Putting the 'Public' in Public Administration: The Rise of the Public Utility Idea

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*The Rise of the Public Utility Idea*

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INTRODUCTION

From the perspective of American legal history, one of the most important and lasting themes in the work of Jerry L. Mashaw is his definitive establishment of the long and deep historical origins of American administrative law and the administrative state. Mashaw’s remarkable charting of “The Lost One Hundred Years of American Administrative Law” is a monumental achievement that forever alters the established chronology and history of the administrative regulatory state in the USA. Through his emphasis on what Bruce Wyman dubbed the “internal law” of administration, Mashaw identified a new route into a previously undiscovered (or at least underacknowledged) history of American administrative action and law a century before the so-called invention of modern administration in the 1887 Interstate Commerce Act.1 Together with the subsequent work of his colleague Nick Parrillo, Mashaw now provides us with an entirely new canvas for rethinking the whole history of the administrative state.2 The American state was not “weak” or “laggard” or “underdeveloped” or “absent” before 1887. And the arrival of sophisticated techniques of administration and complicated administrative legal problems and doctrines certainly did not await the formation of the Interstate Commerce Commission.

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So we now have a new and “long” history of administrative law to contemplate from 1787 to 1887 and beyond. But some important questions and interpretive problems remain. Among the most significant is charting the exact relationship between the sprawling early regime of administrative regulation that Mashaw heroically uncovers to the later transformations in administration and regulation that took place at the turn of the twentieth century. Are these regimes of a piece – similar, contiguous, and continuous – reflective of an evolution rather than a revolution? Or are there still some dramatic differences and changes circa 1887 that suggest not a move from absence to presence (Mashaw has certainly slain that beast), but perhaps a transformation nonetheless? Nick Parrillo’s account of a “salary revolution” – a transformation in personnel, professionalism, and basic government–citizen relations – at the very center of this new, long history of administration is an excellent example of the next stage of inquiry. This essay suggests another potential transformation for further historical investigation – i.e., the very transformation in the nature of “the public” and the general idea of regulation in “the public interest.” At the center of that history stands the law of public utility.

PUBLIC UTILITY AND THE ROOTS OF MODERN ECONOMIC REGULATION

This essay concerns one of the more remarkable innovations in the history of democratic attempts to control the corporation and, in turn, the larger American economy. In the late nineteenth and early twentieth century – after an important series of antecedent changes in corporation law – lawyers, economists, legislators, and democratic reformers pieced together a new regime of modern business regulation. At the very center of that project was the idea of “public utility” or what was referred to at the time as the “public service” corporation.

While most historical accounts of the rise of modern economic regulation in this period trumpet the overriding significance of antitrust or antimonopoly policy, the legal invention of the public service corporation and the public utility was even more significant for the future relationship of American polity and economy. For, in many ways, the modern American administrative and regulatory state was built directly upon the legal foundation laid by the expanding conception of the essentially public services provided by corporations in emergent sectors of the modern American economy: e.g., transportation, communications, energy supply, water supply, and the shipping and storage of agricultural product. In law, the original architects of the administrative state and the authors of the very first casebooks and the teachers of the first
classes on administrative and regulatory law – people like Bruce Wyman, Felix Frankfurter, and, ultimately, James Landis – basically cut their teeth on the legal, political, and economic problems posed by public service corporations and public utilities per se. The public utility, the public corporation, and the modern American administrative and regulatory state, in other words, all grew up together.

Indeed, in the end, the public utility idea and the public service corporation became the central vehicles through which progressive (and, later, New Deal) policymakers pioneered a more capacious notion of “public interest” in politics and economics and a more comprehensive conception of the “social control of American capitalism.”

Awareness of the close linkage between the public utility idea and a more expansive agenda of economic regulation and reform was expressed frequently at the time in some of the most important manifestos of the new reform era. John Commons began his influential *Legal Foundations of Capitalism* with a prolonged analysis of *Munn v. Illinois* and business “affected with a public interest.” Louis Brandeis’s solution to the era’s banking problems in *Other People’s Money* was the idea of “Banks as Public-Service Corporations.”

Richard T. Ely’s famous “Statement” to the opening meeting of the American Economic Association mentioned both western water supply and midwestern rate discrimination as exemplary places to begin thinking in essentially public rather than private terms: “We hold that there are certain spheres of activity which do not belong to the individual, certain functions which the great co-operative society, called the state – must perform.”

But the public utility idea was not just a legal doctrine or an intellectual program or a reform ambition. Rather, the power and historical significance of public utility came from the way in which it burrowed its way to the very core of the American legal and political-economic system. Quite simply, public utility took over turn-of-the-century statute books, commission reports, and court records. And it dominated the period’s legal output: legislative, administrative, as well as judicial. It was the cutting edge and the avant-garde, moving conceptions of regulation beyond the constraints of the common law and

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state police power toward things like comprehensive price and rate controls, ongoing administrative and bureaucratic supervision, municipal ownership, and ultimately public works. It culminated in unprecedented interventions like World War I’s Food Administration (initially justified by the idea that in times of war all businesses were “affected with a public interest”), World War II’s Office of Price Administration and General Max, and the TVA. To this day it continues to hold sway in important sectors of the economy governed by a distinctive law of “regulated” or “networked” or “utility” industries.\(^6\)

The concept itself constantly expanded beyond initial initiatives in special areas like transportation, communications, energy, and water supply to the regulation of things like hotels, warehouses, stockyards, ice plants, insurance, milk, . . . you name it. Railroad commission and public utility reports – consisting of complaints, investigations, rules, cases, holdings, findings, and deliberations – proliferated, taking over huge swaths of law library space and sometimes dwarfing other legislative and judicial materials (see Figure 15.1).

From the Civil War to the New Deal, the very best economists, lawyers, and policymakers were consumed by the problem of public utilities. In railroading – the original and paradigm case – Kenneth Culp Davis has estimated that the extraordinary number of activities and personnel involved in railroad administration alone in this period dwarfed the personnel and output of the entire federal court system itself.\(^7\)

A short-hand but more concrete sense of this massive scale and scope of the “public service corporation” project is suggested by Bruce Wyman’s two-volume, 1,500-page, 5,000-case treatise The Special Law Governing Public Service Corporations published in 1911 – at the height of progressive activism concerning the relationship of business and regulatory administration. Wyman consolidated and summarized two generations of legal-economic regulation in response to the emergence of the large-scale business corporation in the late nineteenth century. “Twenty-five years ago,” Wyman noted, “The public services which were recognized were still few and the law as to them imperfectly realized.” But his massive treatise was now a testament to a “present state of the public service law” in which there was now “almost general assent to State control of the public service companies.”

And how extensive were such public utilities and public service companies by 1911? In the first three substantive chapters, Wyman covered the

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following types of businesses: Ferries, Bridges, Bonded warehouses, Log driving, Tramways, Railways, Pipe lines, Transmission lines, Elevated conveyors, Lumber flumes, Mining tunnels, Gristmills, Sawmills, Drainage, Sewerage, Cemeteries, Hospitals, Booms, Sluices, Turnpikes, Street Railways, Subways,
Wire conduits, Pole lines, Waterworks, Irrigation systems, Natural gas, Water powers, Grain elevators, Cotton presses, Stock yards, Freight sheds, Docks, Basins, Dry Docks, Innkeepers, Hackmen, Messenger service, Call boxes, Gas works, Fuel gas, Electric plants, Electric power, Steam heat, Refrigeration, Canals, Channels, Railroads, Railway terminals, Railway bridges, Car ferries, Railway tunnels, Union railways, Belt lines, Signal service, Telegraph lines, Wireless telegraph, Submarine cables, Telephone systems, Ticker service, Associated press, Public stores, Grain storage, Tobacco warehouses, Cold storage, Safe deposit vaults, Market places, Stock exchanges, Port lighters, Floating elevators, Tugboats, Switching engines, Parlor cars, Sleeping cars, Refrigerator cars, and Tank cars.\(^8\)

So, now we come to something of a historical conundrum. For here we have this big, powerful, proliferating thing at the very center of American law and political economy between the Civil War and the New Deal. And for all intents and purposes, today, it has almost disappeared from sight. What was once at the forefront of law, economics, and public policy discussion has been relegated to the backbench – the dustbin – of American history. From the cutting edge of political economy, the law of public utilities has become something of a backwater concerning fewer and fewer things – electricity, gas, water. What happened? While keeping in mind the very real possibility that reports of the death of public utility have been greatly exaggerated,\(^9\) two answers to this question require at least preliminary mention. The first answer involves something of a success story. For the most part, the lawyers, economists, and reformers pushing the public utility idea essentially won. The overarching goal of the public utility idea was an enlarged police power – an expansive conception of state (and ultimately, federal) regulatory power over the economy. And by the time of the US Supreme Court’s landmark decision in *Nebbia v. New York* in 1934 (concerning the state price regulation of milk during the Great Depression), the conception of state police power was so thoroughly expanded through the infusion of the public utility concept, that the Court no longer found it necessary to designate a specific kind of

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\(^8\) 1 Bruce Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment* 29–33, 39–134 (1911).

business “affected with a public interest” to justify almost any kind of economic regulatory regime seen as in the “public interest” more generally. The public utility idea had done its main work.

But a failure story must be noted here as well. For while the public utility idea was a general success in broadening conceptions of economic regulatory possibility, in the particular case of the range of economic activities considered public utilities per se (and thus subject to higher standards of regulation from strict price controls through to public ownership), the record is less sanguine. If the legal and constitutional story by the time of Nebbia was something of a victory for the proponents of an expanded notion of public interest, soon thereafter in political economy, the public utility idea beat a slow and steady retreat. Indeed, the last half-century or so has witnessed a sustained effort on the part of social scientists to undermine and undo the public utility idea.

Most significantly, the law and economics movement has systematically dismantled central pillars of the public utility argument in a series of full-throated and field-defining critiques like Ronald Coase’s “The Federal Communications Commission” (1959), George Stigler’s “What Can Regulators Regulate?” (1962), Harold Demsetz’s “Why Regulate Utilities?” (1968), Sam Peltzman’s “Pricing in Public and Private Enterprise” (1971), and Richard Posner’s “Taxation by Regulation” (1971). Consequently, most now perceive public utilities in economics (when they are noticed at all) as a peripheral area of policymaking concerning marginal things, primarily the provision of municipal services. The “public utility” moniker is currently something of a pejorative in the academy – viewed with a mixture of scholarly derision and contempt. Because of this peculiarly mixed record of success and failure, a full reckoning with the public utility idea first requires an exercise in historical recovery. Thus, this essay attempts to exhume the lost world of public utility law – a world in which conceptions of public interest, public service, public goods, and public utilities were anything but marginal or maligned. Holding some

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11 For a somewhat more complete detailing of this multi-pronged critique focused more specifically on the problem of regulatory capture, see William J. Novak, A Revisionist History of Regulatory Capture, in Preventing Regulatory Capture: Special Interest Influence and How to Limit It (Daniel Carpenter & David A. Moss eds., 2013), 25–48.
common wisdom at arm’s length, it attempts to recapture the original genesis of the public service corporation at the turn of the twentieth century. In contrast to the anemic vision of “public utilities” in contemporary discourse, it explores the initial emergence of a legal idea of public service and public utility that was innovative, capacious, and extraordinarily efficacious. And in contrast to an exclusive focus on antimonopoly and trustbusting – Roosevelt vs. Wilson; New Nationalism vs. New Freedom – this essay confirms Willard Hurst’s conclusion that the law of public utilities was the “prime symbol” of changing conceptions of the market and regulation in this period.13

A WORLD WE HAVE LOST?: NINETEENTH-CENTURY ANTECESSENTS

A clear picture of the emergence of the law of public utilities first requires an examination of its historical antecedents. For the public service corporation and public utilities regulation emerged at the nexus of important developments in three separate areas of law: (a) an age-old area of English common law pertaining to “public callings”; (b) the rise of the state legislative police power; and (c) the early nineteenth-century American regime of corporation regulation through the state legislative charter. The way these areas of law converged and diverged through the nineteenth century established something of a promising channel for the emergence of a modern and synthetic understanding of public service corporations and public utilities.

The Common Law of Public Callings

Long before the advent of the regulation of business through statutes and corporate charters, the common law developed ample provisions for the public control of certain kinds of economic trades, callings, occupations, and enterprises. Judges in the earliest law reports fairly consistently singled out a set of essentially “public” or “common” callings and trades for differential legal treatment. The common surgeon, tailor, blacksmith, victualer, baker, miller, innkeeper, and, perhaps most importantly, the common carrier, were held to different public legal standards in the performance of their tasks than more

13 As Hurst put it, “One major development, starting in the last quarter of the nineteenth century but coming to fullest definition in our time, has increasingly expressed discontent with the legitimacy of the market on grounds of utility – that is, that the market simply did not prove sufficiently serviceable to allow it the central place as a resource allocator which public policy was prepared to give it between 1750 and 1890. Our prime symbol of this changed judgment was the growth of the law of public utilities.” James Willard Hurst, Problems of Legitimacy in the Contemporary Legal Order, 24 Oklahoma Law Review 224, 225–26 (1971) (emphasis added).
ordinary private interactions. And they were subject to a special class of common law restrictions and duties, such as a duty to provide a service once undertaken and a duty to serve all comers. William Blackstone captured the spirit of the early common law understanding in his Commentaries:

There is also in law always an implied contract with a common inn-keeper, to secure his guest’s goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner: in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but in order to charge him with damages, a special agreement is required. Also if an inn-keeper, or other victualer, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way.

Other English jurists often talked more specifically about public callings in terms evoking larger legal ideas of “public trust,” “public rights,” “public good,” and “public employment.” Once one removed economic activity from the local and private world of mere household and neighborly interaction and held one’s self out generally to doing business with “the public” – certain legal and official and fittingly “public” obligations inevitably followed. As Lord Chief Justice John Holt put it in 1701: “Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all things that are within the reach and comprehension of such an office.” But more significant for the development of modern public utility law, it was with respect to the calling of wharfinger, that Matthew Hale penned what Bruce Wyman called “the most famous paragraph in the whole law relating to public service” in Hale’s influential

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14 See, for example, the survey from Leet Jurisdiction of Norwich between 1374 and 1391 in Edward A. Adler, *Business Jurisprudence*, 28 Harvard Law Review 135, 149–151 (1914).


17 *Lane v. Cotton*, 12 Mod. 472, 484–85 (K.B. 1701) (Eng.).
treatise *De Portibus Maris*. As legal historians Harry Scheiber and Molly Selvin have demonstrated in some detail, Hale exerted great influence over the development of the American law of public ways: highways, waterways, rivers, ports, bridges, and roads. And he most clearly articulated the notion of *juris publici* – rights belonging to the public at large – in certain kinds of public spaces, thoroughfares, and even activities. With respect to the wharfinger – where interestingly public thoroughfares and public callings intersected – Hale first elaborated the notion of economic activities “affected with a public interest,” which would become so significant after the US Supreme Court’s decision in *Munn v. Illinois* (1877):

“If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods...because they are the wharfs only licensed by the queen...or because there is no other wharf in that port...in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be inhanced to an inmoderate rate, but the duties must be reasonable and moderate, though settled by the king’s license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer private interest, but is affected with a publick interest.”

The American reception of some of these English common law doctrines concerning public spaces and public callings was swift and certain. Securing public rights in highways, rivers, ports, and public squares through the use of such precedents was a major preoccupation of antebellum American jurists. And from the earliest days of the republic, certain occupations and businesses continued to be governed by special common law rules owing to their status as common or public callings. Indeed, large bodies of case law rapidly grew up around two of the most important public callings in early American law: the law of innkeepers and the law of common carriers. The significance of this jurisprudence is attested to by the leading figures drawn to its systematization.

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18 Bruce Wyman, *Historical Introduction*, in *Public Service Corporations*, supra note 8, at 14. Wyman added, “No more significant phrases were ever penned.”
Joseph Angell and Isaac Redfield both contributed elaborate treatises on the law of common carriers. And none other than Joseph Beale added a 638-page tome on *The Law of Innkeepers and Hotels: Including other Public Houses, Theatres, Sleeping Cars.* Beale concluded, “The law of innkeepers was the earliest developed and is the simplest and clearest of those topics of law which are concerned with the various public-service callings.”

In short, a fairly elaborate system of common law regulation grew up in the nineteenth century around certain public economic activities that highlighted a series of special duties and public rights. Even before the rise of the state regulation of business through statute and charter, the common law provided surprisingly supple remedies for protecting public rights against private forms of encroachment.

### State Police Power and the Corporate Charter

Much as case-by-case, *ex post* remedies of the common law of nuisance quickly took on the more systematic, *ex ante* form of legislative regulation under the state police power, the common law of public callings was quickly supplemented and in most cases superseded by municipal ordinances and state statutes. Two very different types of legislation simultaneously entered the regulatory mix: (a) general state police power regulations; and (b) the more specialized state statutes known as charters of incorporation. The shifting interrelationship between these two very different types of legislation is central to the most important developments in nineteenth-century business and economic regulation.

The development of nineteenth-century legislative police power regulation of economic activities formerly controlled by the judicial administration of the common law is a topic both enormous and complex. For the purposes

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of this essay, some shorthand must suffice. In area after area of the econ-
omy – from ports to wharves to inns to common carriers to warehouses to
urban marketplaces and beyond – American localities and states began rapidly
drafting ordinances and regulatory statutes that built upon the economic lines
and reasoning of common law precedent but pushed toward a much more
comprehensive, rational, and codified system of economic regulation. The
overarching legal and political justification for this expansion of police power
remained an awareness of the public rights and public interests implicated in
certain kinds of economic activity as anticipated in the common law of public
callings. But the protection of public rights and public interests in a blossom-
ing market, corporate, commercial, and industrial economy demanded more
expansive, predictable, and prospective measures.

Nowhere was this shift to statute more carefully analyzed and ultimately
rationalized than in the classic police power opinion of Massachusetts Chief
Justice Lemuel Shaw in Commonwealth v. Alger (1851). Upholding the legisla-
ture’s right to establish a wharf line in Boston Harbor beyond which no private
structures should encroach, Shaw’s reasoned defense of the public interest
moved deftly from common law to codification; from nuisance to police
power; from public calling to public utility; and from the ancient wharfinger
to modern land-use regulation. He first defended the authority of the legisla-
ture to pass regulatory statutes with broad implications for the entire economy:
“Wherever there is a general right on the part of the public, and a general
duty on the part of a land-owner or any other person to respect such right, we
think it is competent for the legislature, by a specific enactment, to prescribe a
precise, practical rule for declaring, establishing, and securing such right, and
enforcing respect for it.” He then went on to offer one of the most eloquent
defenses of police power and public rights to be found in nineteenth-century
case law:

All property in this commonwealth . . . is derived directly or indirectly from
the government, and held subject to those general regulations, which are
necessary to the common good and general welfare . . . . The power we allude
to is rather the police power; the power vested in the legislature by the
constitution to make, ordain, and establish all manner of wholesome and
reasonable laws, statutes, and ordinances, either with penalties or without,

25 For some overviews of this nineteenth-century transformation to police power, see Ernst Fre-
und, The Police Power: Public Policy and Constitutional Rights (1904) [hereinafter
Freund, Police Power]; Ernst Freund, Standards of American Legislation (1917);
John F. Dillon, Treatise on the Law of Municipal Corporations (1872); Novak,
supra note 21.
not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth.\textsuperscript{26}

Similar (though less grandiose) legislative and judicial reasoning attended the slew of ordinances and statutes that greeted an expanding American economy: regulations of lotteries, hawkers and peddlers, rents and leases, mines, ferries, apprentices and servants, attorneys and solicitors, the exportation of flaxseed and other goods, the inspection of lumber, staves and heading, public auctions, fisheries, flour and meal, the practice of physic and surgery, beef and pork, soal leather, inns and taverns, shipping, common carriers, etc.\textsuperscript{27} Rather than leave the regulation of a growing economy to the common law practices of judges and juries (let alone the imaginary world of laissez-faire theorists), states and localities codified the rights and responsibilities of key economic actors and activities. One of the persistent features of this legislative intervention from the beginning was explicit, sometimes quite detailed, price administration or rate setting: from the regulation of the ancient assize of bread to the early mill acts to the precise setting of prices for ferriage and cartage to the even more explicit rate-setting practiced during the canal and early railroad eras.\textsuperscript{28} As Chancellor Wentworth of New York described this continuity between an older and a newly emerging economy in \textit{Beekman v. Saratoga and Schenectady Railroad Co.} (1831): “The legislature may also from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take, in the same manner as it may regulate the amount of tolls to be taken at a ferry, or for the grinding at a mill.”\textsuperscript{29} Though the initial blueprint of the common law of public callings and common carriers was still decipherable in

\textsuperscript{26} \textit{Commonwealth v. Alger}, 7 Cushing 33, 84–85 (Mass. 1851).

\textsuperscript{27} These headings are culled from \textit{Laws of New York}, 1781–1801, 2 vols. (1802). See also \textit{The Revised Statutes of the State of Michigan} (1858); \textit{The Revised Statutes of the Commonwealth of Massachusetts} (1856).

\textsuperscript{28} \textit{An Act Concerning Passenger Carriers} (ch. 80), in \textit{Acts and Resolves of Massachusetts} 224 (1840); \textit{An Act Concerning Effects of Passengers Transported by Railroad Corporations and Other Common Carriers} (ch. 147), in \textit{Acts and Resolves of Massachusetts} 645–47 (1851); \textit{Licensed Houses} (ch. 28), in \textit{The Charter and Ordinances of the City of Boston, Together with the Acts of the Legislature Relating to the City: Collected and Revised} 203–10 (1834). Boston’s authority to regulate innholders and other public callings in the city was derived from the legislature. \textit{An Act for the Due Regulation of Licensed Houses}, in \textit{Acts and Resolves of Massachusetts} (1832). For the assize of bread see \textit{Mayor of Mobile v. Yuille}, 3 Ala. 137 (1841). On the mill acts, see the discussion of Morton J. Horwitz in \textit{The Transformation of American Law}, 1780–1860 (1977). On rate-setting in the canal era see Harry N. Scheiber, \textit{The Rate-Making Power of the State in the Canal Era: A Case Study}, 77 \textit{Political Science Quarterly} 397 (1962).

\textsuperscript{29} \textit{Beekman v. Saratoga & Schenectady Railroad Co.}, 3 Paige 45, 75 (NY 1831).
such statutes, a new and far more capacious regulatory state was methodically supplanting older legal and economic frameworks.

The second important element in the construction of modern American business regulation was the development and proliferation of a distinctive kind of legislative statute – the special state charter of incorporation. As the preceding discussion makes clear, the American practice of economic promotion and regulation through state corporate chartering did not develop spontaneously in a legal vacuum. Beyond the specific legislative details of any individual corporate charter, the common law of nuisance and public callings still operated, and a whole series of state and local police power regulations continued to govern various kinds of economic activities. It is only by keeping in mind all three modes of nineteenth-century economic regulation – the common law, state police power, and corporate chartering – that one can get a full picture of the relationship of the corporation, economy, law, and democracy.

Before general incorporation statutes achieved predominance in the United States circa 1875, most corporations came into being through a special charter secured directly from the state legislature.30 After 1800, chartering (not only business corporations but municipal corporations, charitable associations, churches, academies, etc.) became a preoccupation of state legislative sessions that almost matched legislative appetite for general police power statutes. Between 1789 and 1865, for example, Connecticut passed something like 3,000 special acts incorporating every conceivable kind of social and economic organization.31 Two characteristics of this early special charter regime had important implications for an emerging law of public utilities.32 First, the special charter was a legal tool through which the legislature extracted what Ernst Freund dubbed an enhanced or “enlarged police power.”33 In exchange for a host of special corporate privileges – e.g., monopoly power, eminent domain power, tax exemption, property grant, public financing,

33 Freund, Police Power, supra note 25, at 358.
rights to collect tolls, etc. – legislatures carved out expanded public powers of oversight and regulation. Second, this enlarged police power pointed directly to the frequent conclusion of first-wave histories that these early specially chartered corporations were essentially seen as public callings or public franchises.

A growing case law only reinforced this original public interest/public service/public utility interpretation. In the first place, courts uniformly rejected an overly strict contract theory of the charter that some corporations argued exempted or inoculated themselves from further regulatory or legislative control. The definitive discussion of this issue arose unsurprisingly in an early railroad regulation case – *Thorpe v. Rutland and Burlington Railroad Company* (1855). There Vermont Chief Justice Isaac Redfield (a leading legal authority on common carriers) rejected a railroad corporation’s argument that its original 1843 charter immunized it from costly subsequent police power regulations requiring such railroads to fence their lines and maintain cattle guards at crossings. Citing Roger Taney in *Charles River Bridge* as well as John Marshall in *Dartmouth College*, Redfield insisted that corporate charters be strictly construed “in favor of the public” so as not interfere with general legislative police power to regulate persons and property in the public interest. Redfield contended that “there would be no end of illustrations upon this subject,” listing just some of the “thousand things” that the legislature regulated on all railroads, including “the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen on a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed.” Redfield justified legislative regulation’s imposition upon corporations of all sorts: “Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories . . . have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension . . . that a corporation did possess some more exclusive powers and privileges upon the

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34 Id. at 359.
35 In addition to the sources cited in Hilt and Hennessey and Wallis, see ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 11 (rev. ed. 1968); 2 JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 24–27 (1917); NOVAK, supra note 21, at 106.
subject of its business, than a natural person in the same business, ... which, I trust, has been sufficiently denied.”

In the opinions of Redfield, Lemuel Shaw, and others, the much-discussed “Road to Munn” was thus already very much established. However, the “Road from Munn” – a much longer road that stretches through progressivism to the early onset of the New Deal – remains very much a matter of modern legal and historical debate. It marks the real explosion and proliferation of modern public utility regulation and the onset of what might be justly labeled “the public utility era.”

ORIGINS OF THE PUBLIC UTILITY ERA

As the preceding discussion demonstrates, there was no single, definitive point of historical departure from which to date the exact birth of the public utility idea. The older historical roots of public utilities were as variegated as they were ubiquitous. Even the more particular mechanism of administrative regulation through various kinds of boards, commissions, and agencies had broad and diverse legal-historical roots. As Jerry L. Mashaw and Nick Parrillo have now definitively established, administrative law, administrative regulation, and administrative governance long antedated the establishment of the Interstate Commerce Commission and even the development of state railroad commissions. As Mashaw put it, “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extra-judicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.” At the local and state level, too, boards of health, county commissioners, and various other administrative entities had long exercised the power to supervise, adminster, and regulate callings, associations, businesses, and corporations deemed important to the people’s welfare. As early as 1832, Connecticut was in the habit of establishing a special “board of commissioners” in the charter of each and every railroad

39 Mashaw, supra note 1; Parrillo, supra note 2; Kessler, supra note 2. Also see the early pioneering work of Leonard White, nicely introduced in Richard R. John’s synthetic review, In Retrospect: Leonard D. White and the Invention of American Administrative History, 24 Reviews in American History 344 (1996).
it incorporated. And the reports, activities, and rulings of other various local and state turnpike commissioners, street and highway commissioners, canal commissioners, bank commissioners, water commissioners, and the like dotted the antebellum legal and political landscape.

But though one particular point of historical origin is elusive, it is possible to detect within this complex mesh of historical laws and institutions certain historical trajectories or developmental trends that are central to explaining the explosive emergence of modern public utilities law at the turn of the twentieth century. In the developments outlined above, one can detect a general trend from highly particularized (and retrospective) common law adjudications on public callings to more generalized (and prospective) legislative police power statutes (frequently coupled with ad hoc administrative delegations of supervisory authority) to the regulation of particular franchises through special provisions included in state charters. Of course, this developmental tendency was anything but clear or linear. Even after the rise of regulation through state charters (and municipal franchises), state police power enactments and municipal ordinances continued to control many aspects of corporate behavior respecting public services. And, of course, individuals continued to litigate in courts seeking judicial enforcement of both legislative and common law remedies concerning the special rights, duties, and obligations of public franchises. So, by the middle of the nineteenth century, there was not so much a determinate (yet alone rational or systematic) law of public utilities as a wide proliferation of regulatory devices and measures – from sporadic court judgments enforcing common law understandings to various state and local police power statutes and ordinances to the host of highly differentiated and individualized provisions of special franchise charters. The limitations of such a regulatory regime – built upon a sprawling disarray of litigation, ordinances, statutes, franchises, and charters that varied across local, state, and federal jurisdictions – would soon become obvious to politicians, reformers, regulators, jurists, commentators, and the public at large.

Two things in particular transformed this old regime. First, with respect to business corporations in particular, the regulatory control afforded through the state charter regime quickly began to unravel through the combination of the forces of: (a) general incorporation; (b) the so-called “race-to-the-bottom” that animated late nineteenth-century state policymaking vis-à-vis corporations; and (c) the increased nationalization and internationalization of commerce

\*\* Resolve Incorporating the New-York and Stonington Rail Road Company (passed 1832), in 2 Resolves and Private Laws of the State of Connecticut from the Year 1789 to the Year 1836, at 1019–1023 (1837).
and business that quickly outran or preempted many state and local regulatory initiatives. The ad hoc, special, local, and state-by-state initiatives that characterized antebellum public policymaking concerning public utilities quickly gave way to an increasing rationalization, systematization, and thoroughgoing nationalization of administrative regulation. Localism and federalism proved no match for the centralization of corporation and public utility policy that ultimately culminated in measures like the Interstate Commerce Commission, the Sherman Antitrust Act, and the Federal Trade Commission. As Felix Frankfurter captured this confluence of events, “The modern system of state utility regulation thus coincid[ed] with the efforts . . . to arm the federal government with powers adequate to assure interstate public services.” Here, administrative regulation in a recognizably national and modern form proliferated, creating conditions for the rapid emergence of an administrative regulatory state and a modern economy in the United States.

Second, one particularly important and highly visible form of common carrier and public service corporation – the railroad – burst onto the American scene with an economic ferocity and a social and political chaos perhaps unmatched by any other historical force other than war. As Alfred Chandler argued, railroads were “the nation’s first big business,” and they marked the beginnings of modern corporate finance, modern corporate management, modern labor relations, and thus, unsurprisingly, the “modern governmental regulation of business.” Just as the scale and scope of railroads transformed the American economy, the scale and scope of railroad administration changed the face of American regulation. As Frankfurter noted, “Railroad regulation was the precursor of the far-flung system of utility control today.” Railroads were not the first transportation companies in the United States, and railroad commissions were certainly not the first administrative agencies. But something about the size and extent of this infrastructural and regulatory intervention forever altered the relationship of the modern economy and the administrative and regulatory state.

The Public Utility Idea

The modern concept of public utility drew on some important legal-intellectual precedents: the common law of public callings, the antebellum

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43 Frankfurter, supra note 41, at 82. Frankfurter went on: “What Charles Francis Adams said about the relation of transportation to the community applies with equal force to more recent utility services. Indeed, the services rendered by what we now call public utilities have been under public supervision for a century.”
police power, and legislative corporate chartering. Out of these early roots and traditions, however, there emerged a distinctively more modern and expansive rendering of regulation in the “public interest” at the turn of the century. Three new elements were especially salient in the transformation of public law that made public utility the entering wedge of modern administrative regulation and that launched the public utility era.

First, the public utility idea drew directly on a new positive conception of statecraft and the public duties of a modern polity—particularly as it concerned the provision of “public services.” The most penetrating analysis came by way of Léon Duguit’s influential essay “Law and the Modern State.”

In this text promoted to American audiences by progressive fellow-traveler Harold Laski, Duguit pioneered his conception of “the eclipse of sovereignty”—the idea that “public service” was rapidly “replacing the old theory of sovereignty as the basis of public law.” Drawing on recent trends in sociological jurisprudence and an increasingly functionalist and pragmatic conception of law, Duguit rooted his modern theory of the state not in its right to command, but in its social functions and public duties, wherein “public service” became “the only adequate foundation for a modern system of politics.” Public utility, then, was very much at the core of this new, pragmatic understanding of the public service functions of the state—of what John Dewey talked about in terms of “the public and its problems.”

Moving beyond older conceptions of the state rooted in political theories of social contract or sovereignty and fiscal-military-ordering imperatives, Dewey outlined a more modern and pragmatic quest for a “democratic state” dedicated to “the utilization of government as the genuine instrumentality of an inclusive and fraternally associated public.” And for Dewey, the growing awareness that more and more businesses were “affected with a public interest” was a classic step forward in the development of that functionalist, democratic, and service-oriented state. As Felix Frankfurter captured this trend in his defining essay “Public Services and the Public,” the new needs to be met in this new era were “as truly public services as the traditional governmental functions of police and justice.” And Frankfurter viewed no task as a more profound for modern government than its role “in securing for society those essential services which are furnished by public utilities.”

Elementary examples of this trend toward public services included the evolution of education and charity from private to public affairs, as well as the development of “the postal and telegraph system” into “public service[s]...
of primary importance.” To these basic examples of the public service idea, Duguit noted the modern repletion of innumerable further instances: “The time has passed when each man was his own public carrier. . . . This makes plain every day the greater necessity of organizing transportation into a public service. In the great towns we need tramways and a public motor service; throughout the country we need railway service. . . . Not only public lighting but also private have been similarly transformed. . . . The time is not far distant when every house will demand electric light. So soon as this becomes a primary need it will create a new subject of public service.” Duguit concluded in perfect sync with the architects of public utility law in America: “Any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity is a public service so long as it is of such a nature that it cannot be assured save by governmental intervention.”

Second, the modern public utility regime was characterized by the coming of age of the police power and administrative regulation. Though police power regulations and administrative rulemaking and adjudication had been features of American governance since the founding of the republic, they now took on a new, enlarged, and purposive form. A new self-consciousness and inventiveness propelled discussions of police power and administrative law as the first systematic treatises and analyses of scholars like Freund, Goodnow, Wyman, and Rexford Tugwell synthesized, reorganized, and in the end transformed the fields of inquiry.

It was no accident that the idea of “police power” came of age in the “public utility” era. The formative treatises and articles of Ernst Freund (as well as a myriad of other legal commentators) were testimony to the convergence and simultaneous growth of police power, public utility, and an expanded conception of public interest. Noting the almost limitless expansion of public utility in the early twentieth century (beyond natural monopolies, railroads, common carriers, inns, grain elevators, banking, insurance, etc.), Freund concluded: “If a business is affected with a public interest its charges are subject to reasonable regulation . . . , it may be required to render services without discrimination,

47 In the United States, Richard John is the historian who has most completely developed this important historical insight. Richard R. John, Spreading the News: The American Postal System from Franklin to Morse (1995); Richard R. John, Network Nation: Inventing American Telecommunications (2010).
48 Duguit, supra note 44, at 32–33, 38, 46–48.
Putting the “Public” in Public Administration

and the amount and manner of service may be regulated in the interest of public convenience – an interest which does not ordinarily call the police power into action. A great expansion of the police power may be expected by further development and application of this doctrine.”

In precisely this confluence of legal-regulatory events and concepts, Rexford Tugwell located a new “public interest” in the economy – “the right of the government to interfere in business affairs. Under its aegis public utilities arise and the police powers are brought to bear in the field of industry.”

Administration and administrative law had a similar experience in its interaction with public utility. Felix Frankfurter, while noting that “[a]dministrative law has not come like a thief in the night” and “is not an innovation,” acknowledged that the “general recognition” and “self-conscious direction” of administrative law was a product of these times and a consequence largely of the public utility revolution. Frankfurter attributed the slow rise of administrative self-consciousness to things like A.V. Dicey’s “misconceptions and myopia” concerning the relationship of English “law” and Continental European notions like “droit administratif.” All that changed in US law with the dramatic rise of administrative regulation in the field of public utility. Public utility put the “public” in American “public administration.” The Law of Railroad Rate Regulation was the pioneering treatise in this field authored by Beale and Wyman – a complement to their work on Public Service Corporations and Wyman’s breakthrough text on Administrative Law. And Frankfurter began his own important work in administrative law with his much-discussed Harvard Law School course concerning Cases under the Interstate Commerce Act. A modern idea of administrative regulation was increasingly recognized and deliberated with an overarching clarity and coherence that frequently eluded earlier commentators. And just as significantly, the rise of a more thoroughgoing judicial review of administrative action – itself a testament to the increased intermingling of public utility, police power, and administration – brought

51 Rexford G. Tugwell, The Economic Basis of Public Interest, at v (1922).
54 Felix Frankfurter, A Selection of Cases under the Interstate Commerce Act (1915).
new cross-cutting and transsubstantive rules, procedures, and standards that would define the substance of administrative law right through to the passage of the Administrative Procedure Act.

From these broader conceptions of public service, police power, and administration there emerged the final, culminating piece of the public utility idea, i.e., a more generalized and autonomous conception of the public interest itself as the basis for increased state and governmental regulation in that public interest. Now, of course, powerful concepts of general public welfare had long been a part of the ethical and philosophical history of the “utility” idea in the abstract. David Hume’s devastating critique of the formalism of social contract theory formed a backdrop to the original emergence of “utility” as a more grounded, general, and consequentialist imperative behind the associative happiness of others and all.55 Jeremy Bentham’s similarly devastating critique of Blackstone credited Hume with establishing that “the foundations of all virtue are laid in utility” rather than in natural law or other legal formalisms.56 The impact of Benthamite utilitarianism on the Mills, the nineteenth-century revolution in English government, and ultimately John Dewey’s “new liberalism,” suggests something of the deep historical roots and power of the general utility idea.57

The modern transformation of the legal idea of public utility drew on these deep sources of inspiration, as the idea of utility helped launch another governmental revolution. The linchpin was the all-important idea of generality – moving older ideas of salus populi, people’s welfare, and res publica beyond the particular confines of customary, common law, and ancient constitutional categories toward a broader and more modern conception of general regulation in the public interest. In The Economic Basis of Public Interest (1922), Tugwell summed up the general arc of development: “The definition of police power in all the recent cases brings it into the broad field of public interest, so that the regulation of business in its economic aspects, its prices and its standards of service, flows from the general interest of the public just as does the right of regulation of business to secure the health, morals and safety of the community.” Here Tugwell correctly identified the basic transformation in law, thought, and action that would ultimately undergird a much larger

reform agenda for the social control of the economy: “When the market is viewed as a social mechanism rather than as a private one, and the reasons why it must be social and cannot be private are clearly envisaged, the problems of price and service control attain a new importance.” Here public utility moved decisively beyond the more commonly discussed reform agendas of antimonopoly and antitrust.

And indeed, the most important aspect to recognize about this new general construct of economic regulation in the public interest was the degree to which it was not confined to monopolies, natural or unnatural. Though many commentators, then, as well as now, acknowledged monopoly as a problem for which public utility provided a response, monopoly was just one of many other important factors driving the public utility idea. As already suggested, Ernst Freund made clear the degree to which the public utility idea pushed the established police power beyond bounds of order, safety, health, and morals toward more general concerns of public welfare, public policy, and even public convenience. So, too, it pushed well beyond the context of economic or social understandings of monopoly and trust. Bruce Wyman and other legal reformers were articulating the general and fundamental principles of a “unified body” of “law governing the public services,” beyond the charter question, beyond the corporation question, and beyond the monopoly question – and distinctly toward the progressive conception of the regulation of business generally in the public interest. Such principles multiplied beyond the concerns or theories of classical or neoclassical economics and resonated much more with the goals of social and political policymaking. “Monopoly is significant as one among many social and economic situations that may be considered by the legislature in adopting its policy,” argued John Cheadle. Rexford Tugwell began his own analysis with the monopoly question, but quickly moved on to a set of much broader public justifications, including consumers’ disadvantage and general public necessity. Imposition, oppression, unreasonable charges, harmful prices, or harmful standards of service were all justifiable regulatory concerns when dealing with necessities. And, Tugwell asked provocatively, “Who would say milk, bread, meat, working clothes, and adequate shelter for each are not necessities?”

58 Tugwell, supra note 51, at 23, 124 (emphasis added).
59 For an early statement of the relation of monopoly and trust to problems of public utility, see Bruce Wyman, The Law of Public Callings as a Solution of the Trust Problem, 17 Harvard Law Review 157 (1904). For the best discussion of monopoly as just one justification for public utility regulation, again see Tugwell, supra note 51.
In just this way, the public utility idea grew beyond so-called natural monopolies like railroads, telegraph, and utility lines, and embraced an almost illimitable number of economic activities where the law imposed a duty to be reasonable in dealing with the public. As legal scholar Nick Bagley has argued about Wyman’s concept of so-called “virtual” or “practical” monopolies, “A business need not be monopolistic in a strict sense. An extraordinary range of market features – the costs of shopping around, bargaining inequalities, informational disadvantage, rampant fraud, collusive pricing, emergency conditions, and more – could all frustrate competition and . . . warrant state intervention” via the enlarged law of public callings and public utilities.\(^{62}\) Conditions like necessity, exorbitant charges, arbitrary control, and consumer harm, in turn, triggered new affirmative legal obligations that themselves greatly expanded extant notions of public interest. Wyman’s list was just a start: “All must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made.”\(^{63}\) Access, sufficient service and supply, cost reasonableness, and nondiscrimination worked together in the law of public utility to generate a new, broad, general notion of government’s obligation to regulate for the public welfare.

But perhaps the best evidence of the extremely close links between the rise of the public utility idea and the emergence of a more modern and systematized administrative and regulatory law serving the public interest is the degree to which these things were intertwined in all of the early attempts to work out their legal origins. The pioneering casebooks and treatises of Joseph Henry Beale, Bruce Wyman, and Felix Frankfurter were a case in point.\(^{64}\) Beale, Wyman, and Frankfurter seamlessly and simultaneously pushed on the ideas of public service, public interest, regulation, and administration in promoting a more expansive idea of the range of acceptable governmental action. As Beale and Wyman suggested as early as 1902: “What branches of industry will eventually be of such public importance as to be included in the category of public callings, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings.”\(^{65}\)

\(^{62}\) Bagley, supra note 9, at 77. \(^{63}\) Wyman, supra note 8, at xi.

\(^{64}\) Joseph Henry Beale, Jr., A Selection of Cases on the Law of Carriers (1898); Wyman, supra note 1; Wyman, supra note 8; Frankfurter, supra note 54.

\(^{65}\) Beale & Wyman, supra note 24, at iii–iv.
How right they were. By 1916, that other pioneer of modern American administrative law Frank Goodnow could posit much more clearly the direct route from public utilities to more general public interest theories of regulation and administration. “A change is noticeable in our attitude towards these matters,” he began:

The regulation which in the case of public utilities was justified on the theory that the enterprise was based upon a privilege has since been extended to enterprises which in no sense owe their existence to the possession of such privileges. The justification for the regulation is found in the mere fact that the public interest is involved. Instances of such action are to be found in the anti-trust legislation which has become so common and in the well-nigh universal legislation passed to improve labor conditions. Workingmen’s compensation acts, employer’s liability and minimum wage laws, compulsory conciliation acts, increase of school opportunities for both the young and the old, paid for out of the proceeds of taxation, all testify to the fact that the private rights philosophy of a century ago no longer makes the appeal it once did.66

This is the modern concept of public utility. Public utility as the entering wedge of the general idea of economic regulation in the public interest. Public utility as the vehicle of reform experimentation that built the twentieth-century American mixed economy and perhaps anticipated the idea that later critical scholars would dub “state capitalism.”

So, despite recent advances in legal and economic history that have quite justifiably elongated the history of the American administrative and regulatory state, there is still something significant about such classic touchstones in the history of modern administrative regulation as the state railroad commissions, *Munn v. Illinois* (1877), the Interstate Commerce Act (1887), the first comprehensive state public utility commissions in states like Wisconsin and New York (1907), and *Nebbia v. New York* (1934). Such developments do need to be read in the wider context of a long pre-history of public service and police power regulation and administration. But with the advent of the railroad and the railroad commission, powerful new forces in regulation, administration, and statecraft quickly remade modern American governance.