Regulatory History by the Book, by Richard R. John

yalejreg.com/nc/symposium-novak-new-democracy-07

**This is the seventh post in a symposium on William Novak's New Democracy: The Creation of the Modern American State. For other posts in the series, click here.*

William J. Novak's *New Democracy: The Creation of the Modern American State* is a bracing conspectus of the legal values that shaped the evolution of governmental institutions in the United States in the decades between the Civil War and the New Deal. Some twenty years in the making, it reveals the latent, and often overlooked, "subterranean processes" (264) that gave form to the better-known manifest events that have been detailed in more conventional accounts. In contrast to his mentor, Morton Keller, whose *America's Three Regimes: A New Political History* (2007) positioned the New Deal as a watershed in American public life, Novak charts continuities between the New Deal "administrative state" and the regulatory regime that emerged in the period between 1866 and 1932.

New Democracy differs from *America's Three Regimes* not only in content, but also in form. Keller's earlier, three-volume trilogy on the history of public life between the Civil War and the New Deal—*Affairs of State: Public Life in Late Nineteenth Century America* (1977); *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (1990); and *Regulating a New Society: Public Policy and Social Change in America, 1900–1933* (1994)—is brimming with people, places, and events. Novak's *New Democracy* is very different. Olympian in its detachment from the hurly burly of public life, it serenely hovers over the American political landscape to illuminate patterns that otherwise might have gone undetected. At its core is a single audacious claim: the administrative state was a "new democratic response" (257) to the radical transformations wrought by the Civil War, the emergence of the industrial corporation (and the rampant political corruption it spawned), rising wealth inequality, and the precarity of life in an industrial age. That the administrative state emerged in *this* period, rather than before 1866, as a large and growing chorus of revisionist historians have implied, or after 1932, as an older generation of New Deal-centric scholars assumed, is Novak's main historiographical contribution. Vigorously argued and boldly framed, *New Democracy* brings within two covers topics in intellectual, cultural, and legal history that are rarely considered together in an engaging pastiche that exudes on every page an unshakable confidence in the yet-to-be realized potential of the democratic experiment in the United States.[1]

The administrative state, in Novak's telling, is far from the ethically insidious, legally dubious, and disturbingly un-American protuberance on an otherwise healthy body politic that "deep state" critics ranging from Friedrich Hayek to Philip Hamburger have portentously warned us against. On the contrary, the administrative state was an entirely admirable complement to the founders' experiment in representative government that, from

its beginnings in the post-Civil War codification of national citizenship in the Fourteenth Amendment, has been indispensable to the "actualization" of "everyday democratic governance" (220). Energized by a "new and expansive conception of the social" (148) that would find its consummate expression in the pragmatic philosophy of William James and John Dewey, the administrative state opened up vistas of the "radical potentialities of progressive social democracy" that we have "only begun to uncover" (24). In no sense was the administrative state a "mere elite technocratic project" (236). On the contrary—and thanks in no small measure to the capable work of the burgeoning cohort of mid-level government administrators who are Novak's unsung, and, somewhat oddly, almost always invisible protagonists—it was "at the center" of the "new democratic quest" (237).

Though Novak was trained as a historian, he is currently a law professor, and, like so many of the members of this guild, is committed to making normative claims that might gain traction in the courts. In his justly admired *People's Welfare: Law and Regulation in Nineteenth-Century America*, published in 1996, Novak summarized an entire epoch in American history in a single phrase—the "well-regulated society"—which he defined as the constellation of legal norms that structured the operation of voluntary associations, local regulation, and the common law. In *New Democracy*, Novak ventures a parallel claim for the timespan that stretched from 1866 to 1932. The "long" progressive era, to apply to Novak's periodization a convention popularized by historian Rebecca Edwards, witnessed the creation of the "modern democratic state" (235), an achievement that—as Novak declares, in a characteristically exuberant rhetorical flourish—was "arguably" the "most significant legal-political development of the twentieth century" (2).

Perhaps the most unusual feature of *New Democracy*, at least for a historian familiar with the conventions of academic history-writing, is the extent to which Novak is untroubled by the not-entirely-implausible objection that the exercise of public power in the United States in the long progressive era has not proved to be entirely salutary. To be sure, Novak is well-aware of the many troubling episodes in the history of the American state. Yet in his account these episodes rarely figure, except incidentally, if at all. If one were to guess what topics would receive more than incidental attention in a history of U. S. state-building in the 1866-1932 period that claimed to be comprehensive, one might suppose that they would include the pacification by the U. S. Army of the indigenous tribes in the trans-Mississippi West, the Chinese Exclusion Act of 1882, the labor injunction, *Plessy v. Ferguson*, the administration of overseas territories acquired during the Spanish American War—including, in particular, the adjudication of the legal status of the inhabitants of the Philippines and Puerto Rico—the segregation of the federal civil service by the Wilson administration, the imprisonment of critics of U. S. intervention in the First World War, and the endorsement of eugenics as a solution to the supposed menace of "race suicide."

For Novak, however, the inclusion of a detailed discussion of such topics—several of which, to be fair, he does mention in passing—would be to miss the woods for the trees. Far more consequential, in his view, was the triumph of a new, *democratic* conception of statecraft,

which he finds to have been manifest not only in the promulgation of a dizzying array of new regulations and regulatory agencies, but also, and revealingly, in the legal treatises of sympathetic jurists. The sheer bulk of these tomes is, for Novak, a testament to the democratic promise of the new world that was aborning: Ernst Freund's *Police Power* (1904) weighed in at 800 pages; Bruce Wyman's *Special Law Governing Public Service Corporations* (1911) at over 1,500 (99, 110). The care that Novak takes in enumerating these page counts, in combination with his detailed listing of state and federal administrative agencies and state regulatory protocols, leaves little doubt but that *something* truly momentous was underway.

Novak's explication of legal texts is unfailingly perceptive and revealing. Yet it highlights a feature of his method that historians who are not specialists in legal doctrine may find somewhat problematic. In its conception, execution, and promise *New Democracy* is a book about books. Perhaps above all, it is a commentary on the published pronouncements of jurists, philosophers, journalists, and reformers that is intended to inspire in the rising generation a commendable zeal, as Kate Andrias eloquently wrote in her blog post, to continue the hard work of building a progressive social democracy.

The godword "democracy" is prominently featured in Novak's title—and his project, as he informs us on his opening page, is a critical chapter in the "legal-political history of American democracy" (1). But what, precisely, is democracy? Though Novak has much to say about a common democratic litmus test—namely, the extension of civil rights to African Americans—he is relatively uninterested in electoral politics and social movements. For this reason, it is, I think, fair to contend that democracy for Novak is more-or-less equivalent to the promulgation of inclusive legal norms in constitutional jurisprudence, social policy, and administrative law. His dramatis personae are concepts: the law of public callings, the police power, the state regulation of corporate charters. Hovering in the wings, if not entirely offstage, are elected officials, party strategists, social activists, government administrators, business leaders, voters, and that residual category that is sometimes euphemistically called ordinary people.

If Novak's heroes are concepts, then, so, too, are his villains. The primary foil for *New Democracy* is the wrongheaded triumvirate of ideas—widely held today, in Novak's view, by legal commentators—that the United States at its founding had a weak state; that late-nineteenth century jurisprudence could be aptly characterized as "laissez-faire constitutionalism"; and that the courts in the early twentieth century embraced a reactionary "Lochnerian" formalism that systemically frustrated the enactment of beneficial social legislation.[2] Novak is at his best, as the readers of his many bravura essays can attest, in his sweeping—and, indeed, often gleeful—debunking of the fallacies that bedevil our understanding of the history of American statecraft, a topic about which he is unfailingly illuminating and shrewd.

Historiographical revisionism figures so largely in Novak's project that it is worthwhile to quote him on this topic at length: "This book continues my long-term effort to debunk persistent and dangerous fallacies about an original American historical tradition defined primarily by transcendent precommitments to private individual rights, formalistic constitutional limitations, and laissez-faire political economy. In contrast, this project excavates an alternative American historical reality where public rights, popular lawmaking, and robust regulatory technologies take center stage in a narrative grounded in an examination of the actual practical workings and pragmatic public policy demands of a rapidly expanding and modernizing polity, society, and economy" (3).

Each of Novak's historiographical claims is, in my view, basically correct. Whether or not he will persuade legal commentators, I am not in a position to say. More problematic is his contention that his argument is *novel*, a claim that he presses by repeatedly citing as evidence assertions advanced many decades ago by historian Arthur Schlesinger, Jr., echoing his father (also a historian), Arthur Schlesinger. The period preceding Franklin D. Roosevelt's election in 1932, Schlesinger, Sr., declared, in a passage that Novak quotes from a book that Schlesinger, Sr., published in 1949, was an age of "doctrineless conviction" whose leading lights remained committed to upholding the "traditional spirit" of "self-reliance and free competition" (5). Schlesinger, Jr., an unabashed apologist for the New Deal, expanded on his father's indictment of the pre-New Deal past in *The Crisis of the Old Order, 1919-1933* (1957), a book that Novak castigates in his conclusion for helping to invest the New Deal with "mythic status" as a fundamental break in American public life (262). To be fair, Schlesinger's *Crisis of the Old Order* did not reach all the way back to the two decades that preceded the Treaty of Versailles, the period from which Novak draws much of his most compelling evidence—as well, of course, as the period that is conventionally regarded as the heyday of progressivism. Yet Novak is on solid ground in challenging Schlesinger's conviction that the election of Franklin Roosevelt in 1932 marked a decisive turning point in American jurisprudence. In so doing, as Novak's own notes make plain, he is joining a chorus of historians who have staked an analogous claim.[3]

More likely to be controversial, at least among certain jurists, is Novak's celebration of the Wilson-era administrative state. As Sophia Z. Lee perceptively observed in her blog post for this forum, it has long been *de rigueur* in conservative legal circles to deride Wilsonian Democrats as racist, elitist, and contemptuous of civil rights.[4] Few historians of the period fail to note—as Novak, unless I missed it, did—that it was the Wilson administration that segregated the civil service and threw the socialist presidential candidate Eugene Debs into jail. This is not the place to sort this issue out—though, for at least some of Novak's readers, his idealization of the progressive administrative state may well spark more discussion than his disparagement of Schlesinger's characterization of progressive reform.

What then of Novak's substantive contributions? In the space that remains, I will briefly consider two: namely, his explication of the public utility "idea" and his characterization of "modern" anti-monopoly. Public utility and anti-monopoly are two of Novak's most

important concepts. Each is the subject of a separate chapter and each is analyzed in an innovative way. While I find much to admire in Novak's treatment of both, I would like to raise a number of caveats that are based on a project I am currently undertaking on the history of American anti-monopoly thought as well as on my 2010 history of the formative era of American telecommunications.[5]

Let me begin with public utility. Novak opens his chapter on this topic with a quotation from the eighteenth-century Scottish moral philosopher David Hume: "public utility is the sole origin of justice" (108). Readers unfamiliar with the history of nineteenth-century American social thought might assume from this quotation that a more-or-less straight line can be drawn from Hume's commendation of public utility to the emergence of public utility in the United States as a legal norm and institutional form. Yet this would not be correct. In Novak's determination to highlight the influence of state police power on federal administrative law, he has exaggerated the autonomy of legal doctrine and minimized the role of political contestation. In addition, he has elided an important difference between nineteenth-century British and American law. As the intellectual historian Daniel T. Rodgers demonstrated in *Contested Truths: Keywords in American Politics since Independence* (1987), nineteenth-century Americans associated utility with British utilitarianism, which many if not most legal commentators unequivocally rejected as unprincipled and amoral. While the phrase "public utility" *would* gradually find its way into public discourse in the nineteenth-century United States, the usage of the phrase as a compound noun—as in the phrase "the Milwaukee gas works is at present a reactionary municipal franchise corporation, but should be in the future a progressive public utility"—would not become at all common until the 1890s.[6] While this qualification might seem like a quibble, it complicates Novak's account, which downplays the relatively late emergence of the public utility idea, as well as its socialist pedigree.[7] In addition, and no less importantly, Novak's discussion of public utility underplays the extent to which, in the opening years of the twentieth century, this idea would become embraced, and in the opinion of certain business critics coopted, by business leaders, politicians, and public relations specialists.

In tracing the evolution of the concept of public utility, in short, there is good reason to consider historical actors other than jurists—or even renowned legal historians like Willard Hurst, whose 1971 essay Novak cites to buttress his claim about the concept's early nineteenth-century pedigree (109). The authors of legal treatises might well find it flattering to regard themselves as blazing new trails, yet it is at least as likely that their conceptual handiwork is a lagging indicator of changes that had already arisen in other domains.

Conspicuous among the historical actors who fail to find a place in *New Democracy* are business leaders. One of the relatively few to rate a mention is railroad president William H. Vanderbilt, whose notorious retort to an inquisitive journalist—"the public be damned"—provides the rationale for his inclusion. Novak pairs Vanderbilt's jibe with a progressive jurist's rejoinder. Yet the most widely discussed answer to Vanderbilt was almost certainly

not to be found in a legal treatise, but, instead, in public transit magnate William McAdoo's celebrated declaration that, as a business leader, his motto was not "the public be damned," but "the public be pleased."[8]

Examples of this kind could easily be multiplied. One of the main reasons telephone leader Theodore N. Vail ostentatiously proclaimed the Bell System a public service in his famous 1910 American Telephone & Telegraph Company annual report was to defend the telephone-telegraph combine against a threatened congressional buyout.[9] Vail and McAdoo appear nowhere in *New Democracy*; neither do the many politicians who took up the banner of public utility, including many socialists, or, for that matter, actual utility users. Who, one might ask, gets to determine what the democratic state is?

To raise such questions is to pay tribute to the extent to which Novak's explication of the public utility idea has riveted our attention on a concept that is too often mistakenly dismissed as outmoded, self-serving, and dull. It is useful to be reminded that the concept of public utility was once at the "cutting edge" and "avant garde" (110), just as it is suggestive to reflect on the extent to which it "burrowed its way to the very core of the American legal and political-economic system" (109). Yet each of these claims raises still further questions. In what sense can it be plausibly contended that the "modern concepts" of public utility and public service (a somewhat different idea, though one that Novak often conflates with public utility) "propelled" new "democratic conceptions of economic and social justice" (109)? Can concepts—even modern concepts—propel history? Who is doing what to whom? Might the embrace by business leaders of concepts like public utility and public service have been deployed, at least in certain instances, to blunt the movement for government ownership? How did they shape the actual provisioning of gas, electricity, telephony, public transit, or water?

Novak's formulation of the relationship between legal norms and institutional forms is characteristic of his method. Here, and elsewhere, the agent of change is not a person, or a group, or even an institution, but a concept. If *New Democracy* were scripted for the theater, it could be staged a masque in which legal doctrines squared off in a life-and-death struggle for the holy grail of democracy.

One might expect that a chapter on public utility would include a more-than-incidental discussion of the kinds of enterprises for which this concept would be invoked. In general terms, Novak meets this test. The "legal foundation" of the modern administrative state, he contends, rested squarely on the "essentially public services provided by corporations in emergent sectors," that is, transportation, communications, energy supply, water supply, and the shipping and storage of agricultural products (108).

Yet, and notwithstanding Novak's emphasis on "emergent sectors," the only enterprise that he discusses in any detail is the railroad. The railroad, Novak contends, burst onto the scene with an "economic ferocity" that was "unmatched" by any force short of war (125), making it

the "original and paradigm case" (110) for the public utility idea. In a very general—and, indeed, in some ways, almost mythic—sense this might be true: the railroad was certainly important, and late-nineteenth-century railroad rate-making unquestionably prompted a great deal of concern. Yet the railroad was hardly an emergent sector in the 1890s, when the public utility idea first found its way one the public agenda. Unlike communications network providers and energy suppliers, railroad firms did not coalesce around patent rights—a key catalyst for public utility discourse—and would only slowly embrace new forms of propulsion, such as electric power. For these reasons, the railroad figured little in the emergence of the law of intellectual property, a body of doctrine that did much to shape several of the emergent sectors to which Novak quite rightly directs our attention—including, in particular, the telephone and electric power.[10]

Even within the rarified confines of legal discourse, Novak's account is not without its blind spots. At no point, for example, does he pause to analyze the role of specific legal instrumentalities—for example, certificates of convenience and necessity—in shaping legal norms, and only rarely does he highlight the often-pivotal role of social activists—including, in addition to socialists, public ownership enthusiasts, journalists, and user groups—in the public debate over ownership, management, and terms of service. In his exposition of the public utility idea, Novak places much emphasis on the legal treatises of Ernst Freund and Bruce Wyman. Freund and Wyman may well have shaped legal doctrine, but they were by no means the only, or even the most influential, legal insiders, a group that would also include, at a minimum, the municipal utility experts Delos F. Wilcox, Frank Parsons, and Edward W. Bemis.

To be sure, and to Novak's considerable credit, his text crackles with the voices of cultural commentators, journalists, social reformers, and even the occasional government official. Yet legal writers often get pride of place, an odd choice for a book that purports to chart not only the justification of the administrative state, but also its inception.

Let me now turn, very briefly, to Novak's chapter on modern anti-monopoly, a concept that, unlike Novak, I prefer to hyphenate.[11] Here I would like to raise a question about chronology. The origins of "modern" anti-monopoly, in Novak's account, were more-or-less coeval with the railroad. What, then, of the pre-Civil War land reform movement, which also trumpeted its anti-monopoly bona fides? And what about the presumably *pre*-modern pre-Civil War anti-monopoly debate over corporate charters? Further questions can be raised about the modernity of anti-monopoly in the period before the New Deal. Like many legal scholars, including his colleague Daniel A. Crane, Novak is impressed with the enormous significance for modern anti-monopoly of the "crucial political year" of 1912 (9). Like Crane, Novak implicitly assumes that modern anti-monopoly found expression in the public debate over the parsing of the Sherman Act during the 1912 presidential election.[12]

Yet is this true? Consider the case of the economist, jurist, justice department official, and longtime Yale Law School faculty member Walton Hamilton. Novak quite appropriately opens his chapter on anti-monopoly with a suggestive quotation from Hamilton on the perennial economic problem of striking a balance between human and material values.[13] Hamilton was a huge admirer of John Dewey—the patron saint of Novak's *New Democracy*—making him for Novak in many respects an ideal interlocutor.[14] Yet in *New Democracy* Hamilton never really emerges from the shadows, at least in part because his contributions to anti-monopoly thought came too late for him to fit conveniently into Novak's chronology. Hamilton, after all, would not write his field-defining brief for "institutional economics" until 1919, seven years after the supposedly "critical year" of 1912. And it would not be until 1941, nine years after the election of Franklin Roosevelt, that Hamilton, in his controversial *Patents and Free Enterprise*, would expand the anti-monopoly agenda to embrace the social control of knowledge *inside* the corporation, a topic that had not yet found its way onto the political agenda in 1912.

It is unfortunate that Hamilton remains so little known. For, in conjunction with Thurman Arnold—Hamilton's colleague and intimate friend first at Yale Law School, then in the U. S. antitrust division, and finally in the Washington, D. C., law firm that Arnold helped found and that is known today as Arnold & Porter—Hamilton would recast anti-monopoly jurisprudence in the 1930s well beyond the narrowly material considerations of economic efficiency that figured so prominently in public discourse in 1912, as Laura Phillips Sawyer astutely observed in her blog post for this forum. Hamilton, like Arnold, regarded anti-monopoly in the best pragmatic spirit as the deliberate invention of a usable past to outfit its protagonists with the necessary intellectual armor to outmatch opponents draped in the outmoded raiments of nineteenth-century legal orthodoxy. In so doing, he broke decisively with the rights-based legal formalism that suffused the anti-monopoly thought not just of the reactionary Supreme Court justice Rufus Peckham, but also of the radical political economist Henry George.[15] Here was modern critical-realist anti-monopoly with a vengeance.

Anti-monopoly activists today are wont to proclaim that it is high time to "bring the institutionalists back in." Though the institutional economists are routinely ignored by legal scholars whose genealogy of anti-monopoly moves abruptly from Brandeis to Bork—as it did, for example, in Crane's essay on antitrust in 1912—mavericks like Hamilton and Arnold dominated the economics profession in the interwar period—while establishing a foothold in several elite law schools, including Yale—and were particularly influential during the so-called Second New Deal that culminated with the TNEC hearings of 1938-41. This history remains too little known: Schlesinger's New Deal trilogy, it is worth remembering, ended *in medias res* with the 1936 election campaign—prior to the ascendancy of Hamilton and Arnold at the U. S. justice department. Intellectually ambitious, impressively prolific, resolutely anti-formalist, and avowedly unafraid of wielding power, the institutionalists' capacious vision of democratic governance laid the foundation in the post-Second World War

era for the golden age of anti-monopoly, a theme that the neo-Brandeisian journalist Matt Stoller has recently described with such interpretative flair in *Goliath: The 100-Year War Between Monopoly Power and Democracy* (2019).

New Democracy provides us with abundant evidence of the institutionalists' significance, yet, because of its chronological cut off in 1932, it misses an opportunity to make connections between the past and present, such as, for example, the potential relevance for today's legal battles over Big Tech of the institutionalists' exposé of the hoarding of knowledge-based assets *inside* the corporation.

Novak's limited engagement with the institutionalists is in a certain sense unsurprising. Hamilton, like all the institutionalists, was firmly committed to diagnosing the challenges posed by specific industries and to devising industry-specific remedies. *New Democracy*, for all its erudition, virtuosity, and panache, lacks the industry-specific granularity that institutionalists like Hamilton so greatly admired. The railroad—Novak's only sustained case study—was undeniably consequential, but it is hardly the whole story. Other industries—including, in particular, those in the burgeoning communications and energy sectors—sectors that, by 1900, were far more technically innovative and complex than even the largest railroad—might well furnish better templates for Big Tech critics today.

New Democracy helps to set the agenda for the many hopeful historians, jurists, and activists who share Novak's conviction that there once was in the past, and might be once again in the future, a truly *democratic* state. In the period between the Civil War and the New Deal, anti-monopoly and public utility were unquestionably influential in shaping law and public policy. Yet in making its case for the democratic state, *New Democracy* raises as many questions as it answers. And this is as it should be. For, just as the pragmatists Novak admires so often proclaimed, the future is open, and there remains much to be done.

Richard R. John is a professor of history and communications at Columbia University. He is writing a history of anti-monopoly thought in the United States from the Boston Tea Party to Big Tech.

---

[1] This is not the place to summarize the burgeoning literature on the pre-1866 administrative state. Novak mostly sidesteps this literature, which is perhaps not surprising, since it cuts against one of his main claims about the novelty of the post-Civil War state, and is not easily reconciled with arguments that he advanced in his 1996 book on the antebellum police power. Novak's neglect of this literature is unfortunate, since it includes some of the most imaginative and compelling scholarship in nineteenth-century American historiography. To get some sense of its range, one might consult the collection of essays on the early American state that were brought together in the spring 2018 issue of the *Journal of the Early Republic*. See, in particular, the introductory essay by Ariel Ron and Gautham Rao: "Taking Stock of the State in Nineteenth-Century America." Outstanding recent monographs

on state-building in the early republic that highlight recent trends in this field include Ariel Ron, *Grassroots Leviathan: Agricultural Reform and the Rural North in the Slaveholding Republic* (2020) and Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (2018).

[2] Novak's evisceration of the cult of "Lochnerism" is particularly pointed: Of the 560 fourteenth amendment-related cases to find their way to the U. S. Supreme Court between 1887 and 1911, reported one authoritative study, in only three (including *Lochner*), would the Supreme Court overturn a state law relating to "social justice" (105).

[3] Among Novak's predecessors in tracing these continuities were Daniel T. Rodgers, James T. Kloppenberg, and Theda Skocpol—each of whom is cited in Novak's notes. For the most part, Novak avoids engagement with his historiographical foils. And on one of the relatively rare occasions in which he does, he overreaches. In her influential work on American state-building, Novak contends, sociologist Theda Skocpol adopted a "Weberian" or top-down approach. In fact, in her most oft-cited programmatic essay, Skocpol deliberately eschewed Weberian orthodoxy in favor of a quite different "Tocquevillian" approach that was broadly compatible with Novak's own project. Theda Skocpol, "Bringing the State Back In," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (1985), 21.

[4] For an introduction to this critique of Wilsonian statecraft, readers may wish to consult Murray N. Rothbard's *Progressive Era* (2017), a 600-page exposé of progressive era politics, with a foreword by Judge Andrew P. Napolitano. Rothbard's ideologically charged tome surveys the familiar landmarks of Wilsonian reform in an idiom that might well prove be more congenial, at least in its general outlines, to libertarian-minded judges than to many if not most of the carefully argued and well-researched articles and books by law professors specializing in administrative law.

[5] In *Network Nation*, my history of the formative era in U. S. telecommunications, published in hardcover in 2010, I analyzed the influence of anti-monopoly law on industry structure and inventive activity for the nineteenth-century telegraph giant Western Union and its rivals, and the consequences of the popularization in the 1890s of the then-novel concept of public utility for the business strategy, public relations pronouncements, and legal standing of the nation's largest and most powerful telephone operating companies. Richard R. John, *Network Nation: Inventing American Telecommunications* (2010), chaps. 3, 10, 11.

[6] My generalization about "public utility" as a compound noun is based on primary source research that I conducted for *Network Nation*. The phrase "public utility" was never used as a descriptor for a telephone operating company before 1890, so far as I was able to determine on the basis of a thorough survey of published primary sources, big-city newspapers, and the trade press. Other phrases, such as, for example, "municipal franchise corporation," were far more common. Dillon's rule unquestionably circumscribed the legal prerogatives of

municipalities. Yet this does not mean, as Novak implies, that municipal regulation was toothless. In the telephone business, for example, municipal law would remain extremely important for big-city operating companies until 1907, and would continue to shape business policy for many decades thereafter. Telephone law, that it, and despite Novak's claim to the contrary, had little in common with railroad law, and was most certainly not derived from it; on the contrary, it emerged out of municipal franchise law, which made it, in a dual sense, civic. John, *Network Nation*, p. 267.

[7] Neither "socialists" nor "socialism" can be found in Novak's index, even though intellectual historians such as Dorothy Ross have long emphasized the influence of socialism in progressive era social thought.

[8] For a nuanced and compelling discussion of early-twentieth-century public utility politics in the gas, electric power, streetcar, and telephone industries, see Daniel Robert, *Courteous Capitalism: Public Relations and the Monopoly Problem*, 1900-1930 (forthcoming).

[9] Early twentieth-century critics of the telephone and other high-tech network enterprises were far more skeptical than Novak is about the potential manipulation of the public utility idea for narrowly self-interested purposes. In their view, civic appeals could entrench corporate prerogatives. Bell president Theodore N. Vail, for example, won wide praise from his fellow business leaders for deploying the public utility idea to blunt the call for a government buyout of the telephone business, a much-discussed public issue in the 1910s. John, *Network Nation*, chap. 11, esp. 387.

[10] Four of the most important recent books on the political economy on the nineteenth-century U. S. railroad industry are Steven Usselman's *Regulating Railroad Innovation: Business, Technology, and Politics in America, 1840–1920* (2002); Albert J. Churella's *The Pennsylvania Railroad*, vol. 1: *Building an Empire, 1846-1917* (2012); Richard White's *Railroaded: The Transcontinentals and the Making of Modern America* (2012); and Benjamin Sidney Michael Schwantes's *The Train and the Telegraph: A Revisionist History* (2019). Each document the technical challenges that the railroad industry encountered as it matured, and, in different ways, make the point that by the 1890s the railroad was by no means on the technological cutting edge. Somewhat surprisingly for a book that advances such broad claims about this industry, none appear to have been consulted by Novak in a substantive way. Indeed, Novak's account of the railroad appears to be based primarily on Alfred D. Chandler, Jr.'s *The Visible Hand: The Managerial Revolution in American Business* (1977), which, and notwithstanding its justifiable fame, has been in the almost half-century since its publication the target of a variety of compelling critiques.

[11] In *Network Nation*, I set "antimonopoly" without the hyphen. I have since changed my mind. Printers typically hyphenated anti-monopoly in the nineteenth century, and I have found it sensible to follow their lead: the concept had too many different, often divergent, meanings to be fully rendered as a single composite noun.

[12] The title of Crane's recent essay on anti-trust history—"All I Really Need to Know about Antitrust I Learned in 1912"—underscores the outsized place that the 1912 presidential election has come to play in the imagination of legal scholars. Daniel A. Crane, "All I Really Need to Know about Antitrust I Learned in 1912," *Iowa Law Review*, 100, no. 5 (2015): 2025-38.

[13] The passage—which Novak uses as an epigraph, and thus, in accordance with custom, does not cite in his notes—is identical, with a few minor changes, to a quotation that appears in the 1915 edition of Hamilton's *Current Economic Problems*, an influential sourcebook for college students that went through many editions.

[14] Walton Hamilton, "A Deweyesque Mosaic," in *The Philosopher of the Common Man*, ed. Sidney Ratner (1940), 146-71.

[15] George remains a shadowy presence in Novak's account, even though, as Jeffrey Sklansky persuasively demonstrated in *Soul's Economy: Market Society and Selfhood in American Thought, 1820-1920* (2002), he helped pioneer the new conception of the "social" self to which Novak devotes so much attention. In his marginalization of George's anti-monopolism, Novak is in good company. George also goes missing from Barry C. Lynn's *Liberty from All Masters: The New American Autocracy vs. the Will of the People* (2020). Though George has recently been hailed as the first progressive, this lacunae is not particularly surprising. The land reform movement and the movement to bring the industrial corporation under social control share an anti-monopoly pedigree. Yet they had different origins, different trajectories, and different legal cosmologies. Land reformers valorized natural rights as a sacred trust that empowered the worthy poor, while proponents of the social control of business disparaged natural rights as a legal shield for an arrogant plutocracy.