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William J. Novak. *The People's Welfare: Law and Regulation in Nineteenth-Century America.* Chapel Hill and London: University of North Carolina Press, 1996. x + 396 pp. $27.50 (paper), ISBN 978-0-8078-4611-7; $59.95 (cloth), ISBN 978-0-8078-2292-0.

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William Novak"s terrific book appears to violate traditional historiography in two ways. First, he apparently – and self-consciously – writes about continuity and not change: "This book argues that one distinctive understanding of public powers and rights was consistently victorious in nineteenth-century courtrooms, assembly halls, and council chambers" (p 17). Second, as his words make plain, his argument centers on a century generally thought to have embodied greater change and more discontinuity than most (perhaps all) other centuries, including the twentieth. One is tempted, therefore, to be dismissive in the most superficial of ways, to grant the premise and simultaneously to deny its significance. The response would be, 'Well, of course the formal structures of society retained the vestiges of an earlier era, both in thought and deed. What else would one expect in a society dominated by localism and served by professionally conservative common law courts?'

What Novak does, however, and does convincingly, is to demonstrate that neither that superficial rejoinder nor the other common tropes trotted out when regulatory systems are said to have been robust – e.g., "But were the laws on the books really enforced?" – actually address the spirit and the reality of public conscious activity that was intended not just to curb excesses in private actions, but also to express the public desire to give direction to those activities. That direction, interest groups notwithstanding, actually embodied an independent conception of the public good. Novak thus tells a story that actually fully accommodates historians' fixation on change. The world he shows us is dynamically complex: Not everything changes at once; change occurs at different paces in different fields – social, political, intellectual, technological, etc. – and some changes mean more than others, especially against the backdrop of other changes occurring more slowly. That is Novak's story, and it is a story exceptionally well-crafted.

Although I greatly admire this book and the elegance with which it is executed, I am less convinced that Novak has conquered, as he suggests, "national myths about culture and institutions," and that he has undermined "fictions about time and sequence" (p 6). His is not a simple, and certainly not a simple-minded,"the-consensus-school-got-it-wrong" attack on American historical mythology – though he does adopt, in order to disagree, an understanding of American liberalism that he traces (though without attribution) to Louis Hartz. (p 6) Rather, his is a subtler and nuanced historiographical understanding, one in which, for example, the definition of liberalism has been narrow because of "its *primary* emphasis on … possessive, transactional, self-interested, and individualistic attributes. " (p. 6 – emphasis added) Similarly, though with less nuance, in discussing "a general theory of Americanization" he attacks those who argue for "the unique virtues bequeathed by American soil, … the cult of American exceptionalism [and] … the cacophony of consensus." (pp. 7-8) Novak thus joins nearly two generations of historians who seek to rectify the myths promulgated by the consensus school. One would think that a multigenerational assault on an intellectual edifice constructed well within the span of a single decade – or at most the early 1950s to the middle 1960s - - would have long since reduced it to rubble. Why bother to concentrate such firepower on debris? What do we gain by bouncing the stones and bricks again?

Nothing. Something else is at work. The myths which Novak attacks are stated by their proponents in absolutist and, even worse, sometimes romantic terms: "statelessness … liberal individualism … great transformation … American exceptionalism." (p 3). For example, statelessness transforms itself from a European intellectual contempt for American continental federalism born of a fixation on "rationalized and centralized government" into an American story of the virtues

of the polity or the acquisition of a national regime (p 3). Romantic American historians, however, long antedated the historians and political scientists of the consensus school. Moreover, the subtler practitioners of the dark arts of consensus, Hartz chief among them, hardly joined the self-congratulatory, sometimes shrill and triumphalist writings that so clearly mark themselves products of Cold War scholarship. Rather, they made a simple point, one worth remembering: However absolutist our language, our felt experience owes its passions not to comparison with absolute standards of social science but to comparisons with other known societies, whether known through lived experience or from the vicarious experience of the text.

Thus, when historians (at least the subtler ones) write of statelessness, or liberalism, or any of the other political descriptions sweepingly attached to American political culture, it is a profound mistake to overread their use of those terms. Historians are not about the business of creating neat and clean models of society, however much they may borrow from, seek inspiration from, or even be parasitic upon the model creators – whether in political science, economics, literary theory, or sociology. Thus, the best historians of the consensus school tried to describe leitmotifs of American political culture, dominant characteristics rather than all-embracing structures. And, of course, because the societies that formed the usually unacknowledged intellectual backdrop were – and here one may choose among various and often loaded adjectives, such as "European," "advanced," "industrial," "commercial," "capitalist" – the unspoken standards of comparison were so familiar as not to warrant mention. Simply as a matter of prose style it would be tiresome to add a set of brackets to every sentence such as, "America was a [largely/ overwhelmingly] liberal society characterized by consensus concerning its social and political ends [when compared to, say, England/France/Germany/Italy]." Of course American society was riven by conflicts, but often they were quite different from those raging in the background. It does little good to deny that a liberal consensus of sorts existed by pointing towards conflicts that do not, or did not, affect that consensus. The great beauty of Novak's book is that he understands that much of the harrumphing about the consensus school and post-war historiography overlooks its comparative and scientistic backdrop. Witness, for example, his discussion of what "statehood" means (p 3).

Novak's subtlety, juxtaposed with his stated desire to undermine myths, suggests that Novak seeks merely to emphasize the positive contribution of his work while wryly discounting the historiographical caricature of post-war history. Bravo, then, for his contribution to our understanding of how law and politics in the first three quarters of the nineteenth century is signal. While I might not go so far as Robert Gordon, who describes the work as "the first comprehensive study ever done of regulation in early nineteenth-century America," my only reason would be a quibble over the term "comprehensive" (back jacket cover).

Novak artfully stitches together regulatory fields that any regular observer might regard as too disparate to be grouped on common ground. It takes a terrific exercise of historical sensibility and imagination to find commonalities in local regulations governing fire control, corporate law created by state courts and legislatures, and judicial supervision of rendering facilities, to name but a few. What is more, the commonalities he discovers are not a product of the rarified legal intellectual imagination of the nineteenth century, as were the divisions of, say, common law actions in that century. Rather, they were the creation of the felt needs of the society. To make the argument overly tautological, American society got the regulation it sought, and it sought more regulation than is today commonly ascribed to that society.

What is more, and despite the multiplicity of jurisdictions and the prevalence of sectionalism and localism, both the regulatory spirit and the regulatory apparatus were remarkably common throughout the country. Again, to be sure, American regulation was not – as it was in Europe –the product of a centralized state, which would have been more prominent and formal, and thus more threatening. It was nonetheless pervasive. It was pervasive not in the sense – and here is where, terminologically at least, I might disagree with Novak – that it was all-encompassing. As Novak himself points out, regulation often was applied differentially. It was not, therefore, the product of the central state expressing its will to power. It may, however, have been the product of many bureaucracies expressing their various wills to power.

Americans came together and adopted patterns of governance that were remarkably similar, despite the multiplicity of jurisdictions and strikingly different subcultures and levels of development. Americans did so not just out of shared necessity - - at least not an economist's *a priori* shared necessity - - but out of a shared necessity molded, indeed created, by a roughly (and I underscore roughly) common spirit, an ideology if you will. That spirit was one of mutuality, an ethic which, while not fully communitarian, hardly sanctioned libertarianism in the economy or libertinism in the society. In its benign

mode it emphasized that individual acts were limited by something like the Hippocratic oath: First, do no harm to others. In its less benign mode it emphasized conformity to norms that could be wielded in a ruthless majoritarian fashion.

Novak says that such spirit extended across many, indeed all, regulatory realms, animating local officials and providing the machinery of governing ignored by observers and academics blinded by Eurocentric notions and other presuppositions concerning the constitution of authentic authority. We have long known, for example, that corporations in the United States are the legal product of the states and, overwhelmingly, always have been. We regard the United States thus, and rightly, as an anomaly among states. In other areas, however, after our acquisition of the centralized administrative state, we somehow lost sight of the seminal role of the authority of the states. Only by recovering that vision is it possible to make sense of, to pick but two examples, Justice Brandeis's view of the states and localities as legal laboratories and incubators or the deep politics behind the Sherman Act.

Novak's style is to group, under capacious abstractions, examples of regulatory policies and their judicial, statutory, and administrative manifestations. He supplements these examples by lists of society's rules for itself – lists having a cadence, indeed almost a poetry, of their own. Novak knows how to deploy his evidence. We are to infer from the lists that the stories Novak tells about one or more items from the list may be told about any of the items. This is an intriguing technique, an example of the historian's craft that can so madden social scientists (perhaps also maddening because it so resembles lawyerly common-law analogic reasoning). The abstractions, embodied in chapter titles, reinforce the inference of universality that we are to draw from the lists, e.g., "Public Safety" (Chapter Two), "Public Economy" (Chapter Three), and so on.

It would be tedious and pointless to review those groupings chapter by chapter. Rather, I focus on a chapter I take to be central to the overall work – the chapter on "Public Economy." First, I applaud Novak's use of the adjective "Public," for it describes how contemporary analysts would have understood and did understand the market – as an institution with its own rules but the rules for which were embedded in the overall rules governing society. It is useful to remember, for example, that the term economics was rarely autonomous until the turn of the century. Rather, the term political economy described the operation of the market in society, recognizing that the market was a product of formal social norms as well as the product of individual desires priced at the margin.

Second, I admire Novak's focus on the individual application of legal rules. Much of the legal history of the public economy has been aimed at the political rhetoric deployed on behalf of or against regulatory structures. Novak goes far beyond such history and examines the attempts of the law actually to affect the conduct of buyers and sellers. He thus neatly sidesteps the arid controversy over whether markets are natural or socially constructed, a controversy that is arid not because it is unimportant but rather because it fuels a false absolute dichotomy between public and private, state and market (p 83). Though Novak's heart is clearly on the side of the socially constructed market (p 88), his aim is to attack the notion that market regulation is itself a novelty of the late nineteenth and twentieth centuries (or, really, a novelty at all). It is in the specifics that he proves his case.

State and market were powerfully intertwined, and not simply because the conditions for functioning markets were laid out by the state(s), in a Hurstian release of energy or any other instrumentalist mode (p 85). Market ordering was also key. Human beings are social animals with varying tastes and skills. They come together for a variety of reasons, not the least of which is exchange - - exchange being the combined value of social interaction (e.g., p 95) and the mutual advantage of matching productive skills to consuming tastes. To that extent markets are (I suppose, and I suppose all but the most dogmatic would suppose) a natural part of the human condition. But all social interactions are subject to failure and the social interaction of exchange is no exception. If we remember that exchange is part social and part matching of production to consumption we may better understand why ordering of exchange is both necessary and desirable – in short, why regulation can be and is itself a positive social good, in short why it is as natural a product of the human condition as "markets" themselves.

If exchange was not itself a root component of social interaction, the English would have had no reason to prohibit such comings-together outside of identified places (p 95) because they would not have happened. But they did so, and for many reasons. Novak demonstrates that the English legacy lasted well into nineteenth-century America through the establishment of official city markets and the prohibition on the sale of (certain) goods outside the confines of those markets (pp 96-100).

We can tell several stories about the existence of such markets. First, official markets facilitated community so-

cial order through regulation of popular interaction. This is, of course, the traditonal political story in which the state plays its leading role. Second, official markets facilitated matching producers to consumers by decreasing each party's transaction costs, such as searching out the potential counter-party in a transaction. This story is, at least in part, the neo-classical revisionist justification for regulation and limits on regulation. Third, official markets facilitated health and safety by giving both regulators and consumers a chance to scrutinize and compare goods sold, setting minimum standards (on the one hand) to protect the unwary and to police the duplicitous and (on the other hand) to promote qualitative competition. This story partially melds aspects of the first two. Fourth – and here is Novak's contribution – at least in part, official markets demonstrate both the naturalness of exchange and of regulation. Exchange springs up, hence the necessity to prohibit certain exchanges –prohibition being a state function and the creation of exchange not being a state function. Regulation springs up too, however, as a necessary component of policing precisely the same variety of talents and tastes that give rise to exchange, not all tastes and talents being compatible either with the social or the economic components of exchange. The desire to control and share the actions of others is as natural as the desire to come together in the first place, in other words.

Because both social and economic components of exchange were part of the market, and because both components had a dark side, regulation was a necessity for the public good, justifying, for example, licensing (p 90). But regulation, especially in its American guise, was more than the repression of humanitŷÒs dark side. It also facilitated the good, whether the production of goods themselves, such as bread (p 90), or of social good, as in enhancing social interaction by decreasing the uncertainties of travel (p 92). In every area of political economy Novak explores, but especially in the paradigmatic arena of corporate chartering, that story repeated itself (pp 105-111). Regulation was both facilitative and directional, recognizing the desire for acquisitive interaction as well as social order.

Each chapter in *The People's Welfare* exhibits such balance. Hence, each chapter is as seductive as the next. I am provisionally prepared to accept Novak's claim that his examples would repeat themselves in almost endless regression until each avenue of regulation is exhausted. Other historians, of course, will confirm, qualify, or revise Novak's findings and claims. Nonetheless we may ask what it was in the equipose of the well-ordered society Novak describes that contained the seeks of its own collapse, at least as an intellectual matter. Regulation may simply have shifted locales, becoming ever more federal in the late nineteenth and twentieth centuries. Its justifications, however, changed markedly, giving rise to precisely the interpretive, theoretical, and historiographical myths Novak challenges. This book has ably, indeed beautifully, recovered the much-cloaked history of local public ordering and its rationales. Perhaps in its promised successor we will learn what about local ordering disserved or disenchanted the public it served. I eagerly await that work.

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