Constitutional Interpretation

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"[W]e must never forget," Chief Justice Marshall admonished us in a statement pregnant with more than one meaning, "that it is a constitution we are expounding." Marshall meant that the Constitution should be read as a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." But he meant also that the construction placed upon the document must have regard for its "great outlines" and "important objects." Limits are implied by the very nature of the task. There is not the same freedom in construing the Constitution as in constructing a moral code.

The conclusion that there are limits to the meaning that may be given the Constitution is not likely to arouse controversy. Yet, that conclusion masks an important ambiguity concerning the source and permanence of those limits. The boundaries of permissible constitutional interpretation, it might be argued, are set by the intentions of those who drafted and ratified the original document and the several amendments to it. Accommodation to change through interpretation is not wholly foreclosed on this view, for the Constitution often speaks in generalities, but (proponents of this view maintain) present judgment is securely bounded by the intentions of "the framers." The opposing view is less easily stated. At the risk of initial oversimplification, the boundaries of permissible constitutional interpretation are, on that view, subject to continuous adjustment. The meaning of the Constitution is never fixed; rather, it changes over time to accommodate altered circumstances and evolving values. Only the former view, it seems apparent, is compatible with the recurrent claim that the Constitution itself stipulates the values that must be employed in making decisions. The latter view recognizes limits to the interpretation that may properly be placed upon the Constitution, but it does not treat those limits as embedded in the


4. See text at notes 79-83 infra.
Constitution. It regards constitutional law not as an expression of values written into the Constitution by the framers, but as the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted.

I

The notion that constitutional interpretation consists of determining the intentions of the framers occupies an important place in the history of thought about the Constitution. Many persons, including some of the most distinguished members of the Supreme Court, have urged that precisely because it is a constitution we are expounding, there is a duty of fidelity to the intentions of those who drafted and ratified the document. Thus, Chief Justice Taney, in deciding "whether a person of the African race can be a citizen of the United States," wrote:

No one, we presume, supposes that any change in public opinion or feeling. . . . should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning . . . .

A century later, Mr. Justice Black developed a similar theme and purported to make it a cornerstone of his constitutional philosophy. Rejecting a claim that the death penalty should be held to violate the eighth amendment's prohibition of "cruel and unusual punishments," he wrote:

In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.

Views such as those expressed by Taney and Black may at times

6. McGautha v. California, 402 U.S. 183, 226 (1971) (separate opinion of Black, J.). The theme recurs in many of Justice Black's opinions. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675-78 (1966) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 69-74 (1947) (Black, J., dissenting). His emphasis upon the intentions of the framers was, of course, intimately bound up with his views on the appropriate role of a judiciary in a democracy, but in light of the central role he accorded the judiciary in interpreting the Constitution, his admonitions must be understood as addressed not only to the judiciary, but as expressing principles binding upon all who are engaged in constitutional interpretation.
have influenced constitutional decision, but it is beyond doubt that they do not reflect the course of American constitutional development. Constitutional decision-making has not been confined to a process of discovering the specific intentions of the framers. There are various reasons why this is so, but the most pervasive is that the questions for which subsequent generations have sought answers in the Constitution have been the questions of those generations. Since those questions were, most often, not the ones the framers had specifically addressed, it is not surprising that answers were not to be found in the framers' specific intentions. Even the most prophetic of the men who drafted and ratified the Constitution had no occasion to speculate concerning the role of the federal government, vis-à-vis the states, in the management of an integrated and industrialized national economy. Nor did the men of a later generation, who imposed on each state the obligation to afford every person "the equal protection of the laws," have reason to consider whether those words should be held to prohibit sex-based discrimination at a time when the relations between the sexes would be far different from those they had known or could have imagined. Although these and myriad other issues not anticipated by the framers have over the years pressed for solution, the notion that the meaning assigned to the Constitution ought to turn upon the intentions of the framers has continued to exert a strong attraction. The effort to resolve that dilemma has led to an appreciation that the concept of "intention" is a good deal more ambiguous than the statements of Chief Justice Tanney and Justice Black suggest.

The intentions of the framers can, for example, be described on different levels of generality. On one level, it is entirely accurate to state that the framers intended to allow the death penalty and to deny Congress the authority to regulate the quantity of wheat that a farmer might grow for domestic consumption. And the men who adopted the fourteenth amendment intended to permit legislation that would bar women from certain occupations or in a variety of other ways distinguish between men and women. At the same time, it seems entirely plausible to understand the framers as having intended to prohibit all "cruel and unusual punishments," not merely specific practices with which they were familiar and to which they objected. Similarly, in authorizing Congress to "regulate commerce


among the several states," the framers can appropriately be un-
derstood as intending to invest it with power to regulate not only
specific activities that they knew affected that commerce but any ac-
tivity that might do so. So also, the guarantee of "equal protection
of the laws" can be understood as proscribing not only certain prac-
tices directed against blacks, with which the draftsmen were immedi-
ately concerned, but also all other practices that arbitrarily
distinguish among classes of individuals. To ask, in each instance,
whether the framers "intended" the specific or the general is to pose
a question that almost invariably is unanswerable. The question as-
sumes that they intended one or the other, but not both. But the
issues did not arise for the framers in a way that forced such a
choice: they could have intended both simultaneously because,
viewing them as compatible, they had no reason to choose between
them.9

The insight that intentions can be understood in general terms
has played an important role in the development of constitutional
law, for it has provided a means by which to mediate between the
belief that the meaning of the Constitution ought to be found in the
intentions of the framers and the need to accommodate the Constitu-
tion to changing circumstances and values. Armed with the aware-
ness that the "intentions of the framers" need not be understood to
denote only their most particular intentions, and that the "important
objects" of the Constitution could not be achieved if its meaning
were held to be confined to such intentions, courts have generally
looked to those "important objects" in interpreting the Constitution,
secure in the belief that in doing so they were still construing the

9. The point is well illustrated by an exchange between Thaddeus Stevens and Robert
Hale during debate over an early version of what was to become the "equal protection" clause
of the fourteenth amendment. Hale objected to the proposal on the ground that it would
authorize Congress to override "all state legislation . . . affecting the individual citizen."
CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). For example, said Hale, all states distin-
guished between the property rights of married women, on the one hand, and of unmarried
women and men on the other. Such distinctions might be outlawed by Congress were the
proposal to be adopted. Stevens responded that "[w]hen a distinction is made between two
married people or two femmes sole, then it is unequal legislation; but where all of the same
class are dealt with in the same way then there is no pretense of inequality." Id. at 1064.
Although inelegantly, Stevens was, as Professor Bickel once observed, "propounding a theory
of reasonable classification." Bickel, The Original Understanding and the Segregation Decision,
69 HARV. L. REV. 1, 36 (1955). The significance of Stevens's response, for present purposes, is
that his ground for denying that the proposal would have the reach suggested by Hale was not
that the distinction between married and unmarried women would survive adoption of the
proposal even though it were arbitrary. It would survive, in his view, because it was not arbi-
trary. He thus had no occasion to choose between an intent to eliminate arbitrary distinctions
in state law and an intent to leave undisturbed state power to treat married and unmarried
women differently. The necessity for such a choice would arise only if that distinction came to
be perceived as arbitrary. See text at notes 69-78 infra.
Constitution, not creating it.\textsuperscript{10} Congressional regulation of agriculture, the virtual abolition of capital punishment, and significant restriction of governmental power to discriminate on the basis of sex may not have been specifically intended by the framers, but each might be thought to have roots in their larger purposes.

The belief that those larger purposes could serve as a touchstone for constitutional interpretation has, of course, been especially important because constitutional development has occurred so largely through the institution of judicial review. The conventional understanding of the courts’ warrant for the power they exercise is not that the values of judges are preferable to those of legislators, or that judges are a better barometer of contemporary societal values than legislators, but that the values embodied in the Constitution — the “important objects” of those who framed the document — are best entrusted to their care. It has long been accepted, of course, that the performance of this function requires the appraisal of new circumstances and, hence, additional value choices. But these additional value choices have been viewed as subsidiary to those written into the Constitution by the framers and, therefore, as susceptible to evaluation on the basis of their tendency to serve the larger purposes to which the framers committed the nation. Constitutional theory and the institution of judicial review have thus been seen as mutually supportive: judicial review is necessary to assure fidelity to the intentions of the framers, and it is justifiable, notwithstanding its unrepresentative character, because the values to which courts give expression are those to which the nation is bound by the Constitution.

A representative statement of this view of the Constitution and of the judicial role is contained in a much-noted article by Judge J. Skelly Wright arguing that courts should play an active role in en-

\textsuperscript{10} The argument has at times been made that different provisions of the Constitution are to be construed differently, some by determining the specific intentions of the framers and others by looking to their larger purposes. Justice Frankfurter, for example, found a distinction between “[g]reat concepts like ‘Commerce . . . among the several States,’ ‘due process of law,’ ‘liberty,’ ‘property’ [which] were purposely left to gather meaning from experience,” National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting), and “very specific provisions of the Constitution” whose “meaning was so settled by history that definition was superfluous.” United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring). Professor Willard Hurst has taken a somewhat similar position, emphasizing a distinction between provisions concerning “particular legal agencies or particular legal procedures,” where the constitution employs terms that have a “precise, history-filled content,” and provisions that “outline substantive power and . . . announce standards for the use of power.” Hurst, The Role of History, in SUPREME COURT AND SUPREME LAW 55, 57 (E. Cahn ed. 1954). For a useful critique of these distinctions, see Wofford, supra note 8, at 515-20.
forcing the Constitution against the other agencies of government. In developing that thesis, Judge Wright rejects the "axiom . . . that a constitutional value choice is the functional equivalent of an ordinary policy decision." "Constitutional choices," he asserts, "are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution." Judge Wright is not Justice Roberts, however. He recognizes that the answers to constitutional questions cannot be determined simply by laying "the article of the Constitution which is invoked beside the statute which is challenged," and that value choices remain to be made in determining the application of the Constitution to contemporary problems. Still, Judge Wright argues, the "broad, majestic language" of the Constitution was intended "to guarantee a general sort of relation between the government and its citizens."

[T]hose outlines provide significant and sufficient guidance; the [additional] value choices [now required] are to be made only within the parameters of the most important value choices embedded in the constitutional language. No matter how imprecise in application to specific modern fact situations, the constitutional guarantees do provide a direction, a goal, an ideal citizen-government relationship. They rule out many alternative directions, goals, and ideals.

The view that constitutional interpretation involves primarily an elucidation of the general intentions of the framers is understandably attractive, perhaps not only because it seems to support the institutional arrangements we have established for giving contemporary meaning to the Constitution, but also because it is so comforting. The uneasiness, often the agony, and always the responsibility that accompany a difficult choice are softened by the belief that real choice does not exist. In law, the search for repose leads us to attribute responsibility for decisions to those who have gone before and, in constitutional law, to wise men we call "the framers." They may not have foreseen the world in which we live nor the problems we now face, but the words they wrote nonetheless provide "sufficient guidance" if only we have the wisdom to understand them properly. And so the social Darwinism of Herbert Spencer and the libertarianism of John Stuart Mill, though not in the minds of those who wrote the Constitution, have at different times each been found

11. See Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769 (1971).
12. Id. at 784.
14. Wright, supra note 11, at 784-85.
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there by men who, no doubt sincerely, believed that the “broad, majestic language” of the Constitution was intended to guarantee that “general sort of relationship between the government and its citizens.” Nor does it pass belief that one day soon (perhaps its dawn has already broken) the egalitarianism of John Rawls will also be found there.\(^\text{15}\)

The “ideal citizen-government relationship” that Judge Wright finds “embedded in the constitutional language” is not, of course, the relationship that Justices Field and Brewer found in the identical language three quarters of a century earlier, but rather the relationship defined in the decisions of the Warren Court, “the one institution . . . that seemed to be speaking most consistently the language of idealism that we all recited in grade school.”\(^\text{16}\) It would be nearer the truth to say that the work of the Warren Court, as that of the Court in the days of Field and Brewer, demonstrates that the substance of constitutional law, as of common law, “at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient.”\(^\text{17}\) In some measure, no doubt, what is “understood to be convenient” depends upon the past. Constitutional values are not born of the moment; they have a history that must be understood if they are to be realized. Our circumstances are perceived in part through the lens of earlier valuations and our aspirations are in part shaped by them.\(^\text{18}\) Ultimately, nevertheless, the values to which constitutional law gives expression are more nearly those of the present than those of the past.

To see that that is so, one need only imagine a stranger to the United States who procures a copy of the Constitution in order to gain an understanding of the relationship it establishes between individuals and government. His first discovery is that government in the United States is not unitary; there are both state governments and a national government. Careful examination of the document reveals, moreover, that there are substantially different restrictions upon the exercise of state and national power over individuals. Neither government, to be sure, may pass a bill of attainder or \textit{ex post facto} law;\(^\text{19}\) deprive any person of life, liberty or property with-


\(^\text{16}\) Wright, \textit{supra} note 11, at 804.


\(^\text{19}\) U.S. Const. art. I, § 9, cl. 3; U.S. Const. art I, § 10, cl. 1.
out due process of law;\textsuperscript{20} or deny citizens the right to vote on grounds of race,\textsuperscript{21} sex,\textsuperscript{22} or age (if they are eighteen years of age or older).\textsuperscript{23} These are the only similarities, however, and there are many differences. The states, but not the national government, are prohibited from impairing the obligation of contracts\textsuperscript{24} and denying to any person the equal protection of the laws.\textsuperscript{25} On the other hand, the federal government, but not the states, is subject to a Bill of Rights,\textsuperscript{26} the many provisions of which are too familiar to require specification. In addition, neither the federal government nor the states may deny citizens the right to vote in federal elections because of a failure to pay any tax, but there is no similar restriction concerning state elections.\textsuperscript{27}

The stranger, were he unfamiliar with our history, might well puzzle over the reason for such different limitations on national and state power, but he could hardly doubt that in the United States the relationship between government and individuals, so far as it is embodied in fundamental law, largely depends upon whether the government involved is that of the nation or of a state. He would, of course, be quite wrong. With at most a few exceptions, the constitutional rights of individuals against state and national governments are now the same. The few restrictions that the contracts clause imposes upon state power appear to be equally applicable to the national government through the due process clause of the fifth amendment.\textsuperscript{28} Restrictions on state power under the equal protection clause also apply equally to the national government, again through the due process clause.\textsuperscript{29} Nearly all of the provisions of the Bill of Rights have been extended to the states, once more through the ubiquitous "due process" clause (though now of the fourteenth

\textsuperscript{20} U.S. CONST. amends. V and XIV, § 1.
\textsuperscript{21} U.S. CONST. amend. XV.
\textsuperscript{22} U.S. CONST. amend. XIX.
\textsuperscript{23} U.S. CONST. amend. XXVI.
\textsuperscript{24} U.S. CONST. art. I, § 10, cl. 1.
\textsuperscript{25} U.S. CONST. amend. XIV, § 1.
\textsuperscript{26} U.S. CONST. amends. I-X. Inspection of the Constitution alone will not, of course, reveal the inapplicability of all of the Bill of Rights to the states. Only the first and tenth amendments are in terms limited to the national government, but it is beyond doubt that the entire Bill of Rights was intended to be applicable only to the national government and the Supreme Court so held at an early date. See Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
\textsuperscript{27} U.S. CONST. amend. XXIV.
\textsuperscript{28} See United States Trust Co. v. New Jersey, 431 U.S. 1, 26 n.25 (1977); Hale, The Supreme Court and the Contract Clause (pts. 1-3), 57 HARV. L. REV. 512, 621, 852, 890 (1944).
amendment), and have been held to impose identical restrictions on state and national power. And, finally, citizens may not, in state elections any more than in federal elections, be denied the right to vote because of a failure to pay a tax. To deprive them of the vote for that reason would deny them "the equal protection of the laws."

How are we to account for these differences between the historical document and contemporary constitutional law? To suggest that the latter is merely the application to modern life of an "ideal citizen-government relationship" contemplated by the framers is to ignore the evidence of the very document that supposedly expresses that ideal. Whatever ideals were in the minds of those who drafted and ratified the original Constitution and its several amendments (and it is a rather heroic assumption that those ideals were constant over time or even that the same ideals actuated all those who at any one time combined in support of a constitutional proposal), it seems plain enough that the ideals did not embrace the need for nearly identical restrictions upon state and national power over individuals. The imposition of a unitary set of restrictions on state and national power was the work of a later day. It is not merely coincidence that this development has occurred almost entirely over the last fifty years, a period during which federalist values have been

30. In 1969, the Court wrote that the due process clause "now protects the [fifth amendment] right to compensation for property taken by the State; the rights of free speech, press, and religion covered by the First Amendment, the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses." Duncan v. Louisiana, 391 U.S. 145, 148 (1969) (footnotes omitted). In Duncan, the Court added to that list the sixth amendment right to jury trial in criminal cases and since that time it has added the fifth amendment guarantee against double jeopardy, see Benton v. Maryland, 395 U.S. 784 (1969), the eighth amendment's prohibition of cruel and unusual punishments, see Furman v. Georgia, 408 U.S. 238 (1972), and (at least in dictum) the bail guarantee of the eighth amendment. See Schilb v. Kuebel, 404 U.S. 357, 365 (1971). Remarkably, the Court has even found the ninth amendment relevant to a determination of the limits of state power. See Griswold v. Connecticut, 381 U.S. 479 (1965).

In extending provisions of the Bill of Rights to the states, the Court has insisted that "the same constitutional standards apply against both the State and Federal governments." Benton v. Maryland, 395 U.S. 784, 795 (1969). But see Apodaca v. Oregon, 406 U.S. 404 (1972).


The imposition of a set of unitary limitations on state and national power was, of course, not entirely the work of the Warren Court. In some instances, as in the assimilation of the "impairment of contract" and fifth amendment "due process" clauses, the task was completed at an earlier time. See note 28 supra. In others, for example the extension of a number of provisions to the Bill of Rights to the states, the process was under way prior to the Warren Court. See, e.g., Palko v. Connecticut, 302 U.S. 319 (1937).

subject to increasing pressure from the centralizing tendencies of modern life. Both the reality of American government and the way it is perceived have changed during these years. Increased mobility and the growth of mass communication have more and more led us to see ourselves as one nation and, together with a rising egalitarianism, have led to a reduced willingness to treat each state as a separate political community. The "layer cake" model of federal-state relations — by which government is divided into separate levels, each operating within a separate sphere — has been replaced by that of the "marble cake" — which emphasizes federal-state cooperation and shared responsibility over nearly the entire range of governmental programs. Although perhaps not inevitable, it is at least not surprising that in these circumstances constitutional law should come to reflect the idea that in their relations with government, at any level, all Americans, wherever located, are entitled to those protections that we as a people hold to be fundamental. That idea may or may not be a desirable one for our times — I do not want to argue the point here — but it does describe contemporary constitutional law and it was not bequeathed to us by "the framers," except as they set us on the path by which we might find our way to it and to other principles that seem appropriate in the light of our current circumstances and aspirations.

The establishment of nearly identical constitutional limitations on state and national power marks a significant departure from the historical document, but it represents only a fraction of the distance we have traveled in shaping constitutional law to our present values. The meaning of the various limitations on governmental power has changed no less dramatically than their applicability. The members of the First Congress, together with the state legislatures, wrote that in "all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defense," intending to assure that a defendant's right to retain counsel would be inviolate. A century and a half later the Supreme Court held that this language in the sixth amendment also conferred a right to the appointment of counsel if the accused was indigent. In the wake of the Civil War, the victors sought to guarantee blacks the rights of citizenship — and perhaps more broadly to create a basis for federal citizenship clearly independent of state citizenship — by including in the Constitution the

provision that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." There is no evidence that this language was thought to limit whatever power Congress might have to provide for expatriation. Yet, in 1967, after a decade of struggle to find a plausible basis for limiting congressional power, the Court held that the quoted language denied Congress all power to deprive a person of citizenship unless it was voluntarily relinquished.

A comprehensive study of the origins of the first amendment provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press" — language which to contemporary ears sounds clear and all-embracing — concludes that those who drafted and ratified the amendment had a far more restrictive understanding of its meaning. Undoubtedly, it meant (to them) that Congress could impose no prior restraints, no system of licensing such as Milton had inveighed against in Areopagitica. Perhaps they also understood that it would establish truth as an absolute defense in prosecutions for seditious libel and that it would confer a right to have a jury determine both law and fact in such cases. Conceivably, though the scholar who has most closely examined the question concludes otherwise, they thought it would ban all federal prosecutions for seditious libel. However broadly one views the meaning they attributed to that language, it seems plain enough that they did not anticipate the breadth of the protection that contemporary constitutional law affords freedom of expression — protection so extensive as to defy brief description. It is scarcely to be imagined, for example, that the framers of the first amendment contemplated the constitutionalization of the law of libel that has occurred during the past two decades or the broad protection now enjoyed by sexually explicit material.

35. See Roche, The Expatriation Cases: "Breathes There the Man, With Soul so Dead . . . ?", 1963 SUP. CT. REV. 325.
38. See id. at 1-17.
41. See, e.g., cases collected in W. Lockhart, Y Kamisar & J. Choper, supra note 39, at 869-927.

The premises of the framers' thought were so different from ours that almost inevitably there is some distortion in stating their understanding so summarily. Thus, it seems likely that the framers did not believe that the first amendment extended to civil libel actions or to sexu-
The departures from the historical document in shaping constitutional law to current perceptions of need are not restricted to instances in which constitutional provisions have been broadened beyond the understanding of the framers. At times the Court has narrowed the original meaning to accommodate the Constitution to those perceptions. Thus, among the sources of the discontent that led to the convention of 1787, few were more important than the "ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations" adopted during the 1780s. The importance of that experience in shaping the Constitution can hardly be overstated, for it called into question, as Madison wrote in 1787, "the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights." When the members of the convention prohibited the states from "impairing the obligation of contracts," therefore, it seems clear that they did so, as Mr. Justice Sutherland wrote a century and a half later in *Home Building & Loan Association v. Blaisdell*, "with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress." Justice Sutherland, however, wrote in dissent. A majority of the Court sustained Minnesota's Mortgage Moratorium Law notwithstanding the clarity of the framers' intentions because "full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope." The "scope of the constitutional prohibition" is to be determined, rather, by examining "the course of judicial decisions in its application," decisions demonstrating "that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compro-

44. 290 U.S. 398 (1934).
45. 290 U.S. at 453 (Sutherland, J., dissenting) (emphasis added).
46. 290 U.S. at 428.
mise between individual rights and public welfare."

Now it is true that all the decisions shaping constitutional law to contemporary values can also be understood as coming within the general intentions of the framers. All that is necessary is to state those intentions at a sufficiently high level of abstraction. The framers may not specifically have intended that the first amendment would restrict private actions for libel, but they believed "that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form."

An unrestricted right of action for libel would trench upon that purpose; hence, the Constitution must — in furtherance of the framers' intent — be read as restricting the permissible scope of libel actions. "Bill of attainder" may have carried a precise meaning for the framers, as Mr. Justice Frankfurter once argued; yet, the Supreme Court has said, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature." Implementation of that purpose, the Supreme Court held, required invalidation of legislation prohibiting members of the Communist Party from serving as officers or employees of labor unions — legislation which, whatever its unwisdom, no member of the Philadelphia convention or of the state ratifying conventions would have recognized as a bill of attainder. Even a decision sustaining Minnesota’s Mortgage Moratorium Law might find support in the framers' larger purposes, for as Chief Justice Hughes wrote for the Court: "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while — a government which retains adequate authority to secure the peace and good order of society." There is, accordingly, "no warrant for the conclusion . . . that the founders of our Government would have interpreted the clause differently" than the Court has over the years.

47. 290 U.S. at 442.
51. 290 U.S. at 435.
52. 290 U.S. at 443.
"The vast body of law which has been developed [over the years] was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution." ⁵³

Reference to the "important objects" of the framers rather than their specific intentions is, no doubt, a necessity if the evolving needs of the nation are to be served. The amendment process established by article V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government. Yet, it must be recognized that the more general the statement of the framers' intentions, the weaker is the claim that those intentions circumscribe present judgment. To begin with, our understanding of the framers' intentions is necessarily distorted if we focus solely upon their larger purposes, ignoring the particular judgments they made in expressing those purposes. Intentions do not exist in the abstract; they are forged in response to particular circumstances and in the collision of multiple purposes which impose bounds upon one another. "[T]o make a general principle worth anything," as Holmes wrote,

you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has gradually emerged as the felt reconciliation of concrete instances . . . . Finally, you must show its historic relations to other principles, often of very different date and origin, and thus set it in the perspective without which its proportions will never truly be judged. ⁵⁴

So, too, in understanding the intentions of the framers. By wrenching the framers' "larger purposes" from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes. In freeing ourselves from those judgments we are not serving larger ends determined by the framers but making room for the introduction of contemporary values.

The "assistance of counsel" was indeed viewed by the framers as an important constituent of fair trial, one of "the essential barriers against arbitrary or unjust deprivation of human rights." ⁵⁵ But their intention to safeguard the right to such assistance in all federal criminal trials was shaped in part by a conception of the relationship between government and its citizens, a conception that did not em-

⁵³. 290 U.S. at 443.
phasize — that barely recognized — an affirmative responsibility on the part of government to its citizens. Absent a sense of such responsibility, it is not surprising that a trial might be deemed fair so long as the defendant was not prohibited from retaining counsel to assist him. Decisions during the past several decades establishing the right of indigents accused of crime to appointed counsel do not merely promote the framers' purpose to achieve fair trials. They also express a fundamentally altered conception of governmental responsibility and, accordingly, of what constitutes a fair trial. Virtually all Americans accept the balance thus struck between the interests of government and of indigent defendants as both wise and humane, but it is a balance that reflects the values of contemporary America, not those of the framers. 56

Contemporary constitutional law defining freedom of speech and of the press, similarly, is not simply a more adequate expression of the purpose of the framers than they themselves achieved — purposes somehow disembodied from the specific protections they understood to be within the compass of the first amendment — but a fundamentally different accommodation of the interests affected by principles governing the exercise of governmental power. Public discussion was, to be sure, greatly prized during the constitutional period both as a "natural right" of free men and as essential to democratic government. The literature of the period is filled with statements of its importance. 57 So great is the allure of these expressions that we are apt to forget how different those times were from our own. The framers, we need to remember, had not read John Stuart Mill. They had not experienced, and thus had no reason to address, the needs of a nation as pluralistic as the United States was later to become. The political order, both of their own time and of the earlier years in which the ideal of freedom of expression first emerged, was far more fragile than that which has existed in the United States at any time during the twentieth century. To reason solely from their statements concerning the importance of public discussion is to ignore the fact that because of their circumstances and their history they held competing values — stability of government, security of private reputations, a conception of sexual morality, etc. — that also played a role in shaping their understanding of freedom of speech and of the press. We ought not to suppose that because these competing values were less frequently given eloquent expres-

56. See note 33 supra.

sion they were entirely subordinated to public discussion. The competing values were already deeply imbedded in the law. The struggle was to gain recognition of the importance of public discussion. The best evidence of the balance that was struck is not the rhetoric that was employed, but the specific principles by which freedom of speech and the press were understood. When we ignore those principles, stressing instead the importance that the framers attached to public discussion and deemphasizing competing values that carried more weight for them than for us, the purposes we serve are not those of the framers, but our own.

The growth of federal power under the commerce clause may serve as a final illustration of the way in which reliance upon the general intentions of the framers permits the values of the present to dominate those of the past. It is customary to attribute to the framers the purpose of authorizing Congress to regulate "that commerce which concerns more states than one."58 In the decentralized, rural economy of the late eighteenth century, that was a relatively limited grant of authority. A considerable volume of economic activity was not within the market economy; much, very likely most, activity that was part of the market economy occurred within the boundaries of a single state and had no discernible consequences outside that state. In these circumstances, the power conferred upon Congress afforded relatively limited opportunity to regulate private activity, and it offered little threat to the retention of very considerable autonomy in the states. Congressional power to regulate "that commerce which concerns more states than one," in the setting of an integrated, industrialized, modern economy strikes a very different balance between that power and the autonomy of states and individuals. Since all commercial activity may have consequences outside the state in which it occurs, the Congress has complete power to displace state government as a source of economic policy. The expansion of the market sector of the economy further extends federal power to displace state authority. Both changes in the economic structure, moreover, subject an ever-increasing proportion of life to federal regulatory authority. Lifting the framers' "intentions" out of the context in which they were formed, and employing them to deal with current issues, thus yields consequences very different from those the framers conceivably could have anticipated, and involves an accommodation of competing values that cannot reasonably be attributed to them. The framers did intend to authorize Congress to regulate

“that commerce which concerns more states than one,” but to separate that intention from their understanding that states and individuals retained substantial autonomy from federal control in the realm of economic activity is to lose “the perspective without which its proportions will never truly be judged.”59 When the framers’ intentions are placed in perspective, it is apparent that attribution of the contemporary law of the commerce clause to them is chimerical.

The correspondence between those intentions and contemporary law would not be increased, of course, if the latter were rewritten to reduce federal power substantially, for that would merely frustrate the framers’ intention that Congress have authority to regulate “that commerce which concerns more states than one.”60 The difficulty, obviously, is that in a modern economy we cannot confer that authority upon Congress and simultaneously allow a large measure of individual and state autonomy. Objectives that were compatible in the latter years of the eighteenth century have ceased to be so during the twentieth. Contemporary constitutional law, in establishing a new order among these objectives, does not reflect the intentions of the framers but a contemporary choice as to how those objectives ought to be ordered.

The law we ascribe to the Constitution is not, in brief, a legacy from the “founding fathers” and the Reconstruction Congress. The “goals” and “ideals” that Judge Wright sees “embedded in the constitutional language” are those that subsequent generations have found there, which is not quite the same as saying that they were put there by the framers. Contemporary constitutional law does, to be sure, rest upon a conceptual framework and employ a vocabulary that is in large measure derived from the framers. The question whether legislation is within the authority of the federal government must, even now, be decided within a framework which recognizes that that government was constituted as one of enumerated powers. We do not consider ourselves at liberty to ignore the question or to answer it merely by demonstrating that the power can best be exercised by the federal government. Decisions continue to be justified by an analysis which begins with the proposition that the exercise of

59. Holmes, supra note 54, at 41.

60. Herein lies the error of the decisions invalidating early New Deal legislation on the ground that the commerce clause was not intended to authorize Congress to exercise plenary power over the national economy. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495, 546-50 (1935). But it needs to be recognized that these decisions were no less true to the framers’ intentions than are more recent decisions regarding the scope of congressional power. The two lines of authority merely emphasize (and ignore) different elements of the framers’ intentions.
power must be referable to the "commerce" clause or one of the other heads of federal power. Similarly, legislation is not beyond the power of government simply because it is unwise or unjust. A decision limiting governmental power must be grounded in a limitation of governmental power contained in the Constitution.

In making these decisions, however, the past to which we turn is the sum of our history, not merely the choices made by those who drafted and ratified the Constitution. The entirety of that history, together with current aspirations that are both shaped by it and shape the meaning derived from it, far more than the intentions of the framers, determine what each generation finds in the Constitution. As Holmes put it in *Missouri v. Holland*:

when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what the Amendment has reserved.61

Federal statutes may still require justification by an analysis that begins with one of the enumerated powers, but the expansive reading of those powers by subsequent generations has all but swallowed up the space that the framers thought they had left between them. The limiting concepts of the Constitution, similarly, have been read — some broadly, some narrowly — to bring them into harmony with contemporary views concerning the appropriate domain for the exercise of governmental power. Neither the text of the Constitution nor the intentions of its draftsmen will explain why in the latter half of the twentieth century the "contracts clause" is read grudgingly while so generous an interpretation is given to "the freedom of speech" and the right of criminal defendants to the "assistance of counsel." An understanding of the current meaning of those provisions, and of other clauses limiting governmental power, depends far more on familiarity with the history of the twentieth century than of the latter years of the eighteenth.

No matter how capacious an interpretation they are given, of course, the relatively specific limitations of governmental authority in the Constitution — *e.g.*, freedom of speech, cruel and unusual
punishment, and assistance of counsel — do not each have an unlimited capacity for growth. Were we dependent solely upon a few such provisions to restrain governmental power, governments might do much that we should prefer to put beyond their authority. To remedy that potential deficiency in the document as written, other clauses have been read as (in effect) a continuing delegation to each generation to find in the Constitution those limitations on governmental power that it believes appropriate. The Constitution has, in other words, not only been read in light of contemporary circumstances and values; it has been read so that the circumstances and values of the present generation might be given expression in constitutional law.

Thus, the fifth and fourteenth amendment provisions that no person shall be deprived of “life, liberty, and property, without due process of law” — provisions that historically and linguistically might have been read as no more than a guarantee of procedural regularity or perhaps procedural fairness — have been treated instead as “a compendious affirmation of the basic values of a free society.”

What values are basic to a free society, as our history demonstrates, is a question that different generations are likely to answer differently. In the age of enterprise, “liberty of contract” was thought to be fundamental and, the framers having neglected to provide for it, protection for it was found in the due process clauses. Economic freedoms are less highly prized now, and so “liberty of contract” is no longer a vital doctrine. Substantive due process, however, despite occasional pronouncements of its demise, retains vitality, protecting interests that a new generation of Americans have come to see as fundamental, interests as diverse as freedom of travel and privacy. The divorce of the text from the use that has been made of the due process clause is by now so complete that the clause has even been held to restrain the exercise of governmental power that does not result in a deprivation of “life, liberty, or property.” Thus, quite apart from whether the practice involves any coercive effect upon individuals, the states are — by reason of the due process clause —

65. See, e.g., 372 U.S. at 729.
prohibited from supporting religious schools. Textual analysis will not yield, will not even permit, that restriction upon state power, but in the interpretation of the due process clause, it is not the text that controls. "[T]he basis of the restriction," as Mr. Justice Frankfurter once wrote, "is the whole experience of our people."68

The equal protection clause, too, has been read as an authorization to fill in the lacunae in the system of restraints upon governmental power that can be drawn from other, more specific provisions of the Constitution — to fill them in, moreover, according to contemporary views concerning the limits that ought to be placed upon that power. We have it on the highest authority that [t]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.69

If the quotation jars, it does so not because of its content, but because of its candor. Decisions under the equal protection clause have always been heavily value-laden, and necessarily so, since value premises (other than the values of "equality" and "rationality") are necessary to the determination that the clause requires.70 This is most obviously so under the so-called "new equal protection," which subjects legislation to "strict scrutiny" if it touches "fundamental interests" or employs "suspect" bases of classification. A determination of the interests that are to be ranked as "fundamental" or the classifications that are to be viewed as "suspect" necessarily rests upon value premises drawn from a source other than the equal protection clause itself.71 The need for such premises is no less, however, under the traditional equal protection test of "rationality": a determination whether there is a "rational basis" for the

71. See generally, Note, Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1159-69 (1969). The lone exception concerns legislation hostile to blacks, since the equal protection clause was primarily a product of the desire to prohibit such legislation. See Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting). Yet, even a determination of the invalidity of legislation hostile to blacks must often rest on value premises that cannot be directly attributed to those responsible for the adoption of the fourteenth amendment. See Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 664-66 (1975).
differing treatment accorded two classes requires the existence of an extrinsic standard — a value or values other than equality and rationality — with reference to which the classification can be measured.\textsuperscript{72}

The values that have informed decisions under the equal protection clause, as under the due process clause, are those that each generation has thought appropriate to its time. In the heyday of “liberty of contract,” a Court committed to \textit{laissez faire} found a good deal of “irrationality” in governmental regulation of the economy.\textsuperscript{73} The death of “liberty of contract” involved more than the passing of a doctrine; it reflected the end of a commitment to the values of \textit{laissez faire}. Not surprisingly, therefore, when the Court abandoned “liberty of contract,” it simultaneously relinquished the use of the equal protection clause to police governmental regulation of the economy.\textsuperscript{74} Legislation that had appeared irrational in the light of certain value premises no longer seemed so when those premises were abandoned.

“Substantive equal protection,” like “substantive due process,” is nevertheless of continuing significance, providing the means by which the Court may protect interests that have come to be viewed as fundamental but that cannot easily be read into more specific constitutional provisions limiting governmental power. The “right to vote” is illustrative. As originally written, the Constitution left with the states the power to decide who might vote in state elections. Save for the limited incursions on that power made by the fifteenth, nineteenth, and twenty-sixth amendments, the Constitution appears unchanged in this respect. Yet, progressive expansion of the franchise has been the rule of our history. We have come to believe that “[t]he right to vote . . . is of the essence of a democratic society and [that] any restriction on that right strikes at the heart of representative government.”\textsuperscript{75} In the absence of more specific authority to subject to constitutional restraint a matter so “close to the core of our constitutional system,”\textsuperscript{76} the court has employed the equal protection clause to void restrictions on the franchise incompatible with the nation’s evolving ideals.\textsuperscript{77} The invalidity of these restrictions may, as the

\textsuperscript{72} See id. at 658.
\textsuperscript{75} Reynolds v. Sims, 377 U.S. 533, 555 (1964).
\textsuperscript{76} Carrington v. Rash, 380 U.S. 89, 96 (1965).
\textsuperscript{77} See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134
Court said in *Harper v. Virginia Board of Elections*, 7 be "founded . . . on what the Equal Protection Clause requires," but only if what the equal protection clause requires is that legislation be judged by contemporary values.

The use of the due process and equal protection clauses to import into the Constitution each generation's conception of the "basic values of a free society" has vastly expanded our capacity to shape constitutional law to current values. Even as so interpreted, of course, those provisions cannot be employed to justify any result toward which we might be inclined at a particular moment. The meaning that we give to them, like the meaning that we give to other provisions of the Constitution, must take account of "the line of their growth." Limitation of state power to enact laws "respecting an establishment of religion," notwithstanding the absence of support for that restriction in the text and pre-adoption history of the due process clause, was tenable primarily because of a developing tendency to look to the Bill of Rights in determining the meaning that ought to be given to that clause. It would be much more difficult to read the due process clause, as some state supreme courts have read the cognate clauses of their own constitutions, 8 to restrict governmental power to engage in commercial and industrial activities. The Supreme Court resisted using the due process clause to impose such a restriction even when it was actively engaged in the review of economic policy. Suddenly to impose that restriction now, in the face of the Court's refusal during the past four decades to read the due process clause as a limitation upon economic policy, would require too abrupt a departure from what the clause has come to mean.

To stress the element of choice in constitutional interpretation is not to argue that contemporary discretion is unlimited, but only that the limits are not those imposed by the language and pre-adoption history of the Constitution. The limits, so far as they exist, are those that have developed over time in the ongoing process of valuation that occurs in the name of the Constitution. So understood, the limits upon permissible constitutional interpretation are not external constraints upon our ability to read the Constitution as the embodi-
ment of current values; they are, rather, the elements of reason that are intrinsic to the process of determining whether a proposed interpretation truly reflects those values. That choice is circumscribed at a given moment does not mean that it is limited over time, however. The notion that government enterprise is so inconsistent with the fundamental values of our society as to offend the due process clause may now seem strained, but it was a good deal more plausible a half-century ago, and it is conceivable (though perhaps improbable) that a half-century from now the wheel will have turned full circle. 

If that should happen, it seems safe to predict, the restraints that currently limit our ability to read the due process clause as outlawing government enterprise will have been considerably loosened. The underlying changes that will have led to a belief that government enterprise should be prohibited will have led also to other decisions limiting the government's role in the economy. A belief that government should not engage in commercial or industrial activity is, in other words, related to a more general system of values. If the belief is sufficiently strong that a constitutional sanction for it seems plausible, that more general system of values is likely to have been given expression in other decisions, including decisions under the due process clause.

In assessing the latitude available for shaping constitutional law to current values, in any event, it is well to recall that we are not limited to exploiting the ambiguities of language in a single constitutional provision. It is, in Marshall's pregnant phrase, "a constitution we are expounding," not a word or clause whose meaning is to be derived in isolation from the document as a whole. The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values to which the Constitution — as interpreted over time — gives expression.

"The life of the common law," Professor F.S.C. Milsom has written, "has been in the unceasing abuse of its elementary ideas." The

82. Justice Miller's prediction concerning the future of the equal protection clause may serve as an appropriate caution to those inclined to believe that present-day interpretation of one or another provisions of the Constitution must endure. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872), it will be recalled, Justice Miller wrote for the Court:

In the light of the history of the Civil War amendments, and the pervading purpose of them, ... it is not difficult to give meaning to this clause ... We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.

83 U.S. (16 Wall.) at 81.

83. See text at notes 99-101 infra.

process he describes in elucidating this aphorism is familiar as well to students of constitutional law:

If the rules of property give now what seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin but it will work. If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.85

The array of concepts and values that may be found in the Constitution affords similar opportunities for responding to the "felt necessities of the time."86 The various provisions of the Constitution reflect a multitude of values. When an issue arises concerning the authority of government, the possibility of recourse to one rather than another constitutional provision to resolve the issue enables us to decide which values are to be emphasized from among the numerous values to which the Constitution gives expression. In this way, we draw upon the past for guidance without being controlled by it.

We are accustomed to thinking about this process primarily in situations where the values expressed by different constitutional provisions conflict — as, for example, when there is a need to choose between the exigencies of the war power and our abhorrence of racial discrimination,87 or between freedom of the press and the right of criminal defendants to a fair trial.88 Often, however, the need for choice from among constitutional provisions arises because the values that impel us toward a particular decision may plausibly be said to receive expression in more than one constitutional provision. Since those values are expressed differently in the different provisions, however, the implications of reliance upon one or another of the provisions may differ significantly. If the implications of resting decision upon one constitutional provision are unacceptable, it may be possible to rest decision upon another with implications we can accept. The existence of such "overlapping" constitutional provisions thus permits us to achieve a more sensitive accommodation of competing values than would otherwise be possible and thereby con-

85. Id. at xi-xii.
86. O.W. HOLMES, supra note 17, at 5.
tributes to our capacity to adapt the Constitution to the balance of values that currently seems appropriate.

The constitutional issue confronted by the Supreme Court in *Jones v. Alfred H. Mayer Co.* is illustrative. In that case, the Court construed section one of the Civil Rights Act of 1866, now 42 U.S.C. § 1982, as creating a cause of action against a person who on racial grounds refused to sell real property to blacks. There remained the question whether the statute, as so construed, was within the constitutional competence of Congress. In a number of early cases, the Court had held that Congress lacked power to legislate against private racial discrimination. Those cases, however, were decided during a period of reaction against the expansion of federal power that had occurred in the years immediately following the Civil War and at a time of federal withdrawal from responsibility for the condition of blacks in American society, a withdrawal symptomatic of a more general submergence of blacks during that period. In the intervening years, important changes had occurred in the United States. Congress, if not yet a national legislature, had acquired vastly expanded powers, with authority to legislate concerning problems national in scope. And improvement in the position of blacks had come to be viewed as the nation’s most pressing domestic problem. Consideration of “what this country has become,” thus, strongly supported a conclusion that Congress had plenary authority in the management of race relations.

These considerations were not dispositive of the constitutional issue posed in *Mayer*, however, for there remained the question whether recognition of plenary congressional authority in the management of race relations was compatible with other values to which the Constitution gives expression. The existence of overlapping constitutional provisions, and of overlapping legal doctrines generally, is important largely because they contribute to our ability to deal with precisely such questions. Congressional authority to enact the 1866 statute, as interpreted, might conceivably have been rested upon the fifth section of the fourteenth amendment, which empowers Congress to enact legislation to enforce the amendment’s substantive provision, including the guarantee of “the equal protection of the laws.” To have rested congressional authority on the fourteenth amendment, however, would have had ramifications far beyond the issue posed in *Mayer*. The due process and equal protection clauses

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89. 392 U.S. 409 (1968).
90. See, e.g., Hodges v. United States, 203 U.S. 1 (1906); Civil Rights Cases, 109 U.S. 3 (1883).
extend to the full range of subjects on which the states are competent to legislate. The primary constraint upon the use of those clauses to enlarge federal power is the principle that they apply only where the challenged conduct is the product of "state action." Abandonment of the "state action" requirement would strain, perhaps beyond the breaking point, the notion that the federal government is a government of enumerated powers. Yet, it is precisely the abandonment of the "state action" limitation that would have been required were the fourteenth amendment to have been employed as the source of authority to enact the Civil Rights Act of 1866. To be sure, the conception of the federal government as a government of enumerated powers was already under considerable strain, but that conception has not yet been wholly abandoned, and, given the continuing concern in the United States for decentralization of governmental power, there is good reason to approach cautiously a decision that would have that effect. If the fourteenth amendment were the sole potential source of authority for the 1866 Act, nevertheless, it would seemingly have been essential to determine whether expansion of congressional authority to legislate concerning race relations was worth the cost of vastly extending congressional authority by eliminating the state action requirement.

In the event, the Court was saved from the necessity of facing up to that question by its ability to find authority for enactment of the 1866 Act in the thirteenth amendment. That amendment, like the fourteenth, had been adopted in the aftermath of the Civil War with the purpose of securing "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The subsequent histories of the two amendments differ significantly, however. Whereas the due process and equal protection clauses have been read expansively, as applicable to an ever widening range of issues, interpretation of the thirteenth amendment has diverged little from its original purpose. A decision resting congressional authority on the thirteenth amendment, accordingly, implied no more than that Congress had full authority to legislate with respect to the relics of slavery, i.e., to exercise plenary legislative authority in the management of race relations.

In combination, the expansive reading of the thirteenth amend-

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ment in *Mayer* and the prevailing interpretation of the fourteenth amendment achieve a more sensitive balance of the relevant competing values than could easily have emerged if it had been necessary to work out constitutional doctrine through either of those provisions standing alone. Private conduct is brought under federal control in a limited area, the management of race relations, in which the accomplishment of national objectives requires plenary federal power. Official conduct, on the other hand, is broadly subject to federal supervision in a large number of areas in which we are as yet unprepared to accept the complete centralization of governmental power but nonetheless wish to subject the states to minimal national standards.

Measured by the standards of textual analysis and historical inquiry, it may be that this careful delineation of federal authority was achieved only by an "abuse of [the Constitution's] elementary ideas." Slavery is commonly understood to mean bondage enforced by law. The discrimination alleged by the plaintiff in *Mayer* was not enforced by law, nor could it fairly be considered bondage. Yet, the decision in *Mayer* was not a radical break with the past. Although the men who adopted the thirteenth amendment may not have seen beyond the need for emancipation, experience subsequent to the amendment's adoption led Congress to conclude that additional "protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him" was necessary and could be achieved only through the exercise of federal power. Authority was found in the thirteenth amendment. The Court responded by sustaining congressional power under the thirteenth amendment to prohibit bondage even though not supported by state law. And as early as the *Civil Rights Cases* — one might say even in those cases — the Court had intimated that it was not only bondage that Congress might proscribe under the thirteenth amendment, but "all badges and incidents of slavery." Although formally reserving the question, the Court went on to sug-


94. See generally, Note, supra note 93.

95. The fourteenth and fifteenth amendments were, of course, adopted to buttress congressional authority, but not all that was done by Congress and sustained by the Court can find sanction in those amendments. See *Clyatt v. United States*, 197 U.S. 207 (1905).


97. 109 U.S. 3 (1883).
gest that these "badges and incidents" included "disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like disabilities and incapacities." These decisions did not extend congressional power under the thirteenth amendment as far as it was extended in *Mayer*, but they nonetheless represented a determination that the proscription of slavery — legally enforced bondage — did not mark the outer limits of congressional power. Continuing experience, and the valuations born of it, led to further expansion of federal power, sometimes initiated by the Court, sometimes by the Congress. These actions were not taken "under" the thirteenth amendment, but they were important nevertheless as steps in the development of a "considered consensus" concerning the broad reach of federal power to deal with the varied problems of race relations.

Neither the early decisions that gave an expansive reading to the thirteenth amendment nor the evolution of the consensus supporting plenary federal power to deal with problems of race relations are relevant to the issue posed in *Mayer* if the contemporary application of constitutional provisions is to be deduced from principles whose meaning is fixed at the time of their inclusion in the Constitution. But as I have essayed to demonstrate in the preceding pages, that view of constitutional interpretation is wholly at variance with our constitutional tradition. The reality of our tradition, to paraphrase Karl Llewellyn's prescription for the interpretation of aging statutes, has not been to determine the meaning of the Constitution by reference to the sense originally intended to be put into it, but rather for the sense which can be quarried out of it. The "quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen."

II

The capacity of constitutional law to adapt to changing circumstances and ideals is now so generally accepted that it has become a part of the conventional wisdom of lawyers and informed segments

98. 109 U.S. at 22.
of the laity. Yet, the influence of earlier attitudes persists. Many, perhaps most, students of the subject would insist that although constitutional law is capable of growth, the Constitution is an historical document that has a core of meaning independent of the interpretation subsequently given to it, meaning that not only interests historians but also constrains development of constitutional law. The words employed by the framers and the meaning they sought to convey, it is said, impose limits on choice, limits that can be altered only by an amendment of the document. Language alone, and certainly language supported by pre-adoption history, are by this view sufficient to foreclose some constitutional arguments — say, that Congress may license printing presses or authorize the use of torture to extract confessions from persons accused of crime. The claim, in other words, is that the specific intentions of the framers establish a minimum or core meaning of the various provisions of the Constitution. Although subsequent generations may expand constitutional provisions beyond that core of meaning, the core itself is inviolable.1

Even if this claim were valid, it would not seriously disturb the conclusion that constitutional law is more nearly an expression of contemporary values than of values stipulated by the framers. No more than a passing familiarity with history is required to appreciate that only a very small fraction of contemporary constitutional law corresponds with what can plausibly be considered the historical “core meaning” of the Constitution, even on the most generous interpretation of that notion. For the rest we must look not to choices that were made by the framers but to those made by subsequent generations. Nor is it plausible to argue that the luxuriant growth of constitutional law beyond the so-called “core meaning” of the Constitution can be derived from principles that underlie the framers’ specific intentions. The principles that will explain those intentions do not inhere in the evidence from which we infer the intentions. They are a contemporary construct. Just as many principles can be constructed to explain a series of decisions, numerous principles can be constructed that will explain, and hence be said to underlie, the framers’ specific intentions.104 Choice from among the various alter-

103. See, e.g., Supreme Court and Supreme Law 63-64 (E. Cahn ed. 1954) (comment of J.P. Frank). The validity of the claim often seems to be assumed, as in Williams v. Florida, 399 U.S. 78 (1970), where the Court, although holding that the sixth amendment guarantee of jury trial in criminal cases does not require a jury of 12, as at common law, appears to have assumed that a contrary result would have been necessary if historical evidence had required a conclusion that a 12-person jury were central to the intentions of the framers. 399 U.S. at 86-99.

natives is inescapable, and through that choice contemporary values
are given expression. No doubt, a commitment to respect the fram-
ers' specific intentions would narrow the range of choice, but constitu-
tional history amply demonstrates that such a commitment would
still permit widely divergent views concerning the proper content of
constitutional law.

The proposition that the framers' specific intentions establish a
core of meaning that is inviolable by subsequent generations is, in
any event, of doubtful validity. The issue seems most nearly to have
been posed in the Supreme Court by Home Building & Loan Associa-
tion v. Blaisdell, and in that instance the Court departed from the
framers' specific intentions in favor of an evolutionary interpretation
of the contract clause. Of course, a single case, even one as impor-
tant as Blaisdell, does not adequately test the claim that there is an
inviolable core of constitutional meaning, but then neither do the
hypothetical cases that are customarily invoked to support it. No
doubt it is true that the Supreme Court would, if the issue were
posed at the present term, invalidate legislation licensing printing
presses or authorizing the use of torture to extract confessions. But
these and similar hypothetical cases that might be suggested to test
the claim pose issues with respect to which our values coincide with
those of the framers. For many such issues, indeed, the development
of our values over the course of nearly two centuries has been in the
direction of strengthening belief in the wisdom of the framers' inten-
tions. In consequence, we have lacked impetus to develop intel-
lectual foundations that would permit us to depart from those
intentions. Not only do we lack such foundations, but because of the
coincidence of our values and what we apprehend as the "core
meaning," our sympathies lie with theories that promise to insulate
that meaning from depredation by those who someday may wish to
depart from it. It is understandable that in these circumstances it
should seem "unthinkable" that the courts would depart from the
"core meaning" of the Constitution. Nevertheless, the inventiveness
that has been demonstrated in designing such foundations when the
framers' intentions and newly emerging values do diverge counsels

105. 290 U.S. 398 (1934).

106. Cf. Wechsler, supra note 62, at 12 ("no one would argue, for example, that there need
not be indictment and a jury trial in prosecutions for a felony in district courts").

107. Perhaps the point is somewhat overstated. Continuing fidelity to the historical "core"
meaning of some constitutional provisions may be attributable less to a current commitment to
the values that led to their adoption than to the fact that they have come to serve other values
or because we have learned that fidelity can be maintained without sacrifice of current values.
In either event, the argument in the text holds.
caution before concluding that there is a core of constitutional meaning impervious to change, save by amendment.

The point is not that we should expect the historical meaning of a constitutional provision to be immediately ignored if an army of social scientists were suddenly to demonstrate that the well-being of the nation would be served thereby. Changes in law do not come about in that way. They do not because change does not occur that way in life. Changes in constitutional law, and the altered circumstances, knowledge, and valuations that underlie them, occur incrementally. The original meaning of the document is not abandoned at a single moment, but gradually. When, for example, in Blaisdell, the Court sustained legislation that the contract clause was designed to prevent, it relied in part upon a foundation of earlier decisions that had shaped that clause to accommodate evolving perceptions of social need, decisions that served as a "doctrinal bridge" between the original understanding of the clause and the result that seemed appropriate a century and a half later. To assess the claim that constitutional provisions have a core of meaning that permanently constrains interpretation, it is necessary to imagine not only the circumstances that might lead to a desire to interpret the provisions inconsistently with that "core meaning," but the development of those circumstances over time and the decisions that would have been made in response to that development.

Now it will be said that whether or not it is predictable that courts would depart from the framers' specific intentions in the event contemporary values were to diverge sufficiently from those intentions, they ought not to do so. Respect for those intentions, it might be argued, is implicit in the very idea that we are expounding a Constitution, not fashioning common law. Yet, once it is accepted that constitutional law should not be confined to the specific intentions of the framers, it is by no means obvious how it can be consistently maintained that those intentions represent an irreducible core of


109. See Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 441-42 (1934). The concept of a doctrinal bridge may help to explain why there are some (very few) constitutional provisions whose meaning is virtually certain to remain constant over time and that can therefore be altered only by amendment. No one, for example, is likely to argue that the age limitations imposed by articles I and II are subject to modification by interpretation. In these, and a few similar instances, the precision of the language employed by the framers seems to preclude even the slightest deviation from its meaning when adopted. Yet, even as to such provisions, one must not dismiss entirely the possibility that change can be accomplished by invoking another, more general provision of the Constitution. See, e.g., Oregon v. Mitchell, 400 U.S. 112 (1970).
meaning immune from the normal processes of constitutional development. It is, for example, hard to see why it should be permissible, in response to changed circumstances and values, to interpret the first amendment as limiting private actions for defamation, though the framers would not have given it that effect, and yet be impermissible to interpret the amendment as permitting censorship if the evolution of our circumstances and our values seems to require such a result.\textsuperscript{110}

There is, however, a more fundamental flaw in the claim that the specific intentions of the framers establish an inviolable core of constitutional meaning. What that claim ignores is that history does not reside merely in the past, but in the interaction of the past with the present. Whatever may have been the specific intentions of the framers, the understanding of those intentions by subsequent generations is necessarily conditioned by concepts with which the latter are familiar but that were unknown to the framers. The perception of the so-called "core meaning" of a constitutional provision cannot, for that reason, remain constant: as new concepts emerge (or older but heretofore submerged concepts become salient) — reflecting altered circumstances and values — there must be an accompanying change in the understanding of the framers' intentions. Obviously the development of constitutional law cannot be constrained by the "core meaning" of the Constitution if the way the "core meaning" is understood depends upon contemporary circumstances and values.

I do not mean by raising this issue to enter into the age-old controversy about whether objectivity can be achieved in the study of history. For whether our understanding of the past is distorted by the fact that we live in the present, it is inevitably influenced thereby. The point can best be illustrated by a problem of historiography with which lawyers have a special familiarity, that of determining the holding of a case. The principle by which a holding is expressed, as every first-year law student learns, may vary over time, not because of any change in the opinion of the court but because of ideas that emerge subsequent thereto. Consider, for example, the plight of a neophyte law student who, on successive days, is called upon to "state the holding" of United States v. Wade.\textsuperscript{111} On the first day, having read only the opinions in that case, he might respond thus: a person suspected of a crime may not, consistently with the sixth amendment, be placed in a line-up for identification unless he has

\textsuperscript{110} Cf. Supreme Court and Supreme Law, supra note 103, at 73-74.

\textsuperscript{111} 388 U.S. 218 (1967).
been afforded an opportunity to have counsel present. But on the following day, after having read the decision in *Kirby v. Illinois*,\(^\text{112}\) where the Court limited *Wade* to situations in which the suspect had been indicted or otherwise formally charged with a criminal offense, he cannot state the holding in the same way. The effect of *Kirby* is not merely to clarify "the law" but to require a reformulation of the way in which *Wade* is understood. Nor does *Kirby* influence the understanding of *Wade* only because *Kirby* was decided by the Supreme Court. Precisely the same change in the way *Wade* is understood would have been required if the distinction had been suggested by the instructor or if, having thought about the case for a while, the student had himself concluded that there were potential grounds for distinguishing between pre- and post-indictment line-ups. In either event, an effort to state the holding would somehow have to come to terms with the fact that *Wade* does not necessarily mean that counsel is required at a pre-indictment line-up. The decision does not, in other words, have a meaning independent of the concepts available to those who seek to understand it.

The same problem inheres in the effort to understand the framers' intentions. Contemporary understanding of those intentions is necessarily influenced by any relevant ideas that are familiar to us, even though they were not known to or salient for the framers. We cannot state the framers' intentions in a way that will seem accurate to us without somehow taking account of such ideas. Suppose, for example, that in the First Congress and in each of the state legislatures that ratified the first amendment assurances had been given that "freedom of the press" meant, *inter alia*, that newspapers would not be required to provide a "right of reply" to persons whom they had allegedly defamed. History has rarely, if ever, provided us with so clear a statement of the framers' intentions. Even intentions so clearly stated, however, cannot have the same clarity in 1981 as in 1791. Concentration of economic power and more specifically concentration of control within the media of mass communication have in recent years led to increasing concern that a major value underlying the first amendment — providing the public with a broad spectrum of information and opinion — is in jeopardy. The situation differs markedly from that which prevailed when the first amendment was adopted, when "[e]ntry into publishing was inexpensive," and "there was relatively easy access to the channels of communica-

\(^{112}\) 406 U.S. 682 (1972).
tion." Once this distinction is drawn, the framers’ intentions appear in a new light. It no longer seems entirely accurate to state simply that they intended to prohibit Congress from imposing an obligation on newspapers to afford a right of reply. So unqualified a statement would suggest that they meant the prohibition to apply in the very different circumstances of our own time. But our knowledge of their intentions does not extend that far, and a contemporary statement of those intentions must somehow accommodate that fact.

Now it might be said that the framers were aware of their inability to foresee the future and provided, in article V, a process by which the Constitution could be amended to reflect changed circumstances and values. The existence of formal amendment machinery cannot be used to support the “core meaning” thesis in this way, however, for the problem is to determine when that machinery must be employed. Since the thesis requires a formal amendment when (but only when) there is to be a departure from the “core meaning,” a method of ascertaining that meaning is essential. Yet, the effort to locate it in the specific intentions of the framers founders upon the difficulty of prescribing the level of generality at which those intentions are to be understood. Are we, for example, to understand the framers’ intentions in the hypothetical illustration above as: (1) prohibiting Congress from imposing a “right of reply” obligation upon newspapers, or (2) prohibiting Congress from imposing a “right of reply” obligation upon newspapers in circumstances in which control over the communications media is widely dispersed? The “core meaning” thesis seems implicitly to assume that the former is appropriate, presumably because that is the level of generality employed by the framers in expressing themselves. But to understand the framers in that way distorts their intentions by attributing to them a choice they could not have made, just as it would distort the meaning of the Supreme Court’s decision in Wade to understand it as having determined whether counsel is required at a pre-indictment line-up.

Although the argument thus far seems to emphasize the impor-


114. Or, to draw from actual rather than hypothetical history, did the framers by adopting the first amendment intend that Congress should not (1) license (a) printing presses, (b) any device for reproduction of the printed word, (c) any means of communication, (d) any means of communication except those whose number is limited by physical laws; or (2) establish a censorship system (a) for printed matter, (b) for any form of communication; or (3) interfere in any way, prior to publication, with (a) printed matter, or (b) any form of communication; or (4) etc.? 
Constitutional Interpretation

tance of changed circumstances, the influence of the present upon the way in which we understand the past is ultimately attributable to contemporary values. Our times differ from those of the framers in innumerable ways. The question is which of the many ways is to count as significant, a question that in the end is one of value. 1981 differs from 1791, for example, in that we now have universal adult suffrage. Yet, an accurate understanding of the framers' intentions concerning the immunity of newspapers from a "right of reply" obligation does not depend upon our noting that difference, for we lack a plausible theory to account for its relevance. Nothing in the values underlying the first amendment, as we understand them, would justify varying the immunity according to whether there is restricted or universal suffrage. By contrast, an accurate understanding of the framers' intentions does require a qualified statement that notes the ease of access to the channels of communication that characterized their times. The difference is that we do have a theory, responsive to first amendment values, that suggests why that fact might be relevant to the existence of the immunity.

Our sense that in the present the framers' meaning is not adequately conveyed by an unqualified statement of their intentions draws support from the fact that those intentions were necessarily more complex than such a statement suggests. Constitutional law has long been informed by an awareness that the so-called "specific intentions" of the framers — the rules that they understood to be embodied in the constitutional provisions they adopted — existed within a broader framework of values. Just as our understanding of the framers' intentions is distorted if we focus exclusively upon those values, ignoring the particular rules by which they were expressed, distortion also occurs if we focus solely upon the rules and ignore the purposes that the rules were thought to serve. An appreciation of the complexity of the framers' intentions, however, leads to an awareness that, in relation to our time, those intentions are often quite ambiguous. Rules and purposes that were once consistent with one another may now seem to point in divergent directions. In view of the multiplicity of the framers' purposes and the varying levels of generality with which those purposes can be stated, there is bound to be — if we have the inclination to seek it — ample opportunity to argue that any contemporary values that would be disserved by adherence to the rules contemplated by the framers are

115. See text at note 10 supra.
116. See text at notes 53-54 supra.
rooted in values to which they intended to give constitutional expression. The ability thus to identify contemporary values with the framers' purposes reinforces our sense that the framers' meaning is not presently captured by an unqualified statement of their intentions. 117

In brief, the so-called "core meaning" of the Constitution is not static. The way it is understood depends upon the interaction of the present with the evidence of the past. The framers' specific intentions cannot constrain the development of constitutional law because those intentions can always be redefined so as to exclude from them the issue that we now confront. Such a redefinition is neither misleading nor disingenuous. Accurate understanding of the framers' intentions requires that we appreciate their limits. The notion that the framers' specific intentions define an inviolable core of constitutional meaning thus founders upon the same difficulty as the notion, more clearly rejected by history, that those intentions establish the outer limits of permissible constitutional development: the issues for which subsequent generations have sought constitutional answers are not those that the framers addressed.

* * * * *

Constitutional law thus emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government. The intentions of the framers describe neither its necessary minimal content nor its permissible outer boundaries. Nor is it surprising that that should be so. The framers were a remarkable group of men, and we are significantly in their debt, but it is a fallacy to suppose that because of their antiquity we can look to them for the wisdom that men seek from their elders. Their experience was more limited than ours. As Pascal wrote more than three centuries ago, in protesting the subjugation of his age to the ideas of the ancients:

Those whom we term the Ancients, were in fact novices in every thing, and formed, properly speaking, the infancy of Humanity; and, as we have added to their knowledge the experience of succeeding ages, it is in ourselves we must find that antiquity we so reverence in others. 118

117. Caution is necessary, however. We are justified in concluding that an accurate understanding of the framers' meaning requires a qualified statement of their intentions. It would not be justifiable to conclude that in light of their underlying purposes they would have intended that newspapers not enjoy an immunity in circumstances such as those that now exist. See text at note 60 supra.

118. B. PASCAL, THOUGHTS ON RELIGION AND PHILOSOPHY 243 (L. Taylor trans. 1894).
It is we, not the framers, who have the experience of life under the
document they wrote and who are familiar with the problems of
maintaining a constitutional order. More fundamentally, we live in
a world that they could not have contemplated, even in fantasy. One
thinks first of the changes that technology has wrought or of the in-
fluence of the vast population migrations during the nineteenth and
twentieth centuries. Yet these are only a part — and not necessarily
the major part — of the gulf that separates their age from ours. No
more is necessary than to mention Bentham and Mill, Darwin, Marx
and Weber, Freud, Keynes, and Einstein and Heisenberg to appreci-
ate how different is our perception of the world from that of the
framers — or, for that matter, from that of the Reconstruction Con-
gress.119 In these circumstances, it would be surprising — even re-
markable — if the intentions of the framers did control the
constitutional law of the present.

To argue that neither the language of the Constitution nor the
intentions of those who employed it controls, the meaning that may
subsequently be given to the Constitution is not, of course, to argue
that they lack relevance to the process by which that meaning is de-
derived. Constitutional law is the means by which we express the val-
ues that we hold to be fundamental in the operations of government.
Judges, or others who wish to appeal to the Constitution, must
demonstrate that the principles upon which they propose to confer
constitutional status express values that our society does hold to be
fundamental. One way in which that can be done is by showing that
those values are rooted in history, that they are not merely the result
of the interests or passions of the moment. As Willard Hurst has
written,

Men do not create satisfying concepts of life's worth or meaning by
simple fiat. Nor do they by enactment, however solemn, create a living
nation, church, or economy. Men grow into values, attitudes, and in-
stitutions.120

The study of history thus enhances our understanding of ourselves,
and in doing so illuminates the issues we confront. Although all of
history is relevant for that purpose, some periods may have special
significance, among which are those surrounding the adoption of the
Constitution or the amendments thereto.121 The events of those

119. See C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS
47 (1932).
121. But not only these periods. No amendments to the Constitution were adopted during
the New Deal (save for the largely peripheral 21st amendment), but the experience of those
years is an important influence upon current thought about constitutional law and seems likely
to be so for the foreseeable future.
times and the responses that were made to them have played a role — on many issues, an important role — in shaping contemporary thought. Decisions were made that established the initial shape of institutions that we have inherited. Concepts were formulated that became not merely the lens through which succeeding generations have viewed the world, but the material from which they have fashioned solutions to the problems they have confronted. It is not surprising, then, that we turn to these periods, perhaps more than to others, in the effort to give structure to our aspirations, to determine the meaning that we ought to give to the Constitution. The search, however, is not for knowledge of the precise accommodation of competing values achieved by the framers, in order that we may some-how deduce the answer to current problems from it, but for a better understanding of the choices that must now be made and of the risks attendant upon alternative solutions. In this way, we draw upon the past, not for answers, but for guidance in coping with the problems that now confront us.

Yet, precisely because we seek a better understanding of the present and guidance in dealing with its problems rather than knowledge of the past for its own sake, we search out from the past those elements of experience and strains of thought that appear most relevant to our own time. In doing so, we almost inevitably mute other parts of that history which — were they to be emphasized — might support a very different interpretation of the Constitution from that at which we have arrived. The picture of a past period that emerges when its history is approached in this way is very different from that which would be drawn by one who sought knowledge of the past for its own sake. But we do not, at least not as constitutional lawyers, seek knowledge of the past merely to understand it. "Our only interest in the past," as Holmes wrote, "is for the light it throws upon the present." The meaning of an earlier period for us — say of the constitutional period or of reconstruction — thus depends upon the fact that it is joined to our time by the years between. Our concern is with ideas in motion. The question is not simply what the framers thought, but what has become of their ideas in the time between their age and ours.

So, for example, the concern for political liberty and freedom from oppressive governmental action that has dominated constitutional thought in recent decades has led us to seek out evidence of the similar concern during the years surrounding the adoption of the

Constitution. We have shown a good deal less interest in the attitudes toward law and judicial discretion that were also characteristic of that period, attitudes that — were they to be emphasized — would severely limit our current capacity to give to the Bill of Rights the generous reading required by modern ideals. Inattention to these latter elements of late eighteenth-century thought would be indefensible if we were attempting to describe the original meaning of the Bill of Rights as a chapter in the history of ideas. Justification depends, rather, upon the divergence between those ideas of the framers and the course that our subsequent history has followed. We see in the framers' concern for political freedom and security against governmental oppression the origins of ideals and aspirations to which the nation has given continuing, even deepening, allegiance. But the framers' conceptions of law and of the proper role of courts do not cast a similar light upon the present. The discontinuity is too great. The evolution of an instrumental conception of law in the intervening years has helped to create a self-consciously law-making judiciary, a development that, in turn, has shaped the other institutions of government that we have inherited. In ways and for reasons that could not have been anticipated by the framers, we have come to rely upon courts as an important agency for fashioning law to meet the altering circumstances and needs of the nation. As a consequence, the framers' expressions concerning law and the judicial role do not convey the same sense of contemporary relevance that we find in their statements about political liberty. Although we recognize a relationship between their concerns and ours, their expressions seem, somehow, not quite to the point.

The relevant past for purposes of constitutional law, thus, is to be found not only in the intentions of those who drafted and ratified the document but in the entirety of our history. But history's relevance, to recall Holmes's familiar insight, is that of necessity, not of duty. The past has given shape to institutions by which the present is governed. To a very considerable extent, moreover, "the range and depth and intensity of present competence and motive depend upon perceptions and values given form by the past." It is nonetheless


125. J. W. Hurst, supra note 120, at 23.
true that in searching the past for a better understanding of the present, we are engaged in a creative activity. We employ the past as a resource, much as courts in a common-law system employ precedent. As we explore the past, in an effort to ascertain how it is similar and how it is different from the present, we see more clearly the choices we now confront. Yet, however useful an understanding of the past may be in clarifying those choices, it cannot determine our response to them. That prerogative — and burden — belongs to the present.