

Victory of Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852-1867

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Review

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Nabers, Deak *Victory of Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852-1867*. The Johns Hopkins University Press, \$49.95 hardcover ISBN 9780801883507

Transforming the Constitution: A Multidisciplinary Study

Victory of Law is a dense, important, and thought-provoking book. Deak Nabers, a professor of literature at Brown University, examines the dilemmas of slavery, race, liberty, civil war, and law in the years 1852 to 1867. Nabers explores political and constitutional arguments on these topics, but he also examines, for example, Melville's *Battle Pieces*, essays by Thoreau, poems by Whitman, and *Uncle Tom's Cabin*. He discusses the legal and constitutional thought of abolitionists William Lloyd Garrison and Wendell Phillips (who generally read the pre-Civil War Constitution and the law as a pact with the devil that protected slavery), that of Alvin Stewart (who read it as a charter of liberty), as well as the constitutional thought of Abraham Lincoln and Stephen A. Douglas. In a concluding chapter, Nabers discusses the contribution of Congressman John A. Bingham, the primary author of section one of the Fourteenth Amendment. That section made all persons born in the nation citizens of the United States and of their states, provided that no state should abridge the privileges or immunities of citizens of the United States, and guaranteed due process and equal protection to all persons.

It is a lot to cover in 198 pages of text, even though the print *is* small. Generally, Nabers covers these topics well. What unifies many of these somewhat disparate sources is the tension between a positive law that protected slavery and ethical aspirations for a law that protected liberty. Melville describes the Civil War as a victory of law, but it is victory won by brute force. Melville's invocation of the victory of law is more ambivalent than it seems at first.

There is also the tension between the Constitution's ethical aspirations and some of its words (e.g., no person shall be deprived of ...liberty...without due

process of law) and its historic purposes and interpretation and its other clauses (such as the clause counting slaves as three-fifths of a person and that requiring their return to slavery if they escape to a free state). This tension is reflected in the view of Garrison and others who see no redeeming features in the law or the Constitution. Indeed they rejected the law and the Constitution as instruments of slavery and despotism. Other abolitionist constitutional theorists affirm the Constitution—even before the post-Civil War amendments—as a charter of liberty.

The great pre-Civil War tension is between morality and ethical aspirations and positive law that supports slavery. According to Nabers, much modern scholarship often sees 19th century law and moral claims for civil rights as opposed to each other. For him, this view is too simple, and an increasing number of legal scholars agree. Garrison attacked the law and slavery with equal relish; Bingham celebrated civil rights and the Constitution with equal relish (18).

As Nabers sees it, section one of the Fourteenth Amendment, mostly written in 1866 by Bingham, both restored and transformed the nation and the Constitution. Instead of seeing the Constitution as the handmaiden of slavery, Bingham saw how it could be transformed into a guarantee of freedom and equality. Bingham could see his mission as restoring the Constitution because he cherished the ideals of liberty and equality he found in the Constitution even before the Reconstruction Amendments. He believed that rightly interpreted, the pre-Civil War Constitution espoused and protected them—though the protection was incomplete. Still, he recognized that past interpretations and slavery in the original slave states had limited those ideals. Bingham's amendment transformed the Constitution by nationalizing the ideals of liberty and equality that he found in the original Constitution and applying them to all the states. Henceforth, for Bingham, states would be required to respect all privileges and immunities of citizens of the United States (including those in the Bill of Rights). The rights to equal protection and due process secured to all would prevent crimes against humanity, such as slavery. Nabers stops his story in 1867. Of course, many of the goals of Bingham and other Republicans were not realized for quite some time. Political terrorism effectively nullified liberties for whites as well as blacks and, in the end, the nation acquiesced in the counter revolution until the 1960s.

Nabers concludes that Bingham's Fourteenth Amendment was a poem as well as a statement of law. As such, it is subject to various interpretations. Whatever one makes of this conclusion and some of the details of Nabers

reading of the history, he has done an insightful job of putting Bingham's restoration and transformation in its larger context of law and literature.

Scholarship that spans disciplines can make substantial contributions. But it also carries its own problems. Each discipline has its own language or, at worst, its own jargon. With the best will in the world, it is often hard for lawyers to recall how much of their language and background assumptions are not shared by the larger scholarly (not to mention the lay) community. A few legal scholars write in extremely obscure terms. The best do not. The same problems often plague literary criticism and other disciplines. Some of Nabers's terms and concepts were opaque for me. These include references (without clarifying explanations) to the constative and performative aspects of Garrison's arguments (49) and to the distinction between agency (practical legal effect?) and language of the Fifth Amendment in John Marshall's opinion in *Barron v. Baltimore* (144).

When my son was about thirteen he insisted that I should not use any words he did not know. My wife asked him how big his vocabulary would be if we had followed that rule since he was two. My criticism may seem equally shallow. Justice Hugo Black said he wrote for the people at the gas station and the barbershop. I am with Justice Black on this one—on the level of aspiration, if not successful execution. Still, though some of Nabers's prose could be more transparent, the flaw does not negate the book's virtues. This scholarly and thoughtful book is of substantial value in understanding the larger literary, political, constitutional, and intellectual context in which the post-Civil War amendments were framed.

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