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The forms and functions of constitutional government are in constant and restless motion, principally restrained from heedless change by the innate conservatism of the law, which finds in stability its most worthy objective. The law regards change merely for the sake of change with suspicion, demanding in the name of stare decisis special justification for departure from the past. But the law also has its moments of movement, particularly in the ever-shifting domain of constitutional law, of which it could be said, with Dean Pound: "Law must be stable, and yet it cannot stand still."[1]

The problem is scarcely new. No society can long survive in which appropriate accommodation is not somehow made to assure stability without stultifying progress. From the conflicting demands of stability and change the law must find, in the words of Mr. Justice Cardozo, "some path of compromise" which offers promise of growth. "Rest and motion, unrelieved and unchecked, are equally destructive . . . ."[2] In this search for proper balance constitutional law presents special difficulties. Stability is essential to preserve certainty and to assure that government and citizen alike may rely upon standards of constant value, while against this compelling necessity there is balanced the equally vital demand for change in the name of progress. The tensions between the two are real and dangerous unless clearly confronted and honestly dealt with.

Constitutional law, like other law, is rooted in the conservative tradition of the legal system as a whole and thus more willingly pays court to the muse of history and the force of precedent than to the muse of sociology and the demand for revision. It is therefore not surprising that lawyers read constitutions as law, in the ordinary meaning of that word, and that judges apply constitutional provisions as they do other law.

> [A constitution] commences, like a statute, with an "enacting clause" in the form of a preamble. It reads like law; its language is the spare legal language of command and prohibition, indistinguishable at most points in texture and tone from the language of ordinary statute law; it neither argues nor exhorts, but lays down, as law lays down, what is to be.[3]

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1. POUND, INTERPRETATION OF LEGAL HISTORY 1 (1923).
2. CARDOZO, THE GROWTH OF THE LAW 2 (1924).
3. BLACK, THE PEOPLE AND THE COURT 7 (1960).

The Constitution of the United States was not cast in legal mold by accident, but by design that was itself the product of ineluctable history. A written Constitution seemed necessary not only to assure adequate authority in the central government, but more importantly to give permanent protection against the potential abuses of government with which there was familiarity enough. The distrust of British forms of government, whether in terms of absolute monarchy or of parliamentary supremacy, had provoked the Declaration of Independence and its ringing denunciation of the "repeated injuries and usurpations" of the "present King of Great Britain."[4] Even after military victory was assured, continuing mistrust of centralized authority had dictated the weak alliance of nation and states provided for in the Articles of Confederation, which proved to be more a charter of "thou shalt nots" than a formula for effective government.

Perhaps fortunately for the future course of American history, the experience under the Articles was so nearly disastrous that the drafting of an entirely new constitution was quickly seen to be the necessary next development. Even so, it is remarkable that, in the short period between the final ratification of the Articles in 1781 and the convening of the Constitutional Convention in 1787, there could have been so complete a reshaping of operative constitutional theory. From a confederation of extremely narrow national power, transition was astonishingly accomplished to a national government of potentially vast affirmative power; from an almost unamendable charter, transition was made to a Constitution which provided flexibility for growth and change; and where judicial review had been precluded before, it now seemed assured. In only one particular were the original motivations of those who sought rupture with Great Britain preserved in both documents. The idea that all government, particularly the national government, must be strictly limited in some respects was preserved intact and indeed made still more explicit in the Bill of Rights which soon became in effect a part of the original Constitution.[5]

Experiment, however, the new Constitution was; and experiment it remains even a century and three-quarters later. Though some of the

4. The Declaration and Resolves of the First Continental Congress (October 14, 1774) and the Declaration of the Causes and Necessity of Taking Up Arms (July 6, 1775) inveighed principally against Parliament. However, by 1776, when the Declaration of Iudependence was issued, "it had become the accepted theory of the colonists that Parliament had no power whatsoever over them and that they were bound to the British empire only by their allegiance to the king. It was this tie with Britain which the Declaration stated was severed." SOURCES OF OUR LIBERTIES 317 (Perry & Cooper eds. 1959). For the text of the three Declarations, see *id.* at 286-89, 295-300, 319-22.

5. See THE GREAT RIGHTS (Cahn ed. 1963), particularly Black, *The Bill of Rights and the Federal Government,* in *id.* at 41, and Brennan, *The Bill of Rights and the States,* in *id.* at 65.

rough edges of uncertainty may have been worn off, the Constitution is, in the second half of the twentieth century, as it was in the late eighteenth century, a charter in constant motion. "From age to age, the problem of constitutional adjudication is the same. . . . It is to keep one age unfettered by the fears or limited vision of another."[6]

The Constitution of the United States was not only an experiment. It was also an act of faith. Those who drafted the Constitution, and those who voted for its ratification, affirmed their faith in a government whose powers were at most suggested without explicit definition. That is the kind of constitution Mr. Justice Cardozo had in mind when he described the constitutional ideal:

> A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars it loses its flexibility, the scope of interpretation contracts, the meaning hardens.[7]

However sound that statement of the constitutional function may now seem, in the eighteenth century the intentional creation of a government with ill-defined powers was an act of such extreme courage that it might well have seemed mere foolhardiness. Indeed, the final draft of the Constitution, the product of one great, and many small, compromises, did not entirely satisfy anyone; and a number of those who attended the Convention did not sign it. Alexander Hamilton, the only delegate from New York who was willing to sign, agreed that it was not "perfect in every part"; and when he later recommended its ratification it was with the faint compliment that it was "upon the whole, a good one, [and] is the best that the present views and circumstances of the country will permit."[8] Others were even less enthusiastic, particularly in such important states as New York and Virginia, where ratification was achieved by perilously narrow margins, and only after assurances had been given that a bill of rights would be immediately proposed as further protection against governmental abuse.

Hesitation was understandable. Earlier experience with written constitutions had not only been limited in extent, but as well largely unpromising. John Locke, who was as much as anyone the intellectual preceptor for the drafters of the Constitution of the United States, had failed in his own efforts at constitution drafting. Confident of the perfection of the constitution which he had drafted for the government of Carolina, he had resolutely provided against change. "These funda-

6. DOUGLAS, WE THE JUDGES 429, 430 (1956).
7. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83-84 (1921).
8. THE FEDERALIST, No. 85, at 590 (Cooke ed. 1961) (Hamilton).

mental constitutions," he had said, "shall be and remain the sacred and unalterable form and rule of government of Carolina forever."[9] Although we can now understand why that constitution was unacceptable, we can also understand the doubts that might have been felt at the proposal in 1787 of a constitution with largely undefined powers and the possibility of amendment over the objection of even several states.

Experience before Locke seemed to point the same way. Solon, whose very name came to signify legal wisdom, was so confident that his proposed reforms were forever sound that he bound the Athenians by oath to proclaim that his laws should not be altered for one hundred years.[10] And Justinian had prohibited any commentary on the product of his codifiers, an act which is now "remembered only for its futility."[11]

Somehow the drafters were wise enough to reject these lessons of more remote history and to be guided instead by their own experience with the rigidly fixed provisions of the Articles of Confederation. Appealingly aware of their own fallibility they provided a way of amendment that was neither so easy as to encourage ill-considered change nor so difficult as to preclude earnestly sought revision.[12]

The crowning achievement of the Constitution-drafters—even more important than the devising of a successful formula for amendment of the fundamental charter—was their creation of a "living" Constitution,[13] adaptable to developments in the physical and social sciences that could not then have been anticipated, and responsive to the changing mores of generations yet unborn. Many years later Woodrow Wilson described the kind of government which that vision made possible.

> [G]overnment is not a machine, but a living thing. . . . It is accountable to

9. SUPREME COURT AND SUPREME LAW 6 (Cahn ed. 1954).

10. WORMSER, THE STORY OF THE LAW 51 (rev. ed. 1962). See also the remarks of Chief Justice Warren in a 1963 address at the Georgia Institute of Technology: "And perhaps the greatest wisdom they showed was in leaving to the people the right to change [the Constitution] by amendment when its language or its interpretation no longer served the national purpose. They knew that change is a law of life, and they did not want our charter of government to be like the laws of the Medes and the Persians which never changed and which eventually became a symbol of the dead past." Warren, *Science and the Law: Change and the Constitution*, 12 J. PUB. L. 1, 7 (1963).

11. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 18 (1921).

12. The lesson has lasted well. A proposed change in the amending process, sponsored by the Council of State Governments, and approved by several state legislatures in early 1963, was disapproved by the American Bar Association later in the same year, 49 A.B.A.J. 986-88 (1963), and seems destined for the limbo it so richly deserves. For a penetrating analysis of the dangers of the proposal, see Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).

13. See Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963).

> Darwin, not to Newton. It is modified by its environments, necessitated by its tasks, shaped to its functions by the sheer pressure of life. . . .[14]

Although a nation and its social structure may be shaped in large part by its constitution and laws, those legal formulations are themselves the product of the nation and social structure of which they are a part. In this there is no contradiction. Law and society are inextricably interrelated; each strives constantly to remake the other into its own image. No one can say which takes the lead in this continuous process of change or which is superior to the other, for in truth each is anterior to its counterpart, while equally each succeeds the other. And so it is that "the judges lead the community's sense of justice as they follow it."[15]

History confirms the point. The greatness of the Roman Empire was in no small part attributable to the appropriateness of the legal structure that was created to meet the needs not only of Rome, but as well, in a marvel of flexibility, the needs of the widely disparate elements of which the Empire was composed. Justinian's Code, although in the evening of Roman greatness, was a superb distillation and rationalization for Roman civilization. Its wide influence throughout the modern civil law world, and even to an extent in the common law world, is adequate reminder of the staying power of a legal structure rationally conceived.

The three most influential revolutions of modern times, the American, French, and Russian, were all grounded upon well articulated philosophies of government, from which supporting institutions could be erected and legal doctrines formulated to ensure fulfillment of the principles for which the struggle had been commenced.

In the United States the strongly phrased Declaration of Independence was within a dozen years succeeded by the Continental Congress, the Articles of Confederation, and the supremely enduring Constitution of the United States. Because the general political and legal objectives were agreed upon from the beginning, it was possible to flesh out the whole structure of the government superbly well in a relatively short time.

In France, however unclear may have been the dramatic cry for "liberty, equality, and fraternity," and however disorganized the period immediately following the physical success of the revolution, the underlying philosophy soon emerged. The frame of government established in the post-Napoleonic period, although not destined to survive in that precise form, operated until the upheavals of 1848

14. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56-57 (1908).
15. ROSTOW, THE SOVEREIGN PREROGATIVE 84 (1962).

made further change necessary, once again to accommodate to the demands of the governed for a government contemporary to their needs. France also contributed, on the private law side, the magnificent accomplishment that was the Napoleonic Code of 1804, which has survived all succeeding challenges to the soundness of its fundamental organization.

Even in Russia, where the success of the revolution of 1917 might have seemed the prelude to rejection of the very idea of a government of laws, at least as other nations recognize that concept, inspiration was from the beginning premised on the systematic expositions in law and logic of Marx and Engels. The failure to achieve elsewhere the anticipated destruction of capitalist society and the persistent refusal of the state to wither away even in Russia are sufficient reminders of the way in which the law accommodates to the exigent facts of the social order. The Soviet state quickly adjusted to these denials in practice of the teachings of theory by creating new norms of government and law that conformed to the realities with which the state, in its highly unwithered form, was confronted.

The United States Constitution, the oldest surviving written constitution, well illustrates stability and change in constitutional law. The very fact of its survival with minimal change over more than 175 years of striking social evolution is strongly persuasive, not only that it was "intended to endure for ages to come,"[16] but as well that it was soundly conceived to achieve exactly that end. The grants of power in the first three articles, to the Congress, the President, and the federal judiciary, were couched in language that was not cautiously restrictive —scarcely, one might say, even guarded.

Article I offers the Congress a generous choice of legislative powers. The scant sixteen words of the commerce clause state a formula which has proved ample for the development of the principal source of national power. The generously unconfined language of the power to tax and spend for the general welfare offers a similarly open-ended invitation for the expansive interpretation which that clause has received from both Congress and Court. When there is added to these and other great legislative powers the culminating elasticity of the "necessary and proper clause," the flex of the legislative muscle is adequately suggested.

The first sentence of article II provides that "the executive Power shall be vested in a President of the United States of America." When there is added to this the uncertain but expandable reach of the President's power as commander-in-chief and as principal custodian of the treaty power, it is understandable how strong chief executives have

16. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

been able to wield vast authority.[17]

Even the federal judiciary, with no power to initiate or adopt legislative programs, is the beneficiary under article III of substantial powers of supervision and restraint upon the other branches of government. Judicial review, as reinforced by the supremacy clause of article VI, is undeniably a powerful instrument which can be used alternatively in the interests of stability or as the advance guard of change.

The significance of stability and change in constitutional law can perhaps best be understood through examination of several principles which may be regarded as basic to the development of constitutional law in the United States.

First. The shaping of constitutional law is not the exclusive province of the Supreme Court of the United States, or even of the judiciary as a whole. President and Congress alike have always been concerned with the constitutional validity of proposed action, whether legislative or executive in character. The rare occasions on which a Congress or a President has advised action in disregard of apparent constitutional barriers are celebrated for their exceptionality, not for their usualness.[18]

Alexander Hamilton believed that "the judiciary is beyond comparison the weakest of the three departments of power," and thus "the least dangerous to the political rights of the constitution. . . ."[19] Others have feared judicial usurpation in light of the presumed finality of judicial review.[20] It is more likely, however, that the veto power of the Court is not as important as its creative function. Even in its more negative role the Court is not beyond reversal, in a few instances by constitutional amendment, and more significantly by legislative revision to avoid constitutional difficulties.[21]

In considering the negative or restraining powers of the federal judiciary it is instructive to recall how relatively few are the instances in which the Supreme Court has invalidated any portion of a federal

17. See, *e.g.*, the discussion in the various opinions in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

18. Probably the most celebrated instance of executive disregard of potential constitutional difficulties was the letter of President Franklin D. Roosevelt to the chairman of a congressional committee urging passage of legislation regulating the coal industry. It concluded as follows: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297 (1938).

19. THE FEDERALIST, No. 78, at 522, 523 (Cooke ed. 1961) (Hamilton).

20. See, *e.g.*, BOUDIN, GOVERNMENT BY JUDICIARY (1932); *cf.* HAND, THE BILL OF RIGHTS (1958).

21. "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).

statute,[22] amounting altogether to fewer than a hundred;[23] many of those decisions either involved relatively unimportant statutes or were themselves later overruled.[24] The times when a presidential act has been specifically repudiated by the Court have been fewer still.[25] Moreover, Congress and President alike have proved themselves uncommonly inventive in finding ways around these occasional barriers erected by the judiciary. Indeed, the Court has never specifically denied the power of the Congress to revise or even withdraw the jurisdiction of federal courts, and specifically of the Supreme Court.[26]

The interdependence of Court, Congress, and President and their joint responsibility for the shaping of constitutional law were effectively summarized in a report of the Senate Judiciary Committee during the period when President Roosevelt's so-called "Court-packing" plan was being debated:

> Today it may be the Court which is charged with forgetting its constitutional duties. Tomorrow it may be the Congress. The next day it may be the Executive. If we yield to the temptation now to lay the lash upon the Court, we are only teaching others to apply it to ourselves . . . .[27]

The importance of judicial review should not, however, be minimized. The very fact of its existence assures basic stability in constitutional law while at the same time providing opportunity for growth and change. To find both stability and change in the same doctrine may seem at first ambiguous. Explanation lies in the fact that both are appropriate functions of the Supreme Court in its role as developer

22. The number of decisions invalidating state legislation is much greater, bringing to mind the remark of Mr. Justice Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).

23. In 1958 Chief Justice Warren observed that "In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution." Trop v. Dulles, 356 U.S. 86, 104 (1958).

24. See, *e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Hammer v. Dagenhart, 247 U.S. 251 (1918), overruled in United States v. Darby, 312 U.S. 100 (1941); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), overruled in Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871).

25. See, *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

26. See *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). Recent commentators have doubted the continuing force of the decision. See Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

27. Sen. Judiciary Comm., *Reorganization of the Federal Judiciary*, S. REP. No. 711, 75th Cong., 1st Sess. 10 (1937).

and expositor of constitutional law. Through judicial review it is possible to preserve a conservative link with the past while, not inconsistently, seeking current anchorage in the dynamics of the contemporary scene. Thus the Court has sometimes thought it necessary to restrain economic innovation or social experimentation, while at other times it has been willing to examine legislative programs and executive action in more relaxed and permissive fashion.

Perhaps the outstanding example which illustrates both aspects of the Court's attitude toward judicial review is found in the fluctuating course of the doctrines pursuant to which specific prohibitions of the Bill of Rights are made applicable to the states. Not long after the ratification of the fourteenth amendment the Court concluded that neither the privileges and immunities clause nor the due process clause imposed upon the states limitations comparable to those upon the national government enumerated in the Bill of Rights.[28] But in the twentieth century the Court has found that many of those specifics are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[29] By the end of 1963 the only important guarantees of the Bill of Rights which had not been specifically "incorporated" into the due process clause were the privilege against self-incrimination, the double jeopardy clause, and the right of jury trial in civil suits. Challenge continues as to each of these, and no one can be sure where the matter will end in this continuing dialogue concerning the meaning of liberty and the extent to which government should be restricted.[30]

Second. Justices of the Supreme Court do legislate, as do their counterparts in the lower federal courts and in the state courts. Mr. Justice Jackson once observed wryly that "Every justice has been accused of legislating and everyone has joined in that accusation of others."[31] The question is not whether, but when, in what degree, and for what ends. It is easy for those who disagree with particular decisions to cry "judicial legislation" much as they might cry "foul" at a sporting event in protest against an unpopular decision by a referee. Thus understood, "judicial legislation" is not inherently more dangerous to the sound progression of constitutional law than "judicial self-

28. The cases are reviewed in Twining v. New Jersey, 211 U.S. 78 (1908).

29. Palko v. Connecticut, 302 U.S. 319, 325 (1937). For recent additions see Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

30. The incorporation into due process of the privilege against self-incrimination is raised in Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744, *cert. granted*, 373 U.S. 948 (1963). It has even been suggested that the jury-trial provision of the seventh amendment as to civil cases might be incorporated. N.Y.U. Law Center Bull., pp. 6-7, Fall, 1963.

31. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 80 (1955).

restraint," however more usual may be a demand for the latter.

The much more important inquiry involves an examination of what courts do with their decision-making power, remembering that failure to keep the law abreast of the times may be as serious an abuse of discretion as a too rapid acceleration in the pursuit of an unripe objective. No one seriously argues, in the vein of Dooley's famous complaint, that judges should follow the election returns.[32] The judge confronted with a problem of constitutional interpretation is required to make a more discriminating assessment. Professor Paul Freund has stated it well: "The judge need only be careful not to confuse the climate of opinion with the heat of the day, not to mistake the gusts of a local storm with the steady winds of doctrine."[33] Even though judges may legislate "only interstitially . . . confined from molar to molecular motions," as Mr. Justice Holmes stated it,[34] their task remains vital and fraught with hazard. There is not in constitutional interpretation the easy road to certainty which Sir Henry Maine attributed to English courts in the nineteenth century:

> When a group of facts comes before an English Court for adjudication . . . . it is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge or acumen, is not forthcoming to detect it.[35]

There is no escaping the fact that law, particularly constitutional law, is not simply "discovered." The formulation and development of controlling principles are in important part shaped by conscious judicial participation in the growth process.

Third. In constitutional law, as elsewhere in the legal system, appropriate reliance on the doctrine of stare decisis assures continuity and stability for the preservation of the system. But, as Mr. Justice Harlan observed in 1962, the Supreme Court has a "considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases . . . ."[36] And Mr. Justice Douglas noted in the same case that "matters of constitutional interpretation . . . are always open."[37] The reasons are not hard to comprehend.

Every rule of law is an experiment, whether resulting from case-by-

32. See MR. DOOLEY ON THE CHOICE OF LAW 52 (Bander ed. 1963).
33. FREUND, ON UNDERSTANDING THE SUPREME COURT 18 (1949).
34. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion).
35. MAINE, ANCIENT LAW 30 (2d American from 2d London ed. 1874).
36. Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962). See also United States v. South Buffalo Ry., 333 U.S. 771, 774-75 (1948); Helvering v. Hallock, 309 U.S. 106, 119 (1940); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-08 (1932) (dissenting opinion).
37. Glidden Co. v. Zdanok, *supra* note 36, at 592 (dissenting opinion).

case development into a principle of the common law, from judicial interpretation of statute, or from judicial application of such generalized commands and prohibitions as the executive power, the commerce power, or due process of law. If the hypothesis upon which a particular solution is premised is proved false, or if the operative facts shift so that the hypothesis is no longer relevant, precedent should not forbid needed change. Rules of law, constitutional no less than others, are generalizations designed to permit men to live in close proximity with their fellows in an orderly society. But these generalizations, however precisely right for one generation, are "not fixed rules for deciding doubtful cases, but instrumentalities for their investigation, methods by which the net value of past experience is rendered available for present scrutiny of new perplexities."[38]

The full Latin maxim, of which stare decisis is the shortened form, is itself instructive as to the creative, but not inflexibly binding, nature of precedent. *Stare decisis et non quieta movere,* said to be the full expression, translates thus: "To adhere to precedents, and not to unsettle things which are established."[39] There is exactly the point. The law, if it is to serve its proper role in society, can never be fully at rest, but must always be to some extent in motion, ever searching for its own best ends.

> The search for a static security—in the law as elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adopting of others to current facts.[40]

Reaffirmation of the truism that precedent must sometimes give way to new doctrine carries with it the danger of a different kind of misunderstanding. While some believe that the Supreme Court has not been mindful of the force and utility of precedent, quite the reverse is in fact true. As recently as 1958 the record of Supreme Court overruling decisions stood at only ninety,[41] and there have been very few additional instances since that time.[42] This is not a significantly large number when it is recalled that most of the doctrines overruled were neither very important by the time of discard nor even of great moment in their revised forms, however proper it may have been in each case to prune out the legal deadwood. The few

38. DEWEY, HUMAN NATURE AND CONDUCT 240, 241 (1922).
39. BLACK'S LAW DICTIONARY 1578 (1951).
40. Douglas, *Stare Decisis,* 49 COLUM. L. REV. 735 (1949).
41. Blaustein & Field, *"Overruling" Opinions in the Supreme Court,* 57 MICH. L. REV. 151 (1958).
42. The most prominent recent example is Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942). *Cf.* Baker v. Carr, 369 U.S. 186 (1962), limiting, if not overruling, Colegrove v. Green, 328 U.S. 549 (1946).

dramatic and well remembered overrulings are the exceptions. And who is there now to argue that the Court's second thoughts were not ordinarily better in these celebrated cases than the discarded doctrine? Surely we are more comfortable today with a Constitution which forbids manifestations of racial discrimination in state-run primary elections[43] and in public schools[44] than a Constitution which invites discrimination or is silent on that score. There are no longer many who would deny a large measure of freedom to state and federal legislatures in their efforts to deal with matters of economic and social welfare.[45] There is no longer much wistful looking back at rulings which permitted compulsory flag salutes[46] or the trial of civilian dependents outside the United States by military courts-martial.[47] Nor on the procedural side is there any noticeable demand for reconsideration of the doctrine that in diversity cases federal courts should apply the substantive law of the states in which they sit.[48]

The great precepts of constitutional law, while not matters of whim or caprice, must nonetheless be capable of movement and flexibility. There is no better example of the growth possible in constitutional principles than the due process clause of the fourteenth amendment, of which Mr. Justice Frankfurter has said, speaking of only one of its aspects, "due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."[49] Precedent is thus a means to the end of constitutional growth and adaptation; it most assuredly is not an end in itself.

Fourth. History and experience have been, and are, the great instruments for the definition of constitutional law. Oliver Wendell Holmes could have been thinking of constitutional law as well as of the common law when he wrote that "The life of the law has not been

43. See Smith v. Allwright, 321 U.S. 649 (1944), overruling Grovey v. Townsend, 295 U.S. 45 (1935).

44. See Brown v. Board of Educ., 347 U.S. 483 (1954), almost overruling Plessy v. Ferguson, 163 U.S. 537 (1896). The overruling was completed in Gayle v. Browder, 352 U.S. 903 (1956).

45. See United States v. Darby, 312 U.S. 100 (1941), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), and Morehead v. Tipaldo, 298 U.S. 587 (1936). *Cf.* Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963).

46. See Board of Educ. v. Barnette, 319 U.S. 624 (1943), overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

47. See Reid v. Covert, 354 U.S. 1 (1957), overruling, on rehearing, Reid v. Covert, 351 U.S. 487 (1956), and Kinsella v. Krueger, 351 U.S. 470 (1956).

48. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938), overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

49. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

logic: it has been experience."[50] No thinking judge denies what Maitland asserted: "To-day we study the day before yesterday, in order that yesterday may not paralyse to-day, and to-day may not paralyse to-morrow."[51]

History and experience interact upon one another so that today's experience with Supreme Court rulings becomes tomorrow's history, ready at hand for adaptation into restatement, modification, or rejection of earlier rulings when next presented for judicial consideration. History is a dynamic component of the judicial process which encourages constant re-examination of doctrines and positions. So long as history is not viewed as a static element, the Constitution can be preserved ever young. History serves the useful function of calling attention to the value of stability, but is clearly no enemy of change. Rather it is the vehicle through which orderly change may be achieved.

Fifth. Probably it has always been true, and certainly it is clear in the twentieth century, that effective government is flexible government. Adaptability must be the catchword, not only to meet crises of the moment but as well to accommodate to changed ways of looking at constitutional doctrines, particularly at limitations on government, such as "unreasonable" search and seizure, due process, equal protection of the laws, and the other vital but open-ended value judgments built into the Constitution. A central function of the three great branches of government, legislative, executive, and judicial alike, is the constant re-examination and redefinition of these values in the contemporary context.

In this process of continuous review and revision critics have found elements of uncertainty that seem to them signs of instability; and of course change by itself does not necessarily mean growth. But the error of the critics lies in viewing all change with suspicion and failing to see the real value that inheres in indefiniteness of formula. With wise guidance from all branches of government, and with honest cooperation among them, vagueness of prescription and proscription alike are seen to be virtues. Chief Justice Hughes once put it this way: "When, in other branches of higher learnings, theology, philosophy, science, the experts disagree, why should we expect suddenly in the law to rise to the icy stratosphere of certainty?"[52]

We should be grateful that "the provisions of the Constitution are not mathematical formulas."[53] As a result there is a rare opportunity

50. HOLMES, THE COMMON LAW 1 (1881).
51. 3 MAITLAND, COLLECTED PAPERS 439 (1911).
52. Quoted by Professor Freund in OYEZ, OYEZ, OYEZ 35 (1963), the printed version of "Storm Over the Supreme Court," a CBS News Broadcast of Feb. 20, 1963.
53. Gompers v. United States, 233 U.S. 604, 610 (1914) (Holmes, J.).

for the development of constitutional law to proceed by way of a continuing dialogue between the Court and the Congress, the Court and the President, and, significantly, between the Court and the people. The Court's prestige is in part attributable to the fact that it is willing to learn from informed criticism, whatever the source.

Bearing this in mind it is apparent why federal constitutional law in the United States has always been essentially contemporary in its responses. Although rooted in the past, constitutional doctrine is not immutably fixed. Instead, constitutional law ever looks at the present as the harbinger of the future. Examples come readily to mind.

1. Use of the so-called "Brandeis brief" has sometimes been permitted by the Court,[54] in seeming violation of the requirement that all pertinent factual matter must appear in the trial court record; but in the early years of the century when the idea was new, a brief which drew on reports of public investigating committees, writings of relevant authorities, and comparable legislative practices was useful in support of the validity of state economic and social welfare legislation. At that time such laws were not necessarily accorded the benefit of the presumption of constitutionality as would now be the case.[55] The whole point of the Brandeis brief was to ensure that the Court had access to contemporary factual data and informed opinions as to the implications of the decisions it was called upon to make.

2. No case better illustrates the fact that the Constitution is to be read in the present tense than *Brown v. Board of Education* where the Court said explicitly:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[56]

The promise of the early demise of racial discrimination as a result of this and related decisions was, as is well known, not promptly achieved under the mandate to achieve desegregation in public schools "with all deliberate speed." But the Court's impatience with unjustified delay has been made clear. Mr. Justice Goldberg has recently spoken pointedly for the Court:

> The rights here asserted are, like all such rights, *present* rights; they are

54. See Muller v. Oregon, 208 U.S. 412 (1908); FREUND, ON UNDERSTANDING THE SUPREME COURT 86-92 (1949).

55. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

56. 347 U.S. 483, 492-93 (1954). For an earlier but not dissimilar reaction, see Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

> not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.[57]

3. The capacity for growth of the American Constitution is by no means exclusively a product of the recent past. In the nineteenth century, when the concern was less with individual freedom, and more with freedom of property, constitutional growth and change were equally demonstrable. One striking example from that period is found in the gradual shift from reliance on the obligation of contracts clause to emphasis on the due process clause as a restraint on state legislative authority in economic matters.

Article I, section 10, of the Constitution denies to the states the power to enact any "law impairing the obligation of contracts." Beginning with Chief Justice Marshall the word "contracts" was given a surprisingly broad reading to prevent the repeal or modification of legislative grants, to prevent the withdrawal of tax exemptions, to prevent the impairment of a charter granted by a state, and to limit relief available to debtors under state insolvency laws.[58] The federal judiciary thus early became a guardian of the rights of private property against state interference. As a result, during the first century of experience under the Constitution the contract clause was considered in almost forty per cent of all cases involving the validity of state legislation.[59] However, with the rise of the railroad, and as the courts enlarged the concept of the police power of the states, the contracts clause received an increasingly restrictive interpretation. Although in 1819 the Court had readily found an implied grant in perpetuity of the charter to Dartmouth College, by 1837 a majority could not find an implied grant of monopoly to the Charles River Bridge Company.[60] Thus began the doctrine that nothing passes by implication in a public grant, unquestionably a limitation on the earlier cases. From this the Court moved gradually, but with seeming inevitability, to an essentially devitalized contracts cause.[61]

Denial of the *laissez-faire* philosophy under the contracts clause by

57. Watson v. Memphis, 373 U.S. 526, 533 (1963).

58. See, *e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); New Jersey v. Wilson, 11 U.S. (7 Cr.) 164 (1812); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810).

59. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 95 (1938).

60. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

61. See Wabash R.R. v. Defiance, 167 U.S. 88, 97 (1897); Butcher's Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Stone v. Mississippi, 101 U.S. 814, 820 (1880). For the similar result as to private contracts, see Manigault v. Springs, 199 U.S. 473, 480 (1905). See also the discussion in SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 149-67 (2d ed. 1954).

no means meant in the nineteenth century an abdication of property interests to the tender mercies of the state legislatures. Reminder is scarcely necessary of the way in which the due process clause, and to a lesser extent the equal protection of the laws clause, of the fourteenth amendment continued the good offices that had previously been satisfied by the obligation of contracts concepts. The contracts clause, at best a somewhat special prohibition, had always been a limited vehicle for the vast tasks originally assigned to it; but the due process clause, available after 1868, suffered from no such modest limitation. The focus then shifted from the narrow obligation of contracts concept to the much broader area of liberty of contract whose high point was marked in *Lochner v. New York*.[62] Despite the forceful attack upon the doctrine advanced by Mr. Justice Holmes' complaint that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[63] this remained the prevailing—although sometimes wavering—doctrine of the Court until 1934.[64] Whether the latest shift marks the Court's return "to the original constitutional proposition," as Mr. Justice Black has suggested,[65] is not here the point. It is simply to note judicial responsiveness to the winds of change that unquestionably blew in the direction of permissiveness for state economic and social experimentation.

The above reminder of the development of constitutional doctrine was drawn from a past era in constitutional law, when concern for property rights was supreme. Now, however, the changed temper of the times demands that the Court sit primarily as guardian of individual liberties, leaving to the Congress and state legislatures almost exclusive control over the allocation of property rights. Professor Freund summarized the situation in these words: "when freedom of the mind is imperiled by law, it is freedom that commands a momentum of respect; when property is imperiled, it is the lawmakers' judgment that commands respect."[66]

CONCLUSION

Interpretation of the Constitution is no less difficult than must have been the original task of draftsmanship. The fact that the Constitution is a written document has assured the advantages of stability in constitutional law, particularly in the guarantee thus assured of restrictions against governmental abuse. At the same time the capacity

62. 198 U.S. 45 (1905).
63. *Id.* at 75.
64. Nebbia v. New York, 291 U.S. 502 (1934).
65. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).
66. FREUND, ON UNDERSTANDING THE SUPREME COURT 11 (1949).

for change in the nature of restrictions and powers alike has been demonstrated over and over again by the Supreme Court, often in concert with the Congress and the President.

The genius of the American Constitution arises out of the effective balance achieved, however precariously and almost accidentally, between the need for stability and the essential accommodation to change. Again, it was Cardozo who hit the right note.

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The ends which the law serves will dominate them all.[67]

67. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).