More Harm Than Good

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In 1985, at the American Bar Association’s annual convention, Attorney General Edwin Meese, III, stated that “it has been and will be the policy of [the Reagan Administration] to press for a jurisprudence of original intention,”1 and suggested that the framers of the fourteenth amendment never intended its passage to bind the states to the strictures of the Bill of Rights.2 Although the theories it advanced were not original, the speech frightened many civil libertarians. Meese is the top spokesperson on legal affairs for the Reagan Administration. As Attorney General, he plays an important role in selecting judicial nominees for a President who, by the end of his second term in office, will have appointed not only at least two United States Supreme Court Justices, but over half of the sitting federal appellate judges in the country.3 Because of his stature, the Attorney General’s advocacy of the “original intent” doctrine could not be dismissed as right-wing rhetoric; thus many challenged the legitimacy of the doctrine, in scholarly journals,4 in courtrooms,5 and in the

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2. Id. at 463-64. The pertinent part of the fourteenth amendment is contained in section one:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.
5. For example, Justice White has written:

As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to . . . the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.
editorial pages of major newspapers.6

In his recent book, No State Shall Abridge, Michael Kent Curtis, a practitioner and law instructor at Guilford College, enters this debate taking an approach different from those of most civil libertarians. Instead of attempting to refute the theory of original intent, Curtis adopts it and sets out to prove that the original intent of the framers of the fourteenth amendment actually was to force the states to comply with the Bill of Rights. He contends that reading the fourteenth amendment in light of the antislavery movement which brought about its passage reveals that its framers intended to provide citizens, especially the newly freed ones, with protection from state tyranny.

Admirably, Curtis has waded through a tremendous quantity of paper to prove that the framers, or at least a majority of them, intended the fourteenth amendment to apply the Bill of Rights against the states. Yet despite the impressive volume of material that the author gathers to support his theory, one cannot help thinking that Attorney General Meese could find equal support for the opposite conclusion. The book leaves a nagging and disturbing suspicion that this debate could go on ad infinitum without resolution.

By engaging in the original intent debate, Curtis lends legitimacy to a doctrine that some have charged is being used by the Reagan Administration to mask a political ideology.7 These critics attack the Attorney General's advocacy of the doctrine, maintaining that original intent is not a viable legal theory and that Meese is using it to hide the Administration's political goals. Curtis, on the other hand, chooses to debate Meese on his own ground. While this is a noble tactic, his failure to set the debate to rest ultimately succeeds more in bolstering the original intent theory than in proving Meese wrong. In this way, perhaps Curtis does more harm than good.

Section I of this Note describes the methodology and focus of No State Shall Abridge, which Curtis discusses in his Introduction. Section II critiques Curtis' analysis of the political and legal philosophies of the framers, contained in Chapter Two. Section III discusses his analysis in Chapter Three of the debates in Congress and among the states about the fourteenth amendment; section IV reviews Chapters Seven and Eight in which Curtis discusses the Supreme Court's interpretation of the fourteenth amendment. Section V discusses Curtis' Chapter Four devoted to

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7. See infra notes 62-65 and accompanying text.
addressing some of his major critics. The last section of this Note is an analysis of Curtis' thesis.

I. Methodology: An Antislavery Analysis

History, Curtis argues, is a powerful legitimizing force and a useful political tool. He maintains that those who are interested in safeguarding civil liberties should use history to support their arguments (p. 5). Accordingly, he sets out to prove that the framers of the fourteenth amendment intended to afford all citizens the special protections enunciated in the Bill of Rights, and that these protections were intended to shield the people from the tyranny of the states as well as of the federal government.

Curtis points out that the crux of the debate over the fourteenth amendment at the time of its passage was not whether it would apply the Bill of Rights to the states, but the conditions under which the Confederate States would be readmitted to the Union. Thus, the primary issue surrounding the fourteenth amendment for many modern legal theorists was one of the least important to its framers. Because so little was said on the issue to which the book is addressed, we must look beyond the debates and writings of the framers to understand their intentions.

Curtis interprets the silence concerning the Bill of Rights issue by analyzing what was said about section one of the fourteenth amendment in its historical context. This he calls an "antislavery" analysis. He investigates and discusses not only the historical events surrounding the debates, but also the political and legal theories of the cast of characters. To understand what the framers intended, he argues, one must understand what the framers were experiencing and what they believed.

Curtis begins his analysis by exploring the language of the fourteenth amendment. He then analyzes the political and legal philosophies of the amendment's proponents. Finally, he examines the speeches and debates in light of these philosophies and their historical context.

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8. Article I, § 2 of the Constitution provided: "Representatives . . . shall be apportioned among the several states . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free persons . . . three fifths of all other Persons." Thus, slaves were counted as three-fifths of a person for representational purposes. The thirteenth amendment abolished slavery, yet the Southern States would not permit blacks to vote. Many Republicans feared that this increase in Southern representation without black suffrage would mean that "[a]fter four years of civil war and untold suffering, it now seemed that the leaders of the rebellion might return to political power on the backs of their disfranchised black population" (p. 14). This concern was tied to the war debt issue, for if the Republicans were to lose their majority in Congress, the war debt could be repudiated or the taxpayers could even be required to compensate slaveholders for the loss of their slaves.

9. As Curtis points out "[o]f the 428 words in the Fourteenth Amendment, 67 were relevant to the Bill of Rights question . . . ." (p. 15).
II. What the Framers Were Thinking

The majority of the book is devoted to analyzing the motivations of the framers of the fourteenth amendment. In five chapters, Curtis explores the beliefs of the framers, the events just prior to the introduction of the amendment, the debates in Congress attending its passage, and the discussion of its meaning among and within the states.

The major theme of *No State Shall Abridge* is that the Republican antislavery thinkers who brought about the enactment of the fourteenth amendment were part of the same movement that argued that the Bill of Rights should be applied against the states. Curtis traces the roots of Republican antislavery thought to the framers of the Declaration of Independence. He points out that some found painful contradictions in a political philosophy that declared that "all men are created equal" yet sanctioned the institution of slavery. A minority, including George Mason, James Madison, and Thomas Jefferson, rebelled against this contradiction. They focused their attention on creating a Bill of Rights that would enumerate protections to which every citizen was entitled, including protection from oppression by the states as well as by the federal government.

Curtis acknowledges that these dissenters did not prevail. When the Bill of Rights came before the Supreme Court in *Barron v. Baltimore*, the Court immediately interpreted it as a set of checks on potential abuses by the federal government and explicitly rejected the argument that it should apply to the states (p. 22). Yet a minority both in the judiciary and in Congress continued to press for an interpretation which would limit the power of the states to infringe on basic liberties. Curtis found opinions in thirteen state courts which "suggested that the specific rights in the federal Bill of Rights limited the states [even] after the decision in *Barron*" (p. 25). Curtis concludes that a minority kept the issue alive—a minority that evolved into the Republican Party of the 1850s and 1860s.

In discussing the Civil War years, Curtis paints an antislavery pic-
nature of the Republican party. He writes that in many ways the Republican party was born out of the abolitionist movement. The party was determined to abolish slavery or at least not permit it to spread to other territories (p. 27-28). In furtherance of this goal, Republicans argued that because free blacks were citizens, they were entitled to constitutional protections.

As the antislavery movement grew, opposition from the Southern States intensified and took the form of suppression of civil liberties, especially free speech and assembly. This oppression was directed, not only against blacks, but against white northerners as well (pp. 28, 30-31). In response, the Republicans "developed a legal theory by which the states as well as the federal government could not deny the fundamental rights of American citizens" (p. 28). Thus, the Republicans' antislavery ideas became intertwined with their belief in the protection of civil liberties (pp. 36-40).

Republican political and legal theories reinforced these ideas. Curtis describes the Republican political philosophy as one which envisioned a government constituted to protect the natural rights of all its citizens, including blacks. Republican legal theory was antislavery as well. Republicans rejected the Supreme Court decision in *Dred Scott v. Sandford*, 13 which declared the extension of slavery legal. Some read the privileges and immunities clause of article IV, section 2, as a hook by which the federal Bill of Rights could be applied against the states (pp. 42-44, 47-48 & 63-65), or found slavery to be a violation of the due process clause of the fifth amendment because blacks were deprived of their liberty without a trial (p. 46).

Curtis concludes that the political, legal, and social goals of the Republican party were born out of the antislavery sentiments of its members and that these sentiments were closely related to strong beliefs in civil liberties. Thus Curtis sets the background for the debates on the fourteenth amendment.

The major problem with Curtis' analysis at this point is his failure to consider the entire range of possible motives of the Republican Party. He describes the goals of President Lincoln and the majority of Republican congressmen in terms of lofty ideals. "Republicans saw events from 1830 to 1866 as a battle . . . to determine whether the nation would become all slave or all free. They believed the liberty of all citizens of the United States hung on the outcome of that battle" (p. 36).

Other Civil War historians have investigated alternative motives of President Lincoln and the Republican Party. Kenneth Stampp, 14 Michael Holt, 15 and Howard Zinn 16 suggest that President Lincoln and

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others in the Republican Party, including radical Republicans, had motivations for supporting abolition that had little to do with the protection of the rights of citizens.

Stampp quotes from a speech given by President Lincoln in 1858. The President said:

I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races,—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.  

From these remarks, Stampp concludes that Lincoln's reasons for supporting abolition were more complex than those of more egalitarian abolitionists.

Even the radical Republicans, Stampp writes, harbored reasons for promoting abolition other than a concern for blacks in the South. Radical Republicans were motivated by a desire to punish southern whites who they believed were responsible for the Civil War. They also saw black suffrage as a means of defeating Southern Democrats at the polls and protecting their industrial economic interests from the agrarian interests of the South. Stampp concludes that “the [Republican] radicals were something less than saints and that some of their motives were ignoble.”

Professor Holt suggests another possible motive underlying Republican support for abolition: concern for the white worker. Some Republicans “insisted that the issue was not white men versus Negroes; rather it was the contest between the slave oligarchy of the South who wanted to introduce slavery into Kansas and the free laborers of the North who wanted to save it for white workingmen.”

Professor Zinn argues that the Republicans, fearing a violent and radical revolution that would encompass not only emancipation but eco-

17. K. STAMPP, supra note 14, at 33.
18. The Radical Republicans had “in them a streak of hatred and bitterness toward the South, a desire to punish her for her ‘treason.’” Id. at 90.
19. Id. at 93; see supra note 8.
20. “[T]he agrarian interests in the South and West, ever suspicious of bankers, capitalists, and urban entrepreneurs generally, posed a serious threat to the economic groups the Republican party represented and to the legislation passed for their benefit.” Id. at 95.
21. Id. at 97.
nomic reform, moved to co-opt the abolitionist movement and contain it. Zinn disputes that freeing the slaves was the sole motivation for the Civil War. He points to a resolution passed by Congress in the summer of 1861: "this war is not waged... for any purpose of... overthrowing or interfering with the rights of established institutions of those states, but... to preserve the Union." 25

While Curtis does concede that not all Republicans who pushed for abolition did so out of concern for the slaves and that while Republicans were antislavery, they were not necessarily committed to political, economic, or social equality (p. 29), he declares in his summation of Republican goals for Reconstruction: "To Republicans the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of the citizens of the United States" (p. 54).

Curtis' failure to adequately address other possible motives shakes his thesis considerably. For if we are to look at the historical reality of the Civil War era to fill the silences left in the debates around the fourteenth amendment and thereby discover the intent of its framers, we must look at all the relevant events and motivations. The fact that motivations other than a desire to free the slaves are omitted from Curtis' analysis is cause to doubt that Curtis has correctly filled in these silences.

For example, in a later chapter when he bemoans the judicial misreading of what he sees as the intention of the framers in passing the fourteenth amendment, Curtis states: "For reasons not entirely clear, Republican judges were abandoning... the rights of blacks" (p. 179). Perhaps if Curtis had investigated the motives of the Republicans a little more closely, he would not have expressed such incredulity at the loss of their commitment to civil liberties. Perhaps that commitment never existed or at least was not the primary motivating factor behind the passage of the fourteenth amendment. If that is true, it undermines his thesis that one must analyze the words of the framers in light of their commitment to abolition and civil rights.

III. What the Framers Said

While Curtis may have misconstrued the motives of the Republicans, he does find support in the legislative record for his argument that the fourteenth amendment was intended to limit abuses of power by the states. In Chapter Three, entitled "The Framing of the Fourteenth

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24. Id. at 193.
25. Id. at 185.
Amendment,” Curtis quotes extensively from the debates, focusing primarily on the author of the fourteenth amendment, Congressman John Bingham.

Bingham was a strong abolitionist who rejected the Supreme Court decisions which declared the states free from the constraints of the Bill of Rights, and who set out to amend the Constitution to prevent further abridgment of civil liberties. Bingham believed that, properly interpreted, the due process clause of the fifth amendment and the privileges and immunities clause of article IV, section 2, applied the limitations of the Bill of Rights to state as well as federal power (p. 61). However, he also recognized that this was not the law—hence the need for an amendment to the Constitution (p. 62). Thus, Curtis proves that at least the principal author of the amendment intended it to be a powerful limit on state abridgment of civil rights.

Curtis does not end his discussion with Bingham. He finds language from other members of Congress who saw the purposes of the fourteenth amendment in the same light. For example, Senator Howard, the amendment’s primary sponsor in the Senate, defined the phrase “privileges and immunities” in the fourteenth amendment as rights which included “the personal rights guarantied and secured by the first Eight Amendments of the Constitution . . . .” (p. 88). After quoting extensively from many congressmen and senators who supported Bingham’s and Howard’s interpretation of the amendment, Curtis concludes that there was “[n]ot a single senator or congressman [who] contradicted [him]” (p. 91). Curtis also finds support for his thesis in the discussion of the amendment when it went before the states for ratification (p. 146).

Yet some of the most powerful support for Curtis’ argument comes from opponents to the amendment. They too saw the amendment as applying the Bill of Rights against the states, and for this reason vigorously opposed it. In the early part of 1867, for example, some Southern Democrats led by President Andrew Johnson recognized that the fourteenth amendment would limit states’ power. They prepared an alternative to section one which confirms that they understood the amendment’s sweeping effect (p. 151).

Thus, Curtis gathers strong support for his thesis from the speeches of many of the participants in the framing and ratification of the fourteenth amendment. This evidence, he argues, was later ignored when the amendment was presented to the Supreme Court for interpretation.

IV. Judicial Interpretation

In the last two chapters of the book, Curtis discusses the Supreme Court’s interpretation of the fourteenth amendment. First he addresses the Court’s early opinions, which explicitly held that the fourteenth amendment did not apply the Bill of Rights against the states (pp. 171-
96), and then he analyzes the later move toward selective incorporation (pp. 197-211).

Believing that he has already proved his thesis that the framers of the fourteenth amendment intended it to apply the Bill of Rights against the states, Curtis devotes his first chapter on judicial interpretation to illustrating how the Court erred in reaching the opposite conclusion. He chastises the Supreme Court for ignoring the historical events surrounding the fourteenth amendment's passage as well as its legislative history (p. 173).

In exposing some of the poor reasoning employed by the Court in this period, Curtis discusses *The Slaughter-House Cases*, in which Justice Miller, writing for the majority, concluded that the "privileges and immunities" referred to in the fourteenth amendment were not the Bill of Rights but were rights such as the right to enter federal government facilities and the right to have access to seaports and protection on the high seas. Curtis finds this analysis incredible: "Why an amendment, which Miller incorrectly thought was designed only to protect blacks, would focus on things such as traveling back and forth to Washington D.C., and to the seaports and protection on high seas and in foreign countries, Justice Miller did not explain" (p. 176).

In listing case after case in which the Supreme Court refused to apply the Bill of Rights' protections to the states, Curtis suggests that the Justices were influenced by the rising tide of racism and federalism. In *United States v. Cruikshank*, a case involving a group of armed whites who had killed over sixty blacks, the Supreme Court held that the defendants could not be convicted for conspiring to deny blacks their right to assemble and bear arms. These rights, the Court held, were only secured against congressional interference. Curtis argues that two forces pushed the Court toward this conclusion. The first was the dying commitment to civil rights for blacks, which was accompanied by the increase in racial violence and the rise in Ku Klux Klan activity. The second was the newly found Republican commitment to federalism.

In this section, Curtis hints at a very important relationship; that between federalism and racism. Arguably, the simultaneous rise in the two was not purely coincidental, but rather that one was used to justify the other. In other words, those who were against securing civil liberties for blacks, instead of arguing their views openly, maintained that enforcing the Bill of Rights infringed upon states' rights. Curtis illustrates,
perhaps unintentionally, that the doctrine of "states rights" has often been a way of nicely preaching racism.

In Chapter Eight, Curtis explores the modern selective incorporationist approach to the fourteenth amendment. Under this theory, the Court rejected the contention that the term "privileges and immunities" in the fourteenth amendment is merely another way to refer to the Bill of Rights and instead held that the due process clause of the amendment mandated that those protections in the Bill of Rights which are "implicit in the concept of ordered liberty" are to be applied against the states. Thus, the right to counsel in certain cases, and the freedoms of speech, religion, and the press, just to name a few, were all made applicable to the states under the due process rather than the privileges and immunities clause of the fourteenth amendment.

Curtis rejects this approach because he maintains that the framers of the fourteenth amendment used the phrase "privileges and immunities" as a synonym for the Bill of Rights (pp. 64-65). Therefore, he argues, there is no need to selectively incorporate the Bill of Rights, for the privileges and immunities clause of the fourteenth amendment covers all of the rights contained in the Bill of Rights.

Curtis devotes close attention to minority opinions in various cases construing the Fourteenth Amendment. He concludes that six Justices have believed that the privileges and immunities clause of the fourteenth amendment applied the Bill of Rights to the states. "Unfortunately," writes Curtis, "they did not sit and reach their conclusions at the same time" (p. 191).

Curtis praises Justice Black's total incorporation theory, arguing that Black found historical support for his position that the framers intended to apply the Bill of Rights against the States (pp. 201-02). Curtis goes on to trace the Warren Court's expansion of the selective incorporation doctrine (pp. 202-04) as well as the Burger Court's cutback on this process (pp. 204-11). He concludes that if the Court continues to cut back on these protections "[i]t cannot . . . justify this result by a fair reading of history" (p. 211).

V. Addressing Critics

Curtis devotes an entire chapter to refuting those legal scholars who have concluded that the framers of the fourteenth amendment did not

with his employees. Id. at 61-62. The Court during this era had no difficulty disregarding the federalism doctrine to protect liberties it deemed important.

intend to apply the Bill of Rights against the states. While he discusses other theorists (pp. 110-13), Curtis devotes most of his attention to Charles Fairman (pp. 92-110) and Raoul Berger (pp. 113-129).

Charles Fairman, in an article published in 1949,36 argued that the framers of the fourteenth amendment did not intend to apply the Bill of Rights to the states. He, too, examined the debates surrounding the amendment’s passage but concluded that the “privileges and immunities” of the fourteenth amendment were not code words for the Bill of Rights. Fairman argued that the framers intended only to provide interstate travelers all of the protections that states afforded their residents. He did conclude, however, that the amendment was intended to hold the states to some higher standard, but argued that this standard was not defined by the framers. Accordingly, Fairman adopted the selective incorporationist approach and argued that the framers’ intent was to apply some unenunciated natural rights against the states.37

Curtis’ major criticism of Fairman’s analysis is that he examined the debates in an historical vacuum without understanding the antislavery origins of the amendment (p. 100). He also criticizes Fairman for paying more attention to the Democratic opponents of the amendment than to its Republican supporters (p. 100). He faults Fairman for overlooking explicit statements by senators and congressmen that they believed the fourteenth amendment was meant to apply the Bill of Rights against the states (p. 105). Moreover, he charges Fairman with being biased against congressmen who did not support his interpretation.

In a later chapter, Curtis addresses one of Fairman’s most powerful arguments. The Reconstruction Act, which passed after the Civil War, provided that, before states could be readmitted to the Union, their constitutions had to conform with the tenets of the United States Constitution, including the newly enacted fourteenth amendment. If, therefore, one read the fourteenth amendment as applying the Bill of Rights against the states, no state whose constitutional provisions contradicted any of the Bill of Rights could have been admitted. Fairman discovered several provisions conflicting with the Bill of Rights in the constitutions of readmitted states and concluded that Congress could not have intended the Bill of Rights to apply against the states.38

Curtis answers Fairman’s argument in two ways. First, he disputes Fairman’s conclusion that state constitutions contained provisions inconsistent with the Bill of Rights (pp. 155-56). Second, Curtis argues that if there were inconsistencies, they were either unnoticed or deemed insignificant by Republicans in Congress. These Republicans were anxiously

37. Id. at 139.
38. Id. at 126-32.
trying to secure the ratification of the amendment, and in their zeal to achieve that goal may have intentionally or inadvertently allowed inconsistent state provisions to stand (p. 155).

Curtis also addresses the original intent scholarship of Raoul Berger, with whom he has maintained an ongoing debate.\(^{39}\) Berger, like Fairman, argues for a strict interpretation of the privileges and immunities clause, claiming that it was intended only to grant visitors to a state all the rights accorded to the state’s residents.\(^{40}\) According to Curtis, if the clause is read as strictly as Berger maintains, “The Fourteenth Amendment would accomplish nothing beyond providing protection for temporary visitors. It would have been of no help to the mass of blacks in the South and of no help to southern unionists. All of the evidence indicates that these were the very people about whom Republicans were most concerned” (p. 115).

Curtis also faults Berger with lodging ad hominem attacks against Bingham and Howard, the amendment’s principal authors. Curtis criticizes Berger for his characterization of Bingham as “muddled,”\(^{41}\) “in-ept,”\(^{42}\) and having “veered as crazily as a rudderless ship.”\(^{43}\) Curtis further charges Berger with deliberately misquoting Bingham and thereby distorting his views (p. 123) and mischaracterizing Senator Howard’s comments as well (p. 127).

VI. Critique: Doing More Harm Than Good

One who sympathizes with his aims will find it difficult to criticize Michael Kent Curtis’ valiant attempt to refute the theory that the framers of the fourteenth amendment did not intend to apply the Bill of Rights against the states. Criticism, however, is in order. The original intent doctrine has been subjected to much important criticism and its proponents, especially in the Reagan Administration, have been accused of using the theory to further specific political goals in the guise of advancing a theory of jurisprudence. While Curtis is to be commended for attempting to refute the Reagan Administration’s arguments, he succeeds only in illustrating the futility of engaging in the debate. Although he does provide evidence that some framers intended the fourteenth amendment to apply the Bill of Rights against the states, he fails to

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40. See R. Berger, supra note 39, passim.

41. Id. at 145.

42. Id. at 219.

prove that all of those involved intended this result or that such an intention was the predominant impetus behind the amendment. And, indeed, it is impossible to prove such assertions one way or the other.

The critical problem with No State Shall Abridge lies in its use of and comfort with the doctrine of original intent. While Attorney General Meese has stated the Reagan Administration’s policy that constitutional jurisprudence “should be a jurisprudence of original intent,” many before him as well as his contemporaries have made powerful arguments that the theory is itself inconsistent with the intentions of the framers of the Constitution, is impossible to apply, and would produce undesirable consequences.

Most would agree that the Supreme Court, when interpreting the Constitution, should first look to the text and try to ascertain the plain meaning of the words. This approach, however, is limited in that the Constitution’s text is very broad and in fact invites interpretation. The debate over constitutional interpretation becomes more heated when one asks how the Supreme Court should interpret the vague meaning of the Constitution’s text. Disciples of the original intent theory conclude that the Supreme Court must search for the intentions held by the Constitution’s framers and “[w]here there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed.” This approach suffers from several problems and, while a detailed analysis is beyond the scope of this Note, some major criticisms should be mentioned.

There are many indications that the framers themselves never intended future generations to glean constitutional meaning from their thoughts and intentions. The broad language and vague terms the framers chose indicate not only that the Constitution and Bill of Rights were the product of political compromise, but that the framers intended that future generations should supply their own specific meanings. Instead of attempting to fill the silences in the debates over the fourteenth amendment with historical interpretation, many believe it best to let the “silences speak for themselves” as an indication that the framers intended the Justices to interpret the Constitution as legal scholars of their

44. Meese, supra note 1, at 456.
48. “[I]t is far from clear that the framers of [the Constitution] intended it to be construed in so rigid a manner, especially in light of their deliberate use of general language easily adaptable to changing circumstances . . . .” Alfange, supra note 46, at 609.
own times and not to look to the past for definitive answers.49

Some have argued that the framers never even considered the possibility that they would be looked to as a source for constitutional interpretation by future generations. "Of the numerous hermeneutical options that were available in the framers' day . . . none corresponds to the modern notion of intentionalism."50

Apparently James Madison, one of the primary authors of the Constitution, felt that future generations should look to the intentions of those who ratified the Constitution and not to the intentions of those who wrote it: "As the instrument came from [the drafter], it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State conventions."51 Following Madison's suggestion, however, leaves one with the impossible task of discovering any single intention motivating the hundreds of people who participated in the ratification process.

Attorney General Meese's goal of abiding by a "demonstrable consensus" among the ratifiers is thus very elusive. Justice Stevens illustrated the point in a recent address. The Justice recited what he understood to be Meese's position on the question of original intent and then wondered aloud if he had misconstrued the Attorney General's meaning. "But if there is ambiguity in the message that was conveyed by an articulate contemporary lawyer last July, is it not possible that some uncertainty may attend an effort to identify the precise messages that equally articulate lawyers were attempting to convey almost two hundred years ago?"52

Defining constitutional rights in terms of original intent also raises the important question of the relevance of the framers' intentions. This problem has two facets, first whether we, as twentieth-century Americans, want to live with the ideals and mores of a generation long gone, and, second, whether their thoughts are even relevant to modern legal problems.

Meese unintentionally illustrated the first problem himself. In an address before the Federalist Society in 1985, Mr. Meese gave several examples of Supreme Court opinions which he described as disregarding the framers' intent. One case he discussed, Dred Scott v. Sandford,53 held that free blacks were not "citizens" within the meaning of the Constitution. Meese read this decision as an example of "seeing the Constitution

50. Powell, supra note 46, at 948.
51. 5 ANNALS OF CONG. 776 (1796) (remarks of James Madison).
53. 60 U.S. (19 How.) 393 (1857); see supra note 13 & accompanying text.
as an empty vessel into which each generation may pour its passion and prejudice."54 In fact, Justice Taney, who wrote the opinion, believed he was applying the intentions of the framers. He wrote that blacks:

are not included, and were not intended to be included, under the word "citizens" in the Constitution. . . . On the contrary, they were at that time [of the adoption of the Constitution] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.55

This case, instead of providing an argument for original intent, dramatically illustrates that our society today would bristle at the idea of having to live by the beliefs of our predecessors.

The other side of this problem is equally troubling. As some have argued, many of today's judicial problems were neither considered nor imagined by the framers. Professor Tushnet, in discussing the question of desegregation of public schools, has written that the framers with their "very modest systems of selective and optional public education" could never have envisioned the public schools of today.56 Chief Justice Warren, writing for the majority in Brown v. Board of Education,57 stated: "In approaching this problem, we cannot turn the clock back to 1868. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."58 If we cannot rely on the framers' thoughts on public education then clearly we must hesitate to rely on them in deciding constitutional questions involving modern technology and science or other complex social, political, and economic relations that did not exist in 1868.

Thus, there are many important problems with the doctrine of original intent and most scholars as well as Supreme Court Justices have disregarded it as a tool for interpreting the Constitution.59 Furthermore, because many voices participated in the framing and ratification of the Constitution and Bill of Rights, the decision of which voice to heed is itself a political one. Contrary to the Attorney General's promises,60 original intent jurisprudence is not free from the danger of imposing normative values in the quest for constitutional meaning.

Anthony Lewis is one commentator who argues that in promoting

54. Meese, supra note 47, at 27.
55. Dred Scott, 60 U.S. at 404-05.
58. Id. at 492-93.
59. See supra notes 5 & 45-46.
60. Meese argues that "a jurisprudence of original intention . . . is not a jurisprudence of political results . . . [I]t is a jurisprudence that in our day seeks to depoliticize the law." Meese, supra note 47, at 29.
original intent, the Reagan Administration is attempting to disguise its political goals in the form of a legal theory. "[W]hat really interests the present Attorney General is not judicial philosophy but particular political results."\(^{61}\) Senator Joseph Biden agrees. "The Attorney General's real position is little-disguised social activism of the Right in which a minority perspective is being imposed upon a majority."\(^{62}\) Meese's own speeches on original intent expose his political agenda. He attacks several recent court opinions, in part for their method, but mostly for their results. "In my opinion" the Attorney General stated, "a drift toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of a limited but energetic government."\(^{63}\) Justice Brennan has interpreted Meese's theory of original intent as "in effect establish[ing] a presumption of resolving the textual ambiguities against the claim of constitutional right."\(^{64}\)

Curtis succeeds in showing that adopting a jurisprudence of original intent does not automatically ensure a specific political result.\(^{65}\) By focusing on those framers who expressed a more expansive view of the Constitution and Bill of Rights, Curtis makes an argument that the framers' intentions were to support civil liberties over and above the power of state governments. He uses Meese's theory of original intent to argue that the framers' intended the fourteenth amendment to protect against violations of the Bill of Rights by state as well as federal governments. Unfortunately, he does not succeed any more than Meese does in wholly convincing his audience that his interpretation is correct.

As stated above, Curtis' thesis that the debates on the Bill of Rights must be read in light of the antislavery feelings of the framers is problematic. He ignores other economic, social, and political motivations of the framers. In light of the myriad other motivations for the Civil War, Curtis' antislavery method of filling in the silences left by the framers of the fourteenth amendment loses its persuasive power. Moreover, as with any application of the doctrine of original intent, the choice of which framer or framers one relies on is itself political.

Curtis has mustered support for the conclusion that at least some framers intended the fourteenth amendment to apply the Bill of Rights against the states, and has thereby presented evidence against Meese's theory that applying original intent jurisprudence results in a restrictive

\(61\) Lewis, supra note 6.


\(63\) Meese, supra note 1, at 464.

\(64\) Brennan, supra note 4, at 5.

\(65\) "[T]here is a conservative application of original intent—for example, that the framers of the Fourteenth Amendment did not intend to make school segregation unconstitutional—and a liberal application for example, that those same framers had an abstract idea of equality with which school segregation is inconsistent." Tushnet, supra note 56, at 39.
view of the amendment's scope. Yet he is unsuccessful in convincing us that his is the definitive reading of the framers' intent. Indeed, he has proven that the debate will continue to rage and that no definitive answer can be found. Unintentionally, he has illustrated the futility of original intent analysis.

Perhaps the most important criticism of Curtis' adoption of the original intent methodology is that he becomes an advocate of the doctrine. While others who are sympathetic with his views have labored to expose the flaws of original intent as a legal theory and the political motives of its proponents, Curtis has lent credibility to the doctrine. He argues that original intent jurisprudence is a legitimate theory, worthy of attention and discussion. In this way he has done much to legitimize the Attorney General's premise. Thus, it is difficult for those who support Curtis' views to agree with his method.

It is worth remembering that the Constitution is not a static but a living document, embracing substantive values that should be jealously protected by the Supreme Court. These values cannot always be gleaned from the text of a document whose language is too broad to lend itself to easy interpretations. Yet the past cannot be relied upon to answer today's puzzles. It is the job of the courts to discover and apply constitutional values to everyday problems, using twentieth-century minds and hearts as well as precedent and logic. As Justice McKenna wrote in *Weems v. United States*:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." . . . In application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be.

Relying too heavily on the past to answer questions of the present leaves us either without answers or forever chained to the values of a generation long gone.

*Hillary Salans*