

THE CONTRACT CLAUSE: ORIGINS AND EARLY DEVELOPMENT

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Forrest McDonald remarked that the adoption of the contract clause at the constitutional convention “is shrouded in mystery.”¹ To unravel this mystery, one must start by considering the economic changes experienced by the American colonies during the eighteenth century. As the colonies grew and became more prosperous, they gradually rejected the doctrine of mercantilism inherited from Great Britain, with its emphasis upon governmental controls, in favor of an emerging market economy. Wage and price regulations, as well as the system of exclusive public markets, gradually atrophied.² Moreover, the law governing real property was revamped little by little to facilitate land transactions, thereby treating landed property increasingly as a market commodity.³

As price controls and regulated markets declined and land speculation quickened, contracts assumed a more prominent role in the growing commercial society of the eighteenth century. In an expanding economy merchants were more likely to trade with or extend credit to persons who were strangers. Under such circumstances, transactions could no longer be grounded in custom or trust. Hence, private bargains in an impersonal market were increasingly determined by written agreements. Parties became accustomed to making deals and

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1. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 271 (Univ. Press of Kan. 1985).

2. James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 *SAN DIEGO L. REV.* 677–87 (2008).

3. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 27 (3rd ed. 2005); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 128 (New York: A.A. Knopf, 1992); Claire Priest, *Creating an American Property Law: Alienability and Its Limits*, 120 *HARV. L. REV.* 385, 408–58 (2006).

looking out for their own interests. Contracts provided a vehicle by which individuals could bargain for their own advantage.⁴ The product of private negotiation, not governmental authority, contractual exchanges not only encouraged economic efficiency but also underscored the autonomy of individuals. To achieve these goals, the stability of contracts was essential. It was necessary that bargains be honored and not subject to subsequent legislative interference.

A careful study of Virginia bears out the waxing of contract law and a market economy. William E. Nelson found that “a vibrant market economy” based on tobacco sales developed as early as the mid-seventeenth century. This robust economy “gave rise to complex commercial transactions and commercial litigation.” Nelson concluded that by the 1640s in Virginia, “the hallmark doctrine of market capitalism, that individuals should be free to enter into contracts which courts would then enforce, was firmly in place.”⁵

I. POST-REVOLUTIONARY ERA

The troubled conditions of post-Revolutionary America, however, presented serious challenges to an economy based on private bargaining. Independence from Great Britain caused considerable economic dislocation. It ended the trade restrictions imposed by the British Navigation Acts but also brought about the loss of markets with Great Britain and its other colonies. In addition, the Revolution caused wholesale interference with private economic relationships by state legislatures. Reacting to the depressed economic climate in the wake of independence, state lawmakers enacted a variety of debt-relief laws to assist debtors at the expense of creditors. They passed laws staying the collection of debts, allowing the payment of debts in installments, and authorizing the payment of debts in commodities.⁶ South

4. WOOD, *supra* note 3, at 162–64.

5. William E. Nelson, *Authority and the Rule of Law in Early Virginia*, 29 OHIO N.U. L. REV. 357–60 (2003); *see also* WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA, VOLUME 1: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660*, 35–36 (New York, Oxford Univ. Press 2008).

6. ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789*, 404–5, 537, 571 (New York, Macmillan Co., 1924); JEROME J. NADELHAFT, *THE DISORDERS OF WAR: THE REVOLUTION IN SOUTH CAROLINA 155–72* (Orono, Me., Univ. of Maine at Orno Press, 1981); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1138–40 (1980).

Carolina's Pine Barren Act of 1785 was a particularly egregious measure. Under this act debtors could tender distant property or worthless pineland to satisfy outstanding obligations.⁷ State lawmakers also issued quantities of paper money and made such paper currency legal tender for the payment of debts. These measures not only hampered commerce by frustrating the enforcement of contracts but seemingly portended threats to the security of property generally. Creditors and merchants saw these laws as little more than a confiscation of their property interests.

Although popular in some quarters, legislative tampering with agreements aroused intense criticism. In 1786, for example, Noah Webster, later the author of a famous dictionary, declared:

But remember that past contracts are sacred things; that Legislatures have no right to interfere with them; they have no right to say, a debt shall be paid at a discount, or in any manner which the parties never intended. It is the business of justice to fulfil the intention of parties in contracts, not to defeat them.⁸

Alexander Hamilton, while Secretary of the Treasury, pictured state legislative interference with contracts as rendering commerce uncertain and as weakening the security of property.⁹ Likewise, Chief Justice John Marshall later recalled the deleterious impact of laws meddling with contracts on society in the newly independent United States:

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object

7. James W. Ely, Jr., *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939, 942–43 (1973).

8. Noah Webster, *The DEVIL is in you*, in COLLECTION OF ESSAYS 130 (Bos., 1790).

9. Letter from Alexander Hamilton to George Washington, May 28, 1790, *reprinted in* 6 THE PAPERS OF ALEXANDER HAMILTON 436 (Harold C. Syrett et al. eds., 1962).

of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from the reform of the government.¹⁰

Legislative interference with contractual arrangements was not confined to debt-relief laws. Consider the controversy over the revocation of the charter of the Bank of North America. The first incorporated bank in the United States, the Bank of North America, received charters from the Continental Congress in 1781 and the Pennsylvania legislature the following year. Given doubts about the authority of Congress to grant charters of incorporation, the Bank was generally regarded as a Pennsylvania institution. In 1785 the Pennsylvania legislature, responding to pressure from radicals and agrarians, moved to annul the charter. Critics maintained that the Bank encouraged the accumulation of capital and hampered the issuance of paper money by the state. The repeal proposal triggered a bitter debate in the state.¹¹ James Wilson, a prominent lawyer and later a member of the constitutional convention and a Supreme Court justice, took the lead in defending the Bank. In a widely circulated pamphlet, *Considerations on the Bank of North America*, Wilson attacked repeal as economic folly. More important for our purposes, he argued that the act incorporating the Bank amounted to a contract between the state and the corporation that the legislature was bound to respect. Wilson insisted that “while the terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other.” Noting the practical significance of corporate charters, he added: “To receive the legislative stamp of stability and permanency, acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture; where is the stamp of their stability?”¹² In a nutshell, Wilson contended that a state was obligated to honor its own undertakings and that stability in regard to

10. *Ogden v. Saunders*, 27 U.S. 213, 354–55 (1827) (Marshall, C.J., dissenting).

11. JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS: EIGHTEENTH BUSINESS CORPORATIONS IN THE UNITED STATES* 310–13 (New York, Russell & Russell, 1965) (1917); F. Cyril James, *The Bank of North America and the Financial History of Philadelphia*, 64 PA. MAG. OF HIST. & BIOG. 62–66 (1940); Janet Wilson, *The Bank of North America and Pennsylvania Politics, 1781–1787*, 66 PA. MAG. OF HIST. & BIOG. 3–13 (1942).

12. James Wilson, *Considerations on the Bank of North America* (1785), in 1 *COLLECTED WORKS OF JAMES WILSON* 71–72 (Kermit L. Hall & Mark David Hall, eds., Indianapolis, Liberty Fund, 2007).

corporate charters was essential for successful enterprise. As Jennifer Nedelsky pointed out: “Not only did [Wilson] think that upholding contracts was extremely important economically, he saw the obligation of contract as part of the fundamental obligations to fulfill promises which makes society possible.”¹³ Other legislators echoed Wilson, with one insisting that “charters are a species of property.”¹⁴ These arguments did not prevail in 1785. Defenders of the repeal law denied that a corporate charter should be treated as a contract and stressed the power of the legislature to revoke charters.¹⁵ Although the charter was rescinded, Wilson had anticipated much constitutional jurisprudence. Indeed, one scholar has contended that the contract clause “was an outgrowth of the arguments about Pennsylvania’s authority to breach its own contract.”¹⁶

Wilson was not alone in advancing these views. In 1786 Pelatiah Webster, a Philadelphia merchant and author of several pamphlets on finance and government, reiterated the points stressed by Wilson. Maintaining that “[c]harters (or rights of individuals or companies, secured by the State) *have ever been considered as a kind of sacred things*,” he denied that legislatures could repeal the grant and destroy the rights of the grantee. Webster even argued that “the sacred force of contracts *binds stronger in an act of state, than in the act of an individual, because the whole government is injured and weakened by a violation of the public faith. . .*”¹⁷

As these comments indicate, state interference with the rights of creditors, when coupled with the revocation of an important corporate charter, bitterly disappointed many political leaders of the post-Revolutionary era. They became convinced that state protection of

13. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 299 n.141 (Univ. of Chicago Press, 1990).

14. As quoted in 2 JOHN STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 313 (Cambridge, Mass., 1917).

15. *Id.* at 312–15 (finding that state legislatures at the end of the eighteenth century asserted the power to alter or repeal corporate charters but rarely exercised such power).

16. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 910 (2008).

17. Pelatiah Webster, *An Essay on Credit in Which the Doctrine of Banks is Considered* at 37–38 (Philadelphia, 1786). A similar argument was advanced by Noah Webster in 1788. He maintained that when a legislature “makes *grants or contracts* it act[s] as a party, and cannot take back its grant or change the nature of its contracts, without the consent of the other party. A state has no more right to neglect or refuse to fulfil its engagements, than an individual.” Noah Webster, *Principles of Government and Commerce, in* COLLECTION OF ESSAYS . . . ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 40–41 (Boston, 1790).

economic rights was inadequate. Historians generally agree that the establishment of safeguards for private property was one of the principal objectives of the Constitutional Convention of 1787. "Perhaps the most important value of the Founding Fathers of the American constitutional period," Stuart Bruchey has cogently pointed out, "was their belief in the necessity of securing property rights."¹⁸ Delegates repeatedly stressed this theme during the convention. For instance, James Madison asserted at the Philadelphia convention that "the primary objects of civil society are the security of property and public safety."¹⁹

The first provision protective of contractual rights was part of the Northwest Ordinance of July 1787. Passed by the Confederation Congress while the Constitutional Convention was meeting in Philadelphia, the Ordinance established a framework for territorial governance in the Old Northwest. Articulating a number of fundamental principles, the Ordinance had much of the character of a constitutional document.²⁰ The Ordinance contained several important provisions regarding the rights of property owners, including one ensuring the sanctity of private contracts. Article 2 of the Ordinance stated:

And, 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.²¹

This language may have been inserted in response to Shays' Rebellion in Massachusetts, which sought to prevent the collection of debts. It has also been seen as part of a larger scheme to encourage commercial development in the largely unsettled territories. Viewed in this light, the protection of agreements was a crucial step in attracting eastern investors. The territorial government was prevented from

18. Bruchey, *supra* note 6, at 1136.

19. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (Max Farrand, ed., Yale Univ. Press, 1937).

20. See Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929-68 (1995).

21. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, July 13, 1787, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 340 (Roscoe R. Hill, ed., 1936). The Ordinance was reenacted in 1789 by the first Congress under the Constitution. 1 Stat. 50 (Aug. 7, 1789).

abridging private economic deals, which created a hospitable climate for outside capital.²² The contract clause in the Northwest Ordinance was the first prescient step in forging a constitutional guarantee of existing contracts.

II. CONSTITUTIONAL CONVENTION

Given the concern shared by many delegates to the Constitutional Convention that state governments were invading property and contractual rights and hampering commerce, it is hardly a surprise that the new Constitution contained a cluster of provisions designed to rectify the abuses at the state level. Thus, the Constitution prevented the states from enacting bills of attainder and from making anything but gold or silver legal tender for the payment of debts.

A provision barring the states from impairing contracts was added late in the convention's deliberations and with surprisingly little debate, given its subsequent significance in American constitutionalism. On August 28, 1787, the delegates were considering constitutional limitations upon the authority of the states. Rufus King of Massachusetts moved to insert into the Constitution language "in the words used in the Ordinance of Cong[ress] establishing new States, a prohibition on the States to interfere in private contracts."²³ King's proposal faced a cool reception. Gouverneur Morris declared his opposition, observing:

This would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts—The Judicial power of the US—will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.²⁴

James Wilson supported King's motion. James Madison was somewhat ambivalent but was generally favorable. He "admitted that

22. Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 448–52 (2013); John M. Morrison, *The Legislative History of the Ordinance of 1787*, in 5 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 331–32 (1889); Andrew R.L. Cayton, *The Northwest Ordinance from the Perspective of the Frontier*, in THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 21 (Robert M. Taylor, Jr., ed., Indianapolis: Ind. Historical Society, 1987); Duffey, *supra* note 20, at 938, 960.

23. Farrand, *Records*, *supra* note 19, at 439.

24. *Id.* at 439.

inconvenience might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it.” Anticipating later issues, Madison added: “Evasions might and would be devised by the ingenuity of the legislatures.”²⁵ George Mason joined Morris in resisting King’s proposal. He stated:

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 mentioned the case of limiting the period for bringing actions on account—that of bonds after a certain (lapse of time,)—asking whether it was proper to tie the hands of the States from making provision in such cases?²⁶

In response, Wilson argued that only retrospective interferences with contracts would be prohibited by the proposed ban. This comment interjected a note of confusion into the deliberations. It prompted Madison to ask: “Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void.”²⁷ John Rutledge moved to substitute for King’s motion the words “nor pass bills of attainder nor ex post facto laws.” This motion carried by a vote of seven to three, and the suggested contract clause was shelved.²⁸

A day later John Dickinson declared that he had examined William Blackstone’s *Commentaries* and had “found 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.”²⁹ But the convention never debated the question of a contract clause again. Nonetheless, the Committee of Style and Arrangement, charged with preparing a final document, placed a differently worded contract clause into Article I, section 10, which contained various restrictions on state power. The proposed language barred the states from “altering or impairing the obligation of contracts.” The convention deleted the words “altering or” without recorded discussion, and the contract

25. *Id.* at 440.

26. *Id.*

27. *Id.*

28. *Id.* Connecticut, Massachusetts, and Virginia voted against the motion.

29. *Id.* at 448–49.

clause was adopted as part of the Constitution.³⁰ The clause could be seen as an extension of the ban on ex post facto laws to measures involving contracts.³¹

Authorship of the clause is uncertain. The committee was composed of Alexander Hamilton, William S. Johnson, King, Madison, and Morris. Only Morris had spoken in opposition to a provision protecting contractual rights. King had initially proposed a qualified clause limited to private contracts, and Madison had offered a guarded endorsement. Neither, however, seems a likely source for a broad restriction on state power over contracts.³² McDonald persuasively speculates that Hamilton, with his modern understanding of contracts, was the probable author.³³ Other scholars have suggested that Wilson, who was not a committee member but who was a close friend of Hamilton, may have proposed the final wording.³⁴ Thus, Jennifer Nedelsky has concluded that “it seems entirely likely that Wilson would have inserted such a clause.”³⁵

In any event, the convention as a whole did not revisit this issue. Elbridge Gerry of Massachusetts warmly endorsed the principle behind the contract clause. He “entered into observations inculcating

30. *Id.* at 619.

31. As adopted, Article I, section 10 provides in part: “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bills of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or any Title of Nobility.” U.S. CONST. art I, § 10.

32. *But see* ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 111–12 (Univ. of N.C. Press, 1968) (discussing King’s role in the adoption of the contract clause, and concluding the King was “persistent and persuasive” and may have convinced other members of the Committee of Style to include the provision).

33. McDonald, *supra* note 1, at 272–73; *see also* RICHARD B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 221–22 (New York, Holt, Rinehart & Winston, 1985) (asserting “it is most probable the Hamilton persuaded his colleagues on the Committee of Style to add” the contract clause).

34. WARREN B. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 115–16 (Johns Hopkins Univ. Press, 1919); MAX M. MINTZ, GOUVERNEUR MORRIS AND THE AMERICAN REVOLUTION 201 (Univ. of Okla. Press, 1970); *See also* PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798 247–48 (Univ. of N.C. Press, 1956) (noting that Wilson has been credited with authorship of the contract clause, but concluding: “While there is no evidence definitely disproving Wilson’s authorship, certainly no evidence exists to prove it.”); MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1724–1798 137 (Univ. of Mo. Press, 1997) (finding “little solid evidence” that Wilson was the author, but stressing that Wilson “believed that legislatures should not violate the sanctity of contracts”).

35. Nedelsky, *supra* note 13, at 299 n.141.

the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts.” Gerry sought to apply the contract clause to the new federal government, but his motion to this effect failed for lack of a second.³⁶ This underscores the fact that the ban on contractual interference was deliberately applied just to the states.³⁷ The framers seemingly realized that laws violative of contracts might be necessary in some circumstances but felt that such measures should only be enacted by Congress. To that end, Congress was empowered to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” Congress, it was felt, could better assess public need and was less likely to be influenced by local considerations and particular interest groups. Moreover, it is striking that, despite its circuitous path into the Constitution, the framers thought a specific ban on state impairment of contracts was sufficiently vital to include at the very time they were arguing that a bill of rights was unnecessary.³⁸

The contract clause fit comfortably into the larger scheme of the Federalists to foster a commercial society. “Federalists proposed, in sum,” two scholars have concluded, “to place the new land in the mainstream of acquisitive capitalism.”³⁹ As we have seen, by the late eighteenth century contracts played a critical role in a growing market economy. The reliability of agreements was essential. Lawrence M. Friedman has pointed out that “business had to be able to rely on the stability of arrangements legally made, at least in the short and middle run.”⁴⁰ The contract clause was designed to provide that stability. Analyzing the purpose of the contract clause, Charles A. Beard tellingly observed: “Contracts are to be safe, and whoever engages in a

36. Farrand, *Records*, *supra* note 19, at 619.

37. For an exploration of why the contract clause was applied only to state governments, see Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267–95 (1988).

38. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 537 (1989) (“This was the Federalist effort to link the eighteenth century’s affirmation of individual liberty with the rhetoric of contract and private property. Thus, the Federalists valued market ‘freedom’ so highly that they forbade the states from ‘impairing the obligation of Contract’ in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.”).

39. KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN SOCIETY* 72 (2d ed., Oxford Univ. Press, 2009).

40. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 203 (3d ed., New York, Touchstone, 2005).

financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played.”⁴¹

III. RATIFICATION DEBATES

Consistent with republican theory that political authority rested on popular consent, the framers submitted the proposed Constitution for ratification by popularly elected state conventions. During the ensuing ratification debates, the proponents of the Constitution termed themselves Federalists and dubbed critics of the Constitution as Anti-Federalists. The ratification debates primarily turned upon far-ranging political and constitutional issues, in which the contract clause did not figure prominently. The Federalists tended to be commercially minded individuals, such as merchants and planters producing crops for export, who looked with favor on the contract clause. A writer in the *New Hampshire Spy* in November of 1787 expressed the Federalist viewpoint, observing the Constitution “also expressly prohibits those destructive laws in the several states which alter or impair the obligation of contracts; so that in future anyone may be certain of an exact fulfilment of any contract that may be entered into or the penalty that may be stipulated for in case of failure.”⁴²

It is useful to review the arguments of both proponents and critics of the Constitution as they pertain to the contract clause. The various restrictions on state power contained in Article I, section 10, including the contract clause as well as the prohibition of paper money and ex post facto laws, were often linked together for the purposes of debate. Leading Federalists pictured this cluster of restrictions as essential for preserving credit and encouraging commerce. Writing in the *Federalist*, Hamilton assailed state infringement of contracts as “atrocious breaches of moral obligation and social justice.” Still, he focused on the dire implications for trade among the states posed by laws abridging agreements. “Laws in violation of private contracts,” Hamilton

41. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 179 (New York, Macmillan Co., 1913); see also Paul G. Kauper, *What Is A “Contract” Under the Contracts Clause of the Federal Constitution?*, 31 MICH. L. REV. 187, 193 (1932) (“The framers of the Constitution were practical-minded men, most of them of the creditor class; one of their chief objects in establishing a federal government and placing limitations on state action was to insure stability in commercial and mercantile transactions by providing against legislative interference dictated by whim, caprice, or class prejudice.”).

42. THE NEW HAMPSHIRE SPY, Nov. 3, 1787.

warned, “as they amount to aggressions on the rights of those states, whose citizens are injured by them, may be considered as another probable source of hostility.”⁴³ He expressed concern that such contractual infringements would invite retaliation by other states, undercutting the goal of a commercial union. Similarly, Charles Pinckney of South Carolina, also a delegate to the constitutional convention, characterized Article I, section 10, as “the soul of the Constitution” at the South Carolina ratifying convention. Echoing Hamilton, Pinckney explained: “Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts.” Moreover, he anticipated that these limitations on the states would restore American credit in foreign markets. “No more shall paper money, no more shall tender-laws,” Pinckney declared, “drive their commerce from our shores, and darken the American name in every country where it is known.”⁴⁴ Wilson, addressing the Pennsylvania ratifying convention, likewise emphasized the interstate dimensions of contracts. He insisted that Article I, section 10, alone “would be worth our adoption.”⁴⁵

Other prominent Federalists saw Article I, section 10, as a vehicle to bar state debt-relief legislation. David Ramsay of South Carolina, for example, observed that this provision “will doubtless bear hard on debtors who wish to defraud their creditors, but it will be a real service to the honest part of the community.”⁴⁶ Likewise, William R. Davie of North Carolina, who had served in the military during the Revolutionary War and represented North Carolina at the Constitutional Convention, championed the contract clause as a curb on irresponsible state relief measures. Picturing the provision as essential for the interests of both agriculture and commerce, he warned that South Carolina

might in the future, as they have already done make pine barren acts to discharge their debts. They might say that our citizens shall be paid in sterile, inarable lands, at an extravagant price.

43. THE FEDERALIST NO. 7 (Alexander Hamilton).

44. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 333–36 (2d ed., Jonathan Elliott, ed., Salem, N.J., Ayer 1987) (1836–59) [hereinafter ELLIOT’S DEBATES].

45. *Id.* at 486.

46. David Ramsay, *An Address to the Freeman of South Carolina on the Federal Constitution* (Charleston, 1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 379–80 (Paul Leicester Ford, ed., New York, Da Capo Press, 1968) (1888).

They might pass the most iniquitous installment laws, procrastinating the payment of debts due from their citizens for years, nay, for ages.⁴⁷

James Madison in the *Federalist* defended Article I, section 10, in different terms, stressing broad considerations of justice. He pictured bills of attainder, ex post facto laws, and laws abridging contracts as “contrary to the first principles of the social compact, and to every principle of sound legislation.” Madison described the restrictions in this section as a “constitutional bulwark in favor of personal security and private rights.” With the contract clause evidently in mind, he added:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with 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 have seen too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding.⁴⁸

This sketchy record makes clear that leading Federalists, despite differing explanations of the contract clause, saw the provision to be of crucial importance. At the same time, their brief and ambiguous comments give little guidance as to the intended scope of the clause. Indeed, there was a range of opinion about the meaning of the contract clause, and the framers did not all share a common understanding. “The clause meant different things to different men in 1787–1788,” Steven R. Boyd aptly concluded, “and throughout the early national period.”⁴⁹

Several proponents of the Constitution expressed the opinion that the limitations on state authority found in Article I, section 10, generated much of the opposition to ratification.⁵⁰ There is little evidence,

47. ELLIOT'S DEBATES, *supra* note 44, at 157.

48. THE FEDERALIST NO. 44 (James Madison).

49. Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789–1815*, 44 WM. & MARY Q. 531 (1987).

50. Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, in 11 THE PAPERS OF JAMES MADISON 297 (Robert A. Rutland et al., eds., Univ. of Va. Press, 1977) (attributing much of the opposition to the proposed Constitution to the articles on paper money and contracts).

however, to support this position with respect to the contract clause. Anti-Federalists rarely focused on the clause in urging rejection of the proposed new government. In fact, several Anti-Federalists admitted that the states had often acted irresponsibly regarding contracts. Thus, in February of 1788, James Winthrop of Massachusetts suggested amendments as a basis for accepting the Constitution. One proposal declared: "It shall be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all."⁵¹ Another Anti-Federalist endorsed the restraints of Article I, section 10: "These prohibitions give the most perfect security against those attacks upon property which I am sorry to say some of the states have but too wantonly made, by passing laws sanctioning fraud in the debtor against his creditor."⁵² His concern was not with the contract clause itself but with the means of enforcement. This writer insisted that state, not federal, courts should be trusted with deciding cases arising under this section.

Although discussion of the contract clause by those opposed to the Constitution was infrequent, one prominent Anti-Federalist, Luther Martin of Maryland, vigorously attacked the denial of state power to interfere with contracts. Speaking before the Maryland House of Delegates in November of 1787, Martin recognized that the contract clause might have a broad reach. In often quoted language, he asserted:

I considered, Sir, that there might be times of such great public calamities and distress and of such extreme scarcity of specie, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor, by passing laws totally or partially stopping the courts of justice, or authorizing the debtor to pay by installments, or delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind necessary in most or all of the States, to prevent the wealthy creditor and the monied man from totally destroying the poor though even industrious debtor. Such times

51. Agrippa, *Letter XVI*, Feb. 5, 1788 (James Winthrop), in *THE ESSENTIAL ANTIFEDERALIST* 56 (2d ed., W.B. Allen & Gordon Lloyd, eds., Lanham, Md., Rowman & Littlefield Publishers, 2002).

52. Brutus, *Letter XIV*, Mar. 6, 1788, in *THE DEBATE ON THE CONSTITUTION, PART TWO: DEBATES IN THE PRESS AND IN PRIVATE CORRESPONDENCE* 265 (Bernard Bailyn, ed., New York, Lib. of Am., 1993).

may *again* arise. I therefore voted against depriving the States of this power, a power which I am decided they ought to possess, but which, I admit, ought only to be exercised on very important and urgent occasions.⁵³

Focusing on debtor-creditor relationships, Martin stressed his belief that the states should retain the power to abridge contracts in periods of economic emergency. This view, of course, was squarely opposed to that of the Federalists.

IV. SCOPE OF THE CONTRACT CLAUSE

With the ratification of the Constitution, debate over the contract clause shifted to ascertaining the scope of its ban on state contractual impairments. No doubt the immediate impetus for the inclusion of the clause was to curtail state debt-relief measures, which weakened the security of private agreements. This has caused some scholars to reach the dubious conclusion that the framers expected the contract clause to be confined to debtor-creditor relationships.⁵⁴ One cannot infer the extent of the contract clause, however, solely from the necessities of the moment. There is no evidence that the clause was directed solely at creditor-debtor legislation. It is phrased in general terms and appears calculated to safeguard all contractual rights from legislative interference.⁵⁵

Perhaps the most vexing question for historians is whether the contract clause was expected to reach contracts made by the states, as well as agreements among private parties. Starting in the 1870s a number of commentators expressed doubt that the framers anticipated inclusion of public contracts within the ambit of the clause. As

53. Luther Martin, *Genuine Information*, Nov. 29, 1787; Farrand, *Records*, *supra* note 19, at 214–15.

54. EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 167–68* (Yale Univ. Press, 1919).

55. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *HASTINGS CONST. L.Q.* 525, 533–34 (1987). The Supreme Court has repeatedly rejected the argument that the contract clause was aimed solely at debt-relief laws. See *Sturges v. Crowninshield*, 17 U.S. 122, 205–6 (1919) (Marshall, C.J.) (“The Convention appears to have intended to establish a great principle, that contracts should be inviolable.”); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 n.16 (1978) (Stewart, J.) (“The even narrower view that the clause is limited in its application to state laws relieving debtors of obligations to their creditors is . . . completely at odds with this Court’s decisions.”).

a corollary, these scholars maintained that the Supreme Court under the leadership of Chief Justice John Marshall expanded the scope of the contract clause beyond the limited objectives of the framers to safeguard private arrangements.⁵⁶ In a 1919 study, for example, Warren B. Hunting reviewed some of the evidence pertaining to the meaning of the clause and concluded without explanation that the convention “had in mind only the contracts of private individuals.”⁵⁷ There was a growing tendency during the Gilded Age to question the application of the contract clause to public agreements.

This narrow interpretation of the contract clause, which gradually gained currency, was endorsed by Benjamin F. Wright in his leading study, *The Contract Clause of the Constitution* (1938). “[T]he men of 1787–1788,” he declared, “discussed the clause only in relation to private contracts, i.e., contracts between individuals.” Wright added: “A careful search has failed to unearth any other statements even suggesting that the contract clause was intended to apply to other than private contracts.”⁵⁸ Writing at a time when New Deal constitutionalism was gathering strength, Wright reflected the tradition of the Progressive historians who were deeply skeptical about the traditional role of the federal judiciary as a safeguard of the rights of property owners and who celebrated the growth of governmental powers over the economy. “Surely it is significant,” Wallace Mendelson cogently noted, “that he produced *The Contract Clause* during the Great Depression . . . when the Progressive Movement’s disdain for ‘government by judges’ was still a rampant force in liberal circles.”⁵⁹ It became an article of faith that Marshall took an expansive view of the contract clause in order to protect vested property interests. This Progressive attitude may have led Wright to downplay contrary evidence. Nonetheless, Wright’s work has been highly influential. Although his interpretation has been increasingly called into question,

56. See, e.g., Clement H. Hill, *The Dartmouth College Case*, 8 AM. L. REV. 189, 196 (1874). For the shift in scholarly interpretation of the contract clause during the 1870s and 1880s, as well as increased criticism of Marshall’s view that public agreements were covered, see Robert L. Clinton, *The Obligation Clause of the United States Constitution: Public and/or Private Contracts*, 11 U. ARK. LITTLE ROCK J. 353–57 (1988).

57. Hunting, *supra* note 34, at 120.

58. BENJAMIN F. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 15, 16 (Harvard Univ. Press, 1938).

59. Wallace Mendelson, *B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era*, 38 W. POL. Q. 263 (1985).

it is still common for scholars to assert that the framers expected the contract clause to cover only private agreements.⁶⁰

I wish to challenge this conventional wisdom and to propose a contrary thesis—that the contract clause could fairly be construed to safeguard both private and public contracts from state abridgement and that the contract clause decisions of the Marshall Court were well grounded. As we have seen, the framers of the Constitution and the delegates to the state ratifying conventions did not focus to any great extent on the nature of the prohibition contained in the clause. Given the sketchy record, I recognize that it is difficult to establish with certainty what the contract clause was expected to accomplish. Further, it is unlikely that all who supported the clause had the same anticipation as to its impact. Still, I contend that a conscientious review of the admittedly fragmentary evidence fails to support the frequent statement that the contract clause was confined to private agreements.

We should start by examining the wording of the contract clause. Wright and others appear to proceed on the problematic assumption that the clause was simply intended to replicate the earlier provision in the Northwest Ordinance. But King's motion to that effect was defeated, and the Committee of Style markedly changed the wording of the clause as finally adopted. Specifically, the committee deleted the words "private" as well as "bona fide, and without fraud previously formed," which appear in the Northwest Ordinance. Wright never really comes to grips with this changed wording, which on its face gives the contract clause a much broader scope. It is curious, to say the least, to maintain that the language as adopted was the equivalent of wording that was explicitly rejected. Instead of this reasoning, I submit that the best evidence of what the framers intended is what was written and adopted. We should be skeptical about the notion that the unqualified language of the contract clause was somehow thought to reach only a limited range of contracts. As Mendelson has pointed out, "[i]f the Constitutional Convention had wanted the clause to cover

60. See, e.g., Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 600 (1987) ("[A] fairly strong case can be made that . . . the clause was *not* thought to impose a general duty on state governments to honor their own obligations."); Bruchey, *supra* note 6, at 1144; See also CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 73 (Univ. Press of Kan., 1996) ("The prevailing view of Marshall's contract clause jurisprudence is that he substantially enlarged the meaning of the clause beyond the intention of the framers.").

only private contracts, it could have easily said so.”⁶¹ The model of the Northwest Ordinance was immediately before the convention. Instead of following the private-contract approach of the Northwest Ordinance, the framers adopted more general wording. This significant change went unchallenged by any delegate, strongly indicating that it reflected the sense of the convention. As Robert L. Clinton has cogently observed, “the proceedings at Philadelphia offer no basis for believing that the Founders intended to make a sharp distinction between public and private contracts.”⁶²

The debates at the state ratifying conventions lend little support for confining the protective reach of the contract clause to private agreements. Only one Federalist unequivocally affirmed that the contract clause would apply solely to private obligations. At the first North Carolina ratifying convention, held in July of 1788, Anti-Federalists warned that the various provisions in Article I, section 10, and particularly the contract clause, would compel the state to redeem its depreciated securities at face value. William R. Davie responded:

Mr. Chairman, I believe neither the 10th section, cited by the gentleman, nor any other part of the Constitution, has vested the general government with power to interfere with the public securities of any state. I will venture to say that the last thing which the general government will attempt to do will be this. They have nothing to do with it. The clause merely refers to contracts between individuals. That section is the best in the Constitution. It is founded on the strongest principles of justice.⁶³

It goes without saying that a single statement, made in the course of a debate, is a slender basis for generalizations about the thoughts of the framers regarding the scope of the contract clause.

Other infrequent references to the contract clause by Federalists are too discursive to cast light on the subject. Discussing the monetary clauses of Article I, section 10, Charles Pinckney told the South Carolina ratifying convention that the states should not be “intrusted with the power of emitting money, or interfering with private contracts; or, by means of tender-laws, impairing the obligation of contracts.”⁶⁴

61. Mendelson, *supra* note 59, at 265.

62. Clinton, *supra* note 56, at 345.

63. ELLIOT'S DEBATES, *supra* note 44, at 191.

64. *Id.* vol. 4, at 334.

This observation tells us little, because the contracts impacted by debt-relief laws were invariably private. Moreover, Pinckney does not purport to be addressing the meaning of the contract clause.

More telling is the exchange between Patrick Henry, a leading Anti-Federalist, and Governor Edmund Randolph, who had served as a delegate to the constitutional convention. At the Virginia ratifying convention Henry insisted that the clause would require states to redeem paper money at face value.

How will this thing operate, when ten or twenty millions are demanded as the quota of this state? You will cry out that speculators have got it at one for a thousand, and they ought to be paid so. Will you then have recourse, for relief, to legislative interference? They cannot relieve you, because of that clause. The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts.⁶⁵

Henry clearly saw the potential sweep of the contract clause. Equally revealing is the response by Randolph. He correctly maintained that Congress, which had issued a good deal of paper money, was not bound by the contract clause. Randolph continued:

I am still a warm friend to the prohibition, because it must be promotive of virtue and justice, and preventive of injustice and fraud. If we take a review of the calamities which have befallen our reputation as a people, we shall find they have been produced by frequent interferences of the state legislatures with private contracts. If you inspect the great corner-stone of republicanism, you will find It to be justice and fairness.⁶⁶

Although Randolph indeed mentioned state interference with private contracts as a particular mischief, he does not contradict Henry or in any way suggest that the protection of the clause was restricted to private agreements.⁶⁷

65. *Id.* vol. 3, at 474.

66. *Id.* at 478.

67. Hunting, *supra* note 34, at 113 (“It will be noticed that Randolph nowhere denies Henry’s contention that the ‘contracts clause’ refers to the contracts of States as well as to those between individuals.”).

The observations of other participants in the ratification debates do not draw a distinction between public and private contracts. Martin flatly opposed any limitation on state authority over contracts and consequently had no reason to address the issue. In the *Federalist*, Madison defended the clause in terms of the unfairness of violating agreements. Since he invoked “principles of the social contract” and was anxious to safeguard “personal security and private rights,” it seems unlikely that he thought states were free under the contract clause to dishonor their own obligations.⁶⁸ It bears emphasis that in most situations, state impairment of public contracts would negatively affect the very “private rights” that Madison sought to protect.

Lastly, the views of Wilson and Hamilton deserve particular attention, as both have been identified as probable authors of the contract clause. Wilson, it will be recalled, was already on record as believing that state legislatures could not abridge their own agreements. It therefore seems highly likely that Wilson fully expected the contract clause to reach public contracts. Likewise, Hamilton was a strong supporter of a comprehensive reading of the provision, a point discussed further later in this chapter.

My purpose is not to demonstrate that the collective intent of the framers was to embrace both public and private contracts within the constitutional ban on impairment. The fragmentary nature of the extant evidence makes it impossible to establish conclusively the thinking of the various framers, who may well have harbored somewhat different ideas as to the extent of protection afforded agreements. But historians have leaped too quickly to the conclusion that the clause was meant to govern only private agreement, virtually ignoring a good deal of contrary evidence. There is certainly room to doubt that the framers drew a bright line between public and private contracts.

V. INITIAL INTERPRETATIONS

Courts, legislators, and interested parties early grappled with the meaning of the contract clause. Despite the apparent clarity of its language, the contract clause posed a number of interpretative issues. When did the clause take effect? Did it apply to already existing agreements? What agreements amounted to a contract for purposes of protection under the clause? Did the clause prevent state lawmakers

68. THE FEDERALIST No. 44 (James Madison).

from making any adjustments to the rights and obligations of contracting parties?

As would be expected, the initial invocation of the provision concerned a debt-relief measure. In November of 1788, just months after ratification of the Constitution but before the new government was organized, the South Carolina legislature passed a revised installment law allowing debtors to pay their obligations over five years. Several South Carolinians protested that the statute was an unconstitutional impairment of contract. Despite some expressed reservations, most legislators felt that laws enacted before the effective date of government under the Constitution were not affected by the clause.⁶⁹ This position was eventually ratified by the Supreme Court.⁷⁰

The first-known federal court decision invalidating a state statute was grounded on the contract clause. At issue in *Champion and Dickason v. Casey* (1792) was a 1791 Rhode Island private act extending for three years the time in which the debtor Silas Casey could settle his accounts with his creditors. The act also exempted Casey from all arrests and attachments for three years. Casey was a prominent Rhode Island merchant who suffered business reversals during the War of the American Revolution. He used his political connections to win passage of the stay law. Two British merchants brought suit in the United States Circuit Court for Rhode Island against Casey to recover unpaid debts of nearly \$20,000. In defense, Casey raised the Rhode Island act as a bar to the suit.⁷¹ The case was heard by Chief Justice John Jay, Justice William Cushing, and District Judge Henry Marchant. They sustained a demurrer to Casey's plead in abatement. Although the decision was never officially reported, newspaper accounts explained the outcome:

The Judges were unanimously of Opinion, that, as by the Constitution of the United States, the individual states are prohibited

69. Boyd, *supra* note 49, at 535. For the legislative debates, see CITY GAZETTE, or THE DAILY ADVERTISER (Charleston), Oct. 24, 27, & 28, 1788.

70. *Owings v. Speed*, 18 U.S. 420 (1820) (Marshall, C.J.) (holding that Constitution did not take effect until March 1789 and that contract clause did not apply to state law enacted before that date).

71. Patrick T. Conley, Jr., *The First Judicial Review of State Legislation: An Analysis of the Rhode Island Case of Champion and Dickason v. Casey (1792)*, in LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND, 1636–1998 218–23 (Patrick T. Conley, Jr., ed., Providence, R.I. Pub. Soc'y, 1998); D. KURT GRAHAM, TO BRING LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND 128–29 (DeKalb, N. Ill. Univ. Press, 2010).

from making laws which shall impair the Obligation of Contracts, and as the resolution in question, if operative would impair the Obligation of the Contract in question, therefore it could not be admitted to bar the action.⁷²

Most of the historical assessment of this case has emphasized its importance in the emergence of federal judicial review. Yet the opinion also demonstrates the high standing of the contract clause in the law of the Early Republic and the willingness of federal judges to enforce it. Not only did the decision arouse no opposition, but the Rhode Island legislature adopted a resolution that it would not grant any more individual exemptions for private debts.

These early harbingers of a muscular contract clause doctrine did not address the scope of the clause. Two members of the Supreme Court, as well as other leading commentators, however, squarely took the position that a state could not repudiate its own agreements. Wilson advanced this view in his separate opinion in *Chisholm v. Georgia* (1793).⁷³ At issue was the authority of the federal judiciary to hear suits brought against states without their consent. In *Chisholm*, a citizen of South Carolina, acting as the executor of a deceased creditor, instituted a suit against Georgia to recover for supplies delivered during the Revolution. The Supreme Court asserted the right of the federal courts to adjudicate this claim, igniting a political firestorm that resulted in the adoption of the Eleventh Amendment.⁷⁴ In his separate opinion, Wilson analyzed the nature of sovereignty and the federal union. Turning to the contract clause, Wilson made his interpretation plain:

Another declared object is, “to establish justice.” This points, in a particular manner, to the *Judicial* authority. And when we view this object in conjunction with the declaration, “that no State shall

72. UNITED STATES CHRONICLE, June 14, 1792; *See also* PROVIDENCE GAZETTE, June 16, 1792. Curiously, it appears that no judgment was entered at the June term of the Circuit Court. At the November term Justice James Wilson, Justice James Iredell, and District Judge Marchant adopted the conclusions of the previous panel and entered final judgment. Conley, *supra* note 71, at 222.

73. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

74. For the controversy aroused by the *Chisholm* decision, see ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (7th ed., New York, Norton, 1991); MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (3d ed., Oxford Univ. Press, 2011).

pass a law impairing the obligation of contracts;” we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, as to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.⁷⁵

In this language Wilson emphatically linked his view, first suggested in his remarks on the repeal of the Bank of North America charter, that a state could not abridge its own obligations to the contract clause.

Going a step further, Justice William Paterson, in the well-known case of *Vanhorne’s Lessee v. Dorrance* (1795), ruled that a Pennsylvania statute that sought to resolve conflicting land claims in the Wyoming Valley of the Susquehanna River by vesting title in one group of settlers impaired the state’s contract.⁷⁶ The conflict originated in an inter-state dispute over the settlement of these territories. During the colonial era a group of settlers from Connecticut acquired title to the disputed tract from Connecticut and from Indians rather than from the proprietors of Pennsylvania. The heirs of the proprietors, however, sold the land in question to Pennsylvania speculators and farmers. This gave rise to a bitter dispute as Pennsylvania and Connecticut settlers both claimed the same land. In the mid-1780s some of the settlers from Connecticut talked of creating a separate state, which could resolve any question as to the validity of their land titles. In order to secure the allegiance of the Connecticut settlers, the Pennsylvania legislature in 1787 enacted a law confirming the title to all land actually settled.⁷⁷ Under the statute, the Pennsylvania claimants were to receive other vacant land by way of compensation for being divested of their property. But a year later the Pennsylvania

75. *Chisholm*, 2 U.S. at 465. Justice William Cushing, concurring, mentioned that the contract clause and other constitutional provisions designed “to establish some fundamental uniform principles of justice” curtailed state sovereignty. *Id.* at 468.

76. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (Cir. Ct. Penn. 1795).

77. See generally Christopher Collier, *Article III, Section 2, and the Bloody Background of Van Horne’s Lessee v. Dorrance*, in *CONSTITUTION DAY 157–81* (Patrick T. Conley, ed., Providence, R.I. Pub. Soc’y, 2010); J.P. Boyd, *Connecticut’s Experiment in Expansion: The Susquehanna Company, 1753–1803*, 4 J. ECON. & BUS. HIST. 36 (1931–32).

legislature suspended the confirming act and repealed it in 1790. The validity of the confirming act was challenged in a test case. The plaintiff, who grounded his claim on a chain of title from proprietors of Pennsylvania, brought an ejectment action to, in effect, quiet title to the land. The defendant sought to demonstrate a superior title. His claim rested upon the 1787 confirming act, which purported to vest title in the settlers from Connecticut.

Paterson had been a leading member of the constitutional convention and later a Senator before being named to the Supreme Court.⁷⁸ He played a key role in a number of the important decisions of the 1790s and emerged as a champion of judicial review. In *Vanhorne's Lessee*, he presided with Judge Richard Peters in the United States Circuit Court for Pennsylvania. In his extensive charge to the jury, which has the character of a philosophical address on the nature of constitutional government, Paterson found infirmities with the confirming act. First, he asserted that the measure amounted to an unconstitutional taking of property because it failed to provide just compensation. Constitutional principles, he insisted, required that just compensation must be in money. Second, and more important for our purposes, Paterson determined that the confirming act ran afoul of the contract clause. Although he recognized that the confirming act and the suspending act were enacted prior to adoption of the United States Constitution and were not affected by it, Paterson evidently reasoned that the 1790 repealing act was subject to the new Constitution and thus afforded him an opportunity to consider the larger issue of state legislative authority over land grants. With respect to the confirming act, Paterson told the jury:

It impairs the obligation of a contract, and is therefore void. . . .
But if the confirming act be a contract between the Legislature of *Pennsylvania* and the Connecticut settlers, it must be regulated by the rules and principles, which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the *Pennsylvania* claimants,

78. See Daniel A. Degnan, *William Paterson: Small States' Nationalist*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., N.Y. Univ. Press, 1998); Julian P. Boyd, *William Paterson: Forerunner of John Marshall*, in *THE LIVES OF EIGHTEEN FROM PRINCETON* 1–23 (Willard Thorp, ed., Princeton Univ. Press, 1946); Leonard Boyne Rosenberg, Ph.D. dissertation, *The Political Thought of William Paterson* (New Sch. for Soc. Research, 1967).

who are third persons, of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from *Pennsylvania*; how then, on the principles of contract, could *Pennsylvania* lawfully dispose of it to another? As a contract, it could convey no right, with the owner's consent; without that, it was fraudulent and void.⁷⁹

In this jury charge, Paterson treated a land grant as a type of contract and maintained that Pennsylvania could not abrogate its first disposition of land to the Pennsylvania claimants. Not surprisingly given this instruction, the jury returned a verdict for the plaintiff.⁸⁰

Other historical evidence is also consistent with an interpretation of the contract clause as protective of both private and public agreements. The 1795 sale by Georgia of vast western public lands, known as the Yazoo, to four land companies set the stage for the most famous pre-Marshall explication of the contract clause. The Yazoo land grants constituted a large part of the present states of Alabama and Mississippi. Amid allegations of widespread fraud and bribery, anti-Yazoo forces gained control of the legislature in November of that year. They promptly enacted a law nullifying the Yazoo land sale. By this time, however, much of the land had been resold by the original grantees to parties who claimed to be bona fide purchasers. For example, millions of acres were acquired by a group of Boston investors organized as the New England Mississippi Land Company. This tangled situation raised the fundamental issue of whether the Georgia legislature could legally declare its prior action void and annul the land titles under the 1795 grant. The investors sought compensation for the land they had purchased, and a protracted controversy ensued over the validity of Georgia's actions. It eventually gave rise to the first Supreme Court decision pertaining to the contract clause, *Fletcher v. Peck* (1810). Our focus at this point, however, is on the earlier stages of the dispute.⁸¹

79. *Vanhorne's Lessee*, 2 U.S. at 320.

80. The Paterson jury charge was printed in pamphlet form and widely circulated in 1796, two years before its publication by Alexander Dallas in volume 2 of the United States Reports. See *THE CHARGE OF JUDGE PATERSON TO THE JURY IN THE CASE OF VANHORNE'S LESSEE AGAINST DORRANCE* (Philadelphia, 1796).

81. For the background of the Georgia land controversy and the persistent efforts of the Yazoo claimants to secure compensation, see C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC* 1–49 (Brown Univ. Press, 1966).

William Constable, a New York merchant and land speculator, sought a legal opinion from Hamilton, who was then practicing law in New York City, concerning the title of the grantees and their assigns.⁸² In a famous opinion, dated March 25, 1796, Hamilton argued that the Georgia rescinding act was unconstitutional. He reasoned:

In addition to these general considerations, placing the revocation in a very unfavorable light, the constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligation of contract. This must be the equivalent to saying, no state shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor shall be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me, that taking the terms of the constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the legislature of Georgia, may justly be considered as contrary to the constitution of the United States, and, therefore, null; and that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so.⁸³

For Hamilton, then, the contract clause covered agreements to which a state was a party. Moreover, grants of land by a state constituted a contract with the original grantees. Hamilton's opinion letter was incorporated into a pamphlet and widely circulated, providing valuable ammunition for defenders of the Yazoo claimants.⁸⁴

Similarly, in August of 1796 Robert Goodloe Harper, a prominent South Carolina attorney and then a member of the House of Representatives, rendered a formal opinion declaring that the attempted nullification of the land sale by the Georgia legislature was void. He emphasized the contractual nature of the transaction, observing the following:

These sales moreover were contracts, made with the utmost solemnity, for a valuable consideration, and carried deliberately

82. 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 382-84 (Julius Gobel, Jr. & Joseph H. Smith, eds., Columbia Univ. Press, 1980).

83. *Id.* at 430-31.

84. *Id.* at 384.

into execution. It is an invariable maxim of law, and of natural justice, that one of the parties to a contract cannot by his own act, exempt himself, from its obligations. A contrary principle would break down all the ramparts of right, dissolve the bonds of property, and render good faith, to enforce the observance of which, is the great object of civil institutions, subservient to the partiality, the selfishness, and unjust caprices of every individual. There is no reason why governments, more than private persons, should be exempt from the operation of this maxim; nor are they considered as exempt by our constitution or our laws. The state of Georgia, being a party to this contract, could no more relieve itself from the obligation, by any act of its own, than an individual, who had signed a bond, could relieve himself from the necessity of payment.⁸⁵

Thus, Harper joined Hamilton in concluding both that the Yazoo land grant amounted to a contract and that the Constitution barred abrogation by a state of its obligations.

The precepts of natural law also informed the emerging contract clause jurisprudence. Belief in the existence of fundamental rights derived from natural law philosophy was widely shared by late eighteenth-century jurists. Under natural rights theory certain rights were deemed so basic as to be beyond the reach of governmental authority. Written constitutions, state or federal, did not encompass the full range of individual liberties. In the famous case of *Calder v. Bull* (1798), Justice Samuel Chase famously invoked natural law: "There are certain vital principles in our free republican governments, which, will determine and overrule an apparent and flagrant abuse of legislative power." Giving examples of prohibited legislative actions, he maintained that state legislatures could not "violate the right of an antecedent lawful private contract; or the right of private property."⁸⁶ Chase explained that lawmakers could not abridge agreements even if there had been no explicit provision barring such interference in the Constitution. In other words, he saw the contract clause as an additional guarantee of the rights of contracting parties, which deserved protection under natural law. Indeed, in the early nineteenth century, the Supreme Court looked to natural law concepts as a basis to interpret or supplement the protection afforded by the contract clause.

85. Robert Goodloe Harper, *The Yazoo Question*, 5 AM. L.J. 395 (1814).

86. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

VI. STATE DEVELOPMENTS

Developments at the state level also attested to the importance of contractual rights in the constitutional order. As they revised their own fundamental laws, many states included a contract clause based on the federal model. In 1790, for example, Pennsylvania and South Carolina added a contract clause to their new constitutions. The Pennsylvania Constitution stated: "That no ex post facto law, nor any law impairing contracts, shall be made." The newer states typically followed suit. The Kentucky Constitution of 1792, the Tennessee Constitution of 1796, the Mississippi Constitution of 1817, and the Illinois Constitution of 1818 each contained a contract clause. Such widespread adoption of constitutional provisions supporting contractual rights at the state level strongly indicates broad acceptance of the principle of contractual stability in the face of legislative interference. It also meant that state constitutions could serve as an independent basis on which to challenge infringements of agreements. Further, it is noteworthy that no state differentiated between private and public contracts in framing its ban. Clearly state constitution makers were not sufficiently concerned about the Wilson-Hamilton-Harper interpretation of the federal contract clause to make a move to limit the range of protection afforded by similar state provisions.

Moreover, in 1799 the Supreme Judicial Court of Massachusetts became the first state court to invalidate a state law as a violation of the Federal Constitution. The case, involving a suit to enforce a promissory note, arose from the 1795 Yazoo grant discussed above. In a decision that anticipated the jurisprudence of John Marshall, the Massachusetts Court ruled that the Georgia repeal act was void as an infringement of the obligation of contract under Article 1, section 10. It found that title to the land was legally conveyed by the Georgia grant.⁸⁷

The failure of Congress to enact a permanent bankruptcy law until 1898 gave rise to constitutional problems. The absence of federal legislation left open questions as to the authority of the states to pass bankruptcy or other debt-relief measures without running afoul of the contract clause. Notwithstanding early federal and state court decisions enforcing the contract clause, state legislatures initially

87. *Derby v. Blake* (1799), reprinted 226 Mass. 618-25.

did much to define the scope of the provision in the late eighteenth century. They compiled a mixed record. A number of states, such as South Carolina, continued to enforce debt-relief measures adopted before the effective date of the Constitution. In addition, some states, including New York and Maryland, experimented with bankruptcy laws. Moreover, a number of jurisdictions gradually curtailed imprisonment for debt.⁸⁸ All of this legislation potentially weakened the rights of creditors under existing contracts.

Of greater long-term significance, some legislators and commentators took the position that legislatures remained free to alter the means of enforcing contracts without impairing the underlying obligations. For example, Joseph Jones, a Virginia legislator and judge who also was also a member of the state ratifying convention, wrote Madison in December of 1787 that the legislature was considering a debt-relief measure that would postpone execution sales for a year unless the property was to be sold at three fourths of its value. To gain this relief the debtor was required to post a bond to secure payment at the end of the one year. Jones explained that the execution law was seen as “calculated to give some relief to Debtors, without any direct interference with private contracts.”⁸⁹ This elusive distinction between contractual rights and remedies found expression in other states and would vex contract clause jurisprudence for more than a century.

Nonetheless, the contract clause apparently had some immediate impact on legislative behavior. State lawmakers interfered with contracts less frequently and in more restrained ways than before adoption of the Constitution.⁹⁰

VII. PROSPECTS FOR A ROBUST CONTRACT CLAUSE

Uncertainty over the protection given contractual arrangements under the contract clause was widespread in the years immediately following the adoption of the Constitution. Clearly the provision was not generally understood as barring any state legislation affecting

88. PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900* 286 (1974) (“By the end of the eighteenth century, imprisonment for debt commonly lasted only until the defaulter qualified for relief.”).

89. Letter from Joseph Jones to James Madison, Dec. 18, 1787, *in* 10 *THE PAPERS OF JAMES MADISON* 329–30 (Robert A. Rutland et al., eds., 1977).

90. Boyd, *supra* note 49, at 548.

contracts. Probably few would have anticipated the emergence of the contract clause into one of the most important provisions of the Constitution during the nineteenth century.

At the same time, the potential for a muscular reading of the contract clause was established well before the Supreme Court first addressed the question in 1810. The very inclusion of the contract clause in the Constitution demonstrated the commitment of the framers to contractual stability. As J. Willard Hurst observed, the contract clause represented “a striking intervention of national law into fields of policy that would ordinarily be the domain of the states.”⁹¹ Moreover, not only had federal courts invoked the clause to strike down state laws infringing contracts, but key figures had endorsed a far-ranging application of the provision as a shield for agreements. Changes in the economy also underscored the pivotal place of contracts and, consequently, for the contract clause. The principal engine of economic growth was the expanding national market. The constitutional text protecting agreements from legislative adjustment by the states harmonized easily with a public policy promotive of national economic development. The language of the contract clause thus proved a base for the courts to safeguard the rights of contracting parties as a means of encouraging the ascendancy of market forces.⁹²

91. JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* 12 (1982).

92. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 63–67 (3d ed. 2008).