

# The Idea of the Constitution as Hard Law

William W. Van Alstyne

Constitution. The system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed. This may be embodied in successive concessions on the part of the sovereign power or it may be formally set forth in a document framed and adopted on a particular occasion, as in the Constitution of the United States. In the case of a written constitution, the name is sometimes applied to the document embodying it. In either case it is assumed or specifically provided that the constitution is more fundamental than any particular law, and contains the principles with which all legislation must be in harmony.

*Oxford English Dictionary*

## I

The "idea" of the Constitution is generally thought to be well declared in the famous rhetoric<sup>1</sup> of its Preamble. The idea was

[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity [.]

But the idea of the Constitution was to do these things by making such alterations in the Articles of Confederation of 1781, as were deemed necessary satisfactorily to secure those ends. So the idea of the Constitution draws one down from the rhetoric of its preamble to see more concretely what those alterations were. It is they, generically, that constitute the idea carried into effect.

The first of these alterations, doubtless the most important at the time, lay in the new enumerations of greater legislative powers, to be vested in a newly

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1. Rhetoric is "the art of prose," and it is "the study of the elements used in literature and public speaking." It is also "an affectation in prose or verse," and it is "the art of oratory, esp. the persuasive use of language to influence the thoughts and actions of listeners." *American Heritage Dictionary* 1114 (1971). The preamble is, perhaps, all of the above.

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constituted Congress,<sup>2</sup> to meet the felt shortcomings widely experienced under the Articles of Confederation between 1781 and 1787. The second alteration lay in the additional imposition of certain restrictions on the powers of state legislatures<sup>3</sup> and separately on Congress,<sup>4</sup> albeit without a general bill of rights. Third, the Constitution broke off from Congress new executive and judicial departments.<sup>5</sup> And the enterprise was virtually finished with the new provisions in article V,<sup>6</sup> to facilitate such additional amendments to the Constitution as subsequent experience might commend to the requisite national and state majorities, without the necessity of unanimous state consent, as the Articles of Confederation had required. Article VI then confirmed the supremacy of national law and of the Constitution, exacting oaths of office from state as well as federal officials “to support this Constitution,” once it were to take positive law effect. Lastly, article VII set the means by which the new constitutional order would take effect, on approval by conventions, in not less than nine states.

Beyond these constitutive considerations (of federalism, separation of powers, affirmatively-expressed restrictions, and the supremacy of the Constitution itself), the idea of the Constitution was also to render the proposed readjustments of federal powers within a much more complicated framework than the Articles of Confederation had done. In brief, the idea was to provide multiple offsets of power and of constituency, as a source of balanced factionalism up and down the new government.

2. Principally in what became article I, §8 of the Constitution, with the most significant emphasis put on the power to regulate national and international commerce free of state barriers, and the power to provide financial support for the national government without trusting to state levies.
3. Principally in article I, §10 (including the prohibition on state laws impairing the obligation of contracts, coining money, entering into treaties, or adopting either bills of attainder or ex post facto laws), and also in article IV, large portions of which were essentially carried over from the Articles of Confederation (e.g., the interstate privileges and immunities clause).
4. Principally in article I, §9, including a restriction on any prohibition of importation of “such Persons as any of the States now existing shall think proper to admit” (i.e., slaves) prior to 1808, as well as restrictions on bills of attainder, ex post facto laws, laws suspending habeas corpus, and certain laws taxing exports from any state or otherwise favoring one state’s commerce over another.
5. In the provisions of articles II and III, respectively.
6. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Bicameralism, for instance, was introduced into Congress<sup>7</sup> first through the different electoral provisions, qualifications and terms of office respecting each house separately,<sup>8</sup> and then again through a differential allocation of certain powers separately vested in each.<sup>9</sup> The executive power was severed from Congress and vested in a president who had only a few independent powers,<sup>10</sup> and made electable by a buffered, ad hoc political constituency of special electors twice removed from any direct, popular vote.<sup>11</sup> The executive power was made somewhat more prepossessing, however, by being placed in the hands of a single office (rather than being fractionated among potential rival executive heads), and the president was granted a veto over Congress which could be overridden only by a two-thirds vote in both houses of Congress.

7. Under the Articles of Confederation (art. v), each state simply sent not less than two or more than seven delegates to Congress annually, with each state having one vote in Congress regardless of how many delegates it sent.
8. Virtual state (rather than popular) representation was continued in the Senate, two senators from each state regardless of size, the senators to be chosen as each state legislature would determine, for substantial, six-year terms. (See art. I, §3, cl. 1, and compare the seventeenth amendment, adopted in 1913). As to the House, its members were to be "chosen every second Year by the People of the several States" (art. I, §2, cl. 1), but "the people" eligible to make the choice were established by the Constitution as the same people already eligible by each state's own laws to vote for the more numerous branch of its own legislature. *Id.* Thus in this respect each state also retained full control of the eligible electorate, even for members of the House of Representatives.  
In view of the numerous voting qualifications that existed among the states in 1787 (and for some time later), in no state were electors even for members of the House of Representatives anything like a majority of the whole people in any state. Cf. the fourteenth amendment, §2 (penalizing House representation of states choosing to disqualify males over the age of 21 and not previously convicted of crimes), adopted in 1868; the fifteenth amendment (prohibiting restrictions by race), adopted in 1870; the nineteenth amendment (prohibiting restrictions by sex), adopted in 1920; the twenty-third amendment (granting three presidential electors to District of Columbia residents), adopted in 1961; the twenty-fourth amendment (prohibiting poll taxes in respect to federal elections), adopted in 1964; the twenty-sixth amendment (prohibiting restrictions by age for those over 18), adopted in 1971. Universal suffrage was not an idea of the Constitution.
9. E.g., the reservation of Senate power alone over approval of appointments (including Supreme Court appointments) (art. II, §2, cl. 2); the reservation of Senate power alone over proposed treaties, hedged further by the additional requirement of approval by not less than two-thirds of those present. Note the different requirement, in contrast, that "all Bills for raising revenue shall originate in the House" (art. I, §7), and the requirement restricting impeachment initiatives to the House alone (art. I, §2, cl. 5), albeit with trial in the Senate (art. I, §3, cl. 6)).
10. Compare the unprepossessing listing of executive powers in article II with the much richer enumeration for Congress in article I. There is little doubt that, nationally, Congress was meant to be *primus inter pares* i.e., a far more important body for substantive initiatives than the executive (or, of course, than the judiciary).
11. Electors appointed in such manner as each state legislature should determine were to vote for the president and vice president for a four-year term; each state's electors were to equal in number the senators and representatives each state had in Congress, but no actual senator or representative could be picked as an elector, see art. II, §1, cl. 2. (See also the modification made by the twelfth amendment, adopted in 1804, and the presidential succession amendment, the twenty-fifth, adopted in 1967, pursuant to which Gerald Ford became president following Richard Nixon's resignation, without election either as president or as vice president. Mr. Ford was never elected to any office by a constituency larger than that of the single congressional district in Michigan which he had represented in the House.

In respect to the judicial power, the new provisions were equally distinctive; the Constitution essentially made provision for a limited oligarchy, that is, an entrenched group of federal judges who would be subject neither to original election, possibilities of recall, periodic reappointment, nor even to the constraint of serving for limited terms. The judges might indeed possess no great initiative powers (“of the purse or of the sword”), but in their insulated authority to say in each instance what the law was—in all the many kinds of cases confided to them by article III and by such acts of Congress as would soon be promulgated<sup>12</sup>, their institutional separation was unique. It is quite clear that a principal purpose in so providing for the judges was to remove them from politics and, to that extent at least, justify an expectation of professional detachment in their work.

The Constitution, in separating out the judicial power so distinctly, as well as in ensuring federalism and in distributing the newly enumerated powers between Congress and the President—each with their distinctive constituencies, different terms of office, the bicameralism of the one and the veto of the other and other checks and cross-checks—took the suggestions of mixed forms of limited government (from Montesquieu, Locke, and Polybius,<sup>13</sup>) with extraordinary seriousness, adapting them very pragmatically—even ethnocentrically—to the American scene.

So thorough was this adaptation that the idea of the Constitution in many ways is more like the idea of a Rube Goldberg machine than it is like anything else. The numerous provisions for myriad and multiple checks, various separations of power (vertically as well as horizontally), offsets of power, differentiated constituencies, varied terms of office—in a word, *the mechanics* of the Constitution—dominate the text of the Constitution, up to and including the provisions in article V of four different ways by which even amendments themselves may be made.<sup>14</sup> Rube Goldberg was famous early this century as the “creator of extremely intricate diagrams of contraptions designed to effect relatively simple results.”<sup>15</sup> His eccentric genius is of a piece with our Constitution as a political document of government; it is an

12. E.g., the Judiciary Act of 1789, by far the most comprehensive single piece of legislation adopted by the first Congress.

13. Montesquieu, *The Spirit of Laws* (1748), ed. David Carrithers (Berkeley, 1977). See also Thomas Jefferson, *Notes on the State of Virginia* (1785), ed. W. Peden (1955); *Federalist Papers*: No. 48 (Madison) and No. 78 (Hamilton); John Locke, *Two Treatises of Government*, ed. P. Laswell (1967); I *The Histories of Polybius* 467–73, trans. E.S. Shuckburgh (1962).

14. Under article V (reproduced *supra* note 6), an amendment may be: (a) proposed by Congress and ratified by state legislatures; or (b) proposed by Convention and ratified by state legislatures; or (c) proposed by Convention and ratified by state conventions; or (d) proposed by Congress and ratified by state conventions. But regardless of the procedure, no amendment diluting state Senate representation can be made without an adversely affected state's consent. And prior to 1808, no amendment could be made banning “the migration or importation of such persons as any of the states now existing shall think proper,” or imposing a “capitation or other direct” tax without apportionment by population, counting “three fifths of all other Persons” (e.g., slaves) with free persons.

15. American Heritage Dictionary p. 565 (1971).

original Rube Goldberg machine that conforms to no pure or idealized governmental type.<sup>16</sup> As for a number of its substantive provisions, moreover, without doubt they are accounted for more from the first necessity to "form a more perfect Union" (i.e. as a necessity to elicit the requisite number of nine ratifications), than for any more exalted reason of philosophy or good government.<sup>17</sup>

## II

The world is now full of written constitutions,<sup>18</sup> of which ours is but one example and by no means in any obvious way the best. It is characterized comparatively (i.e., in comparison with other national constitutions) by its extreme brevity. On its face, it does not explain itself nearly as elaborately or as well as many of the world's modern constitutions tend to do. Its mere seven articles and twenty-six amendments are overall far less lucid (and less integrated), for instance, than the new (1977) Constitution of the Soviet Union, or the still newer (1982) Constitution of the People's Republic of China, each of which is substantially fuller and significantly more elaborate than our own.<sup>19</sup>

Even its enumerations of protected freedoms<sup>20</sup> and of assured rights are noticeably shorter than the much fuller enumerations provided by many constitutions among the nations with written constitutions today. Many of these constitutions (again including the Soviet Union's) furnish an enumeration of positive rights,<sup>21</sup> moreover, none of which our Bill of Rights or the fourteenth amendment guarantee.

Similarly, the several provisions respecting federalism in our Constitution are facially insubstantial in comparison with those contained in other modern constitutions. The federalism provisions in our Constitution are much

16. Compare the somewhat more effusive description by William Gladstone, on the occasion of the centennial of the Constitution:

I have always regarded that Constitution as the most remarkable work known to me in modern times to have been produced by the human intellect, at a single stroke (so to speak), in its application to political affairs.

Letter to the Committee in Charge of the Celebration of the centennial of the American Constitution, July 20, 1887.

17. See, e.g., the two special limitations even on amending the Constitution *supra* note 17; they illustrate but a number of clauses one could cite.

18. It was not always so. Recall that the English had no written constitution in 1787 (and still have none); that less than half of today's 160 national constitutions predate 1970; that a mere fifteen predate the Second World War; and that scarcely a half-dozen predate 1900 (the second oldest—"second" to ours—is Norway's, dating from 1814).

19. The former runs to more than 170 articles; the latter to 138. Each lays out the rationale and governing system much more intelligibly than does the Constitution of the United States (though intelligibility and coherence are, of course, by no means exclusive tests of constitutional stature, as parts of the balance of this brief essay may suggest).

20. E.g., article I, §§9 and 10, the Bill of Rights, and the fourteenth amendment.

21. E.g., rights to minimum subsistence, work, education, and essential health care, which in this country are furnished only pursuant to statutes and private charity, to the extent they are furnished at all.

less robust, for instance, than the comparable provisions one will find in the modern constitutions of Canada, Australia, Switzerland, or West Germany, to name a random few.

Comparatively speaking, our Constitution does not read well. Nearly two-thirds of it is, as previously noted, given over to mechanics, i.e., to complicated provisions on the organization of offices with eccentric and differing constituencies. And the original Constitution exhibits no great affection for fully representative (much less more directly democratic) government.<sup>22</sup> In places, it is quaint (e.g., it forbids states to “lay any Duty on Tonnage,” it provides for the Senate to “chuse” the Vice President when the Electoral College fails.) It also has several sanguinary clauses that seem quite forbidding (e.g., it provides that no attainder of treason “shall work Corruption of Blood”).

In brief, read today, from beginning to end, our Constitution actually looks quite undistinguished as a complete and ordered political document. Its main ideas are more comprehensively reported off shore, in a variety of constitutions that, front to back, tend to present themselves better than our own. After weathering two centuries remove from 1787 and the scars of repeated ad hoc amendment, the Constitution of the United States may be, in fact, among the least outwardly impressive constitutions in the world.

### III

But if neither its formal style, its particular plan for the organization of the national government, its separation of powers, its federalism features, nor even its Bill of Rights are remarkable or especially distinguished today—if, as one says, our Constitution is overall but a raw and ungainly sort of American “Rube Goldberg machine”—then what *may* one claim in its favor? Is there nothing that is otherwise special about it, is there no additional idea in this Constitution, nothing still distinctive and worthwhile that has tended to elude most constitutional systems, even now? To the contrary, there is, and it is to this idea we now turn.

By far the most important idea of the Constitution overhangs the several features we have already reviewed, distinctive and significant as they once were (and in some measure still are). We have overlooked it only because it is so much a part of the constitutional furniture we take for granted—as though it were native to every constitution, virtually inseparable from the definition of “constitution” itself<sup>23</sup>—that we do not separately count it by itself. But we should count it (in fact it is not a commonplace feature of constitutions). Nearly everything else depends upon its success. It is the idea of the constitution as hard law, law written virtually in capital letters (LAW), law as meaning reliable law—and law that is reliable partly because

22. See, e.g., the discussion in notes 8 and 11 *supra*.

23. See that definition again at p. 174 *supra*.

it is not easily altered, law that is hard with *all* the implications of hard law.<sup>24</sup>

In a curious fashion, the first proof of the Constitution's singular status as hard law is captured right on its face, i.e., in its Rube Goldberg, scarred, and semi-archaic look. What one first notices about the Constitution of the United States, for instance, is that so much of the original is still there. When changes come, moreover, they come embodied as concrete, visible, specifically dated additions, i.e., as amendments, each recording its own passage into hard law, each reporting a great deal about what we have been through. Indeed, the history of the Constitution is, in a deeply instructive way, publicly reported very much on its own scarred face.

This same point can be made by a different metaphor, equally suitable and very powerful in its implications: that of the "living constitution," and of amendments as a slowly widening series of cambium rings. Real amendments<sup>25</sup> mark visible events in the life of the world's oldest Constitution. That amendments are difficult to add on goes without saying. Were it otherwise—were these Cambium rings easily put on or were the whole Constitution subject to periodic popular choice—perhaps it might read better and promise a great deal more than it does, but at the high cost of diminishing what *this* Constitution distinctly has meant. The majority of the world's constitutions read better than our own not merely because all are more recent (which they are), and not merely because many have borrowed some of the stronger features of our own (as some have), but because even now most are not to the same extent hard law. They may and do fail that idea in any of several critical ways.

Many are not hard law because they are simply not "law" as we understand it in the United States. That is, they cannot be invoked in court and they cannot be used by judges, to hold against legislative acts. They are in a word political rather than legal instruments. They are grand designs, cornucopias of (empty) rights, statements of elaborate rationales of ordered powers. They "explain" a great sovereign nation, they lay out its general plan of government, articulate its political premises, proclaim its fundamental principles and powers, and otherwise just vanish in the night. In fact, they lack cash value, for they are what the government (or the controlling political party) says they are, and they mean what the government (or the controlling party) asserts. They lack a *Marbury v. Madison*, as it were, and they are correspondingly as malleable or as meaningful merely as the shifting politics of majoritarian or totalitarian government declare. In 1987 the vast majority of all national constitutions are still of this sort. Less than two dozen are "hard law," in the full American sense.

24. "hard. *adj.* 1. Resistant to pressure, firm; 2. durable, lasting; 3. difficult to accomplish; [and] 4. deaf to some degree." *American Heritage Dictionary*, p. 600 (1971). Note esp. the last point; it is quite frequently overlooked.

25. Unlike phantom amendments, e.g., amendments made de facto by Congress with judicial acquiescence, or amendments effectively supplied by the courts. Both kinds implicitly disrespect the hard law demands of article V; they have none of the integrity of cambium rings on a living constitution.

Alternatively, a constitution may not be hard law because of the relative ease with which it can be altered. I have already noted that article V in our own Constitution makes alterations in the Constitution difficult. In most other written constitutions it is not nearly so hard at all.<sup>26</sup> One may virtually declare that, to be hard law a constitution must, in fact, be exceptionally difficult to alter, as well as readily enforceable in accessible and professionally serious courts. The American constitution was remarkable in providing for both conditions. It retains those strong distinctions, even now.

The last of the obvious ways in which a Constitution may not be hard law lies within the politics of judicial staffing and of judicial review, in respect to which there are fundamentally two kinds of threats. The most commonplace of these threats our own Constitution reasonably well protects against, namely, the vulnerability of the judiciary to easy removal or to economic harassment, a threat effectively removed by the protections of article III. The second, however, is implicit in our own constitution and not merely that of other countries. It is at the core of our own most divisive professional disputes.

By the “politics of judicial staffing and of judicial review,” I mean nothing more than who gets appointed, and how those appointed may behave: whether they in fact strive straightforwardly to give the various clauses and cambium rings of the Constitution full faith and credit when appropriately pressed to do so (i.e. to apply the whole Constitution), or whether they may—or may not, depending upon the case and the cause. The latter tendency is a strong one even within our own constitutional tradition. It is quite clear we remain divided in appraising it, moreover, most of all in our assessments of particular judges and of the work of the Supreme Court.

In a number of nations with written constitutions, the constitution, though superior law, is nonetheless weak law because the judges are made to be weak—either *de facto*, in the corruption of their selection (as when the appointing powers quite deliberately pick party sycophants) or *de jure*, by their year-to-year vulnerability to removal, reappointment, or recall. We have already noted that our own Constitution, in the drafting of article III, disallowed the latter check on the federal judiciary.<sup>27</sup> What remains, then, is the cost of thus entrenching the federal judiciary, i.e., the risk of judicial hubris, an inclination to read some clauses in and others out. It is in this interpretive crevice (left open in any system—it cannot possibly be closed) that so much professional combat over “interpreting” our Constitution is also waged: from the ad hoc dogmatics of academic terminology (e.g., hermeneutics, deconstruction, originalism, varieties of deferentialism,

26. The Constitution of India provides a clear example. The Constitution of the Soviet Union provides another. (Its previous constitution, of 1936, had been amended by the Supreme Soviet more than 200 times prior to the comprehensive revision published in 1977. And its constitution of 1936 was its third since 1917.

27. Article III can do nothing to prevent the nomination (and Senate approval) of a weak judge; nonetheless, the assurance of life tenure has operated to make poor prophets of some (although by no means all) presidents who have counted on a nominee's past acts.



noninterpretivism, representativism, nonoriginal interpretivism) to lengthy books and articles on the “right” way of doing (and not doing) the business of judicial review.

From an outsider’s perspective, i.e., from a mere traveler’s point of view, the intense passion of American scholars for constructing dominant rationales of the right way of doing judicial review may seem highly overwrought. From within, however, the matter is seen quite differently, and I tend to agree with the view from within. These disputes are in fact quite important. What is going on underneath is a struggle for the Constitution itself, a reprise on the idea of the Constitution as hard law.

My own view is that judges such as Holmes and the more recent Justice Harlan got the matter about right. Each, I think, generally avoided the Scylla and Charybdis of judicial review; i.e., each generally declined to treat the various clauses in the Constitution either as blank checks (on which judges write out their social passions) on the one hand, or as in *terrorem* exclusionary clauses in a commercial insurance contract, clauses to be construed with an instinct to reduce them to virtually meaningless terms (as some judges have done). In different eras, and in somewhat different ways, Holmes and Harlan reflected well on the judicial role. More than most, they took the clauses of the Constitution seriously, and they left amendments to the processes of article V.

The general example of Holmes<sup>28</sup> and Harlan to one side, I want also to provide three case examples of the idea of the Constitution as hard law, although I realize that picking any particular cases, especially in this company, reopens old differences and invites its own disproofs. Still, I would close with these three: *West Virginia Board of Education v. Barnette*;<sup>29</sup> *Youngstown Sheet & Tube v. Sawyer*;<sup>30</sup> and *Ex parte Milligan*,<sup>31</sup> a case of exemplary significance, decided over a century ago.

In *Barnette*, as this audience will recall, the issue was the extent to which compulsory flag salutes could be required in the public schools. The cultivation of a strong spirit of national solidarity in wartime was felt to be at stake; the case both arose and was decided during World War II. Moreover, by this time the compulsory flag salute requirement of the West Virginia schools was utterly commonplace nationally. Its use in the public school setting had been enthusiastically approved by virtually every sort of representative agency throughout the United States. Even so, it was not sustained against the combined weight of religious and of free speech claims, pressed by a handful of obstinate Jehovah Witness children and their families. “If there is any fixed star in our constitutional constellation,” Justice Robert Jackson said in summarizing the most pertinent point, for the Court, “it is that no

28. Holmes remains a most controversial example; the revisionist literature has been extremely harsh. But I expect more favorable opinion to come back to Justice Holmes who, all in all, was a very great judge.

29. 319 U.S. 624 (1943).

30. 343 U.S. 579 (1952).

31. 71 U.S. 2 (1866).

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

In *Youngstown* the issue was not such a poignant first amendment matter but one merely of separation of powers; it involved the executive seizure of steel mills deemed essential by President Truman to sustain the flow of basic weapons during the Korean War. Even though the matter was merely that of separated power (and even though a passive Congress had not actually acted against the President when he directed Secretary Sawyer to take control of the mills), the Court nonetheless affirmed an order to return the mills to private hands. “With all its defects, delays and inconveniences,” Jackson insisted, “men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” Then, virtually as a footnote, Jackson added the following useful sentences to the case: “Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up.”

Like *Barnette* and *Youngstown*, *Ex parte Milligan* was a case that arose during a time of perceived emergency, albeit nearly a century earlier, in 1864. At issue was the substitution in parts of Indiana of trial by military commission rather than by jury, as usually provided by a specific sixth amendment guarantee. The government invoked its expected claim of exigent circumstances to dispense with the usual forms of indictment and trial. The Court, however, disagreed. “The Constitution is a law for rulers and people, equally in war and in peace.” Absent circumstances exceeding those shown in the case, Justice Davis held, the usual fifth and sixth amendment standards would have to be met exactly, the risks notwithstanding.

In each of these cases reasonable persons might (and did) object to the rigidity with which the respectively pertinent constitutional clauses were applied. The dead hand of those provisions need not have bound the living. In each case interpretative judicial license, theories of deference to other departments of government, a sober consideration and reweighing of competing values, and the like lay at hand. But if one grasps the idea of the Constitution as good for all times and not just for some times, one will not be overly impressed by these possibilities, even though it was the prosperous *Youngstown Sheet & Tube Steel Corporation* and the Copperhead *Milligan* (as well as the *Barnette* family) who prevailed in these disputes. The idea of the Constitution as hard law—resistant to pressure, difficult to accomplish, durable, and deaf to some degree—endures.