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# Introduction

Few provisions of the Constitution have experienced such a roller-coaster ride through US history as the contract clause. Article I, section 10 provides in part: “No state shall . . . pass any . . . Law impairing the Obligation of Contracts.” Inserted into the Constitution without extensive debate, the contract clause was clearly prompted by the sour experience with state debt-relief laws enacted during the Post-Revolutionary Era. It was grounded on the premise that honoring contractual commitments served the public interest by encouraging commerce. The framers, therefore, wished to safeguard the stability of agreements from state legislative abridgment in order to facilitate commercial transactions. Under the leadership of John Marshall, the Supreme Court construed the provision expansively, and it rapidly became the primary vehicle for federal judicial review of state legislation before the adoption of the Fourteenth Amendment. Indeed, the contract clause was one of the most litigated provisions of the Constitution throughout the nineteenth century. Judges in the nineteenth century often extolled the significance of the clause. “There is no more important provision in the Federal Constitution,” Justice William Strong observed in 1878, “than the one which prohibits the states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care that the prohibition shall neither be evaded or frittered away.”<sup>1</sup>

Over time, however, the courts carved out several malleable exceptions to the constitutional protection of contracts—most notably the notion of an inalienable police power—thereby weakening the protection of the contract clause and enhancing state regulatory authority. The exceptions gradually began to swallow the provision, diminishing its importance. An already weakened contract clause received a near-fatal blow in the controversial case of *Home Building and Loan Association v. Blaisdell* (1934), upholding a mortgage moratorium during the Great Depression.<sup>2</sup> As New Deal constitutionalism gained ascendancy in the 1940s, the economic rights of individuals were relegated to secondary status in order to facilitate governmental intervention in the economy. The contract clause was a casualty of this jurisprudential change and largely fell into disuse for several decades. Starting in the 1970s there has been a modest revival of interest in the provision among courts and scholars. Nonetheless, the criteria for invoking the contract clause remain uncertain, and certainly the provision has never regained its former vigor.

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Indeed, one scholar has recently taken a dismissive approach to the contract clause, asserting that the provision was buried by New Deal constitutionalism and “is no longer with us.”<sup>3</sup> If this pessimistic view is correct, the obvious question arises: Why spend time and energy studying an apparent constitutional relic? Part of the answer, of course, is the undoubted historical significance of the contract clause. Neglect of the provision distorts our understanding of constitutional history. In addition, I will argue that the clause, even if diminished, retains contemporary importance. If no longer central to the leading constitutional issues of the day, the contract clause remains a frequently litigated provision in both federal and state courts. Talk of its demise is exaggerated.

Constitutional questions are not decided in a vacuum. I have endeavored to place evolving contract clause jurisprudence within the broader context of the legal culture, which values contracts as an expression of individualism and a market economy. The book takes account of social, economic, and political developments as they illuminate the role of contracting in US society. Although the contract clause by its terms is binding only on the states, I have given attention to instances in which principles derived from contract clause jurisprudence have been invoked in cases involving contractual impairment by the federal government. I have also treated the question of judicial interference with contracts. The contract clause is seemingly directed against state legislative impairment, but throughout the nineteenth century the Supreme Court intimated that, under some circumstances, a state court ruling altering a prior judicial opinion might run afoul of the Constitution if it undermined contractual stability.

A study of the contract clause provides a window into the shifting concerns and assumptions of Americans. It implicates matters central to US constitutional history, including the protection of economic rights, the growth of judicial review, and the role of federalism. Moreover, it sheds light on attitudinal changes with regard to the sanctity of contracts and private ordering of the economy. Adjudication involving the clause reflects the impact of wars, economic distress, and political currents on reading the Constitution. Issues pertaining to debt relief have been a recurring source of contract clause dispute, particularly in the period before the enactment of a permanent bankruptcy law in 1898. In addition, questions relating to land grants, the status of corporations, grants of tax exemption, regulation of health and morals, municipal debt repudiation, rent control, mortgage moratoria, and franchise arrangements have featured prominently in contract clause litigation. At the time of this writing steps by state and local

governments to trim the benefits of public-sector employees have spawned numerous contract clause challenges in both federal and state courts.

Any study of the contract clause must take account of Benjamin F. Wright's classic work *The Contract Clause of the Constitution* (1938). For decades this volume has reigned as the definitive history of the clause and has set the tone for subsequent investigations. I have found Wright's work both informative and balanced but feel that the time is ripe for a fresh look at the history of the contract clause. Nearly eighty years have passed since Wright completed his book. Not only are there subsequent developments and issues to be incorporated in the narrative, but the ensuing decades have opened the way for new perspectives. In some areas, perhaps most notably the understanding of the framers regarding the scope of the contract clause, I have reached different conclusions than those offered by Wright. As the title of Wright's book suggests, his work is almost exclusively focused on interpretations of the clause by the US Supreme Court. He virtually ignores developments at the state level and the construction of parallel contract clauses in state constitutions. I have sought to remedy this omission by blending state and federal court decisions in every time period. I have also considered the extent to which state constitutions might be construed to provide enhanced protection for contracts. It is important to remember that state courts did much of the heavy lifting in interpreting and enforcing the contract clause. They are an integral, if too often overlooked, part of the story.

The book is organized chronologically. Chapter 1 investigates the origins and early evolution of contract clause jurisprudence from the Post-Revolutionary Era to the advent of John Marshall as chief justice in 1801. It points out that the framers felt that a ban on state abridgment of contracts was sufficiently important to be included in the Constitution at the very time they were arguing that a bill of rights was unnecessary. In this connection, it probes the view of the framers of the Constitution and considers contemporary opinion regarding the scope of the contract clause, arguing that, based on admittedly fragmentary evidence, the provision could reasonably be construed to safeguard both private and public agreements from state abridgment. The chapter also considers developments at the state level, noting the widespread adoption of parallel contract clauses in state constitutions. Moreover, I treat the initial federal and state court decisions construing the contract clause and paving the way for a robust reading of the provision in the nineteenth century.

Chapter 2 focuses on the well-known contract clause decisions of the Supreme Court under the guidance of Marshall. Indeed, the provision was a

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centerpiece of Marshall Court jurisprudence. Although Marshall famously interpreted the clause to encompass public as well as private agreements, he also limited the reach of the provision in several respects. He recognized an opaque distinction between contractual rights and the remedies available to enforce those rights. The right/remedy distinction was elusive and opened the door for lasting confusion as legislators repeatedly sought to modify remedies in such a manner as to hamper the enforcement of contracts. In addition, Marshall determined that there were no implied privileges in corporate charters. The state and lower federal courts heard a large volume of contract clause litigation. They invalidated numerous state debt-relief laws, and in some areas, such as police power and eminent domain, anticipated subsequent rulings by the Supreme Court.

In Chapter 3, I address the impact of the Jacksonian movement and the chief justiceship of Roger B. Taney upon contract clause jurisprudence. These years witnessed a proliferation of contract clause litigation at both the federal and state levels. Despite some differences, the overall picture is one of continuity with the work of the Marshall Court. Taney both limited and strengthened the security of contractual obligations under the contract clause. In *Charles River Bridge v. Warren Bridge* (1837)<sup>4</sup> he established the principle that corporate charters should be strictly construed and that privileges such as monopoly status or tax immunity could never be implied. Similarly, the Supreme Court determined that the contract clause did not prevent the states from exercising the power of eminent domain. On the other hand, under Taney the Court vigorously invoked the provision to safeguard the rights of parties under private agreements and to uphold clearly expressed tax exemptions. Following the lead of the Supreme Court, state courts struck down a host of debt-relief measures. They also grappled with the relationship between the state police power to protect the public health, safety, morals, and the protection afforded agreements by the contract clause. By Taney's death in 1864 the basic contours of contract clause jurisprudence had been established.

Chapter 4 looks at the torrent of contract clause litigation generated during the Civil War and Reconstruction. The Supreme Court confronted a number of novel issues emanating from the sectional conflict, such as the use of Confederate currency as a medium of exchange and the enforcement of contracts for the purchase of slaves. After the war, impoverished southern states enacted a variety of debt-relief laws and enlarged homestead exemptions, prompting contract clause challenges. Other cases raised issues similar to those of the antebellum period. The extent of corporate privileges

under their charters remained a much-contested subject. For example, the Supreme Court, as well as numerous state courts, sustained tax exemptions as protected contracts. Moreover, the Court looked with disfavor on legislative attempts to repudiate or evade municipal bonded debt. The decade of the 1870s constituted a high-water mark for the role of the contract clause in constitutional law. Yet the same decade saw an attack on the Marshall Court's application of the contract clause to state contracts, particularly the protection of corporate charters under that provision. Further, state courts began to argue that all contracts were subject to the police power.

Chapter 5 explores a seeming paradox. Even as courts in the late nineteenth century developed a vigorous property-conscious jurisprudence, the contract clause declined in importance. Although both federal and state courts heard a steady stream of contract clause cases, they increasingly relied on other constitutional provisions, notably the due process clause of the Fourteenth Amendment, to protect economic rights. There was a rising barrage of criticism directed against the notion that corporate charters constituted a contract. The Supreme Court embraced the principle that states could not bargain away the police power to preserve public health and safety. Coupled with the doctrine of strict construction of corporate charters, the police power exception did much to undercut the sanctity of corporate charters. The emergence of the public trust doctrine opened another avenue to circumvent the protection of the contract clause. In contrast, courts continued to uphold grants of tax exemption and to invalidate legislative schemes to repudiate municipal debts. They also frequently relied on the contract clause to strike down legislative abridgment of private contracts, including laws that altered foreclosure procedures. The enactment of an enduring bankruptcy law in 1898 reduced the flow of contract clause cases dealing with debtor-creditor relations. This chapter differentiates the contract clause, which protected existing agreements from retroactive impairment, from the emerging liberty of contract doctrine. The liberty of contract doctrine held that the right to make contracts was constitutionally protected by the due process clause.

In Chapter 6, I trace the diminishing place of the contract clause in the constitutional polity from the early decades of the twentieth century until the end of World War II. The chapter is divided into segments, with the first covering the years before the coming of the New Deal in 1933. Both federal and state courts wielded the contract clause to protect contractual arrangements, but there were fewer such cases. Many of the cases presented familiar issues and broke no new ground. Still, in several respects the Supreme Court

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further confined the reach of the contract clause. It ruled that private agreements as well as public contracts were subject to the police power. It ruled in the rent control cases that a legislative declaration of an economic emergency might provide a basis for legislators to override existing contracts. Finally, after decades of vacillation, it held that the contract clause was directed only at abridgment of agreements by legislation and not the shifting judgements of state courts. The second segment considers the profound impact on thinking about the contract clause that occurred in the wake of the New Deal. The landmark *Blaisdell* decision was a crucial turning point and became the fountainhead of modern contract clause analysis at the federal level. After 1940, as President Franklin D. Roosevelt's appointees gained ascendancy, the Supreme Court jettisoned limitations on state authority over contracts. Left without any meaningful role, the contract clause virtually disappeared from constitutional dialogue for several decades.

Chapter 7 covers the period from the end of World War II to the present. The contract clause received scant attention from judges and scholars until the mid-1970s. Then the Supreme Court, in a pair of rulings, relied on the provision for the first time in more than thirty years to overturn state laws that infringed contracts. These decisions served to revive interest in the contract clause, but the halting and ambiguous opinions did not provide a principled basis on which to rebuild contract clause jurisprudence. To complicate matters, the Court, contrary to historical experience, imposed a higher standard of review when a state impaired its own obligations. In the main, however, the Supreme Court demonstrated only a fleeting interest in the contract clause and devised an amorphous multifactor test for determining violations of the provision. Most of the contract clause litigation in recent decades has taken place in the state courts, spanning a wide variety of disputes. Generalization is difficult, but in a number of cases state courts have invalidated laws as running afoul of the clause in state or federal constitutions. The most vexing contract clause issue at present arises from steps by cash-strapped state and local governments to trim benefits for current and retired employees.<sup>5</sup> I examine this ongoing controversy at length, noting the interplay between the contract clause and federal bankruptcy power.

The place of the contract clause is no longer among the most hotly contested issues in constitutional law. Nonetheless, the provision clearly retains some viability as a constraint on state legislative authority. The conversation over the scope of the contract clause will doubtless continue. I hope that this volume will make a contribution to that debate.