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A RADICAL INTENT

NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS. By Michael Kent Curtis.¹ Durham, North Carolina: Duke University Press. 1986. Pp. xii, 275. \$24.95.

Much of the recent debate regarding constitutional interpretation has focused on the relevance of the Framers' intent. Attorney General Edwin Meese III has urged judges to "resurrect the original meaning of constitutional provisions."² In contrast, Justice William Brennan has argued that courts should adapt the Constitution to "cope with current problems and current needs."³ A key disagreement involves whether the Bill of Rights protects citizens against state as well as federal government abuses. Some scholars have called for a rollback of Supreme Court decisions that incorporate provisions of the Bill of Rights in the fourteenth amendment, arguing that these rulings go beyond the intent of the amendment's Framers.⁴ Many supporters of the incorporation doctrine, however, maintain that the Framers' intent is neither discernible nor dispositive.⁵

In *No State Shall Abridge*, Michael Kent Curtis meets Meese on his own ground, embracing the jurisprudence of original intent. He concludes, through an analysis of the historical context of the fourteenth amendment, that Congress intended to apply the Bill of Rights to the states through the now neglected privileges or immunities clause.⁶ Curtis begins by examining how the fight over slavery transformed the Republican party's attitude toward states' rights. Although

¹ The author is a practicing attorney in Greensboro, North Carolina.

² Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465-66 (1986) (speech delivered to the American Bar Association in Washington, D.C., July 9, 1985).

³ Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) (speech delivered at Georgetown University in Washington, D.C., Oct. 12, 1985).

⁴ See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 413 (1977) (arguing that the Court could begin the rollback by reversing its busing decisions or by returning control over criminal procedural safeguards to the states).

⁵ See, e.g., Tushnet, *A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 802 (1983) (arguing that interpretivism is invalid, in part, because "our interests, concerns, and preconceptions" shape our construction of the Framers' world).

⁶ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1. Curtis' argument is similar to one Justice Black advanced forty years ago. Dissenting in *Adamson v. California*, 332 U.S. 46 (1947), Justice Black argued that the Framers intended the privileges or immunities clause to apply the Bill of Rights to the states. See *id.* at 92-123. Justice Black's argument has been nearly forgotten, primarily because of Professor Charles Fairman's influential criticism, see *infra* note 9 and accompanying text, and the shift in the debate caused by the Court's acceptance of the due process incorporation doctrine, see *infra* note 11.

the party vigorously contested slavery in the territories before the war, most Republicans believed that slavery in the states was beyond federal control. The Civil War, however, eliminated much of the Republican deference to states' rights. It also strengthened Republican opposition to civil rights abuses in the South. Before the war, many southern states had restricted abolitionists' first amendment rights (p. 30), and after the war, they suppressed blacks' rights (p. 35). By 1866, "radical abolitionism had become Republican orthodoxy" (p. 34) and the Republicans, aligned with abolitionists and fearing for the safety of unionists in the South, were more willing to use federal power to control Southern civil rights abuses (p. 35).

Curtis then examines the unorthodox constitutional theories many Republican congressmen espoused when they passed the fourteenth amendment. Prior to the Civil War, the Supreme Court had held that the Bill of Rights did not apply to the states⁷ and that article IV's privileges and immunities clause did not guarantee equal rights to citizens of different states but only protected the rights of out-of-state visitors.⁸ Many Republicans rejected these rulings. They believed the privileges and immunities clause had a dual purpose: protecting Americans' substantive liberties (including those liberties set forth in the Bill of Rights) and ensuring equality of rights between citizens of different states (pp. 47-48). Congress intended the fourteenth amendment not as a new constitutional doctrine, Curtis contends, but rather as a mandate to the courts to apply the "correct" constitutional interpretation of "privileges and immunities."

To reach this conclusion, Curtis analyzes various historical texts — congressional debates, party platforms, newspaper accounts of speeches, antislavery tracts, and the various versions of the fourteenth amendment itself. The statements of Senator Jacob Howard, who managed the amendment in the Senate, and Representative John A. Bingham, the author of section 1 of the amendment, provide the best support for Curtis' thesis. When discussing the proposed amendment's privileges or immunities clause, Senator Howard said that the clause included "the privileges and immunities spoken of in the second section of the fourth article of the Constitution" and that "[t]o these privileges and immunities, whatever they may be . . . should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution" (p. 88). Howard then listed most of the Bill of Rights' provisions and concluded that the "object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees" (pp. 88-89). Congressman Bingham, who, like

⁷ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁸ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

other Republicans, believed that the Bill of Rights already limited the states, argued that the proposed amendment was “‘simply a proposition to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today’” (p. 70).

Had more congressmen made similar statements, Curtis’ case would be easier to prove. The language of the debates, however, is often ambiguous, and Curtis must rely on evidence “partially hidden in generalizations” (p. 15) such as “all rights of citizens,” “fundamental rights,” and “privileges and immunities.” To give content to these phrases, Curtis attempts to determine what they meant to the Republicans of 1866 by carefully studying the contexts in which Bingham and other Republicans used them and the likely sources of their understanding, such as Blackstone’s *Commentaries* and the opinions of Chancellor Kent. Curtis concludes that Republican congressmen regularly referred to the Bill of Rights as “fundamental rights” or “the rights of citizens” and that “the words *privileges* and *immunities* [were] a shorthand description of fundamental or constitutional rights” (p. 64).

Curtis then tackles the scholars who have opposed incorporation on historical grounds, notably Charles Fairman and Raoul Berger. In 1949, Fairman published an influential article in which he argued that the fourteenth amendment’s legislative history provided a “mountain of evidence” proving that the amendment’s Framers never intended to apply the Bill of Rights to the states (p. 92).⁹ Curtis argues that Fairman’s analysis was deficient because it overlooked the belief of Bingham and other Republicans that article IV’s privileges and immunities clause obligated the states to obey the Bill of Rights. For example, Fairman relies on Republican remarks that the amendment would not change the Constitution to conclude that the amendment’s Framers did not intend to change existing constitutional law. Curtis argues that the Republican interpretation of article IV is evidence that the Framers meant to change only Supreme Court decisions, not the Constitution.

Similarly, Curtis criticizes Raoul Berger’s *Government by Judiciary* for “fail[ing] to recognize the extent to which suppression of civil liberty in the South in the thirty years before the Civil War molded the Fourteenth Amendment” (p. 113). Curtis argues that this failure caused Berger to “misread the debates in significant ways” (p. 113). Berger, like Fairman, applies the orthodox reading of article IV to the fourteenth amendment’s privileges or immunities clause and, as a result, fails to account for the manifest Republican desire to protect

⁹ See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 134 (1949); see also Graglia, “Constitutional Theory”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789, 797 (1987) (calling incorporation “a proposition for which there is not a shred of historical evidence”).

the civil liberties of life-long residents of southern states. If the amendment protected only the state law rights of migrants and visitors, it "would have been of no help to the mass of blacks in the South and of no help to the southern unionists" — "the very people about whom Republicans were most concerned" (p. 115).¹⁰

The final third of Curtis' book examines the various ways in which state legislatures, subsequent Congresses, and the courts have interpreted the amendment. His discussion of the Supreme Court's gradual incorporation of selected rights¹¹ provides an interesting contrast to his earlier call for full incorporation. For the purposes of his analysis, Curtis proceeds from the premise that original intent is both discoverable and relevant to a court's decision — an assumption that seems at odds with the noninterpretivist jurisprudence that gave rise to the incorporation doctrine as it stands today.¹² Yet he believes that the present conflict between historical and progressive jurisprudence is neither intrinsic nor necessary. *No State Shall Abridge* represents his attempt to harmonize progressive jurisprudence with history.

Curtis recognizes the limitations of his historical analysis: first, that history is only "one of the factors" in a constitutional jurisprudence (p. 11), and second, that the intent of the Framers can never really be proven with certainty (p. 217). Nevertheless, he urges progressive judges to embrace history because "history provides one type of legitimacy" (p. 220), "one tradition against which at least some calls to

¹⁰ Berger attempts to avoid this problem by attributing to the Framers the view that blacks became transmigrants by being transformed from slaves to freemen. See R. BERGER, *supra* note 4, at 40. However, he presents no evidence to support this attribution. Berger's view is also problematic in that it suggests that the Framers did not intend to protect southern blacks who were free prior to adoption of the thirteenth amendment or blacks born after all slaves were freed.

¹¹ After the adoption of the fourteenth amendment, the Court began incorporating the protections of the Bill of Rights through the due process clause of that amendment. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (recognizing the incorporation of freedom of speech and of the press). The Warren Court almost completed this process of incorporation in the 1960's. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the sixth amendment right to trial by jury in criminal cases); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the fifth amendment privilege against self-incrimination). Rights the Court has not incorporated include the second amendment right to bear arms, the third amendment right to refuse to quarter troops in private homes, the fifth amendment right to a grand jury, and the seventh amendment right to a civil jury (p. 203).

¹² The Supreme Court's 1873 decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), foreclosed incorporation through the privileges or immunities clause. The Court then turned to selective incorporation through due process, see *supra* note 11, finding its justification not in the Framers' intent but in the more ephemeral concept of "fundamental" rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 773 (2d ed. 1988). Professor Tribe has suggested that the privileges or immunities clause may become "a fresh source of distinctly personal rights" as courts grow "weary of the heavily encumbered and often sputtering vehicles of due process and equal protection." *Id.* at 558.

restrict individual liberty may be tested" (p. 10). To the extent that Meese and his supporters use history to justify restricting individual liberties, Curtis provides a powerful rebuttal.

Yet judges and scholars should be wary of endorsing historical analysis because history can limit progressive jurisprudence. Despite Curtis' suggestion that the Framers may have intended "certain clauses of the Constitution to be read in light of contemporary conditions" (p. 10), a strict historical analysis could not, for example, justify the Court's long line of privacy cases or support the argument that the death penalty is unconstitutional. Paradoxically — or perhaps deliberately — the real value of Curtis' argument may lie in its demonstration of the indeterminacy of historical analysis.¹³ By showing that historical evidence can buttress conflicting conclusions, Curtis neutralizes the effect of historical arguments in the incorporation debate. Because history is indeterminate, judges have no recourse but to confront the question posed by Justice Brennan: "What do the words of the text mean *in our time*?"¹⁴ If we free it from the chains of the past, the Constitution can better serve its "intended" purpose — the preservation of liberty and justice for all individuals.

¹³ This may be Curtis' real aim. He hints that even if he cannot win the historical argument, he would be content to remove the stranglehold that the anti-incorporationists have had on history — because "who controls the past controls the future, [and] who controls the present controls the past" (p. 9 quoting Orwell).

¹⁴ Brennan, *supra* note 3, at 438 (emphasis added).