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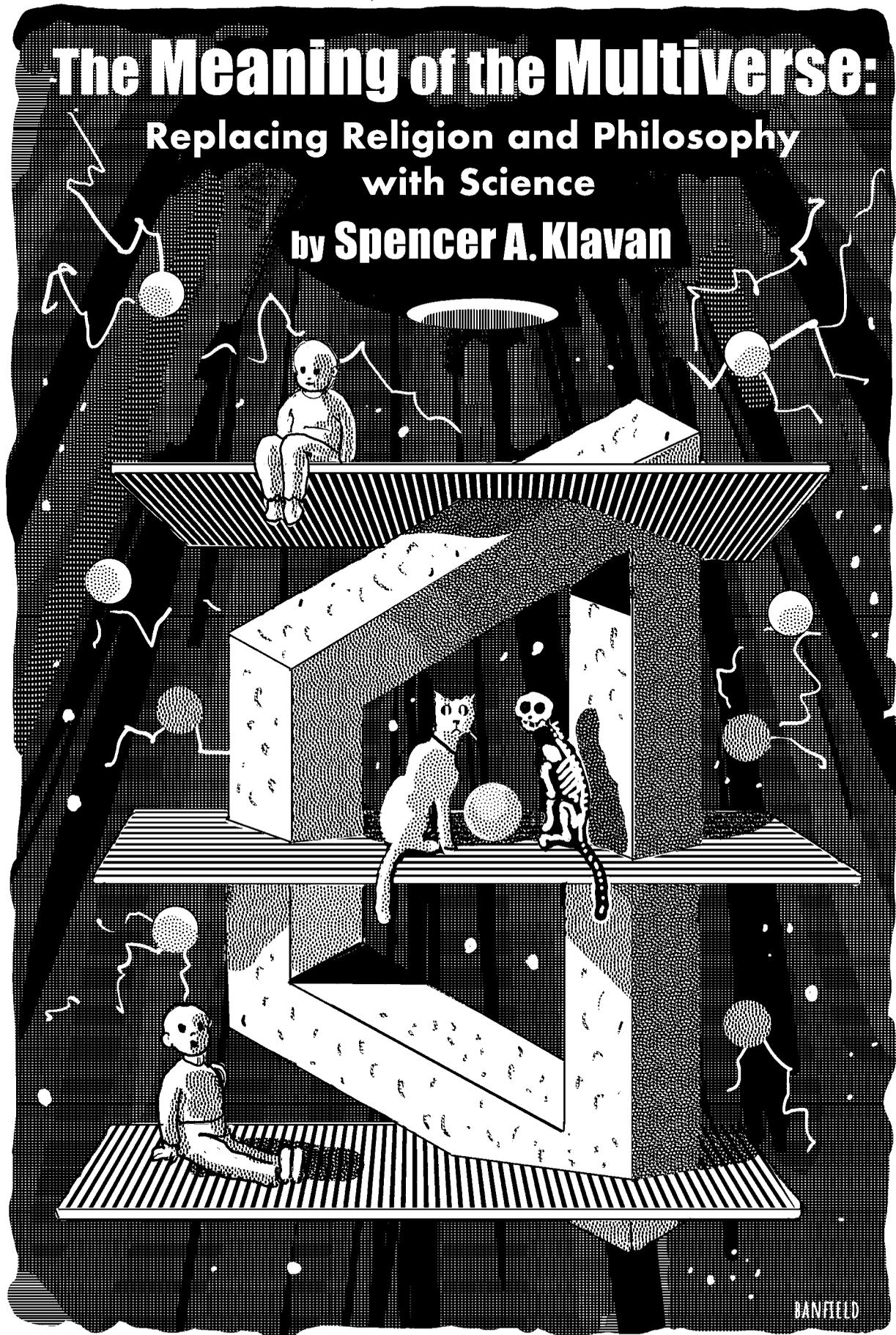
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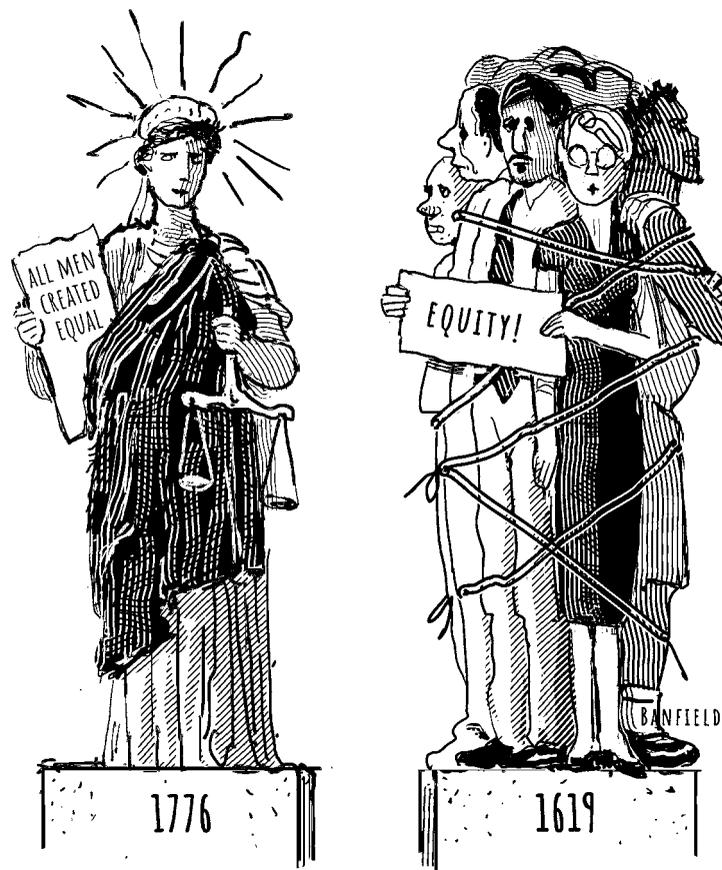


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Book Review by Joseph Postell

THEIR DEMOCRACY

New Democracy: The Creation of the Modern American State, by William J. Novak.
Harvard University Press, 384 pages, \$45



“DEMOCRACY,” FRANKLIN ROOSEVELT proclaimed in his 1932 Commonwealth Club Address, “is a quest, a never-ending seeking for better things.” Filmmaker Michael Moore spoke more precisely in his film *Capitalism: A Love Story* (2009):

Capitalism is an evil, and you cannot regulate evil. You have to eliminate it, and replace it with something that is good for all people. And that something, is called Democracy.

These statements reveal what democracy has become for many over the past century—not a form of government in which the people rule directly or indirectly, but a political program committed to egalitarian outcomes, regardless of the form of government that produces such outcomes.

This transformed concept of democracy grounds William Novak’s *New Democracy: The Creation of the Modern American State*. The Charles F. and Edith J. Clyne Professor of Law at Michigan University argues that between

1866 and 1932, “the American system of governance was fundamentally transformed.” Novak finds in this period “a fundamental reworking,” a “radical, substantive, and transformative policy agenda,” and “a fundamental reconsideration of almost every basic doctrine in American law, politics, and governance.”

CONTRARY TO HISTORICAL ACCOUNTS that place the New Deal at the crossroads in America’s path to a modern state, Novak draws attention to the extensive changes that predated FDR’s 1932 election. He laments “the myth of the New Deal state” and its “tendency to downplay American state development before the Roosevelt Revolution.” “After Reconstruction,” he writes, “but before the ascendancy of Franklin Roosevelt, a new kind of American state unmistakably came into being—a modern legislative, regulatory, and administrative state.” The New Deal, in other words, was not all that new.

This point itself is hardly new. Scholars in *American Political Development* (acknowledged in Novak’s endnotes) and at the

Claremont Institute (conspicuously absent) have been writing about the Progressive era for decades. It is remarkable to read an academic book on Progressivism and the modern American state with no acknowledgment of Charles R. Kesler, John Marini, Ronald J. Pestritto, Bradley C.S. Watson, or Jean M. Yarbrough.

Still, there are some interesting insights in *New Democracy*, especially regarding changes to the police power and the rejection of the old common law. Novak’s claim that Reconstruction was “a great transformation in the overall nature, power, and reach of American governance” that “ushered in a new era in the history of the American state—a new governmental regime” is particularly provocative. Of course, the Civil War Amendments changed American government in profound and lasting ways, and Novak’s first chapter contains fascinating discussions of the “transformation in American citizenship inaugurated by the Civil War and Reconstruction.” Unfortunately, Reconstruction fades into the background after this initial chapter. Despite his initial

claims about Reconstruction, Novak seems to regard the Progressive era as the critical point of departure.

NEW DEMOCRACY IS A SEQUEL TO NOVAK'S first book, *The People's Welfare* (1996), which explored government regulation in 19th-century America. Novak's purpose there was to "debunk persistent and dangerous fallacies about an original American tradition defined primarily by transcendent precommitments to private individual rights, formalistic constitutional limitations, and laissez-faire political economy." The modern state, he implied, was not new and radical but rooted in the traditional ideas and practices of American life.

New Democracy, by contrast, emphasizes the dramatic departure of the modern American state from its roots. This places it in tension with *The People's Welfare*. Novak spends great effort walking the resulting tightrope. On the one hand, he openly acknowledges that "nineteenth-century patterns of associational governance, common law, and local regulation...were displaced by a decisive reconfiguration of the relationship between state, law, economy, and society." On the other, he is careful to avoid the implication that Progressive reformers imported alien ideas and institutions into American politics.

This tension is everywhere in *New Democracy*. Novak highlights both the novelty of the modern American state and the resemblance of its legal innovations to older common law doctrines. For instance, when discussing the emergence of the idea of public utilities and the modern police power, Novak acknowledges the existence of a traditional law of public utilities and police power, but concludes, citing Felix Frankfurter, that it was "a break with history" rather than a continuation of the founding. Novak's first book sought to diminish the distance between the regulatory approach of the 19th century and the modern state. *New Democracy* more openly acknowledges the Progressives' break from the past.

In this telling, cases such as *Munn v. Illinois* (1877), which redefined the notion of "property affected with a public interest," appealed to traditional notions of regulation while providing "the very superhighway down which reformers drove a truckload of far-reaching experiments in the state regulation of economic activity." This was not simply the application of the common-law approach to regulation but something revolutionary, in which "the police power moved beyond older common-

law and constitutional limitations and traditional concerns...to embrace the more ambitious and prospective mission of securing the public welfare."

An important implication of Novak's argument, long advanced by "revisionist" accounts of *Lochner v. New York* (1905), is that the Progressive-era judiciary was hardly as opposed to state regulation as today's scholars maintain. *Lochner* is still treated by many as a canonical case that has come to "stand for and define the entire legal-historical period" of the Progressive era. Novak strongly and correctly dissents from this presentation, noting Charles Warren's 1913 survey of judicial decisions, *The Progressiveness of the United States Supreme Court*—a survey which found that the judiciary overwhelmingly upheld state regulatory laws during the period. Although Novak fails to cite the many scholars, such as David E. Bernstein, Michael Les Benedict, and Charles W. McCurdy, who have long discredited this view of the Progressive-era judiciary, it is good that he supports their conclusion.

BUT THE MOST PROMINENT THEME IN *New Democracy* is the transformation of democracy itself. "The basic eclipse of democracy in reigning theories of the modern American state remains the fundamental defect," he argues. Many attribute the rise of bureaucracy in America to the imposition of a new, quasi-aristocratic, and technocratic conception of rule—one which leaves little room for democratic input or accountability. Novak rejects this understanding of the Progressives. They were not, he argues, against democracy. In fact, when they looked at the modern state "they saw it as nothing less than the beginning of a new and modern democracy."

Novak's theory that the modern state represents a *new* democracy hinges on a fundamental redefinition of democracy. Unlike traditional thinkers (such as Sir Henry Maine, who defined democracy as "simply and solely a form of government"), leading Progressives like John Dewey, Herbert Croly, and Walter Weyl transformed democracy into a substantive conception of justice. As Novak explains, for the Progressives democracy was "a way of life" that "implicated due regard for the welfare of each and every member of the community in the active, ongoing creation of the conditions of collective life together." Such a community could be ruled by elites if it was necessary to preserve the conditions of collective life.

Novak argues that Progressives supported popular rule. He quotes Woodrow Wilson's "The Study of Administration" (1887), which claims that "administration in the United States must be at all points sensitive to public opinion." But he leaves out the parts of Wilson's essay that are openly contemptuous of the people, self-government, and voting. In order to present the Progressives as defenders of popular rule, Novak overlooks some of the obvious tensions in their thinking.

ULTIMATELY, AS NOVAK SHOWS, THE Progressives did not think democracy meant *dēmou kratos* or rule by the people. Theirs was "an ends-oriented democracy that turned not just on procedural inputs but on the substantive policy outputs that more equitably and effectively secured the people's health, safety, and well-being." Such a democracy required the expansion of political power and even the adoption of undemocratic (in the traditional sense) administrative institutions to attain the new democratic purposes. In short, the Progressives had "a vision of democratic administration built on the protection of public over and against private interest." Society's collective will would be imposed by government against private interests through newly established administrative agencies. Just as George W. Bush famously stated, "I've abandoned free-market principles to save the free-market system," the Progressives abandoned traditional notions of democracy to promote democracy as an end rather than a means of governing.

As faithful CRB readers have long known, the New Deal was heavily indebted to the Progressives, who laid the foundation for the modern state. William Novak expertly weaves together intellectual, legal, and political history to show that the critical turning point in American politics came during the Progressive era. Though *New Democracy* leaves some of the most important questions unresolved—such as the extent to which the modern state is alien to the founders' constitutionalism and American legal history, or how Progressives resolved the tension between centralized administration and popular government—it is a useful complement to the ongoing study of the critical decision points that led us to our present moment.

Joseph Postell is associate professor of politics at Hillsdale College and the author of Bureaucracy in America: The Administrative State's Challenge to Constitutional Government (University of Missouri Press).

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