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Book Review: A March of Liberty: A Constitutional History of the United States. by Melvin I. Urofsky.

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even knowing that you believed such things (and without quite understanding just what it is that you have unwittingly been believing). All of this is presented with a ferocity of conviction that leaves you unsettled. And at the end of it all, you have no idea how to go about correcting the situation.[10] Manicheanism, it seems, is a heresy not limited to Christians.

III

Perhaps the most unfortunate consequence of these books is that they may lend support to the view—a view that many are wont to adopt anyway—that history offers little help in understanding current constitutional issues. To be sure, good history is not easily come by. The historian has the difficult task of writing *about* the past but *for* the present; he must moderate a conversation between generations that may not speak in the same terms or, worse yet, may use the same terms but with different meanings. Conversing face-to-face with a friend is often hard enough; conversing with generations long dead is even harder. And when the conversation breaks down, as it frequently does in these books, the historian risks becoming merely a polemicist.

But when the historical conversation prospers, it can be tremendously illuminating; the analyses of American religious history offered by Mark DeWolfe Howe and Henry May are noteworthy examples. We can still learn a good deal from our forebears, but only by actually listening to them before we conscript them to serve in our current spiritual and political battles.

A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Melvin I. Urofsky.[1] New York: Alfred A. Knopf. 1988. Pp. xxii, 969. Cloth, $24.00; paperback, $12.00.

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The legal realist movement had its origin in the philosophical

10. Insofar as Rushdoony does offer prescriptions, they are much like those of CLS not only in the level of their abstraction but even, sometimes, in their substance. For instance, Rushdoony explains that we must "take government back from the state and restore to man his responsibility and freedom to be, in every sphere of life, a participating and governing power." Perhaps Rushdoony and Roberto Unger should collaborate on their next book.

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pragmatism of late nineteenth and early twentieth-century thinkers such as Holmes, Pound, Cardozo, and Karl Llewellyn, who in their famous revolt against formalism rejected logic, abstraction, deduction, verbal systems, and fixed principles as inadequate for understanding the nature of law and legal decisionmaking. According to the realist critique, legal analysis should be result oriented, governed by a logic of consequences, rather than of rigid demonstration from antecedents and first principles.[3] Contemporaneously in the field of constitutional history and law, progressive historians and political scientists taught that the Constitution was an instrument of class rule that reflected socioeconomic interests, rather than a body of political principles possessing philosophical coherence and intrinsic validity.[4]

The threat to democracy and the rule of law posed by totalitarianism in World War II and the cold war disabused many realist-minded scholars of these notions and caused traditional constitutionalism, including legal formalism, to appear in a more favorable light.[5] Formal constitutional principles, including in some instances the original intent of the framers, were discovered to have a useful purpose in protecting civil rights and liberties, and even to express moral and philosophical truths. The result of this reassessment was a modified progressive or liberal outlook that combined, without reconciling, realist instrumentalism and intrinsic constitutionalism, respectively, as major and minor themes in constitutional and legal history.[6] In a further elaboration of the antiformalist impulse, the realist view was radically extended in the 1970s and 1980s in works of the new legal history and the Critical Legal Studies movement.[7] Yet there were also several counter-currents in constitutional history, including liberal theorists like Ronald Dworkin as

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STITUTION: ITS ORIGINS AND DEVELOPMENT (with A. Kelly & W. Harbison) (6th ed. 1983).

3. W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 5-10 (1968); M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 3-15 (1949).

4. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); J. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1907); Randall, *The Interrelation of Social and Constitutional History*, 35 AM. HIST. REV. 1 (1929).

5. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640 (1972).

6. *Cf.* J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (5th ed. 1976); C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (2d ed. 1954).

7. The new legal history is illustrated in L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973) and M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977). For a discussion of critical legal studies logic, see Yack, *Toward a Free Marketplace*

well as the works of Straussians and other political scientists writing in the tradition of political philosophy and intrinsic constitutionalism.[8]

In this historiographical context Professor Melvin I. Urofsky's *A March of Liberty* assumes significance as an attempt to employ the perspective of legal realism as an analytical framework for writing a history of the American Constitution. Taking as his point of departure the "veritable revolution" in constitutional and legal history that has occurred in recent years, Professor Urofsky states his intention "to blend the so-called 'new legal history' with the usual emphasis on great cases." The new legal history refers generally to the study of judicial decisions that has been expanded "to include the economic, social, political as well as legal circumstances surrounding those controversies." More precisely, the conception of legal history that informs *A March of Liberty* holds that "law mirrors social demands and needs; it has no life of its own, but always interacts with society and is subject to shifts in power."[9]

Urofsky also proposes to use the "great cases" approach to constitutional history. It is not clear what he intends by this term, but it appears to mean that some judicial decisions affect the course of history in momentous ways. It may also imply that great cases do not merely reflect social forces. If social forces were the decisive agent in history, would we not celebrate them rather than the court decisions that are merely the conduit through which they are expressed? The "great cases" approach may imply, then, that some judicial decisions not only possess critical importance, but also that they rest upon sound thinking and legal reasoning and evince a correct interpretation of the Constitution or a statute.

That this is the operative meaning of the "great cases" methodology is suggested by the many momentous, soundly reasoned, and presumably constitutionally correct decisions described in *A March of Liberty*. These decisions, however, are preponderantly those illustrating twentieth-century liberalism. This fact leads us to consider the character of Urofsky's work as substantive historical interpretation.

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of Social Institutions: Roberto Unger's "Super-Liberal" Theory of Emancipation (Book Review) 101 HARV. L. REV. 1961 (1988).

8. *See* Lerner, *The Constitution of the Thinking Revolutionary*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (R. Beeman, S. Botein, and E. Carter, II eds. 1987); Wood, *The Fundamentalists and the Constitution*, N.Y. REV. OF BOOKS, Feb. 18, 1988, at 33. The author of this Book Review would include his own account of American constitutional history in this category of writing. *See* A. KELLY, W. HARBISON & H. BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (6th ed. 1983).

9. The quotation is from L. FRIEDMAN, *supra* note 7, at 10.

In the values it asserts and the conclusions it reaches, Urofsky's constitutional history is a thoroughly liberal book. It may not be too much to say that it reflects an unabashed liberal bias. As an introductory example, one notes the author's cloying conceit of telling his story frequently through the eyes of "civil libertarians," as though there existed in society a readily identifiable group whose function it is to monitor the state of our liberties and whose values and point of view can be relied on as a valid standard of historical and political judgment. A further expression of liberal bias is the author's practice of dismissing conservative constitutional arguments and decisions as erroneous and motivated by selfish group and class interests, while treating liberal decisions as motivated by considerations of public interest and a desire to uphold the Constitution. Indeed, Urofsky evinces a kind of intellectual antinomianism that leads him to disregard the canons of critical scholarship and apply a double standard of judgment in analyzing the political actors and constitutional decisionmakers who appear in his narrative.

I

Let us evaluate *A March of Liberty* by considering its treatment of four fundamental principles of American constitutionalism: federalism, the separation of powers, individual and community liberty under republican self-government, and the rule of law as embodied in a written constitution. We begin with federalism, the geopolitical organizing principle of the American polity.

Urofsky reflects the assumption, characteristic of late twentieth-century liberalism, that centralized government and administration are inherently superior to local authority and represent the reasonable and correct position in conflicts between center and periphery. Although the states' rights tradition is recognized in Urofsky's account, that recognition is minimal. For example, Urofsky fails to discuss the British Empire as a system of divided sovereignty and American theories of federalism in the pre-revolutionary period. He points out that divided sovereignty existed under the Articles of Confederation, with the sovereignty of the states standing higher than that of the Confederation. This imbalance was rectified by the Constitution, however, which "clearly put the sovereignty of the nation over that of the states, although it would take a civil war to finally confirm this view." To support this contention Urofsky cites the preamble—"We the people of the United States . . . do ordain and establish"—and the supremacy clause. "We the people" can be understood as referring to the people of the several states,

however, a point later acknowledged when the author concedes that Senator Hayne may have been "technically correct" in claiming that the states through the ratification process made the Constitution. Furthermore, the supremacy clause does not refer to the sovereignty of the nation, but makes the Constitution, laws made in pursuance of it, and treaties, the supreme law of the land. To cite this as proof of the limited role of the states begs the question of the respective constitutional powers of the states and the national government. Finally, if the nature of the Union had been as clear as Urofsky says it was, it is doubtful that a civil war would have been required to resolve the issue.

Urofsky's account of federalism in the constitutional convention is slight, superficial, and lacking in analytical rigor. Nor does he treat the subject more searchingly in the period down to the Civil War. Having concluded that the Constitution clearly resolved the question of the nature of the Union, he is unable to appreciate the complexity and importance of federal-state relations in the eyes of participants. He fails to understand that the historical possibility existed of a decentralized, plural nation, ignoring the fact that "the times"—a legitimating authority in Urofsky's pragmatic instrumentalism—seemed to demand such an approach to nationhood and that the states' rights doctrine was appealed to in all sections of the country. Omitting any discussion of democratic dual federalism, Urofsky reduces the controversy over the federal system to a split between southerners asserting states' rights and Whigs and Jacksonians who he says shared essentially the same "vision of the Union." In this view Chief Justice Taney, despite his sympathy for states' rights, is "as much a nationalist as Marshall"—a curious judgment inasmuch as Taney is later described as favoring secession.

During the Civil War the old debate over the division of sovereignty gave way to "a newer and more vital concern over the role of the central government as the preserver of national unity and the protector of individual liberties." Although wartime centralization was temporary, it foreshadowed the demise of federalism in the twentieth century, when in the ideology of modern liberalism power and liberty were united, and the exercise of government power was seen as an expansion of individual or group liberty. Within this framework Urofsky gives short shrift to federalism as reciprocally limiting divided sovereignty in the American state system. New Deal centralization, for example, is treated only incidentally, as an aspect of the Court-packing fight. Insofar as it is acknowledged to have occurred, centralization under Roosevelt is described as a mat-

ter of the Supreme Court after 1937 returning to the broad view of the commerce power intended by the framers, and as a function of the nationalization of the economy which was in process long before the Depression. About recent developments in federalism Urofsky has little to say, except to note that some state courts have afforded more protection to civil liberties than the Supreme Court. His disregard of federalism is evidenced most spectacularly by his failure to mention *National League of Cities v. Usery* (1976), the Burger Court's attempt to revive tenth amendment federalism, and *Garcia v. San Antonio Metropolitan Transit Authority* (1985), reversing *Usery* and holding that there are no constitutional limits imposed on the commerce power of the federal government by the tenth amendment.[10]

II

If contemporary liberalism rejects the divided sovereignty of federalism, it finds the separation of powers more useful to its ends. *A March of Liberty* traces the formation of institutional arrangements based on the separation principle, giving special attention to the growth of the imperial presidency. While the inquiry into this subject does not entirely ignore liberal presidents, conservatives are seen as primarily responsible for executive power excesses.

Andrew Johnson was the preeminent nineteenth-century precursor of the imperial presidency. According to Urofsky, Johnson sought to prevent any meaningful reconstruction, forced Congress to pursue the policy toward him that it did, and "ensured another century of racial animosity." Claiming "powers that would later be described as imperial in nature," Johnson asserted the right to decide unilaterally which laws were constitutional, and which he would enforce. Rarely has Andrew Johnson been so severely judged. Urofsky states that Johnson "played outside the rules," "moved completely outside the regular political process, and . . . brought the constitutional system as near to destruction as had the war itself." Contrary to prevailing scholarly opinion, Urofsky concludes that the attempt to convict Johnson in the impeachment trial, not his acquittal, upheld the separation of powers.

Among twentieth-century chief executives, the actions of Franklin D. Roosevelt would appear relevant to understanding the origins of the imperial presidency, and to some extent Urofsky seems to agree. He observes that New Deal planners ignored tradi-

10. *See* Kincaid and Schechter, *The State of American Federalism—1985*, PUBLIUS Summer, 1986 at 1.

tional constitutional limitations, that the administration was indifferent to basic constitutional doctrine, that Roosevelt had a politician's pragmatic view of the Constitution, and that his emergency acts in 1933 rested on a "flimsy constitutional basis." Yet Roosevelt "did not invent the 'imperial presidency.'" His significance was to play "a key role in developing the modern idea of strong executive leadership."

If Urofsky at least raises the question of FDR and swollen presidential prerogatives, his liberal bias is evident in his general treatment of the New Deal President. He ignores the issue, dealt with in recent scholarship, of whether Roosevelt's Court-packing plan, his executive reorganization proposal, his use of government employees and relief recipients for partisan purposes, and his attempted purge of the Democratic party together constituted a threat to the separation of powers. The Court reform bill is the only one of these actions that Urofsky discusses, and of it he says only that FDR's "famed political sagacity" for once deserted him. What about Roosevelt's constitutional judgment? Are we to conclude that it was sound on this matter? Urofsky agrees that a constitutional crisis occurred in the mid-1930s, but in his opinion Roosevelt had nothing to do with it. The crisis was caused by the failure of conservative Supreme Court Justices to rethink the Constitution. President Roosevelt was simply an earnest experimenter, trying to keep up with "the temper of the times," who created "the most innovative government in American history." This evaluation hardly accords Roosevelt the constitutional significance that is deservedly his, even in a critical view that sees him as attempting to create a centralized bureaucratic state that would render party politics superfluous.[11] On the evidence that Urofsky himself presents, it is reasonable to think that if FDR and his followers were as casual about the Constitution as they appear in this account, the Supreme Court may very well have been right to strike down many New Deal measures.

Presidential power may have expanded enormously from Roosevelt to Lyndon B. Johnson, but it was Richard M. Nixon who in Urofsky's view threatened to destroy the constitutional balance between the executive and legislative branches. Whereas his predecessors tested the limits of presidential authority, Nixon claimed "unlimited" and "absolute authority." Even so, his claims were seen as within the parameters of the constitutional process, Urofsky

11. *See* Milkis, *Franklin D. Roosevelt and the Transcendence of Partisan Politics*, 100 POL. SCI. Q. 479 (1985); THE NEW DEAL AND ITS LEGACY: CRITIQUE AND REAPPRAISAL (R. Eden ed. , 1989).

says, until Watergate occurred and the forces of morality and rectitude in Congress and the press revealed Nixon for the tyrant he was—or aspired to be. In the end, Watergate pitted good men against bad: "Nixon, Mitchell, and Kleindienst debased their offices; Sam Ervin, Archibald Cox, and Elliot Richardson fulfilled the trust placed in them."

In a work prefaced by the express intention to consider the political and social circumstances surrounding the legal controversies it recounts, this is a peculiarly moralistic, *ad hominem* judgment. Urofsky's account of Nixon and Watergate occurs in a political vacuum. There is no reference to the violence and social upheaval that erupted on the left and dominated American politics from 1964 to 1969; no mention of the liberal and radical hatred of Nixon, cultivated for twenty years, that greeted his inauguration; no discussion even of Nixon's political outlook and his own hostility toward the bureaucracy and the press. The lesson of Watergate is simple, according to Urofsky: Nixon was a corrupt man who overreached himself.

In an unconvincing attempt at impartiality, Urofsky says Nixon did not create the imperial presidency and cannot be blamed for the vast growth of executive power. The Constitution, he explains, gives the president a leading role in foreign affairs, which has been extended equally in domestic politics by political events and modern communications. Urofsky goes on to justify the plebiscitary presidency, being careful to distinguish it from Nixon's exercise of power. Liberal scholars, he points out, had been developing the theory of the plebiscitary presidency—that is, the idea that the government of the United States resides in the presidency—long before some analysts suggested it applied to the Nixon White House. Liberals reasoned that a strong executive may be necessary for modern democratic societies, because only the president can speak for all the people and translate the national will into action. But liberals had in mind a Franklin Roosevelt or a John Kennedy, not a Richard Nixon, for their assumptions "relied on a noble, or at least an honest, President." Urofsky advises us that the "plebiscitary presidency may well be necessary in a modern society," with the clear inference that this is constitutionally permissible only if liberals are elected to fill the office! Meanwhile, since Nixon's resignation, new accommodations and continuous adjustments between the executive and Congress have been made under the separation of powers, which remains a useful instrument for checking conservative presidents.

III

Liberty under republican government is a third concept we may employ in assessing Urofsky's book. What is the nature of the liberty that is on the march in American constitutional history and whither is it tending?

We note first that the threat to American liberty traditionally viewed as the reason for creating republican governments in the revolutionary era is not recognized as an objective reality. Americans rebelled not against British tyranny, Urofsky argues, but against the *perception* of tyranny. The nation was founded not out of a rational decision to create a constitution guaranteeing liberty, but rather out of fears and anxieties conditioned by republican ideology. The implication is that Americans did not understand the nature of British rule, and by extension the nature of liberty. The conditional or equivocal nature of the American appeal to liberty is seen in the Declaration of Independence. Putting aside Jefferson's magnificent generalizations and examining the Declaration "on its own terms," Urofsky describes it as "a propaganda document" designed to justify unlawful action. In fact, however, if we consider the Declaration on its own terms we see that it asserts self-evident natural-rights principles of equality and consent as the basis of American government. To be sure, Urofsky recognizes that the Declaration has had more than propagandistic value in our history. He says it "enshrined the compact theory as the heart of the American philosophy of government." He does not mean to say, however, that the Declaration possesses a rational meaning that endures and is still valid. Rather, it expressed "sentiments," became an "article of faith," and was significant for the broad assertions of immutable principle that later generations read into it. The Declaration, in Urofsky's view, is a palimpsest on which Americans write their changing notions of liberty.

Urofsky takes the position that liberty has no fixed meaning. "Measuring liberty is a difficult, if not impossible task," he writes, "because . . . the criteria are always changing." He illustrates by pointing out that since the 1930s, "a veritable revolution" in liberty has occurred as ideas of racial and gender equality, personal autonomy, civil liberties, and criminal law procedures have been radically transformed. A possible implication of this statement is that a more genuine liberty exists now than before. Certainly Urofsky's favorable discussion of Supreme Court decisions that have helped bring about the radical transformation to which he refers suggests that the liberties in question are not to be considered of merely temporary validity. Yet if the criteria of liberty are always changing, no

such judgment of permanent or universal validity is possible. Under the relativistic assumptions on which Urofsky's work is based, the conclusion follows that liberty must be defined positivistically as whatever the dominant political majority, acting through prescribed forms and procedures, decides it will be.

Urofsky's treatment of at least two major issues, however, appears to contradict the relativistic and positivistic premises of his realist-instrumentalist perspective. The first issue is whether slavery was compatible or could properly coexist with liberty under the Constitution. Although at one point he seems to imply that it could, stating that slavery was protected by "a sacred compromise," on balance he appears to hold otherwise. He emphasizes the steps taken by the founders to contain slavery, and says that in the antebellum period the United States was not bound by common allegiance to particular ideals and loyalty to a single government. This means there were separate systems of liberty in North and South, only one of which could be genuinely constitutional. The abolition of slavery and the adoption of the Reconstruction amendments appeared to resolve this problem by creating a single system of liberty and civil rights. In the form of racial segregation and discrimination, however, the problem recurred and continued for a century after formal emancipation. Liberty for whites in the South, and in the nation as a whole, was arguably not legitimate constitutional liberty so long as blacks were denied civil rights and real freedom.

Urofsky describes the resolution of the American dilemma in Supreme Court decisions from *Brown* to *Bakke*, *Weber*, and the most recent affirmative action holdings. This narrative of the struggle for civil rights reflects an obvious double standard of judgment. Urofsky tells the story of black legal protest and civil rights marchers joyously singing that they would overcome the legacy of slavery and discrimination. But he makes no mention whatsoever of black violence and rioting, the widespread destruction of property in scores of cities, and the decline of the civil rights movement into black power militance. If these actions were an expression of political liberty—as some have argued and as might be inferred under Urofsky's always changing criteria for measuring liberty—they deserve analysis. On the other hand, if black rioting was criminal disorder it ought also to be discussed. Whichever it was, a "realist" should consider whether it played a critical role in the origins of affirmative action.

Urofsky notes that the Civil Rights Act of 1968 imposed penalties for interstate travel and transportation for the purpose of civil disorder. He provides no explanation, however, of why such legis-

lation was deemed necessary.[12] President Nixon's election is described as expressing a white backlash against blacks for pushing too hard in the quest for equality. A less biased account would recognize that the conservative reaction of the late 1960s, insofar as it was about race, was principally directed at the violence and social disorder in the black community. Ever the good liberal, however, Urofsky condemns the white South for its violent opposition to blacks' civil rights advances. He asserts that a "breakdown of lawful authority" occurred in the South after the *Brown* decision, that the White Citizens' Councils were "pledged to total war in defense of segregation," and that the nation accepted the Civil Rights Act of 1964 because it was "exhausted by senseless bloodshed." These statements are of dubious accuracy. Urofsky's account of the 1960s—"a nation in turmoil"—is seriously incomplete and reflects confusion about the nature of liberty and the criteria for evaluating it.

The nature and significance of property rights and economic enterprise under republican government form a second issue for considering how liberty should be measured. In describing state common-law developments in the nineteenth century Urofsky treats entrepreneurial pursuits as a legitimate aspect of civil liberty. Property rights were part of the cultural pattern of liberal individualism that was the basis of social progress. Although noting that laboring men were "not totally wrong" in believing they bore a disproportionate burden of the costs of economic development, Urofsky states that the people in general favored business growth. The legal changes it necessitated, he writes with apparent approval, were "a law made for the times."

The problem is that not all legal developments are "made for the times," in the sense of being good for the community and constitutionally legitimate, even though they presumably are "made for the times" in a nonpejorative sense. Laissez-faire constitutionalism, the cluster of doctrinal innovations by which the courts promoted national economic expansion in the late nineteenth century, illustrates the point. Urofsky disapproves of substantive due process, the most famous of the doctrinal innovations, because it was based on "formalism." It "emphasized the letter of the law and ignored the realities of economy and society." He recognizes, however, that the judicial activism of the Warren Court, of which he approves, is

12. Radical and new left violence is similarly ignored. Urofsky notes, for example, that opposition to the Vietnam War triggered a reaction among blue collar workers and affluent business and professional people, but says the reaction was directed at the "new and strikingly different life-styles" of the young protesters.

cut from the same jurisprudential cloth as conservative laissez-faire activism insofar as it creates rights far beyond what the limited references of the written Constitution would seem to permit. Urofsky therefore suggests that the problem with substantive due process was not the theory itself, but its application. The Supreme Court "selected the *wrong* values for judicial protection." He seeks to buttress this subjective judgment by arguing further that the difference between nineteenth-century conservative activism and twentieth-century liberal activism is that the latter has provoked nothing like the degree of political criticism that was directed against the former. Many would dispute this assertion, however, seeing opposition to liberal judicial activism as a major source of the conservative resurgence of the past two decades.

Faithfully reflecting contemporary liberalism, Urofsky distinguishes liberal and conservative activism by employing the double standard of judicial review associated with footnote four in *Carolene Products*. Economic regulation need only meet the rationality test, while measures affecting civil rights and liberties are subject to strict scrutiny and bear a presumption of unconstitutionality. Urofsky asserts this double standard as a self-evident truth. Intellectual antinomianism apparently releases him from the obligation to explain or justify it, except to attribute it to Justice Brandeis. This is evidently considered sufficient authority to establish its transcendent validity, making it not merely a law for the times, but for all time.

IV

The nature of the Constitution and the rule of law provide still another perspective for evaluating Urofsky's survey of constitutional history. In his view, the basic principles of English and American constitutionalism are threefold: (1) the existence of a fundamental law; (2) the right of the people, through representatives, to participate as equal partners in government; and (3) administration of the law and justice through courts. Praising the English common-law as the best legal system because of its judicially supervised flexibility and resilience in meeting new social and economic conditions, Urofsky views the American Constitution as a common law system possessing similar attributes. The really vital element in our constitutionalism, therefore, according to Urofsky, is judicial lawmaking. Indeed, the paramount theme of *A March of Liberty* is the wisdom and necessity of government by judiciary.

So far from being fixed and permanent, as the founding fathers conceived of it, the Constitution in Urofsky's account was meant to be changed, and not mainly by formal amendment. Because "a de-

veloping society is constantly reexamining and redefining its values," he writes, "[f]or the Constitution to remain a viable organic law, it too must grow; any other policy, such as a rigid reliance on original intent, would lead to what some scholars have termed a 'clause-bound literalism' that would make the Constitution a strait jacket rather than a loose-fitting 'suit of clothes' with room for growth and change." Urofsky's sartorial metaphor suggests nothing of the permanence and durability of the architectural language used to describe the Constitution in the founding and early national period, nor any of the sense of natural development implied in the organic metaphors favored by late nineteenth and early twentieth-century reformers. Urofsky's metaphor suggests that the application of constitutional doctrines, like the choice of designer apparel, is entirely relative and dependent upon personal taste. It is an apt expression of contemporary liberalism.

Discretionary though the choice of styles in constitutional clothing may be, however, Urofsky paradoxically regards it as essential that this function be exercised by the Supreme Court. The principal line of continuity that he discerns in American constitutional history is judicial government based on the supremacy of the courts in constitutional interpretation. Only the clear location of national power in federal courts, for example, averted the legal chaos of the Articles of Confederation. More important than the exercise of judicial review in *Marbury v. Madison* was the question: who decides who decides? Urofsky says John Marshall assumed this power for the Supreme Court, affirming it as "the supreme arbiter of constitutional issues." For the states to enter the field of constitutional dispute and settlement was to invite "anarchy." For presidents to ignore the Supreme Court and hold that each branch of government could construe the Constitution, as Andrew Jackson allegedly did, was a similar prescription for "constitutional anarchy."

According to Urofsky, judicial supremacy has always been necessary under a written constitution, because "some agency had to serve as the ultimate arbiter of what that Constitution meant." It is all the more necessary in the modern world, which is "full of challenges never imagined by the Framers." "While democracy must not rely on 'a bevy of Platonic guardians,' " Urofsky writes, "there is much to be said for a society that refers its most difficult problems to courts and then agrees to live under the ensuing rule of law." Again, however, Urofsky's liberal antinomianism frees him from the intellectual burden of explaining why the courts should decide our most pressing problems, along with the wide range of

essentially political issues that are typically raised in constitutional litigation. In the name of all that is progressive, the ghost of Charles Grove Haines must surely be appalled to see liberals like Urofsky elevate government by judiciary to the level of paramount constitutional principle.[13]

The Supreme Court's critical governing role focuses attention all the more sharply on the question of the nature of judicial decisionmaking. What is really going on when courts resolve constitutional disputes? In chapters on law and economic development in the nineteenth century and constitutional law in the Marshall era, Urofsky offers an instrumentalist analysis of case law. He states that the idea of law as a body of immutable and objective principles and rules was found to be illusory. Courts are described as policymaking institutions deciding cases according to the judges' personal views of the issues at stake, the interests of the parties to the litigation, and "the felt necessities of the time." In the late nineteenth century, says Urofsky, courts stressed the letter of the law and ignored social realities. It would appear, however, that the laissez-faire and substantive due process decisions that illustrate formalism could also be seen as instrumentalist, because they went far beyond the letter of the Constitution, promoted specific economic and social interests, and had policy implications for creating a national economic market. The point of calling these decisions formalist appears to be to criticize the Supreme Court for not responding to social conditions in the "right" way.

Urofsky's realist-instrumentalist analysis appears to be inapplicable, however, to liberal jurisprudence in the post-1937 period. Liberal Justices appointed by Roosevelt, he states, were committed to preserving the integrity and independence of the Supreme Court. It is inaccurate to call them politicians pragmatically tailoring their decisions to meet the exigencies of the moment.[14] The Warren Court, we are told, sought to uphold equality and social justice by protecting the civil liberties of all Americans. Its apportionment decisions expanded and protected individual rights and equality before the law. Its criminal procedure rulings asked only that the government take constitutional rights seriously. Nowhere is there the slightest suggestion that the ideological preferences of the Justices, the political interests of the Democratic party, or the economic advantage of liberal interest groups may have influenced

13. C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS (1944).

14. Urofsky notes that New Deal Justices were fully sympathetic to labor's goals. Labor, however, is described as seeking to exercise its constitutional liberties by organizing and bargaining collectively.

liberal Supreme Court decisions.[15]

If the historical record presents a variety of models of judicial decisionmaking, how should Supreme Court Justices decide constitutional disputes? Urofsky says we must require, as standards in the exercise of judicial power, "balance, sensitivity to the needs of society, respect for the prerogatives of other parts of the government, and a keen awareness of how the results will affect society as well as individual men and women." Conspicuously missing from this exhortation to good judicial behavior is a requirement of fidelity to law. Perhaps adherence to the text of the Constitution is to be dispensed with on the ground, as Urofsky advises, that it runs the risk of "clause-bound literalism," and because "[t]he old notion of law as a fixed 'brooding omnipresence' has, we hope, been discarded forever." Fortunately, he avers, "Holmes's great aphorism, that the life of the law has not been logic but experience, is now universally accepted."

In view of Urofsky's profession of realist-instrumentalist methodology, it is curious that so much of his book is given to explicating the logic of Supreme Court opinions. Why does he spend so much time on formal constitutional exegesis, if it is unrelated to the outcome of the controversies he seeks to explain? Can this concern with the logic of constitutional reasoning be taken as evidence that formalism is not, after all, to be dismissed as irrelevant, but may on the contrary be essential to the judicial process and constitutionalism? And what are we to make of Urofsky's concluding admonition, that judges must not erect their prejudices into legal principles; rather, they must be "guided by the light of reason." Is this an appeal to the rational application of legal principles, as one might suppose?

In its focus on and favorable evaluation of judicial supremacy, *A March of Liberty* reflects the jurisprudential sensibility of contemporary liberalism. Its assertion of realist-instrumentalist theory, however, inconsistently applied and combined with a de facto exercise in doctrinal formalism, suggests a schizoid liberalism. Urofsky's realistic interpretation of nineteenth and early twentieth-century judicial decisionmaking, juxtaposed to his naive, uncritical, and apolitical analysis of modern liberal jurisprudence, suggests, moreover, that his work is influenced by a type of intellectual antinomianism. Elevated to the level of historical theory, this view

15. For a contrasting view, see Shapiro, *The Supreme Court: From Warren to Burger*, in THE NEW AMERICAN POLITICAL SYSTEM 179 (A. King ed. 1978); Shapiro, *The Constitution and Economic Rights*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 74-98 (M. Harmon ed. 1978).

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.

Daniel A. Farber[2]

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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