

1987

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Recommended Citation

Robert C. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 Case W. Res. L. Rev. 631 (1987)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol37/iss4/5>

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OBLIGATIONS OF CONTRACTS: INTENT AND DISTORTION

*Robert C. Palmer**

The contracts provision of Article I has been read to allow for reasonable impairments of contracts by the states. Professor Palmer uses Home Building & Loan Association v. Blaisdell as a vehicle for investigating the change of the contracts provision from a rigid, absolute prohibition into a flexible clause admitting reasonable exceptions.

INTRODUCTION

THE DEPRESSION-ERA decision in *Home Building & Loan Association v. Blaisdell*¹ was an undoubted watershed in the history of the contracts provision of the United States Constitution.² In the face of consistent precedent opposing state legislation for debtor re-

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1. 290 U.S. 415 (1934). Appellees had mortgaged their property in 1928 and it was sold by foreclosure sale in 1932. The existing law had allowed a one year period of redemption. The appellees then sought and were granted a two year extension of that period under the 1933 Minnesota Mortgage Moratorium Law. The appellant challenged the constitutionality of that statute as violative of the contracts provision, U.S. CONST., art 1, § 10, cl. 1, but the Minnesota and United States Supreme Courts affirmed.

2. U.S. CONST. art. I, § 10, cl. 1. This Article utilizes the term "contracts provision" instead of the traditional phraseology "contracts clause"; the provision on the obligations of contracts was not a separate clause. Aside from the petty inaccuracy of the traditional usage, I suspect that there originally existed a specific agenda or at least the embodiment of an accomplished adjudicatory tradition in that usage.

For the impact of the decision in *Blaisdell*, see the dissent. 290 U.S. at 448 (Sutherland, J., dissenting). The dissent's accuracy appears in statements of modern doctrine. Justice Blackmun, in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), elucidated the discretionary nature of the court's application of the contracts clause:

The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 24-25 (footnotes omitted).

lief, Chief Justice Hughes assembled a majority of the Court behind an opinion holding a Minnesota debtor relief statute constitutional.³ Although a vociferous minority of four pointed out the departure from tradition,⁴ Hughes argued “creatively” in defense of the statute on the basis of constitutional construction, contracts provision adjudication in the early nineteenth century, and contemporary case law establishing a trend toward state power to affect contracts.

Although modern legal historians seldom dissect a case at length, the task is rewarding, more so in *Blaisdell* than elsewhere. From one perspective, *Blaisdell* is a study in intellectual history. Neither Hughes nor Justice Sutherland, who wrote for the minority, could advance a truly credible argument. One suspects that Hughes knew the argument could not stand on its own, in that it was result-oriented. It is intriguing to examine the lengths to which he stretched to establish the proposition of valid state legislation creating debtor relief. From a different perspective, one familiar with the Federal Convention and the early development of Supreme Court doctrine will see in *Blaisdell* an extraordinarily odd decision. Few decisions mark so great a distinction between twentieth century adjudication and the early Constitution. Finally, with *Blaisdell* adjudication reached a point where the different traditions of the contracts provision converged. *Blaisdell* is thus a good vantage point from which to review the origins of those traditions.

This argument does not presume the validity of early cases. On the contrary, the thesis is that the major line of contracts provision litigation was so contentious because it ran against constitutional intent. Critics of individual cases, however, seldom traced the matter to its roots. Distortion took place immediately at origins. The first Supreme Court adjudication on this provision, however, was in 1810, so that a misconstruction is not as improbable as it might otherwise have been.

This Article takes the form of an extended commentary on *Blaisdell* in three different areas. The first area of consideration is constitutional construction. Hughes made several assertions about interpreting the Constitution, both about method and about original meaning, that are highly questionable.⁵ Part I derives what can be known about the contracts provision from its text and the convention debates. Also analyzed in the first section is the approach

3. *Blaisdell*, 290 U.S. at 415.

4. *Id.* at 448-83. Justices Butler, McReynolds, and Van Devanter joined the dissent.

5. See *infra* notes 11-18 and accompanying text.

Hughes took in *Blaisdell* in determining the meaning of the Constitution.

The importance of *Blaisdell* is the way in which the police power came to balance the contracts provision in a strictly contractual situation. The introduction of that potential came in *Fletcher v. Peck*.⁶ Hughes made little use of *Fletcher*, but its consequences made *Blaisdell* possible. Part II analyzes *Fletcher* and how it distorted contracts provision adjudication at origins.

Hughes made use of several cases regarding rent regulation and hold-over tenancies to provide an analogy for *Blaisdell* as well as to set a trend for the considerations to which the Supreme Court was willing to accord weight.⁷ Part III thus discusses the *Rent Cases*⁸ and their impact on contracts provision adjudication in *Blaisdell*.

The result of the whole analysis is an explanation both of the intense conflict in nineteenth century contracts provision litigation and of the degree of novelty involved in *Blaisdell*. The overall result of *Blaisdell* is that the contracts provision became a reasonable, principled prohibition in a national context, instead of the unreasonable, unprincipled provision placed in the Constitution to assure a federal system.

This Article does not treat any nineteenth century contracts case beyond *Fletcher* in any detail, precisely because of the thesis. Stephen Siegel has recently covered those cases, but omitted to treat in corresponding detail either the question of original intent or the question posed by *Fletcher*.⁹ The different treatments derive from different concerns. This Article's concern is the establishment of the anomaly that led in *Blaisdell* to the police power considerations trumping matters properly falling under the contracts provision. The anomaly occurred with *Fletcher* and formed the basis that made contracts provision litigation a field of contention in the nineteenth century. That contentious litigation, in comparison with the uncontentious litigation not derived from *Fletcher*, is Siegel's concern.¹⁰

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

7. See *Blaisdell*, 290 U.S. at 440-42.

8. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsch*, 256 U.S. 135 (1921). See *infra* notes 178-209 and accompanying text.

9. See Siegel, *Understanding the Nineteenth Century Contract Clause: the Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

10. See *id.*

I. CONSTITUTIONAL CONSTRUCTION

Blaisdell falls short of offering a full-blown theory of constitutional construction of original meaning, but Hughes did advert three times to different matters that constitute portions of such a theory.¹¹ He first asserted the independence of provisions from their context even within the same clause.¹² He next dismissed the equation of constitutional meaning with the applications and views held by the Framers.¹³ Finally, he declared that the difference between "the intended meaning of the words" and "the intended application" was a "fine distinction" and unhelpful.¹⁴ He preferred to adjudicate in the spirit of the Framers, i.e., the way the Framers would have adjudicated were they able to face modern day responsibilities and conditions.¹⁵ Regardless of whether or not Hughes was serious about being governed by some amorphous group spirit of the Federal Convention, his argument was hardly persuasive.

Hughes, writing in *Blaisdell*, remarked that "[i]n the construction of the contract clause, the debates in the Constitutional Convention are of little aid."¹⁶ More recently, James Willard Hurst echoed a similar sentiment.¹⁷ Hurst, however, was relying on the incomplete analysis of Benjamin Wright in 1938.¹⁸ Both Hurst and Wright seemingly adopted Hughes' pre-condition for such a conclusion: that context was irrelevant to constitutional meaning. Such an assumption is unjustifiedly obscurantist. While Supreme Court justices are not expected to be good historians, they can at least be expected to analyze a document competently. Without a fair evaluation of internal documentary context, the document loses meaning. This section undertakes the analysis of the language and of the documentary context that Hughes avoided, as well as the examination of extra-documentary historical context that Hughes distorted, and shows the possibilities that Hughes' methodology ignored.

11. *Blaisdell*, 290 U.S. at 426-27, 442-44.

12. *Id.* at 426-47.

13. *Id.* at 442-43.

14. *Id.* at 443.

15. *Id.* at 443-44.

16. *Id.* at 427 (footnotes omitted).

17. J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY, DIFFERENT MODES OF BARGAINING AMONG INTERESTS 12-13 (1982).

18. *Id.* at 146 n.3; B. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 8-10, 12-16 (1938).

A. *Language and Documentary Analysis*

Documentary analysis properly takes place not only in regard to the words themselves, but also in expanding spheres of context. The language of the contracts provision sets a few clear guidelines for adjudication, even though it is not without ambiguity. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts"¹⁹ clearly establishes a restriction applicable only to the states. Moreover, although courts make law, they are not considered to "pass" laws. Only extrapolation, not construction, could make the prohibition attach to state courts. In a similar fashion, the clause is irrelevant to the right to contract. Despite the importance of that right in itself and as it related to slavery, the language only relates to states that attempt to legislate retroactively, that is, in such a way as to weaken or nullify—impair—the "obligations of contracts" already in existence at the time of the legislation. The clause thus has no implications for prospective legislation or for the right to contract.

Consideration of the context of the obligations of contracts provision—the consideration that Hughes refused to make—yields particular results about the standard Hughes found in the clause: reasonability. Reasonability played no role in the rest of article I, section 10, clause 1.²⁰ The first provision within the first clause prohibited states from entering into treaties, alliances, or confederations.²¹ Treaties, alliances, and confederations are relatively permanent and general associations, different from the agreements and compacts covered in article I, section 10, clause 3.²² Any treaty, alliance, or confederation would be an intrinsic threat to the federal government. If the arrangement was between a state and a foreign power, it would negate the primacy of the federal government in foreign affairs; if the arrangement was between states, it would erect a third level of government as an intermediary between the states and the federal government. Consequently, the strength

19. U.S. CONST. art. I, § 10, cl. 1.

20. U.S. CONST. art. I, § 10, cl. 1 provides that:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

21. *Id.*

22. U.S. CONST. art. I, § 10, cl. 3 provides that

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

of the federal government rested upon the complete deprivation of such power in the states.

The remainder of clause 1 was intended to be similarly absolute. A state power to grant letters of marque and reprisal would amount to a state power to declare war, or at least to involve the nation in war.²³ The economic aims of the Constitution also demanded sole federal power over the coining of money and the emission of bills of credit, even if that long appeared impractical in a literal fashion.²⁴ In a similar vein, the states were absolutely prohibited from making anything but gold and silver coin the appropriate medium for payment of debts.²⁵ Likewise, although it is possible to imagine reasonable bills of attainder and ex post facto laws in exceptional situations,²⁶ the analysis below will indicate that these prohibitions on the states were meant to be very rigid.²⁷ Finally, the clause prohibited states from granting titles of nobility,²⁸ a prohibition that was at the heart of the preservation of a republican society and could not imaginably be subject to reasonable exceptions. The immediate context of the obligations of contracts provision was one of absolute prohibitions; it would be anomalous if it alone was properly subject to reasonable exceptions.

The difference between article I, section 10, clause 1 and article I, section 10, clauses 2 and 3 similarly raises a presumption against allowing reasonable exceptions for the prohibitions of clause 1. Clause 2 concerned states laying imposts or duties on state exports or imports;²⁹ clause 3 related to states laying a duty of tonnage, keeping troops or war vessels in peacetime, entering into compacts or agreements, or engaging in war.³⁰ The subject matter of these two clauses was such that under certain conditions it would be de-

23. See *supra* note 20.

24. See *supra* note 20. See also J. HURST, *supra* note 17, at 40-42.

25. See *supra* note 20.

26. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 140 (J. Elliot ed., 2d ed. 1936); Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in W. NELSON & R. PALMER, COMMUNITY AND LIBERTY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC (1987).

27. See *infra* notes 45-49 and accompanying text.

28. See *supra* note 20.

29. U.S. CONST. art. I, § 10, cl. 2 provides that

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

30. See *supra* note 22.

sirable and allowable for states to undertake the normally prohibited functions. Both clauses recognized that necessity, but maintained federal control by stipulating that the activities were not to be undertaken without the consent of Congress. Clauses 2 and 3 thus explicitly envision reasonable exceptions to be determined by Congress. Clause 1 has no such stipulation. The assertion that the courts were empowered by that omission to license the exceptions is contrary to the natural sense of the document.

The context of the obligations of contracts provision within article I, section 10 thus produces a strong argument (if context is at all relevant) against any constitutional intent to allow the states to impair the obligations of contracts in reasonable ways. Thus far, the constitutional context sustains the rigid prohibitory character suggested by the language of the provision itself.

The character of article I, sections 9 and 10 also argues against allowing exceptions beyond those demanded explicitly in the clauses themselves. The sections are normally characterized respectively as restrictions on the federal government and restrictions on the states. That description is correct, but insufficiently precise: it fails to explain why those restrictions and only those restrictions were included. If the document was indeed the product of careful thought and drafting, each of these sections should have a rule of inclusion that is also its rule of exclusion: a rule that will demonstrate the commonality of those provisions in the section while simultaneously explaining why other possible provisions were considered less significant and thus excluded. That specification of the nature of these two sections will further determine the character of the obligations of the contracts provision as designedly impervious to reasonable exceptions.

Ascertaining the nature of article I, section 9 depends on determining the reason for inclusion of the seeming individual rights: protection of habeas corpus rights³¹ and the banning of bills of attainder and ex post facto laws.³² Even though these rights were and are very important, it immediately seems strange that they took precedence over rights of speech, press, and religion and the rights against unreasonable search and seizure, self-incrimination, and double jeopardy which subsequently were dealt with only by amendment. The possibilities that the document is poorly drafted or that the Framers thought the rights in clauses 2 and 3 consti-

31. U.S. CONST. art. I, § 9, cl. 2.

32. *Id.* cl. 3.

tuted the most important rights of mankind can be excluded. It remains then to find a perspective that provides a uniform rule of inclusion and exclusion.

Article I, section 9 deals more with excepting powers than with protecting rights. Congress could not prohibit the importation of slaves until 1808,³³ could only levy a direct tax according to a census,³⁴ could not tax or impose a duty on state exports,³⁵ could not discriminate between the ports of different states,³⁶ could not expend money except by appropriations made by law,³⁷ and could not grant titles of nobility.³⁸ These provisions prohibit the utilization of federal powers that were the most dangerous the federal government could use to undermine the states as independent policy centers.³⁹

A characterization of article I, section 9 as a federalism section provides the perspective under which habeas corpus rights and the ban on ex post facto laws and bills of attainder take priority over freedom of religion, speech, press and other rights. Legislative condemnation and arbitrary imprisonment are the means by which a federal government could most rapidly and effectively subdue a state which chose to advocate a different policy. Section 9 is not a miscellaneous, poorly conceived set of restrictions on Congress, but a carefully drafted, thoughtful set of measures designed to institute a governmental system with different, independent centers of policy.

The federalism perspective on section 9 applies equally, *mutatis mutandis*, to section 10, thus helping to determine the nature of the obligation of contracts provision. Article I, section 10 embodies that set of restrictions on state governments necessary to insure that the federal government was a vigorous center of independent policy. The state powers expressly prohibited were those powers by which states could negate federal power and frustrate the federation. This perspective explains the inclusion of the prohibition of legislative condemnations in clause 1 not as an individual right, but as a structural provision. States hostile to a federal policy could rapidly have eliminated federal power within a state by legislatively condemning

33. *Id.* cl. 1.

34. *Id.* cl. 4.

35. *Id.* cl. 5.

36. *Id.* cl. 6.

37. *Id.* cl. 7.

38. *Id.* cl. 8.

39. This argument is presented at greater length in Palmer, *supra* note 26.

federal officers or advocates of federal policy.⁴⁰ States were not prohibited from suspending habeas corpus, as was the federal government; and state suspension of habeas corpus in dangerous situations remained less a threat to the federal government than was such federal action to the states.

The contracts provision thus appears as a structural element without flexibility. Granted that there was much concern at the time about the insecurity of contracts,⁴¹ the contracts provision seems to have had little to do with making sure that people stood by their agreements solely because it was economically beneficial and morally good. The Constitution pointedly excluded a similar restraint on the federal government, thus allowing Congress to use embargoes. The contracts provision guaranteed that states would not impede federal negotiation of commercial treaties with foreign countries, would allow contracts to be honored even though in opposition to preferred state policies (such as a military contract in support of a war unpopular in a particular state), and would prevent a state from disrupting interstate commerce. The prohibition was designedly rigid; such state power seemed, in the constitutional convention's perception of the future, intrinsically hostile to federal policy powers. The provisions simply and rigidly denied such powers to the states.

The language of the contracts provision, its context within and the nature of section 10 in comparison with section 9 indicate that the contracts provision was not subject to reasonable exceptions.

B. *The Legislative History*

Legislative history ought not to be determinative of constitutional meaning. Debate is an ambivalent historical source. The nature of debate dictates that while irrelevant arguments are often made, they are only occasionally answered in full and often are simply ignored. Moreover, debate does not show which arguments convinced listeners (apart from the recorder) or which were ignored as analytically improbable. Analysis of the Federal Convention debates, burdened in these prosaic ways, also labors under the burden of the important but unrecorded work and debate in committee. The document as it was sent out for ratification embodied neither

40. See the CONFEDERATE CONSTITUTION, art. I, § 2, cl. 5, for the insertion of a provision into a federal Constitution of a state right to impeach federal officers whose duties extended only as far as that state. C. LEE, JR., *THE CONFEDERATE CONSTITUTIONS* 173 (1963).

41. B. WRIGHT, *supra* note 18, at 6.

the ideas nor the arguments of any single person or group within the Convention; it was a thorough-going compromise. As such, the primacy of the document itself was probably the reason behind the decades-long refusal to publish either the official journal—unpublished until 1819—or Madison's journal—published only in 1840 after Madison died.⁴² If that was the reasoning of the Convention, it was based on plausible hermeneutical traditions.⁴³ In any case, the document that came out of the Convention should retain its primacy: that was the language that was ratified and made law.

Legislative history is nevertheless relevant to constitutional construction. The debate in the Convention or in state ratifying conventions suggests plausible constructions of the constitutional language that otherwise might not be considered. For the fourteenth amendment privileges and immunities clause, for instance, one can derive from such sources four completely different constructions of a relatively short clause.⁴⁴ Moreover, once possible meanings are derived, legislative history aids the choice between seemingly plausible meanings, without it being regarded as determinative or as replacing the document. In particular, when legislative history coincides with documentary analysis, one can be somewhat assured of having reached that "true meaning" which both the Constitution, as a minoritarian document,⁴⁵ and original-intent analysis hypothesize. In the present situation, legislative history does indeed corroborate the documentary analysis concerning the inflexible character of article I, section 10, clause 1. The issue of flexibility and oversight for article I, section 10 issues had been discussed at the Federal Convention. The Convention drafted, in their own words, an "absolute" clause.

42. See Hutson, *The Creation of the Constitution: Scholarship at a Standstill*, 12 REV. IN AM. HIST. 463, 464 (1984).

43. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885-913 (1984).

44. One can argue (1) that mention of privileges or immunities of United States citizens but not of those of state citizens implied that states no longer had a role in relation to fundamental rights (a radical nationalizing approach); (2) that states were now prohibited from making or enforcing any privilege or immunity that a citizen of the United States happened to have, whether from the state or the federal government, such that the federal government would now oversee in each state rights previously protected by the state; (3) that whatever limitations applicable to the federal government would now be equally applicable to the states (incorporation of enumerated rights via the privilege or immunities clause); or (4) that the clause was essentially a restatement of the Supremacy Clause. None of these constructions do violence to the language, but it is unlikely that a court would derive all of them from their own analysis.

45. See Palmer, *supra* note 26.

Article I, section 10, clause 1 has its origin in articles XII and XIII of the draft of August 6, 1787.⁴⁶ The draft did not include the prohibitions of bills of attainder, ex post facto laws, or laws impairing the obligations of contracts. Article XII, however, did contain the provisions on coining money, granting letters of marque and reprisal and titles of nobility, and entering into treaties, alliances, and confederations. Article XIII contained the subject matter of what would become article I, section 10, clauses 2 and 3, with the addition of the provisions concerning specie as tender in payment of debts and emission of bills of credit. The two articles, each restrictions on state powers, were distinct in that article XIII was a prohibition of the powers except by consent of Congress, whereas article XII was a simple, and absolute, prohibition.

The correct placement of all the provisions as between article XII and article XIII was a matter of explicit debate. The provision concerning bills of credit was moved from article XIII to article XII, with the remaining matters of article XIII divided into what became article I, section 10, clauses 2 and 3. Clauses 2 and 3 both retained the provision putting such state activity under the oversight and in the discretion of Congress. The movement of the bills of credit provision into article XII did not carry with it the clause permitting congressional discretion. Article XIII related to matters not intrinsically inimical to a federal system that required only federal control; article XII related to matters that simply could not be permitted to the states in the proposed federal system.

The debate on those changes in the draft articles XII and XIII came on August 28.⁴⁷ Movement of the bills of credit clause from the latter to the former was done explicitly to make the prohibition absolute:

Mr. Wilson and Mr. Sherman moved to insert, after the words, "coin money," the words, "nor emit bills of credit, nor make any thing but gold and silver coin a tender in payment of debts;" making these prohibitions absolute, instead of making the measures allowable, as in the thirteenth Article, with the consent of the Legislature of the United States.⁴⁸

Nathaniel Gorham, a member of the committee of detail, briefly defended the draft version,⁴⁹ but Roger Sherman advised that the

46. J. MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 459 (E. Scott ed. 1970).

47. *Id.* at 618-24.

48. *Id.* at 619-20.

49. *Id.* at 620 ("Mr. Gorham thought the purpose would be as well secured by the provision of Article 13, which makes the consent of the General Legislature necessary; and

occasion should be seized to crush paper money.⁵⁰ Sherman's language did not hint of discretion in the Supreme Court to allow reasonable issuance of paper money by the states. The incorporation of the bills of credit into the absolute article XII received overwhelming support. Eight states voted for the motion (Virginia voted against; Maryland was divided).⁵¹ The rigidity of the prohibition came not from any special phrasing proposed for the bills of credit provision nor from special policy considerations, but merely from its inclusion in article XII. Article XII was a set of exceptions to state powers that was absolute.

The contracts provision found its origin on the same day and immediately after the discussion about making the prohibition of bills of credit absolute by inclusion in article XII. Rufus King proposed "a prohibition on the States to interfere in private contracts"⁵² to be phrased in the same language as used in the Northwest Ordinance.⁵³ King likewise wanted the new provision to be put in that portion of the Constitution which related to the admission of new states.⁵⁴ The Convention preferred both new language and a position in article XII.⁵⁵

King's motion to prohibit states from interfering with private contracts received immediate opposition. Gouverneur Morris thought such a clause was impractical because it would affect state

that in that mode no opposition would be excited; whereas an absolute prohibition of paper-money would rouse the most desperate opposition from its partisans.")

50. *Id.*

51. *Id.*

52. *Id.*

53. The language of the Northwest Ordinance is as follows:

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.

1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 400-01 (B. Schwartz ed. 1971). See also B. WRIGHT, *supra* note 18, at 6-8. Wright assigns the Northwest Ordinance clause, by reason of King's motion, as the "immediate cause" of the contracts provision. *Id.* at 8. It seems beyond doubt that the Northwest Ordinance clause suggested the constitutional provision, but it does not follow that the two provisions were similar in purpose or in meaning. The Northwest Ordinance provision is a principle, utilizing non-mandatory language: "ought." That is the same kind of language used in early state constitutions, designedly and with specific effect. Palmer, *supra* note 26. Moreover, the Convention specifically declined to include a prohibition of state laws that "affected" contracts. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 46, at 620. Finally, the language of the Northwest Provision was completely superseded at this point in the drafting. *Id.* at 621. The form, substance, and purpose of the federal provision was drastically different from that of the Northwest Ordinance.

54. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 46, at 620.

55. *Id.* at 620-21.

laws relating to the methods of bringing actions, limitations of actions, and other state activity affecting contracts; whatever the mischief, he thought that "within the State itself a majority must rule."⁵⁶ George Mason further argued against King's motion, declaring that such a provision would "tie the hands of the States" from "proper and essential" legislative provisions, such as "limiting the period for bringing actions on open account," as for bonds after a lapse of time.⁵⁷ James Wilson countered, apparently, that such a time limitation was not an interference.⁵⁸

Opposition was ineffective. Wilson, Madison, and Sherman all supported the proposition.⁵⁹ John Rutledge finally proposed a substitute for King's motion: the insertion of the words "nor pass bills of attainder, nor ex post facto laws."⁶⁰ The motion passed, seven states to three. At this point, the Convention still was under the impression that "ex post facto" laws included both criminal and civil laws. Although all the recorded discussion concerns contracts, something must have been said about legislative condemnations for crimes. Nothing was said about real estate, even though "ex post facto law" in the civil sense certainly would have also included laws relating to real estate.

The absolute character of article XII remained clear to the Convention even after the passage of the clause concerning ex post facto laws, enacted at that point to prohibit retrospective weakening of contractual obligations. Immediately following the adoption of the provision prohibiting ex post facto laws, Madison moved to prohibit states from laying embargoes by inserting such a clause in article XII.⁶¹ The pressing need for immediate action and the power already given Congress under the commerce clause defeated the motion.⁶² Madison then moved to transfer the clause relating to imposts and duties on imports "from Article 13, where the consent of the General Legislature may license the act, into Article 12,

56. *Id.* at 620.

57. *Id.* at 621.

58. *Id.*

59. *Id.* at 620-21.

60. There is a difference in the accounts between Madison's journal and the official journal. Madison's journal has the wording of the new provision "nor pass bills of attainder, nor retrospective laws." *Id.* at 621. The official journal has "nor pass any bill of attainder or ex post facto laws." 1 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, 163 (1894).

61. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 46, at 621.

62. *Id.* at 621-22.

which will make the prohibition on the States absolute.”⁶³ The motion failed because the provision on duties and imposts on exports and imports was sufficiently broad to form its own clause, in an expanded version. Throughout the debate, the difference between article XII and article XIII was that one article laid an absolute prohibition on the states and the other laid a prohibition on states that could be lifted by Congress. Article I, section 10, clause 1 in all its parts was not intended to be discretionary, but was a set of absolute exceptions to state power.

The final stages of the legislative history of the contracts provision show no change of attitude. The day after the passage of the ex post facto laws provision, John Dickinson notified the Convention that he had found in Blackstone “that the term ‘ex post facto’ related” only to criminal matters.⁶⁴ The wording they had adopted would not apply to civil cases. This is an indication that the Convention did not believe that its subjective intent would be determinative, but rather that its words would stand on their own.⁶⁵ No record of the Convention’s reaction survives. The Committee of Style heeded Dickinson’s warning and returned a clause, now formulated as article I, section 10, clause 1, “No State shall . . . pass any bills of attainder, or ex post facto laws, or laws altering or impairing the obligation of contracts”⁶⁶ A decision to delete the words “altering or” was made without leaving any trace in the journals.⁶⁷ The clause received its final form in the absolute version suggested by all the debate surrounding the draft articles XII and XIII.

Immediately after the Convention reached the final form for article I, section 10, clause 1, Elbridge Gerry made a remark in a manner suggesting a more principled, less rigid view of the contracts clause. Gerry apparently made a speech on the value of the contracts clause for reinforcing public faith. An exception to a state power would, of course, have that effect. But Gerry then suggested

63. *Id.* at 622.

64. *Id.* at 625-26. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 (1765-69).

65. See Powell, *supra* note 43, at 948.

66. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 46, at 706. It is perhaps important that it was the Committee of Style, not the Committee of Detail that wrote this clause. James Wilson was on the Committee of Detail; he had expressed himself as counsel prior to *Fletcher* to the effect that statutes were contracts. See B. WRIGHT, *supra* note 18, at 17-18.

67. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 46, at 730.

that Congress be placed under a similar prohibition.⁶⁸ Either he was ignoring the needs of the country in time of war or else he considered the clause discretionary and a mere admonition. Whichever notion Gerry had, his mistake was obvious, because he could not even get his motion seconded.⁶⁹

A different problem derives from Madison's *Federalist*, number 44. Even though this is a source from outside the Convention, Madison was sufficiently influential within the Convention that his opinion deserves consideration. Since Hughes cited *The Federalist*, the piece is reproduced here at length:

Bills 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. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. 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 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. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.⁷⁰

Madison's contribution seems at odds with the analysis of the document and its legislative history; that is, the analysis that the contracts provision is an exception to state power introduced to preserve federal policy powers.

A difference exists between the interpreted effect of the provision and the reason for its appearance in the document. An exception to state power inserted to preserve federal policy powers would

68. *Id.*

69. *Id.*

70. THE FEDERALIST NO. 44, at 282-83 (J. Madison) (C. Rossiter ed. 1961).

certainly have the effect of creating a personal right, even if the drafters were not concerned with individuals as such. Madison was not concerned in the ratification debates with trying to function as would a judge. He was trying to show the positive benefits to be derived from the Constitution so that the new form of government would be ratified. Moreover, he had every reason to emphasize the benefit to the people, rather than elucidate the way in which it strengthened the federal government or weakened the states. Emphasis on the federalism nature of article I, sections 9 and 10 would have provided a clear target for the anti-federalists. Emphasizing the benefits to people refuted the main argument of the anti-federalists: that the document did not protect rights. The *Federalist Papers* must be seen as part of a debate; every public debate of significance has produced distorted analysis. Success in such instances is much more important than objective analysis.

The legislative history of the contracts provision confirms the conclusion derived from the successive modes of documentary analysis. Article I, section 10, clause 1 was not meant to be discretionary; it was a set of absolute prohibitions on the states because it contained those prohibitions that were so inimical to the designed federal system. Clauses 2 and 3 were meant to be discretionary, allowing Congress to permit the states to undertake the otherwise proscribed activities.

C. *The Hughes Argument*

Hughes avoided contextual arguments by calling them irrelevant, citing two commerce clause cases,⁷¹ and by asserting a factor in the contracts clause that distinguished it from its immediate context.⁷² Precisely what kind of contextual arguments he found unacceptable is unclear. A traditional contextual analysis would have indicated that inclusion of the contracts provision with the provisions concerning emission of bills of credit and the coining of money would indicate a very narrow range of contracts and concerns,⁷³ perhaps not even extending to mortgage agreements that were the concern in *Blaisdell*. Such a contextual argument deserves sum-

71. See *infra* notes 74-78 and accompanying text.

72. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426-27 (1934).

73. Marshall seems to have argued against some such idea in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 198-99 (1819). One can find a different contextual argument in *Briscoe v. Bank of the Commonwealth of Kentucky*, 36 U.S. 257, 287-88 (1837) (Mr. Southard, for the plaintiffs in error). Hurst makes a different, but less compelling, argument. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* 11-12 (1982).

mary dismissal because of its lack of sophistication. Hughes' distinction between the nature of the contracts provision and its context, however, is spurious.

Hughes cited *Groves v. Slaughter*⁷⁴ and *Atlantic Cleaners & Dyers v. United States*⁷⁵ to support his assertion that contextual arguments are irrelevant.⁷⁶ In *Groves*, discussing a Mississippi constitutional provision concerning commerce in slaves, the Court had to consider whether the powers exercised over foreign commerce by virtue of the commerce clause of the Constitution could be construed as indicating the extent of proper exercise of federal power over interstate commerce. Justice McLean put the matter succinctly: "The power to regulate commerce among the several states is given in the same section, and in the same language. But it does not follow that the power may be exercised to the same extent."⁷⁷ *Atlantic Cleaners & Dyers* made exactly the same point concerning interstate and foreign commerce powers.⁷⁸ This argument, without more, establishes only that consideration of context cannot be restricted to an individual clause, but must also embrace the broader constitutional documentary context. In *Groves* this broader documentary context necessarily considered was article I, clauses 8, 9, and 10.

Hughes also specified the general character of the contracts clause as another legitimating factor in the dismissal of contextual arguments as a means of interpretation. Hughes asserted that "where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause."⁷⁹ Nothing in the Constitution itself would seem to corroborate his assertion that the contracts provision was different in nature from the other matters in article I, section 10, clause 1. Arguably, there is a difference between it and the prohibition against coining money or substituting something for gold and silver as tender by the states.⁸⁰ The difference between the contracts provision and the prohibition of ex post facto laws, however, does not

74. 40 U.S. (15 Pet.) 449, 505 (1841).

75. 286 U.S. 427, 434 (1932).

76. *Blaisdell*, 290 U.S. at 427.

77. *Groves*, 40 U.S. (15 Pet.) at 505.

78. *Atlantic Cleaners*, 286 U.S. at 434 (citing *Groves*).

79. *Blaisdell*, 290 U.S. at 426.

80. *Id.*

seem terribly great.⁸¹ Without the convoluted history of the contracts provision, Hughes' assertion seems nonsensical.

Having isolated the contracts provision from its context, Hughes had to take up directly the question of constitutional construction. He dismissed, quite properly, the idea that "the great clauses of Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."⁸² He further explained why that approach was self-defeating.⁸³ He dismissed a second approach, asserting summarily that it was not "helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application."⁸⁴ Conversely, Justice Sutherland found the distinction analytically useful.⁸⁵ In his opinion, "[t]he provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible."⁸⁶ The proposed distinction seems to have been that between the meaning of the power or prohibition defined at the same level of generalization as the constitutional language and the various applications the Framers could have envisaged.⁸⁷

Subsumed within the meaning/application distinction was the assertion that adjudication under the contracts provision had been

81. Both clauses involve terminal ambiguity. Ex post facto laws could be construed as civil and criminal laws, with as likely a probability as construing contracts to include grants. One could likewise propose a remedy exclusion analagous to that under the contracts provision, that would permit a state to institute a different mode of execution for capital punishments as long as it did not aggravate the sentence. Many of the same difficulties could arise in both clauses. Had a broad definition of ex post facto laws been accepted, the history of both clauses would have been tortuous.

82. *Blaisdell*, 290 U.S. at 443.

83. *Id.*

84. *Id.*

85. *Id.* at 514-53 (Sutherland, J., dissenting).

86. *Id.* at 451 (Sutherland, J., dissenting) (emphasis in original; footnote and citation omitted).

87. Such a distinction would consider "commerce among the several states" as including something like trading and business activities (not including manufacturing) running beyond a single state. The extent of that power, in terms of the proportion of all commerce concerned or the importance and practical effect of the power, is completely indeterminate. Application, for instance, to air traffic would be no problem, because envisaged application would not be constitutionalized. Inclusion of the vast majority of commerce instead of only a tiny portion of commercial activity would likewise be no problem, because the power, while determinate in meaning, was indefinite in effect. See *Blaisdell*, 290 U.S. at 451-53 (Sutherland, J., dissenting).

“warped.”⁸⁸ Hughes, however, is distinctly unhelpful in elucidating the point, and the initial briefs for either party, the supplemental appellant’s brief, and the amicus brief, all of which are now preserved and printed, are devoid of any reference to such an argument.⁸⁹

Hughes’ method of constitutional adjudication was itself flawed. For Hughes, the standard of judgment was based on the fact that “the founders of our Government would [not] have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day.”⁹⁰ The Constitution was designed to erect a minority-protecting government resistant to majority will, minority-protecting so that the liberty-enhancing republican state governments could survive as policy centers while the country was strengthened by a more effective federal government.⁹¹ In that context, Hughes’ standard is just as defective as the argument that eighteenth century attitudes were constitutionalized. Not only does Hughes try to imagine what legislators would legislate when faced with his adjudicatory situation, he poses a burdensome historical task: the estimation of what a very diverse group of people from the eighteenth century would have done if faced with a modern situation. Such a task even historians would find daunting and open to completely subjective and contradictory answers. Hughes’ standard would yield majority favoring decisions without utilizing the mandated amendment procedure.⁹²

Hughes made some small concession to historical investigation of the origins of the Constitution when he posited a general purpose for the clause to be the improvement of commercial intercourse, credit, and private faith.⁹³ Hughes valued the decision he wanted to reach and exalted the more general purposes of the Convention and the strength of precedent over impartial determination of the extent of the prohibition mandated in article I, section 10, clause 1.

Justice Sutherland remained unconvinced by Hughes’ analysis. Sutherland undertook an examination of the context of the con-

88. *Id.* at 443 (“We find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance.”).

89. 27 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 407-819 (P. Kurland & G. Casper eds. 1975). Sutherland’s argument does not contain such an assertion either. See *Blaisdell*, 290 U.S. at 448-83 (Sutherland, J., dissenting).

90. *Blaisdell*, 290 U.S. at 443.

91. See Palmer, *supra* note 26.

92. *Blaisdell*, 290 U.S. at 470 (Sutherland, J., dissenting).

93. *Id.* at 428.

tracts provision. His examination was not as documentarily based as that pursued above; instead he preferred to examine historical context. The historical context he adduced was sufficient for him to arrive at the conclusion that accords with any close examination of the legislative history:

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of such action aimed at giving relief to debtors *in time of emergency*.⁹⁴

One need not disagree with Hughes' perception of the situation's urgency during the Depression to appreciate that Sutherland clearly had the better historical argument. Sutherland saw that the constitutional mandate could work against the best interest of the country in a particular situation and that constitutional mandate and good social policy need not be identical under a minority-protecting constitutional regime.⁹⁵ Social policy considerations should not distort perceptions of documentary and historical construction. *Blaisdell* became the leading contracts provision case, so that its view of the original intent of the provision became official, but not therefore correct. To the contrary, from both the document and the debate the clause would seem absolute.

II. THE COURSE OF EARLY ADJUDICATION

Hughes relied heavily on the validity of the course of adjudication during the nineteenth century: "To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."⁹⁶ While one might well disagree with Hughes' theory of constitutional construction, his analysis so depends on the strength of earlier decisions that the overall evaluation of the result, distinct from the intellectual quality of the opinion, likewise depends on the validity of those earlier decisions. The particular problem to be treated here is the decision in *Fletcher v. Peck*⁹⁷ that held that the contracts provision also cov-

94. *Id.* at 465 (emphasis in original).

95. *Id.* at 470.

96. *Id.* at 428.

97. 10 U.S. (6 Cranch) 87 (1810).

ered executed contracts and thus grants. Hughes did not use *Fletcher* in any important way, but the anomaly *Fletcher* introduced into adjudications under the contracts provision was essential to his argument.

The basic problem in *Fletcher*, a problem that altered nineteenth century constitutional law, is the construction of the contracts provision to apply to property. That protection of vested rights constitutes one of the major strands of nineteenth century constitutional history, since it was the major avenue by which state legislation was struck down in federal court.⁹⁸

A. *Contracts Provision Adjudication before Fletcher*

*Vanhorne's Lessee v. Dorrance*⁹⁹ is the first reported case¹⁰⁰ under the contracts provision and is usually considered a foreshadowing of *Fletcher v. Peck*.¹⁰¹ *Vanhorne's Lessee* arose out of a land dispute between Pennsylvania and Connecticut.¹⁰² Pennsylvania attempted to resolve the conflicting claims within its borders by yielding title to Connecticut settlers and compensating its own citizens with other lands.¹⁰³ A Pennsylvania claimant objected to the exchange and to the statutes mandating compensation in land instead of money.¹⁰⁴ Since the case originated in federal court, the federal circuit court could function as a state court to overturn the Pennsylvania statute under Pennsylvania law; Justice Paterson did so. Paterson declared the compensatory statute void both because of the nature of the compensation—land instead of money—and because of the manner in which compensation claims were to be decided. He further ruled that the Pennsylvanians had never been divested of their estates because certain specified conditions precedent had not been satisfied.¹⁰⁵

Although the whole matter was determined under state law, Paterson nevertheless wanted to handle all the pertinent issues so that the Supreme Court could resolve the whole matter if neces-

98. See generally Siegel, *supra* note 9, at 3-8 & n.2.

99. 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

100. See B. WRIGHT, *supra* note 18, at 18-21 for unreported cases.

101. See B. WRIGHT, *supra* note 18, at 19-20.

102. See J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. I: ANTECEDENTS AND BEGINNINGS TO 1801, at 188 (P. Freund ed. 1971).

103. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 315.

104. *Id.*

105. *Id.* at 317-19. Wright ignored these determinative questions. B. WRIGHT, *supra* note 18, at 19-20.

sary.¹⁰⁶ He therefore discussed whether the Pennsylvania statute, passed in 1789 in favor of the Pennsylvanians to repeal the earlier statutes, fell under prohibitions in the Constitution. The constitutional provisions on which the Connecticut settlers relied were the article I, section 10 ex post facto law and obligation of contracts provisions. Paterson dismissed the relevance of both claims.¹⁰⁷

Paterson's treatment of the claim that the repealing statute violated the obligation of contracts provision deserves close attention. In his analysis of the claim he observed:

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, 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 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, without the owner's consent; without that, it was fraudulent and void.¹⁰⁸

The whole treatment is hypothetical. There is no acceptance of the assertion that the statute was a contract.¹⁰⁹

The weight to be accorded to the obligation of contracts portion of the consideration under federal law depends also on Paterson's treatment of the ex post facto law provision. Paterson did not say simply that the ex post facto law provision applied only to criminal matters. Rather, for the sake of argument, he accepted that the provision extended farther, and then showed that nothing the Connecticut settlers had done had vested any estate in them.¹¹⁰ Paterson did not rule, in treating either provision of article I, section 10, clause 1, how far the particular provision extended. Despite his conviction that the case could conceivably come to rest on the contracts provision in the Supreme Court,¹¹¹ the case before him was

106. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 319 ("it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the Supreme Judicature for revision. . .").

107. *Id.* at 319-20.

108. *Id.* at 320.

109. Hunting concluded from the same passage that Paterson did accept the notion that a statute was a contract. W. HUNTING, *THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION* 117 (1919). Wright reached the same faulty conclusion. B. WRIGHT, *supra* note 18, at 19-20, 244.

110. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 319-20.

111. *Id.* at 319.

settled completely under state law. *Vanhorne's Lessee* is no precedent for *Fletcher*, although the defendant's argument might have proved suggestive for the later case.¹¹²

B. *Fletcher v. Peck: the Factual Situation*

Fletcher v. Peck was the first Supreme Court case to depend on the obligation of contracts clause and the first of many cases in the nineteenth century to declare a state statute unconstitutional under federal law.¹¹³ The assertion of the Supreme Court's right to void a state statute was undoubtedly correct, but Chief Justice Marshall's majority opinion distorted the meaning of the contracts provision.

Fletcher concerned a Georgia legislative land grant, a portion of which was conveyed the following year by the original grantees to a new purchaser, who quickly resold a parcel of the land. After an election, the Georgia legislature revoked the grant on which these titles depended. Two weeks after the revocation, the land was sold once more. Four years later, in 1800, Peck bought the land and sold it to Fletcher in 1803. Fletcher allegedly purchased without notice of the revocation. Nevertheless, Fletcher covenanted that Georgia had been legally seised and had good right to sell the land; that the governor had been properly authorized to grant lands within his jurisdiction; and that all the title Georgia once possessed, had been received finally by Peck, free from impairment by subsequent legislative acts.¹¹⁴ Moreover, only weeks prior to the Peck-Fletcher transaction, Congress provisionally set aside five million

112. The report of the case does not specify the manner in which the Connecticut settlers were regarded. The original dispute concerning the land had been between the states of Pennsylvania and Connecticut and had been resolved, prior to the Constitution, in favor of Pennsylvania. See J. GOEBEL, *supra* note 102, at 188-94. The settlers in *Vanhorne's Lessee* are still referred to as "Connecticut settlers." If this were regarded as an interstate matter, that might have affected the way in which the Pennsylvania statute was construed by the parties: in relationship to outsiders, who were not part of the state, not represented in the government, and not subject to its rules, Pennsylvania acted as an individual, such that its statutes with such outsiders were contracts. A different analysis might follow if Pennsylvania was dealing with its own citizens. Such different considerations may have been what Wilson was considering when he wrote, "For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered a compact and interpreted according to the rules and maxims by which compacts are governed." W. HUNTING, *supra* note 109, at 117 (quoting 1 WILSON'S WORKS 565 (J. DeWitt Andrews, ed. 1896)).

113. G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. II: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 347 (P. Freund ed. 1981).

114. *Fletcher*, 10 U.S. (6 Cranch) at 88.

acres to satisfy claims resulting from the Georgia revocation.¹¹⁵ The suit is generally conceded to have been collusive, as the elaborate undertakings would indicate.¹¹⁶

Georgia's revocation of the initial grant was based on legislative corruption: the legislators had been assured a portion of the proceeds.¹¹⁷ The grant had been exceedingly unpopular in Georgia, but the numerous out-of-state interests dependent on the grant guaranteed a determined opposition to the revocation.¹¹⁸ Since the case was heard originally in federal court, the Supreme Court was able to apply both federal and state law, making the case even more interesting.

Georgia did not completely ignore the rights of innocent grantees. The revocation declared the grant void. The general assembly ordered expunged from state records the law, the grant, and "all deeds, contracts, etc., relative to the purchase. . . ."¹¹⁹ It also declared inadmissible as evidence the law, the grant, and anything relative to them for the purposes of establishing title to the land, but allowed their use in private claims for restitution of money paid in the pretended sales that followed the grant.¹²⁰ Thus, at least in form, purchasers without notice from the original grantees had their monetary recovery preserved for them.

The state of Georgia, however, was not a party and was without an ardent advocate. Neither Fletcher nor Peck had a real interest in resolving the matter solely between themselves—although both had a strong interest in reinstating the original grant.¹²¹ Peck, as a substantial Boston land speculator, could have been ruined by the claims that would have followed Fletcher's. Luther Martin, counsel for Fletcher, did not argue his case vigorously. The goal of both parties was merely to overturn the Georgia revocation statute.

C. Fletcher v. Peck: *Marshall's Opinion*

Marshall maintained that Georgia could not revoke its grant for two reasons. His first argument related not to federal, but to state

115. *Id.* at 95-114.

116. B. WRIGHT, *supra* note 18, at 30; G. HASKINS & H. JOHNSON, *supra* note 113, at 343-45; Siegel, *supra* note 9, at 27.

117. 10 U.S. (6 Cranch) at 89.

118. G. HASKINS & H. JOHNSON, *supra* note 113, at 336-50; B. WRIGHT, *supra* note 18, at 21.

119. *Fletcher*, 10 U.S. (6 Cranch) at 90.

120. *Id.*

121. *See supra* note 116 and accompanying text.

law.¹²² In this context he argued that the revocation statute was “a mere act of power.”¹²³ Georgia should have followed the well-known equity rules and held purchasers without notice and for a valuable consideration secure in their title. The manner in which Georgia acted put all property at risk. Using general principles, as could be done by Georgia courts under Georgia law, Marshall doubted the validity of the revocation. “The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power.”¹²⁴ Marshall utilized such general principles to cast doubt on the validity of the Georgia revocation statute, but he preferred not to rest the opinion on such grounds.¹²⁵

Marshall then examined the revocation act under the contracts provision. The crucial part of his analysis rests in only two paragraphs. This constituted the point at which the provision was distorted from its original purpose.¹²⁶

The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant . . . amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

122. Wright's exposition of Marshall's decision is deeply flawed because he did not recognize the state law basis of part of the decision. He asserts that Marshall merely adduced general principles, instead of inquiring whether that was the nature of federal adjudication as such or of federal adjudication utilizing state law. B. WRIGHT, *supra* note 18, at 29-34.

123. *Fletcher*, 10 U.S. (6 Cranch) at 133.

124. *Id.* at 136.

125. Shirley, in handling this portion of the argument, seems to assume that Marshall was arguing from federal general principles and not the general principles that were common to the states and usable under Georgia law. He also seems to think that the general principles argument was an equal ground for the decision as was the contracts provision. J. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES* 403-04 (1971).

126. *Fletcher*, 10 U.S. (6 Cranch) at 136-37. However, it is unclear whether Marshall premised his opinion solely on the contract provision to invalidate the revocation. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 374 (1986):

[s]ome language in the decision implies that the Georgia statute violated the contract clause because the grant was in the nature of a contract. Other language in the opinion, however, reflects Marshall's uncertainty on whether he could rest the entire decision on that clause. He states that the rescinding legislation violated not only general principles of society and government but also the concept of natural law. Therefore, whether the contract clause, by itself, would prohibit legislation that impaired the obligation of a state to a private party was unclear.

Id. at 374 (footnote omitted).

The original purpose of the contract provision was “to prevent states from enacting debtor relief laws.” *Id.* at 372. However, in *Fletcher*, Marshall construed the clause broadly to include protection of private property interests from encroachment by state legislatures. *Id.* at 373 (footnote omitted).

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.¹²⁷

Marshall adduced two very different reasons why a grant was a contract. Neither of them ought to have been taken seriously.

Marshall's first reason why a grant was a contract derived from Blackstone. At this point, Marshall used Blackstone to construe the word "contract" in the broadest sense possible. Blackstone did indeed say that an executory contract "differs nothing from a grant."¹²⁸ That statement, however, did not mean that all grants are contracts; but rather that, once a contract had been executed, there was no further reason for treating it as a contract. Blackstone's example was a contract in which all the provisions were fulfilled at the time of the making, as in an exchange of horses, where possession of each horse changed at the time of the making of the bargain.¹²⁹ That was certainly a contractual situation and had to be

127. *Fletcher*, 10 U.S. (6 Cranch) at 136-37. It is generally conceded that Marshall was following Hamilton's argument in an opinion Hamilton wrote for purchasers concerned about the validity of the revocation prior to *Fletcher v. Peck*. See B. WRIGHT, *supra* note 18, at 22; G. HASKINS & H. JOHNSON, *supra* note 113, at 350. Hamilton's opinion was also divided into a two-part analysis of state and federal law. With respect to state law, Hamilton determined that the revocation violated principles of natural justice and found no precedent for revoking a statute for legislative corruption. As to federal law, the revocation appeared to violate the contracts provision:

Every grant from one to another, whether the grantor 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 act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null.

Quoted in B. WRIGHT, *supra* note 18, at 22. While this opinion influenced Marshall in shaping the argument in *Fletcher*, Hamilton had no authority for finding that grants were contracts. *Id.* For critical commentary on Marshall's assertion that "[a] party is, therefore, always estopped by his own grant," see J. SHIRLEY, *supra* note 125, at 405-09.

128. 2 W. BLACKSTONE, *supra* note 64, at 443.

129. *Id.* Shirley was very perplexed by this portion of Marshall's exposition, trying to sort through possible references to legal or equitable estoppels. J. SHIRLEY, *supra* note 125, at 404-08.

mentioned, but Blackstone did not talk about any further obligations.

Blackstone did not use the word "contract" in Marshall's broader sense naturally. The same chapter in which Blackstone made that comment was entitled "Of Title by Gift, Grant, and Contract,"¹³⁰ an indication in itself that grants and contracts were distinct categories. Blackstone opened the chapter with a section on gifts and grants, carefully distinguishing between gifts and grants on the one hand, and contracts on the other.¹³¹ The section on gifts and grants was section VIII in the broader heading of "Property in Things Personal";¹³² contracts came in section IX.¹³³ A gift or grant vested "a property in *possession*," whereas a contract gave only "a property in *action*."¹³⁴ If an apparent gift did not take effect immediately with possession, it was not a gift, but a contract.¹³⁵ Contracts, unlike gifts and grants, depended for their enforcement on good and sufficient consideration. Blackstone did not mean that all grants were contracts, but that contracts that were completed at the time of making were just like grants.¹³⁶ Blackstone would have construed the obligations of contracts clause as applying only to executory contracts. Marshall's first reason why grants were contracts, while not completely original,¹³⁷ derived from an abnormal

130. 2 W. BLACKSTONE, *supra* note 64, at 440. Shirley went through Blackstone, but did not analyze Marshall's use of Blackstone. J. SHIRLEY, *supra* note 125, at 404-05.

131. The thirteenth chapter begins:

We are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

2 W. BLACKSTONE, *supra* note 64, at 440 (emphasis in original). Note that in referring to "former" and "latter" he groups gifts and grants together, separating those categories from contract more than from each other.

132. *Id.* at 389.

133. *Id.* at 442-70.

134. *Id.* at 440.

135. *Id.* at 441.

136. Blackstone's words on the subject are:

A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action: for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

Id. at 443 (emphasis in original).

The executed contract, obviously, is already completed: everything that is called for in the obligation has been done. An implied obligation not to reassert one's right would have been importing an executory contract into the executed contract.

137. See B. WRIGHT, *supra* note 18, at 16-18.

usage in Blackstone snatched out of context.

Marshall apparently felt the weakness of using "contracts" in its large sense,¹³⁸ because he developed simultaneously his second reason: the implied contract not to reassert rights. Blackstone had also considered implied contracts; as the only source Marshall used in his analysis, Blackstone serves as a good standard. "*Implied [contracts] are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform.*"¹³⁹ He then mentioned the implied contracts for the payment of reasonable wages and prices. He also recognized the implied contract that underlay all agreements: that failure made one liable to damages. Such implied contracts were so important to Blackstone that he noted that "almost all the rights of personal property (*when not in actual possession*) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them."¹⁴⁰ But even here, he had drawn a clear distinction between grants and contracts, because he excepted personal property in actual possession. If Blackstone would have countenanced an implied contract not to reassert rights, he need not have excepted property in actual possession. For Blackstone, a grantor could not reassert his right because he no longer had any: he had conveyed it all away. A contract not to reassert rights would have been superfluous. Marshall's implied contract, on which his opinion is based, was simply spurious.

Marshall merged the two different reasons, talking finally about grants as executed contracts whose obligations continue. Grants now were simply contracts, whether or not one took the word in its larger sense.¹⁴¹ Some justification was required. Marshall thus offered a principle of construction: constitutional language must be taken in its broadest meaning. Since the language did not distin-

138. Marshall's principle of taking language in its broadest possible sense did not survive; he backed away from such consequences in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517 (1819), where it became obvious that such a principle would include marriage contracts under article I, § 10, cl. 1 protections.

139. 2 W. BLACKSTONE, *supra* note 64, at 443.

140. *Id.*

141. Haskins makes the whole argument rest on the use of the larger sense of "contract" and ignores the way in which Marshall also adduces the implied obligation not to reassert. G. HASKINS & H. JOHNSON, *supra* note 113, at 350. That concentration on perhaps the dominant element of the analysis obscures the weakness that Marshall felt and also ignores the point which Marshall rapidly reached: the complete merging of the ideas of grant and contract. Wright found this part of Marshall's argument "not unreasonable," but then paraphrases it as an assumption that the contract would endure, not a contract in itself. He does not examine the contract/property problem. B. WRIGHT, *supra* note 18, at 32.

guish between executed and executory—nor perhaps between explicit and implied—contracts, the contracts clause had to apply to both. Alexander Hamilton had written, in his 1796 brief on this Georgia statute, about “taking the terms of the Constitution in their large sense.”¹⁴² But even Hamilton had been a bit more cautious here than Marshall; Marshall himself was later to retreat from this principle of constitutional construction.¹⁴³

To support his construction, Marshall relied on an a fortiori argument.¹⁴⁴ A contract to convey land was protected from state laws by the contracts provision.¹⁴⁵ If the obligation to convey was protected, then the land conveyed should have been shielded from laws which revoked the conveyance.¹⁴⁶

The problem is that a fortiori arguments sound reasonable, yet they are often deceptive. This argument assumes that protection of land conveyances was a central object of the contracts clause.¹⁴⁷ This assumption was incorrect. One can more easily argue that the contracts provision embraced federal values, not a concern for individual property rights, since violations of contractual obligations impinged on interstate commerce and foreign affairs and would ultimately threaten the execution of federal powers.¹⁴⁸ With few exceptions, property rights were viewed as a local matter and not subject to direct federal regulation.¹⁴⁹

Marshall knew less about original intent than do we. He had not been a member of the Federal Convention, even though he had been a member of the Virginia ratifying convention. Nor did he have access to the journals of the convention. The official journal of the convention appeared in 1819; Madison’s journal was not pub-

142. See *supra* note 127.

143. See *supra* note 138.

144. *Fletcher*, 10 U.S. (6 Cranch) at 136-37.

145. *Id.* at 137-38 (“[w]hatever respect might have been felt for the state sovereignties, . . . the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people in the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of sudden and strong passions to which men are exposed.”).

146. *Id.* at 137 (“[a] law annulling conveyances between individuals . . . would be . . . repugnant to the constitution It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.”).

147. *Id.* at 138 (article I, section 10 “contains . . . a bill of rights for the people of each state.”). See also *supra* note 145.

148. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 126, at 372.

149. See generally R. CUNNINGHAM, W. STOEUBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 92 (1984).

lished until 1840.¹⁵⁰ During the first decades, "the members of the Constitutional Convention . . . scrupulously, even obsessively, observed that body's secrecy rule."¹⁵¹ Lacking good historical information and not prone to consistent, careful analysis of the document, Marshall spoke of article I, section 10 provisions as "a bill of rights for the people of each state" that would "shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."¹⁵² The perspective is perhaps forgivable; Madison in the *Federalist Papers* speaks not much differently.¹⁵³ Their conclusion, however, is incorrect, since the contracts provision was hardly part of a bill of rights, being much more concerned with commercial matters and policy; it was not concerned with individuals as much as with establishing a federal system.

Marshall also justified his construction of the contracts provision by reference to the ex post facto law provision.¹⁵⁴ That provi-

150. J. HUTSON, *supra* note 42, at 464.

151. *Id.* at 463.

152. *Fletcher*, 10 U.S. (6 Cranch) at 138. Shirley asserts, I think correctly, that Marshall saw that it was impossible to construe the obligation clause to apply to any but executory contracts; that he thought its framers ought to have protected grants and conveyances as well; . . . and he, therefore, invented the "legal fiction" that an executory contract was always inside the body of an executed one, in order to bring it within the protection of the obligation clause.

J. SHIRLEY, *supra* note 105, at 409.

153. THE FEDERALIST NO. 44, at 282-83 (J. Madison) (C. Rossiter ed. 1961). Madison's language, probably influential, deserves quoting.

Bills of attainder, ex-post-facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. 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. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the articles of Confederation, and needs no comment.

154. Shirley asserts that the ex post facto law clause was a ground of decision. J. SHIRLEY, *supra* note 125, at 404.

sion forbade state legislatures from making laws on crimes retrospective. Seizure of property would be one consequence of resulting convictions. Marshall argued that that protection of property fortified his construction of the contracts provision, since the ex post facto law provision would also protect property rights. But the ex post facto law provision only marginally relates to property and is more concerned with protection of the person. The more apparent relationship between the two portions of article I, section 10, clause 1 is revealed by asking what the benefit was to the federal government of thus restricting states. The answer lies in protecting the capacity of the federal government to implement foreign and commercial policy; there is no direct concern for land. Marshall's perception of article I, section 10 was thus defective.

The final portion of Marshall's analysis allowed a state statute to be declared unconstitutional in the course of litigation between private parties. The eleventh amendment¹⁵⁵ had prevented individuals in most cases from suing a state directly for contravening the Constitution. The question remained whether, in the course of ordinary litigation, federal courts could overturn state statutes. Marshall's reasoning here was impeccable.¹⁵⁶ States could make contracts as well as could private individuals. Allowing a state to absolve itself from its own obligations under contracts would demand a unique reading of a clause that, no matter how read, demanded severe restrictions on state power. While this portion of the opinion was perceived as a circumvention of the eleventh amendment, it merely pointed out that the eleventh amendment had not eliminated the possibilities that had been found objectionable. One suspects that the more direct language—that the federal courts could not declare state statutes unconstitutional—could never have passed, since it would leave federal constitutional prohibitions unenforceable. Such a provision would not have been able to cite the alleged impropriety of a state being a defendant against a private plaintiff.¹⁵⁷ After the eleventh amendment, litigation between private parties became a widely used method of bringing state law under federal review. The collusive nature of *Fletcher* indicates that the parties probably intended precisely to void the state statute.

155. U.S. CONST. amend. XI.

156. *Fletcher*, 10 U.S. (6 Cranch) at 137-38.

157. See J. GOEBEL, JR., *supra* note 87, at 722-37.

C. Fletcher v. Peck: *the Dissent*

Justice Johnson took partial exception to Marshall's analysis.¹⁵⁸ He agreed with Marshall that under Georgia state law, the statute could be overturned.¹⁵⁹ He vigorously disagreed with Marshall's utilization of the contracts provision to void the statute. Johnson did not disagree with Marshall on his use of Blackstone to determine the meaning of "contracts." His objection, however, related to a property/contract distinction. He distinguished between the obligations and the effects of contracts. Insertion of the word "obligations" imported "an existing moral or physical necessity," whereas a grant was merely the "consummation of a contract."¹⁶⁰ Even accepting Marshall's temporary principle of constitutional construction, dictating broad meanings, he could see no continuing obligations in executed contracts; the essential aspect of an executed contract was that all the obligations had been carried out.

Justice Johnson thought that Marshall had gone far beyond the obvious meaning of the words and that his construction might well have deprived states of the power of eminent domain. That specific effect would depend on the determination of whether the provision of appropriate compensation might still impair the obligations of the supposed contract not to reassert rights. Johnson's worry was not frivolous, although his opposition to Marshall's analysis could have been much stronger.

Fletcher v. Peck, the first Supreme Court case to treat the contracts provision in a detailed manner, distorted the argument by equating grants with contracts. The obligations of contracts provision thereby became the mechanism for protecting vested rights. The limited leeway that states had prior to *Fletcher* to ignore their eminent domain provisions, subject to their own courts and political opinion, vanished. The other issue of the case, which allowed federal courts to apply state constitutional law to overturn a statute,

158. *Fletcher*, 10 U.S. (6 Cranch) at 143.

159. *Id.* at 143-44. Johnson did not expressly say that he was working under state law. He was, however, following Marshall's form; Marshall had first considered the situation solely under Georgia law, concluding "The validity of the rescinding act, then, might well be doubted, were Georgia a single sovereign power." *Id.* at 136. He then went on to consider the situation under the Constitution. Johnson's use of general principles seems much less innovative when considered as the operation of a federal justice working under state law: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity." *Id.* at 143. He then analyzed the situation in property terms: once granted, the grantor has no longer any interest in the matter on which to act.

160. *Id.* at 144-45.

could have stood without the contracts provision as a barrier to arbitrary state action, but state court adjudication of their own constitutional provisions was more deferential to the legislature. The significance of the use of the contracts provision was its absolute prohibition. Vested rights, under this approach, really were vested.

D. Fletcher v. Peck: *the Consequences*

Fletcher was the first case decided explicitly under the contracts provision. It introduced an intractable problem into contracts provision adjudication. The contracts provision had been carefully tailored not to apply to property. No federal interest dictated involvement with grants of property as such. Compared to impairment of contracts, property impairments undermined no federal power; impairment of property rights likewise was far less significant than any other power prohibited in article I, section 10. *Fletcher* thus represented an intrusion of the federal prohibitory power into internal state matters that logically could have drastically impaired the ability of the state to function as a significant governmental body.

That threat became more imminent in *Trustees of Dartmouth College v. Woodward*.¹⁶¹ Marshall there abandoned his *Fletcher* statement that the words of the contracts provision had to be read in the broadest possible manner. Thus, marriage, admittedly a contract, was considered outside the scope of the contracts protected by article I, section 10, clause 1.¹⁶² States could thus continue to pass laws relative to divorce that applied not only prospectively, but also to existing marriages. *Dartmouth College's* holding, however, was that grants of incorporation not of a governmental character (such as an incorporated town) were contracts, so that no state could revoke or alter the terms of a grant of incorporation.¹⁶³

New Hampshire, in this case, sought to alter the governing board of Dartmouth College for political reasons contrary to the express method prescribed in the charter. The result was determined by *Fletcher*. Was a grant of incorporation like a grant of land? Dartmouth College indicated that the answer was affirmative if the corporation was not a governmental body (which in some way Dartmouth was, although not like a town) and derived its funds from private sources. Justice Story's concurring opinion made clear

161. 17 U.S. (4 Wheat.) 517 (1819).

162. *Id.* at 627-28.

163. *Id.* at 664-66, 714.

that the same logic would apply to banks.¹⁶⁴ *Dartmouth College* thus stripped the states of power to alter the terms of incorporation of private colleges and bank corporations already in existence. Given the intent of the contracts provision, the federal interest in such matters was non-existent.¹⁶⁵ The decision nonetheless denied the states the power to alter certain institutions vital to education and economic activity.

The necessity of such powers in state governments, and the absence of a real federal interest, resulted in a decision that need not have altered state powers as such. New charters of incorporation could contain express reservations of power.¹⁶⁶ *Dartmouth College* served to protect selected institutions and perhaps to provide an example for others to claim similarly protected status from the states. The protection of certain colleges did help entrench the tradition of private colleges with independent political views.

Regardless of the benefits or the justice of the claim, the constitutional justification for the decision is difficult to discern, except via *Fletcher*. The appropriate action for Dartmouth College would have been for its donors to have brought a case in state court alleging a taking or in federal court under diversity jurisdiction. Success would have rested on whether the donors could show that their gifts had been predicated on some particular characteristic of Dartmouth that was guaranteed by preservation of the original charter. Most gifts, however, go no further than an interest in education, not in the selection of the board. The state, even if unsuccessful, would only have had to compensate for the taking of selected gifts, not for the total endowment. As with all *Fletcher*-derived cases, this case would have looked more naturally like one falling under state eminent domain law, not one within any federal interest.

*Charles River Bridge v. Warren Bridge*¹⁶⁷ determined the extent to which *Fletcher* and *Dartmouth College* doctrine would be expanded. *Fletcher* dealt with an explicit grant of property. *Dartmouth College* concerned an explicit clause in a charter of incorporation. Both were based on the implied contract not to reassert a property right, incorporating the assertion that a grant was implicitly a contract. *Charles River Bridge* determined whether the contracts provision was going to protect not only explicit grants,

164. *Id.* at 669, 711-12.

165. See *supra* note 41 and accompanying text.

166. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 174-75 (1973).

167. 36 U.S. (11 Pet.) 420 (1837).

but also implied rights.¹⁶⁸ *Charles River Bridge* focused on an implied grant of exclusivity to tolls that was violated by a rival bridge later built adjacent to the Charles River Bridge.¹⁶⁹ Chief Justice Taney, writing for the majority, thought that use of the contracts provision to protect implied grants of exclusivity would act too harshly on the public, wrongly restricting state police power. If improvements were based on exclusivity of tolls to repay investment, such exclusivity should be explicit.¹⁷⁰ The holding did not overturn *Dartmouth College* or *Fletcher*; it only restricted the extent to which the contracts provision would be used to protect vested rights. The doctrine ceased at implied rights (not including the implied right against re-assertion of title by the grantor), protection of which would have defeated necessary police power controls.¹⁷¹

Though explicitly considering police power, *Charles River Bridge* did not introduce balancing considerations into the contracts provision. The dividing line between those grants protected and those not protected was between express and implied grants. The question was how far *Dartmouth College* would be expanded. Setting a limit meant judicial consideration of the necessary state powers. That limit would not result in an amorphous standard, with courts weighing the benefits and burdens of each situation. Thus, *Dartmouth College* and *Charles River Bridge* were similar. In the former, if the state wanted to alter the terms of the corporation, it had to reserve that right in the grant. In the latter, the grantee seeking exclusivity to certain benefits needed an explicit right. Corporations were protected against unreserved manipulation of their charter; states were protected against unspecified limitations. Both were unreal, in that states were quite willing simply to put the requisite specifications in grants, both as to reservations of authority and as to exclusivity. Both resulted from misapplication of the contracts provision. The painful resolution of the respective rights of state and corporation, however, was necessitated by adopting the *Fletcher* expansion of the contracts provision. Without that unwarranted expansive interpretation, the *Charles River Bridge* consideration of contracts provision prohibitions in relation to the state police power would never have arisen. That acceptance of police power

168. *Id.* at 420.

169. For the context of the case, see S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

170. *Charles River Bridge*, 36 U.S. (11 Pet.) at 547-49.

171. *Id.*

considerations therefore rests on whether or not one accepts *Fletcher*.

The court's struggle for an acceptable application of a contracts provision, thus distorted, ended with a series of cases enunciating the "inalienable powers doctrine."¹⁷² Regardless of explicit grants, certain matters were so essential to a government that they could not be permanently alienated, nor protected under the contracts provision even though granted. In the 1850's and thereafter, the court was forced to concede that the obligations of contracts provision could not have been intended to apply literally to all grants even if explicitly made. The states had to retain, at bottom, the power to govern.

The evolution of nineteenth century doctrine on the contracts provision was overly complex. A grant was a contract. A grant of incorporation to a private body was a contract, vesting explicit rights. Implied undertakings, however, did not come under the contracts provision. Ultimately, even certain explicit provisions were exempted from the effect of the contracts provision if sufficiently associated with essential governmental powers, such as taxation, eminent domain, and general police legislation. Neither the Federal Convention, the states, nor the Constitution had mandated such a restriction on the states. Grants simply were not contracts; states, under the original perception, for good or ill, would have retained authority over grants, whether of property or of incorporation.

Police power considerations also arose in contracts provision adjudication unrelated to *Fletcher*, but in a completely different and less problematic form. The non-*Fletcher* tradition derived from *Sturges v. Crowninshield*.¹⁷³ In *Sturges*, Marshall determined that states could still legislate in the bankruptcy area as long as the federal government chose not to, but only in a prospective manner. In a prospective statute, the bankruptcy provisions would be incorporated in the expectations of contracts to be made.¹⁷⁴ While effectively preserving certain state police powers, Marshall's holding was based not on balancing, but on construction of the clause: the clause only concerned the impairment of obligations already entered into, but did not prohibit any state action relating to contract

172. Siegel, *supra* note 9, at 41-54.

173. 17 U.S. (4 Wheat.) 122 (1819).

174. *Id.* at 196-97.

law.¹⁷⁵ Moreover, Marshall, not unreasonably, asserted that there was, "in the nature of things," a difference between the obligation of a contract and the manner of its enforcement.¹⁷⁶ A state might lawfully alter the method of enforcement, while leaving the obligation intact. Undoubtedly, some alterations in enforcement would impair the obligation, but not all. Particularly with imprisonment for non-payment of a debt, enforcement could be strengthened instead by allowing debtors to pursue gainful activity.¹⁷⁷ State police powers were left intact, but once again the result was not achieved by balancing, but rather by considering what constituted impairment of an obligation.

Charles River Bridge, therefore, within the context of the *Fletcher* tradition of contracts provision adjudication, introduced the explicit consideration of state police power. Taney in *Charles River Bridge* accepted the traditional cases and used state police power to limit the expansion of *Dartmouth College*. The "inalienable powers doctrine" identified several areas in which impairments of obligations could be acceptable despite the contracts provision because of the importance of the power to the governance function. There is an echo of that kind of analysis in *Blaisdell*. *Blaisdell*, however, was not a corporation case, nor did its subject matter fall within the spurious *Fletcher* tradition. Factually, *Blaisdell* should have fallen in the *Sturges* tradition. *Blaisdell*, however, represents not simply an adoption of *Fletcher* traditional methodology, but a complete transformation.

III. THE RENT CASES

Hughes found justification for *Blaisdell* in the *Rent Cases*:¹⁷⁸ a series of opinions arising from emergency rent control measures enacted after World War I. These cases presented the vital bridge between traditional doctrine and the conclusions Hughes reached in *Blaisdell*.

The *Rent Cases* involved two statutes, one for the District of Columbia and the other for New York, that mandated that tenants not be required to relinquish their apartments upon termination of

175. *Id.* at 192-97.

176. *Id.* at 200.

177. *Id.* at 200-01.

178. *Block v. Hirsh*, 256 U.S. 135 (1921) (upholding constitutionality of D.C. Rent Control Act); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (upholding constitutionality of New York Housing Act); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (upholding constitutionality of New York Emergency Housing Laws).

the leases. The landlord could reject the tenant if he showed the tenant unsuitable, if he wanted to occupy the premises himself, or if he wanted to demolish the building for new construction. The tenant, under the statute, had to continue paying a reasonable rent.¹⁷⁹ The "reasonable" rent stipulation was meant to compensate the landlord while preventing him from charging the exorbitant market rate.

From the perspective of the contracts provision and *Blaisdell*, the important point is that the *Rent Cases* are logically irrelevant and do not produce the results that Hughes derived. *Block v. Hirsh* was the first of the *Rent Cases* and, from the way Holmes wrote the opinions, the major case.¹⁸⁰ Methodologically, *Block* presents the pure situation—a case in the District of Columbia and thus free from both contracts provision and fourteenth amendment complications. The issues were whether the statute instituted a taking not really for a public purpose, and thus unjustifiable, and then, if the taking was for a public purpose, whether it required compensation. In such a case, and necessarily because article I, section 8, clause 17 grants Congress plenary authority in the District, police power must be considered more forcefully alongside eminent domain law. Holmes, as was his wont, analyzed the situation as a point along a continuum of activity.¹⁸¹ Minor infringements of property rights by the police power were not so substantial as to come within eminent domain law. At some point, however, the police power no longer justified infringement of property rights.¹⁸² Holmes rightly did not defend the statute vis-a-vis the contracts provision, because, as directed against states, the provision would not restrict congressional action within the District. Holmes' analysis portrayed the situation as involving only property law, not incursion into contractual obligations.¹⁸³

It was only in the second of the cases, *Marcus Brown Holding Company v. Feldman*,¹⁸⁴ that Holmes addressed the impact of the contracts provision on the statutes.¹⁸⁵ Since the statute at issue

179. *Block*, 256 U.S. 135 at 153-54; *Feldman*, 256 U.S. 170 at 197-98.

180. *Block*, 256 U.S. at 153.

181. O. W. HOLMES, *THE COMMON LAW*, 118-29 (M. Howe ed. 1963).

182. *Block*, 256 U.S. at 155-56.

183. Holmes mentioned the effect of the situation on contractual situations in *Block*, but only in that the congressional action prevented owners from making the contracts they wanted. *Block*, 256 U.S. at 157. Prevention of making contracts is not an art. I, § 10, cl. 1 concern.

184. 256 U.S. at 170 (1921).

185. *Id.* at 196-99.

was a New York state statute, the contracts provision could conceivably have some effect. Certainly, one of the clauses of the contract was the surrender at the end of the lease.¹⁸⁶ A further complication was that the landlord had already contracted a new lease for the same premises with another tenant.¹⁸⁷ The New York statute allowed the tenant to evade the surrender clause of the lease and prevented the execution of the second lease.¹⁸⁸ Holmes focused his analysis of the contracts provision in a brief but important passage:

The chief objections to these acts have been dealt with in *Block v. Hirsh*. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, [1920]. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.¹⁸⁹

The chief objection to the acts in *Block* was one of property.¹⁹⁰ By citing *Block* as authority, Holmes implied that *Feldman* was a case primarily of property, and that the contracts provision objection was a subordinate problem.

Holmes' one sentence on the contracts provision also mentioned police power, but only to indicate that the analysis was properly property, not contracts.¹⁹¹ Property, as was held in *Block*, was subject to inconveniences for the common good, just as it was subject to complete taking by eminent domain.¹⁹² The landlord could only contract for whatever property right he himself held, and such right was inherently qualified by state power for the common good.¹⁹³ Holmes found the existence of the second lease to be an insignificant problem; indeed, he explicated the matter no further than has been quoted above.

The problem of the stipulation of the surrender on the termination of the lease, however, seems more substantial; but Holmes does not indicate his reasoning. Sound reasoning would seem to indicate that the surrender clause in the lease is not effectual. Most times

186. *Feldman*, 256 U.S. at 198.

187. *Id.* at 198. The new lease was to take effect the day after the tenant's lease expired.
Id.

188. *Id.* at 199. This provision was purportedly enacted to counter the housing shortage in urban centers.

189. *Id.* at 198.

190. *Block*, 256, U.S. at 135-36.

191. *Feldman*, 256 U.S. at 198.

192. *Block*, 256 U.S. at 155-57.

193. *Id.*

the tenant would execute a new agreement with the landlord, such that at the termination of the lease the tenant did not actually surrender the apartment. The stipulation, as it concerned actual surrender rather than the condition of the tenements, simply stated that the apartment remained the property of the landlord.¹⁹⁴

The extension mandated by the state was more a taking from the landlord and a prevention from entering into a different contract than an impairment of the expired contract. The assertion that *Feldman* involved property law to a greater extent than contract law is supported by the common law of the era; the landlord would have sued in ejectment or similar summary proceedings to recover at the end of the lease, not in covenant or assumpsit.¹⁹⁵ In short, Holmes analyzed the police power in relation to eminent domain considerations; he gave no indication, however, that the obligations of contracts provision would be balanced against the police power.

The dissenting justices maintained that the statutes were violative of numerous constitutional provisions, including the obligations of contracts provision.¹⁹⁶ The reason for their dissent in *Feldman* was included in their dissent in *Block*.¹⁹⁷ Their comments on the

194. A typical covenant to surrender was not a covenant to relinquish the premises. It was a covenant to surrender (a) all improvements, and (b) the tenements "in as good state and condition as reasonable use and wear thereof will permit, damage by fire and other elements excepted." C. LEWIS, *LAW OF LEASES OF REAL PROPERTY* 330 (1930). The emphasis was not on the surrender at all, but on what was to be surrendered and in what state. There was, nevertheless, some litigation involving the surrender clause that emphasized the physical relinquishment purpose of the clause. *Vernon v. Brown*, 40 A.D. 204, 58 N.Y.S. 11 (1899), was an action for breach of the covenant to surrender. The plaintiff sought damages for occupation after summary proceedings; the damages included reasonable rent, repair of the premises, and, perhaps, the expenses incurred in bringing the action. The majority noted that "There was evidence that the value of the rent of the premises, together with the amount necessary to restore the premises to their original condition, exceeded the amount of the judgment." *Id.* at 206, 58 N.Y.S. at 13. Even here, the covenant to surrender was not really a separate, operable clause. Even in the fourteenth century, the surrender clause in a lease seemed to be primarily concerned with surrender in good condition. One of the earliest surrender clauses noted states "in adeo bono statu quo tempore dimissionis predicte sursum teneret usu rationabile et igne alieno dumtaxat exceptis" ("he would surrender [the tenements] in as good condition as they were at the time of the lease, reasonable use and other people's fire only excepted"). *St. Edmund v. Wotton*, Public Record Office, London, CP40/449, m. 36 (1373) (the lease at issue was drafted in 1361).

195. J. TAYLOR, *A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT; EMBRACING THE STATUTORY PROVISIONS AND JUDICIAL DECISIONS OF THE SEVERAL UNITED STATES IN REFERENCE THERETO; WITH A SELECTION OF PRECEDENTS* 515 (5th ed. 1869).

196. *Block*, 256 U.S. at 200-01.

197. *Id.* at 158 (McKenna, J., White, C.J., Van DeVanter, J., and McReynolds, J., dissenting).

obligations of contracts provision thus seem misplaced. They framed the issues in terms of individual rights,¹⁹⁸ which was not the concern of article I, section 10. Moreover, in the long tradition spawned by *Fletcher*, they easily mixed consideration of fifth amendment eminent domain problems with contracts provision problems.¹⁹⁹ Their deep concern is explicable only from the perspective which merges contracts and property. In the realm of property, their concern was at least arguable.²⁰⁰ Even with the analytical mixture of property and contract, however, they focused on the covenant of the contract that was being nullified.²⁰¹ The issue that then arose was whether the physical relinquishment element of the surrender clause was simply a reflection that the landlord maintained ownership during the term of the lease or whether the clause was a substantive part of the contract, such as the stipulation of the rent. Viewing it as a substantive provision, they concluded that Holmes was subjecting the contracts provision to qualification by state power, contravening the Constitution as the supreme law of the land.²⁰² Holmes, however, made no such assertion in his written opinion.

In *Blaisdell*, Hughes elevated the arguments of the *Rent Cases* to the abstract level, eliminating consideration of the differences between the situations in the *Rent Cases* and those in the case before him. He was accurate in observing that:

In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession.²⁰³

Presumably Minnesota had been striving to make these very correspondences with the *Rent Cases*. Hughes was too careful simply to say that the analogy was perfect and that the Minnesota statute was constitutional. Rather, he concluded that the Supreme Court had increasingly appreciated "the necessity of finding ground for a rational compromise between individual rights and public welfare."²⁰⁴

198. *Id.* at 163.

199. *Id.* at 162-63.

200. *Id.* at 198-99 (Holmes' exclusion of minor takings for private individuals' accommodations by reason of public necessity certainly went beyond what had been customary, even if it technically fell within constitutionally permissible bounds).

201. *Id.* at 169-70.

202. *Id.* at 164-68.

203. *Blaisdell*, 290 U.S. at 441-42.

204. *Id.* at 442.

Hughes used the *Rent Cases*, therefore, both to provide an analogy and to represent *Blaisdell* as the most recent Supreme Court modification in this tradition.

The situational differences between the *Rent Cases* and *Blaisdell* are crucial from a contracts provision perspective. Foreclosure on a mortgage is quite different from relinquishing possession at the end of the lease. Foreclosure is an alternative to payment in which the creditor is very interested. The surrender at the end of a lease is merely a recognition that the leased premises are not the tenant's property. The landlord typically neither expects nor wants the provision to be fulfilled, because the tenant would hopefully stay on, barring those same provisions provided for in the *Rent Cases* statutes: unsuitability of tenant, occupation desired by owner, or demolition planned for new construction.²⁰⁵ Foreclosure indeed ends the contractual relationship, but in a far different way from the surrender at the end of the lease. The foreclosure at the end of the mortgage is similar to payment. The surrendering of the tenement, in contrast, is more like the creditor's surrender of the bond after the debtor's payment; a formality necessarily expected but not analytically intrinsic to the contract.

IV. CONCLUSION

Hughes' opinion in *Blaisdell* is, arguably, good social policy; it does not, however, correspond to the constitutional mandate in article I, section 10, clause 1. The difference between *Blaisdell* and the constitutional mandate does not reflect the difference between eighteenth century expectations and faithful construction. Rather, Hughes avoided close analysis of the document. He formulated constitutional purpose apart from the meaning of the clause. He relied on an anomalous doctrinal structure built upon the prestigious but flawed analysis of Justice Marshall in *Fletcher*. Finally, he relied on the *Rent Cases*, realizing that they would not fully support his contentions. The opinion, in short, has no integrity.

The obligations of contracts provision was a prohibition to the states of a certain power, exercise of which was inimical to federal authority. Unlike article I, section 10, clauses 2 and 3, the clause in which the contracts provision appeared was designed explicitly to be absolute and rigid. The rigidity came from its quasi-judicial nature. It was a structural provision and not an individual right. The contracts provision was designed to eliminate a state

205. *Block*, 256 U.S. at 170-71.

power in a particular area that would have undercut federal foreign policy and interstate commerce powers; it was not provided to further economic growth.

The history of the contracts provision was thus severely contorted in subsequent judicial analysis. The controversial nineteenth century history of the provision was derived from *Fletcher v. Peck*. That decision was seriously flawed in its confusion of grants and contracts. The Supreme Court then consistently followed in the analytical wake of *Fletcher*, by adopting a doctrine recognizing necessarily reserved state powers, a doctrine that should have simply been a basic element of governmental structure rather than a contracts provision doctrine. In *Blaisdell*, Hughes imported that doctrine from the *Fletcher* tradition into the *Sturges* tradition, thus allowing states to impair contracts for economic benefit. Although one could argue that that was what the Framers should have intended, it was surely not what the provision meant. In this area, the country has found itself with socially acceptable constitutional doctrine, but at the cost of intellectually bankrupt constitutional adjudication.