



8-1-1965

Constitutional Adjudication

William J. Brennan

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

William J. Brennan, *Constitutional Adjudication*, 40 Notre Dame L. Rev. 559 (1965).

Available at: <https://scholarship.law.nd.edu/ndlr/vol40/iss6/1>

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.



CONSTITUTIONAL ADJUDICATION*

*Honorable William J. Brennan, Jr.***

My subject is "Constitutional Adjudication." That of course is a title which states the ultimate responsibility of the Supreme Court. But a discussion of that responsibility cannot be enlightening without a reminder of two fundamentals that mark our unique structure of government in these United States.

First. The Framers of the Constitution consciously erected a governmental structure which diffuses governmental power. Their concept was that the largest threat to the maintenance of a democratic society lies in undue centralization of governmental power. Their hope was that control by the governed of their society would be assured if they prevented undue concentration of power in any particular governors. To secure this they created a national government of specifically delegated and limited powers and state governments of reserved and independent powers. And in constructing the national government they further diffused power among the three branches—legislative, executive and judicial. But they also engrafted limitations upon all the repositories of governmental power, national and state. Some of these limitations were written into the body of the Constitution itself. The prohibitions in article I, sections 9 and 10, are illustrative. They include, for example, the limitations—applicable both to federal and state governments—against the passage of any bill of attainder or ex post facto law. But most of the restraints are found in the Bill of Rights, initially applied to the federal government by the first ten amendments and extended in large part against the States by the fourteenth amendment.

Second. The special role assigned to the Supreme Court is the interpretation of the Constitution in such way as to carry out this scheme of the Framers. The Supreme Court is a court with all that the word implies to the Anglo-American tradition. But one-half of every term's docket—and much the more important half—is quite different from normal judicial business and quite unlike the usual flow of litigation through state and inferior federal courts—indeed, probably quite unlike the judicial business of any other court in the

* Cardinal O'Hara Lecture, University of Notre Dame, April 21, 1965.

** Associate Justice, Supreme Court of the United States.

world. The central quality of this half of the docket is that the real contest in any case is not so much between the actual parties to it. For, from our beginnings, a most important consequence of the constitutionally created separations of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of actions at law and suits in equity. In this way, important aspects of the most fundamental issues confronting our democracy end up ultimately in the Supreme Court for judicial determination. The Solicitor General of the United States has observed that "they are the issues upon which our society, consciously or unconsciously, is most deeply divided. They arouse the deepest emotions. Their resolution — one way or the other — often rewrites our future history." Until perhaps thirty years ago, the prime examples were contests between state and federal authority and the definitions of the powers of the federal executive and legislative branches. Over the past thirty years, and only over that relatively split second of time, the chief subject of the cases coming to the Court has concerned the relationship of the individual with government — state and federal — that is, with the interpretation and application of the limitations upon governmental power embodied primarily in the Bill of Rights.

A distinguished scholar of the work of the Court, Professor Paul A. Freund of Harvard, has said that:

The current development in constitutional law is to be viewed in the light of the basic functions of the Court in the decision of cases. Three of these functions will help to explain many of the recent controversial trends. [And I interpolate that the basic functions of future Justices won't differ.]

First of all, [because of the way the Framers separated or divided national governmental power] the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitations on that power. The essential powers of government have been recognized and validated by the Court as never before in our history. [In cases decided over the past 30 years.] Congress enjoys constitutional authority over commerce, defense, and the revenues at least as broad as it is likely to wish to exercise. The States are permitted to tax and regulate in ways that were foreclosed or dubious a generation or two ago. Taxation of interstate enterprise, of federal salaries, regulation not only for health, safety and morals but for aesthetic purposes as well, jurisdiction over out-of-state business, are extensions of public power that liberate the law-making process in the States as well as in the Nation.

It is in the realm of procedure that the Court has now been more insistent. And it is appropriate that this should be so. The judges are not experts by virtue of their training or their commissions in the field of economics or public policy. They are, however, the special guardians of legal procedures, of the standards of decency and fair play that should be the counterpoise to the extensive affirmative powers of government. In criminal prosecutions juries are to be fairly selected, evidence is to be legally obtained, and defendants charged with serious offenses are to have the benefit of counsel. Legislative investigations, more frequent and wide-ranging than ever before, are to be conducted with due regard for the right of the witness to know the pertinency of the questions and to be

free of public inquisition that is not related to a legislative purpose. We do well to remember the admiration with which the Anglo-American system of procedure is regarded throughout the world. Peoples that have thrown off the colonial political yoke, whether in India or Israel or Nigeria, have been zealous to retain the procedural guarantees which they learned to prize before their independence.

A second great mission of the Court is to maintain a common market of continental extent against state barriers or state trade preferences. To balance the need for local revenue against the claims of freedom of trade has been another of the tasks and achievements of the Court that now serves as a model for emerging federations on other continents. Western European lawyers are astonished at the wealth of experience and analysis to be found in the U.S. Reports on the problems of a working federation.

In the third place, there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. This too is a corollary of expanding public power. Responsive government requires freedom of expression; responsible government demands fairness of representation. In this context it is not hard to appreciate the central importance of decisions on freedom of press and assembly, on voting rights, and on reapportionment.

. . . But it is well to cultivate perspective, to recognize that although there has been highly significant movement in constitutional doctrine that has to be assimilated rapidly, it has not come as suddenly or as drastically as the more vehement critics assert. The right to counsel for indigent defendants has now been established after twenty years of experience with a rule that made the requirement turn on the facts of each case and thus converted any trial without counsel into the uncertainties of a potential Supreme Court controversy. In those twenty years the States were afforded time in which to bring their procedures into conformity with the best practice. The same is true of the rule that now excludes illegally obtained evidence from criminal trials in the States, after experimenting with a rule that made admissibility turn on the degree of outrageousness of the illegal search and seizure. Legislative investigating committees have not been denied the authority to inquire into the associations of a witness; they must, however, first establish the pertinence of those associations and show probable cause that they have involved illegal or subversive activities. . . . The public schools have, to be sure, been forbidden to install prayers even of a diluted sort; but [given the constitutional injunction of neutrality of government in matters of religion] the alternative would have been to put the Court in the business of picking and choosing among prayers and thus compounding the intrusion of the secular into the religious sphere. Moreover, the [prayer decisions do] not prevent the public schools from engaging in moral education. They are prevented only from doing it in a way that puts psychological constraints on religious minorities in the coercive atmosphere of the school room.¹

This evolution of constitutional doctrine in our lifetimes only reflects the momentous changes we have witnessed in our society. It is a truism that the

1 Address by Paul A. Freund, May, 1963.

change that has swept the world in our century has altered the lives of nearly every person in it. Has this time of change run its course? I don't think so. The chances are better that for a world on the threshold of the space age, even more momentous changes lie ahead. The signs are already about us. The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formation of new thought structures due to scientific advances and social evolution — all these phenomena hasten that day. Our own nation has shrunk its distances to hours, its population is becoming primarily urban and suburban, its technology has spurred an economy capable of fantastic production, and we have become leader of a world composed of a host of new countries which are ready to follow but also quick to reject the path that we take. Our political and cultural differences cannot stop the progress which is making us a more united nation. The maturing tolerance of our religious differences is both symptomatic and significant. As I read in a recent Jewish periodical:

Catholics are talking about their Jewish heritage; church leaders are damning anti-Semitism as sin. Christian clergymen, educators and laymen are re-examining the face of Judaism and are finding a family resemblance in the features — marks of common roots, common aspirations. And Jews are taking a closer look at Christianity, are clarifying their own position, are publicly discussing issues without embarrassment, apology, or compromise. . . . There is a movement toward unity — not theological unity, but unity as people, as members of one American society working together to find solutions to mutual problems and mutual concerns.²

These are facts that have compelled Law itself to rethink its role. None of us in the ministry of the law, whether teacher, practitioner or judge, can deny that Law has sometimes given cause for complaint, that Law has isolated itself from the boiling and difficult currents of life as life is lived. This was not so before the nineteenth century. When the common law flourished greatly, Law was merged, perhaps too thoroughly, with the other disciplines and sources of human value. Custom, for example, was the cherished source of the common law of that time. And what was declared custom but the accumulated wisdom of social problems of society itself? The function of law was to formalize and preserve this wisdom, but it certainly did not purport to originate it. However, under the influence of Austin and other legal thinkers who dominated legal thought in the nineteenth century, the vogue of isolating law from the other disciplines, particularly from theology and from philosophy that was not expressly legal philosophy, had its day. This was admittedly a notion of law wholly unconcerned with the broader extralegal values pursued by society at large or by the individual. It lived in a heaven of abstract technicalities and legal forms, and found its answers to human problems in an aggregation of already existing rules, or found no answers at all. The substantive problems

2 Ianniello, *Perspectives on a New Society*, 17 AD. L. BULL. 1 (1964).

of human living were left for adjustment to the psychologists, sociologists, educators, economists, bankers and other specialists.

But Law is again coming alive as a living process responsive to changing human needs. The shift is to justice and away from fine-spun technicalities and abstract rules. A report of the 1964 meeting of the American Bar Association in New York City has traced the evolution.³ The vogue for positivism in jurisprudence—the obsession with what the law is, which leaves no room for choice between equally acceptable alternatives—gave way first to the concept of sociological jurisprudence, primarily under Roscoe Pound's onslaughts begun over half a century ago. But sociological jurisprudence too had a defect: While it "shifted the emphasis away from positivism . . . it did so at the expense of reality by substituting the abstract idea of society for the actuality of the individual human beings who constitute society in fact."⁴ The new jurisprudence constitutes, rather:

a recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence. . . . The new jurisprudence, as a whole, may be summarized as tending to explore specific, and familiar, situations from a new viewpoint. In a scientific age it asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted. . . . Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice?⁵

Perhaps some of you may detect, as I think I do, a return to the philosophy of St. Thomas Aquinas in the new jurisprudence. Call it a resurgence if you will of concepts of natural law—but no matter. St. Thomas, as you will remember, was in complete agreement with the Greek tradition, both in its Aristotelian and Platonic modes, that law must be concerned with seeing things whole, that it is but part of the whole human situation and draws its validity from its position in the entire scheme of things. It is folly to think that law, any more than religion and education, should serve only its own symmetry rather than ends defined by other disciplines.

While not yet dead, the Austinian concept of law is nonetheless dying.⁶ Law teaching is coming to emphasize the knowledge and experience of the other disciplines, in particular those disciplines that examine or explain the functioning and nature of our society and the aspirations and needs of the individuals who compose that society; in line with this emphasis, the law schools are beginning to insist on preparatory training in these related disciplines. Huntington Cairns in his 1962 Cardozo Lecture emphasized the need for the change when he said that "law to be effective, must conform to the world in which it finds itself. That world is given; law does not make it."⁷

3 ABA Section of International and Comparative Law. *Report of Committee on New Trends in Comparative Jurisprudence and Legal Philosophy*, 89 A.B.A. REP. 1 (1964).

4 *Id.* at 3.

5 *Id.* at 5-6.

6 See, e.g., Hart, *Definition and Theory in Jurisprudence*, 70 Law Q. Rev. 37 (1954).

7 Cairns, *Law and Its Premises*, 24 ALA. L. REV. 418 (1963).

The shift from emphasis upon abstract rules to emphasis upon justice has profound importance for judicial decision making.

[A] shift in the basic philosophy of law . . . results in an epoch-making difference in the way a concrete case is decided. Clearly, cases alone, or even cases, the Bill of Rights, and the legislative statutes together, are not enough; the philosophy of law which the judge . . . brings to the cases, the Constitution, the Bill of Rights, and the legislative statutes is equally important. In fact, it is all-important since it determines the interpretation that is put upon the Bill of Rights, the legislative statute, and the case.⁸

Of course, the judge is not at large to decide according to his personal predilections. Cardozo spoke for all judges when he observed that:

. . . [T]he range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis. . . . Complete freedom — unfettered and undirected — there never is. A thousand limitations — the product some of statute, some of precedent, some of vague tradition or of an immemorial technique — encompass and edge us even when we think of ourselves as ranging freely and at large. The inscrutable force of professional opinion presses upon us like the atmosphere, though we are heedless of its weight. Narrow at best is any freedom that is allotted us. How shall we make the most of it in service to mankind?⁹

Ultimately in those cases where constitution or statute do not clearly decide the case, the judge perforce makes, as Dean O'Meara of the Notre Dame Law School has said, a value judgment, deciding according to his own intellect, experience and conscience. For him, "The complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old patterns."¹⁰

Of course, the fact that Justices of the Court have always been called upon to face and decide some of the dominant social, political, economic and even philosophical issues thrown up by their times does not mean that the Court is charged with making social, political, economic or philosophical decisions. Quite the contrary. The Court is not a council of Platonic guardians given the function of deciding our most difficult and emotional questions according to the Justices' own notions of what is just or wise or politic. To the extent that this function is a governmental function, it is the function of the people's elected representatives. The Justices are charged with deciding according to law. Because the issues arise in the framework of concrete litigation, the issues must be decided on facts embalmed in a record made by some lower court or administrative agency. And while the Justices may and do consult history, the text of the Constitution and relevant precedents dealing with that text are their primary tools. It is indeed true, as Judge Learned Hand once said, that

8 Northrop, *Philosophical Issues in Contemporary Law*, 2 NATURAL L.F. 41, 48 (1957).

9 CARDOZO, *THE GROWTH OF THE LAW*, 60-61 (1924).

10 O'Meara, *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 A.B.A.J. 614, 670 (1957).

the judge's authority depends upon the assumption that he speaks with the mouth of others, that is to say, the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate—for while a judge must discover some composition with the dominant trends of his times, he must preserve his authority by cloaking himself in the majesty of an overshadowing past.

However, we must keep in mind that while the words of the Constitution are binding, their application to specific problems is not often easy. For the Founding Fathers knew better than to pin down their descendants too closely. Enduring principles rather than petty details were what they sought to write down. Thus it is that the Constitution does not take the form of a litany of specifics. There are therefore very few cases where the constitutional answers are clear, all one way or all the other. Particularly difficult in this regard are the cases raising conflicts between the individual and governmental power—the area which in my time has primarily absorbed the Court's attention. Ultimately, of course, the Court must resolve the conflicts of competing interests in these cases, but all Americans should keep in mind how intense and troubling these conflicts can be. Where one man claims a right to speak and the other man claims the right to be protected from abusive or dangerously provocative remarks, the conflict is inescapable. Where the police have ample external evidence of a man's guilt, but to be sure of their case put into evidence a confession obtained through coercion, the conflict arises between his right to a fair prosecution and society's right to protection against his depravity. Where the Orthodox Jew wishes to open his shop and do business on the day which non-Jews have chosen, and the legislature has sanctioned, as a day of rest, the Court cannot escape a difficult problem of reconciling opposed interests. Finally, the coming of age of the Negro citizen, politically and economically, presents a conflict between the ideal of liberty and equality expressed in the Declaration of Independence, and, on the other hand, a way of life rooted in the customs of many of our people. If all segments of our society can be made to appreciate that there are such conflicts, and that they require difficult choices, which in most cases involve constitutional rights—if this alone is accomplished—we will have immeasurably enriched our common understanding of the meaning and significance of our freedoms, as well as have a better appreciation of the Court's function and its difficulties.

How conflicts such as these ought to be resolved is a question which constantly troubles our whole society. There should be no surprise, then, that how properly to resolve them often produces sharp division within the Court itself. When problems are so fundamental, the claims of the competing interests are often nicely balanced, and close divisions are almost inevitable.

It should not be surprising then that Supreme Court decisions—and the Justices themselves—will be caught up in public debate and not infrequently be the subjects of bitter controversy. This has been so throughout our history as a nation. A Washington Post editorial not so long ago did not far miss the mark by saying that this was so because:

one of the primary functions of the Supreme Court is to keep the people of the country from doing what they would like to do — at times when what they would like to do runs counter to the Constitution. . . . The function of the Supreme Court is not to count constituents; it is to interpret a fundamental charter which imposes restraints on constituents. Independence and integrity, not popularity, must be its standards.

Better public understanding of the Court's function and responsibility is an urgent necessity of this day and perhaps will be an even greater necessity of the future since, so to speak, what the Supreme Court does is no longer the concern and interest simply of a political and intellectual elite — the cult of "robe-ism" — but of every citizen. The cult of robe-ism is gone, and with it much of the mystic of the judicial process. . . . The relationship between the national government and the American people is different now even from what it was just a few decades ago. One of the things that have changed in America "is the concept of who matters among the governed, of who are the people with whose opinion a government need be concerned." This echoed Professor Freund's observation that "the most fundamental explanation of the Court's survival and prestige must rest on public understanding of the role and mission of the Court." I add for myself that it is obvious that this public understanding has not been lacking in the past. The question is how to secure that understanding in the future, when decisions of the Court increasingly touch the lives of every citizen. It is essential, just because the public questions which the Court faces are pressing and divisive, that they be thoroughly canvassed in public, each step of the time while the Court is evolving new principles — or perhaps, more accurately, new applications of old principles to new problems — old principles only because they are embedded in our constitutional concept of what constitutes a free and open society. The ultimate resolution of questions fundamental to the whole community must be based on a common consensus of understanding of the unique responsibility assigned to the Supreme Court. It is not accurate to say that new adaptations of constitutional principles are precipitately ordained by the Court.

Evolution of constitutional law has been, in fact, a moving consensus. New positions have been taken and then secured, with fresh controversy revolving in turn about progression from the new consensus. Whether the Due Process Guarantee extended to matters of substance as well as procedure, and whether the safeguards of speech, press and assembly become applicable against the States by virtue of the Fourteenth Amendment, were in their day mooted questions; nowadays these are seen as battles long ago, but the scope of these guarantees is a lively issue that brings new disagreement and uncertainty.¹¹

Controversies over constitutional limits upon governmental powers have been with us from our national beginnings; we settle one only to have another emerge of different mien. If the form of the challenges of the future cannot be predicted with any assurance, we know it is inevitable that such challenges will emerge, and that, as in the past, the issues they create will take the form

11 Freund, *supra* note 1.

of cases and controversies. This will prove only over and over again that, in a real sense, the calendar of the Supreme Court at any time will be a fairly reliable mirror of the issues with which our society is struggling at that time. Certainly we may expect not less but greater implication of the various constitutional guarantees designed to protect individual freedom from repressive governmental action, federal and state. Of course, the federal system's diffusion of governmental power has the purpose of securing individual freedom. But this is not all the Constitution provides to secure that end. There are also explicit provisions to prevent government, state or federal, from frustrating the great design. I don't think there can be any challenge to the proposition that the ultimate protection of individual freedom is found in court enforcement of these constitutional guarantees. This principle is perhaps most strikingly illustrated by the reapportionment cases. Freedom of a state's citizens to experiment with their own economic and social programs is hardly meaningful if the political processes by which such programs must be achieved are controlled by only *some* of the people. The ideal is government of *all* the people, by *all* the people, and for *all* the people. In the field of legislative apportionment, the constitutional guarantee that each citizen will have an equal voice in his government is found in the equal protection clause. Our decisions in the reapportionment cases have enforced this guarantee, and the result should be not the return of discredited judicial intrusion into the field of political judgment, but a more effective operation of the processes by which political judgments are reached.

Similarly, our decisions in the racial discrimination cases have applied the equal protection clause to prevent States from discriminating against citizens because of the color of their skins. Equal protection of the laws means equal protection today, whatever else the phrase may have meant in other times. In the same area of responsibility falls, I think, the series of decisions extending some of the guarantees of the first eight amendments to the States. The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. Its safeguards secure the climate which the law of freedom needs in order to exist. It is true that they were added to the Constitution to operate solely against federal power.¹² But the fourteenth amendment was added in 1868 in response to a demand for national protection against abuses of state power. Did that amendment extend the protection of the first eight amendments against state power? At least ten Justices have believed so, including members of the present Court. But the view which has so far prevailed stops short of that. This view is that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."¹³ This is not a new view. It dates at least from 1897,¹⁴ and was given explicit expression by the Court in 1908.¹⁵ Before I came to the Court in 1956, application of this test had ex-

12 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

13 *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

14 *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 242-46 (1897).

15 *Twining v. New Jersey*, 211 U.S. 78 (1908).

tended the guarantees of the first and fourth amendments and the just compensation clause of the fifth amendment;¹⁶ during my tenure, the fifth amendment's privilege against self-incrimination,¹⁷ the eighth amendment's prohibition of cruel and unusual punishments,¹⁸ and the sixth amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution¹⁹ have been extended. We have also held that the States may not use the fruits of an illegal search and seizure to convict of crime.²⁰

At the same time the Court has debated whether a particular specific, as applied to the federal government, has a different and more stringent meaning than it has when the fourteenth amendment applies the specific to the States. The debate on this question still goes on but the prevailing view is that a provision of the Bill of Rights which is enforced against the States under the fourteenth amendment is enforced according to the same standards with which it is enforced against federal encroachment.

It is true, as Justice Brandeis said, that "it is one of the happy incidents of the Federal System that a State may serve as a laboratory, and try novel social and economic experiments." But the Court has concluded that this does not include the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights. Further, the Court has concluded that to deny the States the power to impair a fundamental constitutional right is not to increase federal power, but rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. This, I think, promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

The common thread of these holdings—none arrived at until after a long series of decisions grappling with the pros and cons of the issues—has been the conclusion that the guarantees in question are essential to the preservation and furtherance of the constitutional structure of government for a free society. I am aware that some of these decisions have aroused the concern of state judges, particularly insofar as they may affect the processes of state criminal procedure. It cannot be denied that the decisions do restrict the latitude of choice open to the States in this area. But that is a price which must be paid for recognition and enforcement of guarantees deemed to have a place among "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²¹ But not all of the guarantees of the Bill of Rights have yet been applied to the States, and future Justices will have to decide which of the remaining ones should be extended. The genius of the Constitution resides not in any static meaning that it had in a world that is dead and gone, but in its adaptability to interpretations of its great principles that cope with current problems and current needs.

16 See *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964).

17 *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

18 *Robinson v. California*, 370 U.S. 660 (1962).

19 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

20 *Mapp v. Ohio*, 367 U.S. 643 (1961).

21 *Hurtado v. California*, 110 U.S. 516, 535 (1884).

I would expect then that constitutional change will be a concomitant of the changes in our society which the future will bring. Just as we have learned that what our constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time, similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. The constant for Americans, for our ancestors, for ourselves, and we hope for future generations, is our commitment to the constitutional ideal of libertarian dignity protected through law. Crises in prospect are creating, and will create, more and more threats to the achievement of that ideal—more and more collisions of the individual with his government. The need for judicial vigilance in the service of that ideal will not lessen. It will remain the business of judges to protect fundamental constitutional rights which will be threatened in ways not possibly envisaged by the Framers. Justices yet to sit, like their predecessors, are destined to labor earnestly in that endeavor—we hope with wisdom—to reconcile the complex realities of their times with the principles which mark a free people. For as the nation moves ever forward towards its goals of liberty and freedom, and new and different constitutional stresses and strains emerge, the role of the Supreme Court will be ever the same—to justify Madison's faith that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [constitutional] rights."²²

22 1 ANNALS OF CONG. 439 (Gales and Seaton ed. 1834).