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No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights

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

In *No State Shall Abridge*, Michael Kent Curtis[1] examines the historical underpinnings of a doctrine which is increasingly under attack as lacking historical support: the incorporation of the Bill of Rights by the fourteenth amendment. In its barest form, Curtis's claim is that the framers of the fourteenth amendment intended that the states be bound to respect all of the individual liberties which, prior to the Civil War, had been protected against only federal invasion. According to Curtis, the framers expressed this thought not in the due process clause, but rather by providing that "[n]o State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*."[2]

The argument that the fourteenth amendment incorporated the guaranties of the Bill of Rights and applied them to the states is not new.[3] It came closest to being embraced by a majority of the Supreme Court in *Adamson v. California*.[4] Justice Black's dissent in that case[5] included an extensive investigation of the congressional history of the amendment and concluded that incorporation was intended by the framers.[6] Three of his brethren agreed.[7] Two years later, however, an immensely influential article by Professor Charles Fairman appeared refuting Justice Black's reading of history.[8] Since that time many

1. Partner, Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, North Carolina. A.B. 1964, University of the South; J.D. 1969, University of North Carolina. Mr. Curtis has written extensively on the incorporation of the Bill of Rights by the fourteenth amendment.

2. U.S. CONST. amend. XIV, § 1 (emphasis added).

3. In fact, Curtis's particular version of the incorporation doctrine — that it was intended by the privileges and immunities clause rather than the due process clause — was rejected by the Supreme Court in a line of post-Civil War cases beginning with the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873). Curtis devotes an entire chapter to his criticism of these decisions. Pp. 171-96.

4. 332 U.S. 46 (1947).

5. 332 U.S. at 68 (Black, J., dissenting).

6. Justice Black did not rely on any particular clause of the amendment. Instead, he asserted that incorporation followed from "the provisions of the Amendment's first section, separately, and as a whole." 332 U.S. at 71.

7. Justice Douglas joined in Black's dissent, 332 U.S. at 92. Justice Murphy, with whom Justice Rutledge concurred, voiced "substantial agreement" with Justice Black, 332 U.S. at 123. However, Justice Murphy wrote separately to voice his opinion that while the fourteenth amendment did indeed incorporate the Bill of Rights, it was not "necessarily limited by the Bill of Rights." 332 U.S. at 124.

8. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

commentators have conceded the historical debate to Fairman.[9]

Curtis, however, challenges that concession. Curtis expands the historical inquiry beyond the congressional debates to the entire historical context of the amendment, a crucial part of which was "the relation between the concern for the protection of civil liberties and the crusade to abolish slavery" (p. 29). The amendment, he asserts, was primarily a product of the Republican-led antislavery crusade which preceded the Civil War. Although this crusade had as its immediate aim the protection of black slaves in the South, it created a backlash hallmarked by repression of free blacks in the North and white abolitionists in the South (p. 31). In "declar[ing] an antislavery constitutional interpretation" (p. 6), the Republican framers were strongly influenced by what they regarded as the unconstitutional deprivation by many states of the fundamental liberties embodied in the Bill of Rights.

The debate over the effect of the fourteenth amendment, says Curtis, is "really a question of the meaning of language" (p. 12). However, he cautions that the language must be read in its historical context. Thus he proposes to interpret the amendment in light of its language, the abuses that produced it, the political and legal philosophy of those who proposed it, and the statements made by leading proponents in the congressional debates (pp. 12-13). After setting forth these ground rules for the interpretative quest, Curtis proceeds to examine each step in the amendment process.

Focusing first on the decades leading up to the Civil War (pp. 18-56), he notes that the denials of the rights of speech and press that resulted from attempts to silence abolitionists in the South effectively prevented the Republican party from campaigning there at all. Even in the North, the Supreme Court's decisions in the fugitive slave cases[10] effectively prevented states from protecting the constitutional liberties of their own free black residents. This history convinced Republicans that "slavery [was] fundamentally incompatible with a free society. Its survival required eliminating the basic liberties of all citizens, white as well as black" (p. 36).

Armed with this understanding of the motivations of the various members of the Thirty-Ninth Congress, Curtis examines the congressional debates in meticulous detail (pp. 57-91). Here he finds coherence where others found only confusion. Curtis then analyzes some of the historical arguments against incorporation, criticizing Fairman and the modern proponent of his views, Raoul Berger,[11] for failing to

9. P. 92. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 174 (1968) (Harlan, J., dissenting); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711-12 (1975).

10. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

11. Mr. Curtis has been engaged in an on-going debate with Professor Berger over incorporation. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Curtis, *The Bill of Rights as a Limitation on State Authority: A*

attach any significance to the fact that "[t]he Fourteenth Amendment was a Republican amendment. It was opposed by the mass of Democrats. But Fairman regularly found the Democrats to be the people who had a clear understanding of the Bill of Rights question. Republicans, he said, were confused" (p. 100; footnote omitted). Curtis concedes that prevailing Republican legal thought could only be characterized as "unorthodox" (p. 52) in light of earlier Supreme Court pronouncements.[12] However, he argues that it was precisely the point of the fourteenth amendment to overrule these earlier Supreme Court decisions and secure the status of orthodoxy for Republican views of civil liberty. "Although [Fairman's] analysis probably accurately reflects the state of constitutional law in 1866, it ignores a Republican consensus on the proper interpretation of the Constitution" (p. 109). Of course, if Curtis is correct in assessing the Republican consensus of 1866, then he certainly seems justified in treating prior precedent as irrelevant to the proper interpretation of the amendment.

As impressive as Curtis's historical evidence is, he is vulnerable to the charge that he relies on Republican statements of intent to the exclusion of all others. However, while Curtis draws little support from members of the Democratic minority, he compensates for this flaw to some extent by his citation to a wide variety of sources — from Blackstone (p. 64) to Cardozo (pp. 199-200) — for the proposition that the phrase "privileges and immunities" has been used before and after the drafting of the fourteenth amendment to include our most cherished rights. Certainly, this is what some of the Republicans meant, and none of the other congressmen challenged this interpretation.[13] Thus, the argument is not simply that Republicans *intended* that the fourteenth amendment apply the Bill of Rights to the States, but that they said so by choosing language that any contemporary — even from the opposing party — would have understood to have that meaning.

Reply to Professor Berger, 16 WAKE FOREST L. REV. 45 (1980); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat,* 42 OHIO ST. L.J. 435 (1981); Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights,* 43 OHIO ST. L.J. 89 (1982); Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response,* 44 OHIO ST. L.J. 1 (1983).

12. Republicans repeatedly stated that the Bill of Rights prohibited certain state actions, in spite of the Supreme Court's conclusion to the contrary in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

13. P. 91. "John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.* . . . Today, the idea that states should obey the Bill of Rights is controversial. It was not controversial for Republicans in the Thirty-ninth Congress." P. 91 (emphasis in original).

Curtis points out that it would be inaccurate to have used the phrase "Bill of Rights," because "the rights of American citizens include, but are not limited to, those in the Bill of Rights." P. 219. *See also* note 7 *supra* (discussing Justice Murphy's similar view expressed in his dissent in Adamson v. California, 332 U.S. 46, 124 (1947)).

In the remaining chapters, Curtis chronicles the treatment which the amendment received after it was drafted: before the states during ratification (pp. 131-53), in congressional attempts at enforcement (pp. 154-70), and before the courts (pp. 171-211). The events described in these later chapters provide further support for Curtis's arguments; however, they make the book considerably less readable without appreciably enhancing the cogency of the argument. This is the biggest problem with Mr. Curtis's otherwise excellent book. The main arguments of the book are supported and developed continuously throughout the book as Curtis moves laboriously through each stage of the drafting process. This choice of chronological rather than thematic organization relies too much on the sheer volume of Curtis's research and undervalues the importance of carefully structuring the arguments he advances. The result is that the considerable power of the thesis is at times obscured by the mass of evidence in its support. The chronological organization is probably unavoidable, but the thesis might have been communicated much more effectively if Curtis had spilled more ink in arguing from his evidence and less in merely presenting it.

Since the Supreme Court has "selectively incorporated" most of the privileges and immunities in the Bill of Rights anyway,[14] one might reasonably question the relevance of the issue today. Curtis removes any such doubts by pointing to recent Supreme Court decisions holding the states to a lesser standard in securing the guaranties thus incorporated.[15] "The fact that a growing body of political opinion is clamoring to free the states from federal protection of the guaranties of individual liberty contained in the Bill of Rights is a disturbing development" (p. 211).

If it is disturbing to Mr. Curtis, it is just as encouraging to the current Attorney General of the United States. As Professor William W. Van Alstyne points out in a Foreword to the book, Mr. Meese has recently urged repudiation of the doctrine of incorporation (pp. vii-x). Moreover, "[t]he fact is that Mr. Meese's point of view does not stand alone; it is no late Reaganite novelty, and it has troubled some of the most serious scholars (and judges) of our constitutional history" (p. ix).

If history is the field on which the interpretative battle will be

14. Significantly, the Court has not settled upon a single rationale for doing so, as Professor Van Alstyne points out in the Foreword. P. ix.

15. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (both upholding nonunanimous jury verdicts in state criminal trials); Williams v. Florida, 399 U.S. 78 (1970) (state juries may consist of fewer than twelve jurors). The second Justice Harlan protested in *Williams*, 399 U.S. at 118, and in Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (applying the right to a jury trial to the states), that the application of the Bill of Rights to the states would bring about a dilution of the guaranties in order to make it easier for the states to comply. It appears that this prediction was accurate. *See* Colgrove v. Battin, 413 U.S. 149 (1973) (extending *Williams'* approval of juries of less than twelve to federal juries).

fought, then Mr. Curtis has made an invaluable contribution.[16] Until now, few have taken issue on *historical* grounds with the Attorney General's contention that "nothing can be done to shore up the intellectually shaky foundation upon which the [incorporation] doctrine rests" (p. viii). With *No State Shall Abridge*, however, Mr. Meese should be on notice that scholars are rising to the challenge. As Curtis writes, "The Court can change direction — if it chooses — and allow states to violate the Bill of Rights. It cannot, however, justify this result by a fair reading of history" (p. 211).

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16. Curtis acknowledges, however, that he is unlikely ever to gain an undisputed victory in the historical battle, due to the nature of historical inquiry: "In a real sense one can never prove that the amendment was designed to apply the Bill of Rights to the states. One can simply take the hypothesis and see how well it fits the evidence." P. 217.