
Introduction

The Reasoning State

Supporters at a Trump rally in West Virginia during the 2016 election campaign feverishly waived signs emblazoned with the slogan “Trump Digs Coal.” Trump himself brandished one of the signs, wore a hard hat, and mimed shoveling coal. “We’re going to put the miners back to work,” Trump promised the crowd.¹ Long in decline due to competition from cleaner, cheaper fuel sources, the coal industry nevertheless held political appeal: it played to working-class voters, rolled back the ambitions of President Obama, and stood to increase the profits of politically connected firms.² After Trump won the election, the forces of raw political power unambiguously aligned with policy changes favoring the industry.

As part of the administration’s push to revive coal, Secretary of Energy Rick Perry sought to revise existing rules so as to allow compensation for “fuel-secure” electricity generation units. Facially, the proposal sought to enhance grid “resiliency,” or the ability to withstand stresses to electrical grids, such as those imposed by adverse weather events.³ The proposal would have privileged generation by fuel that, for example, could be stored on-site in a ninety-day supply. Coal might be stored on-site in these quantities, but few other fuel sources could be – natural gas, wind, or solar, for instance, would not be eligible to benefit under the policy envisioned by Secretary Perry. As a practical matter, this proposal would have increased electricity rates and encouraged generation through legacy fuel sources, principally nuclear and coal.

The governing statutes, however, did not provide Secretary Perry fiat control in this area. Instead, the Federal Power Act permitted him to make a proposal to the Federal Energy Regulatory Commission (FERC),

¹ www.voanews.com/usa/trump-returns-campaign-trail-targets-clinton-coal.

² E.g., Philip Bump, *Why Is Trump More Worried about Coal Miners Than Department Store Employees?* WASHINGTON POST, July 10, 2017, www.washingtonpost.com/news/politics/wp/2017/07/10/why-is-trump-more-worried-about-coal-miners-than-department-store-employees/?utm_term=.9de3821f5334.

³ E.g., Darius Nixon & Eric Wolff, *Energy Regulator Rejects Perry’s Plan to Boost Coal*, POLITICO, Jan. 8, 2018, www.politico.com/story/2018/01/08/rick-perry-energy-coal-nuclear-269263.

which then had a responsibility to consider the proposal and take a final action within reasonable time limits.⁴ Secretary Perry sent a letter to FERC on September 28, 2017, with the proposed rule, which later appeared in the Federal Register.⁵ FERC duly created a rulemaking docket to consider the proposal, solicited comments from the public, and took a final action on January 8, 2018. The Commission terminated the rulemaking. In so doing, FERC referred to statutory standards established in the Federal Power Act: first, the existing tariffs must be deemed to be “unjust, unreasonable, unduly discriminatory or preferential,” and, second, the proposed remedy must itself be shown to be “just, reasonable, and not unduly discriminatory or preferential.”⁶

The proposed rule, the Commission found, failed to satisfy those statutory criteria. The Commission, for instance, pointed to comments by service providers that indicated that there was no problem with existing resiliency. Extreme weather events, such as the polar vortex cited by Secretary Perry, may affect electricity service, but most often due to physical damage to transmission equipment rather than generation shortages.⁷ The Commission further observed that the proposed rule would have subsidized eligible fuel resources without regard to need or cost, conflicting with the second set of statutory criteria. Moreover, for precisely the reasons that Secretary Perry favored the proposal – that is, it promised to boost coal interests – it was also discriminatory against other fuel sources, again conflicting with the second statutory criterion. On these grounds, the FERC terminated Secretary Perry’s proposal.

To both the initiated and uninitiated, FERC’s action may appear ordinary, even boring. It is true that bureaucracies take thousands of actions like this a year. But the action is remarkable, and all the more so for the fact that it is commonplace in some institutions. FERC resisted the wishes of presidential power and engaged in *credible reasoning*. The Commission, that is, took a set of facts on the ground, applied them against ends and guidelines established by statutory standards, and

⁴ 42 U.S.C. § 7173, www.law.cornell.edu/uscode/text/42/7173; see also, Michael Grunwald, *Trump’s Love Affair with Coal*, POLITICO, Oct. 15, 2017, www.politico.com/magazine/story/2017/10/15/trumps-love-affair-with-coal-215710.

⁵ Proposed Rule, Grid Resiliency Pricing Rule, 82 Fed. Reg. 46940 (Oct. 10, 2017).

⁶ Federal Power Act § 206, 16 U.S.C. § 824e.

⁷ Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC 61,012, at 8. Comments of the Midcontinent Independent System Operator, Inc., at 6.

thereby derived a policy choice. This form of reasoning, moreover, was publicly credible: it engaged with counter arguments, cited support from studies and other regulated entities, and did this all in a highly public way. Opponents to the Commission's action could engage with the reasoning if they disagreed. They could even challenge the reasoning before an independent third party, that is, an Article III court, though they did not.

This is a book about credible reasoning in public institutions – why it exists in some places, and not in others. The set of institutions that foster credible reasoning – to a first approximation, administrative agencies and courts,⁸ or what I refer to as the *reasoning state* – today make essentially all policy choices in the particularities.⁹ It is, indeed, a truism that administrative agencies produce most of the laws in our society, and that we do not elect the officials making many consequential decisions.¹⁰ To start our inquiry, note that many observers find it puzzling and disturbing that we invest such authority in the hands in those that we do not elect. Why does some popularly elected official or collection of officials not make these decisions? Why does the president himself – or at least someone he directly controls – not set the tariffs for coal and other fuel sources? Or Congress? These are good questions. So, why have we – and most other democratic societies – set up our state in this way?

⁸ As I argue in more detail later, I would emphatically not include the president in the reasoning state. The presidency, for instance, is understood not to be an agency covered by the Administrative Procedure Act, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and suffers from many of the deficits in regularity and credibility of legislative institutions.

⁹ Those institutions may usefully be contrasted against the *political state*, or roughly those institutions to which we elect officials, most prominently the legislature. Much of this book is about this contrast, between elected officials and the reasoning state. However, as foreshadowed by this FERC example, and as I contend in the closing chapters of this book, the administrative state is itself an incomplete realization of the reasoning state ideal type. The rulemaking and formal adjudications by the independent agency come closest to the enlightenment ideal type of the reasoning state, and mass adjudications in the immigration space, and perhaps in public rights cases more broadly, stand the farthest. For a trenchant criticism of the arbitrariness of the immigration and security services, see Paul Gowder, *Review: Law and Leviathan: Redeeming the Administrative State*, 31 L. & POL. BOOK REV. 1, 12–47 (2020), www.lpbr.net/2021/01/law-and-leviathan-redeeming.html.

¹⁰ 3 JOHN M. DE FIGUEIREDO & EDWARD H. STIGLITZ, *Democratic Rulemaking*. THE OXFORD HANDBOOK OF LAW AND ECONOMICS 52 (Francesco Parisi ed., 2017).

Existing Perspectives and Theoretical Précis

The most conventional response to this question is based on expertise and capacity.¹¹ The democratic organs of government, simply put, do not have the expertise or capacity to resolve the multitudinous problems that our complex society presents.¹² The radical solution to this difficulty, in the common view, is to establish institutions that *do* have the time and expertise necessary to resolve the relevant problems, and then to delegate in large measure the responsibility of sorting out the problems to these institutions. These institutions constitute the administrative state, a state that some contrast with the constitutional state, or roughly, the tripartite state envisioned by James Madison. For instance, the American Bar Association's Special Committee on Administrative Law played an important role in launching reforms to administrative procedures in the 1930s, issuing annual reports for over a decade, starting in 1933. The Special Committee racked itself over how to preserve a semblance of the constitutional state in the face of the administrative state. They fixated on the separation of powers, and made ominous references to

¹¹ Several other minority views exist. First, some argue that the administrative state represents a device for avoiding commitment and time consistency problems. See Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q. J. ECON. 1169 (1985); see also Murray J. Horn & Kenneth A. Shepsle, *Commentary on Administrative Arrangements and the Political Control of Agencies: Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992); Rui J. P. de Figueiredo, *Electoral Competition, Political Uncertainty, and Policy Insulation*, 98 AMER. POL. SCI. REV. 321 (2002); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J. L. ECON. & ORG. 469 (2007). Second, another class of theories argue that the administrative state represents a cynical ruse perpetrated on voters by elected officials, which I discuss in more detail later. See ELY, *infra* note 17, at 132; Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 57–58 (1982); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?* 39 PUB. CHOICE 233 (1982); MORRIS P. FIORINA, *CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1989); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (2008); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 NYU L. REV. 1463 (2015). Finally, a recent and provocative theory maintains that the administrative state exists to manage failures of interpersonal justice, in much the role as we imagine private law. Hanoch Dagan & Roy Kreitner, *The Bureaucrats of Private Law* (unpublished manuscript).

¹² E.g., GARY W. COX, *The Organization of Democratic Legislatures*. THE OXFORD HANDBOOK OF POLITICAL SCIENCE 141 (Barry Weingast ed., 2006), which notes that many regard plenary time as the most significant constraint facing the legislature.

the combination of powers under the Star Chamber and to the fascist regimes then emerging in Europe.

Yet, all the same, the Special Committee acknowledged the bind that it was in – its was an exercise in reluctant adaptation and accommodation rather than resistance. The Committee “freely conceded the value of, and indeed necessity for, administrative machinery for the enactment of detailed legislation in fields of government activity requiring the continuous supervision of experts.”¹³ Along the same lines, New Dealer James M. Landis understood the administrative state in classic fashion in his 1938 Storrs Lectures on Jurisprudence: “the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”¹⁴ “With the rise of regulation,” Landis wrote, “the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operations, ability to shift requirements as condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.”¹⁵ Today, the main lines of thought in law, economics, and political science essentially follow Landis’ intuition.

Landis’ account, though, is a partial one,¹⁶ and it leaves us with a number of puzzles. Congress often does seem to have the “brains” to resolve many of questions at issue. And to the extent it lacks the brains, observers such as John Hart Ely have long wondered why Congress has not invested more in its native institutional capacity.¹⁷ If information and capacity are the constraints, why not expand the institution’s ability to collect and process information? Or use agencies in much their current

¹³ 61 ABA Rep. 720, 744 (1936).

¹⁴ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1966)

¹⁵ *Id.* at 23–24.

¹⁶ For instance, expertise represents a more complete account in areas where expertise cannot be suitably internalized with the legislature, if the policy question is highly time sensitive, or if the expertise in question can only be gained by experience “on the ground.” On this last category, see SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* (2012). For more strongly skeptical takes on the common expertise account, see, e.g., ARANSON et al., *supra* note 11.

¹⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133 (1980); see also LEE DRUTMAN, *THE BUSINESS OF AMERICA: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015).

form in an advisory rather than lawmaking role?¹⁸ But agencies of course issue thousands of rules that carry the force of law every year.¹⁹ Also puzzling, the administrative state is more expert and able than at any time in history.²⁰ On this basis, the administrative state might be expected to hold an esteemed place in society, secure in its contribution to policy. But instead, the administrative state is under constant and increasing attack.²¹ Many observers seem to exhibit indications of clinical anxiety over the institution, and the court flirts with a revived non delegation doctrine, which would in principle substantially cut down the administrative state.²² Why?

A few examples further illustrate how expertise is likely to be but part of the story. Many have questioned the prolific delegation of authority in the Dodd–Frank Act of 2010,²³ including the delegation of how to separate commercial and investment banking services.²⁴ Was it not possible for Congress to learn what was required in this context? After all, the issue was not new: regulatory fixes to this problem have been on

¹⁸ E.g., ELY, *supra* note 17. Note that we might regard the congressional reference cases as a very embryonic institutional arrangement of this sort. See 28 U.S.C. §§ 1492, 2509 (2012).

¹⁹ See, e.g., DE FIGUEIREDO AND STIGLITZ, *supra* note 10.

²⁰ For partial evidence on this point, see, e.g., GERALD MAYER, Cong. Res. Serv., SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS (2014) (showing a steady increase in the percentage of public-sector workers with bachelors' and advanced degrees).

²¹ E.g., Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 599 (2018).

²² See *Gundy v. United States*, 139 S.Ct. 2116 (2019); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147 (2017) (pointing to recent suggestive statements by Justices Alito and Thomas), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741208. For congressional efforts, see most notably, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (as passed by the House, Jan. 11, 2017). For classic, as well as recent, academic critiques of the administrative state, see, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979); FIORINA, *supra* note 11; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1995); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). For an empirical counter point to this trend, consider Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J. L. ECON. & ORG. 27 (2018).

²³ See, e.g., ROBERTA ROMANO, *Regulating in the Dark*. REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 90 (Cary Coglianese, ed., 2012).

²⁴ Dodd–Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 619 (2010) (enacted).

the books, analyzed, and debated since 1933.²⁵ Or consider the periodic adjustments to fuel economy standards for automobiles.²⁶ Why is the legislature incapable of determining those standards? This is a sort of slow-moving problem for which, in principle, a legislature *ought* to be able to understand and develop remedies. Or, similarly, consider the controversial fiduciary rule issued by President Obama's Department of Labor. The rule made clear that retirement investment advisors had fiduciary responsibilities.²⁷ Is this the sort of question that requires expertise that cannot be obtained by legislatures?

These questions, I hope, yield plain answers. The legislature, in principle, should be able to acquire the information necessary to resolve these questions. Why they do not is a question of great interest considered later. As an institution, indeed, the national legislature has invested very little in its ability to acquire and process information; if anything, it is *divesting* in information processing capacity, even as the world becomes ever more complex.²⁸ Yet, many of the important and slow-moving questions mentioned earlier should in principle be within the ken of the legislature. And this suggests that expertise is only a piece of the story.

This book advances an alternative theoretical foundation for the architecture of the modern state. The main claims of the project can be stated succinctly. The binding constraint on other institutional arrangements, and what the administrative state offers, is not expertise,²⁹ but instead the

²⁵ This indeed is largely how Congress approached the question of separating commercial and banking services in the Banking Act of 1933. Banking Act of 1933, H.R. 5661, 73rd Cong. §§ 16, 20, 21, 32 (1933) (enacted).

²⁶ E.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

²⁷ Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016). Later set aside, President Trump's Department of Labor effectively revised the rule at 85 Fed. Reg. 82,798 (Dec. 18, 2020), which President Biden allowed to go into effect in February 2021.

²⁸ E.g., DRUTMAN, *supra* note 17; Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC, Mar. 10, 2015. As noted later, the institution might have adapted to enhance its committee structure, or to invest in institutions such as the Government Accountability Office, or the Congressional Budget Office. Those institutions often perform admirably in their domains, but they are limited in ambition and effect, despite occasional assists from the administrative state. Russell W. Mills & Jennifer L. Selin, *Don't Sweat the Details! Enhancing Congressional Committee Expertise through the Use of Detailees*, 42 LEG. STUD. Q. 611 (2017).

²⁹ As will become clear, expertise is also a constraint on the development of law – that is, it is both helpful to the formulation of laws and costly to obtain. However, I argue that it is

ability to *credibly reason*.³⁰ That is, the administrative state has the promise of producing policy that possesses *reasonableness*, a justifiable nexus between means and ends – and it is publicly *believed* to have that attribute. To apply again the example from the opening page, the administrative state, if properly channeled, has the ability to determine that it is unnecessary, and indeed contrary to statutory guidelines, to subsidize coal production, even against political pressure to this end.

Administrative law is central to this account. If functioning properly, this body of law channels the actions of administrative agencies and generates the possibility of credible reasoning. When acting as a law-maker, administrative agencies may take an action only after complying with administrative procedures that encourage deliberation, rationality, and transparency, and the vast run of agency actions may be reviewed by courts for flaws in procedure or substantive reasoning.³¹ This is unlike

often obtainable in other institutional forms, such as through legislatures. What cannot be readily obtained through other institutional forms is the ability to reason publicly in a credible way, at least concerning the particularities of policies.

³⁰ There is an echo of Schmitt's criticism of parliamentary democracy in this claim. As he wrote in the preface to his 1926 edition of his critique on parliamentarism, though modern parliaments maintain many of the traditions of reason-giving and deliberation, party discipline in fact predominates and deliberative practices represent an "empty formalism," they "function . . . like a superfluous decoration, useless and even embarrassing, as though someone had painted the radiator of a modern central heating system with red flames in order to give the appearance of a blazing fire." CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (trans. Ellen Kennedy) (2000). However, Schmitt locates the inability of modern parliamentary democracies to deliberate and reason in the rise of mass democracy and resulting loss of social homogeneity within the electorate. By contrast, my account locates the fundamental problem with representative democracy in the complexity of modern societies and consequent information problems. My criticism of representative democracy is also less complete than Schmitt's, in the sense that it applies only where information problems exist. As I point out later, those problems exist primarily in the particularities of policies, rather than in their broad strokes.

³¹ In finding these values in administrative procedures, I build on a long tradition in administrative law scholarship. See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–64 (1985); Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 701 (1985); Cass R. Sunstein, *Factions, Self-interest, and the APA: Four Lessons since 1946*, 72 VA. L. REV. 271, 282 (1986) (positing a "deliberative conception" of the administrator); MARTIN M. SHAPIRO, *WHO GUARDS THE GUARDIANS: JUDICIAL CONTROL OF ADMINISTRATION* (1988); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1530 (1992); Martin Shapiro, *The Giving Reasons Requirement*, 1 U. CHI. L. REV. 179 (1992); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001); David

the democratic organs of government, which obtain their authority and legitimacy from popular elections and find themselves encumbered only slightly by procedural requirements.³²

Part of this account, indeed, shows how this promise of credible reasonableness interests elected representatives precisely because the democratic organs cannot commit to procedural regularity. Distrust between elected and electorate is itself endemic to complex democratic societies, which tend to couple gross inequalities in the ability to influence the democratic organs of government with severe information problems. Under these conditions, the public (and competing interest groups) will always worry if special interests or their opponents have captured the legislative process. The delegation of authority to a procedurally constrained, constitutionally inferior entity – that is, the administrative state – partially alleviates problems of *trust* that legislators face with respect to the electorate, thereby enhancing members' electoral

B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2001); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2006); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99 (2007); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948–1979 (2008); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009); David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 8 (2010); Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012); Sidney Shapiro, Elizabeth Fisher, & Wendy Wagner, *The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1396 (2013). In seeing that the public may benefit from “intermediation,” this project shares themes with Samuel Issacharoff & Daniel R. Ortiz, *Governing through Intermediaries*, 85 VA. L. REV. 1627 (1999).

³² It is true that Congress maintains procedural practices that apply in many cases: referral to committees, committee hearings, cloture requirements in the Senate, and so on. However, those processes often represent, to borrow Schmitt's term, empty formalisms, as in the case of committee hearings; other times, members will simply discard with the processes when they become inconvenient or invent new ones that present fewer inconveniences. *E.g.*, BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (2005). As I stress in Chapter 2, the key to understanding the failure of procedural regularity in legislative institutions is that they cannot be enforced by any third party, a situation that is radically different for administrative institutions.

fortunes.³³ This form of constrained delegation also tends to make the public better off.

Briefly sketched, that is the theory, and the task of this book is to fill in and substantiate it. But even briefly sketched, the relationship between this perspective on the administrative state and existing accounts of the administrative state comes into focus. The core claims of this project are sympathetic to viewpoints of those a century ago, such as those of Charles F. Adams or Charles E. Hughes.³⁴ Those observers lived at a time – not unlike our own – of rapid technological change, novel economies of scale, and massive asymmetries in the ability of citizens to influence their government, as many observe.³⁵ The first reaction of the state, then dominated by legislatures, was to confront the problems raised by the new industries, centrally railroads. It was not uncommon, for instance, for state legislatures to set railroad rates. The trouble with this arrangement was that the industries regulated through the legislature

³³ For important works on trust, which I draw on in the chapters to follow, see DIEGO GAMBETTA, *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* (1988); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1996); MARGARET LEVI, *CONSENT, DISSENT, AND PATRIOTISM* (1997); JOSEPH S. NYE, JR. ET AL., *WHY PEOPLE DON'T TRUST GOVERNMENT* (1997); VALERIE BRAITHWAITE & MARGARET LEVI, *TRUST AND GOVERNANCE* (1998); MARGARET LEVI, *A State of Trust. TRUST AND GOVERNANCE* 77, 90 (Valerie Braithwaite & Margaret Levi eds., 1998); MARY E. WARREN, *DEMOCRACY AND TRUST* (1999); JACK KNIGHT, *Social Norms and the Rule of Law: Fostering Trust in a Socially Diverse Society*. *TRUST IN SOCIETY* (Karen S. Cook ed., 2001); RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* (2002); BO ROTHSTEIN, *SOCIAL TRAPS AND THE PROBLEM OF TRUST* (2005); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011); Betsey Stephenson & Justin Wolfers, *Trust in Public Institutions over the Business Cycle*, 101 *AMER. ECON. REV.* 281 (2011); NICHOLAS R. PARILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013). As I note in Chapter 2, my conception of trust is closest to Hardin and Dasgupta, as articulated in the Gambetta volume.

³⁴ CHARLES F. ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ERIE AND OTHER ESSAYS* (1871); BENJAMIN P. DE WITT, *THE PROGRESSIVE MOVEMENT* (1915); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); Edward L. Glaeser & Andrei Schleifer, *The Rise of the Regulatory State*, 61 *J. ECON. LIT.* 401 (2003). As Novak summarizes the thoughts of progressive era leaders, “independent regulatory commissions were ... designed to combat what progressives envisioned as a perennial problem in republican and democratic governance – i.e., the tendency of private economic interests to capture the public political sphere.” WILLIAM J. NOVAK, *A Revisionist History of Regulatory Capture. PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David Moss, eds., 2013).

³⁵ E.g., Glaeser & Schleifer, *supra* note 34.