FOREWORD

THERE ARE FEW HISTORICAL clichés more hoary than this one: *The abolitionists were a tiny, beleaguered minority, widely despised all across the North.* The evidence compiled by Randy E. Barnett and Evan D. Bernick strongly suggests that this is a cliché badly in need of revision. Not because the abolitionists were in fact popular—they were not—but because they were influential. Profoundly influential, in fact. For it was the “constitutional abolitionists” who developed, as the title of this book says, “the original meaning of the Fourteenth Amendment.”

Historians do not write books like this one, aimed as it is at getting the justices of the United States Supreme Court to change the way they interpret the Constitution. Written by two law professors, this book is explicitly, unabashedly designed to persuade the Court to reconsider some longstanding constitutional assumptions about the Fourteenth Amendment.

But to make their case, the lawyers have written a history book. The questions they raise are deeply historical. Where did the phrase “privileges and immunities” originate? What did the phrase originally mean, and how did that meaning change over time? What did it mean by the time the authors of the Fourteenth Amendment invoked it? So, too, with “due process of law” and “equal protection of the law.” Where did those terms originate, and what did they mean in 1868, when Republican lawmakers inserted them into the amendment?

To be sure, Barnett and Bernick are “originalists.” They would have the Constitution interpreted, even today, in accordance with the original *public*

meaning of the text. At first glance this might raise eyebrows among my fellow historians. We are generally more comfortable with multiple or conflicting meanings, with meanings that change over time. We tend to be empiricists more than theorists. We are willing to consider original *intent* as well as original *public meaning*—and we don't usually distinguish between the two. Although we prefer contemporary evidence, we are often forced to rely on memory, fallible though memory undoubtedly is. And yet, "original public meaning," though terminologically alien, is conceptually familiar to historians. Think of it as reading ideas in context, not unlike what Quentin Skinner challenged historians to do several decades ago.

Nor should historians be too concerned that originalism necessarily freezes the Constitution in time. The Fourteenth Amendment, as Barnett and Bernick read it, authorizes the federal government to protect the civil rights of citizens in the states. This, they tell us, is its original and therefore unalterable meaning. What has changed over time, however, is what the political culture has deemed to count as a constitutionally protected "civil right."

In the early republic, for example, voting was considered a mere "political" right, a right that varied from state to state, a right that could be granted or withdrawn at the pleasure of a state legislature. Voting was still thought of that way when congressional Republicans drafted the Fourteenth Amendment. But by 1920, Barnett and Bernick argue, "the right of citizens who had reached the age of majority to vote was deemed fundamental. What was once a mere 'political' right to suffrage had *become* a fundamental civil right." Once that happened, the authors argue, the Fourteenth Amendment empowered the federal government to protect every citizen's right to vote.

Because a right that comes to be accepted as *fundamental* cannot, almost by definition, be taken away, the Fourteenth Amendment created a floor but not a ceiling for the privileges and immunities to which we are entitled. In this telling, then, the unchanging original meaning of the Constitution allowed for a Constitution that can adjust to changes in the political culture. The number of constitutionally protected civil rights could rise, but it could not fall—except by a formal constitutional amendment that changes the meaning of the text.

This is where the abolitionists come in, for they were instrumental in changing the way Americans came to think about the privileges and immunities of citizenship. According to Barnett and Bernick, the original public meaning of the Constitution—the Constitution of 1787—was that civil rights were protected as a matter of interstate comity. But states themselves could

respect or disrespect rights as they chose, as long as every state citizen's rights were respected or disrespected in the same way. And not all states considered African Americans to be citizens of the United States.

As the debate over slavery intensified, abolitionists began to argue that some rights were *fundamental*, that free Blacks born in the United States were citizens, and that every US citizen was entitled to the same rights everywhere. In the abolitionist reading, for example, no state could deprive *any* citizen of the rights of due process.

The radicals who pioneered this way of thinking—Lysander Spooner, William Goodell, Gerrit Smith, and others—were dubbed “constitutional abolitionists” by the historian Richard Sewell, and more recently, Manisha Sinha has labeled their doctrine “abolitionist constitutionalism.” By the 1850s the radical precepts of abolitionist constitutionalism had infiltrated American politics and became the baseline premises of the new, antislavery Republican Party.

Defenders of slavery responded in kind. They, too, began to argue for a fundamentalist understanding of rights, in this case a slaveholder's right to hold property in human beings. So fundamental was this right, Chief Justice Roger B. Taney would argue, that the Constitution obligated the federal government to protect slave property in the territories.

By the 1860s, then, there was wide agreement that the privileges and immunities of citizenship were fundamental and that the federal government was therefore obliged to protect citizens in the enjoyment of those rights.

The significant point the authors make is that the original meaning of the Fourteenth Amendment is to be found in the antislavery constitutionalism that was developed by abolitionists in the decades between the Revolution and the Civil War, particularly after the Missouri Crisis in 1820. By the time congressional Republicans proposed a Fourteenth Amendment, in the immediate aftermath of the Civil War, they understood their proposal to mean several things: Blacks born in the United States were citizens. All citizens were entitled to a number of rights, some of them enumerated in the Constitution, some spelled out in the first eight amendments, and some unenumerated. These rights were fundamental, not simply a matter of mere state comity. Consequently, the federal government was constitutionally obliged to protect those rights in the states.

This is a bracingly expansive reading of the original meaning of the Fourteenth Amendment. No doubt constitutional scholars will debate its merits or demerits as an originalist thesis. No doubt historians will similarly

debate it as an interpretation of Reconstruction. But to this reader, Barnett and Bernick have made at least one point in this superb book that seems beyond doubt: the abolitionist movement bequeathed to all Americans, through the Fourteenth Amendment, a better Constitution, an egalitarian understanding of citizenship, and a more robust conception of our fundamental rights.

James Oakes