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THE MARSHALL COURT AND PROPERTY RIGHTS: A REAPPRAISAL

JAMES W. ELY, JR.*

INTRODUCTION

Historians have long stressed the affinity between the jurisprudence of John Marshall and the protection of property rights. "Two fixed conceptions which dominated Marshall during his long career on the bench," Vernon L. Parrington observed, "were the sovereignty of the federal state and the sanctity of private property."[1] Famous cases involving property rights and contractual stability figured prominently in the work of the Marshall Court. The property-conscious tenets of Marshall's constitutionalism helped lay the legal foundation for a market economy and had a lasting impact on the American polity.

Beginning with the Progressive movement, and continuing through the New Deal Era, the rights of property owners were often disparaged as impediments to economic regulation and the welfare state. Indeed, directly contradicting Lockean politics, constitutional theorists sought to decouple property rights from other individual liberties. In this intellectual climate, Marshall's handling of property cases was presented in a harsh light. To many scholars, the emphasis given to property rights by Marshall and his colleagues seemed misplaced. Max Lerner, for example, argued in 1939 that Marshall's nationalism served "to fight the battles of the propertied group."[2] Lerner added that Marshall's "primary drive was to protect private property from governmental encroachment."[3] The same theme has been echoed by other historians. "The great nationalist decisions of the Marshall Court," R. Kent Newmyer observed, "originated in economic

* Milton R. Underwood, Professor of Law and Professor of History, Vanderbilt University. I am deeply indebted to Herman Belz, Jon W. Bruce, Michael G. Collins, Robert Faulkner, John C.P. Goldberg, Mark A. Graber, David Schultz, and Nicholas Zeppos who read earlier drafts of this essay and offered valuable comments.

1. 2 VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE ROMANTIC REVOLUTION IN AMERICA 23 (1927).

2. Max Lerner, *John Marshall and the Campaign of History*, 20 COLUM. L. REV. 396, 401, 420 (1939).

3. *Id.*

conflict; the national powers established by those decisions were designed to promote national capitalism."[4] More recently, Peter Irons has lamented Marshall's willingness to "read the Constitution broadly to protect the rights of property, but narrowly when he addressed individual rights."[5] In a remarkably reductionist development of this theme, one scholar has depicted the jurisprudence of the Marshall Court as intervention "in the nation's political processes on behalf of the rich."[6]

But the culture of legal liberalism, with its penchant for an expansive federal government and activist judiciary, could scarcely reject Marshall's legacy *in toto*.[7] Therefore, a number of scholars reshaped Marshall's image, emphasizing his role in establishing judicial review and affirming national supremacy, while downplaying his solicitude for the rights of property owners. In a revealing comment, Alexander M. Bickel pointed out that Marshall "is forgiven for his attachment to the rights of property."[8]

In a particularly unhistorical twist, some supporters of the New Deal even presented Marshall as a kind of forerunner of modern liberalism.[9] Although such an argument may have served as a legitimatizing myth for the New Deal, it does not bear much weight in evaluating the work of the Marshall Court. Several scholars of differing viewpoints have sharply dismissed the notion that Marshall's jurisprudence gave sanction to the modern regulatory state.[10] Bruce Ackerman aptly remarked:

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4. R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 61 (1968).

5. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 141 (1999).

6. RUSSELL W. GALLOWAY, JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY, 1790-1990, at 41 (1991).

7. *See* NEWMYER, *supra* note 4, at 148 (finding that reformers have had difficulty making an effective case against the Marshall Court because of their reliance on the powers of the federal government to implement their programs).

8. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).

9. *See* PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969, at 167-68 (1972) (noting that New Dealers invoked image of Marshall as a cloak for the extension of federal authority); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 230-33 (1995) (discussing but rejecting continuity between the Marshall Court and the New Deal program). *See also* Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power Over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415, 433-34 (1996) (questioning whether New Deal expansion of the scope of federal commerce power can be grounded in Marshall's jurisprudence).

10. *See* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 20 (1996) (declaring that "Marshall was not a precursor of modern liberal nationalism or of the positive, interventionist, regulatory state of the twentieth century"). *See also* Richard A. Epstein, *The Mistakes of*

> In any other field but law, it would be laughable to assert that Alexander Hamilton and John Marshall did all the really tough work in elaborating the constitution of the modern welfare state, and that Franklin Roosevelt and the New Deal Congress were basically acting out a vision of active national government *already* fully established by the People in the aftermath of the American Revolution.[11]

Likewise, Stephen B. Presser has criticized the "need" of scholars "to use John Marshall's supposed greatness to legitimize United States Supreme Court actions since the 'Constitutional Revolution' of 1937."[12]

Over time, however, the intellectual and political ascendancy of the New Deal disintegrated. Some scholars began to question the efficacy of economic regulation and the premises of the welfare state. The 1980s and 1990s witnessed a resurgence of interest in property rights by courts and commentators. Recent studies have presented a more balanced account of the Marshall Court's concern with economic rights.[13] It is therefore timely to reassess the Marshall Court's dedication to private property and contractual freedom.

I. THE MATRIX OF MARSHALL'S JURISPRUDENCE

We cannot understand the Marshall Court's attitude toward property in isolation. One must take account of deep-seated societal judgments about the fundamental nature of private property. It is therefore important to ground the Marshall Court's defense of property rights in the constitutional thought of the late eighteenth century. The belief that property ownership was essential for self-government and political liberty had long been a central premise of Anglo-American constitutionalism. "In the eighteenth-century pantheon of British liberty," John Phillip Reid has cogently noted, "there was no right more changeless and timeless than the right to property."[14] Property and liberty were closely linked in the ideology of the American Revolution. The leaders of the Revolution had no plan to destroy or redistribute property. Rather, they saw private property as the basis of the new social order. Drawing upon the principles of John Locke and

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1937, 11 GEO. MASON L. REV. 13 (1988).

11. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 491 (1989)(Emphasis added).

12. STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 172 (1991).

13. HOBSON, *supra* note 10, at 72-110; HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, at 172-89 (1997).

14. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 27 (1986).

English common law, early state constitutions and the Northwest Ordinance of 1787 contained a number of provisions protective of property rights.

Yet, under wartime pressure, legislative behavior did not exemplify revolutionary rhetoric about the sanctity of private property. During the Confederation Era, state governments engaged in massive spoliation of economic rights, confiscating Loyalist property, issuing paper money, and interfering in existing debtor-creditor relationships.[15] This bitter experience convinced many political leaders that state protection of property was inadequate.

Historians have generally agreed that the establishment of safeguards for private property was one of the principal objectives of the Constitutional Convention of 1787.[16] "Perhaps the most important value of the Founding Fathers of the American constitutional period," Stuart Bruchey has pointed out, "was their belief in the necessity of securing property rights."[17] Delegates repeatedly stressed this theme during the convention. Echoing Locke, James Madison maintained that "the primary objects of civil society are the security of property and public safety."[18] Similarly, Rufus King asserted that "property was the primary object of society."[19] The Constitution, of course, contained a number of provisions designed to prevent the states from abridging property and contractual rights. John Marshall was an active participant in the debate over ratification of the Constitution by Virginia, and he was undoubtedly influenced by the prevailing equation of respect for property and preservation of liberty.

The widespread attachment to property rights went beyond the philosophical position that property ownership was the basis of civil society and a safeguard of liberty. It also reflected the view that protection of private property and contractual arrangements was essential for economic prosperity. Endorsing this notion, Marshall insisted at the Virginia ratifying convention that weak government under the Articles of Confederation "takes away the

15. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26-41 (2nd ed. 1998).

16. *See* EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 147 (1919) (stating that one of the most important objectives of the framers was the provision of adequate safeguards for property and contracts against state legislative power); *See also* ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 36 (1968).

17. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (1980).

18. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (Max Farrand ed., 1937).

19. *Id.* at 541.

incitements to industry, by rendering property insecure and unprotected."[20] As Charles F. Hobson has persuasively explained, "Marshall was convinced that strong protection for property and investment capital would promote national prosperity."[21] Since economic growth was a goal to which most people subscribed, the utilitarian aspects of property reinforced the libertarian connotations of private ownership.[22]

Critics of the proposed Constitution, known as Anti-Federalists, opposed ratification of the new scheme of government. Although Anti-Federalists raised a number of objections to the Constitution, there was no disagreement between proponents and detractors over the fundamental importance of private property. Indeed, one scholar has concluded that the Anti-Federalists "were even more concerned with protecting property rights against governmental interference than their opponents."[23]

From the beginning of the New Republic, federal courts signaled their willingness to uphold economic arrangements and to curtail state infringement of property and contractual rights. In *Champion v. Casey* (1792), one of the first exercises of federal judicial review, a federal circuit court struck down a Rhode Island statute granting exemption from attachment as an unconstitutional impairment of contract.[24] Justice William Paterson, who had been an active member of the constitutional convention, articulated the prevailing opinion in the well-known case of *Vanhorne's Lessee v. Dorrance* (1795). At issue was a Pennsylvania statute which sought to resolve conflicting land claims by quieting title in one group of settlers. Declaring that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man," Paterson added in Lockean terms: "The preservation of property . . . is a primary object of the social compact."[25] He concluded that the quiet title law was unconstitutional because it failed to provide adequate compensation for persons deprived of

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20. 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 417 (1916)

21. HOBSON, *supra* note 10, at 75.

22. *See* ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 20-33 (1968) (providing a thoughtful analysis of Marshall's understanding of the utility of private property as the foundation of economic growth).

23. William W. Fisher, III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 100 (1990).

24. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 66-68 (rev. ed. 1926).

25. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795). For a discussion of this case, see Daniel A. Degnan, *William Paterson: Small States' Nationalist, in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 243-44 (Scott Douglas Gerber ed., 1998); JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 590 (1991).

their title to land. Paterson's insistence on the sanctity of property anticipated the work of the Marshall Court.

Further evidence of the key role of private property in embryonic American constitutionalism can be found in Justice Samuel Chase's separate opinion in *Calder v. Bull* (1798). Invoking the precepts of natural law not expressly spelled out in the Constitution, Chase declared: "There are certain vital principles in our free republican governments, which, will determine and overrule an apparent and flagrant abuse of legislative power." Giving examples of prohibited legislative acts, he opined that lawmakers could not enact "a law that takes property from A and gives it to B."[26] This marked the first appearance of what in time became a classic constitutional maxim that it was impermissible for legislators simply to take property from one person and transfer it to another.[27] Chase further maintained that a state legislature could not "violate the right of an antecedent lawful private contract; or the right of private property."[28]

As these examples made clear, judicial protection of property as a basic right limiting the reach of government started before Marshall became Chief Justice in 1801. Seen against this background, it is apparent that the Marshall Court built upon and expanded the accepted constitutional status of property. The work of Marshall and his associates shows continuity with the property-centered constitutionalism of the founding era.

Recovery of the formative constitutional thought at the start of Marshall's tenure as Chief Justice is significant in two respects. First, it casts light on why Marshall and so many prominent members of his generation assigned a high standing to property rights. The right to acquire and use property was seen as a bedrock principle of social order, a fundamental right the protection of which was crucial for the enjoyment of individual liberty and for economic growth. Second, it demonstrates that regard for private property was a widely shared constitutional norm. Decisions of the Marshall Court vindicating property rights withstood intense criticism from local interests because the Justices were implementing principles generally recognized as legitimate. I would assert that decisions of the Marshall Court reflected a broad consensus supportive of private property and contractual arrangements. Rather than frustrating the will of the majority, Marshall and his colleagues were applying widely

26. Calder v. Bull, 3 U.S. 386, 388 (1798). For an analysis of *Calder*, see STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING 41-42 (1991).

27. *See* John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENTARY 337, 337-45 (1997).

28. *Calder*, 3 U.S. at 388.

accepted norms to instances in which lawmakers deviated from these principles.

II. THE CONTRACT CLAUSE

A.. Inception of the Contract Clause

During Marshall's time as Chief Justice, the Contract Clause served as the principal vehicle by which the Supreme Court defended property against state infringement.[29] The Court under Marshall applied the Contract Clause frequently and to a variety of legislative actions. As scholars know well, in a line of decisions Marshall employed the Contract Cause in connection with land grants, tax exemptions, corporate charters, agreements between states, and bankruptcy laws. To put these developments in context, recall that state governments were the primary source of economic regulation throughout much of the nineteenth century. The federal government was largely inactive with respect to economic enterprise. Decisions circumscribing the exercise of state authority under the Contract Clause meant, for all practical purposes, that economic activity would be primarily governed by market forces.[30] At the same time, the Court under Marshall left substantial room for the states to promote and regulate economic behavior.

The starting point for any discussion of the Marshall Court's view of the Contract Clause must be to ascertain the scope of the prohibition against laws "impairing the obligation of contracts." It is now widely asserted that the framers intended the Contract Cause to apply only to private agreements, and not to contracts between states and individuals.[31] Benjamin F. Wright gave a strong impetus to this interpretation in his influential study of the Contract Clause. Maintaining that the clause was originally thought to embrace just contracts between individuals, Wright declared:

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29. Art. I, sec. 10 provides in part: "No State shall . . . pass any . . . Law impairing the obligation of Contracts."

30. MILLER, *supra* note 16, at 35. Decisions of the Marshall Court freeing commerce from state restraints "meant that business activity was not regulated at all, for the federal government was entirely quiescent insofar as restraints are concerned." *Id.*

31. *See* CORWIN, *supra* note 16, at 167-168 (noting that "the intention of the obligation of contracts clause, as the evidence amply shows, was to protect private executory contracts, and especially contracts of debt."). *See, e.g.*, Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 225, 228 (1987) (providing a more current expression of the same view that "a fairly strong case can be made that . . . the clause was *not* thought to improve a general duty on state governments to honor their own obligations.").

> But, in view of Marshall's distrust of state legislatures, and his ardent desire to secure further protection for the rights of property, it is not surprising that the Supreme Court under his domination should have given to the clause a meaning far broader than any which its framers ever attached to it.[32]

It has become a commonplace idea that Marshall expanded application of the Contract Clause beyond the limited objectives of the framers.[33] John E. Semonche, for instance, stated that under Marshall "the Court would widen the reach of the prohibition."[34]

There is considerable room, however, to question this confining interpretation of the Contract Clause. Given its later importance in American constitutional history, the Clause received surprisingly little discussion at the constitutional convention.[35] The immediate impetus for the Clause was clearly to curb state debtor relief measures which undercut the sanctity of private contracts and threatened to disrupt credit relations. The origin of the Contract Clause can be traced to the Northwest Ordinance, enacted only weeks after the constitutional convention assembled, which provided in part:

> [A]nd in the just preservation of rights and property it is understood and declared; that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.[36]

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32. BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 26 (1938). For criticism of Wright's interpretation, see Wallace Mendelson, *B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era*, 38 W. POL. Q. 262, 262-75 (1985); Robert L. Clinton, *The Obligation Clause of the United States Constitution: Public and/or Private Contracts*, 11 U. ARK. LITTLE ROCK L.J. 343, 343-67 (1988).

33. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 43-44 (1988). The leading constitutional history text advanced this view as late as 1970. 1 ALFRED H. KELLY AND WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 277 (4th ed. 1970). "In holding that the obligation of contracts clause applied to public grants as well as to private contracts, Marshall in all probability misconstrued the intent of the Constitution's framers . . . ." *Id.* "By holding that contracts entered into by the state also came under the contracts clause, Marshall gave the provision a far broader meaning than the Convention had intended." *Id.* It is instructive to compare this analysis to the sharply revised treatment of the Contract Clause in the most recent edition of the same work. 1 ALFRED H. KELLY ET. AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 186 (7th ed. 1991). "Moreover, there is nothing in the language of the [C]ontract [C]lause to suggest it is limited to private contracts." *Id.*

34. JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 69 (1998).

35. FORREST MCDONALD, NOVUS ORDO SECLARUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 269-74 (1985).

36. Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 960 (1995).

By its terms the Northwest Ordinance covered only contracts between private individuals. Since the framers had before them a model limited to private contracts, it is noteworthy that they selected more comprehensive language in drafting the Clause. They adopted wording that covered contracts in general.[37]

The Contract Clause did not figure prominently in the ratification debates. Much of the discussion of the Clause was linked to the other restrictions on state power, most notably the prohibition of paper money, contained in Section 10 of Article I. This cluster of limitations on state authority over economic activity, including the Contract Clause, bulked large in the thinking of leading Federalists. James Wilson, a member of the constitutional convention and later a Supreme Court Justice, insisted that Article 10, Section I alone "would be worth our adoption."[38] To the extent that they addressed the Contract Clause separately, Federalists commonly extolled it as an instrument to restore credit and commerce. Writing in *The Federalist*, James Madison offered a different explanation for the Contract Clause, stressing the fundamental unfairness of violating agreements. He broadly declared:

> [L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. . . . 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.[39]

On its face, Madison's statement covers all types of contracts. Since Madison invoked "principles of the social contract" and was ultimately concerned to protect "personal security and private rights," it seems unlikely that he felt states were free under the Contract Clause to dishonor their own obligations. For the most part, therefore, proponents of the Constitution did not draw a sharp distinction between public and private agreements.

Interestingly, a few prominent Anti-Federalists recognized that the Contract Clause could prevent state governments from impairing public contracts. At the Virginia ratifying convention Patrick Henry aptly pointed out that the Clause "includes public

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37. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 539 n.67 (1987). "A distinction between public and private contracts is unwarranted in view of the lack of language limiting the application of the clause to private contracts or similarly limiting discussion at the convention." *Id.*

38. 2 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486 (Ayer Co. 1987) (1888).

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

contracts, as well as private contracts between individuals."[40]

There are still other reasons to conclude that the framers envisioned an expansive reading of the Contract Clause. Grounded in natural law, the sanctity of freely negotiated arrangements had long been a legal norm. By the end of the eighteenth century, given the steady rise of a market economy, contract law was poised for rapid development. The commitment to contracts was a widely shared value. This pervasive attitude suggests that the framers did not believe that states were somehow exempt from compliance with their own undertakings. Furthermore, as discussed above, the framers were vitally concerned with the protection of contractual rights. Since a major purpose of the constitutional convention was to strengthen the rights of property owners, it is not obvious that the framers intended a crabbed understanding of the Contract Clause.

Even before Marshall grappled with the meaning of the Contract Clause, several judges had indicated that a state could not impair its contracts. Justice James Wilson, writing a seriatim opinion in *Chisholm v. Georgia* (1793), observed:

> What good purpose could this Constitutional provision secure, if a State might pass a law, impairing the obligation of its own contracts; and be amendable, for such a violation of right, to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.[41]

As part of his decision in *Vanhorne's Lessee v. Dorrance* (1795), considered above, Justice Paterson also found that a Pennsylvania statute divesting owners of title to land derived from the state impaired the state's contract and was void.[42] In short, there was an early line of authority suggesting that states were bound under the Contract Clause and could not abrogate their own undertakings.

My purpose is not to demonstrate that the framers unmistakably intended to embrace both public and private contracts within the constitutional prohibition against impairment. The fragmentary nature of the extant evidence makes it impossible to establish conclusively the thinking of the framers. Indeed, it is probable that individual members of the constitutional convention had different ideas about the reach of the Contract Clause.[43] By the same token, one cannot convincingly

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40. 3 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 474 (Ayer Co. 1987) (1888).

41. 2 U.S. 419, 465 (1793).

42. 2 U.S. at 304, 319.

43. *See generally* Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789-1815*, 44 WM. & MARY Q. 529 (1987); Samuel R.

maintain that Marshall ignored the collective intent of the framers to restrict the clause to private agreements. Historians have leaped too quickly to the view that Marshall expanded the meaning of the Contract Clause. Rather, he interpreted the clause in light of the broad purposes of the constitutional convention and the language of the document itself.[44]

B. Marshall and the Contract Clause

The Marshall Court elaborated its conception of the Contract Clause in a series of famous decisions, starting with *Fletcher v. Peck* (1810).[45] This case originated in the vast Yazoo land sales made by the Georgia legislature in 1795 to four private land companies at a bargain price.[46] This sale, accompanied by evidence of widespread bribery, aroused a popular furor. A newly elected legislature rescinded the grant a year later. In the meantime, however, the original purchasers had resold much of the land to third parties. A number of these Yazoo claimants lived in New England and claimed to be innocent purchasers who had no knowledge about the fraudulent nature of the 1795 grant. These claimants organized the New England Mississippi Land Company to represent their interests.

This company obtained an opinion from Alexander Hamilton with respect to the validity of the land titles. Foreshadowing the outcome in *Fletcher*, Hamilton maintained that the 1796 Repeal Act was void because states were constitutionally prevented from breaking their own agreements.[47] He initially asserted that the revocation of a land grant contravened "the first principles of natural justice and social policy."[48] Turning to the Contract Clause, Hamilton added: "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 . . . ."[49] He predicted that the federal courts would be likely to pronounce the Repeal Act unconstitutional.[50] Hamilton thus played a key role in developing the position that state land grants could constitute a contract.

Controversy over the Yazoo lands dragged on for years. In

Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV., 513, 516-22 (1993) (noting the ambiguity of the Contract Clause).

44. HOBSON, *supra* note 10, at 72-78.

45. 10 U.S. 87 (1810).

46. For the background of *Fletcher*, see C. PETER MAGRATH, YAZOO: THE CASE OF FLETCHER V. PECK (1966).

47. *Id.*

48. *Id.*

49. *Id.*

50. 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 430-31 (Julius Goebel, Jr. and Joseph H. Smith eds., 1980).

1802 Georgia ceded the territory to the United States. After repeated attempts to secure payment by Congress to settle the disputed Yazoo claims, the New England Mississippi Land Company arranged a friendly suit in federal court based on diversity of citizenship jurisdiction. John Peck of Boston sold a small tract of Yazoo land to Robert Fletcher, a resident of New Hampshire. Fletcher thereafter brought suit for breach of warranty against Peck, arguing that Peck's title was invalid.

Fletcher v. Peck presented a number of vexing issues for Marshall and his colleagues. Much of the literature has focused on *Fletcher* as an early instance of judicial review of a state law and has questioned the propriety of the Court in deciding a collusive case.[51] These important issues will not be examined here. After refusing to consider corruption as a basis to strike down the original sale on grounds that the judiciary could not investigate legislative motives, Marshall, writing for the Court, sustained the 1795 transaction.[52] For our purposes, Marshall made these crucial points: 1) that a grant is an executed contract, binding on the parties, and within the purview of the Contract Clause; 2) that the Contract Clause prevents states from impairing contracts between individuals and the state; 3) that the Georgia Repeal Act was void either because it violated "general principles which are common to our free institutions" or the express ban against impairing the obligation of contracts.[53]

Marshall's opinion was not particularly original. The Supreme Court had intimated in *Huidekoper's Lessees v. Douglass* (1807) that a state land grant was "a contract; and although a state is a party, it ought to construed according to those well established principles, which regulate contracts generally."[54] Moreover, Hamilton had anticipated much of the Court's reasoning in his opinion letter. Yet the opinion in *Fletcher* remains interesting to scholars because the basis of the decision is ambiguous. In addition to his discussion of the Contract Clause, Marshall invoked unwritten limits on legislative power derived from natural law. He stated:

> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensations? To the legislature all legislative power is granted;

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51. 1 WARREN, *supra* note 24, at 393-99.

52. *Fletcher*, 10 U.S. at 142-43.

53. *Id.* at 136-40.

54. 7 U.S. 1, 70 (1805). *See* WRIGHT, *supra* note 32, at 29. *See also* WARREN B. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 19, 19-38 (1919) (reviewing evidence that legal writers regarded a conveyance of property as a contract).

> but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.[55]

Scholars have debated whether Marshall's appeal to "general principles which are common to our free institutions" was simply to bolster his reliance on the Contract Clause, or whether he was suggesting that courts might strike down statutes contrary to the fundamental premises of legitimate government.[56] The Marshall Court's receptivity to natural law principles as a jurisprudential basis for safeguarding the rights of property owners will be explored more fully below. It is sufficient at this point to note that Marshall's observations about natural justice were reminiscent of earlier comments by Justices Peterson and Chase.

The opinion in *Fletcher* does make clear the high standing of the Contract Clause in Marshall's thinking. He maintained that, by adopting the Constitution, the people "manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[57] Marshall then characterized constitutional restraints on state legislative power, including the Contract Clause, as a "bill of rights for the people of each state."[58]

Two years later, the Marshall Court, in *New Jersey v. Wilson* (1812), applied the Contract Clause to uphold a state tax exemption. At issue was a New Jersey statute repealing a perpetual tax exemption granted in 1758 for certain lands purchased by Indians. After the Indians sold the land and left the state, New Jersey lawmakers sought to assess taxes on the land. Marshall, again speaking for the Court, held that the promise not to tax included "[e]very requisite to the formation of a contract."[59] Moreover, the tax exemption was not personal but annexed to the land because it enhanced the value of the property.[60] The purchasers therefore succeeded to the tax exemption privilege, and the repeal measure impaired an essential element of their contract.[61] Another illustration of the Marshall Court's determination that the Contract Clause covered agreements to

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55. *Fletcher*, 10 U.S. at 135-36.

56. *Compare* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV., 2, 44-50 (1991) (concluding that Marshall's opinion in *Fletcher* ultimately rested on the Contract Clause instead of natural law) with Joseph M. Lynch, *Fletcher v. Peck: The Nature of the Contract Clause*, 13 SETON HALL L. REV. 1, 11-19 (1982) (maintaining that *Fletcher* was really decided on principles of natural justice).

57. *Fletcher*, 10 U.S. at 138.

58. *Id.*

59. New Jersey v. Wilson, 11 U.S. 164, 166 (1812).

60. *Id.* at 167.

61. *Id.*

which states were parties, this brief decision did not contribute greatly to emerging Contract Clause doctrine. It did, however, prevent state legislatures from revoking grants of tax immunity, and to that extent curtailed state taxing authority.

The most important of the Marshall Court's Contract Clause cases was *Dartmouth College v. Woodward* (1819).[62] Established by royal charter in 1769, Dartmouth College was engulfed in political and religious controversy during the first decades of the nineteenth century. The case arose from a struggle between the President and the trustees over control of the College, and quickly became a partisan issue in state politics. In 1816, the New Hampshire legislature increased the size of the board of trustees, renamed the institution Dartmouth University, and took other steps to effectively impose public supervision. The old trustees resisted these changes, and set in motion complex legal maneuvers that opened the door for eventual review by the Supreme Court. The College trustees contended, among other arguments, that the charter of a private corporation constituted a contract that was protected against impairment. Brushing aside this argument, the Supreme Court of New Hampshire ruled that Dartmouth was a public institution that existed for the public purpose of education.[63] The charters of public corporations, the Court declared, were not contracts within the meaning of the Contract Clause and could be amended to reflect shifts in public policy.[64]

In an oft-discussed decision, the Supreme Court sided with the College trustees.[65] Delivering the majority opinion, Marshall first declared, without much explanation, that the grant of a corporate charter amounted to a contract.[66] Turning to the scope of the Contract Clause, Marshall was careful to cabin its impact on state legislative authority. He conceded that "the framers of the constitution did not intend to restrain the states in the regulation of the civil institutions, adopted for internal government . . . ."[67]

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62. 17 U.S. 518 (1819). For the background of the *Dartmouth College* case, see FRANCIS N. STITES, PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819, at 1-55 (1972); MAURICE G. BAXTER, DANIEL WEBSTER AND THE SUPREME COURT 65-109 (1966); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835, at 379-419 (1944).

63. *See* Trustees of Dartmouth College v. Woodward, 1 N.H. 111 (1817).

64. *Id.*

65. There is a sizeable literature on the *Dartmouth College* case. For helpful discussions of Marshall's opinion, see HOBSON, *supra* note 10, 88-95; JOHNSON, *supra* note 13, at 174-81; Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY.L.J. 643-706 (1982) (contending that Marshall employed the accepted status of business corporations as a basis to protect charitable and religious institutions from state control).

66. *Dartmouth College*, 17 U.S. at 627.

67. *Id.* at 629.

Indeed, Marshall insisted that the Contract Clause "never has been understood to embrace other contracts, than those which respect property, or some object of value . . . ."[68]

A crucial inquiry therefore was the nature of the institution created by the 1769 charter. After examining the history of Dartmouth College at length, Marshall concluded that it was a private eleemosynary corporation endowed by private funds.[69] He rejected the notion that Dartmouth was a public institution simply because its educational purpose was a matter of public concern.[70] Further, Marshall stressed that a grant of incorporation did not convert a private body into a public agency.[71] Having found that the 1769 charter was a contract, Marshall experienced no difficulty in holding that the New Hampshire statute impaired the contract.[72]

In construing the Contract Clause, Marshall observed that courts must apply the words of the Constitution rather than the particular views of the framers. He agreed that protection of corporate charters was probably not considered by the framers. Yet Marshall sought to effectuate the general intent of the framers to safeguard contractual arrangements, and insisted that the Contract Clause was not confined to any specific category of agreements. "It is not enough to say, that this particular case was not in the minds of the convention," Marshall stated, "when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it . . . ."[73] This mode of interpretation, of course, was congruent with Marshall's conviction that the Contract Clause embodied a vital constitutional principle. Under Marshall's analysis the Contract Clause covered a broad range of contractual arrangements, and the burden was cast on those who sought to establish exceptions.[74]

Justice Joseph Story's elaborate concurring opinion made several points which warrant attention.[75] His evident purpose was

68. *Id.*
69. *Id.* at 640.
70. *Id.*
71. *Dartmouth College*, 17 U.S. at 638-39.
72. *Id.* at 654.
73. *Id.* at 644.
74. The modern Supreme Court has wandered far from Marshall's understanding of the Contract Clause. *See* Keystone Bituminous Coal Assoc. v. De Benedictis, 480 U.S. 470, 502 (1987) (Stevens, J.) (observing that "the prohibition against impairing the obligation of contracts is not to be read literally").
75. For Story's concurring opinion, see R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 129-31 (1985).

to link explicitly eleemosynary and business corporations in such a manner as to restrict the possibility of state regulation. Differentiating between public and private corporations, Story stressed that banking, insurance, canal, and turnpike corporations whose stock was owned by private investors were private in nature even though their activities might benefit the public.[76] In other words, corporations were defined by their organization and not by their function. He was even prepared to extend Contract Clause protection beyond corporate charters to include various franchises, such as the right to operate ferries or markets.[77]

Story also directly raised the matter of reservation clauses in corporate charters. Such clauses reserved to the legislature authority to amend or repeal charters of incorporation. "If the legislature means to claim such an authority," Story declared, "it must be reserved in the grant."[78] Neither Story nor the Marshall Court sought wholesale elimination of state regulatory authority over business enterprise. By recognizing the reserve power doctrine, Story had suggested a means by which the states could circumvent the *Dartmouth College* decision. The exercise of such an expressly reserved power of amendment would not violate the Contract Clause because it was part of the original contract. Although practice was not uniform, many states began to insert reservation clauses in corporate charters and in general incorporation laws.[79]

Rendered at a time when Americans were increasingly turning to the corporation as a means of promoting economic growth, the significance of the *Dartmouth College* case for business enterprise was obvious. In his opinion, Marshall broadly extolled the advantages of corporate management. Corporations, he wrote, "are deemed beneficial to the country."[80] Marshall's general language would clearly encompass business corporations. As we have seen, Story made a special point of characterizing a number of business organizations as private, and thus placing them under the protection of the Contract Clause. The upshot of *Dartmouth College*, then, was to assist business interests by curtailing public control of private enterprise through charter amendments. Yet the widespread use of reservation clauses diluted the potential sweep of *Dartmouth College*.

Under *Dartmouth College,* a state-granted corporate charter was protected to the same extent as other types of private or public contracts. This conclusion, however, simply affirmed

76. *Dartmouth College*, 17 U.S. at 668-69 (Story J., concurring).

77. *Id.* at 689-90.

78. *Id.* at 712.

79. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 197-98 (2nd ed. 1985).

80. *Dartmouth College*, 17 U.S. at 637.

commonly accepted attitudes respecting corporate enterprise.[81] As Stephen A. Siegel has pointed out: "there is no doubt that the norm that state-granted franchises were entitled to some degree of sanctity was widely held at the time the Constitution was adopted and throughout the early republic period."[82]

Indeed, the Marshall Court's protective attitude toward corporate charters was foreshadowed by the bitter controversy over the Bank of North America during the Confederation Era. In 1781, both the Continental Congress and the Pennsylvania legislature chartered the Bank. Amid the economic crisis following the Revolutionary War, there was a move to abrogate the Pennsylvania charter, a step that would effectively kill the Bank.[83] James Wilson attempted to persuade Pennsylvania lawmakers not to revoke the Bank's charter. He asserted, among other contentions, that the legislature had no right to repeal the charter. The act of incorporation, he maintained, was "a charter of compact" between the legislature and the company.[84] Wilson continued: "while these terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other."[85] A legislature, he declared, could not revoke a corporate charter any more than it could divest an owner of real property.[86] Although Wilson's plea did not prevail, the Bank charter was revoked in 1785, he had begun to fashion the doctrine that a corporate charter should be regarded as a contractual relationship. It is highly likely that Hamilton and other framers were conversant with Wilson's views.

Not only did the number of corporate charters multiply rapidly in the post-Revolutionary Era, but such charters came to be regarded as a species of private property immune to legislative revocation.[87] Recognition that corporate charters could not be annulled or altered at the will of the legislature also found early judicial expression. In 1806 the Supreme Judicial Court of Massachusetts observed that "the rights legally vested in this, or

81. Bruce A. Campbell, *John Marshall, the Virginia Political Economy, and the Dartmouth College Decision*, 19 AM. J. LEGAL HIST. 40-65 (1975) (arguing that in practice Virginia legislators scrupulously honored corporate charters).

82. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and 'Takings' Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 31 (1986).

83. Janet Wilson, *The Bank of North America and Pennsylvania Politics: 1781-1787*, 66 PENN. MAG. HIST. & BIOGRAPHY 3, 3-28 (1942).

84. *Considerations on the Power to Incorporate the Bank of North America, in* 1 THE WORKS OF JAMES WILSON 549, 565 (James DeWitt Andrews, ed. 1895) [hereinafter *The Bank of North America*].

85. *The Bank of North America*, *supra* note 84, at 565-67.

86. *Id at 566-67.*

87. Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441-42 (1999).

in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."[88] It follows that the Marshall Court's treatment of corporate charters as contracts did not break new ground.[89] Rather, Marshall and his colleagues were articulating a position that had already gained a good deal of currency.

The Contract Clause was also a major force in shaping debtor-creditor relations. Under the Constitution, Congress had the authority to establish a uniform system of bankruptcy. Congress, however, did not pass a bankruptcy law until 1800, and this act was repealed just three years later. In the absence of federal legislation, many states continued their time-honored practice of enacting debtor-relief measures. State legislatures modified debt collection in a number of ways, including numerous stays of execution and abolition of imprisonment for debt. In addition, states experimented with bankruptcy laws under which insolvents could be discharged of their debts.[90] Lower federal courts were divided over the constitutionality of state bankruptcy measures and the issue reached the Supreme Court in *Sturges v. Crowinshield* (1819).[91]

The *Sturges* case involved a challenge to the validity of New York's 1811 law that discharged debtors from all liability upon surrendering their property in the manner prescribed by the statute.[92] In a unanimous decision delivered by Marshall, the Court ruled that the mere grant of bankruptcy power to Congress did not preclude state legislation on that subject until Congress acted.[93] Turning to the Contract Clause, Marshall grandly declared that the constitutional convention "appears to have intended to establish a great principle, that contracts should be inviolable."[94] Indeed, much of Marshall's opinion reads like a lecture on the sanctity of contractual relationships. He went on to insist any law that discharged the obligations of a debtor was an

88. Wales v. Stetson, 2 Mass. 143, 146 (1806).

89. Some scholars have suggested that the Marshall Court was in error to treat corporate charters as contracts because incorporation involves the state acting as a sovereign. They contend that the Contract Clause should only apply when the state acts as a proprietor. *See* Kmiec and McGinnis, *supra* note 37, at 539-40. This conclusion is problematic. Quite apart from the problem of differentiating proprietary from sovereign actions, it flies in the face of evidence of contemporary opinion that corporate charters should be protected against legislative whim.

90. The leading study of state bankruptcy measures is PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974).

91. 17 U.S. 122 (1819).

92. *Id.* at 128-29

93. *Id.* at 196.

94. *Id.* at 206.

unconstitutional impairment of contract.[95] This broad language seemingly ruled out any state bankruptcy relief, but the precise holding indicated that the Contract Clause only voided the discharge of debts contracted before enactment of the law.[96] Marshall, moreover, agreed that states had limited discretion to alter remedies available to enforce contracts as long as they did not impair the underlying obligation.[97] The ambiguous opinion in *Sturges* left the commercial community in doubt as to the validity of state laws that purported to discharge debts of insolvents incurred after passage of the statute.[98]

A decade of hard times following the Panic of 1819 generated renewed legislative interest in debtor relief. This gave the Marshall Court an opportunity to revisit the question of state bankruptcy laws. In *Ogden v. Saunders* (1827), a fragmented Supreme Court, by a vote of four to three, sustained application of a New York bankruptcy statute to debts contracted after the time of enactment.[99] *Ogden* involved a suit by a Louisiana resident on a bill of exchange.[100] The defendant raised a discharge of all debts under New York law as a defense.[101] The four Justices in the majority, writing separate opinions, held that the state law in effect determined the extent and enforcement of obligations at the date of the agreement.[102] In their view, the Contract Clause was directed against retroactive legislation that impaired existing contracts and did not ban state laws relating to agreements made in the future.[103]

Marshall, authoring his only dissent in a major case, reiterated the sweeping nature of the prohibition imposed by the Contract Clause. More significantly, he grounded contractual rights in pre-existing natural law rather than state law. Marshall asserted that "individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties."[104] He also

95. *Id.*

96. *Sturges*, 17 U.S. at 207.

97. Olken, *supra* note 43, at 522-29 (discussing distinction between rights and remedies drawn by Marshall Court).

98. *See generally* MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 239-42 (1988) (providing a useful analysis of *Sturges*); JOHNSON, *supra* note 13, at 181-84; HOBSON, *supra* note 10, at 95-100.

99. 25 U.S. 213, 255 (1827).

100. *Id.* at 292.

101. *Id.* at 254.

102. *Id.* at 213, 259, 270; *id.* at 254, 274 (Johnson, J., concurring); *id.* at 213, 313 (Thompson, J., concurring); *id.* at 213, 331 (Trimble, J., concurring).

103. For an explanation of *Ogden*, see HAINES, *supra* note 62, at 526-32.

104. *Ogden*, 25 U.S. at 213, 346 (Marshall, C.J., dissenting).

made the powerful argument that, if state law governed contractual expectations, a legislative act "declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract . . . ."[105] Parties in effect would enjoy only those contractual rights that lawmakers chose to recognize. Such a result, Marshall contended, would drastically undermine the sanctity of contract and the protective function of the Contract Clause.[106] Further, he pointed out that under the majority's analysis, lawmakers could not repeal or modify bankruptcy laws because the law at the time of making a contract constituted part of the agreement.[107] Although he failed to carry the day, Marshall's emphasis on the fundamental nature of contractual freedom anticipated later development of the liberty of contract doctrine under the Due Process Clause.[108]

Likely Marshall received only little solace when a majority of the Justices ruled against the validity of the New York discharge in the immediate case. In addition to the three dissenters, Justice William Johnson, who joined the majority on the Contract Clause issue, took the position that a state bankruptcy statute could not be applied to a debt owed to creditors from another state.[109] The reasoning behind Johnson's opinion is opaque, but his conclusion dovetails with one interpretation of the Contract Clause as a vehicle to prevent parochial legislation from interfering with the national credit market.[110]

The result of these state bankruptcy law cases was something of an untidy compromise. A state could validly discharge the debts which insolvents incurred after passage of a bankruptcy law, but retroactive application of such laws to agreements entered into before enactment unconstitutionally impaired the obligation of contract. Further, state bankruptcy laws could not discharge obligations payable to residents of other states. The obvious solution to this confused situation was for Congress to enact a

105. *Id.*, at 339. Richard A. Epstein has argued that Marshall was correct and the Contract Clause should be construed to prevent prospective interference with contractual arrangements. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 723-30 (1984).

106. Ogden, 25 U.S. at 339 (Marshall, C.J., dissenting).

107. *Id.* at 343.

108. *See* WRIGHT, *supra* note 32, at 50 (declaring that Marshall's opinion in *Ogden* "might have given to the Court a power of supervision over legislation under the [C]ontract [C]lause comparable with that developed late in the century under the due process clause"); Kmiec and McGinnis, *supra* note 37, at 538. *But see* Mendelson, *supra* note 32, at 264, 274.

109. *Ogden*, 25 U.S. at 358.

110. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 283-88 (1988).

uniform bankruptcy scheme. However, this step, of course, was delayed until long after Marshall's death. It also bears emphasis that *Ogden* marked a sea change in the Marshall Court's Contract Clause jurisprudence. Thereafter, the Court was more cautious in enforcing the broad scope of the clause, and was more inclined to uphold state legislation dealing with contractual matters.

Another leading decision of the Marshall Court dealing with the Contract Clause was *Green v. Biddle* (1823).[111] This knotty case grew out of tangled land titles in Kentucky. When Kentucky separated from Virginia, the two states entered into a compact under which Kentucky pledged to guarantee titles to land derived from Virginia law.[112] Land ownership in Kentucky, however, was very confused, due in part to faulty surveys and overlapping claims. In addition, Virginia land law was protective of the rights of absentee owners.[113] Settlers in Kentucky found it costly and difficult to obtain clear titles.[114] The multitude of conflicting claims generated widespread litigation.[115] Anxious to favor local interests and encourage settlement, the Kentucky legislature enacted a series of occupying claimants laws starting in 1797.[116] These measures gave relief to occupants who made improvements on a tract of land and were later ejected by a party with superior title.[117] The laws in essence provided 1) that occupants were entitled to recover compensation for improvements built before the title was questioned in court, and 2) that occupants were not liable for rents for the period before a title challenge was instituted.[118] The effect was to markedly alter common law rules to strengthen the claims of settlers against absentee owners, many of whom were Virginians.[119]

In *Green v. Biddle*, the Marshall Court was called upon to decide whether the compact between Kentucky and Virginia was a contract, and whether Kentucky's occupying claimants laws impaired that contract.[120] The matter was considered twice by the Supreme Court. In a unanimous decision rendered by Justice Story, the Court in 1821 struck down the Kentucky statute as a violation of the Contract Clause. Story determined that the laws

111. 21 U.S. 1 (1823).

112. *See* Paul W. Gates, *Tenants of the Log Cabins*, 49 MISS. VALLEY HIST. REV. 3, 3-31 (1962) (providing a history of the tangled claims to Kentucky land and the background of the *Green* litigation); Ruth Wedgewood, *Cousin Humphrey*, 14 CONST. COMMENTARY 247, 249-51 (1997).

113. Gates, *supra* note 112, at 3-31.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Gates, *supra* note 112, at 3-31.

119. *Id.*; Wedgewood, *supra* note 112, at 249-51.

120. *Green*, 21 U.S. at 11.

"materially impair the rights and interests of the rightful owner in the land itself."[121] Under the Virginia-Kentucky compact, Story reasoned, the rights of Virginia owners "shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky."[122] Yet the Kentucky acts clearly diminished the beneficial rights of landowners according to Virginia law, and were thus unconstitutional.[123]

Strenuously insisting that the Virginia-Kentucky compact was not a contract binding upon the state, Kentucky officials obtained a rehearing before the Court. Only four Justices participated in the reconsideration. Marshall evidently recused himself, perhaps bothered by family involvement in Kentucky land speculation. Writing for a plurality of three, Justice Bushrod Washington affirmed the earlier decision that a compact between states was a contract within the meaning of the Contract Clause.[124] It followed that Kentucky had impaired the obligation of contract by rendering land titles less secure than under Virginia law. Dissenting, Justice Johnson protested that the compact was not intended to bind forever the legislative power of Kentucky over land within the state.[125]

The decision in *Green* was highly unpopular in Kentucky.[126] State courts continued to enforce the occupying claimants laws, and similar measures protecting settlers against absentee owners were enacted in other jurisdictions.[127] The application of the Contract Clause to interstate compacts was problematic. Although an agreement between two states could plausibly be viewed as a contract, the Contract Clause was likely designed to protect the economic rights of persons and not one co-equal sovereign from the claims of another sovereign. Yet the result of *Green* was to subordinate the sovereignty of one state to the land laws of another. As Herbert A. Johnson has rightly observed, in *Green* "the [C]ontract [C]lause was perhaps stretched to its logical limit."[128] The outcome was consistent with the Marshall Court's determination in other cases that a state should keep its word, but

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121. *Id.* at 15.
122. *Id.* at 14-15.
123. *Id.*
124. *Id.* at 92.
125. *Green*, at 101-105 (Johnson, J., dissenting).
126. *See* Wedgwood, *supra* note 112, at 254-66 (discussing the political backdrop and criticism of *Green*). On the other hand, Virginians were pleased with the decision and put aside their frequently expressed devotion to states' rights. *See* 1 WARREN, *supra* note 24, at 641-642.
127. HAINES, *supra* note 62, at 464-70; Gates, *supra* note 112, at 23-28.
128. JOHNSON, *supra*, note 13, at 189. *But see* WRIGHT, *supra* note 32, at 47 (describing *Green* as "perhaps the most far-fetched application of the [C]ontract [C]lause").

the Contract Clause was an awkward constitutional vehicle to police interstate compacts. Unsurprisingly, the *Green* decision was widely evaded by state legislators and ignored by later judges. As discussed below, the Supreme Court itself a few years later acquiesced in changes in Kentucky land law that disadvantaged Virginia claimants. Nonetheless, *Green* underscored the Marshall Court's commitment to the rights of property owners even in the face of local hostility.

The Marshall Court was not shy about developing a muscular Contract Clause jurisprudence, but it is important to keep the work of Marshall and his colleagues in perspective. Notwithstanding the nationalist bent of the Marshall Court's best known Contract Clause cases, the Justices never displaced all state authority over contractual arrangements or established exclusive federal hegemony.[129] The states retained a good deal of latitude to legislate with respect to economic policy and private property.

In a line of cases, the Marshall Court recognized limits to the reach of the Contract Clause. One contested issue was the application of the Contract Clause to statutes enacted before the commencement of the federal government. The Court resolved this question in *Owings v. Speed* (1820), holding that the Contract Clause did not extend retroactively to law in effect when the government was organized.[130] This left the states free to continue enforcement of debtor relief and other laws adopted earlier.

Nor did the Marshall Court treat all exercises of regulatory authority as a contract. The Court in *Goszler v. Corporation of Georgetown* (1821) showed its willingness to respect municipal control of streets even if adjacent landowners were disadvantaged.[131] Writing for the Court, Marshall ruled that a city ordinance requiring the gradation of streets was not in the nature of a contract.[132] Therefore the city could pass later ordinances altering the level of streets. Marshall was clearly reluctant to find that the city had entered a contract that would permanently restrain legislative power.[133]

Despite the rulings in *Fletcher* and *Green*, the Marshall Court allowed states considerable room to modify land law. In *Satterlee v. Matthewson* (1829), the Justices rejected a Contract Clause challenge to a Pennsylvania act which changed settled law and

129. *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 895-96 (1978) (noting that the Marshall Court's nationalism was limited in scope).

130. 18 U.S. 420, 423 (1820).

131. 19 U.S. 593, 594-98 (1821).

132. *Id.* at 595.

133. *See id.* at 597-98 (questioning the veracity of a contract that would forever bind legislative bodies).

recognized the existence of landlord-tenant relationships in the context of certain land claims.[134] Likewise, the Court upheld a Pennsylvania law that cured technical defects in the deeds of married women.[135] The Court reasoned that the act confirmed rather than impaired the contracts of married women.[136] In a further chapter of the Kentucky imbroglio over contested land titles, Marshall and his colleagues sustained a Kentucky adverse possession law against an attack based on the Contract Clause.[137] Attempting to settle land disputes, the Kentucky legislature reduced the time to obtain title by adverse possession to seven years for claimants under color of title.[138] The Supreme Court, with Justice Johnson delivering the opinion, distinguished *Green v. Biddle* by stressing that Virginia had long had a statute of limitations governing actions to recover land.[139] Johnson maintained that the Virginia-Kentucky compact did not render Virginia's limitations act perpetual.[140] Otherwise, he warned, Kentucky would be unable to change any laws relating to real property.[141]

Mumma v. Potomac Co. (1834) provided another example of how the Marshall Court sometimes interpreted the Contract Clause to permit states to regulate contractual dealings.[142] At issue were the claims of a creditor against the defunct Potomac Company.[143] After the creditor obtained a judgment against the corporation, the charter of the corporation was annulled pursuant to state law and its property transferred to a successor company.[144] Brushing aside an argument that the dissolution of the Potomac Company violated the Contract Clause, a unanimous Court held that creditors were presumed to contract with reference to the possibility that corporate existence might be terminated for failure to use the franchise.[145] Reluctant to tie the hands of legislators in dealing with corporate franchises, the Court added: "[a]nd it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter."[146] The Court may have been comfortable in reaching

134. 27 U.S. 380, 407-08, 414 (1829).
135. Watson v. Mercer, 33 U.S. 88, 110-11 (1834).
136. *Id.* at 111.
137. Hawkins v. Barney's Lessee, 30 U.S. 457, 467-69 (1831).
138. *Id.* at 464.
139. *Id.* at 466.
140. *Id.* at 467.
141. *Id.*
142. 33 U.S. 281 (1834).
143. *Id.* at 285.
144. *Id.* at 284-85.
145. *Id.* at 287.
146. *Id.*

this conclusion because state law required the successor corporation to make provision for creditors of the dissolved Potomac Company.

The leading decision of the Marshall Court limiting the reach of the Contract Clause was *Providence Bank v. Billings* (1830).[147] The case arose when Rhode Island attempted to tax the capital stock of corporations in the state.[148] Resisting payment, Providence Bank asserted that by granting a charter the state impliedly promised not to tax the bank.[149] Marshall, in his opinion for the Court, emphasized that the taxing power was of vital importance to the functioning of government.[150] He concluded that surrender of a state's power of taxation could not be implied simply from the grant of a corporate charter.[151] Absent an express tax immunity, then, the Rhode Island tax law did not impair the obligation of the contract created by the corporate charter. Acknowledging a reservoir of state authority, Marshall tellingly pointed out that "the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments."[152] *Providence Bank* is also noteworthy as a forerunner of the Contract Clause jurisprudence of the Supreme Court under Chief Justice Roger B. Taney. In *Charles River Bridge v. Warren Bridge* (1837), Taney built upon Marshall's opinion to insist that corporate grants must be strictly construed and do not convey implied privileges.[153]

None of this is to question that the Marshall Court vigorously wielded the Contract Clause to protect economic rights. Many of the cases denying Contract Clause protection dealt with relatively peripheral matters. Moreover, a number of the cases came toward the end of Marshall's tenure, and likely reflected a bow toward the Jacksonian movement and resurgent states' rights sentiment. Still, it is important to recognize that Marshall and his colleagues did not take every occasion to read the Contract Clause broadly. Put another way, The Marshall Court did not willy nilly strike down every contested state law on Contract Clause grounds. Although the Marshall Court's construction of the Contract Clause did much to protect property rights and to foster the growth of enterprise, none of the Court's famous decisions precluded the states from playing a major role in the economy.

147. 29 U.S. 514 (1830).
148. *Id.* at 559.
149. *Id.* at 560.
150. *Id.* at 561.
151. *Id.* at 564.
152. *Providence Bank*, 29 U.S. at 563.
153. 36 U.S. 420 (1837).

III. EXTRA-CONSTITUTIONAL PRINCIPLES

Historians have long debated whether and to what extent Marshall and his colleagues invoked fundamental rights derived from natural law as a basis for constitutional adjudication. The central question is whether the Marshall Court resorted to natural law just to explicate the express text of the Constitution, or as an additional source of constitutional principles.[154] Marshall and his colleagues were steeped in the natural law philosophy prevalent in late eighteenth-century America.[155] Under natural law theory, certain rights were deemed so basic as to be beyond the reach of governmental authority. Those rights enumerated in state and federal bills of rights were not an exclusive inventory of personal liberty. Among the most vital natural rights was the right to acquire and possess private property. As described by Corwin, this doctrine of vested rights held that any legislative action violative of vested property interests was void.[156]

Our concern is focused on the Marshall Court's reliance on extra-textual maxims of natural law as a means to safeguard economic rights. A number of recent historical accounts acknowledge that Marshall and his colleagues occasionally employed natural law language in early opinions, but maintain that they increasingly relied on explicit textual provisions, notably the Contract Clause, in rendering decisions.[157] In contrast, I will argue that the Marshall Court continued to display a willingness to utilize natural law principles to vindicate the rights of property owners. Admittedly the Justices usually saw natural law concepts as a basis to interpret constitutional provisions, but on occasion they treated fundamental principles of justice as restrictions on governmental power. Marshall and his associates made repeated

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154. *See generally* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127-77 (1987) (discussing the centripetal role of fundamental rights as a source of constitutional law).

155. *See generally* FAULKNER, *supra* note 22, at 17 (noting that Marshall considered property "to be unequivocally a natural right"); Nelson, *supra* note 129, at 932 (depicting Marshall as "a traditionalist who believed in natural rights that pre-existed government and legislation"); HUNTING, *supra* note 54, at 42-48 (asserting that the Justices of the Marshall Court believed in the existence of natural law).

156. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247-276 (1914) (noting that the "written constitution is . . . a nucleus or core of a much wider region of private rights, which, though not reduced to black and white are as fully entitled to this protection of government.").

157. *See* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 34-36 (1998) (emphasizing that law endured a paradigm shift from the speculative to the practical that elevated the importance of textual construction); Sherry, *supra* note 154, at 1167-76 (discussing the role of fundamental law and judicial jurisprudence).

references to the fundamental nature of private property. Recall that, in *Fletcher*, Marshall ambiguously cited both the Contract Clause and "the general principles, which are common to our free institutions."[158] This pattern continued throughout Marshall's tenure.

The most notable case in which the Marshall Court employed natural law to restrain legislative authority over private property was *Terrett v. Taylor* (1815).[159] Since scholars seemingly have difficulty in coming to grips with this case and have tended to view it as anomalous,[160] *Terrett* warrants careful examination.[161] The case involved land purchased by the Episcopal Church in Virginia during the colonial era.[162] In 1776, the state legislature confirmed the Church's land titles.[163] Some years later, however, the lawmakers repealed the 1776 law, asserted the right to sell all Episcopal Church property, and directed the parish overseers of the poor to sell any vacant lands.[164] Taylor, a church official, brought suit against Terrett, an overseer of the poor, to quiet title and enjoin the overseers from claiming the disputed land.[165]

In an opinion that has puzzled commentators, Justice Story ruled that the land still belonged to the church and that the overseers should be enjoined from claiming title.[166] Story invoked natural law principles at several points in the opinion. Pointing out that the legislature had confirmed the church's title, he emphatically denied that a legislative confirmation or grant of land was revocable.[167] Story explained that: "[s]uch a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."[168]

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158. Fletcher v. Peck, 10 U.S. 87, 139 (1810). *See* Mark A. Graber, *Naked Land Transfer and Constitutional Development*, 53 VAND. L. REV. 73, 78-85 (2000) (stressing Marshall's invocation of "general principles" as important for understanding *Fletcher*).

159. 13 U.S. 43 (1815).

160. *See* WIECEK, *supra* note 33, at 34-36 (analyzing *Terrett* as a sort of parting gesture by the Marshall Court to natural law philosophy); WRIGHT, *supra* note 32, at 38-39 (describing *Terrett* as "puzzling").

161. *See* G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 608-611 (1988) (providing a cogent discussion of *Terrett*); HAINES, *supra* note 62, at 335-36; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, 1789-1888 138-41 (1985).

162. *Terrett*, 13 U.S. at 43-44.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 44.

167. *Terrett* 13 U.S. at 50.

168. *Id.*

He went on to observe that other legislation repealing an act incorporating Episcopal churches was also void.[169] In reaching this conclusion, Story again relied on unwritten fundamental rights:

> But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.[170]

Story clearly indicated his belief that land titles and corporate charters were protected by the fundamental principles inherent in any free government[171].

Historians have generally characterized *Terrett* as a Contract Clause case.[172] There are difficulties, however, with this assessment. In the first place, at no point in his opinion did Story appeal to the Contract Clause or to any specific language in the Constitution. Further, as Edward White has aptly noted, "it is hard, from the case's facts, to know just what contract a state had impaired."[173]

I suggest that *Terrett* is not properly viewed as an application of the Contract Clause.[174] The matter in dispute was not impairment of a contract but an attempted confiscation of church property by the state. It was analogous to a taking of property without payment of just compensation. But the Takings Clause of the Fifth Amendment governed only actions of the federal government.[175] Outraged by Virginia's interference with vested property rights, but without an express constitutional provision which seemed applicable, Story looked to natural law principles implicit in the Constitution to restrain legislative authority.[176] There is no need to hunt for some tenuous connection to the

169. *Id.* at 51-52.
170. *Id.* at 52.
171. *Id.*
172. JOHNSON, *supra* note 13, at 174; Siegel, *supra* note 56, at 47 n.256.
173. WHITE, *supra* note 161, at 608.
174. *See* WRIGHT, *supra* note 32, at 38 (observing that in *Terrett* "the Court does not apply the [C]ontract [C]lause").
175. U.S. CONST. amend V. ("[n]or shall private property be taken for public use without just compensation.").
176. Sherry, *supra* note 154, at 1175. *But see* MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE 140-44 (1996) (denying that Story relied on natural law as a basis for judicial review).

Contract Clause.

The Marshall Court continued into the 1820s giving judicial sanction to unenumerated fundamental principles as a means to vindicate property rights. At issue in *Wilkinson v. Leland* (1829) was the validity of a Rhode Island law which retroactively confirmed the power of an out-of-state executor to sell land in Rhode Island to pay debts of the deceased owner.[177] Since the will was never probated in Rhode Island, the sale by the executor was inoperative without legislative authorization. Speaking for a unanimous Court, Justice Story upheld the statute on grounds that the land was subject to a lien for the debts of the testator.[178] Ratification of the sale by the legislature, he ruled, did not divest the claimants of any settled rights.[179] Story, however, took the occasion to emphasize that governmental authority over property was confined by principles of natural justice:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention. In *Terrett v. Taylor*, 9 Cranch 43, it was held by this court, that a grant or title to lands, once made by the legislature, to any person or corporation, is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit, that the people of Rhode Island have ever delegated to their legislature the owner to divest the vested rights of property, and transfer them without the assent of the parties.[180]

In addition to Story's forceful invocation of natural law, other

177. HAINES, *supra* note 62, at 583-84.
178. Wilkinson v. Leland, 27 U.S. 627, 657-58 (1829).
179. *Id.*
180. *Id.*

Justices in separate opinions also cited immutable fundamental rights as a limitation on legislative power. Concurring in *Fletcher v. Peck*, Justice Johnson pronounced the Georgia repeal act invalid "on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[181] As discussed above, Marshall employed natural law reasoning in his *Ogden* dissenting opinion. He expressly denied that property and contractual rights were derived from society.[182] Instead, Marshall asserted that these were natural rights not the results of municipal legislation:

> This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it.[183]

Scholars may well have been too hasty in banishing natural law as a component of Marshall Court constitutional jurisprudence. The fact that it was often more convenient to predicate decisions on express language in the Constitution does not diminish the force of fundamental principles as a support for property rights.

This judicial recognition of property rights not tied to a specific constitutional text also played a role in the Marshall Court's construction of state land grants and federal statutes. The Justices interpreted state and federal laws in the light of extra-textual fundamental principles. This mode of interpretation served to restrain legislative authority over property and to avoid constitutional problems.[184] A few examples must suffice.

Polk v. Wendall (1815), for instance, was one of a number of cases in which the Court was called upon to unravel conflicting claims derived from state land grants.[185] In *Polk*, the junior grantee of a tract of land brought an ejectment action against a party holding under an earlier grant.[186] The plaintiff sought to impeach the prior grant on several grounds.[187] Without making explicit the source of law applied, Marshall held for the Court that "the great principles of justice and of law would be violated" unless there was some means to determine the validity of earlier grants.[188] He then maintained that "there are cases in which a grant is absolutely void; as where the state has no title to the

181. *Fletcher*, 10 U.S. at 143 (Johnson, J., concurring); DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 210-12 (1954).

182. *Ogden*, 24 U.S. at 346.

183. *Id.* (Marshall, C.J., dissenting).

184. Graber, *supra* note 158, at 85-98.

185. Polk v. Wendall, 13 U.S. 87 (1815).

186. *Id.* at 87-94.

187. *Id.*

188. *Id.* at 99.

thing granted."[189] In other words, once a state has disposed of land, a subsequent deed to the same parcel would be ineffective. This construction limited state power to make successive grants of the same property without raising the constitutional problems implicit in taking property from the initial grantee.

Marshall and his colleagues similarly interpreted federal statutes in a manner consistent with fundamental principles guarding property against expropriation. After the United States acquired Florida in 1819, Congress created a commission to ascertain land titles in that territory. The congressional act provided that every person claiming land in Florida under Spanish grants must submit a claim to the commission by a specific date. Claims not filed in a timely fashion were declared void. Juan Percheman, the recipient of a Spanish land grant in 1815, never presented his claim to the commission. He later instituted a judicial action seeking confirmation of his title.

Writing for the Supreme Court in *United States v. Percheman* (1833), Marshall began his opinion by stressing that the transfer of sovereignty over Florida did not displace private ownership.[190] He observed:

> The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change;[191]

Language in the treaty regarding land titles, Marshall continued, only made express the security of private property guaranteed under general law. Against this backdrop, he narrowly construed the authority of the commission under the act. He determined that the language about unfiled claims being void simply meant that the commission could not confirm any claims presented after the given date. The act did not govern claims filed later, Marshall reasoned, because it was "impossible to suppose, that congress intended to forfeit real titles, not exhibited to their commissioners, within so short a period."[192] The ultimate validity

189. *Id.*
190. 32 U.S. 51 (1883).
191. *Id.* at 86-87.
192. *Id.* at 90.

of titles not submitted to the commission remained a judicial matter. Marshall upheld the lower court decree confirming Percheman's grant.

Marshall's analysis is difficult to reconcile with the wording and evident purpose of the act. Congress was anxious to resolve claims to land in Florida so that unowned land could be sold and settlement of the territory promoted. To that end, Congress required that claimants present their titles to the commission within a specified time period. It is highly unlikely that Congress expected that individuals who ignored the commission could thereafter assert ownership of Florida land in a judicial proceeding.[193] A more compelling explanation is that Marshall interpreted the act to reflect his views on the sanctity of property rights and to evade possible constitutional infirmity with governmental confiscation of property.

In a move that paralleled the Marshall Court's use of extra-textual constitutional norms, state courts in the antebellum era began to develop the concept that due process placed substantive restrictions on legislative power. The "law of the land" or Due Process clauses in state constitutions were interpreted to prevent legislative interference with land titles. State courts also ruled that even in the absence of a Takings Clause, due process curtailed legislative authority by preventing uncompensated deprivations of property.[194] Fashioned from common law maxims and natural law principles, the evolving notion of substantive due process was akin to the Marshall Court's recognition of unenumerated rights concerning property.

The Marshall Court's exploration of general law principles as a limitation on state legislative authority was tentative in nature. The Justices more readily relied on natural law doctrine in diversity cases where they could look to general principles of federal law.[195] Moreover, the infusion of natural law concepts by Marshall and his associates into the express language of the Constitution diminished the need for the Court to make overt resort to unwritten fundamental law. Yet the Marshall Court's recognition of enforceable natural law rights paved the way for the acceptance of substantive due process by the federal courts later in

193. *Percheman*'s protective attitude toward land titles is seemingly at odds with more recent decisions upholding the extinguishment of property interests when claimants fail to comply with filing requirements. Texaco, Inc. v. Short, 454 U.S. 516 (1982); United States v. Locke, 471 U.S. 84 (1985).

194. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315, 327-42 (1999); Suzanne Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-222 (1992); Michael G. Collins, *Before Lochner —Diversity Jurisdiction and the Development of General Constitution Law*, 74 TUL. L. REV. 1263, 1263-1322 (2000).

195. WHITE, *supra* note 161, at 605-06, 674.

the nineteenth century.

IV. TAKINGS JURISPRUDENCE

In marked contrast to the Contract Clause, the Takings Clause of the Fifth Amendment did not bulk large in the work of the Marshall Court. This may be explained in part by the apparent practice of the federal government before the Civil War to utilize state eminent domain proceedings to acquire property.[196] There was consequently no occasion for the Court to hear questions of "public use" or "just compensation."

The Marshall Court's decision in *Barron v. Mayor and City of Baltimore* (1833), moreover, that the Bill of Rights limited only the power of the federal government, left the states free to develop eminent domain law.[197] Plaintiff owned a wharf on the harbor of Baltimore. The case arose when city officials adopted new street grades and diverted certain streams. As a result, large amounts of earth were deposited in front of plaintiff's wharf and rendered that part of the harbor too shallow to accommodate large ships. Suffering a loss of income, plaintiff brought suit asserting, among other things, that the action by the city amounted to an uncompensated taking of property in violation of the Fifth Amendment.

In his last important constitutional opinion, Marshall declined to apply the Bill of Rights to restrict state activity. He declared that the Fifth Amendment restrained only the power of the federal government. The exercise of state power, Marshall reasoned, was governed by state constitutional provisions. Pointing out that the Bill of Rights was initially advocated by critics of the proposed Constitution, Marshall appealed to history as a guide for constitutional interpretation:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government —not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears

196. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559 n.18 (1972) (stating that "federal officials had apparently had state governments condemn land for federal purposes").

197. WHITE, *supra* note 161 at 589-93; HAINES, *supra* note 62, at 608-09.

> thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[198]

Most historians agreed that Marshall was correct in his conclusion that the Bill of Rights was originally designed as a limit on federal authority.[199]

It remains to consider whether *Barron* marked a retreat from the Marshall Court's vindication of the rights of property owners in other contexts. Clearly, Marshall and his colleagues were disinclined to expand the reach of the Bill of Rights. To some extent this reflected the rise of states' rights ideology toward the close of Marshall's tenure. As a leading treatise states: "the Supreme Court in the last decade of the Marshall era gave broader scope to state powers and less consistent protection to property rights."[200]

But this was not the whole story. It was not inconsistent for the Marshall Court to place weight on the Contract Clause and occasional resorts to natural law while limiting the scope of the Takings Clause. State interference with contractual relations was seen as a major problem at the Constitutional Convention, and was expressly prohibited by the Contract Clause. Marshall could rightly believe he was following the expectation of the framers in reading the Contract Clause broadly. Appropriation of property presented different questions. Although the framers abhorred uncompensated takings of property, this matter appeared less threatening at the state level. Not only was the common law principle of just compensation when government expropriated private property well settled, but several states had already adopted the common law norm as a constitutional requirement.[201] Abusive state treatment of property owners seemed unlikely.

With both the Contract Clause and the Takings Clause, Marshall and his associates followed their understanding of the constitutional scheme constructed by the framers. They wisely decided not to disregard the general perception that the Bill of

198. Barron v. Baltimore, 32 U.S. 243, 250 (1833).

199. HOBSON, *supra* note 10, at 107-10; CURRIE, *supra* note 161, at 189-93. *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 140-58 (1998) (observing that *Barron* reflected the premises of drafters of the Bill of Rights, but pointing out that some antebellum commentators argued that the Bill of Rights did apply to the states). *But see* IRONS, *supra* note 5, at 134-36 (treating *Barron* as an example of Marshall's disdain for claims of individual rights without explaining why Marshall would not have been anxious to safeguard property from state interference).

200. KELLY ET. AL., *supra* note 33, at 198.

201. James W. Ely, Jr., *'That due satisfaction may be made:' the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1-18 (1992).

Rights pertained only to the federal government. There was no need to arouse the anger of the states' rights adherents when the Court could safeguard property rights through other means. It made better sense for the Court to rely on the Contract Clause that expressly applied to the states. Moreover, as discussed above, in cases like *Terrett* the Marshall Court could entertain what were essentially takings claims in diversity cases. In such cases, the Marshall Court employed the concept of fundamental rights as an aspect of general constitutional principles to block uncompensated takings of property.

But this analysis is not entirely satisfactory, because one must still reconcile the fundamental rights premise of *Terrett* with the states' rights rationale of *Barron*. A possible distinction may be in the nature of the property interest at issue in the two cases. Recall that in *Terrett* the state was seeking an outright confiscation of landed property. At issue in *Barron*, on the other hand, was consequential physical damage resulting from a public improvement. Whether a diminution in the value of adjacent land by virtue of improvement schemes constituted a taking of property was a relatively novel issue in Marshall's day. State courts remained divided on the topic during the antebellum era.[202] Consequently, *Barron* may not have presented a compelling set of facts for Marshall and his colleagues to invoke the concept of property as a fundamental right.

In a turbulent era it was not feasible for Marshall to ignore powerful political currents or to achieve complete respect for contract and property. There were always competing considerations of federalism. A political realist, Marshall may well have calculated that neither the timing nor the circumstance in *Barron* was propitious for a further extension of federal judicial authority, even to uphold the rights of an individual property owner. The wonder is that the Marshall Court accomplished so much in protecting economic rights and in harnessing federal constitutional authority to promote enterprise.

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202. *Compare* Hooker v. New Haven and Northampton Co., 14 Conn. 146 (1841) (holding that the flooding of adjacent land caused by a canal project constituted destruction of private property and was actionable even if consequential) with Radcliff's Executors v. Mayor of Brooklyn, 4 N.Y. 195 (1850) (holding that consequential damages resulting from grading a public street did not constitute taking of property). For a discussion of the distinction between direct and consequential damages in antebellum takings jurisprudence, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 71-74 (1977); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 85-92 (1999).

V. PROPERTY IN MOTION

The Marshall Court is commonly identified with the protection of vested rights. This is surely accurate to the extent that vested rights implied security of settled private ownership. But the ready association of the Marshall Court with vested rights is potentially misleading. Vested rights sounds like a defense of the status quo. Indeed, some scholars have argued that the Marshall Court's jurisprudence was crafted to entrench special interests.[203] Yet Marshall and his colleagues stressed private property rights in large part as a means to bring about economic growth, not as a shield merely to safeguard existing interests. The Marshall Court, in J. Willard Hurst's well-known phrase, favored "[d]ynamic rather than static property, property in motion or at risk rather than property secure and at rest . . . "[204] Property and contractual rights were valuable as keystones to a burgeoning market economy.[205]

A glance at some of the leading Marshall Court decisions regarding property rights bears out this thesis. The overriding concern was to protect entrepreneurial freedom and to facilitate capital formation. During the early years of the new republic, many investors were attracted to the land market. Decisions such as *Fletcher* upheld the claims of land speculators and, in effect, treated land as a commodity subject to market forces. By policing state land grants, Marshall helped stabilize the land market. *Green* and various public land cases indicated that the Marshall Court was more concerned with the interests of land speculators and interstate commercial transactions than with actual settlers.[206] As one authority explained: "In expanding the Contract Clause to protect vested rights the Supreme Court encouraged an expansive, dynamic agrarian capitalism that supplied venture capital for more general economic development."[207]

The *Dartmouth College* case afforded constitutional protection for corporate charters and encouraged the growth of business corporations as the chief vehicle for economic growth. It was based on the assumption that public benefit was secured when the law established a framework for private parties to advance their

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203. HAINES, *supra* note 62, at 419.

204. J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24 (1956).

205. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 47 (1993); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 179 (1971) (noting that for Marshall the "essential message always involved a premium on ventures, and a recognition of their broad socio-economic benefits, rather than on holdings per se").

206. UROFKSY, *supra* note 98, at 231-32.

207. KELLY ET. AL., *supra* note 33, at 190.

own economic goals. Speaking in general terms, Lawrence M. Friedman pointed out that the Contract Clause "performed certain functions of promotion and guaranty for business."[208] These goals were congenial with the economic vision of the Marshall Court.

Marshall's commitment to a dynamic understanding of property was also highlighted by his apparent agreement with the strict construction principle as articulated by Chief Justice Taney in *Charles River Bridge*. Although Marshall died before the case was resolved, it has been persuasively argued that, in light of his *Province Bank* opinion and his enthusiasm for economic development, Marshall would likely have broken with Story and opposed the claims of the bridge proprietors.[209]

Additionally, it bears emphasis that the Marshall Court's solicitude for the rights of property owners developed simultaneously with judicial moves to foster a national market by eliminating state trade barriers.[210] Although Marshall did not foreclose state legislation that indirectly affected commerce, his views enlarged the room for interstate exchange and contracting. This nationalist bent was congruent with the Marshall Court's focus on the utility of private property as a vehicle to create wealth.

VI. SHARED VALUES

As historians have documented, many of the Marshall Court's prominent decisions aroused the ire of disappointed local interests and states' rights theorists. By the 1820s, there were a number of futile congressional proposals to curb the power of the Supreme Court. However, it is essential to keep this vocal hostility in perspective. Critics focused on Marshall's nationalism and his steps to strengthen the constitutional union.[211] What is striking is the absence of criticism directed at Marshall's core belief that the federal courts should uphold economic rights.

In resolving property cases, Marshall was able to tap prevailing values about the sanctity of private property.[212] The crucial fact is that the Marshall Court was operating within the mainstream of early nineteenth-century constitutional thought. Historian C. Peter Magrath has pointed out: "The decision in *Fletcher v. Peck*, reflecting a bias in favor of vested property rights,

208. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 133 (1965).

209. KUTLER, *supra* note 205, 172-79.

210. Gibbons v. Ogden, 22 U.S. 1 (1824); JOHNSON, *supra* note 13, 162-72.

211. R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 105-21 (Kermit L. Hall and James W. Ely, Jr., eds., 1989).

212. Nelson, *supra* note 129, at 943-944.

was in nearly perfect harmony with the attitudes and values of most politically-conscious Americans."[213] Not only was the decision in *Fletcher* generally expected, but it gave a green light to congressional action to compensate the prevailing claimants.[214] Likewise, the *Dartmouth College* case created little stir.[215] According to Siegel, the Marshall Court "was expressing, rather than imposing, a social norm."[216]

To a large extent, then, the Marshall Court was applying widely shared principles that property ownership was a personal right deserving of a high level of constitutional protection.[217] Particular rulings sometimes upset local or state interests, but did not produce dissent from the Marshall Court's preoccupation with the protection of private property and contractual arrangements.

In fact, there was a remarkable continuity between the decisions of the Marshall Court and the Contract Clause jurisprudence of the Supreme Court under Chief Justice Taney. As demonstrated by opinions such as *Bronson v. Kinzie* (1843), the Taney Court vigorously affirmed traditional doctrines protecting contractual arrangements.[218] This affinity between the Marshall and Taney eras is further evidence that the Marshall Court reflected general attitudes about the importance of property and private economic ordering.[219]

CONCLUSION

Marshall's constitutionalism was inseparable from his commitment to property rights. To be sure, respect for the rights of property owners was an integral feature of the American social order well before John Marshall became Chief Justice. The framers of the Constitution and Bill of Rights wove guarantees of private property into the constitutional fabric of the new nation. Marshall and his colleagues, however, were instrumental in giving vitality to the property-conscious values of the framers. In so doing, they did much to set the parameters of American constitutionalism for more than a century. Jennifer Nedelsky has perceptively observed:

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213. MAGRATH, *supra* note 46, at 114.

214. Siegel, *supra* note 56, at 28-29.

215. STITES, *supra* note 62, at 101.

216. Siegel, *supra* note 56, at 32.

217. Graber, *supra* note 158, at 77. "Judicial review may have survived and thrived before the Civil War because the Justices spent much time and energy implementing general principles of property recognized as valid by virtually every prominent political actor." *Id.*

218. *See* Bronson v. Kinzie, 42 U.S. 311 (1843) (invalidating Illinois statutes which altered mortgage foreclosure procedures as a violation of the Contract Clause).

219. ELY, *supra* note 15, at 68-71, KUTLER, *supra* note 205, at 134-35.

> [T]he notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth-century advocates of laissez-faire. And the idea that property and contract could define the legitimate scope of governmental power was a basic component of constitutionalism from 1787 to 1937.[220]

Despite some detours and modifications of doctrine, there was a strong continuity between the work of the Marshall Court and subsequent judicial efforts to vindicate private property.[221] The Supreme Court under Melville W. Fuller, for instance, shared the Marshall Court's enthusiasm for economic development and capital formation.[222] Morton M. Horwitz has pointed out: "In fact, under the [D]ue [P]rocess [C]lause of the Fourteenth Amendment, the Supreme Court after the Civil War promulgated doctrines not very different from those that had previously been developed under, for example, the [C]ontracts [C]lause or state just compensation provisions."[223] Marshall's legacy had a lasting impact on the constitutionalization of property rights.

220. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 228 (1990).

221. MILLER, *supra* note 16, at 24. "That century and a half from 1787 to 1937 was characterized, so far as American capitalism was concerned, with the Court helping to construct a protective legal umbrella under which business enterprise could and did flourish." *Id.*; Siegel, *supra* note 56, at 61-62.

222. JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 71-82 (1995) (discussing desire of Fuller Court to foster economic development by safeguarding capital formation and a national market).

223. MORTON M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 158 (1992).