The Fourteenth Amendment: From Political Principle to Judicial Doctrine. By WILLIAM E. NELSON. Cambridge, Mass.: Harvard University Press, 1988. ix, 200pp. £19.95.

Historians have largely left controversies over the intent of the framers of the Fourteenth Amendment to lawyers and legal historians. Was the Amendment an attempt to enunciate a broad guarantee of natural rights, or of the first eight Amendments, or merely to insure that whatever rights or benefits states decided to grant had to be shared equally by every person or citizen? Was it, yet more narrowly, a restriction on only the grossest inequalities or even a constricted,

rather trivial effort merely to constitutionalize the 1866 Civil Rights Bill? How much did the framers mean to expand national power at the expense of the states, and how much did they intend for judges, rather than members of Congress, to become the principal guardians of whatever rights the Fourteenth Amendment protected? Were its origins deep within the antebellum antislavery movement, or superficial, in the experiences of the immediate post-Civil War South and the political exigencies of the Republican Party? Indeed, did the Fourteenth Amendment have any determinable meaning at all, and how, if the evidence on any or all of these points conflicts, can we resolve the contradictions?

Where Raoul Berger took the most confined view of the Amendment, sapping the foundations of the modern Supreme Court decisions on segregation, reapportionment, and abortion, Howard Jay Graham, Robert Kaczorowski, and Michael Kent Curtis, putting different weights on various pieces of evidence than Berger did, read the Amendment quite expansively. Viewing some of the questions with which these debates have been concerned as unanswerable, because the framers never asked them (for example, did they mean to protect gay rights?), and others as irresolvable, because weighting schemes inevitably reflect the policy position espoused by each disputant (for example, did the framers mean to ban segregation?), Nelson eschews any unequal weighting at all.

Indeed, Nelson makes the very contradictory or ambiguous nature of the evidence the basis of his interpretation. His synthesis is antithesis. The Amendment, he asserts, was not doctrinal, not a set of constraints on action, but a rhetorical device to persuade people to 'do good' (9), to dedicate and rededicate themselves to 'vague principles of civic reformation' (89). Republicans 'blithely ignore[d]' conflicts between states' rights and individual rights because they naively assumed 'that states would conform their laws to the moral precepts incorporated into the amendment' (111). They never decided whether the Amendment guaranteed rights absolutely, or only prevented racial discrimination in those privileges that a state chose to promote (123), never decided whether it decreed impartial suffrage (132), never decided whether it might undermine school segregation (135). Treating every statement that mentions equality, even by Andrew Johnson or Confederate Vice-President Alexander Stephens (92), as a true revelation of their values, and sets of such statements as proofs of their acceptance by the antislavery movement (18), the public as a whole (77), or 'most of the American people' (181), he asserts the existence of a bland mid-century consensus on equal rights, natural law, and local control that was so broadly shared because the notions were so fuzzy, so 'empty' (21).

The Fourteenth Amendment, in Nelson's view, was essentially Jacksonian. That is, the framers intended to resolve any possible contradiction between individual rights and governmental power by leaving to state legislatures the authority to pass all 'reasonable' regulations, by which he means laws that did not treat individuals arbitrarily (121), and that aimed at the 'common good', rather than being responses to 'special interests' (172). Nelson assesses Supreme Court opinions from *Slaughter-House* (1873) to *Lochner* (1905) by this standard, and counsels modern judges to abide by this same deeply ambiguous principle. For how are courts to recognize the 'public good', how divide 'reasonable' from 'arbitrary' acts? And how, after denying that historians could determine whether the framers meant to protect fundamental rights (123), can Nelson so surely declare that they did not (199)?

Much more thoughtful, subtle, and deeply researched than Berger's frantic reactionary jeremiad, Nelson's graceful book proves by its very excellence how

shackling the idealist tradition in legal (or other) history is. Instead of trying to find a means of weighing opinions explicitly or a methodological principle with which to dismiss some views as unimportant (Berger, to give him credit, had that, at least), Nelson just sketches the range of expressions and makes no overt effort to decide what is typical or most common or most significant. Instead of questioning whether judges' rhetorical dedication to 'the common good' masked biases in favour of one set of 'special interests' rather than another, he takes them at their word. Instead of examining the facts of a series of school and other segregation cases – facts that in several instances are available in published sources – he blandly asserts that 'the courts were not racist' (186), that a Supreme Court that condemned blacks to filthy Jim Crow cars in *Plessy v. Ferguson* (1896) and acquiesced in the denial to African-Americans of even segregated high school education in *Cumming v. Richmond County* (1899) had merely 'made concessions to both points of view' (187).

One does not have to be a devotee of 'critical legal studies', with its fog of jargon and its unaccountable taste for literary subjectivism, to believe that a dose of legal realism in these formalist days might be salutary.

J. MORGAN KOUSSER
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