts began a long, distinguished,
well-compensated practice in New York City, making his mark as an orator with
cogent, carefully constructed, and long arguments before appeals courts at the
city and state levels as well as before the U.S. Supreme Court. At the peak of his
career he earned well over seventy-five thousand dollars a year, a princely sum
for the time. After a stint as an assistant district attorney in New York, from 1849
to 1853, he became an organizer in the newly founded Republican Party in 1855.
The fulsome compensation he received for his legal services abroad during the
Civil War helped spur the creation of the Department of Justice. After he served
as one of Johnson’s defense attorneys in the president’s impeachment trial be-
fore the Senate, Johnson rewarded him with an appointment as U.S. attorney
general. Evarts advocated enfranchisement for the freedmen but supported re-
admission of un-reconstructed, former Confederate states.50

Firmly opposed to the so-called rule by bayonet approach to the South,
Evarts found no difficulty serving on the legal team that successfully brought
about Rutherford B. Hayes’s ascension to the presidency in 1877. Evarts’s phi-
losophy was that of “a typical nineteenth century lawyer, believing in freedom
of enterprise, in the rights of property, in due process of law, and in the Ameri-
can businessman.” Consistent with these principles, he performed his duties as
Hayes’s secretary of state, president and one of the founding members of the
New York State Bar Association as well as the American Bar Association, and an
opponent of David Field’s revolutionary reform of the civil code.51

Elected to the U.S. Senate in 1885, Evarts became a solid partisan for Re-
publican policies—though with a few surprising positions. He supported the
Blair bill, which he came to favor through his position as a trustee of the Peabody
Fund. He argued for the Lodge Elections bill, the incorporation of the Ameri-
can Historical Association, and the fund-raising effort for the Howard Univer-
sity Law School’s new building that would bear his name.52 When the circuit
courts of appeals bill came to the Senate, this thin, angular man with a sallow
complexion saw it as a boon to lawyers and a capstone to the kind of state the
lawyers had constructed.

On September 19, 1890, Evarts presented his version of the bill to the Sen-
ate. He had made the new circuit courts true appellate courts. Although Su-
preme Court Justices would still participate, they would not be part of the trial,
or fact-finding, process. After a series of amendments that covered everything
from the shape of the circuits to the treatment of appeals from the Indian terri-
tories, Evarts offered his own extensive remarks,53 portraying the circuit courts
of appeal as a neutral reform that relieved the Supreme Court of its overwhelm-
ing caseload. Necessity seemed to drive invention, but Evarts did not rest his case on mere necessity. The terms he used are as instructive as the general content of his arguments. Four times he referred to the “administration of justice” and three times to the “judicial establishment.”

A conscious advocate of a more substantial national state, he frankly portrayed the courts as the best administrators in a time for the nation which required more and more administrative expertise. With his extensive experience as a both a trial and appellate court advocate, Evarts well knew that the enforcement of laws occurred in courtrooms. Properly understood, the judiciary constituted just as much an establishment or institution of government as the other two departments, or branches. He had no doubt that the courts were part of the state. Evarts also presented his measure as a politically neutral reform to serve the interests of “jurisprudence and uniformity of decision.” He repeated that phrase to counter the opposition’s call for subunits of the Supreme Court to alleviate the burden on the whole court.

After Evarts’s presentation, George Vest spoke for those who opposed the measure. He had practiced law both before and after the Civil War in Missouri, during which he represented Missouri in the Confederacy’s House of Representatives then its Senate. His oral arguments on behalf of a client suing his neighbor for shooting his dog, Drum, became part of local legend. He returned to political life in the 1870s, serving in the U.S. Senate from 1879 to 1903. As one would expect from this resume, his arguments repeated the core of the traditional rejection of professional, unelected, central power. He compared the workload of federal judges unfavorably to that of state judges and denounced justices working in “the shadow of the Capitol.” They were unresponsive to any constituency, and life tenure isolated them from the will of the people. They were the worst kind of administrators.

Vest’s solution to the high court’s workload was to subdivide the Court into smaller pieces. With a smaller number of justices deliberating and multiple panels at work, they could supposedly dispose of the burgeoning caseload three to four times more quickly as before. There would be no need to create more unelected judges. One may substitute the word bureaucrats for judges and get the gist of Vest’s antibureaucracy sentiments.

Vest’s counterproposal prompted a dense interchange on the practicability of this “scheme,” its constitutionality, and its jurisdictional import. Kentucky Democrat John G. Carlisle, Hoar, Joseph N. Dolph (R-Ore.), Delaware Democrat George Gray, and Spooner all worried about the constitutionality of his pro-
posal. Vest dismissed their concerns as cavils, derisively remarking at one point that “any lawyer would be satisfied with the decision of three judges of the Supreme Court of the United States.” How the remark fit his earlier criticism of the justices he did not explain. His localism did not appeal to many in the Senate, however, nor to the professional bar organizations to which many of his audience belonged. Yet Vest’s commentary revealed a great deal about the underlying sentiments of an important, if underrepresented in the Senate, portion of the country’s lawyers.59

By this time, the beginning of the 1890s, the legal profession had begun to divide, unevenly, into two segments. An elite bar—leaders of their state bars and members of the newly established American Bar Association—dominated practice in the highest courts. They also garnered the largest fees in a new system of hourly rates for legal services. Some of these lawyers would also serve as professors in the handful of elite law schools in the United States. There, they would work a veritable revolution in legal education. Beginning at Harvard Law School, under the leadership of Christopher Columbus Langdell, new faculties and methods were replacing the nuts-and-bolts institutions with academic classrooms. The anecdote-filled lectures were losing out to Socratic dialogues informed by a scientific exploration of the principles behind the cases. In the decades to come, elite law schools would only admit college graduates and became the feeders of large law firms and corporate practices.60 In the meantime the vast majority of attorneys, like Vest, continued to “read” law in law firms before applying for admission to the bar or attending prestigious law schools, practicing locally or beginning political careers. They resented their increasingly visible second-class status, one that (at least according to Vest) the circuit courts of appeals bill would worsen.

Veering away from Vest’s proposal for a division of the Supreme Court, Dolph presented the case for the other dissenters who favored the House bill over Evarts’s substitute. Dolph began his critique by admitting that the United States had simply outgrown its “judicial system.” The sheer scale and scope of the nation’s enterprises necessitated a change that recognized the growing irrelevance of state borders with the advent of “steam and electricity.” His terms varied slightly from those Evarts had used, resembling more his compatriots’ in the House. Judicial system, judicial establishment, and judicial machinery connote an impersonal, institutionalized functioning. The Supreme Court became “the balance-wheel in the vast mechanism of our dual form of government.”61

The machinery metaphor had appeared before, but now its context was
demonstrably different. This was a machine age. What was more, a politician could still refer to the wonders of technology and be seconded in his statements. While some might have found the analogizing of the court system to impersonal devices disturbing, it felt more and more appropriate as the century reached its conclusion. This was not the high tide of scientific government. It was, however, in its early stages.\textsuperscript{62}

Dolph had no college education, entering the bar of the state of New York after study while teaching school. Service in the Civil War as a member of the “Oregon Escort” protecting emigrants against Native American resistance brought him to Oregon, where he settled down to practice law, mainly for the railroads, then served as a city attorney, a U.S. attorney, then a state senator until 1874, when he expanded his law practice. He became a U.S. senator in 1883, losing his seat in 1894. He brought to the discussion the tremendous burdens under which federal judges operated, especially in a region the size of the Pacific Northwest. Asserting that the Evarts substitute would place too great a burden on these judges, Dolph argued for the Rogers bill. To the contention that the circuit courts of appeals would not have sufficient business to occupy themselves, he wisely reminded his colleagues that, essentially, if you build it, they will come.\textsuperscript{63}

The final statement of the day came from Morgan, whose battle against “northern aggression” had subsided from the incendiary to the quaint. Someone had laundered the Republican “bloody shirt.” Survivors of the war met regularly at celebrations of their common sufferings.\textsuperscript{64} No one held his wartime service against him. Morgan spoke in favor of the Evarts substitute. He had been around long enough to be forgiven his eccentric mix of reformism and suspicion of change. He, too, referred to the “administration of justice,” but he stated obliquely that the South had reason to be suspicious, fearful, and distrustful of federal courts, an allusion to Reconstruction.\textsuperscript{65}

The heritage of Alabama “justice” weighed heavily upon him. Its courts had gone from frontier to settled lands through Indian wars and a civil war. Administration of justice encompassed the maintenance of slavery and the dispossession of the Indians. During Reconstruction Alabama had undertaken a series of experiments in equal justice for people of color then rejected the notion during “Redemption.” If these very contradictions were the essence of politics in the post-Reconstruction era, what could \textit{administration of justice} mean? Morgan was a relic of times gone by, but he could still yearn for some kind of institutional reform in which courts would perform without fear or favor.
When the Senate reconvened on September 20, the participants sallied back and forth on a number of issues. Dolph’s amendment giving appellate jurisdiction over the territories to the circuit courts elicited a lengthy discussion about whether the territorial courts could be trusted, as Evarts maintained. After those present agreed to this modification, the senator from Oregon proposed another change, altering the shape of the Pacific Coast circuit. Evarts objected, for he believed that a discussion of this kind of matter would indefinitely delay passage of any act. Almost completely blind from a degenerative ailment, for him time was growing short.66

The senators, however deliberative their body might be, were just as local in their outlooks as the members of the House. Where courts met, lawyers congregated, litigants gathered, businesses flourished, and money flowed. And the future held an even greater promise of wealth. With the increasing scale and scope of interstate commerce, diversity of citizenship litigation, and the amounts at issue, not to mention the ever-expanding federal criminal code book, the federal courts could expect a substantially heavier workload.

The senators remembered the old script from the Pendleton and Interstate Commerce acts. What else could explain the intervention of Republican senator John J. Ingalls from Kansas? The “efficiency of our judicial system” concerned everyone, he insisted. Reagan rose to second this view. His own circuit, the Fifth, stretching from Texas to Florida, required reorganization. He despised the “autocratic powers” of the circuit judges, whose glutted dockets impaired the “administration of justice.”67 As Evarts had warned in his exchange with Dolph, discussion over the shape of the circuits opened up a floodgate. But behind the gerrymandering of judicial circuits lay the old triumvirate: economy, efficiency, and responsiveness. It would have its say. Evarts would just have to be a little more patient.

Concerns about the jurisdiction of the new courts also arose. John W. Daniel (D-Va.), known as the “Lame Lion of Lynchburg” from a wound he received at the Battle of the Wilderness, offered an amendment to add to the appellate ambit federal felonies and matters involving the custody of a child. Although the proposal possessed no inherent centralization ramifications on its face, Daniel’s language begs a closer reading. A law graduate from the University of Virginia who wrote two renowned books on legal matters and helped establish the “Lost Cause” movement, Daniel did not see the issue as simply one of reform. He put great weight on the concept of “free institutions” in a “republican form of government.” Inherent in the very existence of the nation as a “republic” was the...
core value of liberty. What this had to do with his amendment is not clear, except that it gave him his chance to connect an antebellum southern ideal of personal liberty with court reform.

Vest, however, had not finished. He still opposed the creation of the circuit courts of appeals. Would not this intermediate level of scrutiny merely serve corporations seeking to delay litigation until it died? Pushed by the questioning of northern Republicans, Vest made his last stand. Paraphrasing some unnamed English judge, he asserted that “all justice should be administered in a manner acceptable to suitors; in other words, that the courts of the country should be popularized as far as possible.” The new judges would be bureaucrats, indifferent to the people. “It is a country based upon the will of the people. It is a country that appeals in all its laws and in all the administration of its laws to the consent and confidence and affection of the people.” Vest was indifferent to claims of neutrality. The courts should be accountable not to the abstractions of the law but to the popular will. The consent of the governed trumps the need for dispassionate adjudication.

Speaking past this “sentiment,” Evarts continued to paint his measure’s impact in beige. It was what the litigators wanted. They must be appeased. “The preponderence [sic] of opinion, judicial and professional, and of the community interested in litigation, is hostile to the scheme of a division of the Supreme Court into chambers.” Vest replied that the rural South, the farmer, the trader, and the merchants who felt under siege by the growing reach of interstate corporations needed a champion. Having more federal courts was the antithesis of democracy. “What do the people know about the details of procedure in the Supreme Court? Who has ever made this a burning issue except the Bar Association of the United States, and that has been divided from beginning to end, and it is divided to-day?”

Like punch-drunk fighters in the last rounds, the two sides in the Senate debate staggered toward votes on the amendments to the amendments. One by one they went down to defeat, with roughly half the body absent for each vote. On September 24 the senators resumed their discussion, deciding to keep the Maryland to South Carolina circuit court of appeals in Richmond rather than Baltimore. At long last they voted forty-one to six in favor of passage, with thirty-one absent. Evarts, Hoar, and Pugh received appointments to the conference committee that would reconcile the two measures.

The House received the results of the conference committee on February 28, 1891, during the usual abbreviated second session that followed the November
election. Made a lame-duck Congress by the Democratic surge, its Republicans met knowing that their party had lost the House but retained the Senate. Their choice was either to accept the Senate (Evarts) version or do nothing at all. Most likely, if they did nothing, the new Democratic leadership would have other priorities than the circuit courts or in any case a different approach. With the Republican majority to continue in the Senate, however, the Republican leadership knew that the new judges would be Republican. A statement from the House managers, Ezra B. Taylor and L. B. Caswell, summarized the differences between the two measures:

The effect of the conference is to require the appointment of nine circuit judges, one in each circuit, instead of seventeen, as provided in the House bill, and to create a court of appeals, consisting of two circuit judges and the Chief Justice or associate justice of the Supreme Court assigned to the circuit, while the House bill relieved the justices from this duty. The circuit courts retain original jurisdiction for the trial of causes, while the House bill confines original trials to the district courts. No causes now on the calendar of the Supreme Court are to be remanded to the court of appeals, as provided for in the House bill.74

With discussion limited to thirty minutes for each side, the congressmen considered their two options.

Rogers spoke first, lamenting the Senate’s substitution. He referred to the “federal judicial system” and the distribution of original jurisdictions. This language suggests he considered the judicial branch a single entity with organizational purpose, arrangement, and coherence. Primarily, he contended that the Evarts bill did not relieve the Supreme Court at all, leaving the present overload uncorrected. Circuit riding remained, draining time and resources that could be better used elsewhere. Last, it provided additional marshals who served no additional function.75

Culberson responded essentially with “half a loaf is better than none.” Given the Senate’s action and the pressing need to get something passed, he argued, the House members should hold their noses and affirm. “Shall the demand of the bar of the United States, without regard to party, be ignored?” Bringing up the issue of spoils, he asked rhetorically, “Shall the best interests of the country, so long outraged and disgraced by the law’s delay, continue to be neglected because the President of the United States may fill these places with his party friends?” He was willing to answer yes while still leveling this charge of politicizing the judiciary.76
Oates lobbied again on behalf of a single court of appeals to preside in Washington, D.C. Using the venerable slippery slope argument, he predicted that the circuit courts would soon multiply until their numbers dwarfed the “federal judicial system.” He held that only an economical plan would provide “the administration of justice between litigants and . . . protect the people against turbulence, violence, and lawlessness.” Breckinridge continued, emphasizing his original point about “harmonious and national jurisprudence.” After all, if the law diverges according to jurisdiction, it is no longer law. Although he asserted the need for a national law with the advent of steam travel and the telephone, he also seconded Oates’s fear of multiplying courts.77

Richard Vaux (D-Pa.) worried that the Supreme Court was accumulating too much power. The Congress endangered the Court’s standing with the people, he maintained, by making it an omnipresent force in American political life.78 Vaux had spent most of his career as a practicing attorney in Philadelphia, working for penal reform, and served one term of elected office as mayor. His current status as a member of Congress as an appointee would end in March, for he had lost his bid to be elected in his own right. His appeal from personal experience, “I am a lawyer,” nevertheless captured the essential truth of the second state approach. It was lawyers’ work.79

A Vermont Yankee transplant now representing Wisconsin, Lucien B. Caswell, and a Missouri Republican, Nathan Frank, both practicing lawyers, spoke in favor of the conference report along the same lines as Culberson. Caswell expressed the opinion that “subsequent Congresses will find it easier to amend and improve the law” than to enact it in the first place. Frank reiterated this prediction, stating that eventually there would be “a system entirely satisfactory to the country.”80 One might wonder whether he was referring to a future Republican-controlled Congress, given the imminent Democratic takeover. The old system of spoils even in the judiciary remained deeply relevant.

Following these lackluster endorsements, “one of the most important changes in the jurisprudence of the country” came to a vote of a sort. Speaker Reed recorded 107 ayes and 62 noes. Oates called for the yeas and nays, a more formal roll call vote. This and Oates’s subsequent call for tellers did not elicit sufficient numbers in the speaker’s opinion, only 29 and 33, respectively, for each request. Despite an objection from Breckinridge, Reed refused both requests, thus, the House agreed to the conference report and the Evarts, or Circuit Courts of Appeals, Act became law.81 Tallying the numbers, we find that only 169 represen-
tatives participated in this action at all—only slightly more than the fewer than half, 144, who took part in the original vote, possibly another instance of those with misgivings refusing to go on record against a supposedly neutral, much-needed reform. Similarly, we can only poll the opinions of those who spoke during the debates to discern anything more than the yeas and nays.

The end result of this twenty-year debate was the expansion of the federal court system. Although its supporters claimed that the reform would lighten the load on the Supreme Court, if anything, the amount of litigation quickened. Just like building additional lanes on a highway, the Congress only added to the traffic. The added capacity to handle legal cases furthered the use of that system. With its added capacity the national government’s judiciary could extend its reach. The Congress, whether wittingly or unwittingly, had laid the necessary judicial infrastructure for the administrative state in this, the second state, era.

“Rendering Good Service” with the Second Morrill Act

On June 14, 1890, Justin Smith Morrill introduced a second appropriation in support of “colleges for the advancement of scientific and industrial education.” His nation, his Congress, and he, himself, had changed a great deal since he had first introduced his proposal to aid colleges. The very fact that he felt another piece of legislation was necessary leads to the conclusion that the changes had not wrought a tectonic shift in the nature of the American state. Colleges still wanted assistance. The Congress was still considering how best to aid higher education. The debate over the nature of American government continued. The principles of the second state, however, were now well embedded in the debate. In fact, they framed it. Morrill would have to demonstrate a need, argue that his means were the most limited possible, that the apparatus of government was as minimal as could be, and that the functioning of his proposal was consistent with the prevailing, persistent set of ideas behind American governance. If he did, passage was ensured.

This was not the first time Morrill had tried to supplement the funding plan that became law in 1862. In what may be seen as a backhanded compliment, he attributed its lack of success to his New Hampshire colleague’s quest for common school funding. Blair’s speech on common schools, “like the soul of John Brown, will be marching on and rendering good service everywhere to common schools for years to come.” This allusion to one of the Union’s Civil War
marching songs evinced a certain frustration with the process that had delayed his own bill while the Senate fruitlessly debated the Blair bill. Nevertheless, the arguments for both stemmed from the same tree.

As Garfield, Hopkins, Blair, and many others had, Morrill drew a link between his proposal and the future prosperity and survival of the country: “A popular government of the people pre-eminently requires the support of sound learning in all departments, in jurisprudence, finance, foreign relations, as well as in its home affairs and in its executive and legislative administration.” Literacy and numeracy were not enough. This was not a particularly second state proposition. Washington, Jefferson, and others in the antebellum period had favored aid to higher education. What was different was Morrill’s characterization of the evil to be avoided.

The surplus from the tariff presented an urgent need. He warned it will “beget danger [sic] of heedless and possibly wild projects for massive expenditures.” Morrill shared the fiscally conservative fears of the first state’s formulatarios. Large amounts of money produced extravagance that was devastating to the body public. Here was a first state idea being applied to a second state function: the sponsorship and standardization of higher education.

Morrill expressed hope for quick passage without much debate. But he would be disappointed. Education always lay at the margin of the second state—it dipped too deeply into local prerogatives. Reagan drew the line at federal supervision of education: “Mr. President, I am in hopes that that amendment will not be adopted. There can be but one main purpose in it, and that is to give the Federal Government supervision of education in the States.” Morrill’s attempt to perfect his proposal had elicited the same problem that all plans to increase the size of the national state encountered. Sponsorship and standardization had difficulty existing without some form of supervision.

Hoar urged caution: “There is a good deal of question in my mind what would be the precise legal meaning of the word ‘college.’” Besides the fact that there could be no legal meaning of the word college, his remark served notice to Morrill and Blair, his belated cosponsor, that the measure could not be passed without discussion. Morrill managed to get unanimous approval to have S. 3714 considered the next Thursday after the morning business. Blair had the bill and his committee’s report printed in the Record.

The lateness of the session (June 21, 1890) limited the amount of time that Morrill and Blair could allow for consideration of the merits or demerits. Now that they had been put on notice about the substantial opposition they had not
expected, they had to compromise if they wanted to ensure that there would be enough time for the lower house to pass the bill. And no one could ignore the elephant in the room: race. The senators from southern states in particular were anxious about certain provisions in the legislation which might affect segregated education. Just as other proposals invariably involved slavery before the Civil War and the “Negro” question after it, the second Morrill bill to aid agricultural and mechanical arts colleges and universities had to pass the gauntlet of the race question.

Reagan went so far as to claim a cabal: “I wish to add here that it seems to be upon the theory of a great many leading men in New England, almost a New England idea, that the Constitution of the United States is to be overthrown by the enlargement of the powers of the Federal Government and by the abridgment of the powers of the States, and this is one of the means of doing it.”\textsuperscript{88} The rhetoric may have been a bit overblown, but it had the essentials right. New Englanders were playing a leading role. The legislation would expand the powers of the federal government. But he was wrong in one essential respect: the prevailing view of the Constitution in the Senate favored this enactment, and it knew no section. The great compromise of the second state now encompassed all sections.

Morgan’s critique thrust to the heart of the matter in the harshest terms. He objected to the “scheme” that “the schools shall be regulated by a law passed here and by administrative measures enacted here.”\textsuperscript{89} Although the argument was about the form the national government would take, behind it lay a concern about Alabama’s segregated society. By this time the southern states had almost completed their process of separating their facilities, their public spaces, their economy, and their society into two. Under the label \textit{colored}, whites relegated African Americans to inferior, infrequent, and noticeably removed areas, schools, restrooms, sections of restaurants, if any at all, and railroad cars, among others.\textsuperscript{90} Morgan’s opposition was only the tip of the iceberg. Race was inextricable from the process, as its repeated appearances in the Second Morrill Act debate shows.

Given that race was tied to federalism, Morgan could logically make the link between his section’s peculiar arrangement and elements of the proposal such as section 5, which reads, “the Secretary of the Interior is hereby charged with the proper administration of this law, through the Commissioner of Education; and they are authorized and directed, under the approval of the President, to make all needful rules and regulations not inconsistent with its provisions to carry this
Blair’s committee had attempted to make a step beyond the second state into a regulatory third state. It was a natural progression, but not an automatic or an incontestable one. First there is the gathering and dissemination of information. Then there is sponsorship of various activities. Then the Congress moves to standardize the provision of these services by sponsoring legislation. Finally, there is a concern with supervising the activities. The supervision can either be light, through the courts and congressional oversight, or heavy, through the administration of bureaucracies. Blair and his committee tried to argue for the latter. They ran into trouble not just with ardent segregationists such as Morgan and Reagan but also with members of their own party.

The senators eventually removed all references to the “commissioner of education.” They replaced the wording with secretary of the interior even on relatively innocuous requirements involving who was to receive the reports. There seemed to be an implicit understanding that only a cabinet officer would have the appropriate rank to communicate with the states on their use of the monies. Federalism played a substantial role in this alteration of the legislation. This was not the anti-statist, states’ rights federalism that had prevailed in the first state. This was the federalism of co-sovereigns. As Blair put it, “I believe that both are independent and are sovereign each within its proper sphere.”

The compromise of the second state approach became clear in his rendition of the motivating philosophy. The 1880s had reached their end. Blair summarized the governing ideas of this period: “The nation has the power of necessity, in self-defense it has the power, to educate those who are to be the State and are to be the nation, so that they may exercise the powers of self-government.” The state could only exercise this power through sponsorship and standardization, lightly supervised. Speaking of the agricultural and mechanical arts colleges, Blair stated, “These institutions are really the nuclei where this form of education must take root and from which it must expand throughout all portions of the country.” Just as a tree grows out of an acorn, so would a system of higher education spread from such a limited appropriation. Blair, Morrill, Evarts, and the rest of the Senate placed their faith in this minimalist approach not only because more ambitious funding plans such as the Blair bill had failed but due to their shared commitment to the principles of the second state, in which the nation could be more active, have a more expansive apparatus, and legislate for the betterment of the country.

There was still the issue of how to deal with the South’s segregated educa-
tional system. Pugh had proposed an amendment to make sure that the state legislatures were able to divide their grants between the colleges they had set up for whites and the ones set aside for “coloreds.” Hawley and Ingalls not only tolerated racial discrimination but accepted it as the best system for the South. Hawley opined “I would not do that, but that is their way.” Ingalls went even farther, supporting segregation outright: “I believe that it is inappropriate and improper, in various ways detrimental to the best interests of both races, that coeducation should be conducted.” But even within this acceptance of racial separation he distrusted the southern Democrats’ representation of their system in positive terms. “I do not believe they like the colored people as well as they do the white people, and I think they must be put under bonds just the same as the Northern people must be put under bonds to do justice,” he asserted.\textsuperscript{94} As an admirer of Charles Sumner and an inveterate supporter of civil rights for African Americans, he wanted a proportionate share to go to both groups.\textsuperscript{95}

On June 23, 1890, the Senate completed its hasty deliberations with the unanimity born of the accommodation that marked the end of Reconstruction and was the hallmark of the second state approach. Morrill accepted amendments to his bill which allowed the state legislatures to administer the funds in the way they saw fit with no formal federal oversight except the reporting requirements. The only restriction with regards to segregated colleges was that the distribution had to be “equitable.” To accommodate black colleges such as the Tuskegee Institute, he changed the language to include “the institution for colored students.” The senators thus enshrined the wording of segregation in federal law. With the substitution of the \textit{secretary of the interior} for \textit{commissioner of education} in order to gain the good opinion of senators such as Plumb, the act would was now “conducive to good administration.” The Senate passed S. 3714 without a tally and amended its title to reflect the fact that they had removed the railroad lands from the funding arrangement.\textsuperscript{96}

On August 19, 1890, S. 3714 came before the House under a special rule limiting debate to two hours. Like the Senate, the representatives were concerned about the funding mechanism, were largely in agreement about the constitutionality of the measure, and were divided about the impact of the plan on the state of the republic. Unlike the Senate, the representatives evinced a different overall view of higher education. From the start speakers decried the use of federal money to help train the professional doctors, educators, and lawyers. This distaste for federal funding of “elite” education showed the differences between the two houses of Congress, but it also showed a lingering desire to sponsor the
more common occupations rather than the emerging professional occupations. This was not yet the expert driven society of the third state. The congressmen displayed a second state mentality—a commitment to the generalist in private life as well as public service.

Louis E. McComas (R-Md.) had charge of the bill. He allowed Joseph D. Taylor (R-Ohio) to present an amendment dedicating the funds solely for agricultural and mechanical arts education. They were both college-educated lawyers, though Taylor had a more distinguished legal resume to that point. Neither should have been all that dismissive of higher education, yet the chasm between their experience and the ideas which they entered into the Record could not have been plainer.

McComas explained Taylor's amendment as necessary "so as to prevent the money being expended in the ordinary college training in belles-lettres and the dead languages, but to more nearly confine these schools to industrial training and agricultural education." Taylor echoed "our agricultural colleges educate young men to be doctors and lawyers and preachers and teachers and disqualify them for the farm." Congress, it appears, could not look to a future of professionally educated men while remaining true to the desires of its members' constituents, especially when philosophies like that of the Grange still held sway over issues such as falling crop prices, railroad monopolies, and banks.

At various times during his presentation McComas had to answer questions about why the allocation was out of public land sales and not the general treasury, how much the measure would cost, and what would happen if the money from land sales dried up. He minimized the cost of the proposal, predicted an important impact, and professed ignorance about why anyone might question the constitutionality of the project. He did not have to wait long for the Democratic side of the aisle to rebut him.

Shades of the old days lingered, as Samuel W. T. Lanham (D-Tex.) entered into the Record President James Buchanan’s veto message from the 1859 Morrill Act. Daniel Kerr (R-Iowa) lamented the funding formula that would give to each state equally instead of proportionately, labeling it unconstitutional. Mark H. Dunnell (R-Minn.) joined him, adding that the “pittance” was not enough to help, while it would diminish the chances for farmers to buy their own land by forcing the federal government to sell the land rather than give it, for example, to his constituents. James O’Donnell (R-Mich.) weighed in with his understanding that no farmer wanted the bill but that he would vote for it if amended because he supported education bills.
In the same way that the Department of Agriculture, the Department of Education, the Department of Labor, the education bills, the Pendleton Act, the Interstate Commerce Act, and the Evarts Act received considerable support from organizations dedicated to those respective causes, so the second Morrill bill had its backers. Asher G. Caruth saw a connection between these interest group efforts and those of the railroads on their companies’ behalf. The “education lobby” had “haunted the corridors of this Capitol; they have stood sentinel at the door of the Committee on Education; they have even interrupted the solemn deliberations of that body by imprudent communications.”

His effort to make the agricultural colleges into some sort of nefarious business organization stemmed from an ancient disparagement, distrust, and opposition to special interests, a shadow conspiracy of those seeking to live off the public weal. Caruth’s attempt to characterize the agricultural colleges ran into difficulty because they were by now fixtures of localism. He was unable to fend off various corrections as he became mired in the details of how every institution in each state charged its students. Although he tried to salvage his argument with a reference to pork barrel politics, its members demonstrated the difficulty that anti–state enlargement advocates faced in the second state intellectual environs. The constitutional argument of Jackson, Madison, and Jefferson that Congress could not appropriate money for purposes not explicitly mentioned in the Constitution had lost its persuasive power over congressional majorities. A different mind-set prevailed which allowed for federal funding for sponsorship with a standardizing effect to follow. As long as the supervision of the effort was locally based, the additional programs could overcome older, first state principles.

The line of thought was clear. As long as the idea was to benefit a common, not elite, segment of the country, it could command bipartisan support. John A. Anderson (R-Kans.), a Presbyterian minister, not a lawyer, could speak with some authority on the topic as a former regent of the University of Kansas and president of the Kansas State Agricultural College. He explained that the colleges had “been absorbed by professional educators and . . . have turned out professional men,” by which he meant “lawyers, doctors, preachers, and teachers.” He believed that, once the Morrill bill was amended, these colleges would be encouraged to provide a “practical” education, “out of which the farmers of the country can make more money than they do, or out of which the girl or woman who is compelled to support herself by her own labor can make more money as a telegraph operator or printer or in other directions than without it.”

The House adopted Taylor’s amendment without a count and rejected
Caruth's amendment to strike out the reporting requirements and the withholding provision. By a vote of 135 to 39 the second Morrill Act passed the House. On August 20, on a motion from Blair, the Senate concurred in the House's amendment. On August 30 President Harrison signed the Second Morrill Act of 1890 into law. With this signature the process of debate had come full circle. The debate on the Evarts Act would continue until the following year, but the culmination of a remarkable decade of conceptual development had already been reached.

As the debates over elevating the Bureau of Labor into a department, the Evarts (Circuit Courts of Appeals) Act of 1891, and the Second Morrill Act demonstrate, significant additions to the administrative state took place even as Reconstruction politics receded into distant memory. Moreover, these supposedly neutral reform efforts rested upon the same basic novelties that underlay the Civil War and Reconstruction agencies and departments. The interplay of interest groups, their associations, the pro-enlargement advocates both in Congress and the executive branch, all interacted to produce additions to the national state, though the dictates of the older antibureaucracy ethic remained in place. Lawyers' concepts, procedures, values, and interchanges allowed the congressmen to consider, modify, and ultimately pass these measures. Oddly enough, their words in the Evarts Act debate rendered the most lawyer-specific legislation the most coolly administrative. Rogers's administration, Culberson's judicial machinery, Evarts and Morgan's administrative machinery, and Dolph's Supreme Court as a "balance-wheel" demonstrated that legal matters themselves were now devoid of the human element. Morrill's use of the doctrine of equity to justify funding segregated schools seems warm by comparison.

Congress had moved firmly into new territory. It had created a more elaborate, expansive state as it shifted from sponsorship to supervision to standardization. The way opened for the Progressives. Ultimately, Congress retained the older values, while it accepted new challenges. The lawmakers, like the public they represented, could not avoid repeating the choices of earlier days. The congresses of the Progressive Era did not originate the paradox. They inherited it and chose to reenact it. Future generations could criticize that choice after new crises hit but found they could do no better.

The administrative mentality would have to wait for the Progressive, New Era, and New Deal eras, from the 1890s to the 1930s, but much of the preparatory conceptual work was already in place by 1891. Lawyers in Congress had
given to lawyers in the administration of the civil service, the regulatory agencies, and the courts the opportunity to guide the state-making process in the future. The watchwords *exceptionalism, economy, democratic responsiveness*, and *efficiency* were still in play, the language reflecting ever more dimly an increasingly changing reality. Nevertheless, forced to rely on the encoded outline they had fashioned, the advocates of a more substantial national state continued the expansion of the leviathan into the new area of standardization of administration as well as sponsorship and supervision.