1938

The Constitution and Constitutional Tradition

Charles S. Collier
George Washington University

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol26/iss3/1

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
THE CONSTITUTION AND CONSTITUTIONAL TRADITION*

By CHARLES S. COLLIER†

The purpose of this paper is to call attention to some features of the development of constitutional law in the United States that justify, as the writer believes, the view that we have a practical Constitution, not embodied in any document or group of documents, which both transcends and limits the familiar written Constitution to whose text we constantly recur. It would be natural to refer to this controlling body of rules and principles as an invisible Constitution, or an unwritten Constitution. Yet it is being reduced to writing constantly by the judges, who have the power to pierce through the problems of interpretation, and who are themselves the vital factors in the evolution of legal tradition. Perhaps this point can be made clear by saying that our constitutional law comprises much more than our written Constitution. Even if we put aside those principles actually controlling in our political system which seem to have a non-legal character, and which cannot be enforced by the judicial courts, we still have an enormous development of doctrines and concrete decisions which are related to our written Constitution only by way of afterthought, but which will be applied and enforced by the courts as constitutional law as against the independent choice of other governmental agencies. The criterion of constitutional law in this sense is that it is paramount law, to which other law must conform. The rules and principles comprised in the invisible Constitution are equally

* Address delivered December 2, 1937, at a Convocation of the University of Kentucky, appointed to celebrate the sesquicentennial anniversary of the formation of the Constitution of the United States and its submission to the people in September, 1787.
† Professor of Law, George Washington University; A. B., 1911, Harvard College; LL. B., 1915; S. J. D., 1932, Harvard Law School. Author of articles in various legal periodicals.
binding in practice with those that are plainly to be derived from a study of the written Constitution. The invisible Constitution is authoritative. It will be enforced by the courts and must be applied in practice.

Of course, the attempt is constantly made by conservative students to explain the entire development of constitutional law as a matter of interpretation of certain particular phrases in the Constitution. There are phrases in that famous document which are indeed hopefully broad and indefinite, and which call for much interpretation and explanation, but which hardly justify the immense significance that has been attributed to them in the development of our constitutional law. The principal phrases that have been believed by many to carry actually this excessive load of legal significance are the due process of law clauses in the Fifth and Fourteenth Amendments, and the phrase "judicial power" as used in Article III. These phrases are, so to speak, the sacramental phrases of the Constitution. They are the outward and visible signs of an inward and spiritual grace. Through them are made visible and plain to the eye of faith enormous systems of doctrine which, if we view the matter realistically, seem to be drawn from other spheres than the text of the Constitution. In truth, these elaborate doctrines are derived from general legal traditions, from the principles of economics and of governmental practice, and particularly from the history and traditions of the common law and of democratic government, as practiced in the United States through a long period.

The difficulty with regard to ascribing all this doctrinal development to a few magical words in the constitutional text is both one of political theory and one of realism. As a matter of fact, these terse constitutional phrases are not the actual source of the rich content of constitutional law which has been attributed to them. The source of the due process decisions actually lies in juristic tradition and in the history and experience of democratic institutions, particularly in our own country. To assert that the vast meaning of due process of law is really inherent in these four words—due process of law—is to impose an impossible burden on the lexicographer. To take such a view is not realistic, and it is in a pragmatic sense a false view, for it leads one to under-rate greatly the importance of factors outside
the true field of textual interpretation in determining the final practical meaning and application of constitutional phrases.

Again, this view seems erroneous as a matter of political theory because the courts are not merely the guardians of constitutional phrases. They are the guardians of the established legal order. The courts deal not merely in texts and phrases, nor can they rely wholly even upon such inspired text as we find in the Constitution of the United States. They deal in practical problems, and in the maintenance of orderly development throughout the entire sphere of economic, political, and social relationships. As a matter of fact, courts have historically never confined themselves to the mere enforcement of legislative enactments. They have always been busily engaged in developing their own juristic traditions. The two great forces, enactment and tradition, have developed side by side. As progressive forces, they may be compared to the two legs of a man, which alternately serve him in his forward movement. Both seem to be indispensable to proper legal development. This characteristic has not been confined to Anglo-American legal history, but is as readily to be discerned in the legal history of ancient Rome, and in the jurisprudence of modern continental Europe. It has in fact been a universal judicial practice to develop tradition and to enrich the law by the infusion of new elements derived from the learning and experience of the jurists themselves.

It would be strange if this universal judicial practice of resorting to nourishing traditions should suddenly disappear when we come to the field of constitutional law. Consider the background of a judge who has always been accustomed to study the development of the common law along with the interpretation of statutes, a judge who has always been accustomed to examine the evolution of old equitable principles, and even to invent new ones to meet the needs of his own day. Such a lawyer has never been accustomed to limit himself in his professional studies to the literal interpretation and application of enactments of appropriate legislative authority. How could a man with such experience and such a background give up entirely the idea of developing, or, as the German language picturesquely
phrases it, *unfolding* legal tradition\(^1\) when set to the task of interpreting and applying the Constitution of the United States. It would have been a complete anomaly in legal history if in constitutional law the element of enactment had been the sole and supreme element, and the element of juristic tradition had fallen into entire or even partial abeyance. The lesson of history in this field surely is that both enactment and tradition have their place. Our written Constitution, after all, is only an enactment. Apart from its paramount character, it is like a statute or administrative ordinance adopted at a particular time. It is necessary, in order to attain the highest possibilities in the administration of justice, that enactments be supplemented and corrected at many points by the development of the traditional element in the law. The theory of justice has its permanent place as a force in our legal development, as well as the theory of legislation.

The scope of this paper is too limited for the writer to attempt to describe with any fullness the nature or content of that large portion of our practical constitutional law, which is in fact derived not from the visible text of the Constitution, but from invisible and secret sources. But we may set forth some statements with regard to three phases in the development of our American constitutional law which illustrate and justify what has been said about the practical importance of our invisible Constitution. These three matters are as follows:

First, the importance of juristic tradition in determining the judicial approach to constitutional questions and the judicial method in solving those questions. This topic might be called "The Mystery of the Nature of Judicial Power." The term "judicial power" is used in the Constitution, but no definition or effective description of it is given. Yet the meaning to be attributed to this term, or in a more practical sense, the power to be actually exercised by the federal judges, embraces a subject of enormous and critical importance.

Second, the use of the functional approach in constitutional interpretation. The language of the Constitution has been interpreted, and very properly in my opinion, largely in terms of the fundamental purposes which our system of government was

\(^{1}\) *Rechtsentwicklung*—a significant term used by Hegel and other German juristic writers.
established to accomplish. But if we seek to interpret and apply the Constitution in terms of the fundamental purposes of the framers, we encounter new difficulties that might have been avoided if we had adhered to the method of interpreting the Constitution in a conceptual way. The essence of the functional approach to constitutional interpretation is that the Constitution is to be interpreted in terms of the practical purposes that led to its establishment, rather than of the conceptual purport of the language which the Constitution employs. It is not the constitutional phraseology, but the constitutional objectives that are controlling. But it is obvious that in order to determine what those purposes were, we are obliged to draw upon unwritten sources. This subject might be entitled "The Mystery of the Unwritten Purposes of the Founders of Our Government."

Third. The third matter is the special significance of juristic tradition in conserving and protecting the general legal order, the familiar economic institutions, the accepted political and social ideals. The Constitution does not in literal terms refer to these matters, but it does declare that no person shall be deprived of life, liberty, or property without due process of law. These terms, "life", "liberty", and "property", are broad in themselves, but furthermore, they may be regarded as representative terms which stand for the entire body of historically developed human rights. When some novel enactment is forced into the scenes of legal security in which we have historically grown up, and which are in conformity with our inherited and sincerely accepted ideals, we often feel that the intrusive statute or ordinance must be set aside and denied legal effect because of its practical inconsistency with what we believe to be tried and true. And yet, there may not be any definite provision in the Constitution which contradicts by its paramount authority the novel enactment. But it is possible in practice to take the view that the Constitution was intended to establish security for the general social, economic, and political institutions with which the framers of the government were familiar, and that radical violations by sporadic political action of these cherished traditions must be denied enforcement on constitutional grounds. The due process clause is a familiar and often accepted channel through which arguments actually
derived from judicial tradition and from inherited American experience are brought to bear upon a concrete problem as to the validity of a novel enactment or an administrative act questioned on fundamental grounds. This third division of our subject could appropriately be called "The Great and Growing Mystery of Due Process of Law."

Let us examine briefly each of the three subjects just suggested.

And first, as to the Mystery of the Nature of Judicial Power. What then is the nature of judicial power? What are its limits and what constitutes the essential features of its technical method? The Constitution itself furnishes no answer. Article III of the Constitution does set forth a list of cases to which the judicial power extends. That is, the jurisdiction of the federal courts is defined by designating categories of cases to which the power of those courts may be applied. But what is this power itself?

To answer that question we must fall back upon tradition and experience. It is doubtless true that when the framers adopted the broad phrase "judicial power" and incorporated it into the Constitution of the United States, they had in mind judicial power as exercised in England and in the American colonies. They were not thinking of judicial power as exercised in an imaginary system that might appeal to some political philosopher, nor were they thinking of judicial power as exercised on the continent of Europe. It is therefore legitimate to conclude, as our courts have done, that the nature and limits of judicial power as granted and established by the Constitution of the United States can best be ascertained by referring to the traditional powers of the English courts of general jurisdiction.

Now, if this criterion be accepted, we find a sure and sufficient foundation for the doctrine of Marbury v. Madison\(^2\) as to the power and duty of our courts to disregard enactments that in the judgment of the courts transgress constitutional limitations. For the English courts, unlike the courts of all the countries of continental Europe, have been accustomed from time immemorial to pass judicially upon the recurring question whether or not some specific action of politically constituted au-

\(^2\) 1 Cranch 137, 2 L. Ed. 60 (1803).
Constitutional Tradition

Authorities, such as municipalities, administrative agencies, military commanders, and colonial governments, was violative of the fundamental legal limitations placed upon those governmental units. This principle has been applied even to the action of the crown itself, and the English courts have, at least since the time of James I, been accustomed to disregard acts of the crown or of the ministers, acting in the name of the crown, that were in fact beyond the legal limit of the royal prerogative, as defined and analyzed by the courts themselves, upon the basis of practice and tradition. Judicial power in England has come to mean that the authority of all governmental agencies has in each case a legal nature, is confined within legally determined limitations, and except as to the formal legislation of Parliament itself, is subject to judicial review. The English use the expression "ultra vires"—"beyond the lawful powers"—where we would frequently use the term "unconstitutional". The effect is the same. The courts have established a paramount body of law, by means of which attempted digressions by any other governmental authority from the proper legal sphere assigned to it may be repressed.

In the light of this background—the nature of the judicial power in England—the decision in *Marbury v. Madison* was an historical necessity. *Marbury v. Madison*, however, is only one chapter in the story of judicial power. What shall be the evidentiary basis for a ruling of unconstitutionality? Must unconstitutionality be established beyond a reasonable doubt, or will a fair preponderance of adverse evidence suffice? May a constitutional issue be resolved by reliance upon judicial notice in opposition to factual evidence of record? May a law be unconstitutional as applied to one set of facts, and constitutional as applied to another? Can statutory paragraphs be separated, and if one paragraph be found violative of constitutional principles, may the other be enforced notwithstanding the loss of its associate?

3 Clark's Case, 5 Coke 64a (1596); Rex v. Cutbush, 4 Burrow 2204 (1768); Winthrop v. Lechmere, 5 Mass. Historical Society Collections, Sixth Series 440 (1728); Mostyn v. Fabrigas, Cowp. 161 (1774); Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A. C. 377.

4 Prohibitions del Roy, 12 Coke 63 (1607); Proclamations, 12 Coke 74 (1600); Campbell v. Hall, Cowper 204 (1774); Walker v. Baird, [1892] A. C. 491.
What sort of an interest must the complainant have in order to make it the duty of the court to pass upon a constitutional question? Does judicial power extend to the rendering of declaratory judgments? Just what novel forms of judicial action shall be included in this new category—declaratory judgments? Must the court refrain from deciding political issues, and how shall the category of political issues be defined?

It seems obvious that we have here a host of questions of a truly fundamental nature, relating to the application of judicial power to the settlement of constitutional disputes. It is not sufficient to present to the courts a constitutional problem defined in a precise scholastic way. They cannot be required to give an answer to any such abstract inquiry. The problem must be presented in the midst of a concrete case, and that case must be in all respects suitable for the application of the judicial power. As the phrase goes, it must be a justiciable controversy, and the constitutional problem must be illuminated by convincing proof, introduced in accordance with traditional legal procedure.

Now, the point that I wish to make in regard to this whole matter is simply that the method and scope of the application of judicial power to these controversies involving constitutional issues are not defined in the Constitution. It is possible to take the view that the entire difficulty is a matter of interpreting the phrase "judicial power". But as before suggested, this involves placing a crushing burden upon the lexicographer. The most that can be said for the phrase in the written Constitution is that it incorporates by reference a great existing body of doctrine. The fact is that in determining their own approach and method of action in constitutional disputes, the courts are compelled to draw upon vast reservoirs of tradition. They must select the materials that they are to utilize, and thus their handling of tradition becomes creative and significant. The principles developed in these inquiries are really fundamental to the whole of constitutional law.

The second great field that has been mentioned, in which we seem to be dealing with an unwritten Constitution, lies before us when we attempt to reconstruct imaginatively the purposes which the framers of the Constitution had in mind. All principles should be construed in the light of the purposes for which
they were established. The secret of the law lies in its purposes or policies, and not in the literal purport of its rules and formulas. Certainly the dominant modern tendency is to study law from this point of view. And we could hardly expect that constitutional law would escape so pervasive a juristic tendency. In fact, it has not so escaped.

To make this point more concrete, let us consider, for example, the problem of defining the commerce power of the federal government. We can attempt to construe the words of the grant as a matter of precise rhetoric. We can, if we choose, rely upon that method exclusively. We then examine the dictionaries, ancient and modern, to determine the meaning of the word “commerce”. We ascertain, for example, that the word seems to be derived from a Latin prototype, which was itself a compound based upon a simple popular phrase—“cum merce”—“with merchandise”. It is interesting that the literary method of investigation suggests the idea that commerce is a matter of sales primarily, and not of transportation primarily, as many of our contemporaries seem to think. But our literary investigation soon convinces us that the word “commerce” has a vast and comprehensive meaning, and that it includes not only sales and transportation, but also the general intercourse of the market place, communication, bargaining, and the process of payment, as well as the contract of sale, considered by itself alone.

There is, however, a deeper meaning behind this linguistic investigation. The words of our language represent concepts, developed by long racial or national experience, that correspond to the realities of actual life. The French have a pithy saying that points clearly to this last idea: “La Science est une langue bien faite”—“Science itself is a well-constructed language.” In other words, there is a scientific or philosophical element in language. The categories or classifications established almost instinctively by our ancestors in constructing the standards and forms of language represent real scientific work in the analysis of ideas. Hence, when we analyze words, we are analyzing concepts. We are not dealing with language in an ornamental or merely pedantic sense. We are dealing with language as a guide to underlying realities.

But for all its legal interest and philosophical value, this
method of analyzing the language of the Constitution, that is, seeking its true purport and meaning through the formal value of the words employed, has its obvious limitations and drawbacks. The constitutional phrase we are now discussing reads: "Congress shall have power to regulate Commerce with foreign Nations and among the several States and with the Indian Tribes." Why was this power given to Congress by the framers? Did they mean to turn over to the Congress as complete a control over commerce among the states as that granted over foreign commerce? Is the power to regulate commerce merely a power to police its operation, to iron out definite difficulties, perhaps sometimes to divert its natural flow; or is it also a power to foster, protect, and subsidize commerce? Again, in view of the complex inter-relation between commerce among the states and local commerce, agriculture, and manufactures, how shall we determine where the federal zone of control begins? Does it not depend on the purpose or purposes for which this grant of power was made to the federal government?

All students of constitutional law are familiar with the important case of *Hammer v. Dagenhart*, in which the Supreme Court held that Congress could not constitutionally exclude from the channels of interstate commerce articles manufactured by child labor in the several states. This statute was in form a regulation of commerce among the states. In its primary aspect, it sought to regulate and control the movement of goods from one state to another. Suppose that Congress had passed a statute prohibiting the importation of articles made by child labor in foreign countries. Would not this form of external tariff or embargo have been valid and controlling? It is pretty clear from our history that the power to regulate foreign commerce is complete in itself, and is not limited by the consideration that this regulation may produce a secondary effect of very important dimensions upon productive industry. In fact, the power to regulate foreign commerce has often been used for the very purpose of assisting productive industry in our own country. Why

---

5 U. S. Const., Art. I, Sec. 8, cl. 3.
7 The Brlg Aurora, 7 Cranch 382, 3 L. Ed. 378 (1813); *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294 (1892); J. W. Hampton, Jr., & Company v. United States, 276 U. S. 394, 48 Sup. Ct. 348, 72 L. Ed. 624 (1928).
does not the power to regulate commerce among the several states have an equivalent breadth of application? The two powers, if they are to be distinguished as such, are granted in the same clause of the same sentence. The phrases “with foreign nations” and “among the several states” are simple prepositional phrases that modify the same principal phrase, namely, “to regulate commerce.” From a purely conceptual point of view, how is it possible that regulating commerce with foreign nations is so different from regulating commerce among the several states? How then can the decision in *Hammer v. Dagenhart* be justified? Is it not directly in contradiction of decisions establishing the complete power of Congress over foreign commerce?

From the conceptual standpoint, the anomaly seems complete. But if we consider what were the purposes of the framers of the Constitution, it is easy to persuade oneself that the purpose in granting control to Congress over foreign commerce was different from the purpose in granting control over commerce among the states. The power of regulating foreign commerce had been exercised by Congress under the Articles of Confederation, before our present Constitution was adopted, though perhaps these Acts could be related in most instances to the treaty-making power of the federal government, as then constituted. At an earlier date, this power over foreign commerce had been systematically exercised by the British Parliament. Nothing was taken, therefore, from the states when the power to regulate foreign commerce was confirmed to Congress in the Constitution of 1787—our present Constitution. No theory of implied reservation of existing state authority can therefore be appropriate with relation to foreign commerce. Furthermore, the necessity of a united national front as against foreign nations in commercial matters was obvious. The framers must have intended that the power of Congress should be entirely self-sufficient in the field of foreign commerce, adequate for uniform national protection, and adaptable readily to the varying requirements of shifting national policy.

But the power to regulate commerce among the several states was carved out of powers held by the states in 1787. It

---

* U. S. Const., Art. I, Sec. 8, cl. 3.
* Article IX, Articles of Confederation, adopted by Congress July 9, 1787.
was a new grant, made because of distinct considerations, not relevant to the grant of power over foreign commerce. The history of those times shows that in giving to Congress the power to regulate commerce among the several states, the framers sought to remove barriers and to stimulate commerce. They were not planning a restrictive power, designed to limit the flow of commerce. They hardly can be supposed to have intended to grant to Congress much control over local production and industry, as incidental to the grant of control over commerce. They were not thinking of such control as a part of the commerce power. The pervasive and sensitive contacts of modern commerce were unknown to them. Our rapid systems of transportation and communication, the close inter-relation of the different elements in the economic system of the nation today, the competitive bidding of firms in many different states for the same orders, have brought about a situation where the exclusion of any classification of goods from commerce among the states would immediately produce a most serious dislocation of the productive industry engaged in the manufacture of goods of that classification. The control over commerce, if thus extended, becomes control over production, not only in large-scale manufacturing industries, but in agriculture, in mining, in forestry, and in industries of every sort. Was it the purpose of the framers by the simple words of the commerce clause to grant to Congress such an enormous power over concerns which in the scene that lay before them during their lives appeared to be matters of local concern, widely separated from commerce among the states?

Whether sound or not, this conclusion was accepted by the Supreme Court. The majority of the court felt that there was an implied limitation upon the commerce power, derived from the necessity of preventing the application of that power from upsetting too seriously the balance of authority between the nation and the states. I do not wish, as a matter of ultimate personal opinion, to express agreement with the decision in Hammer v. Dagenhart. My purpose is simply to set forth the true explanation of that decision. I merely wish to point out that the conclusion the Supreme Court reached in that case really

---

10 Hammer v. Dagenhart, note 6, supra.
depends upon a determination as to what the fundamental purpose of the framers was in relation to the commerce clause. The court's conclusion cannot well be derived from a mere analysis of the conceptual purpose of the words of the commerce clause.

What then are the purposes which the commerce clause was intended by the framers to accomplish or to promote? Was it their intention to establish a regime of free trade as between the states? If so, it would be correct to hold that the affirmative regulatory power granted to Congress was intended to be exclusive, so that the states could not legislate so as to restrict in any way the flow of interstate commerce, even in the silence of Congress. Again, if the purpose was to establish a regime of free trade among the states, the regulatory power of Congress must be construed so as to sustain statutes that foster and protect commerce, but not so as to sustain ordinarily statutes that limit, restrict, or impede commerce among the states.

Was it the fundamental purpose to establish a regime of *uniform* commercial regulation throughout the nation? If so, it would seem that the affirmative powers of Congress over interstate commerce must be employed exclusively for establishing regulations uniform in their actual operation and practical effect. Uniformity of formal application might not be enough to justify a statute in connection with such a fundamental constitutional purpose, because the statute might by its terms produce a practical and economic discrimination as between different sections of the country. For example, Congress adopted in 1935 an Act known as the Ashurst-Sumners Act,\(^\text{11}\) which makes it unlawful to transport in interstate commerce goods made by convict labor into any state where the goods are intended to be sold or used in violation of its laws. If Kentucky and Tennessee permit the sale and transportation of convict-made goods, but Ohio does not, the Ashurst-Sumners Act makes it lawful to transport convict-made goods from Kentucky to Tennessee, but not from Kentucky to Ohio. The actual commercial movement of goods of this character will therefore depend upon state laws, and the uniformity of our commercial system will be interrupted.

Of course, the more serious aspect of this matter is that the principle applied by the Ashurst-Sumners Act to convict-

\(^{11}\) 49 Stat. 494 (49 U. S. C. A. Secs. 61-64).
made goods is seemingly capable of application to goods of other classifications. Thus, a statute which forbade the transportation of articles made by child labor of a certain type or classification into a state that prohibited child labor of that type or classification would be sustainable by the same arguments as those used with relation to the Ashurst-Sumners Act. But such goods could be moved freely into states that did not have restrictive laws of this sort. Similar regulations might be applied to many classifications of merchandise, with the result that interstate commerce would assume a checker-board character, and uniformity of commercial regulation throughout the nation would disappear.

Was it, perhaps, the chief purpose of the commerce clause to establish a regime under which the states were to be disabled from adopting laws and regulations that would blockade any part of our national commerce, and cause it to flow by an uneconomic and comparatively unsuitable route? Many decisions of the Supreme Court, particularly with regard to the validity of state laws, can be best explained on the basis of this somewhat narrower principle. No state may deny the facilities within its territory for the transportation, storage, and wholesale merchandising of goods which are in fact in the stream of interstate or national commerce. Yet, the same state may prohibit retail sales of many commodities, such as liquor, cigarettes, oleomargarine, and presumably many other articles, to which a restrictive policy can appropriately be applied consistently with the constitutional freedom of the individual. Such prohibitions obviously have repercussions on commerce among the states. The volume of interstate movement into a particular state will be greatly diminished if retail sales are not permitted. Congress could doubtless affirmatively regulate the movement of goods into a state that were intended for retail sale, and it has sometimes done so—for example, in the Pure Food and Drug Acts.

This seems to show that this movement is affirmatively a part of

---

22 Woodruff v. Parham, 8 Wallace 123 (1868); Wabash, St. Louis & Pacific Ry. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244 (1886); Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128 (1890); Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900); Western Union Telegraph Co. v. Speight, 254 U. S. 17, 41 Sup. Ct. 11, 65 L. Ed. 104 (1920).

interstate commerce. How then can the state effectively dam back this tide of commercial movement by forbidding retail sales within its jurisdiction? Of course, a provisional answer to this dilemma is found in the "original package" doctrine and the decisions pursuant to it. But the constitutional grant itself says nothing about original packages. We have to infer in some way that the fundamental purpose of the grant, contemplating as it does a division of authority between the nation and the states with reference to commerce and the various interests connected with commerce, was decided upon by the framers of the Constitution with the purpose of establishing such an equilibrium between national and state powers as will award to state authority an appropriate sphere of local police action, even when this affects interstate commerce, whilst at the same time, the general interests of national commerce cannot be in any way subverted by any state whose views or policy are not in accord with those of Congress.

The point that the writer wishes especially to emphasize is that the purposes which the framers had in mind with regard to the commerce clause were never plainly written down. Certainly they are not stated in the text of the Constitution. They really have to be reconstructed imaginatively. There are various sorts of evidence to which we can resort. But the truth is that the courts are forced to rely upon independent reasoning, upon history, and upon such knowledge as they can gather of the principles and contentions of the economists, as guides to the correct solution. The purpose that has to be ascertained is not something fixed historically in 1787. We do not inquire simply what would the man of 1787, with his viewpoint at that time, have desired. But the problem goes deeper. What would be the purpose of the ideal man of 1787 at the present time, if he were brought face to face with our present situation? We have to establish an ideal continuity between the purposes of the framers and the transformed purposes which work in the same directions today. All of this calls for the independent thought of the judges. The principles worked out in this field can hardly be

---

14 Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678 (1827); American Steel and Wire Co. v. Speed, 122 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538 (1904); Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900).
said to be genuinely a part of the written Constitution. The
doctrine of the "original package," for example, with all its
shadings and variations, is today impliedly a part of the com-
merce clause. But in building this elaborate structure of inter-
pretation and interlineation upon the text of the Constitution,
the courts have actually been engaged in independent effort.
They have made us a new Constitution, somewhat after the
likeness of the Constitution of 1787, but in reality greatly en-
riched with additional elements derived from a great variety
of outside sources and worked together into one elaborate struc-
ture, so unified in character, and so consistent and convincing
in its logical appeal that most persons fail to notice its composite
nature.

When we come to the great subject of due process in Ameri-
can constitutional law, almost anyone must admit that the ele-
ment of tradition greatly outweighs the element of enactment.
Due process of law is a comprehensive juristic concept for the
protection of private rights as against all forms of governmental
action.

The phrase is an ancient one, and occurs, as everyone has
heard, in Lord Coke's annotations upon the text of Magna Carta.
Where the text of Magna Carta reads: "No free man shall be
imprisoned unless by the legal judgment of his peers and by the
law of the land," Lord Coke gives an explanation of the phrase
"by the law of the land". His annotation is: "that is, by the due
course and process of the law". This phrase suggests procedural
protection primarily. Yet its chief application historically in
the development of American constitutional law has been to
protect substantive rights from invasion by statutory enact-
ments. Curiously enough, it has not been applied so frequently
for the protection of procedural rights.15 One reason for this
apparent perversion is that procedural rights are in several
instances separately guaranteed, especially as against action of
the federal government, by more specific phrases in the amend-
ments to the Constitution. From this consideration has been
derived the argument that these procedural rights must be
regarded as being outside of due process of law, since the fram-

(1900); Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed.
232 (1884); Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53
L. Ed. 97 (1908).
ers of the amendments felt it was necessary to provide more specific language to guarantee their maintenance. However, in these latter days, we have seen a notable revival of the doctrine that due process involves procedural protections. For example, in *Powell v. Alabama*, the famous Scottsboro case, the Supreme Court held that a person who had been tried and condemned in a state court for a serious crime, without the advantage of having confidential counsel definitely assigned to him and able to represent him throughout the course of the trial, had been denied due process of law, in violation of the Fourteenth Amendment.

But unquestionably, the more important applications of the due process clauses in both the Fifth and Fourteenth Amendments have been in the field of preserving the accepted legal order of historically defined *substantive rights* as against radical statutory innovations. It has been held that constitutional liberty includes the general right of entering into lawful contracts of all sorts, and from this it has been inferred that laws abridging this freedom of contract are generally violative of constitutional safeguards, even when these laws are directed toward understandable social objectives, such as the elevation of the standard of living of wage earners or the protection of members of labor unions against unfair discrimination.17

Perhaps the most important application of this doctrine of liberty of contract has been the maintenance by the courts of a free economic market for commodities and services of all kinds, as against a very large number of price-fixing efforts that have been made by the legislatures of the various states and of the nation.18 The Constitution certainly does not forbid price fixing, in so many words. To fix the prices of commodities upon a fair and rational basis may not seem a more serious interference with business liberty than many other regulations that have been imposed by legislation and upheld by the courts. But the

---

subject is one on which the Supreme Court has for many years been very sensitive. Efforts to fix prices have almost invariably been defeated on constitutional grounds. The well-known case of *Nebbia v. State of New York* is an outstanding exception, but it cannot be said that the force of that case has reversed the generalization just stated.

We do not have sufficient space to examine with appropriate care the economic and social ideals by which the judges seem to have been governed in connection with their doctrines about constitutional liberty. Suffice it to say that the general character of these ideals has been conservative. That is, the judges have sought to preserve the system of free economic bargaining which existed in our country during the first half of the Nineteenth Century under conditions of relative economic equality. They have sought to preserve the principle of individual self-determination in a multitude of legal situations as against the mass effect of statutes which were aimed to control the individual, albeit for his own good. The judges took this course both because the ideal of individual self-determination appealed to their philosophical intuitions, and because it reflected the actualities of the pioneer and equalitarian environment under which these judges came to mental maturity.

This system of laissez-faire economics had unquestionably in its time brought forth great fruits in the exploitation of the riches of the new country and in the reward of individual inventiveness and energy. Under this system, our people had prospered on the whole and enjoyed a degree of practical freedom that surpassed that attained under most other legal systems with which we are even now familiar. Therefore, the system itself seemed to deserve constitutional protection, and the judges assumed the laborious task of defending it in its entirety as against the intrusions of reformist legislation. The doctrine in reality acted upon, though not formally announced, was that the Constitution protects the existing legal order from radical and subversive change, even by strong political majorities, acting through our democratic form of government.

It is clear beyond a doubt that these very extensive additions to our constitutional law, developed in the numerous deci-

---

sions under the due process clauses, are not really the compulsory outcome of the mere adoption of the Fifth and Fourteenth Amendments, considered as political decisions taken by the people of the country. The due process clauses were seized upon as the channels through which arguments might be directed for the preservation of the existing economic and social order. The judges, in their due process decisions, are not merely protecting established rules of the common law, considered simply in their aspect with regard to litigation, but they are protecting the entire legal order, which embodies the historically accepted social and economic ideals of the American people.

Another field in which the due process clause has apparently wrought wonders has been the development of theories of jurisdiction. In a complex federated government like that of the United States, problems of jurisdiction are sure to arise. In no other part of the world does the conflict of laws assume so great a practical importance as with us in the United States. The commerce and general business of the country is a closely integrated whole. But there are forty-eight states, and other governmental subdivisions, besides the United States itself, which claim jurisdiction over one aspect or another of the multitudinous activities of the business world. Now, the jurists have developed a great body of doctrine with regard to the theory of the jurisdiction of a state. A centrally important subject of legal study, known to pedagogues as "the conflict of laws," revolves around these theories of jurisdiction. But not everyone has noted the connection between these juristic theories as to the conflict of laws and the many decisions of our courts which hold that departures from the true and approved doctrines of the conflict of laws are not merely legal errors, but are violations of the Constitution of the United States. If anyone is affected by governmental action adversely, in a way that violates the accepted juristic theory of jurisdiction, he can usually with propriety claim that he has been deprived of rights or property in violation of the Fourteenth Amendment, or possibly of the Fifth, if the federal government happens to be the aggressor in the particular case.20

20 Allgeyer v. Louisiana, 165 U. S. 578 (1897); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905); Compania De Tabacos v. Collector, 275 U. S. 87, 48 Sup. Ct. 100 (1927); The
It is probable that this result would have occurred without the due process clauses, at least as regards the action of several states. The nature of the Union involved reciprocal concessions by the several states which subtracted something from that degree of independent authority which they might have enjoyed as independent nations. The bond of the Union qualifies the jurisdiction of the states.\(^2\) There were decisions before the Fourteenth Amendment was adopted that illustrate this point, for they show that the Fourteenth Amendment was not necessary to secure the judicial enforcement of jurisdictional limitations upon the several states. For example, in *Hays v. Pacific Mail*,\(^2\) decided in 1855, it was held that a state tax regularly assessed on a ship which had lain in a California harbor for a considerable period of time, but which was owned and registered in the State of New York, and which was present in California for commercial purposes only, was an unconstitutional burden. The real ground of this decision was that California exceeded its jurisdiction in taxing property transitorily present on the same basis as property permanently located within the state. This element of unfairness existed before the Fourteenth Amendment as well as later. But the due process clause, in these latter days, gave a more convenient basis for such rulings. Arguments which used to be phrased in terms of state encroachment upon the federal commerce power, or in terms of the impairment of contracts, are now phrased in terms of the due process concept.\(^2\)

But in all phases of the development of these arguments, the controlling legal issue has really been whether jurisdiction had properly attached in the state whose governmental action was under review.

The due process concept has developed its own qualifications and its own independent philosophy. Laws that are directed to conserve the physical safety, the health, and the morals of the people have been largely exempted from troublesome due

---

Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930).
\(^3\) 17 Howard 596, 15 L. Ed. 254 (1854).
\(^4\) Of State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179 (1872); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, esp. the opinion of Bradley dissenting, p. 30 ff., 11 Sup. Ct. 876, 880 (1891).
process restrictions. The statement has sometimes been made
that the due process clause does not apply as a restriction on the
police power. But the whole question is one of appropriateness.
The term "police power" will not justify any wanton or needless
invasion of private rights under the guise of protecting the
public health.24 The decisions of the courts clearly establish
this point.25 A more fundamental reason for avoiding any
radical distinction between the so-called police power cases and
other cases is that no language can be found in the text of the
Constitution, nor can any basic ground be found in historic
experience, which justifies applying the restrictive effect of the
due process clause to other recognized governmental powers,
such as the power to tax, or the power to regulate public utili-
ties, or the power to regulate banks and insurance companies,
in a radically different way from that in which it is applied to
statutes directed to promote the public health.26 The govern-
ment, state and national, had regulatory powers with regard to
the three subjects mentioned from the beginning. In these last-
named fields, however, the due process clause assumes surpris-
ing strength, appropriately protecting individuals from the
arbitrary hand of governmental power in every situation. The
truth seems to be that the due process clause is a universal tem-
pering principle, which enables the courts to qualify or restrain
the force of governmental action in appropriate ways, irrespec-
tive of the category to which the governmental power in ques-
tion may be said to belong. The degree of restraint, no doubt,
is various. Thus, it is very clear that the protection given to
private rights in cases where the government attempts what we
ordinarily call public utility regulation is much more complete
than it is in the field where the government attempts what we
call taxation.27 But in all these fields, there is appropriate pro-

24 Per Holmes, J. in Jacobsen v. Massachusetts, 197 U. S. 11, at
25 Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57,
73 L. Ed. 204 (1928); Weaver v. Palmer Co., 270 U. S. 402, 46 Sup. Ct.
320, 70 L. Ed. 654 (1926); Frost v. Chicago, 178 Illinois 250, 52 N. E.
869 (1899); Wynehamer v. People, 13 N. Y. 373 (1856).
L. Ed. 112 (1911); Otis v. Parker, 137 U. S. 608, 33 Sup. Ct. 168, 47
L. Ed. 323 (1927); German Alliance Ins. Co. v. Lewis, 233 U. S. 389,
34 Sup. Ct. 612, 5 L. Ed. 1011 (1914); O'Gorman and Young v. Hartford
27 Cf. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 237,
40 Sup. Ct. 527, 64 L. Ed. 908 (1920), with Phillips v. Commissioner
tection. The courts have developed an elaborate body of doctrine, into which are interwoven many economic and practical considerations by means of which they seek to reconcile public power and private rights, social action for the promotion of social interests and private effort for private advantage. The problem is essentially one of equilibrium. But it is a moving equilibrium, for the relative strength of the public claim and the private demand in different typical situations will vary as the years change. But it must be obvious to anyone that the controlling considerations which guide the courts in their mighty effort to maintain the appropriate balance between the contending forces of governmental or collective action and of individual effort and private enterprise are not derived from the text of the Constitution, but come largely from the studies which the judges can make as to the economic and practical merits of the different legislative schemes in their relation to the admitted social objectives which the legislature is by one experiment after another trying to reach.

One last subject remains to be mentioned to round out this discussion, namely, the great subject of constitutional equality. We all have examined, perhaps with a thrill of patriotic pride, the phrase in the Fourteenth Amendment that reads: "Nor shall any state deprive any person within its jurisdiction of the equal protection of the laws." The phrase "equal protection of the laws" suggests equality in procedural matters and equality in the concrete application of the laws. That is, the guarantee at first blush seems to mean that no state shall withhold from any individual within its jurisdiction the benefit of the equal protection or application of the laws. But actually this clause has been little applied in the procedural field. One reason for this fact is that such a course of application would render nearly every issue a constitutional issue. Every litigant defeated at a trial will represent to an appellate court that he has not been tried as other men have been tried. If the mere formulation of a complaint of unequal treatment in this field

---

of Internal Revenue, 283 U. S. 589, 51 Sup. Ct. 608, 75 L. Ed. 1289 (1931).

of legal procedure were sufficient to enable a defeated litigant to invoke his constitutional rights, it would be hard to see how the constitutional element could be kept out of even the simplest cases. Hence, in a procedural sense, the meaning of the equal protection clause has been severely restricted. But in compensation, the clause has been very liberally interpreted in a way that might not have been expected by a philosopher reading the text of the Fourteenth Amendment for the first time. The equal protection of the laws has become the pledge of equal laws for all, and in the determination of whether or not laws are of an equal character, the courts have assumed another great function of analyzing and weighing the substantive merits of statutes and other governmental enactments.29

In typical arguments on this issue, the requirement of equality is met by the adverse argument that a permissible classification has been made, and not an obnoxious discrimination against a disfavored group. There is nothing, of course, in the text of the Constitution which will enable us to say what is a proper classification and what is not. Here again, we have the starting point of a vast juristic development. The equal protection of the laws requires only such equality as is appropriate in view of the legislative right to make permissible classifications. The courts are called upon to review the standards of classification and compare the classifications actually attempted with historic principles of justice. In all of this field, the courts are developing or creating new principles or conceptions. They are enforcing as paramount law doctrines which, while they may be verbally related to the equal protection clause, really derive their content and practical significance from other sources. A digest of the opinions which the Supreme Court has rendered, formally based on the equal protection clause in the Fourteenth Amendment, gives us an interesting body of constitutional law, which seems to be fundamentally of juristic origin. It belongs to the element of tradition, and not to the element of enactment in our constitutional history.

In conclusion, may we not say that astonishing as the vast development of constitutional law beyond the meager literal text of the Constitution has been, some such development could hardly have been avoided, if once we make certain postulates as to judicial power and as to the desirability and necessity of a stabilizing and permanent governmental factor that would give a central character and a philosophical continuity to the development of our institutions? There are so many cases in which the judges, men of special learning, experience, and insight, are likely to feel with assurance that they understand the true and sound doctrine with relation to the limits of governmental power that ought to be applied in the factual situation under consideration, whatever politicians or the general public may think. Whenever this true doctrine was ignored, and these limits were transgressed by rash political elements temporarily in control of one branch or another of the political government, the opportunity potentially open to the judges to declare that the true doctrine was law, and could not be set aside by the false doctrine was too tempting to be resisted. It was only necessary to find the means by which the true doctrine could be given a superior legal standing, so as to secure it against the assaults of men "dressed in a little brief authority," but supported in many instances by great democratic forces, under a system of government supposed to be the most democratic in the world. The instrument for attaining this necessary subordination of folly to wisdom was the doctrine of the paramount character of constitutional law. But constitutional law means so much more than the Constitution. If all constitutional law is to be regarded as paramount law, we have an instrument which will carry us far beyond the popular and political belief in a paramount Constitution. By the superior authority of constitutional law, unsound enactments violative of historically established private rights were denied practical effect. In order to make this salutary process as pervasive as possible, it was necessary to make the paramount law as hospitable as possible, so as to include in it the sound and true wisdom from many sources. Thus, there has been introduced into our constitutional law a great infusion of selected materials taken from sources other than the primary or textual interpretation of the Constitution. These infusions
have determined the character of our constitutional law more pervasively and persistently than the primary or literal text of the Constitution itself.

After all, there is good reason to rejoice, rather than to repine, over the fact that our national history has taken this course. Our national Constitution is not merely a document. It is a great mass of learning and wisdom, attached to, or encrusted upon an authoritative and fundamental political instrument. The Constitution is the perfect union of enactment and tradition.