Industrial Jurisdiction

Daniel Z. Epstein*

Abstract

William Novak's *New Democracy: The Creation of the Modern American State* reveals how the current administrative state evolved to control economic activity through an incremental rejection of state-based common law and police powers in favor of centralized public regulation. This review identifies the business case for the administrative state and presents the first academic treatment of pro-regulation testimony from business interests during congressional consideration of the Interstate Commerce Act. In so doing, this review shows how the concept of industry is as much a legal concept as it is an economic one. This review argues that the nature of regulatory jurisdiction being tied to the concept of industry has implications for current regulatory entrepreneurship scholarship, which examines the ways regulation can be both a barrier as well as a subsidy to business. By explicating the legal significance of industrial jurisdiction, this review identifies the significance of industry and jurisdiction as typologies of interest in the study and adjudication of administrative law.

Table of Contents

Introduction 306
I. American Jurisprudential Development and the Rise of the Administrative State 307
A. *The Minimization of American Common Law* 308
B. *The Death of Federalism by the Sin of Slavery* . . . 309
II. The Theory of Industrial Jurisdiction 311
A. *The Political Development of Administration* . . . 311
B. *The Business Case for Administration* 313
C. *Industrial Jurisdiction* 315

* Assistant Professor of Law, St. Thomas University School of Law. I would like to thank the editors and staff at the *Dickinson Law Review* for their tireless editing and helpful suggestions.

III. REGULATORY ENTREPRENEURSHIP 317
A. *Industry as Jurisdiction* 319
B. *Jurisdiction Based on Social Change* 319
C. *Regulation as Subsidy* 321
CONCLUSION 322

INTRODUCTION

William Novak's *New Democracy: The Creation of the Modern American State*[1] rejects the familiar political refrain identifying the New Deal as the catalyst for the U.S. federal administrative state.[2] Additionally, Novak further defends the regulatory state as both inspired by, and capable of reinforcing, democracy.[3] Beyond these contributions to the American political development literature, *New Democracy* makes two major contributions to American jurisprudential development. First, it defends the Fourteenth Amendment as challenging the traditional distinction between the public and private law.[4] The Fourteenth Amendment altered norms about government limits while providing the moral justification for the administrative state, as necessary, to preempt state-based or local injustices. Second, and related, Novak's *New Democracy* elucidates how the rise of the federal bureaucracy—and the bureaucracy's justification as legally legitimate—means that modern democracy involves a commitment not simply to American politics but to American civil society as well.[5]

Novak's argument has major implications for administrative and constitutional law. Most importantly, it provides the framework for the democratic justification of the federal administrative state as pluralistic.[6] While pluralism in the administrative state has become an increasing focus of scholarly thought,[7] this review aims to focus on a discrete strand of thought within Novak's book concerning the

1. WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022).

2. Richard R. John, *Regulatory History by the Book*, YALE J. REGUL.: NOTICE & COMMENT (July 27, 2022), https://tinyurl.com/2a5d67az [https://perma.cc/LT4K-VTSA].

3. *See generally* NOVAK, *supra* note 1; Jed Stiglitz, *Democracy and Then Democracy*, YALE J. REGUL.: NOTICE & COMMENT (July 25, 2022), https://tinyurl.com/3ku6vrfr [https://perma.cc/8MBD-D6JZ]; Kate Andrias, *New Democracy: Finding Hope in the Past and Heavy Lifting for the Future*, YALE J. REGUL.: NOTICE & COMMENT (July 21, 2022), https://tinyurl.com/2yx4suza [https://perma.cc/2JCL-STFT].

4. *See generally* NOVAK, *supra* note 1.

5. *Id.*

6. *See* Daniel Epstein, *Regulatory Pluralism*, SOC. SCI. RSCH. NETWORK (Oct. 18, 2022), https://tinyurl.com/53ztrhyu [https://perma.cc/T2N4-QFAV].

7. *See generally* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L. J. 1 (2022).

legal theory of regulatory jurisdiction. Jurisdiction is crucial to regulatory power as it sets forth the category of persons subject to a given agency's scope of authority.[8] Perhaps counterintuitively, Novak's contribution also shows how jurisdiction *preserves* those persons (often businesses) subject to an agency's authority. This conclusion runs counter to the notion that regulation, and particularly, the administrative state, harms industry. In this sense, regulatory jurisdiction functions similarly to citizenship rights, and it is no coincidence that Novak paints a picture of the rise of the administrative state as crucially informed by civil rights.[9] The power of regulatory jurisdiction to both govern and preserve business is crucial to the modern legal idea of industry.

Part I of this review carefully constructs the arguments in support of Novak's contributions. This Part analyzes Novak's historical treatment in terms of the political-economic evolution that was orthogonal to the constitutional subtext. Part II identifies a typology for what this review calls "industrial jurisdiction." The contention is that "industry" is a public law term describing those businesses whose existence is due to their regulation. Part III shows how the typology of industrial jurisdiction fits within the emerging scholarship of regulatory entrepreneurship. The central claim of regulatory entrepreneurship scholars is that for some businesses, political change is a key to growth. From the standpoint of the political economy literature, and consistent with Novak's grand thesis of *New Democracy* and Jed Stiglitz's recent *The Reasoning State*,[10] industrial jurisdiction means that regulation can be a driver of both economic growth and social transformation.[11] The review concludes with some proposed directions for how administrative law informs the law of entrepreneurship.

I. AMERICAN JURISPRUDENTIAL DEVELOPMENT AND THE RISE OF THE ADMINISTRATIVE STATE

Novak identifies two intellectual themes that made the idea of a federal administrative state possible in the United States. First, he identifies the increasing inability of the common law to countenance issues presented by the rise of modern industry and the rejection of the common law's validity.[12] Second, and related, he notes the national

8. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290 (2013).

9. William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017); William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377 (2010).

10. EDWARD H. STIGLITZ, THE REASONING STATE (2022).

11. *See id.* at 243.

12. *See generally* NOVAK, *supra* note 1.

centralization of governance resulting from the post-Civil War civil rights movement and, particularly, the Fourteenth Amendment.[13]

A. The Minimization of American Common Law

In *The People's Welfare: Law and Regulation in Nineteenth-Century America*,[14] Novak stressed "the distinctive common-law underpinnings of the early American well-regulated society."[15] In *New Democracy*, however, it is the rejection of American judge-made law that forms what Novak calls the United States' "second American Revolution,"[16] which "sought to make lawmaking, state building, and policy making more rational, reasonable, instrumental, efficacious, and democratic."[17] Professor Novak argues that "[l]ocal and common-law techniques—from existing poor law to corporation law—were no longer up to the task of modern public provision, infrastructure, and police and, indeed, were themselves sources of new inequalities."[18] The "new democracy" of administrative politics replaces "contract, property, and tort as the central building blocks of American legal modernity" with "the public law categories of citizenship, police power, public utility, social legislation, antimonopoly, and administrative law."[19]

Given its inability to solve problems of racial inequality, the American common law ideal had to be rejected not just on moral grounds, but on epistemological ones as well, in order to make room for an idea of national and equal citizenship. Novak writes, "[m]odern processes and programs of democratization quickly outstripped the local, legal, and federated technologies of nineteenth-century common-law, associative, and municipal self-regulation. New democratic projects guaranteeing national citizenship, regulating industries and corporations . . . required the implementation and enforcement abilities of a new kind of state."[20]

That "new kind of state" guaranteed the conditions for anything but a "weak" or limited national government but instead one whose commitment to civil rights required robust intervention in economic activity. Novak explains:

---

13. *Id.*
14. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).
15. NOVAK, *supra* note 1, at 14.
16. *Id.* at 2.
17. *Id.* at 70.
18. *Id.* at 6.
19. *Id.* at 15.
20. *Id.* at 22.

> Power and rights grew up inextricably bound together in the creation of a modern American democratic state. The Civil War, emancipation, and Reconstruction forged a new constitutional relationship between the individual and the state in which unmistakable increases in state power accompanied unprecedented extensions of public policies as well as public rights.[21]

B. *The Death of Federalism by the Sin of Slavery*

"Modern American history begins with the abolition of the slaveholders' constitution."[22] The delegitimization of slavery and "the act of secession" served to limit the politics of "voluntarism and local self-government in the United States."[23] As such, "[n]ationalism, rights, and constitutionalism triumphed over older, competing ideals—namely, sectionalism, local self-government, and the private ordering principles of common law."[24] Only in rejecting the antebellum common law regime as problematized by slavery was "the emergence of a more universal or uniform conception of citizenship rights" possible.[25] Here, Novak foreshadows the significance of regulatory jurisdiction in post-bellum America. First, the "well-regulated society" that defined pre-industrial America was "a society oriented primarily around the concrete practices of local and associational self-governance at the expense of the kind of universal abstract rights near the core of the modern citizenship concept."[26] Novak brings the psychological work of William James to bear on the democratic theory of John Dewey to show how critics of antebellum American state theory exposed an epistemology that ignored the "social" nature of the self.[27] Yet more than this foundational rejection was a political one, as "a crucial ingredient in the persistence of the law of personal status and membership . . . was the discriminatory exercise of local and state police power."[28] Second, and crucial to administrative law, was the development of "a right to a jurisdiction"[29] wherein national regulation preserved

21. *Id.* at 29.
22. *Id.* at 25.
23. *Id.* at 27.
24. *Id.* at 28.
25. NOVAK, *supra* note 1, at 36.
26. *Id.* at 38.
27. William James was a philosopher who, together with Chauncey Wright and Charles Sanders Peirce, founded the philosophical school of American pragmatism. The pragmatists argued for concepts of knowledge, mind, and self that contradicted the received wisdom of philosophy and, in so doing, developed the field of psychology. Philosopher John Dewey extended the pragmatists' work to ethics and politics in challenging the received, atomistic views of knowledge and personhood.
28. NOVAK, *supra* note 1, at 40.
29. *Id.* at 46.

citizenship and the privileges and immunities attendant to national citizenship. The Fourteenth Amendment was instrumental to national commerce as it "integrated individuals into the national socioeconomic ambitions and policies of a modern American state."[30]

American jurisprudential development confirms Novak's intellectual history. The Fourteenth Amendment's passage on July 28, 1868 secured an expansive power to both Congress and the courts. For the first time, federal courts could invalidate all laws and judicial decisions of the states "abridging the rights of citizens or denying them the benefit of due process of law."[31] The Court sought to preserve its institutional legitimacy against counter-majoritarian claims after the Fourteenth Amendment greatly expanded its authority to superintend state law. While pre-1868 judicial review authorized striking down state laws under the Commerce Clause and federal laws under the Fifth Amendment Due Process Clause, post-1868 judicial behavior reviewed state laws under the Due Process Clause of the Fourteenth Amendment and federal laws under the Commerce Clause.[32] *Ward v. Maryland*,[33] albeit decided (though not brought) just after the Fourteenth Amendment, is illustrative in that it makes no mention of "due process" and was decided under the Commerce Clause, consistent with pre-1868 jurisprudence.[34] We can suppose that the intervention of the Fourteenth Amendment did not immediately shift the Court's economic jurisprudence; instead, it is likely that a political response forced reconsideration. Indeed, every Supreme Court decision from the *Slaughter-House Cases*[35] until 1937, including *Holden v. Hardy*[36] and *Muller v. Oregon*,[37] reversed the Court's prior policy of striking down state laws under the Commerce Clause and instead relied upon the Fourteenth Amendment to do so. After the Fourteenth Amendment, Congress sought to utilize the Commerce Clause as an affirmative regulatory tool and not simply as a limiting principle of state powers.

---

30. *Id.* at 55.
31. Holden v. Hardy, 169 U.S. 366, 382 (1898).
32. *See generally* Slaughter-House Cases, 83 U.S. 36 (1872). The Court stated:

> The case of Ward v. Maryland . . . involved the validity of a statute of Maryland which imposed a tax in the form of a license. . . . This court decided that the power to carry on commerce in this form was "a privilege or immunity" of the sojourner. . . . The act in question is equally in the face of the fourteenth amendment in that it denies the plaintiffs the equal protection of the laws.

Id. at 37.

33. Ward v. Maryland, 79 U.S. 418 (1870).
34. *Id.*
35. Slaughter-House Cases, 83 U.S. 36 (1872).
36. Holden v. Hardy, 169 U.S. 366 (1898).
37. Muller v. Oregon, 208 U.S. 412 (1908).

Had the Supreme Court applied the Fifth Amendment's Due Process Clause to limit congressional regulation after 1870, it would have risked invalidating several 19th century precedents that authorized congressional, not state, regulation of economic activity. This political bargain between the Court and Congress was eventually revealed by the Court's holding in *West Coast Hotel Co. v. Parrish*,[38] where the Supreme Court reversed its anti-regulatory position by applying the Fourteenth Amendment's due process guarantees as a form of judicial review to affirm a state labor regulation.[39] The Court could have comported with precedent and struck down the statute under Commerce Clause preemption grounds, but that would have been inconsistent with the congressional notion that the Commerce Clause could justify affirmative federal powers. Had the Court in *West Coast Hotel* affirmed the Washington State Supreme Court's upholding of the statute on independent grounds that the state has an inherent power to regulate purely intrastate matters of commerce, it too would have implicitly limited Congress's power to regulate state labor matters. The early 20th century Supreme Court could either undermine the Fourteenth Amendment's precedents, expanding its own authority, or shift its policy authority in a way that justified robust executive power through congressional delegation.

II. THE THEORY OF INDUSTRIAL JURISDICTION

A. The Political Development of Administration

In response to continuing public pressure concerning the increasing power of railroads, their holding companies, and the impact on industrial workers, Congress, most prominently from 1903 to 1910, delegated its rulemaking powers. Up until this time, the regulation of industry was carried out by congressional investigations from 1789 to 1887 and executive branch investigations from 1887 to 1902.[40] The federal administrative state, which formed in the early 20th century, was preceded by a federal investigative state. It took nearly two decades after the creation of the Interstate Commerce Commission (ICC) before Congress empowered it to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act."[41] In short, agency legislative rulemaking post-dated agency legislative investigations by

38. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
39. *Id.* at 400.
40. *See e.g.*, DANIEL Z. EPSTEIN, THE INVESTIGATIVE STATE: REGULATORY OVERSIGHT IN THE UNITED STATES 19 (2023).
41. Hepburn Act of June 29, 1906, § 20, ch. 3591, 34 Stat. 584, 593.

several decades. But the Hepburn Act of 1906 represented the first time in American history that Congress delegated the power to make rules with the force of law to an agency formally located within the executive branch.

The "administrative" state as conceived by scholars today was largely born from 1903 to 1914, primarily in the authority granted to the ICC, by empowering the investigative state with implementation (rulemaking) powers in order to interpret and enforce statutes. Before that time, Congress had withheld delegation of rulemaking power in recognizing, as the Court did in *Humphrey's Executor v. United States*,[42] that agency investigations (just like congressional investigations of the private sector) were ancillary to the rulemaking activity of Congress. For instance, before the Federal Trade Commission (FTC) was delegated rulemaking power, the FTC's investigative powers were conditional on Senate resolutions authorizing compulsory process.[43] At the time, the FTC, like the ICC before it,[44] was dependent upon Congress for its policy agenda while subject to robust reporting requirements so that agency investigations of the private sector could inform congressional rule-writing.[45] Delegation of regulatory power to the executive became necessary and proper only in the context of an executive already vested with investigative and adjudicative powers.[46]

---

42. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

43. *See generally* FTC v. American Tobacco Co., 264 U.S. 298 (1924).

44. Investigations against corporations were dependent upon authorization pursuant to Senate resolutions. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 324 (1915) (regarding the Interstate Commerce Commission).

45. *See American Tobacco Co*., 264 U.S. at 303.

46. Buckley v. Valeo, 424 U.S. 1 (1976). The Court stated:

> Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.

Id. at 137–38; *see, e.g.*, Hannah v. Larche, 363 U.S. 420 (1960). The Court stated:

> As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. at 440–41.

B. The Business Case for Administration

It is commonplace to think that the rise of the ICC threatened the *laissez faire* interests of the railroad industry. This Section focuses on a lacuna in William Novak's *New Democracy*: what was the role of business in advocating for the federal administrative state? The formation of the ICC was incremental, and the mere existence of the Senate Select Committee on Interstate Commerce was controversial.[47] But the testimony before the Select Committee reveals how a centralized federal bureaucracy meant large global corporations could obtain regulatory certainty through a legal regime that preempted multijurisdictional rules. The ICC was created by codifying a novel concept—interstate commerce—and the Interstate Commerce Act of 1887 inaugurated a new interpretation of Congress's authority to regulate commerce. That interpretation was framed by those who stood to benefit from it, most notably the barons of post-Industrial Revolution America, particularly railroad and freight owners, who now could simplify the various threats of litigation and patchwork state regulation by supporting the creation of a single bureaucracy, not quite part of Congress nor fully supervised by the President.[48] In return for a single, predictable and lobbyable regulator came the birth of the modern regulated industry.[49]

The role of business in creating the ICC is strongly implied in *New Democracy*. Novak articulates "[t]he need for a coercive state in harmony with a centralizing industrialism."[50] He writes that "[i]ncreasing modern awareness that large collectivities—corporations, cooperatives, unions, and especially states—were exerting unprecedented force in social, political, and economic affairs begged for better explanations. The individualistic theories of the past—social contract, natural rights, and classical economics—no longer

47. *See generally* TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS (1955).

48. *See* ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION AND REBIRTH OF A VITAL AMERICAN FORCE 174 (1992).

49. *See* ISAIAH LEO SHARFMAN, RAILWAY REGULATION: AN ANALYSIS OF THE UNDERLYING PROBLEMS IN RAILWAYS ECONOMICS FROM THE STANDPOINT OF GOVERNMENT REGULATIONS 122–23 (1915) ("The effective prevention of discrimination between commodities, then, depends upon the existence of a comprehensive system of regulation, with adequate ratemaking powers in the regulating body."); *accord* Report of the Senate Select Committee on Interstate Commerce, S. REP. NO. 49-46, pt. 2, at 873–77 (1886) (statement of E.F. Kelley); William C. Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases*, 28 HARV. L. REV. 34, 36–38 (1915) ("[T]he power of the state is servient not merely in local matters affecting interstate commerce, but in the regulation of its own internal commerce as well."); Minnesota Rate Cases, 230 U.S. 352, 433 (1913).

50. NOVAK, *supra* note 1, at 73; 3 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE BEGINNINGS OF CRITICAL REALISM IN AMERICA 124 (1930).

adequately explained the present."[51] Further, the "industrializing world of complex business and social transactions, private and public interest appeared increasingly intertwined and interdependent."[52]

National railroads benefited from the ICC by avoiding the costs of the many, often inconsistent, rules promulgated by state administrative commissions.[53] The majority report of the Senate Committee on Interstate Commerce found:

> [A]mong the leading representatives of the railroad interests an increasing readiness to accept the aid of Congress in working out the solution of the railroad problem . . . and not a few of the ablest railroad men of the country seem disposed to look to the intervention of Congress as promising to afford the best means of ultimately securing a more equitable and satisfactory adjustment of the relations of the transportation interests to the community than they themselves have been able to bring about.[54]

Edward H. Allen, President of the Board of Trade of Kansas City (of interest to the legislative writers due to it being an "interstate" city) testified before the Senate Select Committee on Interstate Commerce that a national regulatory commission would give "special individuals opportunities for making a profit that no other individual in the community may share in."[55] Allen, like so many other representatives of the business community, made clear in his testimony, "I think it is to the interest of the country in this matter to have a department of the Government that shall make it its special business to look after railroads, so far as interstate traffic is concerned."[56] George W. Parker, vice-president and general manager of the Saint Louis, Alton and Terre Haute Rail Road Corporation (known as the "Cairo Short Line") testified, "I am one of those who have always thought that a national commission . . . would result in benefit[s] to the transportation lines, as well as to the shippers."[57] Parker's testimony exemplifies how American business regulation served to protect the emerging industrialization (nationalization) of previously state-centric businesses:

51. NOVAK, *supra* note 1, at 74.
52. *Id.* at 80.
53. *See* SHARFMAN, *supra* note 49, at 123; *accord* Report of the Senate Select Committee on Interstate Commerce, pt. 2, *supra* note 49, at 873–77 (statement of E.F. Kelley); Coleman, *supra* note 49, at 36–38; *Minnesota Rate Cases*, 230 U.S. at 433.
54. Report of the Senate Select Committee on Interstate Commerce, pt. 1, *supra* note 49, at 175.
55. *Id.*, pt. 2, at 880 (statement of Edward H. Allen).
56. *Id*. at 883.
57. *Id.* at 904 (statement of George W. Parker).

> My judgment is that it is better for both the railroads and the commercial interests of the country that pools or railroad confederations should be legalized. Of course, I assume that its legalization would be attended with restrictive laws that would secure to both the transportation lines and to shippers' reasonable rates and regulations through the proposed national commission.[58]

There was a clear business case for national, preemptive regulation. As David K. Zucker analyzes, establishing the ICC was "the inevitable fulfillment" of "the Federalist agenda."[59] The ICC "was the result of a plan to create unity among the states of the United States and to shift the balance of power between the state and federal governments through empowerment of the central government."[60] The regulatory interests of business explain why the ICC looked more like an executive department than the Pacific Railway Commission, which was also a creature of 1887 but closer in structure to a congressional committee.[61]

C. *Industrial Jurisdiction*

Regulatory certainty in the law was how industrial capitalists solved the collective action problems that arose with litigation and overregulation at the state and local level.[62] To say industry became regulated assumes that American industry was ever really unregulated or that regulation was somehow unnecessary to the survival of American industry. Federal regulation made national industry in the United States conceivable because while litigation or state enforcement could destroy a business's operations, once a business is within the scope of federal regulation, the bureaucracy's jurisdictional mandate depends upon survival of the industry. Virtually all federal regulatory authority is attached to industries and professionals within those industries. The prior Sections illustrate the typology of industrial jurisdiction. Jurisdiction sets forth an agency's authority, but the scope of that authority is always limited to an industry or industries. Without jurisdiction there is no industry and vice versa.[63]

---

58. *Id*.

59. David K. Zucker, *The Origin and Development of the Interstate Commerce Commission and Its Impact on the Origination of Independent Regulatory Commissions in the American Legal System: A Historical Perspective*, DASH HARV. 95 (2016), https://tinyurl.com/yrw5uz29 [https://perma.cc/UL8B-BUUL].

60. *Id*. at 95–96.

61. The Pacific Railroad Commission was, for practical purposes, a legislative committee. *See* TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 52 (1955).

62. *See* discussion *supra* Sections II.A–B.

63. *See* NOVAK, *supra* note 1, at 73.

The theory of industrial jurisdiction arises from the observation that common law liability and state police powers present threats to corporations who seek national or global scale. Those corporations engage in collective action by forming an industry as a solution to the threat.[64] The formation of industry was necessary due to the fact that corporations could no longer rely on a "contract theory" of the corporate charter as a basis for exemption or inoculation from regulatory control.[65] The common law was insufficient to regulate the rise of interstate corporations, thus requiring a "new social legislation" or "industrial legislation" to regulate them.[66] Here, the theory of federal regulatory jurisdiction arises from the fact that these businesses are "affected with a public interest," to quote the Supreme Court's 1876 decision in *Munn v. Illinois*.[67] Because these newly formed industries are socially transformative (affect the public interest)—and here, the startup railroads mirror contemporary disruptive startups—they are not appropriate for primarily local or state-based regulation once the role of the federal government is as a "functionalist, democratic, and service-oriented state."[68] As Ernest Freund—a favorite legal intellectual of Novak's—argues, "[i]f a business is affected with a public interest its charges are subject to reasonable regulation."[69] Those industries enter into a contract with the government to regulate them in return for that regulation being exclusive of state or common law-based regulation.[70]

Many, but not all, regulations arise because of collective action problems: no one private entity will absorb the risk of solving a social problem that would provide benefits to an entire class of similar producers. Regulation is most likely to be effective when an industry (consisting of firms providing competing products or services) forms and the firms within the industry cannot agree on an industry-wide solution for paying for the negative externalities those firms create. Industrial preservation is thus an implied authority of all industry regulators within their legal responsibility to prevent negative externalities (i.e., harm to the public welfare). It breaches the social contract when regulators fail to preserve the industries they regulate.

---

64. Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 137–158 (2000).

65. NOVAK, *supra* note 1, at 118.

66. *Id.* at 91.

67. Munn v. Illinois, 94 U.S. 113, 126 (1876).

68. NOVAK, *supra* note 1, at 121.

69. 2 ERNST FREUND, CYCLOPEDIA OF AMERICAN GOVERNMENT 708 (Andrew C. McLaughlin & Albert B. Hart eds., 1914).

70. *See, e.g.*, Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 691–719 (1986).

These collective action problems led to the creation of a centralized bureaucracy in the service of industrialization.[71] The genius of the administrative state is that regulation and industry are simply different species within the same genus borne from the protective effects of national policy, itself preemptive of state regulation or private litigation, justifying the rise of businesses within a sector delimited by borders or judge-made law. To know which industry a business can be identified with, ask who regulates it in Washington. Perhaps the most lasting contribution of *New Democracy* to legal theory is the insight that industry does not thrive from some *laissez-faire* state but stands to benefit from the regulatory state.

III. Regulatory Entrepreneurship

The scholarship on "regulatory entrepreneurship" uses the term to describe companies, commonly startups, that provoke legal change by operating in areas of legal gray, growing "too big to ban" and mobilizing users for political support.[72] Pollman and Barry contend that innovative entrepreneurs like Uber and Tesla succeeded by investing in political reform.[73] Tim Wu describes regulatory entrepreneurship as avoiding an existing legal regime.[74] Just like the railroads were regulatory entrepreneurs in securing industrial jurisdiction, scholars have also described regulatory entrepreneurship as resisting industrial jurisdiction or engaging in regulatory arbitrage.[75] Melissa Durkee's work on interpretive entrepreneurship explains the relationship between industrial jurisdiction—the regulatory regime that preserves industry—and the sort of "[w]ell-funded, scalable, and highly connected startup businesses [that] target state and local laws and litigate them in the political sphere instead of in court."[76] For the disruptive startup, it is literally challenging an established industry.[77]

---

71. *See* discussion *supra* Section II.B.

72. Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. Cal. L. Rev. 383, 398–410 (2017).

73. *Id*.

74. Tim Wu, *Strategic Law Avoidance Using the Internet: A Short History*, 90 S. Cal. L. Rev. Postscript 7–8 (2017).

75. *See generally* Frank Partnoy, *The Law of Two Prices: Regulatory Arbitrage, Revisited*, 107 Geo. L.J. 1017 (2019); Elizabeth Pollman, *Corporate Disobedience*, 68 Duke L.J. 709 (2019); Melissa J. Durkee, *Interpretive Entrepreneurs*, 107 Va. L. Rev. 431 (2021).

76. Pollman & Barry, *supra* note 72, at 383; *see generally* Durkee, *supra* note 75.

77. Durkee, *supra* note 75, at 433 n.1. "'Disruption' describes a process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses." Clayton M. Christensen, Michael E. Raynor & Rory McDonald, *What Is Disruptive Innovation*?, Harv. Bus. Rev. (2015), https://tinyurl.com/yhr7azrc [https://perma.cc/V89T-DW6L].

These companies can therefore engage in a form of entrepreneurial interpretation where they argue the law is sufficiently gray that the jurisdiction established for a regulator does not cover or apply to their business.[78]

Because the nature of regulatory power is defined by the existence of an industry (nuclear power producers, public securities issuers, drug manufacturers who market interstate), so long as an innovative firm threatens the preservation of established firms within an industry, the least costly public welfare option is to deem the innovator to be subject to the regulator's jurisdiction or authority. For instance, Airbnb may be regulated by a hotel board or Uber may be regulated by a public transit board. For competitive reasons, startups or innovators facing regulation due to the externalities they create upon incumbents do not form partnerships *ex ante* with other firms with similar products or services. Industries represent coalitions (e.g., Lyft agreeing with Uber or Airbnb agreeing with Vrbo to solve incumbent-driven regulatory costs) that are only profitable once an innovator has established market impact. Industry formation is, therefore, not synonymous with business formation.

Because bureaucratic authority ensures the dominance of incumbent industries, startups, which threaten incumbency through competition, create externalities when their products or services harm the public. Proving such harm is difficult but unnecessary, for intrinsic to the idea of industrial jurisdiction is the notion that the public is exposed to risk whenever politically protected incumbents face disruption.[79] Note that regulatory barriers persist to the extent that a given startup must absorb the full cost of the negative externalities it creates while the coalitional nature of industry defrays those costs from being borne uniquely by a company. But startups' *ex ante* failure to resist classification as a regulated industry by regulators does not mean that innovators must succumb to static regulation to solve the collective action problem of shared externalities. When innovators whose value can scale quickly enter into ownership agreements with private investors who also invest in their competitors, new industries are created whose preservation depends upon capital, not regulation. In this sense, the most pivotal deregulatory activity results when investors anticipate that new technology will form currently non-extant industries.[80]

---

78. *See* Durkee, *supra* note 75, at 433.

79. LabMD, Inc. v. FTC, 894 F.3d 1221, 1227 (11th Cir. 2018) (reversing the FTC which determined a company created harm to consumers through an "intangible privacy harm").

80. *See* Pollman & Barry, *supra* note 72, at 383–84.

A. Industry as Jurisdiction

When a regulator asks, "what is my jurisdiction?", the response is: the industry within which a given regulatory target can be identified. Novak surveys many progressive legal and political thinkers on the idea of industry as a legal institution. In describing post-industrial economies, Karl Polanyi argued, "the market has been the outcome of a conscious and often violent intervention on the part of government."[81] Administrative regulation made modern industrial monopoly possible. Novak's discussion of early administrative law scholarship reveals that "modern capitalism elevated the state to a key role in 'structuring, facilitating, and guiding (in short, "regulating" or, better, "regularizing") capital accumulation.'"[82] In the new democracy, the administrative state becomes a "government of industry."[83] John Maurice Clark defined the new industrial jurisdiction as supposing that the "social control of business" "is an integral part of business, without which it could not be business at all."[84]

Novak describes public service companies' "general assent" to control by the state.[85] In return for a "host of corporate privileges"—for instance, "monopoly power, eminent domain power, tax exemption, property grant, public financing or rights to collect tolls"—regulators devised the concept of jurisdiction as defined to cover a given industry.[86] Novak explicates this idea of industrial jurisdiction with reference to Léon Duguit's "Law in the Modern State," where "[a]ny activity that has to be governmentally regulated and controlled because it is indispensable to the realization and development of social solidarity is a public service so long as it is of such a nature that it cannot be assured safe by governmental intervention."[87]

B. Jurisdiction Based on Social Change

Industries need to be regulated because of their role in serving the public. Novak recognizes that "public utility, the public corporation, and the modern American administrative and regulatory state,

81. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 250 (1957).

82. NOVAK, *supra* note 1, at 185; Bob Jessop, *Survey Article: The Regulation Approach*, 5 J. POL. PHIL. 287, 289 (1997).

83. NOVAK, *supra* note 1, at 185.

84. JOHN MAURICE CLARK, SOCIAL CONTROL OF BUSINESS 12–13 (William H. Spencer ed., 1926).

85. NOVAK, *supra* note 1, at 111.

86. *Id.* at 118.

87. *Id.* at 121; LÉON DUGUIT, LAW IN THE MODERN STATE 48 (Frida Laski & Harold Laski trans., 1919).

in other words, grew up together."[88] In Justice Frankfurter's words, the modern regulatory system armed the federal government with powers "adequate to assure interstate public services."[89]

In *Munn*, the Supreme Court noted that the Fourteenth Amendment's Due Process Clause did not provide a basis to invalidate federal regulations.[90] Novak traces how, instead, *Munn* influenced the Supreme Court's determination that the Commerce Clause served as the basis for such regulation.[91] The Court's use of the phrase "affected with a public interest" served as a jurisdictional category for those businesses subject to federal regulation (what Novak calls "regulated industries law").[92] Felix Frankfurter referenced "[t]he resultant contemporary separation of industry into businesses that are 'public' and hence susceptible to multiple forms of control."[93]

The idea of industry as those businesses which solve collective action problems through federal regulatory jurisdiction influenced the Supreme Court to "annex the principles of *laissez-faire* capitalism to the Constitution and put them beyond the reach of state legislative power."[94] The "corporate consolidation and expansion" of business into industry represented "precisely the major sectors of the American economy that lawyers, economists, reformers, and legislators were busily redefining as increasingly public in nature—public utilities and public service corporations—subject to interventions ranging from enhanced police powers to direct rate regulation to outright public ownership."[95] Novak's argument that the "*Lochner* era" may be more accurately referred to "as the era of police power and public utility" recognizes that *Lochner* stood for the rise of industrial, preemptive nationalism.[96] *Lochner* also stood for the idea that regulation benefits large industries precisely by placing those businesses beyond the reach of the states.

For Novak, the idea of industry is synonymous with "essentially public services provided by corporations."[97] Novak references Mary

---

88. *Id.* at 108.

89. FELIX FRANKFURTER, PUBLIC AND ITS GOVERNMENT 84–85 (1930).

90. Munn v. Illinois, 94 U.S. 113, 125 (1876); NOVAK, *supra* note 1, at 139; *see also* discussion *supra* Section I.0.

91. *See* Nebbia v. New York, 291 U.S. 502, 523–24 (1934); NOVAK, *supra* note 1, at 143.

92. NOVAK, *supra* note 1, at 180.

93. *Id.* at 143; Felix Frankfurter & Henry M. Hart Jr., *Rate Regulation, in* 13 ENCYC. SOC. SCI. 104 (Edwin R. A. Seligman ed., 1934).

94. NOVAK, *supra* note 1, at 106; LAWRENCE M. FRIEDMAN, THE HISTORY OF AMERICAN LAW 358–60 (2d ed. 1985).

95. NOVAK, *supra* note 1, at 107.

96. *Id.*

97. *Id.* at 108.

Callcott's *Principles of Social Legislation*,[98] where she argues that the common law is inadequate for modern society due to its failure "to keep pace with advancing of changing ideals."[99] The argument that law cannot keep pace with innovation is a familiar refrain. As Novak strongly implies, entrepreneurs seek to change law to protect innovation. In other words, they become regulatory entrepreneurs as well as economic ones.

C. Regulation as Subsidy

In American politics, the idea that the public nature of business implies control or that public and private interests are intertwined[100] has a more prosaic description: a government subsidy. Novak quotes Émile Durkheim for the proposition that "[g]enuine liberty . . . is itself the product of regulation."[101] Similarly, Novak relies on Dewey's dictum that there are no modern rights "exempt from any social restriction."[102] While startup businesses may be seeking to avoid regulatory jurisdiction,[103] market entrants within established industries often face a main regulatory barrier in the form of needing a permit or license before engaging in commercial activity. For instance, novel nuclear power companies seek permits from the Nuclear Regulatory Commission, or a hydrogen power company needs loan guarantees or tax credits to prove commercial viability. What Justice Frankfurter referred to as "public" industries view regulation as essential to business. Regulations may be costly for businesses, but regulations are also subsidies: those businesses Novak describes as "affected" with the public interest survive because of regulatory authority and rely on such authority to enforce the law against new competitive entrants to the market.

Novak's recognition that lawyers were instrumental to converting business sectors into publicly regulated industries means that regulatory lawyers are crucial to ensuring that entrepreneurial interpretations in the law "prevail in various contexts for meaning."[104] Regulatory lawyers representing industries serve as gatekeepers of regulatory norms. Rachel Barkow has noted how "[m]ost aspects of

98. MARY CALLOTT, PRINCIPLES OF SOCIAL LEGISLATION (1932).
99. NOVAK, *supra* note 1, at 159.
100. *See* discussion *supra* Sections I.B. & II.B.
101. ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 3 (W.D. Halls trans., 1893).
102. NOVAK, *supra* note 1, at 157; JOHN DEWEY & JAMES H. TUFTS, ETHICS 438 (1908).
103. *See* Durkee, *supra* note 75, at 484–88.
104. *Id*. at 486.

agency enforcement policy generally escape judicial review."[105] This is a function of the fact that regulators prefer to act through discretionary activities wherein regulated parties seek settlements rather than testing legality in court. Rory Van Loo describes how this fact has meant that "policymakers have begun relying on third-party enforcement by the real gatekeepers of the economy: the firms who control access to core product markets."[106] Thus, Novak forces us to consider how business lawyers can create regulatory barriers or otherwise remove barriers through interpretive lobbying in the form of business counsel.[107]

CONCLUSION

Industrial jurisdiction animates the modern administrative state. It is an authority to oversee and preserve the "essentially public services provided by corporations in emergent sectors . . . transportation, communications, energy, water, and the shipping and storage of food."[108] *New Democracy* reveals a two-part political strategy of entrepreneurs looking to obtain the quasi-public status of industry: first, they define "regulation" as simply the exclusive legal jurisdiction over a member of an industry and second, they use regulation to overcome collective action problems brought by state or local regulation, judge-made legal norms, the plaintiff's bar, or criminal law.

When regulators think about the concept of "industry" the relevant referent also fully modifies the concept of regulatory jurisdiction. In short, regulatory jurisdiction is limited in its coverage of "publicly affected" industries. And all such industries are regulated. For a regulator, the definition of "industry" means "regulated." For American public lawyers, the idea of industry is the idea of regulation. "Industry" is the phenomenon of solving collective action problems via regulation. And this means when a business assumes industry status it has entered into a quasi-contractual arrangement with a regulator to concede jurisdiction. We tend to think that regulation is simply a cost of business, but the theory here is that regulation ensures the survival of an industry, itself composed of businesses with shared characteristics. Jurisdiction, here, is industry-protective and this becomes obvious when we think about the government licenses and permits

105. Rachel E. Barkow, *Overseeing Agency Enforcement,* 84 GEO. WASH. L. REV. 1129, 1130 (2016).

106. Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 471 (2020).

107. *See generally* Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742 (2018).

108. NOVAK, *supra* note 1, at 108.

so often sought by members of an industry. At the same time, a pre-industrial business or an undefined business sector has not signed this social contract of sorts. Other market participants attempt to enter that social contract by conceding jurisdiction (what lawyers mean by "compliance"). Furthermore, industrial jurisdiction suggests that once established as industries, "socially transformative" businesses—those which are publicly affected—tend to expand the role of centralized, federal regulation rather than reduce the regulatory valence.

New Democracy informs academic discussions about regulatory and interpretive entrepreneurship by introducing the idea of industry as a legal typology consonant with regulatory jurisdiction. It also suggests a promising path for additional administrative and constitutional law scholarship, for implied within the idea of industrial jurisdiction is that for a business that is not within a defined industry, a state of exception exists. For established industries, the business's state of exclusion from industrial jurisdiction is itself a barrier to market entry. But because the idea of jurisdiction depends upon a clearly defined industry, when jurisdiction does not cover a business product or service, the state cannot regulate. From the standpoint of state theory, regulatory entrepreneurship therefore raises enduring questions of interest for constitutional thought about statelessness and permissionless innovation.

***