

ESSAY

The New Capitalism, the Old Capitalism, and the Administrative State

Gregory A. Mark†

This Essay concerns the evolving relationship between the economy, specifically the economy of the British North America that became the United States, and the methods society deployed to legitimate, control, and channel economic behavior, especially religion and law. Using the recently published work of three eminent academics—Benjamin Friedman, Jonathan Levy, and William Novak—it addresses the changes in thought necessary to legitimate acquisitive economic behavior and the consequent centering of law as the secular replacement for religion. Having unleashed that behavior, society, yet wary of it, at least in its extreme forms, had to develop mechanisms to channel that behavior in ways that created social benefit and limit its antisocial extremes. That behavior became known as capitalism. The state had always regulated economic behavior, of course, but the purposes of regulation, and its mechanisms, changed as capitalism evolved, and as understandings of capitalism evolved in tandem with the economy itself.

In the United States, that evolution was marked by a continuing attention to democratic aspirations, aspirations both political and egalitarian. As capitalism fostered wider markets, as its evolution embodied industrialism and commercialism, it created problems that the regulatory state could not handle. In America, the transition from regulatory to administrative state was complicated by its federal structure and background democratic egalitarian yearnings. Friedman, Levy, and Novak illustrate and elucidate aspects of that evolution. This Essay suggests that reading them together explains more than each separately and ends by noting how the tensions they explain usefully add to our understanding of American law, and, coincidentally, the potentially transformational administrative law decisions of the Supreme Court in the 2023–2024 term.

INTRODUCTION

Capitalism has been endlessly controversial. The administrative state has been endlessly controversial. Capitalism, depending

† Professor of Law, College of Law, DePaul University. B.A. Butler University 1979; M.A. American History, Harvard University 1980; J.D. University of Chicago 1988. My thanks to Caitlin Hamilton and Emma Martinez for assistance with this Essay. For Dennis Hutchinson, who embodies the essence of deep professional and personal friendship.

on who is doing the accusing and when the accusation is made, is a phenomenon that destabilizes the political and social order, fosters inequality, impoverishes the working class, degrades the environment, engenders racial division, and alters the planet's very climate for the worse, among other things. The administrative state, depending on who is doing the accusing and when the accusation is made, is a phenomenon that undermines democratic governance, breeds political divisions, worsens the very problems it exists to solve, has in any case been captured by those it should regulate, undermines the economy, and was politically illegitimate *ab initio*, among other things. Capitalism, a term which purports to be descriptive of an economic stage of human development, to define a process of human economic behavior, and to encapsulate a novel understanding of human aspiration, has become simply pejorative in everyday use. In its everyday use it purports to be descriptively useful but simply signals disapproval.¹ The administrative state, a term which once denoted a marriage of expertise and democratically created institutions in service of human flourishing, is termed the deep state by its most extreme detractors²—a fearful monolith of unstoppable, unseen, illegitimate, elite, and ravenously expanding power, destroying cherished traditions and upending the very institutions that created it.

That lawyers should care about understandings of capitalism and the administrative state should be, therefore, self-evident. What lawyers should know (much less do) about both is less so. Into this fray wade three scholars, each brilliantly emblematic of different views on the United States' embrace of both capitalism and the administrative state. Professor Benjamin Friedman, a macroeconomist by trade and economic historian by

¹ So casual is the condemnation that serious work failing to toss in the condemnatory term warrants criticism for that very reason, without explanation. See, e.g., Manohla Dargis, 'Origin' Review: *The Roots of Our Racism*, N.Y. TIMES (Dec. 7, 2023), <https://www.nytimes.com/2023/12/07/movies/origin-review-ava-duvernay.html> ("Caste" has generated criticism, including for its omission of class politics; as the historian Charisse Burden-Stelly points out in the journal *Boston Review*, the word capitalism never appears in the book."). Whatever else one may say about journalist Isabel Wilkerson's book, *Caste*, given its variegated analysis of systems of caste rather than class *qua* class, Professor Burden-Stelly's critique cannot simply be that the omission of the word "capitalism" is meaningful in and of itself.

² Such is the condemnation that even the person who ran it for four years, President Donald Trump, who prides himself on a run of winning so long that in his 2016 campaign he said the country would be "sick and tired of winning," could not speak of triumphing over the deep state, or even exposing it. Mark Y. Rosenberg, *Sick of Winning*, THE HILL (Apr. 24, 2020), <https://perma.cc/KZ9X-92PT>.

autodidacticism, writes with a traditional (albeit liberal) and critical, but ultimately sympathetic, view of capitalism.³ His recent book *Religion and the Rise of Capitalism*⁴ provides a persuasive engagement with the intellectual culture that birthed the texts that described and analyzed market behavior and phenomena while simultaneously legitimating the very behaviors analyzed.⁵ He reminds us that law is not the only way in which human behavior is regulated and channeled, and that the pursuit of the commonweal we take for granted was, in social fact, both novel and deeply subversive when it came to the fore. That lawyers were at the heart of the transformation should inspire those who seek further transformation. Professor Jonathan Levy, a wunderkind of economic history, simultaneously revivifies economic history for historians while writing an approachable volume that integrates economy and society. By generation and approach, his work embodies much of what scholars writing in the “the new history of capitalism” genre,⁶ born in the tumult of the early twenty-first century, seek to understand, broadly speaking, as the “financialization”⁷ of capitalism. His *Ages of American Capitalism*⁸ divides history into four periods: a two-century long opening, “Commerce”; a three-quarter century long symbiosis of industrialism, technological invention, and systemic innovation, “Capital”; an almost half-century’s legal taming of Capital, “Control”; and then the slightly more than four-decade long untethering from Control, “Chaos.” Aspiring not simply to Control, but to an enhanced and historically legitimated Control, comes

³ In calling Friedman’s analysis traditional I mean nothing pejorative. Given my admiration for the work that could hardly be the case. It is traditional in the sense of the “Old Capitalism” of the essay’s title, in that it periodizes economic history in ways redolent of old ideas of progress, from one stage of development to another. That view, especially in its Marxist (and that Friedman certainly is not) iteration, still informs much historical writing and is not without utility. *See, e.g.*, STEPHEN KOTKIN, *STALIN: PARADOXES OF POWER, 1878–1928*, at 40 (2014) (discussing philosopher Karl Marx’s staging of history, building on the work of leading intellectuals Charles Fourier, Henri de Saint-Simon, David Ricardo, Adam Smith and, of course, Georg Wilhelm Friedrich Hegel).

⁴ BENJAMIN M. FRIEDMAN, *RELIGION AND THE RISE OF CAPITALISM* (2021).

⁵ *See generally, e.g.*, ADAM SMITH, *THE WEALTH OF NATIONS* (Shine Classics 2014) (1776); BERNARD MANDEVILLE, *THE FABLE OF THE BEES, OR PRIVATE VICES, PUBLIC BENEFITS* (Phillip Harth ed., Penguin Books 1970) (1714); DAVID HUME, *A TREATISE OF HUMAN NATURE* (Ernest G. Mossner ed., Penguin Books 1969) (1739).

⁶ *See AMERICAN CAPITALISM: NEW HISTORIES 4* (Sven Beckert & Christine Desan eds., 2018).

⁷ *Id.* at 16.

⁸ JONATHAN LEVY, *AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES* (2021).

Professor William Novak's *New Democracy*.⁹ Building on his earlier work on the pervasiveness of regulation in the United States,¹⁰ *New Democracy* seeks to give pedigree not just to the role of the administrative state to control the complicated behaviors characteristic of the modern political economy, but to channel them, indeed to help shape them, into vehicles that enhance a democratic, participatory, and significantly more egalitarian society. Giving a pedigree to a vision of the administrative state that does not actually exist in the United States is decidedly a forward-looking project. Novak, historian by training, sits today on a law faculty.¹¹

These volumes share many virtues. They are masterfully researched, written with grace, largely devoid of both the jargons of their technical specialties and of the off-putting vocabulary of much of the contemporary academy. That said, while they are a joy to both the uninitiated and the specialist, they are volumes of heft. The shortest of the three, Novak's *New Democracy*, contains a mere 271 pages of text (but another 80 pages of notes, a scholarly feast).¹² Friedman's *Religion and the Rise of Capitalism*, at 415 pages, is a bit more than a beach read (and a healthy scholarly meal at 65 pages of notes).¹³ Levy's *Ages of American Capitalism*, at 741 pages, should be absorbed over time (the 110 pages of notes constituting a virtual menu of scholarship).¹⁴ Moreover, their full titles speak to their ambition. Levy's subtitle, *A History of the United States*, suggests how central he understands capitalism has been to the country's existence. Similarly, Novak's subtitle, *The Creation of Modern American State*, puts the modern U.S. administrative apparatus at the core of the nation's highest, and most idealistic, ambitions.

⁹ WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022) [hereinafter NOVAK, *NEW DEMOCRACY*].

¹⁰ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) [hereinafter NOVAK, *THE PEOPLE'S WELFARE*].

¹¹ *William J. Novak*, UNIV. MICH. L. SCH., <https://perma.cc/8MFH-6MTW>.

¹² NOVAK, *NEW DEMOCRACY*, *supra* note 9, at vii–viii.

¹³ FRIEDMAN, *supra* note 4, at vii.

¹⁴ LEVY, *supra* note 8, at ix–x. I note the size of the books as well as their references to original and secondary sources simply to suggest that nothing in an Essay can do justice to the scope of their scholarship, much less the (mountain probably underdescribes it) quantity of scholarship over the past couple of centuries devoted to capitalism and the state, even if one limits oneself to the United States. In this Essay I will of necessity avoid reference to most of that literature and instead simply commend readers to the endnotes and bibliographies of these works. I will, however, reference, very selectively, very recent or forthcoming scholarship that is especially, in my view, illuminating of some issues the books raise. I will also attend to the reactions of others whose perspectives, different from mine as a legal historian, have raised interpretive issues.

Friedman, while lacking a subtitle, alludes to two transformative historical interpretive predecessors, economic historian R.H. Tawney's volume of the same title¹⁵ and, of course, sociologist Max Weber's *The Protestant Ethic and the Spirit of Capitalism*.¹⁶ These authors do not lack for ambition. In their ambition, and in the scope of their works, however, they have left themselves open to some sniping—the worst vice of a reviewer—asking for something different than what was offered. One might well ask why, given what has been provided.

In this Essay, I suggest reading these three volumes not as a trilogy, but as a triptych, the unfolding of which both enriches understanding and enlivens imagination. (For us lawyers, the first should ground the second.) Enrichment should undermine the casual contemporary condemnation of capitalism's ubiquity, of which none of these volumes is guilty. For if capitalism is responsible for every evil, then the description of the wrongs of the past elides every other causal factor, flattens human consciousness and agency, and leaves qualifications and nuance to the side. As a normative matter, if capitalism is responsible for every evil, then nothing done to ameliorate error, prejudice, ignorance, or ideology as animators of human action is of much consequence. If the administrative state is pervasively perverse and corrupt, then no exercise in the line-drawing assignment of governmental functions in the government's exercise of power is possible. In this extreme view, ultimately, institutional governance is both illegitimate and dangerous and federalism and separation of powers are both ineffective and illusory, serving only to blur vision, turning citizens into spectators or clowns. These volumes combat both these delusions and their more respectable cousins, ones playing out in contemporary electoral politics.

Proceeding roughly chronologically, this Essay develops first the subversive nature of capitalism and the consequent need to explain—and by explaining justify to many—its coming. And subversive it was. First, upending centuries of hierarchy, it required a new understanding of the good. In so doing it also undermined one form of social control and behavior channeling, religion, while not fully displacing religion's sway. Second, capitalism also required a new role for the state. Society's rules grew in secularity

¹⁵ See generally R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM: A HISTORICAL STUDY (1926).

¹⁶ MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., Taylor & Francis e-Library ed. 2005) (1904–1905).

and required a larger legion of actors to interpret those rules. Not for nothing have lawyers been analogized to priests. As the economy grew more complicated (and capitalist), those rules had to account for a new dynamism and pluralism in society. That dynamic pluralism manifested itself in new understandings of religion, politics, and the economy. The god of unity gave way to competitive tolerance in religion, legitimate controversy in politics, and competition in the economy.¹⁷ The ideal of the state as embodying a divine instantiation and thus requiring that wealth flow to its aims went by the boards. Thus, the rules of capitalism, embodied in understandings of certain ambition on the one hand (economics) and structures channeling and curbing that ambition on the other (law), became central and thus controversial. Because pluralism in politics was now a virtue, not a vice, competing understandings of who should get what and why in a newly dynamic economy played out in novel ways. State functions, heretofore muted because rarely necessary (think policing economic relations over space and time) or considered illegitimate (egalitarian redistribution), became central. Thus, third, as capitalism begat complication, complication begat administration, and administration, as novel, required legitimation that mere regulation, whether legislative or monarchical—at least in theory—did not. But since who gets what and why became central to politics, the legitimacy of regulation became conflated with the legitimacy of administration. In turn, administrative legitimacy required grounding not just in the mechanics of government, but in the very legitimacy of the administrative state, its democratic structure and democratic (read egalitarian) aims. Reading Friedman, Levy, and Novak as a triptych explains much, and in explaining demonstrates that the counsel of despair that characterizes contemporary life is overwrought.

I. CAPITALISM AS SUBVERSIVE

In an era when capitalism is and has been for living memory the status quo, contemplating that it was once antihierarchical may well be a hard act of imagination. Yet antihierarchical it was. In fact, capitalism undermined traditional economic relations and

¹⁷ For a recent, and novel, understanding of the emerging legitimacy of competition in religion, politics, and economics, see THOMAS E. RICKS, *FIRST PRINCIPLES: WHAT AMERICA'S FOUNDERS LEARNED FROM THE GREEKS AND ROMANS AND HOW THAT SHAPED OUR COUNTRY* 275–78 (2020).

in so doing complicated a sociopolitical order based on land ownership. Land, immovable and productive of life's necessities, embodied virtue.¹⁸ The buying, holding, and selling of things was speculation; the speculative market, especially insofar as it centered on self-interest, embodied corruption.¹⁹ Christianity, interested in salvation, was not much interested in the standard of living but certainly cared about corruption.²⁰ Religion, insofar as it regulated day-to-day behavior, focused on conduct that manifested a sinful state of mind; the pursuit of gain beyond what was necessary was the pursuit of corrupt luxury, hence worthy of restraint.²¹ Wages were low, the standard of living unchanged for generations. The ruin that followed speculative bubbles only reinforced the moralist understanding of the economy.²² So far nothing unusual in the historiography of the English political economy, nor the economy of Europe writ large.²³

The point is one of legitimation of conduct, not regulation. Self-interested conduct was regarded as corrupt and thus self-interested conduct was illegitimate. Since self-interested conduct

¹⁸ FRIEDMAN, *supra* note 4, at 42.

¹⁹ *Id.* at 35, 41–42.

²⁰ *Id.* at 31–32.

²¹ *Id.* at 36.

²² *Id.* at 37:

The economic dimension of [] vice and immorality took on particular visibility after 1720, with the bursting of the South Sea Bubble, one of financial history's classic episodes of speculation followed by collapse, comparable to the Dutch tulip mania a century before and to numerous classic shakeouts of market excess since.

²³ The critique of Friedman's focus on Calvinism is overdone. See David Skeel, *'Religion and the Rise of Capitalism' Review: God and Mammon*, WALL ST. J. (Jan. 29, 2021), <https://www.wsj.com/articles/religion-and-the-rise-of-capital-review-god-and-mammon-11611938200> (“[Friedman] relies on a caricatured version of Calvinism . . . to set up his central claim.”); see also Paul Oslington, *Review Essay: Religion and the Rise of Capitalism*, 24 J. MKTS. & MORALITY 325, 331–32 (2021). Predestination, while fixing a person's place in the firmament, was not, in Friedman's view, a monocausal explanation for a static economy. Rather, it contributed to what Friedman, borrowing from sociologist Robert Merton, called the “cultural soil” of pessimism about human possibility. FRIEDMAN, *supra* note 4, at 7 (citing ROBERT K. MERTON, SCIENCE, TECHNOLOGY & SOCIETY IN SEVENTEENTH-CENTURY ENGLAND 238 (1938)). Predestination is, then, about absence of free will—the power to choose to be saved. One's place absent choice otherwise follows. Given, however, the choice to be saved, then choice in matters human follows. A heresy to Calvinists, but, as it turned out, one with a robust future. See Alan Wolfe, *The Religious Roots of Our Free Enterprise System*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/books/review/religion-and-the-rise-of-capitalism-benjamin-friedman.html>; see also Jürgen von Hagen, *Benjamin M. Friedman: Religion and the Rise of Capitalism*, 58 BUS. ECON. 245, 246 (2023).

was a vice, indeed vicious, thus it was to be discouraged, inhibited, and suppressed. The point Friedman identifies as remarkable is the transformation of the cultural soil, dominated by religion, that inhibited conduct conducive to the creation of wealth and channeled behavior away from activity that led to human happiness on earth. He covers a lot of ground quickly. He moves on quickly, for example, from the Jansenists, a seventeenth-century French Catholic movement condemned by the Church but which became especially influential in the Dutch Republic. Here, doing great violence to a very complicated theological struggle that Friedman deftly narrates, simply put, the Jansenists attempted to reconcile free will and salvation. In legitimating choice, the movement laid some of the groundwork for legitimating the market.²⁴ Friedman notes, not unimportantly, that among the Jansenists were lawyers.²⁵ While an aside, he regards the confluence of lawyers and theologians as important because lawyers operated in the secular arena, transferring legitimacy from religion to law.

The next, vital, exercise was philosopher Bernard Mandeville's. His famous (infamous at the time) *Fable of the Bees*²⁶ upended notions of private virtue becoming public virtue. To the contrary, private vice—personal gain—benefited society; private virtue, especially constant demands for private virtue, not so much. More aptly, working for private gain created benefits, which today's economists would term positive externalities.²⁷

The move away from the religious instantiation of self-interest as vice, however, merely meant that religion's regulatory role declined.²⁸ Religion's channeling role required other persuasive intellectual efforts. Vice had to be recast as virtue. Enter the Scottish Enlightenment. Focusing principally on philosophers Francis Hutcheson and Adam Smith, with nods to fellow philosopher David Hume and economist Josiah Tucker, Friedman makes clear what these men, many trained in religion

²⁴ FRIEDMAN, *supra* note 4, at 48–49.

²⁵ *Id.* at 45.

²⁶ BERNARD MANDEVILLE, *THE FABLE OF THE BEES, OR PRIVATE VICIES, PUBLIC BENEFITS* (Phillip Harth ed., Penguin Books 1970) (1714).

²⁷ *See id.* at 49–54; *see also* JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 360 (1936). Especially important in Mandeville is that the bees were ruled by law, their behavior so channeled, and not by their own virtue.

²⁸ FRIEDMAN, *supra* note 4, at 80.

and law, accomplished.²⁹ For vice to become virtuous, self-satisfaction required a vehicle to transfer benefit from oneself to another.³⁰ The market was that mechanism.³¹ To condense the story, the societal benefit was an increase in the standard of living, enabled by the division of labor and specialization, measured empirically. Human flourishing augmented moralism, supplanting the language of morality with the language of success.³²

What followed was a dramatic shift in thinking that led to a dramatic shift in the role of the state, hence the role of law. Smith, for example, not only was an antimonopolist (monopolies being grants from the state prohibiting competition with the grantee),³³ a position for which he is well-known, but also was opposed to concentrated ownership of land and slavery.³⁴ No absolutist about market virtue, though he is famous for the idea of “spontaneous order,”³⁵ he was strongly in favor of strict control of banking.³⁶ For Smith, therefore, the rule of law was not simply about enabling the market, with its capacity to engender wealth creation, but about enabling the market in order to promote competition’s beneficial restraints on human conduct.³⁷

II. CAPITALISM AND AMERICA

The controlling influences of religion, traditional English property law and its reinforcement of the English sociopolitical order, and the transformational influence of the Scottish Enlightenment in America were part of Atlantic history. While the trans-Atlantic ties may appear to be obvious, they had never been fully developed as an interpretive genre until twentieth-century historians, especially Bernard Bailyn, Jack Greene, and J.G.A. Pocock, did so.³⁸

²⁹ *Id.* at 12 (noting that the legally trained significantly outnumbered every other occupational or professional group among the core thinkers of the Scottish Enlightenment).

³⁰ *Id.* at 59.

³¹ *Id.* at 56.

³² *Id.* at 60–72. One could say, doing only slight violence to Adam Smith, that the transformation of linguistic importance was reflected in the titles of his two great works. *The Theory of Moral Sentiments*, after all, antedated *The Wealth of Nations*.

³³ FRIEDMAN, *supra* note 4, at 89, 100.

³⁴ *Id.* at 73, 101.

³⁵ *Id.* at 97–98.

³⁶ *Id.* at 102.

³⁷ *Id.* at 85, 103–06, 119.

³⁸ See generally BERNARD BAILYN, VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION (1988); ATLANTIC HISTORY: A CRITICAL APPRAISAL (Jack P. Greene & Philip D. Morgan eds., 2008); Alison Games, *Atlantic History: Definitions, Challenges, and Opportunities*, 111 AM. HIST. REV. 741 (2006).

To summarize (all too briefly), the genre posits that the societies on the shores of the Atlantic cannot be fully or correctly understood without understanding their interplay—an interplay at once demographic, economic, political, and cultural. Thus, no study of capitalism in America can afford not to take account of such interplays. Additionally, certain it is that the intellectual, legal, religious, and economic interplays across the North Atlantic were not unidirectional, from the metropole to the periphery.

The North America colonized by the English was literally organized on the basis of English property law. The differences, however, between a small island nation and its North American continental empire quickly made themselves felt. Parliament was quick to notice the differences and sought to profit from them. As Levy notes, for example, the Debt Recovery Act of 1732³⁹ radically altered the property law protections of English law.⁴⁰ English property law was designed to keep large estates intact the better to preserve the power and station of the aristocratic owners of the estates.⁴¹ To that end, very roughly put, creditors could not seize the lands of delinquent borrowers.⁴² Indeed, in many ways the estates were inalienable, save on the death of the rightful owner, and even then, were not generally subject to seizure by creditors or divisible on petition of an heir.⁴³ Paradoxically, however, lands in America, originally so protected, came to be seen by the colonists as excellent collateral for loans to improve those very lands.⁴⁴ In the case of the American South, moreover, those large landholdings were overwhelmingly tilled by the enslaved. The legal status of the enslaved also was problematic. Slavery's nonexistence in Britain made the enslaved's property status a domestic nonissue, save among those who were abolitionists for the empire. In the North American colonies, however, their status mattered a great deal. It mattered a great deal not simply that they were human property, but whether they were analogized to real property, and therefore protected from alienation, or to chattel, subject to

³⁹ 5 Geo. 2 c. 7 (Eng.).

⁴⁰ LEVY, *supra* note 8, at 61. For a brilliant treatment, and a thorough and richly sophisticated understanding, of the Atlantic interplay of land, slavery, commerce, and law, see generally CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* (2021).

⁴¹ Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387 (2006).

⁴² *Id.* at 387–88.

⁴³ *Id.*

⁴⁴ *See id.*

seizure.⁴⁵ The colonies, in fits and starts, moved from real to chattel. Parliament, not without its own fits and starts, eventually decided—unsurprisingly—that it valued the interests of the creditors of the metropole more than the landholders of the periphery.⁴⁶ Moreover, ultimately, the enslaved, once in a sense tied to the property they tilled, were unmoored and became fully alienable, with unspeakable consequences for their human welfare, especially the welfare of the enslaved family.⁴⁷

Making a commodity of the enslaved, however, did not necessarily reduce them to tools of capitalism, any more than any other form of property.⁴⁸ To do that required the same change in the intellectual firmament, the cultural soil, of the colonies, as took place in Scotland and England. The American cultural soil, however, was more receptive to capitalism's growth, not having a formal aristocracy and nobility already entrenched. Without a single dominant religion ordering the colonies, taken as a whole, each would also have been less enamored of universalizing the restrictions of any given religious order (unless, of course, one could ensure the dominance of one's own order, a view that, at least over several generations, failed to come to fruition).⁴⁹

The legal relationship of the colonies to the mother country was not designed for, in fact was often antithetical to, capitalist development (an anachronism if one views the American colonies as precapitalist). The relationship was mercantile, designed to transfer wealth to the metropole, not foster the well-being of any of the colonists, even the class of the colony's well-off.⁵⁰ In that sense, for example, the Debt Recovery Act was not an example of a law enacted to foster wealth creation (whatever its ultimate consequence) but rather to ensure that wealth could be siphoned from the colonies to English creditors, where that wealth would enhance the power of England.⁵¹ Similarly, trade and its regulation were designed to enhance English power, not create wealth

⁴⁵ PRIEST, *supra* note 40, at 76.

⁴⁶ LEVY, *supra* note 8, at 58.

⁴⁷ *Id.* at 157.

⁴⁸ With this claim Levy might well have a quibble, perhaps a quarrel. For Levy, capital is but a legal form; anything with pecuniary value can be converted into something by investing that can provide a yield over time, thus wealth creation. See LEVY, *supra* note 8, at xiv. So might Priest. PRIEST, *supra* note 40, at 151.

⁴⁹ See FRIEDMAN, *supra* note 4, at 148; see also LEVY, *supra* note 8, at 4–5.

⁵⁰ See LEVY, *supra* note 8, at 15; see also FRIEDMAN, *supra* note 4, at 33.

⁵¹ PRIEST, *supra* note 40, at 74–80.

for traders, even if that were incidental.⁵² Indeed, therefore, trading with parties in countries not authorized by Parliament was not entrepreneurial economic behavior but rather smuggling, subject to the wrath of the Royal Navy.

Evaluating when capitalism superseded mercantilism and what that supersession entailed may be useful for understanding the evolution into capitalism. For instance, was colonial slavery an example of or a predecessor to capitalist labor relations? The questions of why and how that evolution occurred, however, are even more useful. To understand how the internal dynamics of capitalist market behavior were both generative and regulatory, one must return to the systems of thought both Friedman and Levy analyze. The thinkers of the Scottish Enlightenment were well-known to late eighteenth-century Americans, and their ideas found ready reception among the colonists. The colonists who became revolutionary had already glimpsed the truths of Mandeville's satiric poetry praising the rule of law above virtue, Smith's (if not quite Hume's) religious skepticism, and the dynamism possible with making commodities of things. Cash poor but land rich, not much encumbered by a feudal past with its formal class structures, and open, at least colony by colony, to religious pluralism, the colonists were also mobile. They expanded westward from the coast—much to the consternation of imperial authorities eager to avoid war with Natives so they might better wage war with other Europeans—seeking more land to develop. The result? The colonists, whom the English of the mother country ruled better to enrich themselves, were by 1774 not simply the richest, but also the most equal population on earth (the enslaved aside, of course).⁵³ Mercantilism, paradoxically, had made the exploited well-off.

They were well-off, but not yet capitalist, at least not fully. Levy, in an unconscious nod to Professor Willard Hurst, the doyen of American legal history, argues that capitalist development requires more than elimination of obstacles—it requires inducements to invest.⁵⁴ Hurst had, famously, propounded as key to American development the “release of energy.”⁵⁵ Hurst meant not

⁵² See LEVY, *supra* note 8, at 37.

⁵³ *Id.* at 59–60.

⁵⁴ *Id.* at 3 (discussing not simply the capitalist's ability, but willingness, to invest).

⁵⁵ JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3 (1956). Unconscious, at least on my reading, because uncited. Levy acknowledges that he has “referenced the works of scholarship” that he “has relied on the most.” LEVY, *supra* note 8, at 755. Since Hurst's approach parallels, but does not undergird, Levy's, the absence is understandable.

simply that obstacles to development be eliminated, but that legal structures be created to animate development. Not quite the same as inducements to invest, admittedly, but requisite to the safety of any investments and requisite to concerns that the return on investment could be pocketed.

Given Levy's understanding of capitalism and his focus on the psychology and consequent behavior of capitalists—that capitalists require the confidence to invest over time in order to overcome their preference for preservation of wealth, the liquidity preference⁵⁶—the understanding of what was good for the state also had to change. Unsurprisingly, the key figure in the United States was Founding Father Alexander Hamilton. Hamilton, as anyone who has read historian Ron Chernow's mammoth biography⁵⁷ or its intellectual forbear, historian Forrest McDonald's *Alexander Hamilton: A Biography*⁵⁸ (not so much, unfortunately, playwright Lin-Manuel Miranda's stunning hip-hop musical *Hamilton*) can attest, knew, in a manner likely unique in North America, that empowering the United States required the creation of an economy that could sustain a new nation-state in a world characterized by ruthless imperial clashes. In that sense Hamilton was traditionally mercantilist, the economy serving the state. His own experiences as a lawyer, not insignificantly in the commercially and financially key city, then as now, New York, put him in regular and constant touch with the tools of finance and commerce, as well as the legal architecture sustaining them.⁵⁹ That experience, one must assume, however, altered his understanding of economic power. A close reader of Smith, he also was an antimonopolist, a believer in the division of labor, and displayed an inchoate but growing belief in economic dynamism.⁶⁰ Despite his role in founding the Society for Establishing Useful Manufactures, on the shores of the Passaic River in New Jersey, and his *Report on the Subject of Manufactures*,⁶¹ in 1791,⁶² it would stretch credulity to say that he foresaw either industrialism or the organizational form that gave it its flexibility, the business corporation. As I have

⁵⁶ See LEVY, *supra* note 8, at xxi.

⁵⁷ RON CHERNOW, *ALEXANDER HAMILTON* 344–62 (2004).

⁵⁸ FORREST MCDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 117–210 (1979).

⁵⁹ LEVY, *supra* note 8, 74–75.

⁶⁰ See *id.* at 75.

⁶¹ ALEXANDER HAMILTON, *Final Version of the Report on the Subject of Manufacturers* (Dec. 5, 1791), in 10 *THE PAPERS OF ALEXANDER HAMILTON* 230–340 (Harold C. Syrett ed. 1966).

⁶² CHERNOW, *supra* note 57, at 32, 374.

noted elsewhere, the Report contains not a word about corporations.⁶³ His lack of such prescience notwithstanding, he did understand that investment required confidence, that such confidence would grow from a sound governmental structure supportive of (and not predacious of) investment, though some of his ideas about a supportive legal environment were hardly innovative, much less exemplars of twenty-first-century capitalism. For example, he was a straightforward believer in subsidies.⁶⁴ He also believed in tariffs, at least to protect infant industries, and, of course, a central bank.⁶⁵ The innovation that was the particular federal structure of the United States, however, required innovative insights, insights necessary to keep the original thirteen states, as well as those yet to join, together. Among the dangers would be internecine economic warfare, tariff wars, and trade barriers among the states. The Constitution that Hamilton did so much to realize prevented exactly that, placing the regulation of interstate commerce in federal hands,⁶⁶ “forbidding interstate mercantilist discrimination. The result was to check state discrimination, opening up a unitary commercial space and increasing the extent of markets and thus the demand for goods.”⁶⁷ Hamilton is the key transitional figure in transforming the economy from one designed to benefit the state and incidentally the population to one designed to meet the desires of the population and thus benefit the state.

This legal, cultural insight manifested itself in the first half of the nineteenth century in a pluralism in politics, the market, and religion that has characterized the United States ever since. Absent an animating and unitary religious focus or an equivalent political structure, the United States became a place of vast differences compared to other nation-states, paradoxically bound together by a belief in the virtue of union, not uniformity. An explosion of decentralized developmental experimentation followed. As Levy notes, “state governments energetically fostered economic development, in everything from chartering corporations, to creating infrastructure that increased the extent of markets, to, in

⁶³ Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 415.

⁶⁴ LEVY, *supra* note 8, at 82.

⁶⁵ Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures"* 3–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9943, 2003).

⁶⁶ U.S. CONST. art. I, § 8, cl. 3.

⁶⁷ LEVY, *supra* note 8, at 88.

the North, abolishing slavery.”⁶⁸ In Levy’s telling, moreover, the efflorescence of democracy engendered exactly the confidence necessary for the economic takeoff: “[f]rom a source deep within American democratic culture, a high inducement to invest in commerce positively raged.”⁶⁹ The cultural transformation was key, for it was a culture of optimism. Not for America was the crabbed view of human possibility that had characterized a formal system of class, a religious view of predestination, and a politics centered on the state. Rather, in a system built on the view that acting both individually and in fluid, self-creating organizations of members with similar aims, the population in its entirety would flourish.

Except for the enslaved. Marx, albeit briefly, wrote of a clear divide in the understanding of the labor of the enslaved and the labor of the paid.⁷⁰ Even if, however, for the purposes of this Essay, we bypass the endless debate over whether the system of slavery in the United States is better regarded as precapitalist, protocapitalist, or perversely capitalist,⁷¹ the work of the enslaved had value, great value, and it was largely captured by others. Since such labor was essential to certain forms of commercial agriculture, notably cotton in the antebellum South (though rice, tobacco, and indigo were certainly precursors and companions), no discussion of the role of capitalism would be complete without addressing slavery. Among the endless political and historical controversies attendant to the system of slavery in the South, including the contemporary justifications and condemnations and the subsequent analyses, none were or are so fraught as those over the treatment of the enslaved and how the value of their labor was captured—intertwined questions.

Levy, following other prominent historians, regards the enslaved as “capitalized labor.”⁷² In the first half of the nineteenth century, as slavery rubbed raw the conscience of a growing portion of the population (largely in commercial centers in the North) and drew abolitionist condemnation for exploitation, a counter-literature developed in the South, arguing that the enslaved were

⁶⁸ *Id.* at 92; *see also* FRIEDMAN, *supra* note 4, at 240–48 (discussing transformations in religious views of laboring).

⁶⁹ LEVY, *supra* note 8, at 95; *see also id.* at 107, 118–19, 121, 127.

⁷⁰ KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 591 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Charles H. Kerr & Co. 1906) (1873).

⁷¹ Levy also sidesteps these debates. *See* LEVY, *supra* note 8, at 153.

⁷² LEVY, *supra* note 8, at 151 (quotation marks omitted) (quoting GAVIN WRIGHT, SLAVERY AND AMERICAN ECONOMIC DEVELOPMENT 74, 93 (2013)).

better-off under slavery than the laborer in the north.⁷³ The thesis that slavery was not necessarily one that redounded to the material detriment of the enslaved had itself an unusual history. Some late twentieth-century historians took up the material claim, albeit in a very different manner than the Southern Fire-Eaters. They wholly endorsed the understanding that slavery was a system of social, political, and cultural exploitation.⁷⁴ The economics of slavery, however, was another matter. Professor Eugene Genovese, and slightly earlier in a quantitative vein, Professors Robert Fogel and Stanley Engerman, for example, prominently took issue with a “liberal” historiography of slavery. Genovese regarded slavery as much a cultural institution as an economic one, and that while the master viewed himself as paternal, and thus responsible, he also had an interest in social subjugation that transcended solely economic exploitation. While not exactly, on that view, an institution of benevolence, slavery created circumstances in which the enslaved assumed certain agency, resisting the universalist authority of the master, especially through the assertion of religious autonomy.⁷⁵ Fogel and Engerman argued that masters had little incentive to destroy or impair the value of slave property through dangerously harsh discipline and punishment, much less starvation or malnourishment, because all that would do is lessen the value of their own property and the ability to extract value from it.⁷⁶ With such diminution, they would do little aside from debasing their own capacity to stay atop the social hierarchy of the South.⁷⁷ Against this historical and historiographical background Levy takes up the view of the enslaved as capitalized labor.

⁷³ See, e.g., GEORGE FITZHUGH, *CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS*, at ix (1857) (“My chief aim has been to shew, that Labor makes values, and Wit exploitates and accumulates them; and hence to deduce the conclusion that the unrestricted exploitation of so-called free society, is more oppressive to the laborer than domestic slavery.” (emphasis omitted)).

⁷⁴ See generally, e.g., ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (1963); Jane Dailey, *Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia*, 63 *J. S. HIST.* 53 (1997); THOMAS C. HOLT, *BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION* (1977).

⁷⁵ See EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 162 (1975).

⁷⁶ See generally ROBERT FOGEL & STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974).

⁷⁷ See *id.*

Taken in the narrow sense Levy intends, the understanding of the enslaved as instruments in which masters invested for pecuniary gain makes eminent sense. On that understanding, masters were little different than other investors. They needed confidence. They needed, therefore, a system of positive law, backstopped by a supportive culture, to create the confidence to commit capital for the long term. That the enslaved could be bought or sold was a given of the slave economy. As Levy noted earlier, however, how liquid—to use the modern term, which he adopts—the enslaved were, as an instrument of value creation, was another matter.⁷⁸ The Debt Recovery Act of the mid-eighteenth century, as mentioned, enhanced liquidity of slave property, enabling collateralization of that property.⁷⁹ The various economies of the South, contra Genovese, however, meant increasing exploitation. Cotton required labor nearly year-round. When cotton cultivation exhausted the ground, slave property could be sold as the cotton economy moved westward. The price of the enslaved, as with any commodity, became not local but functionally national (or at least Southern; not international because of the illegality of the trade and thus the greater difficulty in pricing).⁸⁰ Where cotton was not the most prominent part of the economy, and the enslaved were not as needed in the fields year-round, they could be, and were, rented out for their labor.⁸¹ In seeking to explain the evolution of the American economy, Levy must account for the differences in the economic systems of North and South. The systems depended on the different manner in which each imbued investors with confidence to invest. As for the South:

The best way to understand the U.S. slave economy is this way: riding the upswings and the downswings of the speculative credit cycle, white slave owners progressively squeezed every productivity gain possible out of the scarce resources of an organic economy, whether that meant extracting kinetic energy from the bodies of enslaved men and

⁷⁸ LEVY, *supra* note 8, at 161.

⁷⁹ PRIEST, *supra* note 40, at 74–80.

⁸⁰ See LEVY, *supra* note 8, at 156–62.

⁸¹ *Id.* at 161. Sarah Winsberg, a legal historian, has written an incisive paper on the law facilitating, and thus imparting confidence in, the lender's willingness to lend the enslaved. See generally Sarah Winsberg, Hiring the Enslaved: Custom, Bailment, and Slavery's Commercial Law (unpublished manuscript) (on file with author) (presented at the American Association of Law Schools Annual Meeting, January 2024).

women, colonizing the most ecologically fertile soils, or biologically innovating crop seeds.⁸²

“[S]oaring slave asset price[s]” notwithstanding, the “U.S. slave economy” was in for a fatal shock.⁸³ By 1865’s end that economy was no more. Here I have something of a quarrel with Levy’s phrasing, and perhaps his understanding. As he puts it, “Economically speaking, emancipation destroyed \$3 billion worth of enslaved property.”⁸⁴ Strictly speaking, that is the case if one understands the value of slave property to be solely the value of the slave as property to the owning master. In fact, however, that value, while severely altered and likely diminished, was not destroyed. Rather, emancipation transferred the value of the enslaved’s labor from the masters to the formerly enslaved, while simultaneously transforming the nature of the ownership of that labor. The enslaved could no longer be bodily bought and sold; their labor, and its value, now in their own hands could—theoretically—be equivalent to that of free labor elsewhere. Theoretically, of course, because as the Union troops left the South as Reconstruction waned, and the Southern political structure was recaptured by whites, what trappings of free labor had been introduced disappeared, with a vengeance. Much of Southern legal history after Reconstruction can be summed up as an attempt to rebuild restrictions on the freedman’s labor the better to replicate the enslaved’s role in the economy, but this time without even the patina of paternalism. Levy certainly knows and understands this cardinal truth.⁸⁵ The claim of the disappearance of \$3 billion in value must therefore be tempered. The value of slave property as a capital investment disappeared, but a portion of that value was the value of slave labor, apart from the value of the enslaved body as property. Without plumbing the literature on the modern understandings of “human capital,” capturing the value added by

⁸² LEVY, *supra* note 8, at 159.

⁸³ *Id.* at 159.

⁸⁴ *Id.* at 195. Levy makes a slightly different claim a few pages earlier when he notes, “In 1860 the value of black slaves exceeded the total value of U.S. industrial capital stock.” *Id.* at 189. My reservation is the same for this claim.

⁸⁵ See LEVY, *supra* note 8, at 206. When we speak of the legacy of slavery, and the harms of that legacy visited on contemporary African Americans, the legacy is probably more accurately embodied in the attempts to reimpose those restrictions than on slavery itself, in part because, unlike slavery, they could not be eliminated in one stroke. Indeed, the attempts to reimpose vicious restrictions, the fight against those restrictions, the innovations in restrictions that followed, the fight against the new restrictions, *ad infinitum*, embodied an energy loss that no doubt was its own drain on progress, economic and otherwise.

labor writ large to hard assets, i.e., property, is what valuing an ongoing concern means. What is certainly true, however, is that the South did itself no service, at least no economic service, in its attempt to rebuild on the foundations of the slave economy.

III. CAPITAL AND AMERICA

The United States of the postbellum period saw the realization of the greatest economy the planet had ever seen, the testing of regulatory legal technology in utterly novel circumstances, and a transformation of the guiding nature of religion. In this period, the democratic aspirations of the population encompassed in a growingly conscious manner the difficulties wrought by the transformation of an agricultural economy to an industrial economy. As with religion before, organizing human affairs in keeping with the afterlife, law became a, perhaps the, tool by which human welfare, of this life, not the future life, was to be addressed. Unsurprisingly, the nation and the federal government, not simply because of the Civil War, though that was no small part of the growing centrality of the nation-state, supplanted the states, though the change in focus was neither universal nor steady. It was, however, always controversial.

A. Legitimate Federal Action

Levy nicely synthesizes the many ways in which the federal government played unique and transformative roles in the period during and immediately after the Civil War. The creation via novel subsidies of transcontinental railroads, long and widely appreciated by historians, was but one of those roles.⁸⁶ Less appreciated, however, was the role the Civil War played in building the United States' capital markets. The need to borrow money funneled unprecedented amounts of capital, domestic but especially foreign, through New York and into projects generated out of Washington, D.C.⁸⁷ The organizational requirements of fielding a military across fronts stretching, ultimately, thousands of miles, especially if one includes naval blockades, created an entirely new cadre of men adept at adjusting to changing circumstances and communicating over great distances, coordinating intricate flows of men and materiel through newly built transportation networks, and ensuring that innovations in technology made themselves felt

⁸⁶ *See id.* at 189–90.

⁸⁷ *See id.* at 196, 201.

quickly where they might best be useful.⁸⁸ The better to ensure that this cadre of what would later be termed technocratic experts—the managerial class—brought their talents to bear in ways that befitted the traditions and aspirations of the democratic polity, Congress also passed the Morrill Act,⁸⁹ spanning the country with land-grant institutions of higher learning that deliberately combined technical and humane education.⁹⁰ The legislation passed to make these transformations happen, and the bureaucracies that implemented the legislation, transformed the role of the federal government permanently. Law’s channeling function, helping create the common good, sometimes by facilitating private actors and sometimes by defining the path to the common good, became more acceptably federal, augmenting the more traditional understanding that the function was that of the states.⁹¹

Levy’s emphasis is on the confidence-creating aspects of authority, especially at the federal level. Confidence’s most important aspect in the late nineteenth century was some assurance that the currency not be, to use the contemporary term, debased, or in twenty-first-century language, inflated away. This explains the tie to the gold standard.⁹² The issue for the capital markets, however, was more than a stable currency. The markets required something more, some way to bring dispersed liquid capital together and dispense the accumulated capital to the businesses that would in turn invest in illiquid (because long-term) projects, while simultaneously allowing capitalists to cash out investments when their preferences turned to liquidity. Neither the debt, nor certainly the equity, market was in the latter half of the nineteenth

⁸⁸ See *id.* at 198–99.

⁸⁹ Pub. L. No. 37-130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. § 301 et seq.).

⁹⁰ LEVY, *supra* note 8, at 198. Hurst makes much more of this effort than Levy. See HURST, *supra* note 55, at 79; see also NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 2–3 (summarizing Hurst).

⁹¹ See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 23:

The word “progressivism” does not do justice to the radicalness and range of reforms and causes . . . between Reconstruction and the New Deal: four new amendments to the Constitution, the invention of the public utility idea, modern antimonopoly, workers’ compensation and social insurance, the invention of the modern independent regulatory commission (the Interstate Commerce Commission, Federal Reserve Board, Federal Trade Commission, US Shipping Board, Federal Power Commission, Federal Radio Commission), and simply innumerable transformations in state and local public policy making.

⁹² See LEVY, *supra* note 8, at 209.

century what they are in the first quarter of the twenty-first. Corporations, creatures of state law, borrowed money (bank loans and corporate bonds) and issued equity (common and preferred stock) to finance their businesses. Once operating they generated surpluses (profits, which, hopefully, augmented continuing dips into the capital markets) to continue and expand their work with the remit of some to investors via dividends. These securities traded on exchanges and through informal networks. The securities markets were not, however, much good at building investor confidence. Rather, they were subject to manipulations by those who controlled both the corporations and those involved in the brokering of securities.⁹³ These manipulations, in part, caused investors to pull money out of the securities markets, precipitating crises which had reverberations in the day-to-day economy. There were few checks on manipulation. Financial journalism was in its infancy.⁹⁴ The listing requirements for securities to trade on exchanges were not robust and when they were somewhat strong, were often suspended.⁹⁵ Business analysts, such as Dun and Bradstreet, relied on information about the character of owners and managers, in part because corporate financial data was absent or opaque. The analytic tools of modern financial theory were years from being born and what analysis took place was backward-looking, not conceptually based on discounted future cash flow.⁹⁶

⁹³ *See id.* at 215–23.

⁹⁴ To be sure, business and financial reporting had long existed, but they tended to specialize or devolve to parochial interests. *See* HENRIETTA M. LARSON, GUIDE TO BUSINESS HISTORY: MATERIALS FOR THE STUDY OF AMERICAN BUSINESS HISTORY AND SUGGESTIONS FOR THEIR USE 857–58 (1948) (“[B]usiness periodicals and newspapers . . . had their beginning in late mercantile capitalism and grew to considerable volume under early industrial capitalism. The tendency since the birth of the industrial capitalist press has been in the direction of specialization.”). Modern general reporting came later. For example, Dow Jones—which later published the Wall Street Journal and created the first modern market indices—was not founded until 1882. *See About, DOW JONES*, <https://perma.cc/TU6P-WY9S>.

⁹⁵ The NYSE publishes its listing requirements. They did not really exist before the Civil War. *See* ROBERT SOBEL, THE BIG BOARD: A HISTORY OF THE NEW YORK STOCK MARKET 85 (2000); Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUD. 113, 127–28 (1998). *See also* James Willard HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 91 (2015) (discussing evolution of requirements in the 19th century). For non-NYSE traded instruments, *see* ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 66 (1976) (discussing Section 41, other exchanges, and over-the-counter securities).

⁹⁶ *See generally* PETER L. BERNSTEIN, CAPITAL IDEAS: THE IMPROBABLE ORIGINS OF MODERN WALL STREET (2005).

B. Legitimate Economic Regulation

Indeed, even concepts of what constituted corporate corruption, such as “watered stock,” were rooted in analogies to physical beings, not the future expected returns of the business. Watered stock, like animals given a lot to drink before being weighed for sale on a per-pound basis, was common stock issued for less than par value, meaning less than the minimum cash contribution necessary to buy the stock when it was issued.⁹⁷ A corporation could “water” its stock by accepting less cash for shares than required, issuing shares for overvalued property, issuing shares for the promise to pay the necessary cash later, issuing shares for past or future services, and the like. Each share’s par value was supposed to be combined for purposes of creating what amounted to a capital reserve fund within the corporation, “funded capital,” that served to reassure creditors that the corporation had at least some capital available for them should the business find itself in distress.⁹⁸ That, at least, was the theory. Investors, of course, knew that the market price of securities would fluctuate—for example, debt declined in value as the confidence that it could be repaid shrank; preferred stock fell in value as confidence that the corporation’s directors would declare dividends as promised declined; and common shares rose in value as the business prospered and the possibility increased that the directors would remit cash in the form of (hopefully ever increasing in size) dividends, and thus the confidence that that might happen drove prices up (or down, if confidence waned). Thus, the structure of basic corporate law was designed to create a baseline minimum of confidence in the enterprise.

In the everyday interactions among citizens and businesses, however, finance was one, largely minor, consideration, unless market instability became economic instability. More important were their wages and working conditions; the quality of goods they bought, especially those literally consumed; the prices they were charged for transportation and storage of raw materials, intermediate, and finished goods; the availability, cost, and safety of their shelter; and the many other aspects of daily life. In many cases, of course, they lacked the ability to police as consumers the markets for those goods and services; how, after all, should the

⁹⁷ LEVY, *supra* note 8, at 216.

⁹⁸ *Id.* at 313. Levy’s account is too abbreviated. He assumes too much about what most of his readers will know about corporations and business finance, at least if my several decades teaching basic contracts and corporate law is any guide.

average consumer know that the milk she was consuming had been watered and adulterated, much less assess the meliorative capacity of the medicines being purchased, and so much more. As Novak detailed in his prior work, *The People's Welfare*,⁹⁹ the police power—the power of states to regulate health, safety, and morals—was quite literally key to a healthy polity.¹⁰⁰

C. Legitimizing Theory

A healthy polity was much more than a physically healthy polity, though surely that was its minimum. Friedman, Levy, and Novak all recognize that the United States wanted, or at least many in the country wanted, more. Friedman, admittedly more concerned with the ways in which changes in religious thought changed attitudes such that the energies of capitalism might be released, nonetheless is cognizant of religion's channeling and generative role in thought and policy in the late nineteenth century and beyond. The influential writings of various Protestant theologians in the early half of the century attempted to amalgamate a precise, indeed scientific, understanding of religion to the political economy. Otherwise dogmatically diverse theologians "saw political economy as an application of Newtonian science, taking for granted that scientific laws and principles are what they are because God made them so."¹⁰¹ The postbellum prosperity of the country took applied science, a matter of earthly concern, a step further. That prosperity also animated a concern for social welfare, manifested not simply in the individual, but the body politic. Congregationalist preacher Henry Ward Beecher "made clear that . . . newly developing wealth was good for both individuals and society."¹⁰² Turning earlier theology completely on its head, rather than simply laying the legitimating groundwork for the Scottish Enlightenment, other, later theologians applauded wealth seeking as socially beneficial.¹⁰³ What Friedman terms the "Competing Gospels," the Gospel of Wealth and the Social Gospel, energized an "Economics for Social Improvement."¹⁰⁴ Religion and economy would move in tandem, influencing human behavior for

⁹⁹ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LIFE & REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

¹⁰⁰ *See id.* at 14.

¹⁰¹ FRIEDMAN, *supra* note 4, at 257.

¹⁰² *Id.* at 292.

¹⁰³ *See id.* at 295–97.

¹⁰⁴ *Id.* at 311.

the better. That “behavior was subject to influence from the environment in which people lived, above all from their material environment and the legal and social institutions that societies put in place.”¹⁰⁵ The American Economic Association, founded in 1885,¹⁰⁶ reflected the views of its key leaders, notably economists Richard Ely and John Bates Clark, the latter still famous for the award given regularly to the most promising young academic economist.¹⁰⁷ Each had a powerful belief not simply in wealth creation, but in wealth creation with a social purpose.¹⁰⁸ They sought to influence social welfare through attention to the material environment and to the legal and social institutions necessary for social purpose.

In that, of course, they stood with those who sought to use the police power not simply to staunch harm, but to build a better society; not simply to employ the negative functions of law, but to use its positive and creative, especially institutionally creative, functions. Levy is not inattentive to these aspirations, but they are not the core of his concern with the creation of confidence for investment. The legal regime certainly facilitated confidence in some ways, creating the richer economy extolled by the theologians. The capacity to capitalize subsoil rights,¹⁰⁹ the facilitation of agricultural cooperatives,¹¹⁰ the democratization of stock ownership,¹¹¹ the personification of the business corporation,¹¹² and the creation of trade associations¹¹³ are a few of the examples he gives. As the economy moved away from agriculture to industry, however, the ideal of independence through property ownership became problematic.¹¹⁴ As households became dependent not on their own land but on income from breadwinners, they became more vulnerable.¹¹⁵ Their vulnerability, in turn, threatened capitalist confidence as they tried

¹⁰⁵ *Id.* at 317.

¹⁰⁶ *About the AEA*, AM. ECON. ASS'N, <https://perma.cc/E3NR-8Q4Z>.

¹⁰⁷ *John Bates Clark Medal*, AM. ECON. ASS'N, <https://perma.cc/4EGT-RJXU>.

¹⁰⁸ See FRIEDMAN, *supra* note 4, at 311 (quoting from John B. Clark and Richard T. Ely in an epigraph).

¹⁰⁹ See LEVY, *supra* note 8, at 251.

¹¹⁰ See *id.* at 303, 308. That such cooperatives had a decidedly volatile internal life does not mean that they were not intended as confidence-creating institutions. See VICTORIA SAKER WOESTE, *THE FARMER'S BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865–1945*, at 6, 52 (1998).

¹¹¹ See LEVY, *supra* note 8, at 318.

¹¹² See *id.* at 320.

¹¹³ See *id.* at 369.

¹¹⁴ See *id.* at 271–73.

¹¹⁵ See *id.* at 289.

to organize, sought stability in their own lives, and attempted to obtain more of the wealth being created by industrialization.¹¹⁶

By the end of the nineteenth and into the beginning of the twentieth century, the social and economic changes Levy notes raised concerns about the very shape of society. They were concerns not just of the religiously inspired economists Friedman discusses.¹¹⁷ They were also the concerns of a heterodox group of innovative, socially conscious thinkers, fully cognizant of the wealth that had been and was being created. They aspired to an expansive and novel understanding of governmental action, one profoundly democratic not simply in form and processes, but in substance.¹¹⁸ Progressive (in the early twenty-first-century sense), they sought a decidedly American, pragmatic understanding of the state. Novak begins his inquiry with them, rejecting a historiography centered on the French, and especially the German, theorists of bureaucracy.¹¹⁹ He wants to direct our attention not to traditional understandings of U.S. law in society but “to the monumental impact of the rise of modern *public law* in American sociolegal development.”¹²⁰ His claim is that “the public law categories of citizenship, police power, public utility, social legislation, and administrative law” are key to the “modern democratic state.”¹²¹

Novak is famous for lists: lists of laws, actions, agencies, and literally whatever illuminates his claims.¹²² By sheer length they prove, overcoming objections. His lists of thinkers and actors in the creation of the modern democratic state are similarly overpowering.¹²³ To address every thinker and category, much less every list, that Novak elucidates would not be of much utility. For Novak, the modern democratic state is fundamentally one in which governmental mechanisms, while grounded in traditional democratic politics, are not limited to traditional forms. His “aim is to chart the rise and significance of the lasting mechanisms and technologies of

¹¹⁶ See LEVY, *supra* note 8, at 273–79.

¹¹⁷ But those economists certainly mattered. See, e.g., NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 188.

¹¹⁸ See *id.* at 2; NOVAK, *THE PEOPLE'S WELFARE*, *supra* note 10, at 21–22.

¹¹⁹ See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 8.

¹²⁰ *Id.* at 14 (emphasis in original).

¹²¹ *Id.* at 15.

¹²² See, e.g., *id.* at 131–32. Of the technique he is entirely conscious. See *id.* at 2.

¹²³ NOVAK, *NEW DEMOCRACY*, *supra* note 9, 22–24.

law, state, and policy that transformed democratic governance” between the end of the Civil War and the New Deal,¹²⁴ largely coinciding with Levy’s Age of Capital. For Novak, the most prominent thinker is the U.S. philosopher John Dewey; the most prominent creators of the modern democratic state, the University of Chicago and Harvard University law professors Ernst Freund,¹²⁵ Felix Frankfurter,¹²⁶ and Sophonisba Breckenridge.¹²⁷ Dewey’s formulation of the need for a “democracy of wealth,”¹²⁸ Freund’s focus on the police power inside administrative government, Frankfurter’s conception of the public utility, and Breckenridge’s understanding of the administration of social services, undergird the ambitions and structure of modern democratic governance.¹²⁹ For purposes of understanding the democratic aspirations in a capitalist economy, however, the administrative state is central.

To play a role in democratic governance, and to be its beneficiary, one had to be a citizen. Remarkably loose in conception and definition until the eve of the Civil War, when citizenship was defined in exclusionary rather than inclusionary terms in the Supreme Court’s incendiary ruling in *Dred Scott v. Sandford*,¹³⁰ citizenship became by virtue of the War and the War’s constitutional amendments a kind of entitlement to protection and participation in the polity,¹³¹ though for some time and for many that entitlement was a bare toehold.

D. Legitimizing Administration as Democratic

What protection and participation meant, of course, was up for grabs.¹³² What fostering the good meant was yet a step farther.

¹²⁴ *Id.* at 22–23.

¹²⁵ Born in the United States but educated at Heidelberg in Germany and then in the United States at Columbia University. See *Guide to the Ernst Freund Papers 1882–1934*, UNIV. OF CHI. LIBR., <https://perma.cc/62UA-Y9B9>.

¹²⁶ Austrian born but decidedly U.S. educated. See *Felix Frankfurter*, OYEZ, <https://perma.cc/7DLA-DBB2>.

¹²⁷ Activist and later University of Chicago professor; also decidedly U.S. educated. See *Sophonisba Breckenridge*, UNIV. OF CHI. CROWN FAM. SCH. OF SOC. WORK, POLY & PRAC., <https://perma.cc/DX57-PCBN>. Indeed, her time as a student at the University of Chicago, including as the law school’s first female graduate, coincided with Freund’s time on the faculty, a factoid unmentioned by Novak. See *id.*

¹²⁸ NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 21.

¹²⁹ See *id.* at 13.

¹³⁰ 60 U.S. 393 (1857).

¹³¹ See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 46–47, 66–67.

¹³² At the risk of introducing yet another volume of great heft, the recent book by Professor Daniel Rodriguez is enormously instructive. In his book, he notes that “the police

Conceptually, however, the new understanding was different, radically so. Referring to Smith's work, among others, Novak writes, "What were originally liberating ideas honed in historic battles with despotic and aristocratic regimes were distorting into a caricature of liberty and freedom as something like the bleak obligation to be left alone amid a fiercely competitive social and economic struggle for 'the survival of the fittest.'"¹³³ Combatting this caricature was for Dewey and his predecessors and progenitors the first task. Among them was philosopher T. H. Green, who conceived of freedom and liberty, in Novak's words, as "the power and ability to actually achieve something—to improve and to develop."¹³⁴ Improvement and development meant building and regulating; Hurst provides Novak with a list of statutes, encompassing a move from common law—reacting to the facts of controversies before courts—to prospective legislation in the following areas: "[g]overnment organization"; "[s]chools"; "[r]oads"; [t]axation"; "[p]ublic health"; "[c]orporate organization," including "[p]ublic utilities" and "[a]ntitrust law"; and "[s]ecurities regulation," including "[c]ollective bargaining" and "[i]nsurance regulation."¹³⁵ The police power in its legislative manifestation was thus enormously broad.

More to the point, however, for purposes of democratizing the administrative state, is that in both process and substance these changes were democratic, albeit at the state level. But the administrative vehicles created at the state level of necessity embodied administrative discretion. The state legislatively created and financed schools, and then they largely ran themselves. The state financed the construction of roads (and canals) and then they

power was (and still is) the fulcrum of the state's regulatory authority, and much of ordinary regulation of various objects and situations emerged from the police power, seen as a central element of a sovereign government under the rule of law." DANIEL B. RODRIGUEZ, *GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES* 1 (2024). It embodied the channeling function of law, creating institutions for the common good. Noting that administrative agencies at the state level often "presaged" those at the national level, "we saw meaningful regulation undertaken by administrative agencies, and the emergence of a significant amount of administrative law." *Id.* at 86. From the use of eminent domain taking land for public purposes, to the establishment of schools and mandating attendance, to quarantining the sick and mandating vaccination, at the state and local level the law was being used in public, universalist, and positive—not merely negative—ways by democratic governments.

¹³³ NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 77–78.

¹³⁴ *Id.* at 81.

¹³⁵ *Id.* at 90 (quoting JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 138–39 (1977)). To Rodriguez's point, schools, roads, and public health were the province of state and local authorities, as was corporate organization (save the two national banks of earlier eras) and its subcategories (at least until the Sherman Act). So too was securities regulation (until the 1930s) and its subcategories—indeed, most insurance regulation still is.

largely were run by their supervisors. Whether hugely successful (think the Erie Canal) or less so (think the Ohio and other mid-western state canal systems),¹³⁶ they were not run by legislatures. They were run by administrators, who, of necessity, exercised managerial discretion. To be sure, the states also passed a myriad of regulations that were simply enforced by authorized agents, such as those banning gaming, drunkenness, and the like.¹³⁷ But even there, simply making something illegal did not mean that all illegal conduct was squashed by authority. The enforcers, as always with police and prosecutors, exercised discretion, a discretion moreover always subject to the resources provided by the legislature, often a limiting factor on their power. That a state had plenary authority to regulate on health, safety, and morals did not mean that it had no choice in what, and how, to regulate. Nor did the existence of a statutory mandate compel universal enforcement. Thus, at least at the state level, the distinction between legitimate regulatory authority and legitimate administrative authority seems not to have been much of a concern.¹³⁸

Democratic authority could therefore be legitimate even when discretionary. Could democratic authority also be redistributive? The answer, of course, is yes, at both the theoretical and practical levels. Return momentarily to the list Novak quotes from. Take the simplest example, roads. Even if one puts aside the use of eminent domain, which is inherently redistributive, the very placement of the road benefits some constituents more than others, even if all constituents benefit. Redistribution is inherent in all but the most limited, negative actions of the state, protection of the nation, and perhaps not even there is it entirely absent. That was Freund's starting point. If protection was an act of promoting public welfare, then so should be "the positive promotion of public welfare through 'internal public policy'" with purely utilitarian objectives, whether social or economic.¹³⁹ In Freund's view, the breadth of what was actually so regulated was enormous, the potential for positive future regulation the more so.¹⁴⁰

¹³⁶ See generally HARRY SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861* (1969).

¹³⁷ See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 92–93.

¹³⁸ The regulation could not, however, be "arbitrary" or "unreasonable." RODRIGUEZ, *supra* note 132, at 4. The regulation or exercise of authority could be challenged in state courts on either, or both, of those bases. See *id.* at 95.

¹³⁹ NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 97 (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 5–6 (1904)).

¹⁴⁰ See *id.* at 99.

The need for novel regulation, in the eyes of reformers, was not simply that the common law was no longer adequate. The common law is also, after all, a creature of the states, not the federal government. The nature of the corporate economy made not just common law controls, but control at the state level, inadequate.¹⁴¹ Nowhere was this more true than in dealing with the first great class of corporations, the railroads. Even if a state had rate-setting authority, and even if that authority were purely administrative, and within the state it was completely legitimate, the power of the state stopped at its borders. The railroad did not.¹⁴² A railroad with an extensive network could also simply bypass local regulation in many cases by sending trains around instead of across state lines. Inefficient perhaps, compared to the natural monopoly route, but expedient, and even perhaps productive.¹⁴³ But industrial corporations proved equally difficult to control, at least in some respects. Where monopoly was concerned, local prosecution could easily be evaded by reincorporation in a jurisdiction in which corporate combination was not discouraged. The list of the nationalizing concerns could readily be greatly extended. The issue, however, was not that the concerns might transcend state boundaries. The issue was federal authority itself.

E. Legitimizing Federal Administration

The conceit of U.S. federalism is that plenary lawmaking authority lies with the states. The federal government is a government of limited authority, empowered by the Constitution to deal with certain matters, but not others. It does not have plenary authority over economic matters, for example, but is limited by the language of the Commerce Clause,¹⁴⁴ which allows Congress to pass laws “[t]o regulate Commerce . . . among the several States.”¹⁴⁵ What the power entails has, of course, been subject to, mildly put, changing interpretation. What all agree on, however, is that Article I limits congressional authority. Thus, whatever equivalent of the police power in economic matters exists at the federal level is limited. Any exercise of that authority is subject to challenge, with resolution of the challenge lying in the federal

¹⁴¹ LEVY, *supra* note 8, at 320, 600; NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 5–6.

¹⁴² See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 125–35.

¹⁴³ For the most accessible account of this phenomenon, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 131–68 (1991).

¹⁴⁴ The U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁵ *Id.*

courts. Such limits are absent at the state level. Complicating matters at the federal level is another hurdle. Absent plenary authority, Congress is also not free to define how it can exercise its own authority; under Article I, only Congress is allowed to exercise “legislative Powers.”¹⁴⁶ Without indulging in a lengthy exegesis of the nondelegation doctrine, the courts have held that what legislative powers Congress has can be exercised only by Congress.¹⁴⁷ The extent of the administrative discretion of any federal body that Congress creates to enforce its legislation is thus subject to both the possibility of a court ruling that Congress lacked the authority to pass the empowering legislation in the first place and then, in the second place, that Congress handed over too much discretion to enforce (by making rules to specify how, when, and where enforcers may act) to that agency. Both of these restrictions have, at some level, the underlying rationale that the exercise of federal authority should be legitimate—legitimate in the sense that only the democratic lawmaking bodies may make law, and then only in areas in which the power is affirmatively granted, the better to keep in check tyranny.

A moment’s observation is all that is necessary to realize how these restrictions might thwart the ambitions of creating a more democratic national government, empowered to act positively as well as negatively. The federal government may, of course, do much by indirection that is not allowed directly. It can spend money.¹⁴⁸ It can spend money and justify the spending by linking spending rationales to legitimate exercises of federal authority. Novak notes, for example, the enormous expansion of federal authority during the First World War under the guise of the military emergency.¹⁴⁹ Perhaps a more telling example, however, is one he did not use. The original authorization to build interstate highways was titled, after all, the National Interstate and Defense Highways Act,¹⁵⁰ born of President Dwight Eisenhower’s anxiety at trying to move men and materiel across the United States manifested by an attempt to do just that before the Second World War, when he was, after all, an

¹⁴⁶ *Id.* art. I, § 1.

¹⁴⁷ *See, e.g.,* *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

¹⁴⁸ *See* NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 100.

¹⁴⁹ *See id.* at 102.

¹⁵⁰ Pub. L. No. 84-627, 70 Stat. 374 (1956) (codified as amended in scattered sections of the 23 U.S.C.). Interestingly, though in passing, Levy does note the justification for the interstates. LEVY, *supra* note 8, at 497.

officer in the Army.¹⁵¹ Even if one could justify interstate road building under the Commerce Clause (and national roads preexisted the interstates), interstate internal improvements had not always been without political suspicion, the same political suspicion that gave rise to the constitutional restrictions on congressional authority in the first place.

Novak's discussion of the rise and fall of the public utility is instructive for industrial policy formation. A public utility is simply a business that is owned by a governmental authority. Usually, such ownership would have been justified on one of several grounds, chief among them being that a natural monopoly should be in the public hands. Railway terminals, canals, and a long list of other businesses could be so justified. Similarly, businesses that were key to community survival or prosperity might warrant public ownership. Water supply, power supply, subways, and more, for example, fit the bill. Indeed, many, as should be obvious, could be doubly justified. Always, however, the public interest was the general justification.¹⁵² While the power of competition to meet the needs of the public, the original Smithian insight, was subject to more than a little reservation,¹⁵³ the claim also arose that regulation was superior to competition, in part because it avoided competition's "wastes."¹⁵⁴ The examples of government-owned businesses that survive go unnoticed in many ways because they are not regarded as businesses in the first place. For example, the United States Postal Service and various other federal entities (such as the Pension Benefit Guarantee Corporation, essentially an insurance company) surely qualify as businesses. They may not be all that successful as business enterprises, and indeed may exist solely because their private precursors failed (Amtrak being an example¹⁵⁵), but they are businesses nonetheless. These businesses are subsidized to be sure, but then again, so are many "purely" private businesses (such as the airlines after 9/11). Such enterprises were, if not ubiquitous, then certainly far more common at the local level than they are today, especially where the provision of utilities is concerned. What has been lost is the faith

¹⁵¹ *1919 Transcontinental Motor Convoy*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBR., MUSEUM & BOYHOOD HOME, <https://perma.cc/L5CA-BXA9>.

¹⁵² See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 111.

¹⁵³ See *id.* at 126, 191.

¹⁵⁴ *Id.* at 109 (quoting 1 RICHARD T. ELY, REPORT OF THE ORGANIZATION OF THE AMERICAN ECONOMIC ASSOCIATION 16 (1887)); see *id.* at 180–82, 212, 215.

¹⁵⁵ *Amtrak*, BRITANNICA MONEY (July 22, 2024), <https://perma.cc/ARP9-M55Z>.

that these businesses will avoid the waste of competition. The social control of business, so important to democratic theorists and activists concerned about exploitation of the public early in the twentieth century,¹⁵⁶ has apparently been replaced by the specter of an even more wasteful government, undisciplined by either market or political constraints. Perhaps, too, the public imagination is no longer excited by public heroes, preferring instead the frisson generated by entrepreneurs like founders Steve Jobs or Elon Musk. And, while the faith in managerial elite, at its height in the decade and a half after the Second World War,¹⁵⁷ has plummeted, so has faith in government, especially at the federal level.¹⁵⁸

For Levy, the era of “Control,” from the New Deal through the election of President Ronald Reagan, exemplified the outer limits of the regulatory and public ambitions of the theorists and activists seeking a more democratic political economy that Novak identifies and explains. What followed was, on neither account nor in the eyes of Friedman, much good. That said, any historian ought to beware analyses of contemporary or near contemporary phenomena.¹⁵⁹ That is not what historians are good at. Certainly, historians pick their topics based on their concerns, and it would be passing strange if economic and legal historians concerned with the political economy did not write with an eye, perhaps jaundiced, but gimlet-eyed nonetheless, to the present. Informed, indeed insightful, often brilliant, they can help. But of prescription, perhaps the legal audience might be a tad wary. Wary, but not dismissive.

CONCLUSION

Friedman, Levy, and Novak share aspirations in common. None eschew a wealthy U.S. populace. Each aspire to a greater community. Friedman, quoting his late colleague Professor Kenneth Arrow, notes, “a great deal of economic life depends for its viability on a

¹⁵⁶ See NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 185; LEVY, *supra* note 8, at 411.

¹⁵⁷ See, e.g., LEVY, *supra* note 8, at 473 (comparing managerial autonomy to “meddling stockholders”).

¹⁵⁸ *Public Trust in Government: 1958–2024*, PEW RSCH. CTR. (June 24, 2024), <https://perma.cc/4YDJ-923W>.

¹⁵⁹ For that reason, I have largely confined myself to their historical work. Conscious as I am that I am also a law professor, I will, despite that professional reservation, comment on their contemporary analyses and implicit aspirations.

certain degree of ethical commitment. Purely selfish behavior of individuals is really incompatible with any kind of economic life.”¹⁶⁰ Levy laments the egalitarian left for its failure of imagination.¹⁶¹ Novak, wearing his heart on his sleeve, obviously wants to revivify “[a] distinctly modern notion of a *public service state* . . . self-consciously oriented around the significant new obligations of tackling large-scale public problems and satisfying ever-expanding socio-economic needs.”¹⁶²

When the administrative state that has characterized modern U.S. regulation is itself up for grabs,¹⁶³ perhaps attention to why the country’s government was formulated in its extraordinarily odd way is worth some concerted attention. Friedman, Levy, and Novak believe that we ought to attend to that question. So do I. Not everything is accomplished by direct attention to a central goal. The unintended consequences of our actions may exceed the importance of the intended consequences. Friedman emphasizes the virtue paradox: the more imposed the less it manifests itself as a matter of public welfare. Levy emphasizes the confidence paradox, the more the tales we tell ourselves to bolster our forward-looking beliefs, the more we render ourselves at risk

¹⁶⁰ FRIEDMAN, *supra* note 4, at 408 (quotation marks omitted) (quoting Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL’Y 303, 314 (1973)).

¹⁶¹ LEVY, *supra* note 8, at 718.

¹⁶² NOVAK, *NEW DEMOCRACY*, *supra* note 9, at 225 (emphasis in original).

¹⁶³ While up-for-grabs may be a bit dramatic, the history of the administrative state suggests that the fear, if not the reality, of upending the federal administrative apparatus is palpable. After the advent of the major questions doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), many feared what would follow. *See generally*, e.g., Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 U. VA. L. REV. 1009 (2023). Similarly, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), sparked concerns about the future of the administrative state. *See* Noah Rosenblum, *The Supreme Court Won’t Stop Dismantling the Government’s Power*, THE ATLANTIC (June 28, 2024), <https://www.theatlantic.com/ideas/archive/2024/06/supreme-court-jarkesy-v-sec-loper-bright-chevron-deference/678842/>. While it may be a bit soon to judge exactly what will happen, the historical faith in the egalitarian aspirations of the administrative state, the ones Novak so clearly elucidated, have been put aside. Procedural concerns about the administrative apparatus are, instead, paramount, and they have substantive repercussions. That much is apparent. While seemingly acknowledging the legitimacy of the regulatory state, *Loper Bright* certainly eliminates judicial “deference” to agency understanding of relevant empowering law, while leaving open how useful the agency’s judgment might be. *See Loper Bright*, 144 S. Ct. at 2273 (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . Careful attention to the judgment of the Executive Branch may help inform that inquiry.”). More troublesome may be *Jarkesy*. *See Jarkesy*, 144 S. Ct. at 2173–74 (Sotomayor, J., dissenting) (discussing huge disruption to enforcement where administrative proceedings are unavailable or compromised).

for believing those tales. Novak emphasizes the public spirit paradox, the more we seek to embody public spirit in our governmental institutions, the more we understand that the quest has no end.

Return to 1774. The revolutionary fire was about to be set. The colonists, the richest and most equal population on earth—save the enslaved, a glaring stain on that equality—were about to try to sever the bonds with the country that gave them their aspirations, that paradoxically had secured both their wealth and their equality. In doing so, they took an economic dive. That they certainly did not intend. They set themselves on the course for a later war as modern and mechanized as any in the century, if not necessarily as bloody as elsewhere in the world, by burying the issue that most divided them. That they certainly did not intend. In the interregnum they tried to democratize organized access to the capital markets, setting in motion a revolution in business organization facilitating the creation of wealth that once again put Americans at the top of the international wealth hierarchy while domestically creating a social hierarchy of nearly unprecedented magnitude. That they certainly did not intend. And so on.

In 1774, white male Americans were equal and wealthy. If good fortune and equality are our aims, perhaps attention to unintended consequences should matter. Imbued with a twenty-first-century motivation to expand the beneficiaries of that equality and wealth, yet being as attentive to unintended consequences to our motivations, perhaps 1774 should be our model.