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Terrance Sandalow
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A CONSTITUTIONAL LAW ANTHOLOGY

EDITED BY

MICHAEL J. GLENNON

Professor of Law
University of California, Davis, Law School

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Contents

Terrance Sandalow, *Constitutional Interpretation,* 79 Mich. L. Rev. 1033, 1033–50 (1981).

"[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 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

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framers intended to end capital punishment by the Amendment.

Views such as those expressed by Taney and Black may at times 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-á-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 Taney 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 understood as intending to invest it with power to regulate not only specific activities that they knew affected that commerce but any activity that might do so. So also, the guarantee of "equal protection of the laws" can be understood as proscribing not only certain practices directed against blacks, with which the draftsmen were immediately 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 assumes 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.

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 Constitution to changing circumstances and values. Armed with the awareness 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 Constitution, not creating it. 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 rôle in enforcing 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 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.

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." 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." 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. 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 restric-

tions upon the exercise of state and national power over individuals. Neither government, to be sure, may pass a bill of attainder or *ex post facto* law; deprive any person of life, liberty or property without due process of law; or deny citizens the right to vote on grounds of race, sex, or age (if they are eighteen years of age or older). 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 and denying to any person the equal protection of the laws. On the other hand, the federal government, but not the states, is subject to a Bill of Rights, 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.

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. Restrictions on state power under the equal protection clause also apply equally to the national government, again through the due process clause. 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 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 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 then 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 "[a]ll 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.

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 compromise 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 implementa-

tion 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. "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."

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.

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." 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 emphasize—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.

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. 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 expression 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." 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." 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." 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 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.
> . . .

. . .