holds that those who profess liberal values are able to transcend the political forces and social conditions which otherwise affect the actions of men and women and shape the course of history. Professing realism, pragmatism, and instrumentalism while practicing to a considerable degree a doctrinaire formalism, Urofsky's constitutional history illustrates the tensions and contradictions in late twentieth-century liberal scholarship.

THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE. By William E. Nelson.[1] Cambridge: Harvard University Press. 1988. Pp. ix, 253. $25.00.

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If this journal gave titles to book reviews, I would have borrowed one from a famous article by Calabresi called *Another View of the Cathedral*. Calabresi was referring to the Monet paintings showing the radically different but always entrancing appearance of a cathedral at different times. In his most recent book, Professor William Nelson offers us a novel view of the Great Cathedral of American Constitutional Law, the fourteenth amendment.

Like Monet, Professor Nelson sometimes paints with broad daubs that may obscure details of the cathedral in the interest of the larger picture. He rarely troubles to distinguish between the various portions of the fourteenth amendment, an omission that sometimes makes for confusion. Yet, like Monet's, Nelson's painting reflects long study of the subject. Unlike prior researchers, he has gone beyond the pages of the *Congressional Globe* to engage in extensive archival research.

No one perspective can display the entire cathedral. From the novel vantage point chosen by Nelson, some of its familiar parts drop out of sight. Histories of the fourteenth amendment normally focus on its place in Reconstruction. The amendment was intimately linked with the Civil Rights Act of 1866, which in turn grew out of the thirteenth amendment. Customarily, historians devote considerable attention to the debates on those measures in seeking to understand the fourteenth amendment. Nelson, having sought higher ground in the hills above the cathedral, devotes virtually no

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attention to those debates, nor to other Reconstruction measures that might shed light on the amendment. Even the old doormat in front of the cathedral where the framers wiped their boots, the *Dred Scott* case, disappears from view, without even a listing in the index. Some readers may be startled at the disappearance of these familiar landmarks, but the choice of any one perspective inevitably sacrifices some of what can be seen from other vantages.

What is Nelson's perspective on the amendment? Essentially, he tells the following story about nineteenth century constitutional law. In his view, the fourteenth amendment itself was largely an exercise in rhetoric rather than lawmaking. The framers "wrote the amendment . . . to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule." Today, we can see that these principles are sometimes inconsistent, but the framers hoped that conflicts would rarely arise, leaving to later Congresses or courts the task of resolving those conflicts. When the courts were faced with the problem of translating these vague aspirations into constitutional doctrine, they responded along the following lines:

> [Their] premise was that individual rights did not preexist law and were not created by federal law; individual civil rights were the creations of state law. The federal government could have no power to determine the content of civil rights if it was to remain the government of limited power that all Americans wanted. The only power that the Fourteenth Amendment granted to Congress and the federal courts was power to hold the states to the rule of law: the power to insure that the states extended the same rights to all individuals equally except on those occasions when the good of the public at large demanded that distinctions between individuals be drawn.

This pragmatic compromise broke down, however, in *Lochner*, when the Court began to view the amendment as embodying rights rather than merely a requirement of equal treatment. Although Nelson doesn't say so, this presumably means that we ultimately have the *Lochner* Court to thank for the major decisions of the Warren Court protecting free speech and the rights of criminal defendants.

Nelson provides a new perspective on the fourteenth amendment and its relationship to the Court's late nineteenth century decisions. He persuasively assembles a considerable body of evidence in favor of this viewpoint. There is indeed a large rhetorical component to the debates on the fourteenth amendment; the speeches often resonate more of the pulpit than the courtroom. Historians are now generally agreed with Nelson's view that there was an unresolved conflict during Reconstruction between antislavery ideals and continuing respect for state prerogatives. This conflict left a

major tension for the courts to resolve. As Nelson shows, the late nineteenth century cases typically did so more pragmatically than *Lochner* and with greater sensitivity to the public interest in regulation. Thus, Nelson performs a service by showing how cases like *Munn* successfully resolved some of the deep-seated internal strains in the views of the framers.

Nevertheless, while he has highlighted an important theme in nineteenth century constitutional thought, Nelson slights other aspects of the historical record. In particular, I believe, he overstates the "mushiness" of pre-war and Reconstruction republican thinking. His handling of the post-war cases may also give some readers pause.

Chapter 2 of the book discusses pre-war ideology. According to Nelson, equality was a "vague, perhaps even an empty idea in mid-nineteenth century America." While conceding that higher law arguments appeared in briefs and judicial opinions, he suggests that the idea of higher law was also merely "a form of political rhetoric rather than legal analysis." It is clearly true that natural law often served rhetorical rather than analytic functions, but it is misleading to suggest natural law was merely a rhetorical embellishment to legal argument. Most notably, the "law of nations" used higher law concepts as the basis for a well-developed set of doctrines relating to public international law, conflicts law, and commercial law. As every law student knows, this was the era of *Swift v. Tyson*, when the common law was seen (as Holmes said later) as a "brooding omnipresence in the sky."

The law of nations had more than theoretical interest to anti-slavery republicans. In a series of decisions going back to Lord Mansfield, the courts had recognized a "presumption in favor of liberty," under which slavery was recognized as an unnatural status which could only be created by local legislation. At least until just before the civil war, even Southern courts recognized this proposition. It was also the foundation of the pre-war republican view that slavery was lawful in the South but could be banned in the territories. The pre-war republicans also had more interest in specific individual rights than Nelson gives them credit for. In particular, Southern restrictions on free speech had been an important rallying cry for the republicans in the 1850s. True, concepts of higher law were often extremely vague, but they had more of a defined core than Nelson seems willing to acknowledge.

As evidence that pre-war references to equality and liberty were essentially devoid of cognitive content, Nelson points to the fact that equality and liberty were invoked by both anti-slavery and

pro-slavery forces, from which he concludes that the concepts themselves were empty. All this evidence shows, however, is that there was no consensus, not that the contestants lacked clear conceptions of their own.

Turning to the debates on the amendments, Nelson argues that "[i]n many respects the debates . . . amounted to little more than a rhetorical replay of antebellum antislavery arguments," with some "slight but significant" changes. Although the republicans did have to come to grips with specific issues to a somewhat greater extent during the debates, most of the rhetoric "never went beyond vague generalities . . . ." Thus, as Nelson says in the introductory chapter, the "framing generation understood constitutional politics as a rhetorical venture designed to persuade people to do good, rather than a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms."

I am puzzled by Nelson's description of the framers' conception of constitutional politics. Whatever may be said of section 1 of the amendment, neither the other sections of that amendment nor the other civil war amendments look like mere exhortations to "do good." The lengthy debates about the precise wording of the fifteenth amendment, for example, demonstrate that the framers were indeed trying to "establish precise legal rules and enforcement mechanisms." Moreover, "constitutional politics" presumably includes the process of transforming the relationship between the Southern states and nation, and much of Reconstruction was blatantly coercive rather than hortatory. As Nelson himself points out, the 1866 Congress was willing to jail recalcitrant Southern judges who violated civil rights. Were these the legislators who, as Nelson says later, wanted to prevent discrimination "without altering radically the structure of the federal system or increasing markedly the powers of the federal government"?

While, as Nelson says, republicans did not want to give unlimited power to the federal government, they were ruthlessly willing to invade the powers of the states when necessary to achieve their goals. The ratification of the fourteenth amendment itself is a compelling example. After the Southern states declined to ratify, their governments were reconstituted under military authority. Even then, ratification can be considered voluntary only in the most formal sense, because the Southern states had been told that it was the price of readmission to Congress. Because of Nelson's failure to discuss Reconstruction as a whole, he gives an exaggerated impression of continuity regarding ideas of federalism during the second half of the nineteenth century.

Although he admits that the historical record is inconclusive, Nelson emphasizes the evidence that the amendment guaranteed only equal treatment rather than fundamental rights:

> The simplest explanation, which was repeated continually during the congressional and state ratification debates, was that the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights. The only effect of the amendment was to prevent the states from discriminating arbitrarily between different classes of citizens.

Although there are statements in the debates which support this interpretation, it is rather hard to square with some of the language of the amendment. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" looks like a rights guarantee to me. So does the due process clause. By 1866, state due process provisions had been given well-established procedural meaning (notice and the opportunity to be heard, often with a requirement of a jury trial), as well as more controversial substantive content. For this reason, the contrast between "rights" and "equality" was blurred: because the states already recognized the rights of some citizens, all the amendment required was that they treat others equally well.

In discussing the pre-war and Reconstruction periods, Nelson emphasizes the vagueness of the framers' thought and deemphasizes their nationalism and belief in fundamental rights. This choice of emphasis overplays the similarity between the framers and later nineteenth century judges, thereby minimizing the extent to which the Supreme Court later betrayed the ideals of Reconstruction.

Some readers may also be troubled by Nelson's enthusiastic embrace of late nineteenth century jurisprudence, whether or not it is consistent with the original intent. Even *Plessy* seems to receive a certain degree of approval: "Nineteenth-century courts recognized the legitimacy of white parents' claims that they should have some autonomy in determining the people with whom their children associated in school, and were not prepared to subordinate that claim entirely to the interest of blacks in equal educational opportunity for their children." He goes on to say that "the *Plessy* court acted in much the same fashion as had the framers of the Fourteenth Amendment," and that the decision "should not be understood to have legitimated the practice [of segregation] except in a context where it held out some promise of ultimate racial equality." In short, he says (on page 187) that the *Plessy* Court wisely adopted a "balanced posture."

My own reading of the case does not suggest that Louisiana's

power to segregate railroads was conditioned on any future progress toward racial equality. Nelson's readings of some other cases are also rather different from my own. For example, the issue in *Minor v. Happersett* was whether the fourteenth amendment conferred suffrage on women. In the course of holding that it did not, Chief Justice Waite remarked that the amendment might have indirectly created new voters "because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen." Nelson puts considerable weight on this sentence. To me, it seems to be a straightforward reference to the citizenship clause of the fourteenth amendment. That clause rather obviously "increased the number of citizens" and thereby allowed more people to satisfy at least one of the requirements for voting under state law. According to Nelson, however, "The sentence makes little sense except by reference to the point made frequently in the fourteenth amendment debates: the amendment did not create rights but instead left their creation to state law; all it did was require the states to give to their least favored citizens the same rights they gave to those who were most favored."

Nelson's assessment of *Lochner* is also rather idiosyncratic. If the Court had stayed true to the spirit of the framers and to the nineteenth century precedents, he says, it would have reached the same result but on a different ground, which is that the statute arbitrarily singled out bakers for special treatment. As a result of *Lochner*, however, courts "transformed the Fourteenth Amendment from a bar to arbitrary and unequal state action into a charter identifying fundamental rights and immunizing them from all legislative regulation."

Nelson's assumption, made explicit in the Preface, is that "judicial protection of equality typically leaves legislatures greater leeway in making law than does judicial enforcement of a defined set of natural rights." This strikes me as at best a dubious assumption. I am hard-pressed to think of any Supreme Court decision involving fundamental rights, however activist, that could not have been readily rephrased in terms of equality. Free speech decisions can, as Ken Karst demonstrated some years ago, be readily understood as conferring equality on those with unpopular views or methods of expression. *Miranda* and similar decisions give the poor and ill-informed the same rights enjoyed by the rich and knowledgeable. *Roe* is easily seen as protecting women's right to equality. As for

economic activism, *Lochner* itself is the epitome, and Nelson finds it readily justifiable under an equality rationale.

In his final chapter, Nelson describes the late nineteenth century Court as "[f]aithful to the compromises that had taken place during the framing and ratification of the amendment." The Justices thereby reduced the amendment to a prohibition on "plainly arbitrary" legislation. This appraisal can only be explained by Nelson's willingness to dismiss much of the framers' views as merely "rhetorical." Because the discussions of specific issues in the fourteenth amendment debates are rather inconclusive, the Court's later actions cannot be said to violate the specific intent of the framers. But their broader rhetoric was not merely window-dressing. It reflected a passionate belief in equality and individual liberty. It is hard to find much passion for either in the later judicial opinions which Nelson surveys. If they did not violate the letter of the "original intent," they desecrated its spirit.

As the subtitle of the book suggests, Nelson's true topic is not so much the framing of the amendment as its transformation into judicial doctrine. Perhaps a more accurate title would have been, "The Origins of Late Nineteenth Century Constitutionalism." The book illuminates our understanding of some elements of the framing of the amendment, namely, those that would successfully take root in nineteenth century jurisprudence. Less is said about other elements, some of which may have more connection with the jurisprudence of our own day. Such selectivity, however, is probably inevitable. Like any great historical event, the passage of the fourteenth amendment ultimately evades our attempts to capture its meaning for all time.