

**NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE.** By *William J. Novak*. Cambridge: Harvard University Press. 2022. Pp. 1, 271. \$40.50.

Reviewed by *James T. Kloppenberg*\*

Whenever a Democrat has held the presidency since World War II, comparisons with Franklin Delano Roosevelt inevitably percolate from pundits to the public. Roosevelt is almost universally credited with having invented an active role for the U.S. federal government. His New Deal brought the state into Americans' lives, for better (say Democrats) or worse (say Republicans), to a degree unprecedented in our nation's history. Even though FDR's own initial misgivings about many of those steps complicate the standard narrative, he is thought to have created the modern American state.

Not so fast, argues William Novak in his splendid *New Democracy*.<sup>1</sup> Skillfully and persuasively, Novak ties the administrative state and the New Deal's federal policies—and the legal framework that made them possible—to the decades that preceded the Great Depression. Without the intellectual revolutions of the late nineteenth and early twentieth century and the pioneering steps taken by progressive reformers and judicial activists, Novak shows, the New Deal would have lacked the imaginative horizon and the administrative capacity to construct the new regime of public law, the regulatory apparatus, and the schemes of social provision that made possible the shift in U.S. governance during FDR's presidency.

In his path-breaking first book, *The People's Welfare*,<sup>2</sup> Novak challenged prevailing understandings of early-nineteenth-century America as a land of laissez-faire by showing the pervasive presence of regulation in local and state government. In *New Democracy*, he demonstrates the revolution in American governance from 1866 to 1932 that predated FDR's New Deal. This book is welcome for many reasons. In recent

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1. Charles F. and Edith J. Clyne Professor of Law, University of Michigan Law School.

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

decades Novak has published a number of articles debunking what he called, in *The American Historical Review*, “The Myth of the Weak American State.”<sup>3</sup> Novak has hardly been alone in calling attention to the tradition of active government in U.S. history. Steven Conn’s essay collection *To Promote the General Welfare*<sup>4</sup> is one example; *Boundaries of the State in US History*, co-edited by Novak, James T. Sparrow, and Stephen W. Sawyer is another.<sup>5</sup> Nikolas Bowie’s 2018 Harvard Ph.D. dissertation, “Corporate America: A History of Corporate Statehood Since 1629,” and the law review articles it has spawned, is yet another.<sup>6</sup>

Novak’s *New Democracy* raises the stakes. He aims not just to highlight aspects of the multidimensional and centuries-long existence and gradual expansion of the nation’s commitment to regulation in the public interest. Instead, he demonstrates the intellectual, legal, and political changes that permanently altered governance in the United States. If the late eighteenth-century founding saw the creation of American democracy, Novak insists that these years constitute nothing less than our second national revolution—“a decisive reconfiguration of the relationship between state, law, economy, and society in the United States” (p. 1). Whereas scholars have traditionally located that transformation in the New Deal itself, Novak insists it occurred in the decades leading up to FDR’s election. He makes a convincing case.

Novak skillfully weaves together legal history with the history of ideas, politics, and society. Although the notion that principles of law can be extracted from the cultures in which law is embedded has always been a preposterous fiction, plenty of legal scholars—even today—pretend that one can derive timeless universal maxims from a variety of sources, either economics, psychology, biology, or those phantasmagorical creatures of the post-WWII era, “originalism” and “rational choice,” or today’s “textualism”

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3. William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008).

4. TO PROMOTE THE GENERAL WELFARE: THE CASE FOR BIG GOVERNMENT (Steven Conn ed., 2012).

5. BOUNDARIES OF THE STATE IN US HISTORY (James T. Sparrow, William J. Novak & Stephen W. Sawyer eds., 2015).

6. Nikolas Bowie, *Corporate America: A History of Corporate Statehood Since 1629* (May 2018) (Ph.D. dissertation, Harvard University), <https://dash.harvard.edu/bitstream/handle/1/41127189/BOWIE-DISSERTATION-2018.pdf?sequence=1&isAllowed=y> [<https://perma.cc/7MMD-YKG7>].

and its insistence on the “plain meaning” of statutes. Instead, as Oliver Wendell Holmes, Jr., put it as early as 1881, “The life of the law has not been logic: it has been experience.”<sup>7</sup> As Novak’s evidence makes clear, judicial decisions, although sometimes treated as if they were deduced from abstract principles, instead reflect nothing more grandiose than what Holmes called the “felt necessities of the time.”<sup>8</sup> As philosophical pragmatists and the legal realists they inspired have long insisted, law is the product of economic, social, political, and intellectual warfare. That is why the launching of this journal is important. Too often American law reviews reflect—and for that reason concentrate attention on—ways of thinking about the law that are oblivious to the indispensability of historical context—and therefore all but blind to reality. Novak’s *New Democracy* is a powerful antidote.

In chapters dense with evidence and sophisticated argumentation, Novak convincingly demonstrates that the U.S. democratic state not only emerged from practices that were rooted much more deeply in the American experience than the fairy tale still told by champions of *laissez-faire*, but he also shows that it matured as a force at least as powerful as, and far more committed to the public good than, the authoritarian states to which it has often been contrasted. Law schools today continue to harbor professors—and train students—committed to ideas inconsistent with the basic principles and practices of democracy. By contrast, the Progressive reformers Novak examines in *New Democracy* devoted their lives to establishing a democratic state capable of acting effectively to secure autonomy and equality for all Americans, not merely those who benefit economically from an ostensibly “free-market” system stacked in favor of those lucky enough to possess property and power (p. 191). Unlike approaches that treat contract, property, and tort as the “central building blocks” (p. 15) of American law (and the centerpieces of legal education), Novak focuses on aspects of public law, including police power, public utility, social legislation, antimonopoly, and administration. Thanks to the efforts of democratic thinkers and activists such as John Dewey, Jane

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7. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications 1991) (1881).

8. *Id.*

Addams, W. E. B. Du Bois, Louis Brandeis, Sophonisba Breckinridge, Florence Kelley, Ernst Freund, Frank Goodnow, Roscoe Pound, Walter Weyl, and dozens of others examined in *New Democracy*, public law and social provision were changing dramatically before FDR entered the White House.

A brief review cannot do justice to the richness of Novak's analysis. Each of his six substantive chapters stands on a mountain of evidence compiled from social, political, economic, and legal treatises, court cases, and legislation to demonstrate the depth and breadth of the transformation that occurred from the end of the Civil War to FDR's election. Novak understands that the new American state not only pioneered new forms of necessary economic regulation and social provision, but it also more effectively shut out Black Americans, Chinese immigrants, Indigenous People, and all those deemed unworthy of U.S. citizenship. Enhanced state power could reinforce restrictions as well as open doors. During these years, however, many Americans came to share Jane Addams's judgment that the best cure for the problems of democracy is more democracy. They also came to understand that democracy is much more than a set of institutions. It is instead, as John Dewey put it, "a way of life."<sup>9</sup>

I have a dog in this fight. In my first book *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920*, I argued that new ideas about epistemology, ethics, and democracy transformed ideas and politics on both sides of the Atlantic.<sup>10</sup> Influential thinkers on both sides of the Atlantic engineered a "revolt against formalism" (p. 19), to use the phrase Novak borrows from the philosopher Morton White,<sup>11</sup> in an effort to dislodge once and for all—or at least so they hoped—the facile claim that foundational, unchanging truths exist in the domains of philosophy, politics, society, and law. The view of self-government as an ethical ideal, an ideal that rests on cultural commitments

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9. JOHN DEWEY, *Creative Democracy—The Task Before Us*, in JOHN DEWEY & THE PROMISE OF AMERICA 12 (Progressive Educ. Ass'n, Progressive Educ. Booklet No. 14, 1939), reprinted in 14 JOHN DEWEY, *THE LATER WORKS, 1925-1953*, at 226 (Jo Ann Boydston ed., 1988).

10. JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920* (1986).

11. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949).

to autonomy, equality, and an ethic of reciprocity rather than merely free elections and the rule of law—indispensable as those are—has been central to my own scholarship ever since. In *Reading Obama*, I examined Obama's writings to show that he shared philosophical pragmatists' aversion to fixed dogmas, legal realists' insights into the historicity of the law, and social Christians' conviction that the Beatitudes offer a sturdy foundation for their democratic commitments.<sup>12</sup> My book *Toward Democracy: The Struggle for Self-Rule in European and American Thought* traced the rise of democracy from the ancient world through the late nineteenth century in an effort to show the prior steps that led to the developments at the heart of *New Democracy*.<sup>13</sup> Yet the parallels between Novak's work and mine are hardly the only reason why I find his argument compelling.

Recent years have seen an avalanche of scholarship sustaining the importance of the case Novak makes. Economists, political scientists, sociologists, historians, journalists, and legal scholars have challenged the adequacy of our current constitutional framework to address snowballing inequality and exclusion.<sup>14</sup> Countless critics have lamented the myopia of so many Americans' obsession with rights and aversion to obligations.<sup>15</sup> The source of the solutions we need now can be found precisely where Novak locates it, in progressives' and social democrats' commitments to establishing a culture and institutions oriented toward solidarity instead of

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12. JAMES T. KLOPPENBERG, *READING OBAMA: DREAMS, HOPES, AND THE AMERICAN POLITICAL TRADITION* (2011).

13. JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* (2016).

14. See, e.g., Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); Joseph Fishkin & William E. Forbath, *The Anti-oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017); Alana Semuels, *The Founding Fathers Weren't Concerned with Inequality*, ATLANTIC (Apr. 25, 2016), <https://www.theatlantic.com/business/archive/2016/04/does-income-inequality-really-violate-us-principles/479577/> [<https://perma.cc/S5CM-7DY8>].

15. See, e.g., JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021); Sean Illing, *The Paradox of American Freedom*, VOX (Nov. 8, 2021, 10:00 AM), <https://www.vox.com/vox-conversations-podcast/2021/11/8/22763202/vox-conversations-sebastian-junger-freedom> [<https://perma.cc/B3F9-KNG3>].

individualism. As Novak has shown, first in *The People's Welfare* and now in *New Democracy*, commitment to what brings us together—rather than what keeps us apart—is older, deeper, and more authentically American than the post-Reagan-era insistence that the United States is a nation devoted to protecting the rights of persons and property rather than extending the principles and practices of democracy. For scholars and citizens battling against privilege on behalf of justice, *New Democracy* will prove an invaluable resource.