

Tocqueville²¹ Book Forum

New Democracy: The Creation of the Modern American State

William J. Novak

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Editor: Christopher Schaefer

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Introduction by Christopher Schaefer (University of Cambridge)

In 1996, William Novak published *The People's Welfare: Law and Regulation in Nineteenth-Century America*, which documented the deep roots of the regulatory state in American history. His argument for a robust early American state helped to fuel a historiographical reassessment of the U.S. federal government. Since the publication of *The People's Welfare*, he has continued to contribute to this literature, most notably in his 2008 *AHR* article “The Myth of the American State” as well as in a trio of books that he co-edited on the subject. But he has not written another full-length monograph on the subject. Until now.

In *New Democracy: The Creation of the Modern American State*, Novak returns a quarter of a century later to the subject of the American state before the New Deal. In six thematic chapters, he synthesizes a massive amount of primary and secondary source material to explore key topics in the development of the American state (citizenship, police powers, public utility, social legislation, antimonopoly, and democratic administration). Throughout, he marshals the argument that American governance underwent a revolution, not during, but *before* the New Deal.

Our four reviewers find much to praise in *New Democracy*. Laura Phillips-Sawyer notes the impressive synthesis and numerous historiographical contributions, including his ability to bring European social theory to bear on the development of the modern American state. Alain Chatriot—commenting in French—compliments the rich chapters of *New Democracy* dense with details. He also notes Novak's rereading of John Dewey, James Tufts, and Walter Weyl. Stephen Sawyer argues that Novak's new intervention—more expansive than his 2008 *AHR* article—has “rendered claims for a stateless, laissez-faire American past frankly untenable.” History matters, as does democracy in Novak's telling. Rather than focusing his history of political modernity on capital, industrialization and social class, Novak begins with democracy itself. In our longest and most substantive review, Kate Masur compliments Novak for being deft and refreshing, and *New Democracy* for being “deeply researched and beautifully organized.”

Our reviewers, however, also find faults...or at least omissions. Laura Phillips-Sawyer expresses concern that topics that don't merit chapters—such as liberalism, republicanism, judicial obstructionism, the rights of marginalized people, or the mechanics of democracy itself—end up not receiving adequate attention relative to their historical importance. She notes two major issues raised by Novak's framing. And Kate Masur wonders how Novak's story would look if race were more thoroughly integrated into his telling of the creation of the modern American state.

In a detailed reply, William Novak returns to the “inherited ideological tradition” against which his own work has struggled. He is very pleased that the reviewers here have recognized his work “to uncover a deeper and strangely obscured history.” And in response to Phillips-Sawyer and Masur, he defends the authorial choices that he made in crafting the book. To conclude, Novak insists on the historical recovery of “expressions of substantively democratic possibility.”

At *Tocqueville 21*, we are interested in questions of democracy past, present, and future. Our hope is that by clarifying the past, we might better understand the present and then make better choices for the future. William Novak's *New Democracy* provides an excellent opportunity to reassess the past relationship between American democracy and the American state, with, we hope, implications for both the present and the future. And in that spirit, we wish you happy reading.

Christopher Schaefer recently completed his PhD in History at the University of Cambridge. He is the managing editor of *Tocqueville 21*.

Review by Laura Phillips-Sawyer (University of Georgia)

The Limitless Possibilities of the Long Progressive Era's New Democracy

Writing in 1912, Walter Weyl—who, along with Herbert Croly and Walter Lippmann, would go on to found *The New Republic* magazine—described a nation rent by rising wealth inequality and captured by a “powerful plutocracy” (Weyl, 158). Yet, Weyl saw cause for optimism—greater productivity and rising living standards propelled a new type of “democratic striving” that demanded not only political democracy, but also economic and intellectual democracy (Weyl, 207). Weyl’s [The New Democracy](#) challenged readers to look beyond mechanical ideas of individualism and the “glitter of plutocracy” to “see the countervailing developments of the last twenty years in political, industrial, and social life” (Weyl, 159). In those countervailing forces, Weyl identified a “spirit” of the era, which “emphasize[d] social rather than private ethics, social rather than individual responsibility” and was “marked by a social unrest, a new altruism, a changed patriotism, an uncomfortable sense of social guilt” (Weyl, 160). More than anything else, the new democracy rejected the “so-called individualistic democracy of Jefferson and Jackson” (Weyl, 161-2) and embraced a much broader conception of democratic participation that required a greater diffusion of wealth and educational opportunity.

One hundred and ten years later, [William J. Novak](#)—a distinguished legal historian and the Clyne Professor of Law at the University of Michigan—has revived Weyl’s mission to articulate and defend this idea of the new democratic state, which entailed “a modern approach to positive state craft, social legislation, economic regulation, and public administration still with us today” (1). At the core of this work, Novak contends that the reconceptualization of democratic theory, captured in Weyl’s largely forgotten book, produced the modern American state.

New. Modern. Democratic.

These terms guide the book’s narrative and structure its argument. Novak’s [New Democracy: The Creation of the Modern State](#) argues that, between 1866 and 1932, the United States underwent a “second American revolution” in governance, which entailed “a new understanding of the interdependence of statecraft and economic development in a mixed economy, and a new political economic vision of the democratic control of capitalism” (2). The seismic societal changes wrought by the Civil War and Reconstruction, industrialization, urbanization, immigration, cartelization, and monopolization, etc. created a crisis of democracy—these changes forced a rethinking. Ultimately, progressive reformers came to rely on new modes of governance, such as more expansive public law and the administrative state, to curtail or control new forms of economic inequality and economic domination. These changes in governance “quickly out stripped the local, legal, and federated technologies of 19th century common law, associative, and municipal self-regulation” (22).

Novak identifies the “great transformation” in modern state capacity to be “not the product of subterranean sociocultural forces or teleological processes of modernization,” but rather “the consequence of a quite self-conscious and systematic deconstruction of the pillars of the old regime” (25). And, critically, these developments took place *before* President Franklin Roosevelt’s

New Deal and its expansion of federal government programs, such as social insurance plans and economic regulation. Novak is less concerned with analyzing the “old regime” than he is interested in recentring democratic theory as guiding the “unmistakable increases in state power [that] accompanied unprecedented extensions of public policies as well as public rights” (29).

New Democracy synthesizes both an immense secondary literature and an impressive body of published primary sources, ranging from legal cases, treatises, and works of social theory. The book is organized around six thematic chapters—on citizenship, police powers, public utility, social legislation, antimonopoly, and democratic administration. Each revolves around the question of how progressive lawmakers, reformers, and social theorists expanded state capacity and autonomy in order to create a more inclusive and well-regulated society. For example, despite the fact that the Supreme Court’s *Slaughterhouse Cases* (1873) gutted the substantive rights conferred to African-Americans by the Reconstruction Amendments and enabled the continuation of state-level black codes, Novak shows that the amended Constitution created a “new juridical subject—the modern rights-bearing citizen,” (66) which structured ongoing conversations regarding the rights of people and the obligations of government.

That reconceptualization of national citizenship—the recognition of inclusion—coincided with the reworking of “the foundational tenets of American liberal and democratic thought” by “a plethora of theorists and publicists led by Lester Frank Ward, Walter Weyl, Walter Lippmann, Herbert Croly, and John Dewey” (77). This was the beginning of something “distinctly modern”—a recognition of large collectivities and the role of the state as an agent of social change and development (73). These progressives’ anti-formalist and anti-metaphysical critiques of common law adjudication as ex-post, piecemeal, and inadequate to deal with changing socio-economic realities led them toward legal positivism and an embrace of new regulatory technologies to achieve more widespread “positive liberty and freedom” (83). The reconstructed idea of the social guided these reformers to “a new age of social legislation and police regulation,” which Ernst Freund would describe as conferring a more general legislative regulatory authority above and beyond the local and state police powers described in Novak’s first book, *The People’s Welfare* (89). This tour de force continues Novak’s “long term effort to debunk persistent and dangerous fallacies” that American political economy has been defined by its “transcendent pre-commitments to private rights, formalistic constitutional limitations, and laissez-faire political economy” (3).

Novak’s *New Democracy* focuses our attention on the myriad ways in which progressive reformers translated a new public philosophy into expanded state regulatory capacity in order to meet the challenges of industrialization and rising socio-economic inequality, and thereby, they rendered the democratic pursuit of freedom accessible to more Americans. This focus, however, leaves little room for examining the limiting principles of liberalism or republicanism, the boundaries of judicial obstructionism of the *Lochner* Court, or the rights of those peoples who were neglected (or worse, targeted) by this expansion of state authority over citizens’ lives. The previous generation of revisionist legal and business historians more narrowly focused on the tension between classical and modern *liberalism* and emphasized how nineteenth century notions of federalism, police powers, and “free labor ideology” structured both social movements and business regulation into the twentieth century. While much of Novak’s story is familiar, it is novel

in its circumspection of the “old regime,” which previous scholars excavated, explained, and critiqued.

Instead, Novak insists that “the so-called *Lochner* era . . . might more constructively and accurately be referred to as the era of police power and public utility” (107). In this way, Novak revives aspects of what Richard Hofstadter referred to as the [progressive historians](#)’ commitment to elevating the people over the elites: Vernon Parrington (1930) charted the proliferation of critical realism; Charles Warren (1913) cataloged state laws during the so-called *Lochner* era, demonstrating that the judiciary upheld the vast majority of them (105). John Commons (1924) did something similar for labor and employment law (26, 106). Novak also borrows from the postwar consensus school, which emphasized ideological continuity and democratic consensus. Yet, one still wonders what limiting principles shaped, and indeed limited, these pragmatic progressive reform efforts. As [William Forbath](#) has argued, for example, legal doctrine and legal violence—such as the judiciary’s animus toward redistributive “class legislation” and its use of the labor injunction—shaped and severely limited the aspirations of organized labor around the turn of the century.

A Historiographical Reconceptualization

In lieu of those legal constraints, Novak argues that a reconceptualized idea of democracy acted as the conceptual lode star for the era, leading to limitless possibilities for public law and the administrative state. We cannot truly understand this revolutionary development of the modern state or its relationship to society, Novak tells us, without understanding the progressives’ transformation of democratic theory and then its operationalization by legislatures and the judiciary in new legal doctrine.

As Novak writes, democracy meant more than “a simple matter of constitutional structure, representational arithmetic, or electoral instrumentalities” (16). Those mechanics were important, to be sure; however, for Novak, procedural democracy was but a “formal means [to] achiev[e] a more complete and substantive democracy.” Thus, Novak shifts our focus from democracy as a process, a negative right, or a means to an unknown end, and toward “democracy as a ‘way of life’” to serve “greater democratic objectives” (19-20). The progressive pragmatists’ response to modernity was therefore not Robert Wiebe’s “search for order” but instead a march toward “a more complete and substantive democracy” (19). For Novak, the idea of new democracy cannot be understood by the limiting principles or even dialectical tensions between rival political or social movements, but rather as “an ends-oriented democracy that turned . . . on the substantive policy outputs that more equitably and effectively secured the people’s health, safety, and well-being” (20). In fact, the mechanics of democratic participation—voting, polling, political parties, and interest groups—receive relatively little attention; instead, Novak is interested in charting the way in which the idea of new democracy was pursued by institutionalizing more expansive public laws and creating administrative agencies. The writings of John Dewey and his collaborator James Tufts illustrated this transformation of the idea of democracy.

Perhaps the most interesting historiographical interventions are Novak's corrections to the field of American Political Development, to which he has already made substantial contributions. [Stephen Skorownek](#) and [Theda Skocpol](#) famously reoriented scholarship in political economy around "bringing the state back in," in search of "critical junctures" in which state regulatory capacity grew and bureaucratic agencies gained autonomy from other branches of government. Distinct episodes of crisis, such as the Civil War and World War I, precipitated state development; and, as [Lou Galambos](#) and [Brian Balogh](#) have emphasized, the professionalization of managers and bureaucrats helped embed new governing structures, like administrative agencies. But as APD scholars excavated the origins of the modern administrative state and the emergent bureaucratic autonomy—historicizing and naturalizing it—they lost sight of the political. According to Novak, they lost sight of democracy. While the critique has some merit—APD has focused on Weberian notions of state capacity and autonomy—[Balogh](#) as well as [Daniel Carpenter](#) have also emphasized the mechanisms of democratic participation through political parties, polling, and mezzo-level bureaucrats interacting with interest groups. But that is not the idea of democracy that Novak pursues here.

Novak's historiographical and philosophical contribution is to bring European social theory, particularly the work of Michel Foucault, Pierre Rosanvallon, and [Axel Honneth](#), to bear on the development of the modern American state. Novak begins with *recognition* in the first chapter on citizenship and he quickly moves to the necessity of *redistribution* to achieve a modern, democratic society through the remainder of the book. The idea of democracy then becomes at once both a means and an end—he reconceptualizes what democracy requires the state to provide its citizens in order to be truly free and the methods to obtain that freedom. According to this rendering, it seems that democracy is justice.

Two issues arise from this reframing, leaving ample room for future scholars to pursue this line of inquiry. First, democracy as justice accepts its own failures, or the ways in which democratic practices enshrined or exacerbated existing power relationships rather than always leading to more equitable or just outcomes. For example, in the chapter on social legislation, Novak rather quickly dismisses any attempt to disentangle "humanitarian reform" (i.e., poor laws, labor laws, social work, social insurance, social security, etc.) and "social engineering and the carceral state, sex regulation, criminology, policing of families, and of course eugenics" (147). But what does this mean that they were "bundled together in the larger historical development of modern social regulation"? Does it mean that these two divergent normative positions simply emerged at the same time, or that they are inextricably linked? That democracy is quite capable of harnessing state power to produce unjust, inequalitarian outcomes receives attention but little critique. In fact, many of these most egregious types of moral and criminal legislation—e.g., [Red Light Abatement Acts](#)—were carried out through injunctions and equity summary proceedings, which deliberately evaded juries (see 174-).

Second, and more to the point, this account of democracy as justice cannot fully capture the contingency and compromise that most historians have highlighted as defining the American state-building process. Even if Warren and Commons were right in their depictions of the expansive regulatory capacity of the state, the competing notion of public and private spheres shaped these debates regarding what was constitutionally feasible at any particular moment in

time. After all, it was the limitations to police power regulations that inspired Charles Beard's "Writing *Laissez Faire* into the Constitution" (1914) or Edward Corwin's "The Twilight of the Supreme Court" (1934). Indeed, those progressive histories propelled further democratic reforms and informed how historians interpreted the Court's anti-majoritarian holdings. Recentring the structure of contingency and the voices of dissent within Novak's account might also incorporate a wider variety of [populist ideas](#) or "[municipal socialism](#)" that also influenced the growth of state regulatory capacity.

New Democracy presents a powerful argument for the reperiodization of the rise of the modern American state around the recognition of inclusive national citizenship and the idea of the social control of business, and for the reconceptualization of American state-building around the idea of new democracy. Novak also provides a timely challenge to the persistent and pervasive mythology of a *laissez-faire* past, which continues to guide American politics and judicial opinions. By placing the individual within the collective and asking us to reconsider how the idea of substantive democracy has guided many of the most profound changes in American governance, Novak's account of modern American state-building presents a hopeful account of the regenerative nature of democracy.

Laura Phillips-Sawyer is a historian and an associate professor at the University of Georgia School of Law. She is the author of American Fair Trade: Proprietary Capitalism, Corporatism, and the 'New Competition,' 1890–1940 (Cambridge University Press, 2018).

Review by Alain Chatriot (Sciences Po, Paris)

État et démocratie aux États-Unis

Les recherches de William J. Novak témoignent depuis plusieurs décennies de la vitalité des interrogations sur l'histoire politique des États-Unis en prenant au sérieux les enjeux juridiques, administratifs et d'action publique. Son dernier livre, *New Democracy. The Creation of the Modern American State* était très attendu et il ne déçoit pas! Plusieurs lectures en sont possibles : certaines concernent l'histoire américaine, d'autres sont plus générales et interrogent le fonctionnement de l'État et des pratiques démocratiques.

Prenant la suite chronologique d'un précédent volume (*The People's Welfare: Law and Regulation in Nineteenth Century America*, Chapel Hill, University of North Carolina Press, 1996), ce livre couvre la période d'après la guerre de sécession (*civil war*) jusqu'au début des années 1930 et articule une approche juridique et historique des formes de l'action publique tout en proposant une réflexion plus large à la fois théorique et pratique sur les formes de la démocratie. L'auteur explique nettement le pas de côté qu'il propose par rapport à l'historiographie traditionnelle en expliquant son choix de concentrer l'analyse sur certains objets : « *The chapters of this volume bear witness to this alternative emphasis. In place of contract, property, and tort as the central building blocks of American legal modernity, New Democracy is built around the public law categories of citizenship, police power, public utility, social legislation, antimonopoly, and administrative law.* » (p. 15) On comprend ainsi que son analyse ne se limite pas aux débats d'idées mais se confronte aux formes sociales et politiques qui caractérisent le fonctionnement de l'État en Amérique.

Six chapitres très denses articulent la démonstration. Le premier sur la citoyenneté revient sur une question classique avec les enjeux raciaux après le milieu des années 1860, en montrant comment la guerre a questionné les conceptions mêmes de la citoyenneté et des droits afférents et comment ces luttes ont construit une nouvelle vision de la nation et de sa Constitution. Le deuxième chapitre, avec une citation du juriste français Léon Duguit en exergue, présente les réflexions savantes sur la réorganisation de l'État et les transformations du droit public américain. C'est dans ce cadre que Novak analyse le « myth of Lochner » en revenant sur les interprétations de la décision de la cour suprême des États-Unis pour *Lochner v. New York* en 1905.

Les trois chapitres suivants s'affrontent aux enjeux économiques et sociaux avec d'abord une réflexion sur l'utilité publique autour de la régulation des entreprises (en particulier pour les compagnies ferroviaires avec l'enjeu d'une intervention fédérale et à distance de la corruption politique). Le quatrième chapitre étudie les changements dans le fonctionnement de l'État-providence et les débats autour de « l'hygiène sociale » révélant de nombreux échos aux discussions animant alors les milieux de la réforme sociale dans la France du début du XX^e siècle. L'avant-dernier chapitre s'affronte à la question des législations contre les monopoles en montrant comment débats académiques et mesures politiques se répondent. Il résume ainsi sa perspective : « *The movements for antimonopoly, public utility, and unfair competition came together to form a new legal-political architecture for modern American economic regulation at both the state and federal levels. The modern legal, legislative, and administrative tools forged in the epic battles over railroads, monopolies, and corrupt*

business practices together moved the primary site of regulatory control beyond case-by-case limitations of common-law adjudication and corporate chartering. » (214).

Le sixième et dernier chapitre intitulé « *Democratic Administration* » réfléchit à la croissance de l'administration moderne américaine couvrant toute une série de champs économiques et sociaux et se confrontant à différentes échelles à la question de la corruption. La conclusion du livre propose ainsi une remise en perspective du moment New Deal en insistant sur le fait que l'action de Roosevelt, pour importante qu'elle ait été, se comprend aussi et même peut-être d'abord mise en perspective avec les formes de l'action publique développées et débattues depuis la fin du XIX^e siècle.

On retrouve donc ici plusieurs des thèmes jadis évoqués dans un article de Novak au titre percutant : « The Myth of the « Weak » American State » (*American Historical Review*, 113, 2008, 752-772). L'introduction mobilise entre autres références (Michel Foucault est aussi évoqué) les travaux de Pierre Rosanvallon, en retenant en particulier sa définition large du politique qui y intègre les enjeux économiques et sociaux. On comprend dès lors que l'approche de l'État ne se limite pas à une simple description du fonctionnement de l'administration. Novak explicite ainsi cette vision : « *Such a synthetic approach highlighted the state as something more than an administrative mechanism or an instrumental governmental apparatus just as the political involved so much more than partisan competition for institutionalized power.* » (11-12) Loin des approches de certains auteurs de sciences sociales marquées par une phobie de l'État dans une veine anarchiste plus ou moins explicite, l'enjeu est bien ici de penser la possibilité et surtout les formes d'expression historiques d'un État démocratique. Non pas pour écrire une histoire irénique mais bien pour constater qu'au XX^e siècle, certaines législations sociales et économiques ont accompagné l'essor des sociétés démocratiques.

Un intérêt supplémentaire, au-delà de la richesse des chapitres et des cas abordés, réside donc bien sans doute dans le lien fait par l'auteur entre l'histoire de l'État et celle de la démocratie. Sa relecture des œuvres de John Dewey ou de James Tufts mais aussi de Walter Weyl nous rappelle l'ampleur et l'intérêt des débats sur la démocratie au début du XX^e siècle et donne envie au lecteur de mieux connaître une richesse d'échanges intellectuels encore un peu méconnus en France.

Alain Chatriot is a Full Professor at Sciences Po, Paris who specializes in the History of the State, administration and economic and social policies, and the History of the Third Republic.

Review by Stephen W. Sawyer (American University in Paris)

The History and Myth of American Democracy

Creation stories and myths conjure up images of a distant past that penetrate our present in persistent, surprising, and often distorting ways. And so it is for the emergence of the modern American state. The creation story: the US was founded not to govern but to preserve freedom from government. The myth: an American state only emerged from some vague obsession with conquering “bigness” in the calamitous wake of the Great Depression in the New Deal. The consequences of these accounts have been as misguided as they have been enduring, perhaps best captured in [Philip Hamburger’s zealous gloss, “Is Administrative Law Unlawful?”](#)

Puncturing such narratives is no small task. It takes volumes, mountains of evidence, and multiple voices from many directions. Fortunately, we have an increasingly broad range of historians working from a wide set of perspectives to tackle these myths. William Novak has been at the forefront of this undertaking. His [The People’s Welfare](#) on the regulatory powers and technologies that pervaded antebellum US and his masterful article, “The Myth of the Weak American State” have provided some of the most convincing arguments for a more accurate account of the development of an American state. So it would be an understatement to suggest that historians have not been waiting for Novak’s *New Democracy*. With the book now in hand, its expansive chapters spreading from the birth of a new American citizenship to the rise of a democratic administration have rendered claims for a stateless, laissez-faire American past frankly untenable. The jury is being called back in.

History matters – so Novak concludes the opening salvo of his book. History in this account pushes far beyond narrative reflections on the past. If Novak draws so heavily on pragmatism, and specifically critical legal realism, it is also because he shares Dewey’s conviction that the state must always be rediscovered. The American state does not just have a history; it is a history. Far from a mere series of ever-expanding offices, decrees, and interdictions – though they too are present throughout the book – the US state must be understood in this account as a set of processes driven by popular action and public demands. As he says of the 13th, 14th, and 15th amendments in the opening chapter on citizenship, these were not just a change in the constitution. The amendments marked a new kind of law-making and constitutionalism, a veritable revolution in American public law. It was a more “democratic” law, which rejected the “judge-made” laws and principles of an ancient common-law tradition. It opened the possibility of a “revolt against formalism” in constitutional law that Novak places at the core of the creation of a modern American state. This new constitution was not grounded in juridical logic, but in legal experience. In the place of a static, founding document; the constitution was being made. Shedding the formal prescriptions of the old slaveholders’ constitutionalism, these amendments gave birth to nothing short of a new “governmental regime” which could now be shaped in response to social needs and demands from across the US. As Wilson himself argued: “The probable origin of government is a question of fact, to be settled, not by conjecture, but by history” (75). Novak has taken us from the People’s Welfare to the People’s Constitution.

Democracy matters — indeed, it was by laying the foundation for a new democracy that these constitutional amendments inaugurated a new age of American government. Alongside the

rejection of formal constitutionalism, a new democracy was born by transforming the scale at which American government, from municipal to federal, could operate. Shifting away from the myriad belongings, jurisdictions, and corporate privileges that still marked citizenship in the antebellum period, the second American Revolution of the Civil War witnessed the birth of a new culture of generality. Building on the ideas of the Paris School—Pierre Rosanvallon and Claude Lefort in particular—Novak picks up where *The People's Welfare* left off. In that book we saw Novak trace the primarily local, variegated, and uncoordinated set of popular actions known as regulatory police through which popular authorities maintained a well-regulated society in the first half of the nineteenth century. But as Rosanvallon has argued, cultures of generality were essential to the birth and development of modern democracy. Novak uncovers this new mode of generality in American governance by tracing how the scale of popular intervention and governance expanded in the six decades preceding the New Deal. The nature of American democracy underwent a profound shift as regulatory police powers were scaled up. It was only with the enlarged ability to regulate for all citizens that government could take on the robber barons, monopolies, and political administrative corruption. Similarly, the very idea of public service and public utility in the American context depended on the capacity to operate for the American people in general and as a whole.

As Novak highlights in each of the chapters, it was impossible to separate this tectonic shift in government from the new democratic imperatives of welfare, combatting socio-economic and racial inequality, and public provision. To be clear, none of these novel ideals were fully achieved, and some of them were only touched upon. But American governance and US democracy, Novak clearly demonstrates, did come under the sway of a pervasive new set of principles. Perhaps most important among them was a new more sociological conception of the state “rooted in a complex set of social, political and institutional relationships.” Drawing on the ideas of Léon Duguit, remnants of the opposition between sovereign will and individualism, which were particularly ill-suited for a new American federalism, were being lopped off in favor of novel ideas on public utility and solving social problems. The invention of the social opened the path toward a massive political transformation. As Roscoe Pound noted in his famous critique of contract law, true liberty could not include the right to contract oneself into slavery and statehood could not be characterized by acts of a heteronymous public power lording over an “unruly” people. Rather, as his colleague Ernst Freund put it, “the care of the public welfare, or internal public policy, has for its object, the improvement of social and economic conditions affecting the community at large and collectively.” In short, this was a move from “shadow democracy” to “real democracy.”

To present, histories of political modernity have overwhelmingly focused on “capital, industrialization, and social class.” Following a Tocquevillian inspiration, Novak has pushed us with this book to start with democracy. The full set of consequences inherent in this move remain to be explored. In many ways, *New Democracy* is but a first step in this exploration, opening irreparable cracks in the normal science of American political development. Two themes are particularly salient in this account. First, the push beyond the liberal and classical republican narrative of American history. As Novak convincingly argues, liberal theory of the state suffers from an obsession with individual rights, contract, property, market, and civil society, that simply do not accurately account for the rise of a democratic administration that transformed public life

in the US (7). Similarly, “moments of the American political have always owed more to majorities and magistrates than to either Milton or Machiavelli” (8). Democracy in this account, offers its own set of obligations and priorities rooted in collective action and governmental supervision of the public good.

Second, histories of political modernity in the American context have overwhelmingly highlighted the European origins of American state building. Historians inspired by the work of [Daniel Rogers’s *Atlantic Crossings*](#) might easily draw the conclusion that if the US came to enjoy a robust public power in the service of the people, it was by adopting European ideas on the state. No doubt, European influence played a role, and Novak does not ignore these influences. But with *The New Democracy* and *The People’s Welfare*, we now have an account from the early American republic up to the New Deal in which Novak has upset the corollary idea that the core of US public authority is essentially foreign, a result of such “European” interventions. US government—its regulatory power, ability to provide for the public good, capacity to take on corruption and monopoly and shake drives toward public capture—was neither exogenous nor the result of crisis; the American state arose from within the long tradition of American democracy.

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Review by Kate Masur (Northwestern University)

The Progressive State, New Democracy, and the Elision of Race

I began reading William Novak's *New Democracy: The Creation of the Modern American State* in June 2022, just as the US Supreme Court ended its term with a telling trifecta: The court limited the power of the Environmental Protection Agency to impose regulations designed to slow climate change, invalidated a New York law designed to save lives by limiting carrying firearms in public, and reversed its long-held position that states cannot ban or unduly restrict access to abortion. These decisions are unpopular with Americans, who evidently would prefer a state that protects human well-being. Majorities support the right to access [abortion](#) and want more government action to [address climate change](#) and restrict [firearms](#). And the court's decisions were only one among many indications that American democracy is in crisis. This was also the summer of the US House hearings on the former president's attempt to nullify the 2020 election, and of localized efforts to ban books and demand that K-12 teachers replace American history with patriotic propaganda.

In this context, it was genuinely refreshing (and even at times escapist) to immerse myself in Novak's rendering of a cohort of Progressive Era intellectuals and reformers who were convinced that government could and should help all people thrive. This group articulated a new vision of American democracy that was about far more than voting and political representation. That "new capacious democratic vision," Novak writes, included "public provisioning and public accomplishments that could lift all people in securing a substantively democratic way of life" (20). One of Novak's key protagonists, the philosopher John Dewey, wrote that in the democracy he envisioned, "all industrial relations are to be regarded as subordinate to human relations" (21).

In *New Democracy*, Novak deftly examines how Dewey and other progressive reformers reimagined the state to meet the challenges of their own time. Addressing a wide array of social and economic problems, progressive reformers envisioned using local, state, and national government as a tool to promote collective well-being. As Dewey wrote, in a "democratic state," government was "the genuine instrumentality of an inclusive and fraternally associated public" (121). Novak presents *New Democracy* as a sequel to his first monograph, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996). His objective in both books is to illuminate a deep American history, extending back to the antebellum period if not earlier, of public regulation and administration in the name of promoting human welfare. The stakes and significance of this project are clear not just in the Supreme Court's June 2022 decisions, but also in the Trump administration's [1776 Project](#) (2021), a clarion declaration of conservative ideology that names "Progressivism" as one of several attempts to "destroy our constitutional order."¹ The 1776-ers and many others would have us believe that supporters of state intervention on behalf of the common good have been radical outliers in a nation committed to unfettered markets and individual rights. Novak's opus shows otherwise.

New Democracy is deeply researched and beautifully organized, with chapters that are largely thematic and build on one another conceptually. The structure allows Novak to show how reformers, operating in a variety of different fields, drew on inherited theories of law and

¹ The others were "Slavery," "Communism," "Fascism," and "Racism and Identity Politics."

governance but transformed them to meet their own moment. Of central importance is how this cohort rethought the “police power,” an old idea about the power of the state—in the United States, literally *the states*—“to pass laws that regulated private interest, properties, and liberties in the more general interest of public safety, health, comfort, order, morals and welfare” (92). *The People’s Welfare* made a crucial contribution by showing how Americans from the founding to the Civil War understood and readily deployed the police power in attempts to regulate economic relations and other aspects of human behavior. *New Democracy* continues the story by showing that writers of the Progressive Era drew on and revamped the police power in the service of their modernizing vision of social well-being. These reformers were systematizers who tended to take the piecemeal and somewhat defensive aspects of common law traditions and turn them into general rules and proactive policies. For instance, Novak writes that in the hands of reformer Ernst Freund, the police power was “no longer primarily preoccupied with negative common-law protections or the simple maintenance of civil and criminal justice but reconstituted as an instrument for the positive promotion of public welfare and the satisfaction of public needs and necessities” (98).

Growing recognition that large corporations exploited everyday people and damaged the social fabric led the intellectuals and reformers in Novak’s book toward an expansive vision of state regulation of business. Reformers insisted that railroads and grain elevators, though run privately and for profit, served the public in crucial ways and therefore could be subjected to extensive regulation. They defined such businesses as “affected with public interest” and established innovative governmental forms—including regulatory commissions and other administrative agencies—that wielded extensive power in the name of the broader, public good. Some readers might be surprised to read of this flowering of state regulation of business in a period sometimes known as the “Lochner Era”—after *Lochner v. New York* (1905), in which the Supreme Court infamously struck down a state law regulating commercial bakeries. But Novak argues persuasively that the decision’s significance has been overstated and that in fact, “this was an era of unprecedented expansion rather than limitation of legislative police power” (105). Progressive economists and others also pushed their ideas about economic regulation to the federal level, leading Congress to establish new commissions and agencies designed to stem the power of private monopolies and otherwise address the challenges posed by new forms of industrial capitalism. Believers in the state’s power to materially improve people’s lives, they rejected narrow and formalistic interpretations of constitutional and statutory law and embraced, instead, an ethos of pragmatism and experimentation.

A hallmark of *New Democracy* is its case for a cohesive American vision of the state as an agent of what Novak calls the “actualization of everyday democratic governance.” Novak devotes two chapters to questions of social rather than economic regulation. Here he explores progressives’ attention to the well-being of laborers, to children’s health, and to problems of housing, sanitation, nutrition, and vice, particularly in cities. He acknowledges that reformers of this generation developed a vision of “social police” that drew new attention to sexuality and “more generalized policing of the social norm,” which in turn generated the production of novel social pathologies. Mostly, though, these chapters mesh with those on economic regulation, offering a portrait of reformers as agents of far-reaching good who developed an innovative vision of human interconnectedness (or “the social”) and an associated idea that law should be

“socialized” to serve the public welfare. From such ideas, Novak summarizes, emerged “child welfare legislation, mothers’ pension laws, housing and city planning legislation, public health laws, public education reform, public recreation laws, liquor legislation” and much, much more (160). Nascent visions about what government could do to promote human thriving morphed into creative ideas about how to do it, and Novak’s last chapter makes a straightforward case for understanding the administrative state as the “functional vehicle” that progressives conceived “to achieve a more just distribution of power and resources in a democratizing and modernizing society.”

New Democracy is preeminently a book about ideas, and one of its great strengths is the connections it makes across discursive fields. Drawing on a vast range of treatises, textbooks, journal articles, and other published works, Novak highlights men and a handful of women who saw themselves as theorists and creators of a new American democracy. Each chapter (on themes like police powers, antimonopoly, social legislation, and so forth) brings together people writing in different genres, including philosophy, law, social science, journalism, and political theory. As a result the book is erudite, wide-ranging, and curiosity-inducing. But the approach does have its limits. For instance, we don’t learn much about the institutions that incubated such ideas or about the life stories of individual people who gave them voice. Likewise, the violence and upheavals that inspired many reformers remain largely offstage, as do radical intellectuals who may have pushed members of this cohort to revisit their own assumptions. Novak also leaves it for other historians to figure out (as many have!) how—and whether—new ideas made their way into policy: the political headwinds they faced, the deals required to get them there, and the challenges of implementation and enforcement. Still, this is a sparkling tour-de-force of intellectual history that captures the creative thinking and elan of reformers engaged in the urgent work of rethinking American democracy and governance. It is a cadre whose thought has much to offer us today.

I do have one major concern with *New Democracy*, and it relates to the implications of writing a history of the “creation of the modern American state” without having much to say about Black Americans, race, or the US South. In the paragraphs that follow, then, I continue a conversation Novak and I have been having for some years about where such questions fit into his depiction of the “people’s welfare” tradition as a counterweight to still-powerful American myths of laissez-faire and private right.

New Democracy does draw attention to the convergence of racism and questions of democracy in the first chapter, entitled “Citizenship.” The chapter begins with the sentence, “Modern American history begins with the abolition of the slaveholders’ constitution” and places the defeat of the Confederacy front and center. The chapter argues that citizenship was a decentralized and ill-defined concept from the nation’s founding until the end of the Civil War and the ratification of the Fourteenth Amendment. Novak says (and I agree) that the main area of contention over citizenship in those years was the nature and extent of the citizenship of free Black people. Defeat of the slaveholders’ rebellion meant defeat of the old regime of citizenship, and from its ashes, Novak writes, rose the Fourteenth Amendment’s nationalization of birthright citizenship and with it “a decidedly new and generalized field for contemplating the rights of people and the obligations of government in the United States” (66).

Yet Novak doesn't return to citizenship as such in the chapters that follow. He could have discussed, for example, how and why birthright citizenship came to matter in subsequent decades; how the prohibition on naturalization for Asians shaped who could and could not become a citizen; or how, as historian Beth Lew-Williams [has written](#), Americans state-builders of this period produced a modern vision of "alienage" in dialogue with new notions of citizenship. Perhaps more to the point, however, given the first chapter's emphasis on the defeat of the Confederacy, the abolition of slavery, and the decisive choice to affirm African Americans' citizenship in part by nationalizing citizenship itself, we might have expected *New Democracy* to trace what happened next to African Americans, to former enslavers and their progeny, and to the region they all so fundamentally shaped. Yet the South, white southerners, and Black Americans are largely absent from the rest of the book.

I found this perplexing. For instance, *New Democracy* highlights all manner of ways people imagined using the state's police power toward genuinely democratic ends, but it neglects the complex reality that governing bodies, representing themselves as agents of "the people," often mobilized the police power to marginalize and oppress groups of people who were either entirely unrepresented in those bodies or represented in tiny numbers that permitted them little influence. To provide just one example, we might look at the case of [State v. Gibson](#) (1871), in which the Indiana Supreme Court upheld a state ban on interracial marriage. The court affirmed that marriage was "essential to the peace, happiness, and well-being of society" and that the state could retained authority to regulate marriage "under the police power possessed by the states"—notwithstanding the Fourteenth Amendment and federal civil rights statutes passed after the Civil War. A state legislature, representing the will of "the people" of the state, could determine who could marry whom within the state: "The people of this State have declared that they are opposed to the intermixture of races and all amalgamation," the court wrote. "If the people of other states desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the State shall declare such policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction."

The Indiana court was not alone among state courts in deferring to the state legislature — and by extension to "the people" of the state—even state policies were based in antidemocratic ideas about biological race and "corruption of blood." State requirements of segregated schools and public accommodations were, like bans on interracial marriage, widely considered "reasonable" uses of the police power of the states. As the Supreme Court affirmed in *Plessy v. Ferguson* (1896), "Laws permitting, and even requiring" separation of races "have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." In short, the expansive police power of the state could be used to liberate but also to coerce and oppress. This too was a problem of democracy that many reformers confronted in in the Progressive Era. Yet the N.A.A.C.P.—founded in 1907, steered by prolific writers, and very much part of the era's ferment about democracy—is mentioned only once in *New Democracy*, and it is in the introduction.

Beyond the N.A.A.C.P., many reformers and social scientists of the period, the kind of people whose words and ideas make Novak's book so rich, brought their energies to bear on what

historian Natalie J. Ring has called “[the problem South](#).” Ring discusses how Progressive Era intellectuals, large philanthropies, and the US Department of Agriculture defined “the South” a region in need of special attention. They investigated and attempted to remedy region-specific diseases such as hookworm, malaria, and pellagra. And they took an interest in the region’s particular agricultural challenges, for example by spending money to study and ameliorate the cotton boll weevil and reduce the damage it produced (113-20). As Ring and historian [Eric S. Yellin](#) have shown, many white progressives including President Woodrow Wilson, himself a theorist of public administration, believed the state must impose racial segregation to reduce the supposedly inevitable “[friction](#)” that occurred when two races interacted on roughly equal terms. Meanwhile the polymath intellectual [W. E. B. Du Bois](#) insisted that such ideas had no scientific basis, warning that Black Americans would never settle for segregation and that “if the United States expects to take her place among the new nations . . . then certainly she has got right here in her own land to find out how to live in peace and prosperity with her own black citizens.”

Some of Novak’s protagonists, theorists of the new democracy, were in fact thinking about the racial future of the United States. For instance, Novak regularly mentions John R. Commons, the progressive labor economist, but ignores his well-known and oft-expressed anti-immigrant, anti-Black sentiments. Novak also frequently quotes the economist and journalist Walter E. Weyl, author of [The New Democracy: An Essay on Certain Political and Economic Tendencies in the United States](#) (1912). Weyl, a white man from Philadelphia, wrote jubilantly of Americans breaking with their oppressive past and using government to build a new democracy. But in a sections not discussed by Novak, Weyl also expressed grave concern about the nation’s “racial problem,” which he said was “of more fearful portent than that of any of the nations in Europe.” Weyl lamented: “We are still paying the endless price of slavery. The South is psychologically cramped. The North is bewildered. The Negro problem is the mortal spot of the new democracy” (342). Weyl worried about the possibility of a “savage race war” and conceded that racial segregation was a “solution” that satisfied no one. He held forth about the dilemma for several pages but came up with no good answer: “Whether we love the Negro or hate him, we are, and shall continue to be, tied to him” (345).

What would Novak’s *New Democracy* have looked like if he had taken a fuller measure of such issues, perhaps by following the history of Black Americans and the South beyond chapter 1? Would it have required a change of overall argument or framework? Would it have compelled a more thorough reckoning with the noxious uses of state police powers—powers not just to segregate but to sterilize, incarcerate, coerce, disenfranchise, and even execute? Would it have invited a more three-dimensional portrayal of the reformers themselves? *New Democracy* illuminates a great deal, but what does it also obscure because Progressive Era ferment about race and democracy is not included? Or is it enough to accept that these topics were simply beyond the scope of an already vast and impressive project?

We live in fraught times, but I would not accept the proposition that to raise these questions is to stand with the *1776 Project* in condemning the entire “progressive” project (or even most of it). Pointing out abhorrent applications of progressives’ vision of a proactive state is not the same as suggesting that progressive reformers were wrong to challenge a laissez-faire approach to capitalism and inequality, wrong to reject pinched legal formalism, or wrong to believe the state

could enhance what T. H. Green called people’s “positive power or capacity of doing or enjoying something worth doing or enjoying” (81). Nor is it to criticize Novak for seeking to excavate the genuinely democratic and often inspiring aspects of progressive thought and, more broadly, for revealing how deeply American it is to believe that the state can and must help foster human flourishing. Many things can be true at once, which is why I think *New Democracy* would have been enriched by a confrontation with some of the dilemmas and contradictions that came along with new visions of vigorous state promotion of the public welfare. This book deserves a wide and engaged audience for many different reasons, one of which is so we can keep thinking about these crucial and timely questions.

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Reply by William J. Novak (University of Michigan)

New Democracy and the De-Democratization of American Law and History

In June 2022, the United States Supreme Court momentarily and controversially elevated the status of American legal history to new heights of significance in contemporary constitutional jurisprudence. In his majority opinion in *New York State Rifle & Pistol Association v. Bruen*, Clarence Thomas used the words “history” or “historical” more than 100 times in establishing the centrality of “this Nation’s historical tradition” in determining the scope of contemporary American constitutional rights and claims.² Samuel Alito resorted to the same words over 50 times in *Dobbs v. Jackson Women’s Health* in similarly holding that any judicially recognized constitutional right must be “deeply rooted” in “this Nation’s history and tradition.”³ “An analysis focused on original meaning and history,” Neil Gorsuch argued in *Kennedy v. Bremerton School District*, was key as well to unlocking an Establishment Clause which “must be interpreted by ‘reference to historical practices and understandings.’”⁴ In *West Virginia v. EPA*, Gorsuch and Elena Kagan deployed competing historical accounts of agency delegations going “all the way back to this Nation’s founding” and beyond, in debating the revival of “the nondelegation doctrine.”⁵ The June cases are all testament to the rise to prominence of a politically freighted vision of American history and tradition inexorably tied up with legal formalism, judicial supremacy, and constitutional limitations. The roots of that history and tradition run deep.

As historians of recent American conservatism have been teaching us of late, the foundations for many of the conservative initiatives that flowed from the 1980s Reagan Revolution were originally (if somewhat ironically) laid during the heyday of American Cold War liberalism in the 1950s and 60s.⁶ In law and constitutionalism, as Edward Purcell and Richard Primus have convincingly demonstrated, America’s confrontation with totalitarianism (from right-wing Fascism through to left-wing Communism) gave rise to a quickly revised and still-lasting vision of American exceptionalism at the start of what Henry Luce dubbed an “American Century.”⁷ In public law, Richard Primus notes, “Constitutional thought still operates within the framework defined by opposition” to totalitarianism.⁸ Indeed, in such exceptional times, the American

² *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022).

³ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022).

⁴ *Kennedy v. Bremerton School District*, 597 U.S. ____, (2022). As Gorsuch put it more specifically, “[T]he line’ that courts and governments ‘must draw between the permissible and the impermissible’ has to ‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’” *Town of Greece* 572 U. S., at 577 (quoting *School Dist. of Abington Township v. Schempp* 374 U. S. 203, 294 (1963)).

⁵ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

⁶ For a few diverse examples of this increasingly popular historiographical move, see Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016); Paul Sabin, *The Attack on Big Government and the Remaking of American Liberalism* (New York: W.W. Norton & Co., 2021); Reuel Schiller, “Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market,” in Gary Gerstle, Nelson Lichtenstein, and Alice O’Connor, *Beyond the New Deal Order: U.S. Politics from the Great Depression to the Great Recession* (Philadelphia: University of Pennsylvania Press, 2019): 168-185.

⁷ Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University Press of Kentucky, 1973); Richard Primus, “A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought,” *Yale Law Journal*, 106 (1996): 423-457; Henry R. Luce, *The American Century* (New York: Farrar and Rinehart, 1941).

⁸ Primus, “A Brooding Omnipresence,” 423.

traditions of antiformalism, pragmatism, and critical realism chronicled in my new book *New Democracy* came under blistering attack as not foundational or formal or morally absolute enough to take on totalitarian “fighting faiths.” In history, consensus historians like Daniel Boorstin and Louis Hartz launched a fetish for “American studies” as historians no longer emphasized ubiquitous connections with continental European states and policies, but meticulously catalogued instead America’s distinctiveness, especially its supposed lack of divisive political ideologies and the “givenness” and “naturalness” of its exceptional constitutional and liberal traditions.⁹ After two generations of arduous work by progressive reformers building a *New Democracy* upon bold public law traditions of citizenship, police power, public utility, social legislation, antimonopoly, and public administration, antitotalitarian discourse turned back instead to celebrations of American individualism, voluntarism, private rights, and constitutional limitations. The road from these first antitotalitarian priorities to the rise of contemporary conservative legal formalism (e.g., textualism, originalism, 1st Amendment fundamentalism, and the return of the nondelegation doctrine) was straighter and narrower than most might first think.

Prior to the 1950s, of course, the dominant vision of American history – authored by what Richard Hofstadter labeled “the progressive historians” – did not include an especially favorable view of either the founders, the constitution, or judicial review.¹⁰ Most famously, Charles Beard’s epic *The Economic Interpretation of the Constitution* (1913) took critical aim at the secular theology of George Bancroft’s “nationalist school” which presented the making of the Constitution as an act of almost divinely-inspired benevolence:

By calm mediation and friendly councils, says Bancroft, the people had prepared a Constitution which in the union of freedom with strength and order, excelled every one known before . . . In the happy morning of their existence as one of the powers of the world, they had chosen justice for their guide; and while they proceeded on their way with a well-founded confidence and joy, all the friends of mankind invoked success on their endeavor as the hope for renovating the life of the civilized world.¹¹

Beard’s view of America’s original constitutional moment was decidedly less sanguine. Written in a period when many viewed judges, courts, and constitutionalism as undemocratic obstacles to a progressive popular will, Beard critically investigated the moment of creation as another opportunistic moment for dominant economic interests to secure their privileges by writing them into a national charter. Beard was not alone in his critiques of law and constitutionalism, rather he was joined by two generations of realistic skeptics who produced some of the most thoroughgoing critiques of constitutionalism in American history with titles like *The Growth and Decadence of Constitutional Government*, *Court over Constitution*, and *Government by Judiciary*.¹²

⁹ Daniel J. Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953); Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, and World, 1955).

¹⁰ Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (Chicago: University of Chicago Press, 1968).

¹¹ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1913), 10.

¹² J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York: Henry Holt and Co., 1930); Edward S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Princeton: Princeton University Press, 1938); Louis B. Boudin, *Government by Judiciary*, 2 vols. (New York: William Godwin, Inc., 1932).

By 1950, however, the American constitutional narrative began to change again – and change rather dramatically. For Daniel Boorstin, the constitutional institutions bequeathed us by the founders were part of the original “genius of American politics,” where even the Revolution itself became a mere disagreement about the nature of “the true constitution.”¹³ In addition to themes of continuity, consensus, and special genius, the theme of “liberty” also began a new ascendancy in Cold War interpretations of American foundations. Clinton Rossiter’s *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty*, published in 1953, was a *locus classicus*, again emphasizing “broad agreement” over “constitutional fundamentals.” At the core of those fundamentals stood liberty – “natural law” and the “rights of man” – the original constitutional baseline for the “ethical, ordered liberty that the American people still cherish as their most precious intellectual possession.”¹⁴ Such exceptionalist ideas about the foundations of America soon found their way into an untold number of ever more polemical and propagandistic American Cold War histories.

In consequence, a slow but steady de-democratization of American history increasingly took hold of the American national narrative. That original “crisis in democratic theory” ultimately prefigured the further degradation of democratic dogma at the heart of neoliberalism as well as more recent conservative efforts to restore a Burkean-like constitution of historic and traditional private liberties. “Undoing the Demos,” Wendy Brown labeled it, erasing the “idea of a people, a demos” – a public – “asserting its collective political sovereignty,” and replacing it with an ancient and formal constitutional tradition dedicated to the judicial protection of sacrosanct private rights.¹⁵

Most of my work uncovering 19th and 20th century vernacular forms of American legislation, regulation, and administration, originally in *The People’s Welfare* and now in *New Democracy*, has struggled beneath the substantial weight of this inherited ideological tradition. In contrast to pervasive myths about an original American legal-political inheritance dedicated primarily to private individual rights, a weak state, formalist constitutional limitations, and laissez-faire political economy, I have worked to uncover a deeper and strangely obscured history of American public rights, public law, popular lawmaking, and surprising energetic state regulatory and administrative technologies. That act of historical recovery simultaneously required a substantial critical project – a realist “cynical acid” – to strip away the “myth, folderol, and claptrap” that grew up around the supposedly ongoing history of an eternally limited, hampered, and ultimately “weak” American state.¹⁶ And I am so grateful that all four of these discerning reviews grasp the centrality and supreme importance of this first critical intellectual and political theme. Steve Sawyer highlights the pragmatism and critical realism at the heart of the quest for a more democratic law and statecraft – a “revolt” against the sclerotic formalisms that encrusted our constitutional traditions, resisting change and reform. As Sawyer puts it, “Creation stories and myths conjure up images of a distant past that penetrate our present in persistent, surprising, and often distorting ways.” Kate Masur and Laura Phillips-Sawyer further illuminate the

¹³ Boorstin, *Genius of American Politics* 76.

¹⁴ Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (New York: Harcourt, Brace and Company, 1953), 1, 415-416.

¹⁵ Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), 39.

¹⁶ William J. Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review*, 113 (2008): 752-772.

distorted stakes of an illusioned American present that yet again confronts a “democracy in crisis” in ways anticipated by Walter Weyl – “a nation rent by rising wealth inequality and captured by a ‘powerful plutocracy.’” Hannah Arendt famously associated such “dark times” distinctly with attacks on the “public realm” – rendering it so “obscured” and “dubious” and “despised” that people ask no more of politics than that it serve personal, private, and substantively “petty” interests.¹⁷

My work has been an attempt to render the American “public realm” somewhat less obscure and less dubious by challenging the historical myths and abstractions that so consistently camouflage and distort it. In place of constitutional fictions about our nation’s true “history and traditions” it has attempted to construct an alternative public narrative. Alain Chatriot catalogs some of those substitute emphases: “In place of contract, property, and tort as the central building blocks of American legal modernity, *New Democracy* is built around the public law categories of citizenship, police power, public utility, social legislation, antimonopoly, and administrative law.” Such public law categories were the workshop of Progressive reformers who, as Masur puts it, “were convinced that government could and should help all people thrive” via “public provisioning and public accomplishments that could lift all people in securing a substantively democratic way of life.” Phillips-Sawyer too accurately captures this alternative progressive vision of democracy, focused on the need for “social rather than private ethics, social rather than individual responsibility” – “a new altruism” and “a changed patriotism” – in short, a “new democracy.”

The major goal of *New Democracy* was thus precisely the corrective historical intervention so capably traced by each of these reviews – to attempt to close the gap between what we now increasingly know about an ever-expansive American regulatory state history and a prevailing libertarian constitutional mythology that seems to only grow stronger with each new US Supreme Court term. And that primary interpretive orientation governed a whole host of subsidiary decisions about focus and emphasis. Any book attempting to reckon with a 70 year historical period across competing areas of legal and public policymaking (economic as well as social) confronts hard authorial choices. Imperialism and war, for example, were important as well as controversial sites for early 20th century American statebuilding (and thankfully both topics are now subjects of ever-burgeoning monographic literatures). Without taking anything away from the significance of such major historical forces, I consciously chose instead to enter some less well-traversed territory, where I thought I could deliver fresh legal-historical perspective. And I believe my chapters on police power, public utility, and democratic administration genuinely break new ground.

Similarly throughout, I had to make difficult choices about when and where to research and emphasize the “limits” of new democracy as an idea, a reform movement, and a complex set of legal-political policy practices. And as these reviews suggest, such limits are duly acknowledged throughout the book. But here I was also guided by a keen historiographical awareness that an overemphasis on precisely such limitations – e.g., enumerated powers, constitutional limitations, substantive due process, *Lochnerism*, non-delegation, the judicial review of administrative action –

¹⁷ Hannah Arendt, *Men in Dark Times* (New York: Harcourt Brace & Co., 1968), 11.

has been *the* orthodox interpretation of American constitutional history and political development for at least three generations. Previous histories of state police power have been written solely within the confines of court records of the judicial review of police power regulation.¹⁸ Histories of the American labor movement as well as the American social welfare and administrative state have been written primarily in terms of the exceptional limits upon American statecraft.¹⁹ A pervasive naysaying, thou-shalt-not orientation has long been an article of faith in the creed of American constitutional theology. In paying so much attention to the admittedly important question of limits on state power and democratic action, American legal-political historians have sometimes lost the forest among the trees. More significantly, ubiquitous histories of past limitations and misdevelopments and false promises have also inadvertently burnished an essentially Cold War narrative about judges, the rule of law, and the constitutional limitation of democratic possibility ever-poised to de-democratize the American present yet again.

So despite ever-present constraints on what any single book can accomplish, *New Democracy* chose first to foreground an original aspiration – an aspiration rooted in what Masur calls “America’s First Civil Rights Movement” and what chapter one calls “The Origins of Modern American Citizenship.” I then attempted to follow the implementation of that new national and democratic dispensation through a modern transformation of legal-political ideas like antiformalism, pragmatism, and critical realism. But, of course, such legal ideas were not mere matters of intellectual history or what some call “law-in-the-books.” Rather, law-in-action was the clarion call of progressive social-democratic reform. And so my book further traces the lineaments of new democracy through a flurry of extraordinarily impactful public state policies, ranging from public utilities to social legislation to democratic administration. “Alongside the rejection of formal constitutionalism,” as Stephen Sawyer puts it, the book chronicles the “tectonic shift in government” flowing from “the new democratic imperatives of welfare, combating socio-economic and racial inequality, and public provision.” In contrast to social science approaches marked by a seemingly relentless state-phobia, as Alain Chatriot concludes, the book challenges us “to think about the possibility” as well as “the historical forms of expression” at the core of substantive democratic statecraft. The historical recovery of just such expressions of substantively democratic possibility remains the critical core of *New Democracy*. And critical realism and substantive democratic possibility might still hold out the best antidote to the constitutional formalisms that still so frequently distort and encase our nation’s history and traditions.

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¹⁸ Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1995).

¹⁹ William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992); Stephen Skowronek, *Building a New American State: The Expansion of National Administration Capacities, 1877-1920* (New York: Cambridge University Press, 1982).