

Book Review

Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America

The People's Welfare: Law & Regulation in Nineteenth-Century America. By William J. Novak.* Chapel Hill, N.C.: University of North Carolina Press, 1996. Pp. x, 396. \$55.00 (hardcover), \$19.95 (paper).

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“Productivity was the central test and validating canon.”¹ Thus did the late Willard Hurst, our leading historian of nineteenth-century law, characterize the criterion by which, from the 1830s to the 1870s, Wisconsin “confidently wielded authority over the waterways”² of the lumbering region that formed so vital a part of its economy. In this instance Hurst was referring specifically to statutes and decisions that affected the operations of a single state’s extractive and processing industry, together with its use of the public waters. But the statement conveyed accurately enough the larger picture of American legal culture in the era, from the 1790s to the Civil War, a picture that Hurst provided in the masterful studies—both monographs and works of synthesis—through which he has profoundly influenced an entire generation of legal historians’ research.³ In *The*

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1. JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 172 (1964).

2. *Id.*

3. Numerous methodological studies have analyzed Hurst’s influence from a variety of perspectives. See, e.g., Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC’Y REV. 9 (1975); Harry N. Scheiber, *At the Borderland of Law and Economic*

People's Welfare,⁴ American historian William J. Novak pursues in great depth and with admirable originality one of the most important themes originally set forth by Hurst and a few other pioneers in the literature of American history:⁵ how government "confidently wielded" authority through exercise of the police power, that is, how the state deployed regulatory power for the protection of the public's health, safety, morals, and welfare.⁶

History: The Contributions of Willard Hurst, 75 AM. HIST. REV. 744 (1970) [hereinafter Scheiber, *At the Borderland*]; Morton Keller, *The Varieties of American Legal History: Hurst's History*, 6 REVS. AM. HIST. 1 (1978) (book review); Earl Finbar Murphy, *The Jurisprudence of Legal History: Willard Hurst as a Legal Historian*, 39 N.Y.U. L. REV. 900 (1964) (book review).

Some leading "Critical Legal Studies" scholars, beginning in the 1970s, argued that the changes initiated by courts in "instrumentalist" decisions that allegedly transformed the law of torts, property, and contracts, were consciously designed by judges to redistribute wealth from the agricultural to the "entrepreneurial" commercial and industrial sectors and as such were part of a pattern of exploitation. Nonetheless, these scholars did not acknowledge a debt to Hurst. Indeed, they mistakenly lumped him with "liberal" historians who failed to recognize the redistributive functions of law. This school, however, owed much to Hurst's identification of the "pragmatic" judicial style (which he also occasionally termed "instrumental"). Besides, much of Hurst's writing was profoundly critical of the failure of 19th-century law—and of government more generally—to operate in a rational, accountable, and fair way. See Harry N. Scheiber, *Back to "The Legal Mind"? Doctrinal Analysis and the History of Law*, 5 REVS. AM. HIST. 458 (1976) [hereinafter Scheiber, *The Legal Mind*] (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1790-1860* (1977)) (critiquing one key work in the literature that misunderstood Hurst yet owed much to his writings); see also Tony Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263 (suggesting that the distributive effect of the law in the 19th century requires further investigation).

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

5. Other such pioneering historians include Leonard W. Levy and Richard B. Morris. See LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* (1946).

6. The term "police power" is derived from the common law definition of "public police," which Blackstone described as "the due regulation and domestic order of the kingdom." 4 WILLIAM BLACKSTONE, *COMMENTARIES* *162. Justice Story characterized the police power as the instrument for "the promotion of the peace, health and good order of the society," matters which were among the fundamental duties of government. [Joseph Story], *Natural Law* (1832) (originally unpublished manuscript), reprinted in JAMES McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 313, 322 (1971). I think that Professor Novak exaggerates considerably when he contends that before 1877 American jurists tended to justify the police power and other elements of state authority mainly on the basis of the common law heritage, while the post-1877 period was dominated increasingly by liberal constitutionalism and centralization. See NOVAK, *supra* note 4, at 188. In Novak's view, "sovereignty" became the keynote of theories relating the conceptual foundations of the governmental order. See *id.* ("'Sovereignty' increasingly replaced 'police' as the key word in regulatory apologetics.").

Chief Justice Taney's formulation of the police power portrayed it as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." License Cases, 46 U.S. (5 How.) 504, 582 (1847), quoted in Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 221-22 (1984) [hereinafter Scheiber, *Public Rights*]. My own, more general reading of the cases from the early Republic, however, is that the arguments based on a theory of sovereignty and those based on common law notions of common welfare were intimately interrelated. Both common law theory and the civil law tradition regarded the sovereign (or, for England, the King in Parliament) as the trustee for the public good. Early American state and federal decisions analyzed in these terms both the police power and the eminent domain (takings) power. Such cases established not only the welfare of the community, cast in common law terms, but also the notion of inherent and essential power flowing from the concept of the state's sovereignty—a notion derived as much from the Continental writers in civil and natural law as from the British tradition—as a fountainhead of theory. For Continental writers such as Emmerich de Vattel, who were widely quoted in American legal treatise writings and judicial decisions, the phrase "attribute of sovereignty" applied to the police power (along with eminent domain and taxation powers) because the power was "coeval with the State itself" and as much a "natural right"

Novak analyzes both how American jurists conceptualized the police power and how implementation patterns signaled the broader public philosophy concerning the legitimate reach and limitations of government's regulatory role. Following an extended analysis of the intellectual underpinnings of the police power in the common law and law of the early Republic, Novak devotes separate chapters to specific regulatory activities of the states. One chapter, for example, considers regulations enacted for purposes of public safety, giving detailed attention to how municipal governments regulated the storage and handling of gunpowder, an area of law in which the inherited doctrines of public nuisance were mobilized.⁷ The "superior rights of the public," Novak finds, were asserted systematically in defense of the public safety: "Property rights were protected, but relatively, not absolutely."⁸ Further, in this same context, Novak considers the response of the law to catastrophic urban fires such as the disaster New York City suffered in 1835, when the government relied upon traditional precepts of the law of necessity and demolished buildings purposefully to create a fire break. Although owners received compensation, payment was a matter of legislative discretion—and, as specified by statute, compensation was only for the buildings that were blown up or torn down, not for their contents.⁹ The large doctrinal significance of the judicial actions was to reiterate the concept that injury to a property owner might be found to be *damnum absque injuria* (an injury without remedy).¹⁰

of the state as any individual rights were "natural"—and thus inalienable. James B. Thayer, *The Right of Eminent Domain*, 9 MONTHLY L. REP. (n.s.) 241-42 (1856), quoted in Harry N. Scheiber, *Introduction to EMMERICH DE Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 3, 8-9 (Charles G. Fenwick trans., Legal Classics Library 1993) (1758); see Scheiber, *Public Rights*, *supra*, at 222-24 (discussing the centrally important case of *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851), in which Chief Justice Lemuel Shaw blended common law public nuisance doctrine, a republican theory of sovereignty, and implied limitations on the legislature in what soon was recognized as a classic exposition of police power); see also NOVAK, *supra* note 4, at 122 (discussing Pennsylvania Chief Justice Gibson's position on the commonwealth's powers).

Chris Tomlins recently provided a highly original and suggestive analysis of the conceptual origins of "police" in the Revolutionary and post-Revolutionary era, when the champions of the new Constitution headed off a potentially powerful republican egalitarianism by successfully contending for the primacy of law over politics. See CHRISTOPHER L. TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 74-96 (1993). Tomlins's work complements, but in at least one important aspect (with regard to the question of equality in relation to police) significantly departs from, Novak's interpretation and my own.

None of the modern analysts, including myself, accepts the view that a prominent student of the police power, W.G. Hastings, once advanced. Hastings argued that individualistic and property-minded state and federal judges in the new republic innovated the conceptualization of the police power, which others saw as having deeper roots in both common and civil law. See W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC'Y 359 (1900); see also TOMLINS, *supra*, at 89 n.101 (arguing that Hastings's attribution of the concept of the "police power" to American devotion to limited governance is evidence that the property-minded "Federalist model" succeeded in dominating even academic thought).

7. See NOVAK, *supra* note 4, at 51-82.

8. *Id.* at 65.

9. See *id.* at 71-79.

10. See *id.* at 72. This same precept was invoked in numerous antebellum cases that found no compensable losses to property values suffered by private owners damaged by, for example, changes in road grade. Such proceedings would today be known as inverse condemnation cases, and the outcome

Here again, Novak draws out the larger meaning for the definition of powers that the government might exercise when the safety of the public was at stake: "Houses, goods, occupations, trades, industries, manufactures, sales, exchanges, land uses, and the like were all subject to regular and harsh public limitations when the safety of the people was threatened by fire."¹¹

Considering urban market regulations for purposes of assuring sanitary, quality, and weight standards, Novak notes that, years ago, historians successfully "exploded the 'myth of laissez-faire' and demonstrated the myriad ways that law and active state governments furnished the necessary *conditions* for early American economic development."¹² Novak comments, however, that these earlier studies did not adequately recognize how law and institutions shaped the market: They tended, he claims, to treat the public- and private-market sectors as distinct, rather than as interpenetrated by public authority and especially regulatory power.¹³ The author gives the impression that the idea of an active republican polity, shaping the institutions and profoundly influencing the dynamics of the private sector, is now to be unveiled as a new and marvelous discovery. As subsequent sections of this Book Review indicate, however, no matter how important the content of Professor Novak's message and how interesting the documentation he offers, this is not an "alternative story" that ought to come as a startling surprise.

For example, Novak's fourth chapter, titled "Public Ways: The Legal Construction of Public Space,"¹⁴ presents the story of "the invention of public property"¹⁵—in the sense that the policing and general regulation of

described would be a rejection of the claim that a "taking" had occurred amounting to eminent domain action requiring compensation. The line between the police power and the "takings" power, as drawn by the courts, was precisely the fulcrum on which compensation requirements were decided, and the *damnum absque injuria* principle was invoked in that context. *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823), is a classic example in the early American state cases. The court ruled that a house owner had no recourse, even though the municipal government's regrading of the street exposed his building's foundations and made it inaccessible from the public way. "Every one who purchases a lot upon the summit or on the decline of a hill," the court declared, "is presumed to foresee the changes which public necessity or convenience may require." *Id.* at 431. It was particularly telling that this case concerned Boston, proclaimed by the Puritan founder John Winthrop as "a City upon a Hill." A MODEL OF CHRISTIAN CHARITY (1630), quoted in DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 3 (1958). See generally NOVAK, *supra* note 4, at 115-48 (describing the *damnum absque injuria* principle); Harry N. Scheiber, *Eminent Domain*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 630 (Leonard Levy & Kenneth Karst eds., 1986) [hereinafter Scheiber, *Eminent Domain*] (explaining the principle's relationship to eminent domain); Harry N. Scheiber, *State Police Power*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra*, at 1744, 1746 [hereinafter Scheiber, *State Police Power*] (discussing the principle in the context of the police power).

11. NOVAK, *supra* note 4, at 81. Fire and similar catastrophes constituted a special circumstance, evoking the most extreme responses. The remainder of Novak's inquiries deal with circumstances not in this unique category, and the "regularity" and "harshness" of the public limitations he finds imposed on private property and on private behavior, economic and social, are of a different order.

12. *Id.* at 85.

13. See *id.* The studies Novak has in mind are the "commonwealth" studies that explored the dimensions of interventionism at the state level. See *infra* note 177.

14. See NOVAK, *supra* note 4, at 115.

15. *Id.* at 116.

highways, other thoroughfares, and public squares, constituted an important expansion of state governments' regulatory activities and jurisdiction with ramifications for "the general conduct of economic and social life."¹⁶ There is less that is new in this chapter than in the others, both with respect to the specific cases that are analyzed and with respect to the importance of this aspect of the law in the antebellum era. Nor can there be any quarrel, I would imagine, with Novak's reiteration of the contention advanced by others before him that the jurisprudence of regulatory law for waterways and other public ways became a fountainhead of public rights doctrines supportive of regulatory intervention.¹⁷

On the whole, however, Novak offers a great deal of information little known to students of the period. Sections of Novak's work dealing with the regulation of disorderly houses,¹⁸ temperance law,¹⁹ and several aspects of public health,²⁰ inevitably use some material from the existing literature. The author, however, introduces in these sections an important new theme: the movement of the post-Civil War period toward bureaucratization of control and, within the federal structure, the movement of governance "upward" from the local to the state level (and later, after 1877, the further advance of this movement to policy setting and direction of substantive implementation by the national government). At the same time, Novak argues, in the liquor prohibition field and later in other realms of law, "the die of a new constitutional regime was cast" and "[t]he terms of debate [were] decisively shifted" because the state courts for the first time were developing a doctrine of private rights that overrode the classical public rights tradition.²¹ Here enters a familiar old friend: *Wynehamer v. People*,²² in which the New York Court of Appeals overturned a liquor control law because it violated sacred rights of property. As Edward Corwin contended some eighty-five years ago when he made *Wynehamer* the centerpiece of his argument on the pre-Civil War origins of substantive due process, this decision (almost unique in antebellum state jurisprudence) presaged what the courts would expand into a comprehensive charter for the protection of private rights after the adoption of

16. *Id.* at 117.

17. *See id.* at 147. For previous studies advancing this view, see, for example, LEVY, *supra* note 5, at 303-21; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 159, 165 (1975), and Harry N. Scheiber, *The Road to Munn: Eminent Domain and Public Purpose in the State Courts*, 5 *PERSP AM HIST.* 327, 335-55 (1971).

18. *See* NOVAK, *supra* note 4, at 157-70.

19. *See id.* at 171-89.

20. *See id.* at 191-233.

21. *Id.* at 188.

22. 13 N.Y. 378 (1856), *cited in* NOVAK, *supra* note 4, at 186. Corwin identified *Wynehamer* as the first important antebellum case in which a state court interpreted the "due process" requirement in police power regulation to encompass substance rather than only procedure. *See* Edward S. Corwin, *Due Process of Law Before the Civil War*, in *AMERICAN CONSTITUTIONAL HISTORY* 46, 54-55 (Alpheus T. Mason & Gerald Garvey eds., 1964). Corwin also traced the doctrinal lineage of public rights from earlier police power cases in the eastern and midwestern states. *See id.* at 46-66.

the Fourteenth Amendment.²³ In Novak's framework, the importance of the New York decision is not merely what it presages but rather what it rejects: an entire system of law that he portrays as "a local, customary, and discretionary regime"²⁴—the law of the well-ordered society in which regulation had enormous scope and dominance.

Indeed, Novak offers much of value in his intensive examination of several important aspects of regulation in American governance to 1877. Much of what Novak represents as his most valuable contribution to an understanding of basic historical interpretations and cultural aspects of American law, however, depends on the notion that a distorted view of the past has prevailed—presumably with scholars as a general matter, and certainly with respect to the public (which, he says, subscribes to the myth of a golden age of *laissez faire*). For example, Novak concludes by summarizing his by now oft-reiterated view that, contrary to conventional wisdom, the legal order before 1877 was heavily regulatory in character, with no clear separation of "market" from governmental order, and with a jurisprudential foundation in the common law rather than in constitutionalism.²⁵ Announcing his intention to write a successor volume that will deal with the modern (post-1877) liberal-constitutional state, Novak offers a look ahead by arguing that a paradigm shift occurred: The old common law tradition, described in this book, "was discarded, and a new law was invented."²⁶ Statism and individualism emerged side by side, both of them energized, paradoxically, by the same new constitutional jurisprudence.²⁷ The results: "an increasingly centralized, bureaucratized sovereign state; a sociocultural politics centered around an ever more thinly defined conception of the self; and a formal and instrumental approach to law and governance that privileges realistic and radically presentist formulations of interest and power over idealistic and historical visions of *salus populi*."²⁸

This theme is not new, but Novak's occasionally strong statement of it is new and extreme. Previous historical writings have recognized very clearly first, that regulation shaped institutions and constrained private rights in antebellum America and second, that the legal doctrines that supported such interventions were developed in a rich matrix of common law, civil law, and constitutional jurisprudence. Those who are already well aware of this history in its broad outlines—an audience that will benefit from the way in which Novak now expands the base of documentation very impressively—will, I

23. See Corwin, *supra* note 22, at 53-66.

24. NOVAK, *supra* note 4, at 188. What Corwin avers that *Wynehamer* rejected was the previously dominant view that considerations of "due process" were, properly, purely procedural. See Corwin, *supra* note 22, at 54-58.

25. See *id.* at 237.

26. *Id.* at 247.

27. See *id.*

28. *Id.* at 248.

think, be surprised by the overarching claim Novak advances, namely, that “the deluge of restrictions on economic life passed by state and local authorities in this period suggests that ‘regulation’ might supplant ‘the market’ as a better metaphor for the age.”²⁹ Whether there was in fact a “deluge,” let alone whether regulation was so obviously the *dominant* motif of law in that era, will receive further attention in this Book Review.

Partly because Novak raises this issue, but more importantly because history—in providing the stuff of the myths by which ideologues and politicians can cast a mantle of legitimacy over their ideas—matters, we need to understand correctly how Novak’s book fits into the historiography. To provide that context, therefore, Part I of this Book Review considers the literature on nineteenth-century law and economic change in America—the literature upon which Novak builds and to which he adds insightful perspectives and abundant new data. Part II deals briefly with the narrower question of how well legal scholars and historians until now have understood the scope and importance of the specific regulatory legislation and jurisprudence that form the core subject of Novak’s work. Finally, Part III offers reflections on Novak’s larger thesis as to the character of the legal tradition. I have no quarrel at all with his insistent claim that the historical record reveals a powerful doctrinal tradition of public rights—a contention I have advanced over thirty years and that numerous other widely cited historians have explored. I will argue, however, that there is serious doubt whether Novak can sustain his sweeping contention that pro-regulatory doctrines *dominated* public law and, further, that regulatory principles were the dominant element in American jurisprudence and working governance from the Revolutionary era to the 1870s.

I

The influence of Willard Hurst has been so far-reaching in large part because of the definitive way in which he demonstrated the extent to which there was a systematic pragmatic bias in the state court decisions affecting enterprise. Hurst identified this bias from evidence that courts frequently preferred the “dynamic” uses of property (that is, active enterprise and innovation) over legal claims associated with “static” uses, embodied in what are traditionally known as “vested rights.”³⁰ By adhering to this pattern of

29. *Id.* at 84.

30. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956). “Vested rights” are, in the end, the rights that courts will enforce. Use of the term in constitutional law and legal history generally refers to private rights in property that are claimed to have priority over claims of others or, indeed, over claims of government itself—unless a “taking” is declared under eminent domain procedures, with a requirement of compensation. For a brief historical survey of the doctrine in American courts, see Harry N. Scheiber, *Vested Rights*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 10, at 1962, 1962-64.

priorities, state courts—and to no less degree, state constitution writers and legislatures—advanced what Hurst has called “working” principles expressing the material values of a society increasingly committed to market capitalism and the promotion of growth.³¹ To put it in other terms, Hurst posited that, during the early phases of nineteenth-century industrialization,³² “law in action”³³ reflected the key premise that “it was common sense, and it was good, to use law to multiply the productive power of the economy.”³⁴ In this respect law was dedicated to what Hurst, in a memorable phrase—whatever its merits as to precision—termed “the release of energy.”³⁵ The phrase suggested that law was geared in significant ways to support individuals, groups, communities, and firms in the pursuit of private goals.³⁶

Hurst’s view has been influential, too, for its emphasis on how antebellum American society relied on the market, particularly on the market’s foundations in private property, for the ordering of its social and economic relationships. According to Hurst, the prevailing view in law and public policy reflected the “values of the striving, business-oriented middle class”³⁷ and held that there must be “substantial autonomy for private exercise of will in the market.”³⁸ By emphasizing what easily might be interpreted as the autonomy of the private realm, and by his attention to aspects of nineteenth-century jurisprudence that supported and advanced the concepts of economic liberty and “freedom of contract,” Hurst incorporated into his model an important element of what might be termed the “vested rights” interpretation of nineteenth-century American law. Ironically, this vested rights model was the

31. See HURST, *supra* note 30, at 5 (describing “working” principles); HURST, *supra* note 1, at 171-72, 203; see also HURST, *supra* note 30, at 4 (discussing a “pattern of attitudes and values”); *id.* at 70 (describing how faith in “our confident working principles” eroded in the face of unforeseen adverse results of market forces).

32. Hurst deals with the introduction of modern-style bureaucratic regulatory measures and administration in the last two chapters of *Law and the Conditions of Freedom in the Nineteenth Century United States*. See HURST, *supra* note 30, at 33-108.

33. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); see also Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911-1912) (discussing law as based on custom and social pressures rather than on conscious reasoning).

34. HURST, *supra* note 1, at 172.

35. “The Release of Energy” is the title of the first chapter of Hurst’s *Law and the Conditions of Freedom in the Nineteenth Century United States*. HURST, *supra* note 30, at 3.

36. Hurst swept into this concept, however, communal or collective values as well as noneconomic values dear to individuals, and he did not confine “release of energy” to the material side of life. See, e.g., HURST, *supra* note 30, at 27-29 (discussing eminent domain and the police power); JAMES WILLARD HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 155-60* (1960) (discussing reasonable uses of power as the core of the concept of constitutionality and the relation of this concept to state police power, the commerce power, and authority in fiscal affairs); see also HURST, *supra* note 1, *passim* (discussing the early development of public utility law concepts).

37. JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 226 (1977). The dominant forces in politics were not necessarily a true majority, let alone representative of a consensus of all elements in a diverse population. In 1979, Hurst dealt with his critics on this point in a fascinating reconsideration of his own work. See James Willard Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 1 (1979).

38. HURST, *supra* note 37, at 228.

very interpretation that Hurst, in the whole corpus of his work, sought explicitly to modify and in significant measure to refute.³⁹

Corwin developed the vested rights model to its fullest form, arguing that the protection of established property rights against interference by the state was the basic doctrine of American constitutional law.⁴⁰ Corwin found evidence for this interpretation mainly in the post-Civil War federal judiciary's property-minded doctrines—and especially in the role of the Supreme Court and many state courts in overturning regulatory and social legislation during the so-called *Lochner*⁴¹ era. But he also traced its wellsprings to the Marshall Court's invocation of natural law in its Contract Clause jurisprudence (most dramatically in the *Yazoo Frauds Case*⁴²) and in a scattering of other pre-Civil War decisions in which federal and state courts thwarted legislative tampering with property rights.⁴³ Corwin began to develop his thesis in articles that appeared as early as 1911, but even today many historians of antebellum constitutional law emphasize the protective doctrines that the Marshall Court and other federal courts delineated—with powerful doctrinal support from James Kent and Joseph Story in their great treatises⁴⁴—in the defense of vested rights.⁴⁵ In this view of constitutional history, the Taney Court's decisions—which hedged on the commitment to property rights (most dramatically in *Charles River Bridge v. Warren Bridge*⁴⁶) and widened the range of permissible regulatory action by the states under their police power—constituted an aberration, definitively corrected when the Court developed its Fourteenth Amendment jurisprudence in the postwar period and

39. For analysis of the vested rights interpretation, see Scheiber, *At the Borderland*, *supra* note 3; Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, 33 J. ECON. HIST. 232 (1973), reprinted in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132-41 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978); and Scheiber, *supra* note 30. Novak provides a critical summary of the vested rights interpretation. See NOVAK, *supra* note 4, at 22-23.

40. See Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

41. *Lochner v. New York*, 198 U.S. 45 (1905).

42. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). A history of the case and its political background is provided in C. PETER MAGRATH, *YAZOO* (1966).

43. See *AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN* (Alpheus T. Mason & Gerald Garvey eds., 1964).

44. See JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (New York, O. Halstead 1827), JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Fred B. Rothman & Co. 1991) (1833).

45. See, e.g., KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY STATESMAN OF THE OLD REPUBLIC* (1985); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 595-675 (1988) (Vols. III-IV of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund & Stanley N. Katz eds.)); see also George Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1 *passim* (1981) (stating that establishment of the rule of law, and hence protection of vested property rights, was Marshall's great achievement).

46. 36 U.S. (11 Pet.) 420 (1837). Stanley Kutler, for one, has placed the history of this case squarely in a Hurstian framework. See STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION* 102-16 (1971), see also CARL B. SWISHER, *THE TANEY PERIOD, 1836-64*, at 71-98 (1974) (Vol. V of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund & Stanley N. Katz eds.))

the *Lochner* era.⁴⁷ In this view, the spirit of America's legal culture in the early nineteenth century is captured in Justice Story's following assertion in 1829:

[G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.⁴⁸

As a recent study of property rights in American legal history thus reiterates, "Antebellum legal culture placed a high value on the security of property."⁴⁹ In scores of state court rulings as well as in federal jurisprudence (including some key cases in which Chief Justice Taney spoke for the Court in terms much more reminiscent of Marshallian doctrine than of the *Charles River Bridge* decision), American jurists "envisioned respect for property rights as the basis for both ordered liberty and economic development."⁵⁰ Unlike Corwin and other orthodox adherents of the vested rights interpretation, Hurst consistently qualified his portrayal of how the legislatures and courts gave the market wide play. He likewise qualified his stress upon the significance of economic liberty as a cherished value. For Hurst, it was important to pay equal attention to the elements of American law that trenched upon private rights and modified or rejected private claims in order to advance the concept of the communal interest and to articulate public values.⁵¹

Hurst's account of the relationship between the legal system and the economy systematically emphasized that positive law shaped institutions and channelled the dynamics of the market. Following Hurst's lead, many nineteenth-century legal historians have recognized that the doctrines of contract, property, and tort were multifaceted. They have also recognized that the police power qualified all three of these doctrinal systems governing private economic relations.⁵² Studies that employ this approach hold in firm and clear focus the ways in which property law doctrines protected and

47. This is the portrayal offered, for example, in the widely used text by ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 91-120 (Sanford Levinson ed., 2d ed. 1994).

48. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829); see also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 81 (1992) (quoting *Wilkinson*, 27 U.S. (2 Pet.) at 657).

49. ELY, *supra* note 48, at 80.

50. *Id.* at 80-81; see also Scheiber, *supra* note 30, *passim*. For an important analysis of how republicanism confronted property rights, regulatory claims, and competing theories of constitutionalism, see R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814 (1987).

51. In particular, see Hurst's treatment of corporation law in JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES 1780-1970* (1970).

52. *Cf.* HURST, *supra* note 1, *passim* (developing this view with respect to tax law, labor law, eminent domain, and the police power).

nurtured private rights, expressing the values of possessive individualism⁵³ and of freedom of action in market transactions. Such individualistic values were embedded first, in the precepts of classical contract law (the "freedom of contract" ideal) prescribing that the will of the parties should be honored; and second, in the precepts of property law requiring that reasonable use and expectations, and quiet possession, should be similarly honored.⁵⁴ On the other hand, however, constitutional and private law judicial decisions regarding property and business enterprise also embodied a positive doctrine of "public rights" that expressed community values. As I have written previously, public rights were much more than a residual leftover after the Contract Clause and other protections of property were accounted for:⁵⁵

These doctrines also embody notions of the sovereignty of the state and its legitimate reach. While governmental power is mobilized and constrained in our constitutional system, for the protection of private owners' "dominion" over their property, it is also mobilized in the name of rights of the public—the notion of *salus populi*, what we moderns usually term "the public interest."⁵⁶

The jurists who put in place the foundation stones of vested rights doctrine relied in part on the language of the Federal Constitution. But they also invoked the precepts of natural justice and "higher law," and they drew on the canon of the common law to advocate the fundamental and inalienable character of private rights. In precisely the same manner, however, the exponents of public rights found a parallel theory in the standard treatises of Continental law—by Vattel,⁵⁷ Grotius,⁵⁸ Pufendorf,⁵⁹

53. This phrase is adopted from C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962), and is now in wide use.

54. See HURST, *supra* note 30, at 28-29; HURST, *supra* note 1, at 159-66, 203-04, 343-423; HURST, *supra* note 51, *passim*. Many of the leading aspects of 19th-century contract and property law are reexamined in essays by Charles McCurdy, Donald Pisani, and others in the forthcoming book, *FREEDOM OF CONTRACT AND THE STATE* (Harry N. Scheiber ed., forthcoming 1998).

55. See generally Scheiber, *Public Rights*, *supra* note 6.

56. Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, in *LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL* 217, 221 (Ellen Frankel Paul & Howard Dickman eds., 1989) [hereinafter Scheiber, *Jurisprudence—and Mythology—of Eminent Domain*] (quoting Blackstone). Blackstone wrote:

There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or *that sole and despotic dominion* which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.

2 WILLIAM BLACKSTONE, *COMMENTARIES* *2; see also Harry N. Scheiber, *Doctrinal Legacies and Institutional Innovation: Law and the Economy in American History*, 2 *LAW CONTEXT* 50, 62-65 (1984) [hereinafter Scheiber, *Doctrinal Legacies*].

57. See VATTEL, *supra* note 6.

58. See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1646).

59. See SAMUEL PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO* (F.G. Moore trans., Oxford Univ. Press 1927) (1682).

and Bynkershoek⁶⁰—all of which were cited extensively in antebellum state cases. Their theory posited that the rights of “sovereignty” were inherent and inalienable powers of the states, serving as the basis for taxation, regulation, and property takings.⁶¹

Reconciling the ideals of limited government and the rule of law with the republican theory that the legislature speaks for the people—so that, as Gordon Wood argues, it becomes questionable “whether the people’s personal rights could meaningfully exist apart from the people’s sovereign power”⁶²—became “the great dilemma of political leaders in the new republic.”⁶³ It also became the great dilemma of the republic’s jurisprudence, and American lawmakers did not seek to effect a reconciliation of those competing theories by denying the prerogatives of the state. Instead, even the most conservative of them sought a formula that would resolve the tension between individualism and sovereign power. “Rights of the public” were to be asserted, not without limit, but within the framework of doctrines such as “public purpose” (a doctrine formulated by courts to serve as a limitation on taxation or eminent domain) and the requirement of just compensation for all takings except those implicating public safety, welfare, or health as measured by standards that derived from the common law of nuisance or other legitimating canons.⁶⁴ The formalization of the police power, worked out in these terms, emerged most

60. See CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* (Tenney Frank trans., Clarendon Press 1930) (1737).

61. See LEVY, *supra* note 5, *passim*; MORRIS, *supra* note 5, *passim*. The Continental jurists were cited by American judges especially frequently in eminent domain cases. See Scheiber, *supra* note 17, *passim*; see also NOVAK, *supra* note 4, at 29-30 (discussing the ramifications of the Continental writers’ arguments on the social nature of human kind). William Stoebuck has used the phrase “inherent power doctrine” to characterize this strain in Continental jurisprudence. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559-68 (1972).

62. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 189 (1991).

63. *Id.*; see also BENJAMIN F. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938); Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241 (Jon Elster & Rune Slagstad eds., 1988).

64. See generally ELY, *supra* note 48; ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCÍNYTRE COOLEY: A STUDY IN THE HISTORY OF IDEAS* (1987); WHITE, *supra* note 45; Charles W. McCurdy, *Federalism and the Judicial Mind in a Conservative Age: Stephen Field*, in *POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM* 31 (Harry N. Scheiber & Malcolm M. Feeley eds., 1989) [hereinafter McCurdy, *Federalism and the Judicial Mind*]; Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975) [hereinafter McCurdy, *Government-Business Relations*], reprinted in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER*, *supra* note 39, at 245; Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 WASH. U. L.Q. 1; Scheiber, *Public Rights*, *supra* note 6. The “public purpose” doctrine emerged in the early Republic principally in eminent domain cases; by the 1850s, however, it was also invoked as a limitation upon the use of taxation. See Harry N. Scheiber, *Public Purpose Doctrine*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 10, at 1489. In his analysis of the colonial era in Massachusetts, offering insight into the doctrinal heritage of public rights in the 19th-century, William Nelson reviewed the “balancing of private right and public need” in ferry cases, road construction and maintenance, fire prevention, fish passage on navigable streams, and milldam construction. NELSON, *supra* note 17, at 52. He concluded that the statutes “suggest[ed] strongly that private property served community needs first and individual convenience second.” *Id.* Unlike Professor Novak, Nelson believes that the collectivist bent of colonial law gave way after the Revolution to a property-minded and pro-entrepreneurial style. See *id.* at 144-74.

dramatically and thoroughly in several cases decided by the Massachusetts court, particularly in Chief Justice Lemuel Shaw's decision in *Commonwealth v. Alger*.⁶⁵ Many scholars during the last four decades have elaborated *Alger's* importance, most notably Leonard Levy, in his biography of Shaw,⁶⁶ and Scott Reznick and I, in articles.⁶⁷ The literature on these cases and their doctrinal importance flows directly from the concerns of Hurst and Levy, and most of the writers who have developed the theme of regulation and its legitimacy in antebellum American law have done so with a view toward revising and correcting the vested rights model.⁶⁸

Hurst's influence, meanwhile, reached out beyond the fields of law and history proper to persuade economists writing on the history of the U.S. economy to give serious attention to the impact of legal institutions. Many such economists proudly designated themselves as "cliometricians" interested almost exclusively in quantifiable data and, as a matter of methodological orthodoxy verging on ideology, committed themselves to the idea that government and the law could be taken as "givens" to be held static in the background of analysis, as part of that marvelous package of set-asides taken care of with the strategy of *ceteris paribus*.⁶⁹ The historical literature produced by this school in economic history blocked out law and government, except as inert "background" or "context."⁷⁰ When these economists, in the

65. 61 Mass. (7 Cush.) 53 (1851).

66. See LEVY, *supra* note 5, at 247-54.

67. See Reznick, *supra* note 64, at 13-19; Scheiber, *Public Rights*, *supra* note 6, at 221-24

68. Astonishingly enough, however, this entire aspect of American legal history, involving analysis of the positive state in legal theory and as a reality of the relationship between law and capitalism, was kept out of view in Morton Horwitz's much-cited study of the "transformation" of American law, see HORWITZ, *supra* note 3, whose main thesis is the target of important criticisms in Novak's work. See, e.g., NOVAK, *supra* note 4, at 22-23, 61-62, 274 n.51. Horwitz gave attention to eminent domain law, but public law more generally and its regulatory aspect especially were given almost no play in his book. This omission lent some unwarranted credibility to his main thesis, based on the history of doctrinal innovation in private law, that the courts adopted an instrumental style to reshape doctrine in the interest of industrial entrepreneurs and the propertied classes uniformly at the expense of the dispossessed and even the agrarian property owners. See HORWITZ, *supra* note 3, at 253-54. Early critiques include Charles J. McClain, Jr., *Legal Change and Class Interests: A Review Essay on Morton Horwitz's The Transformation of American Law*, 68 CAL. L. REV. 382 (1980) (book review); and Scheiber, *The Legal Mind*, *supra* note 3. Professor Horwitz's analysis of contract law, which is central to his thesis, was attacked across a broad evidentiary and interpretive front in an important critical article by A.W.B. Simpson. See A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

69. See DOUGLASS C. NORTH, *GROWTH AND WELFARE IN THE AMERICAN PAST* (2d ed. 1974) (exemplifying this view). Professor North, co-winner with Robert William Fogel of the Nobel Memorial Prize in Economics, subsequently assumed a very different posture and devoted himself to intensive analysis of institutions and their impact. For an insightful recollection and analysis of North's and Fogel's contributions to the "New Economic History," see ROGER L. RANSOM ET AL., *EXPLORATIONS IN THE NEW ECONOMIC HISTORY: ESSAYS IN HONOR OF DOUGLASS C. NORTH* (1982). See also Lance E. Davis, *It's a Long, Long Road to Tipperary, or Reflections on Organized Violence, Protection Rates, and Related Topics: The New Political History*, 40 J. ECON. HIST. 1 (1980) (discussing institutional analysis in relation to quantification).

70. This methodology drew strenuous objections from historians and some legal scholars. See, e.g., TONY ALLAN FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* (1979); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource*

late 1970s, finally began to recognize the importance of institutions generally and property rights in particular, the shift came about in part because of Hurst and other legal historians. They had demonstrated that "the market" was itself an institution whose structure and distribution of advantages were defined in large part by conscious political decisionmaking, by the investment of public funds in the provision of infrastructure, and by the shifting, purposive allocation of property rights and privileges.⁷¹ Also recaptured in mainstream scholarship on economic history (which has shifted since the 1950s from the discipline of history largely to the segment of the field dominated by economists) was recognition of the importance of conscious planning in public economic policy, especially in transportation policy. The economists also began to take serious account of the roles of publicly owned, financed, and operated enterprises in the transport and banking sectors. A long-established line of historical studies, dating from the 1930s and continuing to the present, has dealt with this aspect of public sector involvement in the dynamics of economic change.⁷²

Regulatory law before 1877, however, generally received little attention in historical writings by economists.⁷³ When economists gave law systematic consideration, they focused most often on property rights; regulation entered the analysis, in nearly all instances, only with respect to federal administrative law late in the century.⁷⁴ Even in studies by Robert Heilbroner, an economist

Allocation in Nineteenth-Century America, 10 L. & SOC'Y REV. 235 (1975-1976); Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC'Y REV. 57 (1975-1976) [hereinafter Scheiber, *Federalism*]; Harry N. Scheiber, *Law and Political Institutions*, in 2 ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY 487 (Glenn Porter ed., 1980) [hereinafter Scheiber, *Law and Political Institutions*]; Harry N. Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41 J. ECON. HIST. 103 (1981) [hereinafter Scheiber, *Regulation*]; Harold D. Woodman, *Post-Civil War Southern Agriculture and the Law*, 53 AGRIC. HIST. 319 (1979). Major contributions to the dialogue on this issue were made in a symposium organized in honor of Hurst by Professor Robert W. Gordon. See Symposium, *Law and Society in American History: Essays in Honor of J. Willard Hurst*, 10 L. & SOC'Y REV. 9 (1975-1976). Professor Morton Keller, of the Brandeis University Department of History, and Albro Martin, then of the Harvard Business School, pursued the dialogue further by organizing another symposium. See Symposium, *Legal and Business History*, 53 BUS. HIST. REV. 295 (1979); see also James Soltow, *American Institutional Studies: Present Knowledge and Past Trends*, 21 J. ECON. HIST. 87 (1971) (discussing the importance of institutions, including government, in economic history).

71. See Scheiber, *Regulation*, *supra* note 70, *passim*.

72. See Robert A. Lively, *The American System: A Review Article*, 29 BUS. HIST. REV. 81 (1955); Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 75 J. AM. HIST. 740 (1987); Harry N. Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in Nineteenth-Century America*, 3 J. INTERDISC. HIST. 135 (1972); Harry N. Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159 [hereinafter Scheiber, *Public Economic Policy*].

73. A very important exception was the research of Jonathan Hughes, who did not do much original work in primary sources on the subject but nevertheless gave regulation serious attention. See, e.g., JONATHAN R.T. HUGHES, *THE GOVERNMENTAL HABIT: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT* (1977) (detailing the continuity of the common law heritage from England and colonial America to the modern day).

74. See, e.g., LANCE DAVIS & DOUGLASS C. NORTH, *INSTITUTIONAL CHANGE AND AMERICAN ECONOMIC GROWTH* (1971); NORTH, *supra* note 69. Similarly, the role of state government in American history, especially before 1950, is largely ignored by scholars in political science who offer grand

sympathetic to the objectives of modern welfare and regulatory measures who stands opposite free-market enthusiasts on the ideological spectrum, one finds virtually no awareness that a regulatory tradition existed in the nineteenth century at all.⁷⁵

An equally extreme neglect of the regulatory tradition in governance, and of the public rights tradition in American jurisprudence, occurs in the writings of some “free market” adherents in the field of legal scholarship. The most notable is Professor Richard Epstein of the University of Chicago Law School, whose attacks on the jurisprudential heritage of the New Deal period are often cast in historical terms and who typically cites the “original understanding” of constitutional imperatives to discredit modern constitutional norms that have legitimated interventionist policies.⁷⁶ Scholars who follow this line are unwilling to admit that government interventions have made any positive contributions to economic growth and development, let alone to the well-being of the citizenry or the advancement of individual aspirations. They also carry the vested rights view so far as to deny the legitimacy not only of the modern era’s New Deal constitutional legacy, but also of historical scholarship like Hurst’s that has shown how intervention represents a core element of the inherited American legal tradition. In fact, Epstein contends that virtually all governmental interventions that produce costs to private property owners are “takings” and hence must be compensated.⁷⁷ Further, Epstein believes that this notion is consistent with Blackstone’s version of common law in the 1780s, which he claims was incorporated wholesale (frozen and immobile, like a mammoth fixed in the ice of a tundra) into American constitutional law at the nation’s founding.⁷⁸ The persistence of this kind of approach gives some force to Professor Novak’s insistent assertions that modern free market, antiregulatory, anti-welfare-state politicians and their scholarly allies have successfully promoted a myth depicting a golden age of laissez faire in the

interpretations of government and the economy. *See, e.g.*, Chalmers Johnson, *The Idea of Industrial Policy, Introduction to THE INDUSTRIAL POLICY DEBATE 3* (Chalmers Johnson ed., 1984); Aaron Wildavsky, *Squaring the Political Circle: Industrial Policies and the American Dream, in THE INDUSTRIAL POLICY DEBATE, supra*, at 27. An exception is Frank J. Mauro, *State and Local Promotion of Innovation, in LEGAL STRATEGIES FOR INDUSTRIAL INNOVATION 321* (Richard A. Givens ed., 1982).

75. *See, e.g.*, ROBERT L. HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA* (1977).

76. *See, e.g.*, RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). This is not the occasion for developing the details of the views of free market ideological advocates such as Richard Epstein or, for example, Bernard Siegan, another writer whose allegedly historical studies are largely oblivious to a vast body of evidence and scholarly writing that refutes his main (“libertarian”) thesis. *See, e.g.*, BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); *cf* ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987) (accepting a broad scope for the police power but also seeking a middle ground on the question of the eminent domain power by starting from a position sympathetic to the neo-libertarian view).

77. *See EPSTEIN, supra* note 76, *passim*.

78. *See, e.g., id.* at 22-23 (arguing that Blackstone’s account of private property best explains what the term means in the Takings Clause).

American past.⁷⁹

In fact, I would contend that, except for the small segment of the scholarly community that Epstein and like-minded colleagues represent, there has been a growing appreciation—common to law, history, and economics—of the significant impact of public sector investment and “public rights” jurisprudential doctrines (among others) on the nineteenth-century American economy. Indeed, a lively and continuing scholarly interest persists in the approach that Hurst exemplified, an approach that embraces the tension between sovereignty, public rights, private claims, and other constitutional doctrines (such as states’ rights and national supremacy) during the nineteenth century.⁸⁰ Carol Rose’s work on community rights, “sociability,” and the question of the commons in relation to localism and republicanism, for instance, has extended the Hurstian framework in a highly original way.⁸¹ Hurst’s framework has also provided context for new monographic studies that have explored the ways in which traditional communities and “precommercial” interests sought to mobilize egalitarian values and claims of natural rights in a valiant resistance to the incursions of the market economy.⁸² Lawrence Friedman’s now-classic work on the history of contract law in Wisconsin, for example, indicated how a great variety of important governmental functions during the nineteenth century were performed through private law doctrines as

79. See NOVAK, *supra* note 4, at 6-8, 247-48. As I indicate, however, I think that Novak exaggerates the extent to which this ideological and ahistorical approach to legal and jurisprudential tradition is taken at face value in the scholarly world. See *infra* Part III.

80. A full and incisive critical survey of the literature, still quite current though written nearly ten years ago, appears in Pisani, *supra* note 72. Also of interest with respect to property rights and regulation, and the implications for republicanism, are JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990); and WOOD, *supra* note 62. Community (or collective) values and private rights are a major theme in the interesting essays in *TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION* (Herman Belz et al. eds., 1992). The relationship of economic individualism to republicanism—a relationship with broad implications for how we ought to interpret and implement “public rights” claims in jurisprudence and law—was a subject created by Joyce Appleby, whose influential writings are taken up in several essays in *TO FORM A MORE PERFECT UNION*, *supra*; see especially, however, the critiques in Kenneth Karst, *Liberalism*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 311 (Leonard W. Levy ed., Supp. I 1992); and Donald Winch, *Economic Liberalism as Ideology: The Appleby Vision*, 38 *ECON. HIST. REV.* 287 (1985).

81. See CAROL M. ROSE, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, in *PROPERTY & PERSUASION: ESSAYS IN THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 105, 145-50 (1994). Sociability is also explored sensitively in relation to the jurisprudence of the early Republic in a remarkable article by David Thomas Konig. See David Thomas Konig, *Jurisprudence and Social Policy in the New Republic*, in *DEVisING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC 178, 184-88* (David Thomas Konig ed., 1995).

82. An exceptionally vivid example of such a confrontation is given in a study of how the traditional fishing rights on Carolina rivers and streams were threatened and then defended in a losing battle by those who fought in the name of traditional communal rights. See Harry L. Watson, “*The Common Rights of Mankind?*”: *Subsistence, Shad, and Commerce in the Early Republican South*, 83 *J. AM. HIST.* 1 (1996); *infra* notes 176-181 and accompanying text; see also Steven Hahn, *The Yeomanry of the Nonplantation South: Upper Piedmont Georgia, 1850-1860*, in *CLASS, CONFLICT, AND CONSENSUS: ANTEBELLUM SOUTHERN COMMUNITY STUDIES* 29 (Orville Vernon Burton & Robert C. McMath, Jr., eds., 1982) (discussing yeomans’ claims to grazing rights in the back country and other traditional and egalitarian claims).

well as through public law innovations at a time when fiscal restraints, lack of political will to support bureaucratized government, and reliance upon self-enforcing legal instrumentalities limited the public sector's administrative capacity.⁸³ Hendrik Hartog provided important insights into how the public sector developed an independent administrative competence at the municipal level in the early years of the Republic.⁸⁴ Tony Freyer's studies of company law, federal and state commercial law, and state police and eminent domain powers have enriched further our understanding of how public rights doctrines related to the values of localism and republicanism.⁸⁵ In a searching reappraisal of nineteenth-century labor relations and the law, Christopher Tomlins too has demonstrated that American jurists were forced to confront robust public rights and communal rights doctrines, even at the height of the movement that carried American law into a highly individualistic mode in the employment relationship and industrial accident areas.⁸⁶

Morton Keller's magisterial study of American governmental institutions and their operations during the postbellum period exemplifies the extent to which historical overviews and syntheses have incorporated issues of law and the economy.⁸⁷ Keller explores a broad range of questions that Hurst has made central to the literature on the relation between law and economic change. Consider also that in Charles Grier Sellers's 1991 study of Jacksonian America, the author pursues similar themes against the background premise that "lawyers were the shock troops of capitalism."⁸⁸ Similarly, Howard Gillman's splendid book on *Lochner*-like doctrine in the long-term development of nineteenth-century regulatory law brilliantly manifests a continuing quest to understand the full dimensions of the origins, continuities, and adaptations of regulatory norms and constitutional doctrine.⁸⁹

As the foregoing survey has, I hope, made clear, some deep cleavages persist between those who see the historic tradition of American law in relation to economy and society as *benign* and those who instead regard that tradition as *insidious* (either because the deployment of law systematically abetted exploitation of the dispossessed or, alternatively, because law increasingly permitted government to become excessively interventionist and hostile to

83. See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965).

84. See HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983).

85. See FREYER, *supra* note 70; TONY A. FREYER, *PRODUCERS VERSUS CAPITALISTS: CONSTITUTIONAL CONFLICT IN ANTEBELLUM AMERICA* (1994).

86. See TOMLINS, *supra* note 6, at 129-79.

87. See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* (1977).

88. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846*, at 47 (1991).

89. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); see also JONES, *supra* note 64; McCurdy, *Government-Business Relations*, *supra* note 64.

individualism). The literature exhibits three distinctive approaches. First is the vested rights model, which regards the protection of property rights as the dominant tradition and portrays regulation as a late development (be it salutary or deplorable) in the historical picture. Second is the view that a highly pragmatic, or instrumental, judicial style prevailed in a legal culture that gave primacy to material growth. Some scholars link this view to the notion of an exploitative legal system, working against the interests of those who were economically dispossessed; others have credited Hurst's belief that "release of energy" had many dimensions. Third is the model with which I have sought to explain the overall record, a model portraying tension among competing concepts of public rights and private claims rather than depicting law's influence on society as monolithic at any moment in time or linear with respect to how it changed over time. Whichever interpretation survives further scrutiny by students of the legal tradition, at least today we can say with confidence that the complexities of the institutional and doctrinal history are no longer generally lost from sight in a framework of vested rights theory or, even worse, lost from sight altogether in historical analysis.

With respect to Professor Novak's book in particular, it is misleading to insist, as he does, that an appreciation of government's positive role and of public rights doctrine is absent from our scholarship, let alone that it has suffered "terminal neglect"⁹⁰ or been "erased from American history."⁹¹ The importance of Novak's own scholarship on the history of law and society speaks for itself and does not require such hyperbole to gain the attention it deserves.

II

Anyone interested in nineteenth-century American law and governance who has been paying attention to the literature on this subject at any time in the last thirty years could hardly be unaware of the kind of regulation that concerns Professor Novak in this new book. This is not to say that his explorations are redundant or that they lack originality; on the contrary, they have a depth and interest that make his study unique. Nonetheless, precisely because history (and concomitant mythmaking) matters so much to our understanding of the American legal tradition, it is important to know how historians until now have regarded the traditions of intervention and regulation, as well as how they have understood the jurisprudence that gave regulation its constitutional and legal sanction.

Consider what the article on regulation in the standard modern encyclopedia of American constitutional law and history, published in 1986,

90. NOVAK, *supra* note 4, at 7.

91. *Id.* at 9.

had to say of regulations in the antebellum period: "Long and widespread practice throughout the country," William Letwin wrote, "confirmed that state legislatures can indeed regulate the terms and conditions not only of trade but also of production, as well as entry into various occupations—though courts repeatedly insisted that the states' police powers, broad though they were, must be limited by profound constitutional antipathy to arbitrary action."⁹²

Even the *Lochner* era, Letwin asserted, should be seen as "a relatively short interval" during which the federal judiciary invalidated "a few particular forms of economic regulation," but did so without placing in doubt the constitutionality of the state legislatures' regulatory powers across a broad range of social and economic matters.⁹³ Regulatory intervention under state law, of course, including municipal government regulations, was a "historically continuous practice" in American governance.⁹⁴ "Seldom questioned" in the antebellum era, as Letwin reminded us,

[was] the constitutional authority of the states to carry on any and every form of economic regulation [S]tate and local governments set the prices to be charged by wagoners, wood sawyers, chimneysweeps, pawnbrokers, hackney carriages, ferries, wharfs, bridges, and bakers; required licensing of auctioneers, retailers, restaurants, taverns, vendors of lottery tickets, and slaughterhouses; and inspected the quality of timber, shingles, onions, butter, nails, tobacco, salted meat and fish, and bread. This very incomplete list attests to an intention to exercise detailed control over the operation of markets, especially (though not only) those that have since been

92. William Letwin, *Economic Regulation*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 10, at 602, 603.

93. *Id.* The *Encyclopedia of the American Constitution* also published an article by Bernard Siegan reiterating the litany of Supreme Court decisions and dicta that spoke of the sanctity of property rights but ignoring completely all well-known Supreme Court jurisprudence supporting state police powers validating the tradition of public rights. See Bernard H. Siegan, *Economic Liberties and the Constitution*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 10, at 600, 600-02. It became common in the Reagan-Bush era for neoconservatives to cite this revival of a long-discredited laissez faire version of American law and constitutional history in order to give historic legitimacy to their legislative proposals. See Hugh Heclo, *Reaganism and the Search for a Public Philosophy*, in *PERSPECTIVES ON THE REAGAN YEARS* 31, 31-63 (John L. Palmer ed., 1986). See generally *THE NEW DIRECTION IN AMERICAN POLITICS* (John E. Chubb & Paul E. Peterson eds., 1985). This movement was expressed most recently in the efforts of conservative Republicans to justify the crippling of environmental and other regulatory legislation's effectiveness through so-called "property rights" bills that would require compensation for diminution of property values attributable to regulation. Initiatives and referenda in several states (including Washington and Arizona) were introduced in the 1996 elections to impose compensation requirements on regulatory law at the state level; they failed to pass. See Edmund L. Andrews, *Outlook '96: The Economy Giving Business a Chance To Test the Wings of Deregulation*, *N.Y. TIMES*, Jan. 2, 1996, at C1 (providing a summary of the issues expressed in the "property rights bill" and its place in the Republican agenda for the 1996 elections); *Arizona Voters Defeat a Property Initiative*, *N.Y. TIMES*, Nov. 14, 1994, at B8 (discussing Arizona's defeat of a similar bill); John H. Cushman, Jr., *House Clears More Limits on Environmental Rules*, *N.Y. TIMES*, Mar. 3, 1995, at A19 (discussing a House bill that would preclude prevention of development on ecological grounds unless the landowner is compensated for any decrease in property value); Bill Slocum, *Property Rights vs. Ecological Concern*, *N.Y. TIMES*, June 16, 1996, § 13 (Connecticut Weekly), at 1 (discussing a legislative fight in Connecticut).

94. Letwin, *supra* note 92, at 603.

characterized as providing "public services" and those thought to be morally dubious because of association with usury, betting, intoxication, or excessive jubilation.⁹⁵

As Letwin concludes, "American governments were never dogmatically addicted to laissez-faire, notwithstanding a broad though sometimes faltering preference for private enterprise, and the Constitution, as intended, written, and interpreted, is not a manifesto in favor of laissez-faire."⁹⁶

In his pathbreaking *A History of American Law*,⁹⁷ published a decade and a half earlier, Lawrence Friedman likewise recognized the importance of regulation during the period 1776 to 1847. There is no ideological boundary-drawing in the record, Friedman wrote, and on the whole, "Economic law was practical and promotional."⁹⁸ Yet regulations of all kinds, he showed, were also manifest in state statutes and municipal ordinances: Legislation in Georgia, Connecticut, and New York imposed quality controls and inspection, specified marketing standards, and regulated auctioneers and itinerant peddlers.⁹⁹ In Massachusetts, meanwhile, laws regulated fish farming, bird hunting, cranberry picking, and the like.¹⁰⁰ Drawing upon standard monographs on Massachusetts policy¹⁰¹ and on the history of medical licensing,¹⁰² Professor Friedman's account demonstrated how quarantine regulations and nuisance laws trespassed on property rights, and how consumer-oriented regulations posed at least a doctrinal challenge to the notion of caveat emptor in the common law of contract.¹⁰³

95. *Id.*

96. *Id.* I do not pursue in this Book Review the question of whether the Constitution should be interpreted as having intended to impose a laissez faire regime on either federal law or, by extension, state law. The early history of constitutional adjudication, even during the height of Marshall Court influence, shows little evidence of any such intention or interpretation. See Scheiber, *State Police Power*, *supra* note 10, at 1744-51. Moreover, scholarship on the Constitutional Convention and the founding era has firmly established that the leaders who gathered at Philadelphia in 1787 to write a new charter, and certainly the politicians on both sides of the Federalist-Antifederalist divide who comprised the first Congress, consciously laid the foundations for a neomercantilist regime and were in no way committed to laissez faire as the controlling principle of regulatory law. See JOHN E. CROWLEY, *THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION* (1993); E.A.J. JOHNSON, *THE FOUNDATIONS OF AMERICAN ECONOMIC FREEDOM: GOVERNMENT AND ENTERPRISE IN THE AGE OF WASHINGTON* (1973).

97. FRIEDMAN, *supra* note 70.

98. *Id.* at 161.

99. *See id.*

100. *See id.* at 161-62.

101. See OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH, A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1744-1861* (rev. ed. 1969).

102. See RICHARD HARRISON SHRYOCK, *MEDICAL LICENSING IN AMERICA, 1650-1965* (1967). John Duffy and Charles Rosenberg have conducted especially important research on the history of police power interventions for protection of public health, research which forms essential background to Novak's discussion, see NOVAK, *supra* note 4, at 149-89, of legal and institutional responses to the cholera epidemics and other public health problems. See JOHN DUFFY, *A HISTORY OF PUBLIC HEALTH IN NEW YORK CITY, 1866-1966* (1974); JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* (1990); CHARLES E. ROSENBERG, *THE CHOLERA YEARS: THE UNITED STATES IN 1832, 1849, AND 1866* (1962).

103. *See* FRIEDMAN, *supra* note 70, at 161-63.

Scholars have done more than identify a strong regulatory strain in the history of American law and its relation to the economy; they have also recognized that interventions by state governments represent a continuation of a long tradition dating to the colonial period, a tradition reflecting the foundation of America's economic and social legislation in English common law. A case in point is the history of American labor law. Richard Morris's book, which was long the leading work on the subject, traced themes such as types and degrees of servitude, the status of apprentices, and wage and craft regulations, from the colonial era well into the nineteenth century.¹⁰⁴ Chris Tomlins's more recent scholarship on the same subject also gives abundant attention to the inheritance of common law that sought to prevent market models and the legal fiction of equality of bargaining from prevailing.¹⁰⁵ These doctrines were advocated by counsel in key labor cases in the 1840s, and though they did not win out at the time, they were indicative, at minimum, of the duality (or multiplicity) of doctrinal tradition.¹⁰⁶

Three other examples will illustrate the point. First, economic historian Jonathan Hughes has posited that in colonial America "virtually every aspect of economic life was subject to nonmarket controls."¹⁰⁷ According to Hughes, the body of statutory law and judicial precedent established over nearly two centuries of colonial development "was like an institutional gene pool."¹⁰⁸ He noted, "Most of the colonial institutions and practices live on today in some form, and there is very little in the way of nonmarket control of the economy that does not have a colonial or English forerunner."¹⁰⁹ Throughout American history, governmental policies at all levels in the federal system have included a powerful component of regulatory law "because, put bluntly, Americans distrust capitalism in its pure form."¹¹⁰ Hughes faulted state intervention for being too fragmented, too driven by ad hoc responses to crises, and too often captured by special interests.¹¹¹ In this respect, his view echoed the powerful critique Willard Hurst long levied against the failures of American law. Historically, especially prior to the Progressive era, Hurst argued, American governance failed to define and pursue the public interest effectively.¹¹² The result was "drift and default," incoherence of policy, responsiveness without responsibility, and a lack of the administrative

104. MORRIS, *supra* note 5.

105. See TOMLINS, *supra* note 6.

106. See *id.* at 333-63.

107. HUGHES, *supra* note 73, at 49. Hughes, as has been noted, is the exception among economists who have written on the nineteenth-century economy. He has been well-informed on interventionism and given it an important place in his analyses of institutional change and the dynamics of growth. See *supra* note 73.

108. HUGHES, *supra* note 73, at 49.

109. *Id.*

110. *Id.* at 238.

111. See *id.* at 238-41.

112. See, e.g., HURST, *supra* note 30, at 53

competence needed to keep the public sector's power on par with a fast-developing corporate sector.¹¹³ It is an interesting question whether this failure to fulfill the ideals of public rights (a failure posited by both Hurst and Hughes) itself constitutes an important element of continuity in American law.¹¹⁴ In any event, there has been no absence in the literature—whatever the failures of some commentators to take account of that literature¹¹⁵—of studies affirming the salience and continuity of regulatory themes in law and governance.

Second, the scholarship of the last three decades has established that several doctrinal areas of nineteenth-century law were anchored in a public rights tradition and a theory of sovereignty that themselves originated at least three centuries earlier. One such area is a doctrine that Lord Matthew Hale first systematized in his treatise *De Portibus Maris*, published circa 1670.¹¹⁶ Hale provided a carefully formulated distinction between public waters under control of the sovereign (*publici juris*), for the use of the public; purely private waters (*juris privati*), from which the public might be excluded by private owners; and waters that were under private ownership yet affected with a public interest and hence subject to public regulation.¹¹⁷ In 1971, I showed that Hale's tripartite formulation of property rights in waters was a doctrinal staple in the antebellum state courts and of key importance to the process through which American judges fashioned a doctrine of public rights, first in the eminent domain area and later in the realms of the police power, public trust, and tax law.¹¹⁸ Professor Carol Rose has advanced that analysis considerably in developing her argument that communal and localistic claims

113. *Id.* There are some areas of the historical record in which various critiques on this line might be extended effectively to take account of the ways in which direct ballot democracy (e.g., the successful campaign to incorporate racist provisions into the 1879 California state constitution, see generally Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35 (1989)) should be incorporated into the body of evidence supporting Hurst's view that "[l]aw did foster a good deal of injustice." HURST, *supra* note 37, at 223. Hurst argued that such injustice did not occur exclusively or even largely because of class-oriented judicial decisions in the pattern that Horwitz, for one, sought to argue was the prevailing norm. See Scheiber, *Public Economic Policy*, *supra* note 72, at 1166-71, 1183-84. See generally DAVID ALAN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890* (1992).

114. See Scheiber, *Doctrinal Legacies*, *supra* note 56, at 66.

115. See, e.g., EPSTEIN, *supra* note 76; SIEGAN, *supra* note 76.

116. LORD MATTHEW HALE, *DE PORTIBUS MARIS*, in *COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 72, 72-83 (Francis Hargrave ed., London, T. Wright 1787) (c. 1670).

117. See *id.* These concepts were incorporated into American law in the *Granger Cases* and were long believed (based on Fairman's contentions) to have been introduced as a result of a chance discovery of Hale's treatise because of a reprinting. See *Stone v. Wisconsin*, 94 U.S. 181 (1877); *Winona & St. P.R.R. v. Blake*, 94 U.S. 180 (1877); *Chicago, M., & St. P.R.R. v. Ackley*, 94 U.S. 179 (1877); *Peik v. Chicago & N.W. Ry.*, 94 U.S. 164 (1877); *Chicago, B., & Q.R.R. v. Iowa*, 94 U.S. 155 (1877); *Munn v. Illinois*, 94 U.S. 113 (1877); Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Brudley*, 5 STAN. L. REV. 587, 587-91 (1953). I have previously demonstrated that in fact the Justices in 1876-1877 must have been entirely familiar with Lord Hale's theory, and that the concept of waters "private in ownership but affected with a public interest" had been deployed on manifold occasions for six decades in the state courts. See generally Scheiber, *supra* note 17.

118. See Scheiber, *supra* note 17, at 335-55.

had a much larger place in antebellum constitutional adjudication than scholars have previously recognized.¹¹⁹

Professor Novak has incorporated into his book the foregoing view of Hale's heritage in American state law and the ways in which it helped build the doctrinal foundations of a regulatory tradition, and the issue need not detain us further here. There is a linkage, however, between this element in the common law tradition—which became fused with American constitutionalism in decisions such as *Commonwealth v. Alger*¹²⁰—and a different common law doctrine whose foundations in the ancient common law and adaptation by American courts also form an important part of what we have learned in recent years about the history of public rights. This latter is the doctrine of “duty to serve,” which Charles Haar and Daniel Fessler traced back to the fifteenth century (if not earlier).¹²¹ The doctrine originated when a monopoly power conferred to English mills, ferries, and markets—types of activity “affected with a public interest”—was conditioned implicitly on fulfillment of duties to the public.¹²² Haar and Fessler suggested that the subsequent history of this doctrine supports two aspects of American legal development worthy of our attention. They contended that the decisions of American judges on implicit and explicit obligations to the public of enterprises deemed to be affected with a public interest bespoke an “underlying belief that . . . the common law was up to the task of founding public policy.”¹²³ In addition, they linked this critical dimension of public rights doctrine to the question of *equality of rights*. Elaborating on the *publici juris* doctrine, they argued that when enterprises were deemed subject to regulation under that classification, courts required such enterprises to grant equality of access to members of the community seeking to use them.¹²⁴ Haar and Fessler's persuasiveness on this point indicates, I believe, that Novak's analysis would have been stronger had it taken adequate account not only of this discrete issue but also of the larger nexus between public interest concepts and egalitarian ideals in the formation of public rights law.¹²⁵

My third example is Howard Gillman's recent research which has further reinforced the concern (so central in the literature on legal-economic history)

119. See Carol M. Rose, *The Ancient Constitution Versus the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74 (1989).

120. 61 Mass. (7 Cush.) 53 (1851). Other cases advanced the definition of the police power and likewise promoted this fusion. See Scheiber, *State Police Power*, *supra* note 10, at 1746 (discussing landmark cases on this subject); see also NOVAK, *supra* note 4, at 106-11 (same).

121. See CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* (1986).

122. See *id.* at 15.

123. *Id.* at 111.

124. See *id.* at 191-92; see also *id.* at 147 (using the argument on Hale in Scheiber, *supra* note 17). Elsewhere, Haar and Fessler draw upon Leonard Levy's study of the Shaw Court and its accomplishment in defining basic elements of a public rights doctrine. See *id.* at 123.

125. I return to the subject of equality later in this Book Review. See *infra* Part III

with continuities in the doctrines bearing on economic institutions and legal relationships and on the evolution of the police power in particular.¹²⁶ Arguing against both the vested rights model and the exploitation thesis that portrays American jurists as engaged in an orchestrated effort to exploit the dispossessed in order to promote industrial capitalism, Gillman reexamined the evidence with a view toward understanding judicial motivations. He sought

to encourage a renewed appreciation of the extent to which judicial behavior . . . may be motivated by a set of interests and concerns that are relatively distinct from the preferences of particular social groups, the policies prescribed by particular economic theories, or the personal social and political loyalties and sympathies of individual judges.¹²⁷

Gillman's analysis of substantive change in judicial interpretation of police power is important for his identification of the Jacksonian period as a watershed of major innovation, when courts began "to emphasize the illegitimacy of so-called unequal, partial, class, or special legislation; that is, legislation which advanced the interests of only a part of the community."¹²⁸ In Gillman's analysis, as in Haar and Fessler's on the doctrine of duty to serve, considerations of equality surfaced as criteria for establishing constitutionality. For example, Gillman quoted an 1815 Massachusetts decision that, while upholding a special tax on the original stock of incorporated banks, ruled that the legislature could levy such burdens only in a way that conformed with a standard of equality: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed."¹²⁹ This type of egalitarian jurisprudential standard was reshaped in the late nineteenth century—and indeed by the Court in *Lochner v. New York*¹³⁰ in 1905—as a means to guard against the evil effects of "class legislation." That process, Gillman contended, revealed the abiding strength of continuities in legal and political culture. Their incorporation into the conservative jurisprudence of the *Lochner* era, he argued, indicates how jurists confronting class conflict and major social dislocations in the era of high industrialization could remain constant in seeing the problems of their day "through an ideological prism developed by another group of social elites in response to the social turmoil of the 1780s," the founding period of the Republic.¹³¹

126. See GILLMAN, *supra* note 89.

127. *Id.* at 11.

128. *Id.* at 49.

129. *Id.* at 50 (quoting *Portland Bank v. Apthorp*, 12 Mass. (12 Tyng) 252, 257 (1815)).

130. 198 U.S. 45 (1905).

131. GILLMAN, *supra* note 89, at 199. Several of the state constitutions of the Revolutionary period and the early 19th century specifically referred to the imperative of equality of treatment in legislation. For example, the Pennsylvania constitution of 1776 stated that government is not instituted "for the particular

One need not accept every particular aspect of Gillman's historical arguments to credit him for wrestling with issues of doctrinal continuity in law and their relationship to social and political ideological continuities. We should also credit him for building on the earlier work of Alan Jones on Justice Thomas Cooley,¹³² of Charles McCurdy on Justice Stephen Field,¹³³ and of Willard Hurst on the history of corporation law¹³⁴ to advance our understanding of vital functional connections between the successful jurisprudential response to monopoly and the problem of inequality in the Federalist, Jacksonian, and post-Civil War eras. Here again, the nexus between equality and the police power surfaces as a problem that deserved further exploration in Novak's book. Gillman demonstrated how the abhorrence of anything that appeared to be "class legislation"—involving the dispensation of government's largess or the imposition of regulatory sanctions in a discriminatory manner—triggered concerns about equality of treatment and due process. That demands for judicial estoppel of "class legislation" came from groups that often were themselves privileged in other ways, and that the society sustained race and sex discrimination throughout the period of such debates, may be dismaying. It is no more so, however, than the fact that all of the nineteenth-century American rhetoric about "community," public values, and collective rights that Novak and others (including myself) have viewed with such admiration was also articulated in that identical context—indeed, in a society that protected African-American slavery in addition to accepting systematic racial and gender discrimination.

III

In light of the broad recognition accorded the history of regulation in previous studies, why must it still be said that Novak's new exploration of the police power and its history is a work that makes a unique and no doubt enduringly important contribution to our understanding of the development of public rights doctrine? How does it cast significant new light on nineteenth-century "governance" generally (i.e., on the character and operation of American legal and governmental institutions)?¹³⁵

emolument or advantage of any single man, family, or sett of men" but rather is "instituted for the common benefit, protection and security of the people, nation or community." PA. CONST. of 1776, art. V, *see also* L. ROY GUNN, *THE DECLINE OF AUTHORITY: PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENT IN NEW YORK, 1800-1860*, at 183-89 (1988). *See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

132. *See* JONES, *supra* note 64.

133. *See* McCurdy, *Government-Business Relations*, *supra* note 64.

134. *See* HURST, *supra* note 51.

135. Novak has offered a formal definition of "governance" that some might find rather obscure, if not outright baffling. He defines governance as "a constitutive public practice—a technology of public action with its own history, structures, and rationalities that produce as much as they are produced by economics, ideology, and culture." NOVAK, *supra* note 4, at 8. He goes on to speak of "governance as

The book is of exceptional interest, first of all, because of the sheer *volume* of cases in the appellate courts that Novak has read and offered in support of his views. With respect to the general jurisprudence of public rights, Novak builds upon interpretive concepts that a variety of previous scholars have elucidated. Even in this regard, however, he undertakes a very full and hence particularly useful integration of themes in his discussions of sovereignty, the *juris publici* doctrine, and the like. The result is a comprehensive view of how the antebellum American judiciary lay the foundations of public rights doctrines generally.¹³⁶ As to specific areas of regulation in which the police power was deployed, no one else has successfully undertaken this kind of deep probe into exemplary areas of regulatory activity, and into what judicial review in these specific areas tells us about the values and priorities of governance and law in that era.¹³⁷ For each of the areas of law he explores, Novak offers evidence of how the claims of public rights were advanced and implemented, setting forth lucidly the rationales that lawyers advanced and judicial opinions expressed on the validity of regulatory ordinances and statutes. He illustrates for each of the areas that he covers in depth the often startling degree to which minutiae of social and economic behavior were subject to regulation. Not only was the police power in action extremely broad in reach, but it also, he contends, amounted to “intense regulation and public monitoring.”¹³⁸ As I will suggest below, I think that this notion of “intense” regulation, as well as the allied claim of intense (and presumably effective) “monitoring” of private activity, is probably inaccurate. Novak’s view on this score runs counter to much of what we know with a fair measure of certainty about how regulation actually worked in antebellum American communities generally, and in the rural areas occupied

conduct,” *id.*, which I, at least, find more accessible and meaningful as an indicator of institutions, how they operated, and what their operations say to us about the premises of the society that acted through government to define and achieve policy aims and to articulate legal rules. This issue need not detain us here, however; to me it seems important only to the rhetoric, not the substance, of Novak’s thesis.

136. Novak’s argument fails, however, to include some older works that might have provided significant additional material for a reconstruction of the intellectual and jurisprudential history of both the antebellum era and the transition to what Novak terms the “new paradigm” after 1877. *See, e.g.*, 2 JOSEPH DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1606-1865* (1946); HOWARD JAY GRAHAM, *EVERYMAN’S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE “CONSPIRACY THEORY”, AND AMERICAN CONSTITUTIONALISM* (1968); Henry Steele Commager, *Constitutional History and the Higher Law*, in *THE CONSTITUTION RECONSIDERED* 225 (Conyers Read ed., 1938); J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 *WIS. L. REV.* 67 (1931); Walton H. Hamilton, *The Path of Due Process of Law*, in *THE CONSTITUTION RECONSIDERED*, *supra*, at 167 (contending that the briefs of Counsel John Archibald Campbell in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), announced the jurisprudential foundation of a new paradigm in constitutional law—exactly the point that Novak seeks to make himself, *see* NOVAK, *supra* note 4, at 231-33 (likewise citing the Campbell briefs).

137. *See supra* notes 7-28 and accompanying text (discussing the subjects covered in the chapters devoted to specific areas of law).

138. NOVAK, *supra* note 4, at 14.

by over three fourths of the population in particular.¹³⁹

In any event, Novak reaches the following conclusion from the evidence he has gathered so industriously and analyzed to our great profit: "*Private rights were relative; public rights were absolute.*"¹⁴⁰ What a contrast (or so it appears, at first glance) with the quotation at the beginning of this Book Review, taken from Willard Hurst, that "[p]roductivity was the central test and validating canon."¹⁴¹

The contrast may not be as great as it seems at first blush, however, if we recognize that regulatory powers affecting economic relationships can be and have been mobilized to advance the cause of productivity and material growth—and, in a variety of contexts, to support policies that advantage one group or class at the expense of another. Moreover, despite the juridical pronouncements declaring private rights to be contingent and the claims of the public to be "absolute" (as Novak puts it), it is extremely difficult for me to accept the idea that *any* of these competing canons was "absolute" from the 1790s to 1877 while the others were subordinate.¹⁴² I am likewise convinced that one can identify no single pattern with respect to outcomes. The correct identification of winners and losers has been a central issue in debates among legal historians concerned with the impact of law upon society. Some scholars contend that legal institutions operated exploitatively to advance industrial or other economic interests;¹⁴³ others believe that vested rights prescriptions prevailed;¹⁴⁴ and now comes Novak, who argues that the public rights doctrine and notions of overriding community interests were uniformly dominant.¹⁴⁵ My own view is that the law defined priorities and trenched on private rights, curbing entrepreneurial liberty in a complex pattern of tension among several guiding principles or doctrinal traditions—vested rights, pragmatic pursuit of material growth, and public rights. The public rights doctrine was variously developed in eminent domain, taxation, public trust, and police power jurisprudence and was expressed in communal claims that

139. Nearly all of Novak's examples of regulatory legislation in the public health area, for example, concern municipal law. *See, e.g., id.* at 55 (stressing fire as a danger in towns and cities, where "fire's menace was no longer symbolized by the ignition of an isolated barn"). The same is true with respect to his discussion of measures to protect against fire or its spread. *See, e.g., id.* at 79 (discussing the legal response to fire in New York City and the ways this response revealed "how interconnected people's lives were in early American cities"). And he explicitly addresses many of the regulatory issues he covers as issues of urban governance. *See, e.g., id.* at 83-113 (discussing urban market regulation); *id.* at 95-105 (discussing "The Urban Marketplace").

140. *Id.* at 131 (emphasis added).

141. HURST, *supra* note 1, at 172; *see supra* text accompanying note 1.

142. *See* Scheiber, *Doctrinal Legacies*, *supra* note 56; *see also* Howard Gillman, *The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism Is Not Necessarily Exogenous to Liberal Constitutionalism*, 21 L. & SOC. INQUIRY 67 (1996).

143. *See* HORWITZ, *supra* note 3.

144. *See* Corwin, *supra* note 22.

145. *See supra* text accompanying notes 28-29.

reflected inherited principles of social organization associated with a less ruthlessly commercialized market environment.¹⁴⁶

My caveats regarding Novak's argument that "public rights were absolute" are based primarily on a reading of federal and state decisions that endorsed the whole range of competing doctrines that I have mentioned. Some reservations, however, also flow from the inadequacy of the data with respect to actual enforcement practices. There is, to be sure, scattered rhetorical evidence that enforcement was sometimes heavy-handed and that administrative discretion may have been much broader and more robust than scholars have ordinarily recognized. Particularly intriguing, in this regard, is Novak's citation of a complaint by the New York Shipowner's Association in 1865 that the local health officer was "clothed with more power than the President of the United States."¹⁴⁷ Novak also quotes a commentator who contended that the declaration of a quarantine "has been well compared to a declaration of war."¹⁴⁸ The interests that administrative regulation adversely affected are not necessarily the most reliable sources of judgment about the character and implementation of the rules at issue, but these voices need to be considered. Moreover, similar expressions of outrage about allegedly arbitrary decisions by public officials exercising their authority in operating the public works abound in the records of the canal agencies and in petitions for redress against discretionary policies opposed by local communities or functional interest groups because they were economically disadvantaged by them.¹⁴⁹ Of course, in operating a transportation enterprise the state had no choice but to adopt detailed rules and regulations, and failure to enforce them would have brought traffic to a halt, caused expensive damage, or created chaos. Hence it is entirely unremarkable that in 1846 New York's codification of its canal regulations comprised 500 separate provisions in a 129-page statute book.¹⁵⁰

A more challenging historical question (and one that we must confront without much hard evidence) is whether other types of regulatory laws were

146. See *supra* notes 30-61 and accompanying text. See generally Pisani, *supra* note 72; Harry N. Scheiber, *Law and the Imperatives of Progress: Private Rights and Public Values in American Legal History*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 303 (1982); Scheiber, *Public Rights*, *supra* note 6. But see Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135 (advocating anew much of the vested rights interpretation of the main constitutional law tradition).

147. NOVAK, *supra* note 4, at 211 (citing JOHN DUFFY, A HISTORY OF PUBLIC HEALTH IN NEW YORK CITY, 1625-1866, at 353 (1968)).

148. *Id.* (quoting Blewett Harrison Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 269 (1889)).

149. A significant portion of the archival records of the Ohio canal commissioners, to cite a body of evidence in governmental administration that is most familiar to me, involved complaints of precisely this sort. The rhetoric of public interest, the public good, the commonwealth ideal, and the like, was almost invariably present. As I note below, the rhetoric of equal rights was also regularly mobilized. See *infra* note 177; see also HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861, at 88-93 (1968) (arguing that egalitarian doctrine provided a rhetorical imperative for equal treatment of all regions and interests by expanding public investment in transport).

150. See NOVAK, *supra* note 4, at 120.

enforced faithfully and rigorously. We know with certainty that in some fields of nineteenth-century American governance not addressed in Novak's work, governmental institutions proved largely incapable of dealing with private interest pressures: The private sector outran the public sector in its command of expertise, information, and influence. A prime example lies in the history of how the railroad companies artfully mobilized public subsidies and obtained extraordinary corporate privileges (including the eminent domain power) yet successfully resisted most of the manifold efforts to impose meaningful public regulations upon them for fifty years.¹⁵¹ Public agencies were beset with problems derived from office holders' blatant conflicts of interest or from office holders' failure even to recognize the concept of conflict of interest.¹⁵² In the administration of national and state land laws, for example, the record fully bears out M.I. Ostrogorski's much-quoted observation that everywhere in America "the spring of government [was] weakened or warped."¹⁵³ From a detailed investigation of one major agricultural and industrial state's management of its state lands prior to 1860, for instance, there seemed abundant reason to conclude that "[f]ailure to develop an internally consistent, well-ordered land disposal policy was more than matched by a faithless administration . . . and a scenario of understaffing, corruption, and widespread evasion of the law."¹⁵⁴ This finding is consistent with Hurst's thesis that legislative and administrative operations of nineteenth-century government demonstrated a lack of independent energy, a serious degree of bureaucratic incompetence, and an inability to pursue long-term goals that transcended the responses to immediate pressures.¹⁵⁵

151. On the subject of regulatory efforts, see GEORGE H. MILLER, *RAILROADS AND THE GRANGER LAWS* 42-58 (1971); David Maldwyn Ellis, *Rivalry Between the New York Central and the Erie Canal*, 29 N.Y. HIST. 268, 271, 275-76 (1948); and Frederick Merk, *Eastern Antecedents of the Grangers*, 23 AGRIC. HIST. 1 (1949). On subsidies, see generally CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890* (1960). Local government grants of cash and stock investments in railroad corporations caused a widespread crisis in municipal finance in the 1860s, when numerous companies that had received such aid failed to build the promised lines or fell into bankruptcy, resulting in the great wave of railroad bond-aid cases before the Supreme Court. See 1 CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, at 918-1116 (1971) (Vol. IV of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund ed.)).

152. For an example of the dim line between private and public interest in the activities of officials in midwestern state canal finance administration, see Harry N. Scheiber, *Public Canal Finance and State Banking in Ohio, 1825-1837*, 65 IND. MAG. HIST. 119, 128-31 (1969) [hereinafter Scheiber, *Public Canal Finance*]. On administrative incompetence in the administration and sale of a state's public lands, see Harry N. Scheiber, *Land Reform, Speculation, and Governmental Failure: The Administration of Ohio's State Canal Lands, 1836-60*, 7 PROLOGUE: J. NAT'L ARCHIVES 85, 85-98 (1975) [hereinafter Scheiber, *Land Reform*]. The question of the national government's competence and autonomy during the post-Civil War era is considered on a broad canvas in STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982). See also Scheiber, *Federalism*, *supra* note 70, at 88-89, 113-17 (discussing the relationship of federal structure and dynamics to administrative weakness at both the national and state governmental levels).

153. 2 M.I. OSTROGORSKI, *DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES* 550 (Frederick Clarke trans., 1922) (1902).

154. Scheiber, *Land Reform*, *supra* note 152, at 85.

155. See HURST, *supra* note 1, at 227-31.

Such administrative underdevelopment and laxity often prevailed, despite some triumphs of public entrepreneurship, largely because government did not command adequate funding. This lack of funding stemmed from strong public resistance to taxation at levels above two to four percent of national income.¹⁵⁶ Such resistance to taxation is itself a telling piece of evidence about the strength of antigovernmental and individualistic legal culture. If society had such a powerful commitment to the interests of community and the public weal, why the unwillingness to give the public sector sufficient resources to act more effectively? Is it possible that a similar kind of laxness or incompetence might have characterized some—or even a large part—of the regulatory regime that comprised the real boundaries of the police power in that era? Or that even where some appellate cases do appear to indicate that enforcement was being undertaken, we might be seeing only exceptions to a more general pattern of laxness in translating law on the books into regulatory reality?

This last possibility seems especially apposite since some distinguished writers on that era's legal development, such as Lawrence Friedman, have contended that in actuality "the scope and administrative strength of regulation were limited."¹⁵⁷ Many of the programs enacted for the regulation of markets and commodity inspection "probably never lived except on paper" in the western states and perhaps in many of the older, settled areas as well.¹⁵⁸ Many of the regulations, moreover, were designed to be privately enforced, rather than overseen through detailed "monitoring" and enforcement by public officials. In these instances especially, the evidence of successful enforcement through private action might very well represent an exception to the norm.¹⁵⁹

156. For data on government revenues and expenditures in relation to national product, see Lance E. Davis & John Legler, *The Government in the American Economy, 1815-1902: A Quantitative Study*, 26 J. ECON. HIST. 514 (1966); and Paul B. Trescott, *The U.S. Government and National Income, 1790-1860*, in TRENDS IN THE AMERICAN ECONOMY IN THE NINETEENTH CENTURY 337, 342-43 (National Bureau Econ. Research ed., 1960). The record of the antebellum state governments in building complex canal systems (on a scale that exceeded any other public enterprise except perhaps the military buildups and operations during wartime) varied from superb to catastrophic. See generally GOODRICH, *supra* note 151. For differences in the quality of performance in the first phase and later phases of Ohio Canal policy and administration, see, for example, SCHEIBER, *supra* note 149, at 61-80, 120-33, 297-306. The breakdown of rational planning, probity of administration, and efficiency in Ohio is a particularly telling piece of evidence since this was undoubtedly one of the strongest states in the antebellum era in terms of administrative competence in state-level governance. See *id. passim* (providing a general discussion of government's role in the antebellum economy); see also GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1860*, at 32-55 (1951) (providing an authoritative, brief survey of the canal projects); Harry N. Scheiber & Stephen Salsbury, *Reflections on George Rogers Taylor's The Transportation Revolution, 1815-1860: A Twenty-Five Year Retrospect*, 51 BUS. HIST. REV. 79 (1977) (discussing Taylor's analysis of government investment and operations in the U.S. transport sector prior to 1860 and its relationship to the larger context of interventionist and laissez faire aspects of policy).

157. FRIEDMAN, *supra* note 70, at 165.

158. *Id.* at 165.

159. See *id.* at 165. The claim of "public monitoring" is Novak's. NOVAK, *supra* note 4, at 14. James Ely, like Friedman, contends that detailed regulation of markets and sales came under heavy attack by merchants and artisans rallying to the banner of economic "liberty" and their rights as citizens. See ELY, *supra* note 48, at 22-23. Furthermore, "regulatory bodies were feeble, and enforcement often lax." *Id.* at

Novak confronts this issue directly and with great candor, but his handling of the data shortfall problem¹⁶⁰ is not entirely satisfying. He concedes, for example, that some of the detailed market regulations upon which he relied heavily (e.g., New York's marketing statutes) came under political attack and were actually repealed for a considerable period of time.¹⁶¹ He is also fully aware of the evidence in writings by Hurst, Hartog, and others that public regulatory officials failed dramatically in some instances, conceding that "[a] convincing challenge to *pervasive myths of lax law enforcement* . . . requires a deeper investigation of prosecution, litigation, and local governance."¹⁶²

It is not at all clear why Novak should dismiss so casually as "myths" the evidence other scholars have found showing enforcement laxness. He does make several arguments for the proposition that his book successfully refutes those so-called "myths." The most persuasive is the thesis that every court case examined by him concretely involved a regulation "that was distinctly enforced,"¹⁶³ and that taken as a whole, these cases "are but the tip of the iceberg in an extensive (and sometimes hidden) legal history of enforcement."¹⁶⁴ This idea, it seems to me, is an imponderable of

62. Ely points out that the regulations that were imposed seem to a modern commentator "modest" at best, "typically piecemeal and directed against specific problems," and generally not redistributive in impact or intent. *Id.*

160. See NOVAK, *supra* note 4, at 273 n.46; see also *infra* note 164 (providing details of Novak's discussion).

161. See NOVAK, *supra* note 4, at 288 n.32.

162. *Id.* at 60 (emphasis added).

163. *Id.* at 274 n.46.

164. *Id.* Novak offers three other arguments to counter what he admits is an "overwhelming emphasis [in the literature] on legal, regulatory failure and concomitant . . . lax enforcement." *Id.* First, he contends that even "statistically anomalous" cases can be accurate indicators of important aspects of legal culture (even if not accurate as to where enforcement resources are being directed). This argument, however, simply ignores the realities of enforcement. He cites the modern case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), as an example of how an anomalous case should be viewed because it is "ideologically powerful." NOVAK, *supra* note 4, at 274 n.46. There is no gainsaying that *Bowers* is an important piece of evidence for an investigator of "law, sexuality, and the policing of morality in late twentieth-century American life," *id.*, but simply to say that the case is important is not enough. On the contrary, the case must be viewed in light of what the statistics (which define its anomalous status) tell us about the larger pattern of ideological, moral, and enforcement norms. Furthermore, the opinion's rhetorical and substantive content must be placed in jurisprudential context, alongside judicial and legal sources that are expressing very different views.

Second, Novak contends that "100 per cent effectiveness is rarely anticipated in human laws." *Id.* No one will contradict this position, but there is still the hard question: What percentage is at issue when we seek to measure the level at which particular laws are in fact effective? (Exemplary works that grapple with this issue include MORRIS, *supra* note 5; and David H. Flaherty, *Law and the Enforcement of Morals in Early America*, in *LAW IN AMERICAN HISTORY* 203 (Donald Fleming & Bernard Bailyn eds., 1971)). My own conclusion in investigations of law and the economy, including public rights and police power questions, has been that there is a tension among competing ideologies and norms. This conclusion leaves me open to the criticism that I duck the hard question of which norm was actually dominant. My response is that there is no iron rule in history that a given norm is manifestly dominant in any sphere or in any period. Even when a scholar as careful as Hurst concluded that material growth and its requirements were largely controlling in law that sought "release of energy," he was at pains to stress that there was a counterpoint of public rights doctrine and practice in the law and that constitutional norms of responsibility and accountability were often imposed by the courts. See HURST, *supra* note 37, at 45-46, 223-24, HURST, *supra* note 51, at 19-22, 39-50.

considerable magnitude.

The “iceberg” included, first of all, the vast majority of the population that was engaged in agriculture early in the century. In 1820, nearly eight out of ten workers were in the agricultural sector, either as proprietors or as rural laborers; in 1840, the proportion was still as high as sixty-three percent.¹⁶⁵ Although the marketing of agricultural products came under government regulation in a variety of ways that historians have long explicitly recognized,¹⁶⁶ the day-to-day work and economic transactions of this large majority of the population were largely untroubled by government supervision or regulation of any substantial kind.¹⁶⁷ Thus Novak’s claim that “[l]icensing left little in the early American economy untouched”¹⁶⁸ seems inconsistent with the evidence.

The “iceberg” also included other large areas of economic and social behavior that were largely left alone by government—because public officials did not act on their writs of authority, because many rules left to private enforcement were dead letters, and perhaps in some instances because of actual resistance to enforcement. Occasionally, such resistance was violent. One example of private coercion lies in the history of the “claims clubs”—organizations of squatters on public lands, who would join together

Novak’s third argument is a practical one: the contention, to which no scholar who has worked with 19th-century records will object, that “records are inadequate for making a case for or against enforcement.” NOVAK, *supra* note 4, at 274 n.46. Yet in light of this concession, Novak’s insistence that public rights were “absolute” and that enforcement officials provided detailed “monitoring” are manifestly implausible.

165. See Stanley Lebergott, *Labor Force and Employment, 1800-1960*, in 30 OUTPUT, EMPLOYMENT, AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800: STUDIES IN INCOME AND WEALTH 117, 119 tbl. (National Bureau Econ. Research ed., 1966). In U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 74 (1960), the estimates given are even higher for the proportion engaged in agriculture. The statistics include slaves as well as free workers in the estimates of sectoral proportions. See *id.*

166. See, e.g., ELY, *supra* note 48, at 20-22.

167. Given the lack of any evidence to the contrary in the vast scholarly literatures on either rural life or economic development in the antebellum economy, I would contend that the burden falls on any commentator who would claim that agricultural activity was comprehensively under regulation. As noted above, see *supra* notes 155-158 and accompanying text, even many of the marketing regulations that were on the books were apparently administered with considerable laxity, if at all. In some years of research on rural-sector activities associated with the canal projects, I have found evidence of extraordinarily detailed and heavy-handed interventionist policies to shape development that canal authorities exercised in establishing rate schedules on a “mercantilistic” basis that favored in-state producers and merchants at the expense of outsiders. See SCHEIBER, *supra* note 149, at 247-681. This was in contrast, however, to a virtually complete absence in the records and correspondence of farm interests—and even millers and other processing entrepreneurs—of mention of any kind of regulation that significantly controlled their day-to-day manufacturing or farming activities.

168. NOVAK, *supra* note 4, at 7. If Novak’s argument were that these activities demonstrably *did* come under a licensing regime (or, for that matter, were in other ways vitally affected by interventionist policies in the public interest), that would be a very different, and much more plausible, kind of contention than one claiming little was left “untouched” or outside the regulatory sphere in essential ways.

Apposite here is Hurst’s sage admonition that “Legal History needs to come to terms with the fact that legal processes had more involvement with some institutions than with others.” HURST, *supra* note 37, at 55. Specific evidence of how this admonition can provide insight into complex patterns of intervention and nonintervention was succinctly provided in a classic article. See Carter Goodrich, *State In, State Out: A Pattern of Development Policy*, 2 J. ECON. ISSUES 365 (1968).

at first auctions, when purchases and acquisition of title became possible for the first time, to intimidate any outsiders who might be interested in bidding on the tracts that they occupied.¹⁶⁹ A similar phenomenon occurred in the early mining communities of the Far West, in which the first arrivals established their own property rules and then enforced their claims by force against challengers.¹⁷⁰ These last examples are particularly intriguing because the claims clubs and miners' organizations can be portrayed with equal plausibility as either (1) examples of deeply rooted collectivist ideals and communal and anticommercial values in action; or (2) exemplary of a cynical mobilization of coercive power by a first-arrived special interest group of expectant capitalists, pursuing naked self-interest under the banner of social justice.

We also have good documentation of dramatic instances in which reliance on the police power and on legal definitions of community "rights" and interests yielded to angry mob action against state or private property. In Ohio,

169. See Allan G. Bogue, *The Iowa Claims Clubs: Symbol & Substance*, 45 MISS VALLEY HIST REV 231 (1958); see also FRIEDMAN, *supra* note 83, at 206-07 (discussing how the effective bypassing of the formal legal framework for rulemaking, as accomplished by the claims clubs, was one aspect of a larger pattern in which the legislature and courts had to confront the realities of political power and private lawmaking).

170. The miners' claims have been assessed by some commentators as a benign and creative rulemaking device, by others as bespeaking privatism at its worst. Thus to one legal scholar they amounted to a "chaos of casual individual initiative and insistent competing claims." Joseph Bingham, *Some Suggestions Concerning the California Law of Riparian Rights*, in LEGAL ESSAYS IN TRIBUTE TO ORIN KIP MCMURRY 7, 8 (Max Radin & A.M. Kidd eds., 1935). To a prominent early historian of the Anglo-American occupation of California, however, the miners' claims were evidence of "[s]turdy self-reliance, mingled and tempered with a high appreciation of one's dependence upon others, the power to stand alone, [and] the power to organize." CHARLES HOWARD SHINN, *MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT* 275-76 (Alfred A. Knopf 1948) (1884).

Justice Field, who had been on the California bench during the Gold Rush, declared from the high Court many years later that the miners' code was evidence of "love of order and system and of fair dealing which are the prominent characteristics of our people. . . . [and in this instance creating rules] so framed as to secure all comers, within practicable limits, absolute equality of right and privilege." *Jennison v. Kirk*, 98 U.S. 453, 457 (1878). Charles McCurdy's scholarship on early California resource jurisprudence casts in a brilliant analytic light the complexities faced by the state's high court in trying to maintain a rule of law ideal against the shifting definition of priorities by the legislature and the force of the miners' codes. See McCurdy, *supra* note 70. On how the balance between egalitarianism and property-rights-mindedness became even more complicated by racism and a variety of brands of "radicalism"—some of which would be admired by historians who like to find in the 19th century the historical foundations of class consciousness and conflict, but many of which embarrass such a quest for historic continuity and legitimacy—see the discussion of the historiography in Scheiber, *Public Economic Policy*, *supra* note 72, at 1169-72. Cf. Harry N. Scheiber, *The Frontier and Legal Culture: Market Values on the Overland Trail*, 57 N.Y.U. L. REV. 1209 (1982) (reviewing JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980)). See generally REID, *supra* (discussing informal arrangements on the wagon trains on the Oregon Trail and the California overland routes, and what they tell us about freedom of contract, individual responsibility and its legal limits, coercion, and other key features of mid-19th-century legal culture). Reid brilliantly uses the evidence of behavior in these "convoy" communities, moving across the landscape on their own resources and constructing their own rules, as a laboratory test for generalizations such as those that Hurst, Corwin, and others have variously advanced as to the basic tenets of law that represented some kind of core or consensus, at least among the franchised classes. For a history of extralegal coercive incidents and movements painted on a broad historical canvas, see RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975).

for example, when a giant reservoir was built in Mercer County in 1844 to supply the northern line of the Miami Canal, one of the state's major public works, local residents demanded that all timber be cleared from the flood area in order to avoid public health hazards.¹⁷¹ The legislature responded with an act requiring the canal administrators to clear the trees, but the directive was ignored (no "precise monitoring" here). The local populace then addressed the problem itself, forming a mob that breached the banks of the reservoir and drained it themselves. A criminal action was filed against the perpetrators, but a grand jury quickly cleared them—an example of the jury as independent judge of law's legitimacy, a recurring problem in the history of American legal culture that has assumed new importance today in a racial context.¹⁷² Another well-known episode concerned the highly effective way in which farmers on an early Michigan railroad line in the 1850s took care of the inadequate fencing that had led to devastation of their livestock.¹⁷³ Were the mobs formed to destroy railroad property evidence of a breakdown of law or instead a manifestation of a fringe area (nonetheless one considered within the legitimate boundaries of legal behavior) in the legal culture of the day?¹⁷⁴

It is not my purpose to argue here that Novak's position is extravagantly wrong, but rather to suggest that here, as with the argument that courts treated public rights as "absolute," even one who warmly welcomes scholarship that takes public rights seriously (as I do) would prefer an approach that is less dismissive of complexity and tension in the law or in the legal culture.¹⁷⁵

171. The Mercer County incident is fully documented in SCHEIBER, *supra* note 149, at 174-75.

172. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

173. See CHARLES HIRSCHFELD, *THE GREAT RAILROAD CONSPIRACY: THE SOCIAL HISTORY OF A RAILROAD WAR* (1953).

174. The legitimacy of mob action in specific circumstances as part of the European heritage manifested in colonial America is explored in the classic study, Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. (n.s.) 3 (1970). I have not dwelt here on other examples of mob actions, for example actions against abolitionists, Asian immigrants in the Far West, the Irish in Boston, the Mormons, or mine owners and managers. They represent a significant part of the story of how "well-regulated" the society actually was, who was counted "in" and who "out" in defining community and enjoying its collective protection through law, and how effectively the law was actually mobilized in dealing with such incidents and movements. Specific citations to individual writings do not seem required in this context, but most of the literature is cited and discussed in BROWN, *supra* note 170.

175. These criticisms further suggest that a full comprehension of the "well-ordered society" requires an inquiry into how that society maintains order—an inquiry, in other words, into mob control, criminal justice administration, and the basic "night watchman" functions more generally. Novak's inquiry deals with public safety in narrower and more exclusive terms, which I think created an unfortunate omission. This omission is understandable enough in light of his having worked through more than a thousand appellate cases and dug into the facts that had led to their initiation in trial court, and in light of his mastery of a large part of the enormous relevant literature, but it weakens the force of the book nonetheless.

An outstanding work in the growing and rich literature on subjects omitted by Novak is the California study, LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910* (1981), which is not listed in Novak's bibliography and apparently not cited by him. The Friedman and Percival study has important lessons for historians who would generalize about legal culture and the identification of norms in legal behavior, as derived from the evidence of trial dockets and patterns of decision. I think that the application of some of these lessons in the course of Novak's analysis—especially as to the weight that one ought to give to

The complexities suggested by the history of the claims clubs and related phenomena have parallels in the task of interpreting specific judicial decisions and patterns of regulatory action and inaction. For example, what is one to conclude about the significance for our portrayal of "governance" and legal culture in the nineteenth century of a tale—told recently in a brilliant article by Harry Watson¹⁷⁶—of yeoman farmers (many reliant on fishing for subsistence) in the Carolina country, who waged a long campaign to stop the construction of dams that impeded fish migration? The language of their petitions and the arguments of their advocates mobilized in full force the rhetoric of traditional rights, the common law tradition of public waters and fisheries, and communal claims cast in the language of egalitarianism and republicanism.¹⁷⁷ They failed to obtain redress to the extent they demanded, though if we credit the importance of "discourse" itself as evidence of legal culture and competing values, the communal rights argument must be recognized as significant. In the end, however, the fish stocks were depleted and the subsistence fishery largely destroyed. "Precommercial" republican values failed to prevail, and commercial fishing operations downstream, exploiting the resource without self-restraint and successfully resisting effective public regulation, were largely responsible for that outcome.¹⁷⁸

It can probably be said, then, that the resilience and triumph of the fabled individualism of those who engaged in commercial fishing downstream, a

juridical rhetoric and to cases that may or may not be typical of a larger pattern—would have added a valuable dimension to his study.

176. See Watson, *supra* note 82.

177. As I have already observed, see *supra* text accompanying note 125, Novak might have addressed more fully the problem of how the ideal of equality was related to the police power and the legal culture that it expressed and supported. The history that Watson writes in his Carolina study emphasizes that the rhetoric of egalitarianism was an integral part of the ideology of republicanism and had a moral force that gave it special significance in the process of mobilizing demands on the legal system. See Watson, *supra* note 82, at 17-24, 28-32.

Equally relevant evidence comes from the sphere of promotive action, especially in popular demands for transport investments (internal improvements, as they were then called) by the state and federal governments alike. Elsewhere I have argued that the demands for "equal benefits" in the distribution of transport lines through public investment was so consistently voiced that one could reasonably term it *doctrinal*. As a doctrine, moreover, it was important in political argumentation as a force counterpoised against two competing theories of government action: (1) the "commonwealth" conception that generally warranted interventionism by the positive state; and (2) the theory of systematic planning and ordering of growth through state intervention, informed by engineering expertise and involving the application of cost-benefit analysis in laying canal lines or chartering private transportation companies. In one sense, of course, resorting to egalitarian doctrinal ideas was a way by which Americans elevated their quest for localized advantage to the status of political principle. See SCHEIBER, *supra* note 149, at 91, 355-56, see also FORREST G. HILL, *ROADS, RAILS, AND WATERWAYS: THE ARMY ENGINEERS AND EARLY TRANSPORTATION* (1957) (discussing comparable pressures on the national government to conform to egalitarian imperatives by distributing largess for transport investment). The "commonwealth" conception invoked for localized good, or "common weal" in the classical language of English common law and political philosophy, to serve as the validating principle for legislation and judicial decisions that subordinated the self-interested claims of individuals in favor of the society's larger communal needs. See HANDLIN & HANDLIN, *supra* note 101; LEVY, *supra* note 5; Lively, *supra* note 72; see also Wiley E. Hodges, *Pro-Governmentalism in Virginia, 1789-1836: A Pragmatic Liberal Pattern in the Political Heritage*, 25 J. POL. 333 (1963) (complementing the commonwealth approach in a largely neglected but excellent study)

178. See Watson, *supra* note 82, at 36-41.

powerful and atomistic economic individualism, are the elements in this story that are most revealing about American “governance” and legal culture—at least in that part of the country, at that time. The legislature found itself confronted on the one hand with claims from the yeomen and subsistence fishing interests that the “common good” and traditional rights dictated protection of their fisheries and, on the other, with the commercial companies’ claims of rights to economic liberty and free enterprise. The latter successfully countered the yeomanry’s arguments by contending that the free marketplace “served a much wider public than the inhabitants of any particular stream bank,”¹⁷⁹ so that the communal good was best served by unregulated access to the resource and a freedom of contract regime: “[I]t was easy to argue . . . that the market should therefore have privileged access to the fish that God had sent to men in general.”¹⁸⁰ The slogan of “republican equality” thus had cut both ways, and so the legislature, stymied, adopted a limited policy of regulation that treated all interests alike, thereby effectively advantaging the commercial enterprises. The old communal fishing rights were allowed to wither, the commercial enterprises were not brought under effective regulation, the pretense that all interests were being treated equally was sustained, and in the end the resource itself fell victim to an entrepreneurial imperative clothed in egalitarian rhetoric.¹⁸¹

To take a similar example of complexities that inhere in concrete examples, consider the much-cited early New York waterways case *People v. Platt*.¹⁸² The court in *Platt* struck down as unconstitutional statutes that did not compensate land owners for the removal of dams that were interfering with salmon, though the harvesting of this important food resource was claimed to be a traditional communal right on the Saranac.¹⁸³ The court guarded carefully against any inference that its decision called into question “the power or supremacy of the legislature, to legislate for general and public purposes,

179. *Id.* at 41.

180. *Id.*

181. *See id.* Watson argues that this occurred partly because no one understood the biology of the fishery. But in later periods of regulatory history, when scientific research on fisheries biology and management was more advanced and state agencies maintained laboratory programs, the policy process remained muddled, if for no other reason than that often the scientific disagreement about the biology created a paralysis of will that allowed fishing interests to prevail. *See, e.g.,* ARTHUR MCEVOY, THE FISHERMAN’S PROBLEM 221-33 (1986); Margaret Beattie Bogue, *To Save the Fish: Canada, the United States, the Great Lakes, and the Joint Commission of 1892*, 79 J. AM. HIST. 1429 (1993); Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-1970*, 13 ECOLOGY L.Q. 381 (1986). There were comparable disagreements among experts in 19th-century promotional policy, as is evident, for example, from the history of the canal enterprises of the states. Sometimes the special interests, including local and functional economic interest groups, simply overwhelmed the process. *See* GOODRICH, *supra* note 151, at 230-62; LOUIS B. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 9-17 (1948) (concerning the force of localism).

182. 17 Johns. 195 (N.Y. Sup. Ct. 1819).

183. *See id.* at 215.

promotive of the public good, when acting within the pale of the constitution."¹⁸⁴ Because the river had never been navigable and so was *juris privati* in the common law classification set forth by Lord Hale,¹⁸⁵ compensation was owed if dams were to be removed. What later came to be known as inverse condemnation doctrine restrained the discretion of the state under the police power.¹⁸⁶ Is the significance of this case the outcome, which placed a vitally important limit upon the police power and erected a bulwark in defense of private, vested rights? Or is the case more significant for the court's explicit recognition of regulatory authority in the legislature's discretion—so long, of course, as such authority remained "within the pale of the constitution"?

Thanks to Professor Novak's efforts, scholars will be able to wrestle with such questions in a much richer historical and theoretical context than was previously available.¹⁸⁷ Even if he has not greatly extended the list of what has for some years been regarded as the central line of cases that developed police power doctrine in the realm of general jurisprudence, he has given those cases a rich contextual setting. He has also vastly expanded the range of evidence with which scholars must grapple in dealing with public rights, their doctrinal development, and their significance for actual governance, unearthing numerous decisions that he persuasively argues are of key importance to doctrinal development in discrete policy areas.

I have difficulty, however, with Novak's enthusiastic characterizations of the public rights doctrine as the "pervasive"¹⁸⁸ and "dominant"¹⁸⁹ doctrine in American law. I think it is more consistent with the overall record, especially given what we know of the character of nineteenth-century contract, tort, and labor relations law, to interpret the tradition instead as one of continuous and creative tension between competing validating canons.¹⁹⁰

184. *Id.*

185. See *supra* text accompanying note 117.

186. See Scheiber, *supra* note 17, at 337-40. Novak revisits these issues in his book. See NOVAK, *supra* note 4, at 117-21, 139-44.

187. One of the most interesting interpretive openings that Novak explores has to do with regional differences in legal culture, an issue seldom addressed in the literature until now. In an intensive, though limited, research foray that compares the law of Louisiana (a civil law jurisdiction, as well as a Southern one) pertaining to levees and waterways generally with the law of Northern common law states, Novak finds a very great degree of commonality both as to policy and as to legal doctrine with respect to "deeply rooted notions about public rights on public ways." NOVAK, *supra* note 4, at 137-42. For essays that explore in the context of Southern regional history some of the major themes that have been pursued in the study of 19th-century American legal history, see the essays on Southern history in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* (James W. Ely & David J. Bodenhamer, Jr. eds., 1984) [hereinafter *AMBIVALENT LEGACY*], especially Tony A. Freyer, *Law and the Antebellum Southern Economy: An Interpretation*, in *AMBIVALENT LEGACY*, *supra*, at 49; and Lawrence M. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY*, *supra*, at 30.

188. NOVAK, *supra* note 4, at 6.

189. *Id.* at 17.

190. See Harry N. Scheiber, *Economic Liberty and the Constitution*, in *ESSAYS IN THE HISTORY OF LIBERTY* 75 (Henry E. Huntington Library ed., 1988).

Novak says that his account is about “the public conditions of private freedom.”¹⁹¹ Whether we regard the counterpart “private freedom” element in this history as harmful on balance in its social and political consequences or see it instead as a salutary contribution of American law to the fulfillment of important democratic ideals, it ought not to be unduly minimized or rendered obscure. To do so is no more defensible than to allow the vested rights model or other general interpretations to obscure (or oversimplify) the complex dynamics of the public rights doctrine and its meaning for an understanding of American governance. The judiciary that repeatedly pronounced that the common good (and sometimes merely “the public convenience”¹⁹²) could constitutionally justify requiring private property rights to yield to public controls was the very same judiciary that so creatively (and consistently) worked out the doctrine that private market transactions were to be adjudged as having been concluded by individuals of equal bargaining power competent to look to their own interests—that promoted, in other words, a model of economic individualism and “freedom of contract” in a market-defined world of social relationships.¹⁹³ The same Massachusetts court that assured the right of laborers to organize and act collectively as free individuals in *Commonwealth v. Hunt*¹⁹⁴ only a short time later applied identical logic in announcing the fellow servant doctrine that left so many common laborers and even skilled workers at the mercy of fate in a dangerous workplace.¹⁹⁵

191. NOVAK, *supra* note 4, at 17.

192. *City Council v. Goldsmith*, 29 S.C.L. (2 Speers) 428 (1844), *quoted in* NOVAK, *supra* note 4, at 101.

193. See LEVY, *supra* note 5, at 303-21; NELSON, *supra* note 17, at 136-44; see also GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (1974) (noting that in the 19th century, the freedom of contract theory implied a “narrow scope of social duty” and summing up 19th-century freedom of contract theory with the adage that “[n]o man is his brother’s keeper; the race is to the swift; let the devil take the hindmost”); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 298 (1990) (discussing the public interest and the police power as exceptions to fundamental constitutional rights of individuals to contract freely).

The same style of judicial thought was exemplified by the individualistic, freedom of contract idea that found expression in some leading police power decisions. For instance, in a landmark 1823 case the Massachusetts Supreme Judicial Court ruled that a house owner had no right to compensation when a municipal street regrading project undermined his home’s foundations and made it inaccessible. “Every one who purchases a lot upon the summit or on the decline of a hill,” the court declared, “is presumed to foresee the changes which public necessity or convenience require,” and hence no compensation was mandated. *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 431 (1823); see also *supra* note 10 (discussing *Callender*).

194. 45 Mass. (4 Met.) 111 (1842).

195. The infamous fellow servant decision was *Farwell v. Boston & Worcester Railroad*, 45 Mass. (4 Met.) 49 (1842), which invoked the assumption-of-risk and fellow servant rules to deny recovery to an injured railroad employee on grounds that the worker’s contract discounted the ordinary perils of the job in question, and that the employer was at second remove from the act that caused injury. The reasoning of this case, it should be noted, was founded on the same premises (or fictions) as others mentioned: individualism, freedom of contract, and neutrality of marketplace institutions. See generally LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 301-02 (2d ed. 1985) (explaining Chief Justice Lemuel Shaw’s reasoning in *Farwell*); TOMLINS, *supra* note 6, at 352-68. Of course, this same court also was responsible for the most important state decision on the police power. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

Such anomalies and ironies abound in the record of law and the economy, especially in the era of slavery¹⁹⁶—an era also of unprecedentedly rapid technological change and economic integration, and of successive new challenges in the law to inherited doctrines and their premises.¹⁹⁷

At one point in his discussion of public health laws, Novak seems to endorse (almost in passing) the interpretation that argues for a shifting pattern of tensions among competing doctrines or ideologies. He avers there that in the early nineteenth century “American public law was not univalent, holding true to single externalist trajectories like ‘nationalism,’ ‘commerce,’ the ‘release of creative energy,’ or the ‘subsidization of economic growth.’ Instead, it encompassed a diverse set of legal and social priorities.”¹⁹⁸ It does not detract much from the importance of his book that this passage is inconsistent with the many occasions, elsewhere in the book, in which he seems to abandon this view and insists instead on the appealing but probably incorrect idea that the public rights doctrine was *dominant* and *controlling*. There is no question in historical research more compelling for gaining perspective on the central issues of our own day than that of how “the people’s welfare” and the “common good” have been defined and pursued in America, in what relationship to rule of law, and with what results.¹⁹⁹ Novak has enriched this perspective with an ambitious research design, presented with admirable clarity and verve.²⁰⁰

196. Slaveholding communities, of course, defined the “common good” in ways that should give one pause before celebrating too enthusiastically the public rights idea in all its variants.

197. See, e.g., FRIEDMAN, *supra* note 83; cf. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 103-31 (1996) (discussing the sale and mortgaging of slaves); *id.* at 337-53 (discussing police regulations limiting slaveholders’ absolute control over slaves).

198. NOVAK, *supra* note 4, at 214.

199. *Id.* at 239, 248.

200. Novak ends his account in 1877, arguing that by then the doctrines of privatism became ascendant and the era of the “well-regulated society” was over. See *id.* at 245-48. Whether this periodization is justified will have to be judged by the evidence he presents in a promised successor volume, and it will be interesting indeed to see how he works out the thesis. It seems premature now, however, to deal with the issue on the basis of the very general assertions that he makes in this book about the new order that came to prevail. To illustrate the paradigm shifts that he proposes to substantiate, Novak includes a figure illustrating differences in “locus of authority,” “preferred social unit of governance,” “preferred method of governance,” and “rule of law” for each of three periods (colonial, Revolution to 1870s, and 1870s to 20th century). *Id.* at 238 fig.2. Readers may find it instructive to compare a similar figure, by Hurst, charting time shifts in public policy concerns and legal responses. See HURST, *supra* note 30, at 40 fig.1.

