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William J. Novak's *The People's Welfare: Law and Regulation in 19th Century America* (book review)

Alfred S. Konefsky
konefsky@buffalo.edu

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William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Chapel Hill: University of North Carolina Press, 1996. Pp. x + 396. \$55.00 cloth (ISBN 0-8078-2282-2), \$19.95 paper (ISBN 0-8078-4611-2).

William J. Novak has written a book at once ambitious and audacious that proposes a counterrevolution of sorts in our understanding of American law from the aftermath of the Revolution to the aftermath of the Civil War. His theory is disarmingly simple: American society during this period was highly regulated by public and private law, and was not a laissez-faire society free from constraints on individual activity.

In seeking to correct the conventional interpretations about the organization, structure, and operation of law in American life, Novak counters four persistent “myths” about nineteenth-century America: statelessness, liberal individualism, the great transformation, and American exceptionalism. In their place, Novak substitutes the concept of a “well-regulated society,” stressing governance and police. Governance is based on traditions and principles honed by ideas organized around notions of public spirit, local self-government, civil liberty (a liberty never absolute), and law (particularly, a *common law*). Novak argues that there is an additional “myth of American liberty” that needs to be reexamined. He claims that “the storied history of liberty in the United States, with its vaunted rhetoric of unprecedented rights of property, contract, mobility, privacy, and bodily integrity, was built directly upon a strong and consistent willingness to employ the full, coercive, and regulatory powers of law and government. The public conditions of private freedom remain the great problem of American governmental and legal history” (17).

The cornerstones of the limitations of freedom are found in an opening chapter on “the common law vision of a well-regulated society.” Novak rejects concepts of law rooted in liberal constitutionalism’s insistence on protecting individual autonomy from state activity and legal instrumentalism’s assertion of a reflexive and functional, if not reductionist, legal system. Instead, Novak posits a common law derived from consent, history, experience, accommodation, and public spirit, and located in a pragmatic methodology focusing on man’s experience as a social being in a society founded on relative and relational rights. As a result, the common law’s emphasis was on “an overall concern with the people’s welfare obtainable within a well-regulated society” (26). In fact, the commitment to this vision can be measured by the invocation of two familiar common law maxims crucial to the implementation of social order: *salus populi suprema lex est* (the welfare of the people is the supreme law), and *sic utere tuo ut alienum non laedas* (use your own so as not to injure another). Both maxims informed public and private nuisance law. According to Novak, “the end of this rule of common law and the crowning achievement of this whole body of thought was good governance in a well-regulated society: laws were tools of regulation; regulation was the condition for social order and the pursuit of the people’s welfare; social order and the people’s welfare were the primary objects of governance” (42).

In order to illustrate the details of this well-regulated society, Novak provides examples in five chapters, each representing a separate category of public limitations of private activity: public safety (fire and gunpowder regulations); public economy (product licensing, the creation and maintenance of public, urban marketplace sites, and corporations—Richard Posner and Richard Epstein might want to read this chapter, if not the book); public ways (roadway, riverway, and port regulations); public morality (disorderly houses, bawdy houses, and various types of liquor regulations); and public health (medical police, quarantines, and offensive or noxious trades). In each of the chapters the lesson is clear: absolute private rights of property or contract gave way to the well-being of the community. The very notion of absolute private rights indeed may be something of a misnomer, since Novak seems to suggest that the starting point for analysis of law and society is

the assumption that the public welfare is foremost and that individual rights are derivative and must be accommodated to an overarching public interest. "The first historical lesson to be drawn from the well-regulated society," writes Novak, "concerns the overwhelming presence of the state and regulation in nineteenth-century American life. . . . All private interests and rights were subordinate to . . . public objectives" (235–36).

Novak provides abundant evidence for his claim that, through ordinances, municipal regulations, statutes, and common law decisions, public officials—including judges—carved out realms of public activity that most citizens sanctioned in some way, though in the private law setting at least one of the parties was challenging the norm. And some regulations provide examples of micro-management: the 1810 statute regulating rates on the New York City-Nassau Island ferry provided the same charge for carrying mahogany bedsteads, tea or card tables, or dogs—four times the charge for carrying lambs, muskets, or empty milk kettles. Novak unmasks the intrusiveness of the premodern polity into many corners of American life. Novak's point, of course, is that nineteenth-century Americans did not experience this regulation as intrusive at all, nor did they merely tolerate it, rather they encouraged and accepted it as part of their everyday existence. The historical question then is what do we make of this "regulation"?

A clue may reside in the historiography that dominates Novak's book, Novak primarily relies on, though to varying degrees, the historical relationship of law and society suggested by Morton Keller's regulatory studies and by the work of Dirk Hartog and Chris Tomlins. Events and ideas about governance, police, and law are socially constructed (the intellectual debt to Foucault is acknowledged as well) through a complex matrix that defies ready characterization, but that once might have been ascribed to economic determinism or functionalism. Firmly, though not uniformly rejected (you have to read the footnotes carefully), are the 4-H club (Hartz, Horwitz, Hovenkamp, and Hurst), presumably because they suffer from the sin of having espoused at various times, though with different conclusions, ideas that placed the monolith of individualism as the centerpiece of American legal historiography. Individualism will not do, whether it is linked causally to industrialism, materialism, or entrepreneurship. Rather, according to Novak, a closer look reveals a society in balance—with a commonly held belief that it was appropriate for *individuals* to accept restraints on their freedom for the purpose of enhancing the better good. Nineteenth-century America was an organically united society agreeing on certain principles, among them the limitation in certain circumstances of the social and economic expression of freedom. Duties and responsibilities were shared, so that communities, and, ultimately, individuals could prosper.

This then is a modern, historiographical version of community, shorn of economically determined constraints. In an earlier generation, this book might have found its origins in neo-Marxist thought where we could have debated whether or not Novak's evidence means that individual rights did not have a central role to play in American society, and that American society, therefore, was grounded in community, or instead, that a modern emphasis on individual rights shows an illegitimate transformation from a communitarian ethic. What Novak does directly,

however, is challenge the historically drawn image of unrestrained, self-interested activity as the norm with interest, factions, or groups competing for resources (particularly economic activity in the marketplace—there is no such thing as a “free” market, all markets are regulated in some fashion). Instead, he suggests that the appropriate method of interpretation should take into account the relationships between individuals (with duties to one another) and society (with duties enforced through regulated activities). The goal is to transcend traditional dichotomies of interpretation like private/public, individual/state, individual/community, and reduce them to the category of historical anachronism, an old way of thinking about the world.

As in all counterrevolutions, there are certain untidy corners. In striving to redress a perceived imbalance in one direction toward individualism, Novak may have swung the pendulum too far back in the direction of regulation. One narrative may have simply replaced another, though the more accurate account may lie somewhere in between. And there may be competing definitions of individual liberty at stake. One person’s regulation may be another person’s freedom. For example, when an individual’s property is altered under state authority to make a better roadway, it may be an uncompensated regulation of that owner’s interest. But presumably the result of the public improvement is to encourage or enhance another person’s ability to exercise their liberty perhaps by getting to market to buy and sell or engage in some other activity.

By focusing on a “well-regulated society,” Novak risks emphasizing consensus over conflict and therefore deemphasizing the plight of certain disadvantaged and excluded groups in nineteenth-century America. For instance, Gordon Wood’s most recent work on the radicalism of the American Revolution is missing from this book. Because Wood stressed the increasingly uncomfortable match between revolutionary rhetoric and the legacy of dependent social relations, it would have been nice to know how the notion of regulated private conduct fits with movements to free from restraints individuals embedded in the status relations of husband/wife, parent/child, master/servant, town/pauper, landlord/tenant, or creditor/debtor. It is to Novak’s credit that he seems aware of the consensus problem, as well as the paradox of simultaneously resisting being driven back in time looking for the roots of his paradigm (for instance, the rich, ambiguous seventeenth-century Puritan morality tale of Robert Keayne, analyzed at different times by Perry Miller, Bailyn, and Innes), and forward in time (addressed in a brief, concluding chapter) to the presentist concerns of a twentieth-century world of a centralized, interventionist, bureaucratic state poised in an uneasy tension with a regime of individual rights and entitlements.

The modern state is now omnipresent: are we to wax nostalgic for a simpler, locally grounded model of nonthreatening, regulatory equipoise, or are we to accept some modern notion of regulation secure in the knowledge that it is as central to the American experience as, say, republican, civic virtue? We just need to guard against its excesses, like any other threat to social order, but we ought to be reminded that some version of regulation has always been with us. Does regulation, therefore, not only heighten consensus but also lead to emphasizing the con-

tinuity between the American past and present? Along these lines, the major unanswered question in Novak's book is how we, as a society or through our public entities, have gone about the process of determining just exactly what the public good is. How do we identify the source of the public good in rationalizing or defending private or public activity? At various times, for instance, legal regimes have sanctioned slavery, or segregation, presumably because of some concept of the "public good." How did democracies make those decisions?

It is a tribute to Novak's considerable accomplishment that he stimulates you to think and ask questions, to challenge old conventions about the past, and to reopen debates in order to reexamine complacent attitudes. Sophisticated and provocative, well-written, well-argued, and exhaustively researched, William Novak has provided an important, useful, and controversial attempt to reorient our understanding of nineteenth-century American legal history.

Alfred S. Konefsky
SUNY-Buffalo Law School
