DEMOCRACY'S CHAMPION: A TRIBUTE TO MICHAEL KENT CURTIS

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When my former law professor, mentor, friend, and colleague at Wake Forest Law School for eighteen years, Professor Michael Kent Curtis, retired in the fall of 2020, I minded, quite frankly, more than I can say. In many ways, Professor Curtis has been the North Pole of my career. Michael inspired me to think that my career as a law professor could be possible. And as one of the earliest advocates for my tenured appointment at Wake Forest, he provided not only the inspiration but, in a material sense, the path to its realization. Words fail me in expressing gratitude for that early and essential support.

Beyond that, Michael has been the model for the kind of scholar I strive to be: always honest (a virtue in the context rarer than one might think), fierce but compassionate, rigorous, path-charting, *and practical* (translation: useful to lawyers). He knew how to pick his battles, but he never shirked a challenge he thought worth rising to, however the odds may have looked on the outside.

In my view, Professor Curtis's most important victory came in his clash with Raoul Berger, the most prominent academic opponent of the application of the Bill of Rights of the federal Constitution to the states—so-called incorporation.[1] While the Supreme Court famously shrank the Privileges or Immunities Clause of the Fourteenth

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1. *See generally* Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619 (1997); Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517 (1997); Raoul Berger, *A Lawyer Lectures a Judge*, 18 HARV. J.L. & PUB. POL'Y 851 (1995); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Raoul Berger, *Liberty and the Constitution*, 29 GA. L. REV. 585 (1995); Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715; Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1 (1994); Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9 (1993); Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993); Raoul Berger, *"Original Intent": A Response to Hans Baade*, 70 TEX. L. REV. 1535 (1992); Raoul Berger, *Incorporation of the Bill of Rights: A Response to Michael Zuckert*, 26 GA. L. REV. 1 (1991); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

Amendment to virtual nonexistence,[2] it had, in fact, beginning in the 1920s, held the states bound by federal constitutional safeguards.[3] By 1968, the Court had applied nearly all of the Bill of Rights to the states by reading substantivity into the Fourteenth Amendment's Due Process Clause.[4] This approach was the anathema of the country's archconservatives, and its legitimacy remained under sustained but largely futile attack.[5]

In the early 1980s, political reactionaries believed they finally had an administration strong enough to roll back the Bill of Rights and vindicate state sovereignty as they saw it.[6] President Reagan, especially through his attorney general Edwin Meese, was an eager champion of the cause.[7] Meese's July 1985 speech before the American Bar Association in Washington, D.C., was nothing less than a declaration of war on incorporation and the fundamental rights doctrine.[8] Consequently, the very fabric—the meaning—of American citizenship was at stake; and America's twentieth-century Anti-federalists appeared to be ascendant.

In a series of exchanges with Professor Berger, culminating in what is perhaps his best-known work, the book *No State Shall Abridge*, Professor Curtis, who was at the time practicing law full-time as a partner at a Greensboro, North Carolina law firm, picked up the battle.[9] Unlike most civil libertarians opposed to anti-incorporation goals who generally dismissed and, therefore, avoided

2. *See* Slaughter-House Cases, 83 U.S. 36 (1872).

3. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 581 (1937).

4. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

5. *See* Kevin F. Ryan, *Lex Et Ratio . . . Courts and the Culture Wars*, 29 VT. BAR J. 5, 6–7 (2003).

6. *See* Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 118 (1996).

7. *Id. See also* Peter Schotten, *Is the Constitution Still Meaningful? Public Reflections Upon the Fundamental Law of the Land*, 33 S.D. L. REV. 32 (1988) (explaining that Meese supported decisions favorable to states' rights).

8. Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 460–66 (1986).

9. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2–3 (1986); Michael Kent Curtis, *Reflections on Albion Tourgée's 1896 View of the Supreme Court: A "Consistent Enemy of Personal Liberty and Equal Right"?*, 5 ELON L. REV. 19, 20 (2013); Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1393–94 (2009); Michael Kent Curtis, *The Bill of Rights and the States Revisited After Heller*, 60 HASTINGS L.J. 1445, 1482 (2008); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 915 (2008); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 20 (1996).

originalism's specifics, Curtis chose to meet Meese and Berger head-on—on the ground of originalism itself—marshalling first-order, first-rate, historical scholarship to prove that the framers of the Fourteenth Amendment actually had intended for it to serve as a limitation on state government action.[10] I sometimes wonder what might have been had Berger not been foolish enough to challenge him. How lucky we are that Berger did so.[11] It is no exaggeration to say that Professor Curtis stopped the Reagan/Meese assault on incorporation of the Bill of Rights in its tracks.[12] Anyone who has benefited from, say *Lawrence*[13] and *Obergefell*,[14] as I have, misses an important part of the picture if he misses this.

In addition to his primacy as a scholar of constitutional interpretive theory, Michael's name has been synonymous, for more than thirty years now, with freedom of speech. He represented the ACLU in countless cases long before joining the Wake Forest Law faculty.[15] His advocacy of and importance to this issue nationally are ongoing.[16] He is, quite simply, a giant in First Amendment law, cited by scholars and courts alike; and I say this even though our disagreement on certain First Amendment questions is widely documented. [17] His commitment to free expression was never

10. *See* Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45, 45–46 (1980) (criticizing RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977)); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 435–36 (1981); Michael Kent 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, 90 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1, 1 (1983); Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517, 517–18 (1984).

11. *See id.*

12. *See* Michael Kent Curtis, *Conceived in Liberty: The Fourteenth Amendment and the Bill of Rights*, 65 N.C. L. REV. 889, 890 (1987); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 715 (2013).

13. Lawrence v. Texas, 539 U.S. 558 (2003).

14. Obergefell v. Hodges, 576 U.S. 644 (2015).

15. *See In re* R.L.C., 643 S.E.2d 920 (N.C. 2007).

16. *See, e.g.*, MICHAEL KENT CURTIS, FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); Michael Kent Curtis, *Democratic Ideals and Media Realities: A Puzzling Free Press Paradox*, 21 SOC. PHIL. & POL'Y 385 (2004); Michael Kent Curtis, *Free Speech Matters*, HUFFPOST: THE BLOG (Aug. 20, 2015, 10:48 AM), https://www.huffpost.com/entry/free-speech-matters_b_8007178.

17. *See* Shannon Gilreath, *"Tell Your Faggot Friend He Owes Me $500 for My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557, 609–10 (2009).

situational or self-serving. He believed in giving his opponents equal time. In my personal experience, he often facilitated that equal time.

Lastly, I want to note that Professor Curtis, unlike many legal academics, always remained engaged with legal advocacy work. As but two principal examples, I offer his efforts to halt an erosion of the right to sexual autonomy for gay and lesbian North Carolinians by a state supreme court in the hands of religious zealots,[18] and his role as a guiding architect of the theory of equal protection that saw the delegitimization in the Fourth Circuit of the racial gerrymander of North Carolina's electoral districts.[19] Michael came to the Wake Law faculty not as a refugee from law practice but at the apogee of a successful career as a litigator and appellate lawyer.[20] His reputation for defending fundamental freedoms and for intervening for racial justice was made long before he settled in at Carswell Hall,[21] where he arrived with an already impressive record of important scholarship accomplished while he was a full-time litigator.[22] But he never simply rested on his well-deserved accumulation of laurels. In his seventies, he still did twice as much as I did in my forties. And, as this symposium attests, he is still working.

The reason for this longevity always appeared to me to be explained by the fact that Professor Curtis, in my view, possesses in estimable measure what I think is the defining characteristic of truly great lawyers. That characteristic is compassion. Empathy is an improvement over callousness, certainly. But empathy alone is worth comparatively little to real people oppressed through real injustice. Compassion—by which I mean, in context, the courage to intervene in the unjust situation in order to make a difference—is the ultimate requirement. Professor Curtis has been and remains a model of the wise, compassionate, and effective legal advocate.

When the *Wake Forest Law Review* board and certain of his faculty colleagues had the idea to mark his retirement from the Wake Forest Law faculty with a dedicated symposium, Professor Curtis demurred from the traditional Festschrift, preferring instead for this symposium to be a percolator of ideas that may constitute effective interventions in the assaults on our constitutional freedoms that are

18. *See In re* R.L.C., 643 S.E.2d at 920–21.

19. *See* Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019).

20. Michael Kent Curtis, *Resume* (2016), http://mirrored-files-digitalmeasures-wfu.s3-website-us-east-1.amazonaws.com/curtismk/pci/cv.curtismk-1.pdf.

21. Carswell Hall was the original home to Wake Forest's law school after the school's move from the town of Wake Forest, North Carolina to Winston-Salem, North Carolina. The Law School later moved to the Worrell Professional Center, where it remains today.

22. *See Resume*, *supra* note 20.

now at pace with a renewed vigor.[23] That is exactly the sort of scholarship, with Professor Curtis's work as a springboard in many instances, that resulted from this energizing symposium.

As only one high-profile example of the need for such focused work, Justice Alito's *Dobbs v. Jackson Women's Health Organization*[24] opinion is proof certain that the Meese form of anticonstitution constitutionalism is alive and well—and on the offensive. In this "to the barricades!" moment for civil libertarians, it is worthwhile to remember that Professor Curtis's decades of committed advocacy and illuminating constitutional scholarship, aimed chiefly at preserving American democracy, helped to build the very barricades to which we go. And that is where, in this moment of what many of us believe is a veritable constitutional crisis, Professor Curtis will surely be, and where he would want us all to be.

23. Rick Hasen, *January 28 Wake Forest Virtual Symposium: "Preserving American Democracy: Exploring Modern Democracy through the History and Development of First Amendment Jurisprudence and Election Law"*, ELECTION LAW BLOG (Jan. 18, 2022, 6:43 AM), https://electionlawblog.org/?p=126988.

24. 142 S. Ct. 2228 (2022).