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## Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure

Michael W. McConnell<sup>†</sup>

*In this Essay, Professor McConnell argues that constitutional interpretation should extend beyond the substantive principles expressed in the Constitution to the structural and institutional choices of the Framers. As an example, he explores possible explanations for the disparate treatment the Constitution accords to property and contract rights. Despite the Founders' general commitment to the preservation of private contract and property rights, the contracts clause, by its terms, applies only to state governments, while the just compensation clause applies solely to the federal government.*

*Part I of the Essay summarizes the textual problem posed by the contracts and just compensation clauses. Part II reviews the history of the adoption of those clauses. Part III offers two possible explanations for the reference of each of the two clauses to but one of the two levels of government in our federal system. Part IV concludes the Essay by discussing some implications of these explanations.*

### INTRODUCTION

The natural inclination is to think that individual "rights" must be

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<sup>†</sup> Assistant Professor of Law, The Law School, The University of Chicago. B.A. 1976, Michigan State University; J.D. 1979, University of Chicago.

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protected against "the state"—that is, against government in general. Political liberalism, in both its new and old varieties, derives from a perceived conflict between individual autonomy and governmental authority. Yet it is striking how often the language of the United States Constitution protects important rights against one level or branch of government but not against the others. The provisions of the Bill of Rights apply only to the federal government and not to the states; the equal protection clause of the fourteenth amendment applies only to the states and not to the federal government; the first amendment applies to Congress and not, apparently, to the executive or judicial branches. It is also striking that the courts typically disregard these limits and protect rights against government action generally. Thus, most provisions of the Bill of Rights have been "incorporated" against the states;<sup>1</sup> the equal protection clause has been "reverse-incorporated" against the federal government;<sup>2</sup> and the apparent limitation of the first amendment to legislative action has been ignored.<sup>3</sup>

One of the most puzzling, and thus most interesting, instances in which the constitutional text guarantees individual rights against one level of government but not the others appears in the area of economic liberties—the rights of property and contract. The fifth amendment prohibits takings of private property for public use without just compensation. But, until its incorporation through the fourteenth amendment at the end of the 19th century, the just compensation clause applied only to the federal government.<sup>4</sup> States were free to take property without providing compensation, unless the taking happened to violate some other provision of law. On the other hand, the contracts clause of article I, section 10, prohibits laws "impairing the Obligation of Contracts." This provision applies only to the states. The federal government may impair the obligation of contracts without constitutional restraint unless the impairment is also a taking of property or a violation of some other provision of the Constitution.

A mere glance at the Constitution suffices to show that this difference in treatment was not inadvertent. Section 10 of article I contains certain limitations on state powers; section 9 of the same Article contains

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1. See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

2. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

3. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) (first amendment challenge to executive action); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (first amendment challenge to court order); see also Denbeaux, *The First Word of the First Amendment*, 80 Nw. U.L. REV. 1156 (1986) (questioning the wide acceptance of the application of the first amendment to the non-legislative branches in light of the historical purposes of the amendment).

4. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The Court applied the just compensation clause to the states through the fourteenth amendment in *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

parallel limitations on the powers of Congress. Section 10 provides that “[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.” Section 9, which applies only to Congress, provides that “[n]o Bill of Attainder or ex post facto Law shall be passed.” The omission of a contracts clause from section 9 is too obvious to be anything but deliberate.<sup>5</sup>

The inconsistent treatment of these two overlapping economic rights has been occasionally commented upon,<sup>6</sup> never convincingly explained,<sup>7</sup> and often ignored by scholars in the field. I will explore possible reasons for this disparate treatment of contract and property rights, and thus the original constitutional connection between individual rights and the structure of government. I propose two different, but complementary, explanations loosely derived from comments made by Hamilton and Madison in *The Federalist Papers*. The “Hamiltonian” explanation emphasizes the special role of contracts, as opposed to tangible property, in national commerce. The “Madisonian” explanation emphasizes the relation between threats to contractual and property rights and the problem of faction in state and federal government.

Part I of this Essay will briefly summarize the textual problem posed by the contracts and just compensation clauses, as illuminated by the conceptions of property rights prevalent at the time the Constitution was drafted. Part II will review the history of the adoption of the two clauses with attention to the relationship between individual liberties and constitutional structure. Part III will offer a speculative and analytical account of the reasons for the structure of these constitutional provisions. Finally, Part IV will discuss some of the implications of these conclusions for constitutional analysis today.<sup>8</sup>

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5. For the historical context underlying this assertion, see *infra* text accompanying notes 49-51 & 54-64.

6. See, e.g., B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 9, 172 n.237 (1938); Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 895 (1982); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 512-13 (1944); Hutchinson, *Laws Impairing the Obligation of Contracts*, 1 S.L. REV. (n.s.) 401, 409-10 (1875); Johnson, *The Contract Clause of the United States Constitution*, 16 KY. L.J. 222, 223-24 (1928); McKinney, *The Constitutional Protection of the Obligation of Contracts*, 53 CENT. L.J. 44, 45 (1901).

7. The most serious attempt to explain this anomaly was made by Professor William W. Crosskey. See 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 352-60 (1953). For further discussion of Crosskey's view, see *infra* note 93.

8. I will not address the “liberty of contract,” which was an aspect of substantive due process that originated in the late 19th century. This Essay deals with rights arising from contract, not the right to make contracts. Nor will the Essay deal, except tangentially, with the procedural due process protections for property under the fifth amendment.

## I

## CONTRACTS AND PROPERTY: A TEXTUAL PUZZLE

Critics as well as admirers frequently observe that the American constitutional scheme was designed, in large part, for the protection of private property. James Madison, writing in *The Federalist* No. 10, stated that "the protection of different and unequal faculties of acquiring property" is "the first object of government."<sup>9</sup> He wrote to Thomas Jefferson that the principal motivation for the Constitutional Convention was not (as is often thought) that the Confederation government was ineffectual, but that the rights of property were endangered by the unstable popular governments of many of the states.<sup>10</sup> Gouverneur Morris, also a leading draftsman, stated during the Constitutional Convention: "Life and liberty [are] generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property [is] the main object of Society."<sup>11</sup> These were not isolated statements or idiosyncratic views: The protection of private property was a nearly unanimous intention among the founding generation.<sup>12</sup>

The Constitution is, in most respects, admirably suited to the protection of private property. We think immediately of its explicit restrictions against takings of property without due process and just compensation, against impairment of the obligation of contracts, against bills of attainder, and against debased currency, all backed up by the institution of judicial review. Still more important, however, is the structure of government, which is designed to promote economic stability and to insulate property rights from popular upheavals.

Discussions at the Convention show that the Framers were well aware of the dangers to property that are inherent in unchecked popular assemblies. Gouverneur Morris, for example, commented that "[e]very

9. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

10. 5 THE WRITINGS OF JAMES MADISON 27 (G. Hunt ed. 1904) (letter composed Oct. 24, 1787). Other commentators of the period agreed. See, e.g., *Letters From the Federal Farmer* No. 1 (Oct. 8, 1787), reprinted in 1 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 258 (1987) and in 2 H. STORING, THE COMPLETE ANTI-FEDERALIST § 2.8.6, at 226-27 (1981) ("[S]everal legislatures, by making tender, suspension, and paper money laws, have given just cause of uneasiness to creditors. By these and other causes, several orders of men in the community have been prepared, by degrees, for a change of government . . .")

11. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (M. Farrand ed. 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

12. For greater elaboration and support for this conclusion, see E. JOHNSON, THE FOUNDATIONS OF AMERICAN ECONOMIC FREEDOM 191-92 (1973); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 469-70 (1976); Plattner, *American Democracy and the Acquisitive Spirit*, in HOW CAPITALISTIC IS THE CONSTITUTION? 14-17 (R. Goldwin & W. Schambra eds. 1982); J. Nedelsky, *Property and the Framers of the United States Constitution: A Study of the Political Thought of James Madison, Gouverneur Morris, and James Wilson* 1-2, 11-12 (Ph.D. thesis, Univ. of Chicago, Mar. 1977) (copy on file with author).

man of observation had seen in the Democratic branches of the State Legislatures, precipitation—in Congress changeableness—in every department excesses against personal liberty, private property, and personal safety.”<sup>13</sup> The Convention’s proposal of an extended union, deliberative representation, and checks and balances was the antidote to this problem. The structure of government was designed to promote “the permanent and aggregate interests of the community,”<sup>14</sup> and to reduce the “instability, injustice, and confusion” that had always plagued popular governments.<sup>15</sup> By making legislative change difficult to achieve, the system inclined toward limited government. It also provided procedural safeguards to protect settled expectations from passing political passions. The underlying bias of the system was to preserve the status quo; this in turn protected the preexisting distribution of property.

The difference in application of the contracts and just compensation clauses, however, is difficult to square with this emphasis on property rights. If taking property without compensation is wrong, why is it permitted to the states? If impairing contract rights is unfair, why is it permitted to the federal government? A simple theory of the importance of property will not explain the discrepancy; nor is it explicable on the ground that one level of government is inherently more trustworthy than the other. Unless we are to conclude that the Constitution is simply incoherent on these points—and the presumption should be to the contrary—the search for an explanation must go beyond the Framers’ attitude toward property to the connection they saw between private rights and the structure of political institutions.

These reflections raise practical questions of interpretation. Should the contracts clause be interpreted broadly, so as to protect against takings of property by a state? This depends, in large part, on whether there was a reason not to apply the just compensation clause to the states in the first instance. Should the just compensation (or possibly the due process or ex post facto) clause be interpreted broadly, so as to prevent the federal government from impairing the obligation of contracts? Again, this depends on one’s view of the underlying purposes.

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13. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 512 (punctuation clarified); see also THE FEDERALIST No. 44, *supra* note 9, at 282-83 (J. Madison) (stating the need for constitutional protection of personal security and private rights); 5 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 27 (letter to Jefferson noting frequent encroachments by state laws on individual rights); *Letters from The Federal Farmer* No. 1, *supra* note 10 (citing the infringement by state legislatures of creditors’ rights).

14. THE FEDERALIST No. 10, *supra* note 9, at 78.

15. *Id.* at 77; see also Madison, *Notes on the Confederacy* (Apr. 1787), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 320, 324 (Philadelphia 1867) (decrying the multiplicity of state laws). On Madison’s understanding of the connection between government instability and invasion of property rights, see J. Nedelsky, *supra* note 12, at 85-90.

The nature of the problem, as well as its persistence, is illustrated by two Supreme Court decisions—one under Chief Justice Marshall, the first decision to construe the contracts clause, and the other at the end of the Court's 1985 term, a recent attempt to construe the just compensation clause. Both play upon the slender distinction between contract and property rights.

In *Fletcher v. Peck*,<sup>16</sup> the State of Georgia attempted to seize large land holdings from the current owners (who were, for the most part, bona fide purchasers) because the original grants had been procured by bribing the legislature. This attempt would appear to be a classic "taking," as Marshall's opinion for the Court implicitly acknowledged. Where are the "limits to the legislative power," he wondered, "if the property of an individual, fairly and honestly acquired, may be seized without compensation?"<sup>17</sup> But since the just compensation clause did not apply to the states, the Court had to look elsewhere for a basis to invalidate the action. Marshall's solution<sup>18</sup> was to hold that a "grant" was a "contract;" the grant of land by the State of Georgia "implies a contract" by the State "not to reassert" its right to the land in question.<sup>19</sup> Georgia's seizure of the lands thus violated not the just compensation clause, but the contracts clause.

The reasoning in support of the Court's conclusion, that a "grant" is also a "contract," is instructive for our purposes. "It would be strange," Marshall commented, "if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."<sup>20</sup> This merely restates the problem: Does it make sense to protect contract rights without also protecting property rights? Marshall solved the problem in *Fletcher* essentially by ignoring the textual difference between the contracts and just compensation clauses.<sup>21</sup> If takings are also impairments of contract, and if impairments of contract are also takings, then the constitutional scheme seems to make little sense. But even if we overlook its textual improbability, Marshall's solution fails to eliminate the

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16. 10 U.S. (6 Cranch) 87 (1810).

17. *Id.* at 135.

18. Marshall's reasoning is nearly identical to that of a legal opinion previously issued by Alexander Hamilton. See B. WRIGHT, *supra* note 6, at 21-22. Hamilton's argument had been paraphrased by counsel for Peck. 10 U.S. (6 Cranch) at 123.

19. 10 U.S. (6 Cranch) at 136-37.

20. *Id.* at 137.

21. See J. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES* 408-09 (1895); Currie, *supra* note 6, at 895. Currie points out that Marshall's construction leaves some, albeit reduced, "independent field of operation" for the just compensation clause. *Id.* at 896. Marshall, however, made no attempt to reconcile his reading with the constitutional text. Contrast *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 109-11 (1834), in which Justice Story's opinion observes that no constitutional provision restrains states from taking property without compensation.

“strangeness” of the constitutional scheme. Under his view, a purchaser of property is protected only where the State is the seller. Specifically, the State of Georgia could seize the property of any citizens who were not grantees from the State. Is this not also “strange,” since it treats differently persons whose rights as against the world, including the government, are identical?<sup>22</sup>

*Bowen v. Public Agencies Opposed to Social Security Entrapment*<sup>23</sup> is the mirror image of *Fletcher v. Peck*. In *Bowen*, the federal government reneged on a written commitment to allow state and local governments to withdraw from the Social Security system at any time. The commitment had been made in exchange for the voluntary participation of those governments in the system. This would appear to be an impairment of the obligation of contract if it is a constitutional violation at all. Because the contracts clause does not apply to the federal government, however, the respondent governments characterized the federal government’s action as a taking of property. Marshall’s logic in *Fletcher* could have been used in reverse: Would it not be “strange” that the valuable right to withdraw from the Social Security scheme could be taken away without compensation, after the federal government had received its consideration?

In *Bowen*, however, the Court did not follow Marshall’s reasoning. The Court held that respondent’s right, however valuable, bore “little, if any, resemblance to rights held to constitute ‘property’ within the meaning of the Fifth Amendment.”<sup>24</sup> The Court’s reasoning is somewhat unclear,<sup>25</sup> but it does not seem to be based on the contractual nature of the right to withdraw.<sup>26</sup> Apparently, the right “did not rise to the level of ‘property’ ”<sup>27</sup> because it was merely executory and the United States had given generalized notice, before the agreement was made, that it could alter the terms of the program.<sup>28</sup> Thus, the Court applied contracts clause analysis of the most grudging and positivistic sort to prove

22. See Hutchinson, *supra* note 6, at 416; Trickett, *Is a Grant a Contract?*, 54 AM. L. REV. 718, 729 (1920).

23. 106 S. Ct. 2390 (1986).

24. *Id.* at 2398.

25. The Court reasoned that the right to withdraw from the Social Security system is not a “debt” or an “obligation . . . to provide benefits under a contract for which the obligee paid a monetary premium” and therefore that precedents protecting federal debts and obligations as “property” were inapplicable. *Id.* at 2398-99.

26. Indeed, the Court implied that a contractual term over which the respondents had “any bargaining power” or for which they had provided “independent consideration” might have been considered protected property. *Id.* at 2399. This may demonstrate that, in the Court’s view, some executory contracts create rights under the just compensation clause, although this language also may be merely unconsidered dicta.

27. *Id.*

28. *Id.* at 2398 n.19, 2399.



that the public employers had been denied no property right.<sup>29</sup> Although the Court's result may be correct, its property analysis seems an indirect way to reach the conclusion that the federal government is not forbidden to impair the obligation of contracts.

Historical evidence from the founding period only complicates the puzzle. To the extent the terms were distinguished, "contract" seems to have been understood as a subcategory of property. Blackstone, the Framers' leading authority on the common law, treats contract as "property in action."<sup>30</sup> His discussion of contract law appears in the *Commentaries* solely as one of the various means by which title to property may be acquired.<sup>31</sup> Contract would seem to have no higher legal status than title by gift, grant, marriage, or occupancy.<sup>32</sup> Property, according to Blackstone, is the essential concept—the "third absolute right, inherent in every Englishman."<sup>33</sup> This is not to say, however, that contract rights are unimportant. Rather, they are subsumed in the larger concept of property. Blackstone's definition of property is compendious enough to comprise contract rights as well as more tangible forms of property. The rights of a propertyholder, he explains, "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."<sup>34</sup>

The concepts of property inherited from the English common law were echoed and even expanded by the Framers. Madison, for example, wrote an essay on property in which he distinguished between the term "property" in its "particular application" and in its "larger and juster meaning."<sup>35</sup> He defined the "particular application" by paraphrasing Blackstone (without attribution): "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."<sup>36</sup> Madison associated this meaning with the just com-

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29. Under the contracts clause, a state can avoid restrictions by the simple expedient of announcing, in advance, that it does not intend to comply with its contracts. *E.g.*, *Greenwood v. Freight Co.*, 105 U.S. 13, 17 (1882). *But see* *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 339 (1827) (Marshall, C.J., dissenting) (contending that allowing legislatures to reserve the right to revoke contracts renders the contracts clause meaningless). By contrast, it is unconstitutional for the government to disturb a property interest arbitrarily, even if it announces in advance its intent to do so. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

30. 2 W. BLACKSTONE, COMMENTARIES \*440.

31. *Id.* at \*442-70.

32. Contrast Thomas Hobbes, who defined "Justice" as meaning that "men performe their Covenants made." T. HOBBS, *LEVIATHAN*, pt. I, ch. XV, at 71 (London 1651) (emphasis deleted).

33. 1 W. BLACKSTONE, COMMENTARIES \*138. The first two are natural liberty and personal security. *Id.* at \*125, \*130.

34. *Id.* at \*134.

35. 6 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 101 (essay entitled "Property," which appeared in *The National Gazette*, Mar. 27, 1792).

36. *Id.*; *cf.* 2 W. BLACKSTONE, COMMENTARIES \*2 (minor textual variations).

pensation clause.<sup>37</sup> In its “larger and juster meaning,” Madison saw property as embracing “every thing to which a man may attach a value and have a right,” including “the free use of his faculties and [the] free choice of the objects on which to employ them.”<sup>38</sup>

Madison’s essay concluded that property in both the narrower and broader senses warrants legal protection: “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses.”<sup>39</sup> His principal concern, it seems, was with the acquisition and transfer of property rather than its mere possession; that is, with contract rights as well as property rights. “That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which . . . are the means of acquiring property.”<sup>40</sup>

Gouverneur Morris was in agreement. As one scholar has commented:

[T]he rights of property Morris was so concerned with were those essential to a commercial society, the rights of property in transaction. Everyone knew that people’s possessions should be secure from theft or arbitrary confiscation; Morris’ arguments urged that in a commercial society the freedom of disposition and the security of contractual agreements were at least as important as this physical security.<sup>41</sup>

The Founders’ emphasis on acquisition and transfer as well as possession was consistent with the development of a commercial republic.<sup>42</sup> An agrarian economy could be preserved on the basis of property rights alone; commerce required exchange. The emphasis on contract was also connected with the distrust of a landed nobility and attendant aristocratic institutions.<sup>43</sup> The constitutional scheme tends toward a social system of economic mobility—of static inequality but expansive opportunity—rather than one of fixed concentrations of wealth.<sup>44</sup> At the same time, however, the need to protect rights of possession was seen to follow from the rights of acquisition. “The personal right to acquire property,

37. 6 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 103.

38. *Id.* at 101.

39. *Id.* at 102.

40. *Id.*

41. J. Nedelsky, *supra* note 12, at 33-34.

42. See generally THE FEDERALIST No. 11 (A. Hamilton) (on the importance of the Union to the development of American commerce).

43. See, e.g., Pennsylvania Packet, Mar. 11, 1780, at 2, col. 1 (G. Morris), quoted in J. Nedelsky, *supra* note 12, at 30 (“Above all things government should never forget that restrictions on the use of wealth may produce a land monopoly, which is most thoroughly pernicious.”).

44. Hence the trend toward abolition of primogeniture and entail during the founding period. See 1 WRITINGS OF THOMAS JEFFERSON 59-60 (P. Ford ed. 1892); I. BRANT, JAMES MADISON, 1751-1780, at 300-01 (1941).

which is a natural right," Madison stated late in life, "gives to property, when acquired, a right to protection, as a social right."<sup>45</sup>

The Founders' views, however, do not explain the differential treatment of contract and property rights in the Constitution. Although contract rights were not seen as identical to property rights, they were a type of property right. Thus, it cannot be said that one right was more valuable than the other. It remains to be seen why each category of rights should be protected only against different levels of government.

## II

### FRAMING OF THE CONTRACTS AND JUST COMPENSATION CLAUSES

The historical record of the events and debate at the time of adoption of the Constitution and Bill of Rights casts little direct light on the question here. Although Madison commented in a letter to Jefferson that the contracts clause, along with two other prohibitions on state action in article I, section 10, "created more enemies than all the errors in the System positive and negative put together,"<sup>46</sup> we have little record of this controversy. Records concerning adoption of the just compensation clause are even more sparse. Nonetheless, it is useful to canvass the available sources, both to eliminate possible explanations that are inconsistent with the record and to discover evidence that explains why the rights of contract and property received such disparate treatment in the Constitution.

#### A. *The Northwest Ordinance and the Treaty of Paris*

Both the contracts and just compensation clauses originated in article 2 of the Northwest Ordinance, which was adopted by Congress under the Articles of Confederation on July 13, 1787, some six weeks after the Constitutional Convention had convened. The Northwest Ordinance's precursor to the just compensation clause provided:

[N]o man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any person[']s property, or to demand his particular services, full compensation shall be made for the same . . . .<sup>47</sup>

45. 9 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 361 (speech at the Virginia Constitutional Convention, Dec. 2, 1829); *cf.* THE FEDERALIST No. 10, *supra* note 9, at 78 (protection of unequal faculties of acquiring property is "the first object of government"); *see* J. Nedelsky, *supra* note 12, at 93-95 ("the protection of vested rights assumes supreme importance" to Madison because they are the result of "the exercise of the faculties for acquiring property").

46. 5 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 271 (letter of Oct. 17, 1788).

47. NORTHWEST ORDINANCE art. 2, cl. 5, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 340 (R. Hill ed. 1936). It should be noted that the first portion of this provision is a

According to Richard Henry Lee, "It seemed necessary, for the security of property among uninformed, and perhaps licentious people as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined."<sup>48</sup> This suggests that the need for explicit, nationally imposed definition and protection for property rights, going beyond the common law and local legislation, was associated with the lesser degree of sophistication of people on the frontier.

The Northwest Ordinance's precursor to the contracts clause, which followed immediately after the provision just quoted, provided:

[A]nd in the just preservation of rights and property it is understood and declared; that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.<sup>49</sup>

This provision had no counterpart in the state constitutions of that day, and no explanation for its appearance has been found.

These provisions are of interest for two reasons. First, the two provisions were closely associated in the Northwest Ordinance, being successive clauses of the same article, connected by the conjunction "and." Indeed, the contract provision was said to be intended for the "the just preservation of rights and property," thus emphasizing the connection between the rights protected. Second, the two provisions applied to the same unit of government—the territory. Under what would soon become our Constitution, the territories are subject to the constitutional restraints applicable to the federal government; but in some ways federal power over the territories closely resembles state governmental powers.<sup>50</sup> The provisions could therefore have set a precedent for applying their restraints to the federal government, to state governments, or to both. These factors make it all the more striking that the Framers separated the two concepts in the Constitution and applied each to a different level of government.

Another potential precursor to the clauses, the treaty of peace with Great Britain (the "Treaty of Paris"), similarly accentuates the oddity of

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prototype for the due process clause, and the second for the just compensation clause. The clauses follow in the same order in the fifth amendment.

48. 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 620 (E. Burnett ed. 1963). Lee's remarks may have been addressed to other sections of the Northwest Ordinance, which set forth the rules of intestate succession, dower rights, testamentary succession, recordation of title, and conveyance by lease, bargain, or sale, rather than to the just compensation clause alone.

49. NORTHWEST ORDINANCE art. 2, cl. 7, reprinted in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 47.

50. Congress' power to make "all needful Rules and Regulations" for the governance of the territories, U.S. CONST. art. IV, § 3, cl. 2, is a source of plenary governing authority, rather than of enumerated powers.

the constitutional scheme. The treaty protected British subjects both from "any lawful impediment" to the collection of bona fide debts and from confiscation of property.<sup>51</sup> This language required the United States to protect the contract and property rights of British subjects from any legal impairment, an obligation logically coterminous with the protections embodied by the just compensation and contracts clauses. If the Framers had been concerned with enforcing these treaty obligations, it would have been logical to prohibit both levels of government from impairments of contracts and uncompensated takings. That the two principles were associated in treaty as well as in domestic legislation reinforces the conclusion that the Framers' failure to protect contract and property rights against both the states and the federal government in the Constitution cannot be explained by inadvertence. The obligations imposed by the Treaty of Paris necessarily drew attention to the connection between these issues.

### B. *The 1787 Constitution and the Contracts Clause*

The early drafts of the Constitution at the Convention contained no contracts clause or equivalent provision. This may be explained by the fact that the forces that later favored a contracts clause at first devoted their energies to an attempt to invest Congress with the power to nullify any state law thought to be unwise or contrary to the plan of union. Such a power was thought by its advocates, including Madison, to be "necessary to secure individuals against encroachments on their rights."<sup>52</sup> Madison thought specific restraints against violation of contracts "not sufficient" because legislatures could evade them at will by using "an infinitude of legislative expedients."<sup>53</sup> Only when that effort had narrowly failed did the delegates turn to more precisely tailored protections against the most common excesses of democracy in the states.

On August 28, 1787, Rufus King of Massachusetts moved to add a constitutional prohibition, applicable to the states alone, against interference with "private contracts."<sup>54</sup> The wording of the provision was to be that of the Northwest Ordinance. Gouverneur Morris spoke in opposi-

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51. Definitive Treaty of Peace between the United States of America and his Britannic Majesty, Sept. 3, 1783, United States—Great Britain, arts. IV, VI, 8 Stat. 80, 81-82, T.S. No. 104.

52. See 5 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 27 (letter to Jefferson, Oct. 24, 1787).

53. *Id.* at 27-28. Among the "expedients" available to state legislatures to defeat contracts were statutes of limitations, evidentiary rules, moratoriums on court jurisdiction, and requirements that creditors accept payment in something other than hard currency. A broad congressional power to nullify such laws would more effectively bar such expedients than would a specific prohibition.

54. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 439-40. The entire debate on this day is recorded on these pages of Farrand's Records. The quotations in the following text will not be separately noted.

tion, stating that “[t]his would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts.” He further noted that the federal judiciary would be “a protection in cases within their jurisdiction”—presumably cases involving citizens from different states. “[W]ithin the State itself,” Morris said, “a majority must rule, whatever may be the mischief done among themselves.” This suggests a principal concern for the impact of state legislation on interstate commerce, and relatively little concern, on Morris’s part, for preventing infringements of contractual rights within the individual states. It also suggests that Morris believed that an absolute prohibition on impairments of the obligation of contract would be impracticable.

Madison spoke in favor of the provision, while reiterating his view that only a general power of Congress to nullify state laws would be adequate protection. Although he acknowledged that Morris was correct that “inconveniences might arise” from the absolute prohibition, he contended that “on the whole it would be overbalanced by the utility of it.”

George Mason of Virginia opposed the provision, noting, “This is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential.” He gave as an example a statute of limitations for collecting on bonded indebtedness. In the Maryland House of Delegates, Luther Martin made a similar argument that in times of “great public calamities and distress” it might become the “duty of government” to interfere with contractual obligations.<sup>55</sup> Martin mentioned the more pertinent examples of laws “totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation.”<sup>56</sup>

James Wilson of Pennsylvania, who previously had supported the provision but without recorded reasons, now pointed out that the answer to the objections raised by Mason and Morris was that “*retrospective* interferences only are to be prohibited.”<sup>57</sup> Wilson’s point introduced a note of confusion in the Convention. Madison asked whether protection

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55. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 214-15 (speech delivered Nov. 29, 1787) (emphasis deleted).

56. *Id.* at 215 (emphasis deleted). These sentiments were not unusual. New York’s recommended amendments to the 1787 Constitution included one which would allow the states to pass insolvency laws for the relief of debtors other than merchants and traders. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (J. Elliot ed. 1881) [hereinafter DEBATES IN THE STATE CONVENTIONS].

57. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 440. This is the interpretation ultimately adopted by the Supreme Court in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 215-17 (1827), over the only dissenting opinion ever written by Chief Justice Marshall in a constitutional case.

of contracts from retrospective interference was not "already done by the prohibition of ex post facto laws." But at that stage, the Convention had not yet adopted an ex post facto provision applicable to the states. The ex post facto clause to which Madison presumably referred, which had been debated six days before, was applicable only to Congress.<sup>58</sup> Apparently following up on this suggestion, Edward Rutledge then made a substitute motion to prohibit the states from passing bills of attainder and ex post facto laws.<sup>59</sup> This motion carried.<sup>60</sup>

The next day, John Dickinson of Delaware reported the results of his researches in Blackstone to the effect that "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite."<sup>61</sup> Subsequently, the Committee on Style proposed the contracts clause in its present form, and on September 14, the Convention adopted it without further recorded debate.<sup>62</sup>

Immediately upon its adoption, Elbridge Gerry of Massachusetts moved to apply the contracts clause to the federal government as well as to the states. His reasoning is familiar: Since the contracts clause protects against breaches of the public faith, Congress ought to be "laid under the like prohibitions."<sup>63</sup> The motion failed for lack of a second.<sup>64</sup> This further demonstrates that application of the contracts clause to the states and not the federal government was deliberate.

Both debate and historical context make clear that—whatever else it may mean—the contracts clause was intended to prevent the states from enacting laws retroactively relieving debtors from the payment of their private debts.<sup>65</sup> In the depressed economic conditions of the Confederation period, many states had passed laws to relieve private debtors including: debt moratoriums; laws allowing debts to be paid in gradual installments despite contrary terms of the contract; laws allowing debts

58. See U.S. CONST. art. I, § 9.

59. Madison's notes record that Rutledge used the language "retrospective laws." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 440. The printed journal recorded the motion as using the language "ex post facto laws." *Id.* Marginal notes by George Washington and David Brearly corroborate the journal rendition, as does Dickenson's subsequent comment quoted in text. *Id.* at 440 n.19.

60. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 440.

61. 2 *id.* at 448-49. This definition of "ex post facto" was subsequently adopted by the Court in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

62. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 619. The Committee initially proposed that no state shall pass laws "altering or impairing the obligation of contracts." *Id.* at 597. The words "altering or" were later omitted.

63. *Id.* at 619.

64. *Id.*

65. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 204-06 (1819).

to be paid in commodities rather than hard currency; and laws requiring creditors to accept paper money (often of little value) as legal tender for the payment of debts.<sup>66</sup> These were the specific evils that inspired the contracts clause. It is important to bear in mind that the type of contract the Framers had most in mind was the contract of debt.<sup>67</sup>

### C. *The Fifth Amendment Just Compensation Clause*

The origins of the just compensation clause are well known, though there are few records bearing on the drafting and adoption of the constitutional provision itself.<sup>68</sup> Unlike the contracts clause, the principle of the just compensation clause was deeply embedded in both the common law and natural law traditions. Blackstone insisted that if the legislature required a landowner to surrender his property for the common good, it must also give him "a full indemnification and equivalent for the injury thereby sustained."<sup>69</sup> Grotius, Pufendorf, Burlamaqui, Vattel, and Van Bynkershoek agreed with this conclusion.<sup>70</sup> With some exceptions (takings of undeveloped land for roads, wartime requisitions, and seizure of the property of Tory Loyalists), the colonies regularly paid compensation when taking property for public use.<sup>71</sup> Compensation was, however, made pursuant to specific statutory authorization or judicial decision, and not as a matter of constitutional right. As of 1789, only Vermont

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66. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 353-55 (1827) (Marshall, C.J., dissenting); A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789*, at 570-71 (1927); B. WRIGHT, *supra* note 6, at 4-6, 15-16.

67. For a recent comparison of the historical background to the current interpretation of the contracts clause, see Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987).

68. For further elaboration of the historical background of the just compensation clause, see F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 10-36 (1985); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 553-88 (1972); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). For differing views about the present significance of the clause, see B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

69. 1 W. BLACKSTONE, *COMMENTARIES* \*139.

70. 2 J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* pt. III, ch. 5, §§ XXIV-XXIX (Nugent trans. 4th ed. 1792) (1747); E. DE VATTEL, *THE LAW OF NATIONS* 112 (J. Chitty trans. 1870) (1758); H. GROTIUS, *THE LAW OF WAR AND PEACE* 385, 807 (F. Kelsey trans. 1925) (1646); 2 S. PUFENDORF, *THE LAW OF NATURE AND NATIONS* 1285 (C. & W. Oldfather trans. 1934) (1688); C. VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 218-24 (T. Frank trans. 1930) (1737).

71. The evidence for this conclusion is assembled in Stoebuck, *supra* note 68, at 579-83. A contrary conclusion is reached in M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-64 (1977). The disagreement largely revolves around the significance to be attached to uncompensated takings of undeveloped or unenclosed land for roadbuilding. Stoebuck argues that compensation was not given in such instances because of a presumption that the value of the undeveloped land taken for the road was offset by the benefit of access to the road. Stoebuck, *supra* note 68, at 582-83. *But see* Note, *supra* note 68, at 695 n.6 (disputing Stoebuck's analysis).



and Massachusetts had included just compensation requirements in their constitutions.<sup>72</sup>

There is no stated explanation for the decision to apply the just compensation clause to the federal government and not to the states. At first blush, however, this may seem less puzzling than the decision to apply the contracts clause to the states and not the federal government. The entire Bill of Rights, of which the just compensation clause is a part, was a restriction on federal, not state power.<sup>73</sup> The just compensation clause was not unique in this regard. In part, then, the clause was not applied to the states at this juncture simply because attention was drawn to limiting power to prevent an overpowerful central government. This cannot be the full answer, however, because the House of Representatives adopted three additional limitations on state power as part of the Bill of Rights.<sup>74</sup> Indeed, although the Senate rejected them,<sup>75</sup> Madison, who proposed these limitations, described them as "the most valuable" of his proposed amendments to the Constitution.<sup>76</sup> Conspicuously, the just compensation clause was not among the provisions Madison and the House would have applied to the states. This strongly suggests that the decision not to apply the just compensation clause to the states was deliberate.

So far as historical records show, none of the participants in the Constitutional Convention ever proposed that the 1787 Constitution include a just compensation clause, or any equivalent to it. Indeed, the 1787 Constitution contained no reference to the rights of "property" whatsoever.<sup>77</sup> Nor did any of the states petition Congress to include a

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72. MASS. CONST. of 1780, pt. I, art. X, reprinted in 1 FEDERAL OR STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 958 (B. Poore 2d ed. 1878) [hereinafter B. POORE]; VT. CONST. of 1786, ch. I, § 2, reprinted in 2 B. POORE, *supra*, at 1868; see also VT. CONST. of 1777, ch. I, § II, reprinted in 2 B. POORE, *supra*, at 1859.

73. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247-49 (1833); see *Currie, supra* note 6, at 964-68; Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953). But see 2 W. CROSSKEY, *supra* note 7, at 1066-76 (contending that many provisions of the Bill of Rights were originally intended to apply to state as well as federal government). This understanding continued to be accepted until many years after passage of the fourteenth amendment. Beginning with the just compensation clause in 1897, many provisions of the Bill of Rights were held to be applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (sixth amendment's right to jury trial); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (just compensation clause).

74. Madison's three proposed protections against state governments were the "equal rights of conscience," the "freedom of the press," and the right to "trial by jury in criminal cases." 1 ANNALS OF CONGRESS 452 (J. Gales ed. 1834) (June 8, 1789). The House adopted all three, with minor variations, on August 17, 1789. *Id.* at 784.

75. *Id.* at 86 (Sept. 21, 1789).

76. *Id.* at 784 (Aug. 17, 1789).

77. The only place the term "property" appears in the 1787 Constitution is in article IV, section 3, clause 2, where it refers to "Property belonging to the United States."

just compensation provision in the initial amendments to the Constitution. Although the protection of property and the role of men of property in the government were major topics of discussion, the 1787 Constitution relied almost exclusively on institutional arrangements to secure property rights.

The first recorded proposal for a just compensation provision for the United States Constitution was made by Madison, when he presented his draft amendments to the House of Representatives on June 8, 1789.<sup>78</sup> No letter or statement by Madison has been found to explain why he made this proposal, or how it was drafted. Likewise, there are no recorded discussions in the Congress or the state legislatures that cast light on why the just compensation clause was thought to be a necessary addition to the Constitution, or why, if necessary, it was not thought equally applicable to the states. Indeed, the clause was one of the least controversial provisions in the Bill of Rights, occasioning no recorded substantive comment at all.

### III

#### POSSIBLE EXPLANATIONS FOR THE DIFFERENT TREATMENT OF CONTRACT RIGHTS AND PROPERTY RIGHTS

Although the Framers provided no explicit explanation of the different protections afforded contractual and property rights, this treatment is broadly consistent with two different but complementary understandings of the rights involved and their relation to the constitutional system. The first relies on a conventional understanding of the difference between property and contract, and finds the latter of greater importance to the commercial life of the nation. The second relies on a more abstract understanding of the distinction between property and contract; it finds contractual rights relatively more secure in the hands of the federal government and property rights relatively more secure in the hands of the states. I find a suggestion of these explanations in the interestingly divergent accounts of the contracts clause offered by Hamilton and Madison in the *Federalist Papers*. I will therefore call them the "Hamiltonian" and the "Madisonian" explanations.<sup>79</sup>

#### A. The "Hamiltonian" Explanation

In *Federalist* No. 7, Hamilton sets forth the various tendencies that

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78. 1 ANNALS OF CONGRESS, *supra* note 74, at 452.

79. These "Hamiltonian" and "Madisonian" explanations must be understood as analytical constructs based on the thought of these Founders, and not as historical reconstructions of their actual views. As a historical matter, these constructs may exaggerate the degree to which Hamilton's and Madison's political theories differed at this period. *See, e.g., infra* note 80.

might cause the states, in the absence of a more effectual union, to go to war against one another. One of these is interference by one state with contractual obligations owed to citizens of other states. "Laws in violation of private contracts," he says, "amount to aggressions on the rights of those States whose citizens are injured by them."<sup>80</sup> Indeed, he points out that the "enormities perpetrated by the legislature of Rhode Island" had excited a "disposition to retaliation" in neighboring Connecticut. Hamilton argued, moreover, that "if unrestrained by any additional checks," there was no reason to expect any improvement in the individual state legislatures in the future.<sup>81</sup> In *Federalist* No. 22, he elaborated that the "interfering and unneighborly regulations of some States," if not "restrained by a national control," would become both "serious sources of animosity and discord" and "injurious impediments to the intercourse between the different parts of the Confederacy."<sup>82</sup>

The reason for the contracts clause, then, was not merely that laws impairing the obligation of contract are "atrocious breaches of moral obligation and social justice"—though Hamilton also believed this to be true.<sup>83</sup> The principal motivating factor was the effect of such laws on citizens of other states, on commerce throughout the country, and even on peaceful relations among the states. Charles Pinckney shared this understanding. In the debate before the South Carolina ratifying convention, he described the limitations on the powers of the states, including the contracts clause, as "the soul of the Constitution."<sup>84</sup>

Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts. The citizen of South Carolina will then be able to trade with those of Rhode Island, North Carolina, and Georgia, and be sure of receiving the value of his commodities.<sup>85</sup>

This statement echoes Gouverneur Morris' reaction to Rufus King's proposal of a contracts clause, and parallels the Supreme Court's subsequent interpretation of the commerce clause. When the baneful effects of state legislation are visited upon the citizens of the state itself, it is reasonable to rely upon the political processes to correct it. And if they do not, as Morris pointed out, "within the State itself a majority must rule,

80. THE FEDERALIST No. 7, *supra* note 9, at 65. Madison made a similar observation in his *Notes on the Confederacy*, *supra* note 15, at 321, but did not develop the theme in his *Federalist* essays.

81. THE FEDERALIST No. 7, *supra* note 9, at 65. Rhode Island was notorious at that time for its debtor relief legislation. See A. NEVINS, *supra* note 66, at 570-71.

82. THE FEDERALIST No. 22, *supra* note 9, at 144-45.

83. *Id.* No. 7, at 65.

84. 4 DEBATES IN THE STATE CONVENTIONS, *supra* note 56, at 333.

85. *Id.* at 335.

whatever may be the mischief done among themselves."<sup>86</sup> Constitutional prohibitions are needed principally to protect against parochial legislation with effects on out-of-state business that disrupt the flow of national commerce.

This approach is similar to the so-called "negative" commerce clause doctrine, which prohibits states from discriminating against interstate commerce.<sup>87</sup> Justice Jackson made the classic statement of this doctrine in *H.P. Hood & Sons v. Du Mond*:

[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . has as its corollary that the states are not separable economic units.

. . . .

Our system, fostered by the Commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . .<sup>88</sup>

Parallels might also be drawn to the privileges and immunities clause of article IV and to some applications of the equal protection clause, which also prevent state discriminatory treatment of nonresidents. Together with the contracts clause and the prohibition on state issuance of paper money, these constitutional provisions prevent the states from obstructing interstate commerce, and thus foster the development of the United States into an integrated commercial republic. Indeed, in *Federalist* No. 7, Hamilton treated discriminatory state trade regulations and laws violating private contracts as aspects of the same problem.

Under the "Hamiltonian" view, the contracts clause serves the same ends as the Constitution's other economic provisions; however, it operates in a quite different way. The Commerce clause applies by its terms only to interstate commerce.<sup>89</sup> By contrast, the contracts clause applies to all contracts, not just to those with parties in different states. Accord-

86. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 439 (Aug. 28, 1787); *see supra* text accompanying notes 54-55.

87. The commerce clause itself, U.S. CONST. art. I, § 8, cl. 3, is no more than a grant of power to Congress to regulate commerce among the states. The "negative" (also called the "silent" or "dormant") commerce clause is the judicial doctrine that the clause impliedly displaces some aspects of state regulatory power over interstate commerce, even in the absence of congressional action. *See, e.g., Lewis v. BT Inv. Mgrs.*, 447 U.S. 27 (1980).

88. 336 U.S. 525, 537-39 (1949). This "free trade" understanding of the commerce clause is challenged by Professor Kitch in *Regulation and the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9-55 (A.D. Tarlock, ed. 1981).

89. U.S. CONST. art. I, § 8, cl. 3. This is the traditional understanding of the reach of the commerce clause. This understanding has been disputed, *see* 1 W. CROSSKEY, *supra* note 7, at 50-83, but I will assume its validity for purposes of this discussion. While Congress' power to regulate commerce under the commerce clause now effectively extends to purely intrastate transactions, *see, e.g., Perez v. United States*, 402 U.S. 146 (1971), the "negative" commerce clause retains the original emphasis on interstate movements. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct.

ingly, the "Hamiltonian" explanation might be called into doubt. If the protection of out-of-state obligees is the purpose, why not confine the clause to interstate contracts, as Morris obliquely suggested?<sup>90</sup>

The explanation, I think, is that it is important to national commerce that contractual rights—especially those derived from the quintessential contract of debt—be transferrable in the national market. If *A* borrows money from *B* in Philadelphia, *B* should be able to resell the debt instrument to *C* in Baltimore without legal hindrance. If states were permitted to impair the obligation of intrastate contracts, then a single contract could have one meaning if held by *B* and a different meaning if held by *C*. To confine the contracts clause to interstate contracts would introduce a serious element of uncertainty and confusion into commercial affairs. If debt instruments are expected to enter the national market, it must be clear at the outset that they cannot be nullified by state laws.

The reason for not applying the contracts clause to the federal government now becomes evident. Some impairments of the obligation of contract, it was generally agreed, would be necessary. Even supporters of the clause, like Madison, agreed that it would produce "inconveniences."<sup>91</sup> In particular, the Framers anticipated some form of insolvency legislation, which would inevitably impair the obligation of contract. It was only natural to vest in Congress the authority to adopt such dangerous but potentially "proper, & essential" measures, insofar as they affected interstate commerce. The exercise of congressional authority would not likely disrupt national commerce or lead to interstate hostilities. Thus, Congress was given the express authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States."<sup>92</sup> The constitutional provisions that forbid states to impair the obligation of contracts and grant Congress the power to pass bankruptcy laws are two sides of the same coin.

Under this analysis, the Framers failed to apply the just compensation clause to the states because they believed that takings of property were less likely than impairments of contract to have interstate consequences. This would explain why contracts received greater protection from state interference than property.<sup>93</sup> This conclusion rests, however, on an important—and questionable—presupposition about the nature of

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1637, 1648-52 (1987) (commerce clause does not prohibit state regulation of corporate shareholder voting rights).

90. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 439 (Aug. 28, 1787).

91. See *supra* text accompanying notes 54-55.

92. U.S. CONST. art. I, § 8, cl. 4.

93. Professor Crosskey concludes that the application of the contracts clause solely to the states demonstrates that Congress was intended to exercise plenary authority over commercial law. I W. CROSSKEY, *supra* note 7, at 355. He argues that the Framers intended the contracts clause to end

“property.” Property, under this view, must be conceptualized as tangible property, located in one place. This is a conventional understanding of property: property as “thing ownership.”<sup>94</sup> If property is viewed in the sense of modern financial property—corporate shares, electronic transfers, bank deposits, and so forth—then property is no less interstate in nature than are contracts. Indeed, in this sense, property is little more than a web of contractual commitments. When, however, the dominant concept of property is land and comparable fixed, tangible “things,” it is plausible to believe that state action affecting property rights will have consequences principally within the state. The provision of federal diversity jurisdiction might then be sufficient protection for the out-of-state claimant.

It also seems plausible that contract, and not property in this conventional sense, is the principal object of commerce across state lines. If, as Blackstone says, a contract is “property in action,” then commerce, too, is property in action. Restrictions on the transfer of goods in the national market are more likely to take the form of interference with contracts than the seizure of tangible property. Although title to property—like contractual rights—can be transferred to another state, the Framers may well have made a rough empirical judgment that contractual rights, especially debts, were much more likely to travel across state lines.<sup>95</sup> It therefore seems reasonable—if the purpose of the contracts clause is to protect against interstate hostility and the disruption of interstate commerce—that the Framers would prohibit the states from pass-

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state power over the law of contracts, but did not likely intend to end all governmental power over contracts.

The Contracts Clause . . . could not, therefore, have been intended as an interdiction of something the Federal Convention regarded as inherently evil; it was a provision, instead, for making some power, or powers, of Congress, *in so far forth*, exclusive.

*Id.* (emphasis in original). The contracts clause thus becomes an argument in favor of Crosskey’s central thesis: that the commerce power of Congress is not limited to interstate commerce. The alternative reading of the contracts clause, presented in the text, is fully consistent with the conventional view of the commerce power. Indeed, it is based on the assumption that the principal concern of the Framers in this area was to provide federal authority over commercial matters with interstate effects.

94. See *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (discussing whether “property” in the just compensation clause means a “physical thing”); B. ACKERMAN, *supra* note 68, at 97-100, 116-67 (contrasting lay and legal understandings of property); Grey, *The Disintegration of Property*, 22 NOMOS: PROPERTY 69, 71-73 (1980) (listing six current uses of the term “property”).

95. The interstate nature of debt was the subject of contemporary comment. See, e.g., Madison, *supra* note 15, at 321; see A. NEVINS, *supra* note 66, at 570-72. I have encountered no significant discussion of problems arising from interstate ownership of property. Interestingly, New York’s ratifying convention proposed confining federal bankruptcy power to the debts of merchants and traders, leaving the states free to enact insolvency legislation on behalf of others. 1 DEBATES IN THE STATE CONVENTIONS, *supra* note 56, at 330. This suggests that some debts were thought to have more of an interstate character than others.

ing laws impairing the obligation of contract, while leaving property rights to the protection of state law.

### B. The "Madisonian" Explanation

Madison's explanation of the purpose of the contracts clause in *Federalist* No. 44 differs markedly from Hamilton's in No. 7. Madison explains that "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."<sup>96</sup> The reason for the clause, then, is perhaps not its impact on interstate commerce, but the prevention of injustice. If so, it is difficult to see why laws impairing the obligation of contracts should not be forbidden at the federal as well as the state level, as are bills of attainder and *ex post facto* laws.

Madison himself posed, and answered, this very question. In a letter to Jefferson explaining why Congress should be given the authority to nullify state laws—a power explicitly aimed at such injustices as the "violations of contracts"—he noted: "It may be asked how private rights will be more secure under the Guardianship of the General Government than under the State Governments, since they are both founded on the republican principle which refers the ultimate decision to the will of the majority . . . ." <sup>97</sup> The full answer to this question would, he said, "unfold the true Principles of Republican Government;" <sup>98</sup> the nub of the answer is that a larger, more extended republic would be less vulnerable to control by particular interest groups or coalitions. <sup>99</sup> Madison's discussion of the contracts clause in *Federalist* No. 44, after the portion quoted above, proceeds:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. . . . They very rightly infer, therefore, that some thorough reform is wanting, which will . . . give a regular course to the business of society. <sup>100</sup>

The source of the problem, therefore, is "fluctuating policy" and "sudden changes"—the instability of government that is to be found in small, unchecked popular assemblies like state legislatures. The very design of the federal government was intended to bring stability—to "give a regu-

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96. THE FEDERALIST No. 44, *supra* note 9, at 282.

97. 5 THE WRITINGS OF JAMES MADISON, *supra* note 10, at 28.

98. *Id.*

99. *See id.* at 31.

100. THE FEDERALIST No. 44, *supra* note 9, at 282-83.

lar course to the business of society." It was the state governments, not the new federal government, which Madison believed most likely to endanger "personal rights."<sup>101</sup>

The "Madisonian" explanation for applying the contracts clause solely to the states, then, is that an extended republic, deliberative representation, and the network of checks and balances that characterize the federal scheme make further provision against interference with contracts unnecessary. Moreover, since an absolute ban on laws impairing the obligation of contracts would produce "inconveniences,"<sup>102</sup> it made sense to preserve flexibility by rejecting the application of the contracts clause to the federal government. Bills of attainder and ex post facto laws (assuming the latter are confined to criminal statutes) are unnecessary to good government, and thus could be banned at both levels.

The Madisonian explanation gains force when contract and property rights are distinguished not on the conventional ground but on a more sophisticated legal basis, expounded by Professor Wesley Hohfeld.<sup>103</sup> Under his analysis, the distinctive feature of property is that it is a right "good against the world," while contract is a right good only as against determinate persons—those with whom one has made the contract.<sup>104</sup> A particular object may give rise to both contractual rights and property rights. *X* may contract with *Y* for exclusive use and enjoyment of real property owed by *Y*. *X* has a contractual right as against *Y*; if *Y* enters the property he is in breach of contract. However, *X* also has obtained, by virtue of the contract, rights against the world, in the nature of property rights.

The principal danger addressed by the contracts clause is that the government will favor one determinate set of persons over another—debtors over creditors. The relationship in question is person to person. The principal danger addressed by the just compensation clause, on the other hand, is that the government itself will appropriate the property right. The relationship is government to individual. The distinction between the two constitutional provisions, under this view, is not

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101. See also 1 ANNALS OF CONGRESS, *supra* note 74, at 458. Madison stated that the restrictions on state power in article I, section 10, were "wise and proper restrictions in the Constitution. I think there is more danger of those powers being abused by the State Governments than by the Government of the United States." *Id.*

102. See *supra* text accompanying notes 54-55.

103. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld II]; Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). For a related explanation of the distinction between property and tort, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

104. Hohfeld's analysis is based on the classic distinction between rights *in personam* and *in rem*. Hohfeld II, *supra* note 103, at 718-21.



between tangible and intangible rights, but between forced transfers to other individuals and forced transfers to the government.

I have spoken thus far of the *principal* dangers addressed by the contracts and just compensation clauses. Each has a secondary significance, of lesser legal weight, that cuts the other way. Ever since *Fletcher v. Peck*,<sup>105</sup> and contrary to strong indications in the legislative history, the contracts clause has been held to apply to contracts entered into by the government itself, as well as to private contracts.<sup>106</sup> When the relationship in question is that between government and individual, the case is conceptually more like a takings case than the prototypical impairment of obligation of contract. The just compensation clause also has a second element—the “public use” requirement—that prohibits the taking of property, even with compensation, for other than a public use. The danger here is that one person’s property will be taken for the private benefit of another. The relationship in question is person to person. Conceptually, cases arising under the “public use” limitation are more like contracts clause cases than prototypical takings.<sup>107</sup>

There is a close connection between the principal problems addressed by the contracts and just compensation clauses and the political evils Madison viewed as characteristic of the states and the federal government, respectively. As explained by Madison, there are two inherent weaknesses in republican government that give rise to two necessities of constitutional design: “to guard the society against the oppression of its rulers,” and “to guard one part of the society against the injustice of the other part.”<sup>108</sup> The first concern is that government officials will rule

105. 10 U.S. (6 Cranch) 87 (1810).

106. The Northwest Ordinance provision and Rufus King’s initial proposal were expressly limited to “private” contracts. See *supra* text accompanying notes 47-66. Debate in the Convention centered entirely on whether this proposal “would be going too far”—no one criticized it for failing to go far enough. The subsequent deletion of the reference to “private contracts” was not explained. The discussion and historical background provide no reason to infer that this change was intended to broaden coverage. Even after the word “private” was deleted, Charles Pinckney interpreted the clause as preventing states from “interfering in private contracts.” 4 DEBATES IN THE STATE CONVENTIONS, *supra* note 56, at 334. The only unequivocal statements that the clause applied to public contracts were made by opponents of the Constitution and of the clause. 4 *id.* at 190 (statement of James Galloway); 3 *id.* at 474 (statement of Patrick Henry). Patrick Henry appeared to be answering an unrecorded assertion to the contrary by Madison, and both Henry and Galloway were immediately contradicted by participants in the Convention. See 4 *id.* at 191 (statement of W. R. Davie); 3 *id.* at 478 (statement by Edmund Randolph). Professors Wright and Corwin have concluded that the clause was not intended to apply to public contracts. E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 167-68 (1977); B. WRIGHT, *supra* note 6, at 3-16.

107. The “public use” aspect of the fifth amendment is of little present-day significance. R. EPSTEIN, *supra* note 68, at 161-62; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); see, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding state statute condemning land for sale to the tenants).

108. THE FEDERALIST No. 51, *supra* note 9, at 323; see also Madison, *supra* note 15, at 325-28 (ascribing unjust laws to self-interested legislators and to the influence of “factions”).

in their own interest instead of the interest of the people. The second concern is that some persons will use the machinery of government to exploit others; the dominant faction, presumably the majority, will oppress minority interests.

Madison's celebrated argument in *Federalist* No. 10 is that the second concern is best met at the federal level, where the multiplicity of factions will make it unlikely that any one group could summon the strength to exploit the others. His argument is familiar; I will not detail it here.<sup>109</sup> Madison concludes optimistically that the "rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it."<sup>110</sup>

It follows, however, that the first of these concerns—the fear of self-interested government—is best met at the state level. There, the officers of government will live among the people, be more numerous in relation to the population, and be more susceptible to popular control. The representatives at the federal level, by contrast, will live at a remote distance from their constituents; offices will tend to be held by the well-known but unrepresentative few; communication will be slow and difficult; and the intended ethos will be one of deliberation rather than mere representation of the interests and opinions of the constituents. These arguments were the stock in trade of the Antifederalists,<sup>111</sup> and they had persuasive force. Even Madison had to acknowledge (in a private letter) that "[a]s in too small a sphere oppressive combinations may be too easily formed against the weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration."<sup>112</sup> The faults Madison identified in the state governments arise from an excess of popular control rather than a lack of it. Thus Madison wrote to Jefferson that were it not for the problem of faction, the "voice" of the majority "would be the safest criterion" of the public good, and that "within a small sphere, this voice could be most easily collected, and the public affairs most accurately managed."<sup>113</sup>

Under Madison's view, it is understandable why the contracts clause

109. Probably the best summary and analysis is found in Diamond, *The Federalist*, in *HISTORY OF POLITICAL PHILOSOPHY* 659 (L. Strauss & J. Cropsey 3d ed. 1987). For an application of modern public choice theory to Madison's argument, see V. OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC* (2d ed. 1987).

110. *THE FEDERALIST* No. 10, *supra* note 9, at 84.

111. See H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 17-19, 48-52 (1981).

112. 5 *THE WRITINGS OF JAMES MADISON*, *supra* note 10, at 31. For a modern statement of this view, see Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380-91; see also McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1500-07 (1987).

113. 5 *THE WRITINGS OF JAMES MADISON*, *supra* note 10, at 29.

should apply only to the states. Laws impairing the obligation of private contracts are an instance of injustice by "one part of the society against . . . the other part." Such laws are particularly likely to be adopted—and likely to be particularly egregious—at the state level, where factions (such as the debtor class) might well seize the machinery of government for their own advantage. At the federal level, however, such laws are not likely to pass unless they would further the public good. Indeed, the bankruptcy clause is evidence that the Framers believed national action impairing contractual rights might be necessary.

It is also understandable, under this view, why the just compensation clause was applied to the federal government. Since the federal government is more remote, and more likely to develop interests separate from and in tension with the people, it is important that private property not be exposed to confiscation for the benefit of the government. Such confiscation had been practiced by military authorities during the revolution. Indeed, St. George Tucker, writing in 1803, stated that the main purpose of the just compensation clause was "to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."<sup>114</sup>

It is less apparent why the just compensation clause should not also apply to the states. The "Madisonian" explanation shows why such a provision might have been considered more vital at the federal than the state level, but it does not explain why the clause could not have been applied at both levels. It is possible that the clause was not applied to the states out of simple inadvertence: No one suggested that it should be, perhaps because the common law was thought clear enough. The "inadvertence" explanation, though, must confront the fact that Rufus King, proponent of the contracts clause, explicitly lifted his proposal from a provision in the Northwest Ordinance. Since the first clause of that provision is a just compensation requirement, King's proposal must have directed the attentions of at least some of the delegates to the just compensation concept. And although the common law, as seen through Blackstone, was tolerably clear, in practice the courts had not always recognized just compensation as a judicially enforceable principle in the absence of specific legislation.<sup>115</sup>

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114. 1 ST. G. TUCKER, BLACKSTONE'S COMMENTARIES 305-06 (Philadelphia 1803); cf. John Jay's essay, *A Freeholder*, reprinted in 5 P. KURLAND & R. LERNER, *supra* note 10, at 312-13 (objecting to impressment of horses and other property by military officials without proper authority).

115. See, e.g., *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (denying compensation for wartime taking); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 56-62 (S.C. 1796) (2-2 decision) (denying compensation for taking of unimproved land).

Perhaps the better explanation, along "Hamiltonian" lines, is that takings of property were viewed as an internal affair of the various states, unlike violations of contract, which were more likely to have effects in other states. However, no affirmative reason for restricting application of the clause to the federal level was recorded. Unlike the impairment of the obligation of contracts, which Madison believed necessary in some extreme circumstances, there is no evidence that the Framers believed property should ever be taken without compensation. The Framers apparently saw no need to retain the power at the level of government least likely to abuse it. The most that can be said is that the just compensation clause applies to the level of government most needful of restraint.

#### IV

#### IMPLICATIONS FOR INTERPRETATION OF THE CLAUSES

It would be rash to propose radical revisions in our understandings of the contracts and just compensation clauses on the basis of these conclusions. The proposed explanations are, indeed, more in the nature of speculations than of hard historical or legal conclusions. Nonetheless, they suggest certain directions for thinking about the constitutional issues raised by the clauses.

First, they suggest that efforts to give the contracts clause a broad application at the state level, so as to protect what might more conventionally be viewed as property rights, are less objectionable than efforts to give the just compensation clause a broad application at the federal level, so as to protect contract rights. Thus, to take the illustrative cases with which we began, both the expansive approach of *Fletcher v. Peck*<sup>116</sup> and the restrictive approach of *Bowen v. Public Agencies Opposed to Social Security Entrapment*<sup>117</sup> seem appropriate, whatever the merits of their specific holdings. This is because there was an affirmative reason to refuse to apply the contracts clause to the federal government, but no comparable affirmative reason to refuse to apply the just compensation clause to the states. By the same token, the Court's decision to incorporate the just compensation clause as an aspect of the fourteenth amendment due process clause<sup>118</sup> does little apparent violence to the constitutional scheme. This decision made broad interpretations of the contracts clause, as in *Fletcher v. Peck*, less significant.

Second, these conclusions suggest that the modern thrust of contracts clause jurisprudence is precisely backwards. The Court has stated that "impairments of a State's own contracts would face more stringent

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116. 10 U.S. (6 Cranch) 87 (1810); see *supra* text accompanying notes 16-22.

117. 106 S. Ct. 2390 (1986); see *supra* text accompanying notes 23-29.

118. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

examination under the Contract Clause than would laws regulating contractual relationships between private parties."<sup>119</sup> However, it is interference with private contracts that lies at the heart of the clause. The reason the states, rather than the federal government, were thought in need of this form of restraint is that state governments are especially susceptible to control by self-aggrandizing political factions. This perspective suggests particular vigilance against laws altering private contractual arrangements. Even assuming that public contracts are properly subsumed under the clause,<sup>120</sup> this should be viewed as a more marginal application. Violation of public contracts might be better viewed, in most instances, as a takings problem, with compensation rather than an outright prohibition as the remedy.<sup>121</sup>

Third, the analysis casts doubt on the Court's willingness to allow states to impair the obligation of contracts merely on the showing that it is plausibly "necessary for the general good of the public."<sup>122</sup> The Framers well understood that there would be times when laws violating contractual rights would seem "proper, & essential" and that the restraint imposed by the Constitution would cause "inconveniences."<sup>123</sup> Their solution was to allow such laws to be enacted only at the federal level. Only if the public need were pressing enough to procure congressional action, despite the safeguards of the federal system, did they think laws impairing private contracts should be enforced. The Framers relied, not on ad hoc judgments of courts to determine when laws violative of contracts are desirable, but on procedural mechanisms of representative government and checks and balances.

Finally, and most generally, this analysis suggests that we should not base constitutional interpretation solely upon broad principles of substantive political theory—such as the sanctity of private property. In the minds of the Framers, these issues were complicated by the overriding need to establish just and stable institutions of republican government. The Framers were too practical to think they could bind the nation to wise policy through constitutional language alone. The Framers pro-

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119. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977). For a critical appraisal of these cases, see Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 *CASE W. RES. L. REV.* 597 (1987).

120. See *supra* note 106.

121. See McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 *U. CHI. LEGAL F.* 295, 308-11 (1987) (discussing constitutional remedies for violations of government procurement contracts, nonprosecution agreements, and consent decrees).

122. *Allied Structural Steel Corp. v. Spannaus*, 438 U.S. 234, 241 (1978) (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)); see also *Hoine Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) ("The question . . . is whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.").

123. See *supra* text accompanying notes 54-55.

vided specific judicially enforceable protections against some of the more pernicious evils of government. More often, however, they relied on structural features of the federal system to prevent oppression. The Founding generation held property and contractual rights dear, and for good reasons. But they did not simply invest future judges with sweeping power to protect these rights. This, no doubt, was also for good reasons. Aggressive judicial review, when predicated on loose and discretionary standards of judgment, is (at best) in tension with republicanism. In seeking to understand the design of the Constitution, therefore, we cannot automatically proceed from a principle of political right—such as property—to an assumption that the mechanism for protecting it is judicial review. No less important is the way in which the Framers contemplated that these principles of right would emerge through the structure of government.

