NYU JOURNAL OF LAW & LIBERTY

THE PROTECTION OF CONTRACTUAL RIGHTS: A TALE OF TWO CONSTITUTIONAL PROVISIONS

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In recent years, scholars have done much to enhance our understanding of the constitutional jurisprudence of the late nineteenth century. In so doing, they have called into question the one-sided Progressive historiography, which pictured judges of this era as little more than handmaidens of big business.[1] Although historians writing in the Progressive and New Deal mindset long dominated assessments of judicial behavior in the Gilded Age, revisionist scholars have presented a more balanced portrait of constitutional doctrine in this era. They stress that Gilded Age jurists sought to uphold time-honored principles of limited government and economic freedom in a rapidly changing society. Moreover, revisionist scholars have pointed out that constitutional law of the late nineteenth century was grounded in the views of the Framers of the Constitution and represented continuity with the past.[2]

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[1] *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 2–9 (2003) (criticizing Progressive and New Deal era historians for tailoring constitutional history to serve political objectives).

[2] *E.g.*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (1995); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1867*, 61 J. AM. HIST. 970 (1975); *see also* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 92 (2001) (noting that "revisionist accounts of the *Lochner* era tend to stress its links to antebellum legal thought and to view it as a more or less ordinary outgrowth of nineteenth century currents of American constitutionalism").

Further work, however, remains to be done. One intriguing subject is the seeming shift in the constitutional base for protecting contracts from legislative interference. During the nineteenth century, the Contract Clause[3] was one of the most frequently litigated provisions of the Constitution and was often invoked to strike down state laws.[4] In 1896, Justice George Shiras tellingly observed: "No provision of the [C]onstitution of the United States has received more frequent consideration by this [C]ourt than that which provides that no [S]tate shall pass any law impairing the obligation of contracts."[5] Yet by the late nineteenth century, the Contract Clause began to gradually erode and was eclipsed by the liberty-of-contract doctrine under the Due Process Clause of the Fourteenth Amendment. A 1932 Note in the *Columbia Law Review* correctly observed: "[T]he last fifty years have witnessed a decline in the importance of the Contract Clause. The limelight has shifted to due process."[6]

The unanswered question is why such a change occurred. Although this matter has received some attention from scholars,[7] it is still largely unexplored. This essay seeks to explain the reasons for this curious transformation in the constitutional order. My primary focus will be on the period 1875 to 1905, when the Supreme Court squarely applied the liberty-of-contract doctrine in the case of *Lochner v. New York*.[8]

Contracting in Nineteenth-Century America

Americans of the nineteenth century assigned a high value to the enforcement of agreements. There was a strong ethical belief in honoring one's promises. In addition, contracts were central to the market economy and provided a vehicle whereby individuals could bargain for their own advantage.[9] "The institution of contract," Morton J. Horwitz explained, "thus represented the legal expression of free market principles, and every interference with the contract system . . . was treated as an attack on the very idea of the market as a natural and neutral institution for distributing rewards."[10] Contract rights also represented a significant kind of wealth. "A very large proportion of the property of civilized men," Chief Justice

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[3] U.S. CONST. art. I, § 10, cl. 1 provides in part: "No state shall . . . pass any . . . Law impairing the obligation of Contracts . . . ."

[4] BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION xiii (1938); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 273 (1868) (pointing out that no provision of Constitution "has been more prolific of litigation, or given rise to more animated and at times angry controversy" than Contract Clause).

[5] Barnitz v. Beverly, 163 U.S. 118, 121 (1896).

[6] Note, *The Contract Clause of the Federal Constitution*, 32 COLUM. L. REV. 476, 478 (1932).

[7] *See* Bernard Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95, 98–100 (discussing reasons for post-1890 decline of Contract Clause).

[8] 198 U.S. 45 (1905).

[9] *See generally* LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA, A SOCIAL AND ECONOMIC CASE STUDY (1965) (analyzing social significance of contract law in American life).

[10] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 33 (1992).

Salmon P. Chase remarked in 1870, "exists in the form of contracts."[11] Reflecting these considerations and the needs of burgeoning commerce, contract law evolved swiftly after 1800. Historian Willard Hurst noted "the overwhelming predominance of the law of contract in all its ramifications in the legal growth of the first seventy-five years of the nineteenth century."[12] With some exceptions, American law left private parties free to promote their own interests through contract. As Justice Joseph Story observed: "[E]very person who is not from his peculiar condition . . . under disability is entitled to dispose of his property . . . as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable or otherwise are considerations not for courts of justice but for the party himself to deliberate upon."[13]

Leading treatise writers recognized the growing importance of contracts in the polity. Theophilus Parsons, for example, declared that the law of contracts "may be looked upon as the basis of human society."[14] The individualistic dimensions of contract law, moreover, had sweeping implications for the nature of the social order. The triumph of contract represented a step away from a fixed hierarchical system in which one's place was determined by birth and status, toward a society in which relationships were governed by agreement of individuals. Notionally, contracts allowed a person to fashion his or her own position in society. The English political economist Henry Sumner Maine summarized this change when he famously declared that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[15] Viewed in this light, contractual arrangements were a positive force deserving of legal protection. Indeed, few Americans before 1900 would have doubted the accuracy of Maine's statements.

Emergence of Contract Clause Jurisprudence

The growing importance of contracts in American life informed the Supreme Court's interpretation of the Contract Clause. It is therefore helpful to briefly sketch the evolution of Contract Clause doctrine. The troubled economic conditions of the post-Revolutionary era produced frequent state legislative interference with debtor-creditor relations.[16] Anxious to assure the stability of contractual arrangements, the Framers of the Constitution included the Contract Clause to prevent state abridgement of contracts.[17] The Supreme Court, under Chief Justice John Mar-

[11] Hepburn v. Griswold, 75 U.S. 603, 624 (1870) (Chase, C.J.).
[12] J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 10 (1956).
[13] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 337 (14th ed. 1918).
[14] 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 3 (5th ed. 1866).
[15] HENRY SUMNER MAINE, ANCIENT LAW 165 (1st American ed. 1864).
[16] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 37 (2d ed. 1998).
[17] Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 534 (1987) ("[T]he history of the Clause suggests that it was aimed at all retrospective, redistributive schemes in violation of vested contractual rights, of which debtor relief was merely a prime example.").

shall, gave a broad reading to this provision, holding that the language encompassed both agreements among private parties and contracts to which states were parties.[18] As scholars know well, in a line of cases, the Marshall Court ruled that the Contract Clause applied to legislative land grants,[19] tax exemptions,[20] corporate charters,[21] agreements between states,[22] and state bankruptcy laws.[23]

For our purposes, the most important Contract Clause case decided during Marshall's tenure was *Dartmouth College v. Woodward* (1819).[24] The controversy originated as a struggle over control of Dartmouth College and soon became a partisan issue in state politics. In 1816, the New Hampshire legislature increased the size of the college's board of directors and sought to impose public supervision. Complex legal maneuvers ensued, leading to eventual review by the Supreme Court.[25] Speaking for the Court, Marshall declared that the grant of a corporate charter amounted to a contract.[26] Finding that Dartmouth College was a private eleemosynary corporation, he had no difficulty in holding that the state law impaired the contract. Coming at a time when Americans increasingly looked to the corporation as a vehicle for raising capital and fostering economic growth, the *Dartmouth College* decision had the potential to aid business interests by curbing public interference with state-granted corporate charters by means of subsequent legislative amendments.

Yet the ruling in *Dartmouth College* did not close the door on all state authority over business corporations. In an elaborate concurring opinion, Justice Story raised the matter of clauses in charters of incorporation reserving to the state legislature the power to amend or repeal such charters.[27] "If the legislature means to claim such an authority," he observed, "it must be reserved in the grant."[28] The exercise of an expressly reserved power of amendment would not run afoul of the Contract Clause because it was part of the original grant. Thus, Story had pointed to a means by which states could evade the *Dartmouth College* decision. Although

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[18] James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1029–33 (2000) (contending that Marshall's application of Contract Clause to public as well as private agreements was consistent with both purpose and language of clause).
[19] Fletcher v. Peck, 10 U.S. 87 (1810).
[20] New Jersey v. Wilson, 11 U.S. 164 (1812).
[21] Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).
[22] Green v. Biddle, 21 U.S. 1 (1823).
[23] Sturges v. Crowinshield, 17 U.S. 122 (1819).
[24] *Dartmouth Coll.*, 17 U.S. 518.
[25] For the background of this litigation, see MAURICE G. BAXTER, DANIEL WEBSTER AND THE SUPREME COURT 65–109 (1966); FRANCIS N. STITES, PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819, at 1–55 (1972).
[26] For helpful treatments of Marshall's opinion, see CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 88–95 (1996); Bruce A. Campbell, Dartmouth College *as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643 (1982); Ely, *supra* note 18, at 1036–37.
[27] For a discussion of Story's concurring opinion, see R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMEN OF THE OLD REPUBLIC 129–31 (1985).
[28] *Dartmouth Coll.*, 17 U.S. at 712 (Story, J., concurring).

the practice was not uniform, states started to place reservation clauses in corporate charters and in general incorporation laws.[29]

The Marshall Court was not alone in enforcing the Contract Clause. Some antebellum state courts also invalidated debtor-relief legislation as an unconstitutional impairment of contracts.[30] Other state courts followed the *Dartmouth College* decision and held that a corporate grant constituted a contract that could not be altered by subsequent legislation.[31] State governments were the primary source of economic regulation throughout most of the nineteenth century, and so decisions limiting the exercise of state authority under the Contract Clause meant that much economic activity would be governed by market forces.

Despite the development of a muscular Contract Clause jurisprudence, Marshall and his colleagues never displaced all state authority over contractual arrangements. As discussed above, states could circumvent the rule that a corporate charter was a contract by expressly reserving the power to alter or repeal grants of incorporation.[32] In *Ogden v. Saunders* (1827), moreover, the Court majority, over a dissent by Marshall, ruled that the Contract Clause was directed only against legislation which retroactively impaired existing contracts.[33] States were free to enact laws which applied to agreements made after the statute was enacted. In other words, the clause did not reach laws that operated prospectively.[34] The Supreme Court subsequently adhered to this understanding of the Contract Clause. Justice Noah Swayne, writing for the Court in *Edwards v. Kearzey* (1878) explained: "The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts hereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."[35]

Marshall himself limited the reach of the Contract Clause by recognizing a rather cloudy distinction between contractual rights and the remedies to enforce those rights. As he explained in *Sturges v. Crowinshield* (1819):

> The distinction between the obligations of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of

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[29] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 197–98 (2d ed. 1985).
[30] *E.g.*, Bailey v. Gentry, 1 Mo. 337 (1822); Jones v. Crittenden, 4 N.C. 55, Car. L. Rep. 385 (1814); Townsend v. Townsend, 7 Tenn. (Peck) 1 (1821) (finding that stay law ran afoul of Contract Clause in both United States and Tennessee constitutions).
[31] *E.g.*, Hartford Bridge Co. v. Town of E. Hartford, 16 Conn. 149, 177–78 (1844) (holding that law reviving ferry across Connecticut River impaired franchise of bridge company); Derby Tpk. Co. v. Parks, 10 Conn. 522, 540–43 (1835) (characterizing Contract Clause as "a most valuable provision of the [C]onstitution of the United States" and finding law charging toll rate of turnpike company invalid).
[32] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 337–39 (5th ed. 1883).
[33] 25 U.S. 213 (1827).
[34] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS 223 (1887).
[35] Edwards v. Kearzey, 96 U.S. 595, 603 (1878).

> the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.[36]

Marshall went on to declare that states, for example, could abolish imprisonment for debt without impairing the obligations of the contract. In the wake of Marshall's suggestion, the Court in *Mason v. Haile* (1827) easily sustained retroactive application of a Rhode Island law abolishing imprisonment for debt. It reasoned: "Such laws act merely upon the remedy, and that only in part. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy."[37]

Courts amplified the right/remedy distinction throughout the nineteenth century. An absolute refusal of a state to provide any means of legal redress, of course, would clearly violate the obligation of contract. But courts took the position that state lawmakers could make even material changes in the process of contract enforcement so long as a substantial remedy was provided.[38] An allied question related to the exemption of the property of debtors from the claims of creditors. Exemption laws generated a great deal of litigation, and generalizations are difficult. As a broad proposition, courts upheld laws exempting certain property from execution, but treated laws that greatly enlarged the exemption of debtor property as effectively depriving the creditor of all remedy.[39] The elusive rights/remedy gave courts a degree of flexibility in Contract Clause cases and allowed judges to uphold some statutes that arguably amounted to contractual infringements.

Moreover, the rise of the business corporation caused judges to rethink the sanctity of corporate charters. Exclusive privileges obtained in earlier charters could block technological and economic progress.[40] In *Providence Bank v. Billings* (1830), therefore, the Marshall Court adopted the view that privileges, such as tax exemptions, could not be implied from the grant of a corporate charter and must be expressly set forth in order to receive protection under the Contract Clause.[41] Roger B. Taney, Marshall's successor as Chief Justice, built upon this decision to insist in *Charles River Bridge v. Warren Bridge* (1837) that corporate grants should be strictly construed for Contract Clause purposes.[42] The Taney Court pursued this norm vigorously to narrow the Contract Clause as a shelter for corporate privilege.[43]

The Supreme Court under Taney, however, continued to strike down state laws which interfered with private contractual arrangements. Thus, in *Bronson v.*

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[36] Sturges v. Crowinshield 17 U.S. 122, 200 (1819).
[37] Mason v. Haile, 25 U.S. 370, 378 (1827).
[38] COOLEY, *supra* note 4, at 286–88.
[39] CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS ON POLICE POWER IN THE UNITED STATES 516–22 (1886).
[40] *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 161–63 (1971) (pointing out that claims embodied in earlier corporate charters had potential to retard new enterprises and adoption of innovations).
[41] 29 U.S. 514 (1830).
[42] 36 U.S. 420 (1837).

Kinzie (1843), the Justices invalidated laws which retroactively modified the terms of existing mortgages.[44] Taney forcefully asserted that the purpose of the Contract Clause "was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union . . . ."[45] The *Bronson* rationale was applied in several later cases in which state legislatures had substantially altered the remedy available to mortgagees.[46] Similarly, the Taney Court ruled that a tax on Maryland banks violated a tax exemption in their corporate charters and was barred by the Contract Clause.[47] By the mid-nineteenth century, the Contract Clause was increasingly invoked to bar localities from repudiating their bonded debt. In *Gelpcke v. City of Dubuque* (1864),[48] decided late in Taney's tenure, the Justices treated principles forged in Contract Clause cases as a matter of general law in a federal diversity suit.[49] They ruled that state courts could not retroactively divest bondholders of their contractual rights by changing the interpretation of state law governing the validity of bond issues.[50] In effect, the Supreme Court took the position that state courts, as well as state legislators, were forbidden to impair the obligation of contract.[51] Contract Clause doctrine figured prominently in several hundred municipal bond cases heard by the Supreme Court in the years following *Gelpcke*. Applying Contract Clause-like principles in the exercise of its diversity jurisdiction, the Court regularly sustained the validity of local bonds.

So widely shared was the conviction that agreements should be honored that the Constitution of the Confederacy, notwithstanding its affirmation of state sovereignty,[52] contained a clause that prevented the states from abridging contracts.[53] Interestingly, the Confederate Constitution placed a similar restriction on Congress.[54] In 1870, Chief Justice Chase referred to the Contract Clause as "that

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[43] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 25–27 (1991).
[44] 42 U.S. 311 (1843).
[45] *Id.* at 318.
[46] *E.g.*, Howard v. Bugbee, 65 U.S. 461 (1861).
[47] Gordon v. Appeal Tax Court, 44 U.S. 133, 149 (1845).
[48] 68 U.S. 175 (1864). For a discussion of *Gelpcke*, see Charles A. Heckman, *Establishing the Basis for Local Financing of American Railroad Construction in the Nineteenth-Century: From* City of Bridgeport v. The Housatonic Railroad Company *to* Gelpcke v. City of Dubuque, 32 AM. J. LEGAL HIST. 236 (1988).
[49] Recall that under the rule in *Swift v. Tyson*, 41 U.S. 1 (1842), the federal courts were free to apply federal common law to general commercial questions arising in diversity cases.
[50] *Gelpcke*, 68 U.S. at 205–06. In later diversity cases involving municipal bonds, the Supreme Court often employed Contract Clause language. *E.g.*, Douglass v. Pike County, 101 U.S. 677, 686–87 (1880).
[51] For a study of the extent to which a change in state judicial decisions might violate the Contract Clause, see Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373 (1992). *See also* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 747–50 (1984) (arguing that Contract Clause should be construed to reach both judicial and legislative activity).
[52] *See* CHARLES ROBERT LEE, THE CONFEDERATE CONSTITUTIONS (1963) (viewing Confederate constitution as expression of states rights philosophy).
[53] CONFEDERATE CONST. of 1861, art. I, § 10, cl. 1; *see* Barnes v. Barnes, 53 N.C. (8 Jones) 366 (1861) (invalidating stay law on grounds measure violated Contract Clause in Confederate Constitution); *see also* Burt v. Williams, 24 Ark. 91 (1863) (striking down Civil War era state law suspending collection of debts until one year after peace as violative of Contract Clause in Arkansas Constitution).
[54] CONFEDERATE CONST. of 1861, art. I, § 8, cl. 4 (authorizing Congress to enact bankruptcy laws, but declaring that "no law of Congress shall discharge any debt contracted before the passage of the same").

most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice . . . ."[55] By 1878, Justice William Strong could proclaim with considerable accuracy: "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away."[56] A few years later, Maine similarly declared that "there is no more important provision in the whole Constitution" than the Contract Clause, and he pictured this clause as "the bulwark of an American individualism against democratic impatience and Socialist fantasy."[57]

Waning of Contract Clause

Yet the same time period produced a number of Supreme Court decisions that, according to historians, marked the beginning of the gradual decline of the Contract Clause. The Court limited the ambit of the Contract Clause by declaring that state legislatures could not bargain away attributes of sovereignty. In *West River Bridge Co. v. Dix* (1848), the Court concluded that the power of eminent domain was paramount to rights conferred by a corporate charter.[58] It followed that exclusive franchises and grants of corporate privilege could be acquired by eminent domain, upon payment of just compensation, without violating the obligation of contracts. A state, in other words, could buy its way out of an ill-considered charter.

More significant was a cluster of cases holding that states could not even use express contract language to divest themselves of the authority to exercise their police power to safeguard the health, safety, and morals of the public.[59] The Supreme Court in *Beer Co. v. Massachusetts* (1878), for example, rejected a Contract Clause challenge to a state prohibition law that rendered worthless a corporate franchise to manufacture liquor.[60] Observing that "[a]ll rights are held subject to the police power of the State," the Court ruled that a state could not by any contract bargain away its power to legislate for "the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."[61] Similarly, the Court determined in *Fertilizing Co. v. Hyde Park* (1878) that a corporate charter authorizing a company to manufacture fertilizer in a particular location was not impaired by a local ordinance prohibiting the transportation of

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[55] Hepburn v. Griswold, 75 U.S. 603, 623 (1870) (Chase, C.J.).
[56] Murray v. Charleston, 96 U.S. 432, 448 (1878).
[57] HENRY SUMNER MAINE, POPULAR GOVERNMENT, FOUR ESSAYS 247 (H. Holt & Co. 1886).
[58] 47 U.S. 507 (1848).
[59] *See* BISHOP, *supra* note 34, at 220–21; COOLEY, *supra* note 32, at 339–44; *see also* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1836–1918, at 618 (new & rev. ed. 1926) (pointing out that in late nineteenth-century Contract Clause cases Supreme Court "was prepared to go to great lengths in sustaining State legislation interfering with corporate charters").
[60] 97 U.S. 25 (1878).
[61] *Id.* at 32–33.

offal.[62] Although this ban effectively halted the operation of the factory, the Court insisted that contractual agreements were subject to the police power to abate a public nuisance. This emerging police power exception to the Contract Clause was amplified in *Stone v. Mississippi* (1880).[63] At issue was a state law outlawing the sale of lottery tickets. A company previously authorized to conduct lotteries for a term of years argued that this measure abridged its contractual right to sell tickets. Chief Justice Morrison R. Waite, speaking for the Court, rejected this contention. He emphasized that a state legislature could not bargain away its police power over public health and morals, and that any attempt to do so did not create rights protected by the Contract Clause.[64]

The need to safeguard public health again trumped the Contract Clause in *Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co.* (1884).[65] The case involved an 1869 corporate charter granting the Crescent City Company an exclusive privilege to conduct the business of butchering, a potentially unwholesome trade, in New Orleans for twenty-five years. A subsequent state constitution abolished the monopoly features of corporate charters, and New Orleans opened the right to engage in butchering to general competition. Brushing aside an argument that the constitutional provision impaired the contract in the 1869 charter, the Supreme Court took the position that states cannot by contract limit the exercise of their power over public health and morals.[66]

The language of the Contract Clause contains no mention of a police power exception. Recognition of such a limitation clearly diluted the scope of the Contract Clause, but did not necessarily undermine its protective function concerning most contracts. Much depended on how the police power was defined. By the late nineteenth century, this question was frequently litigated within the context of the Contract Clause. So long as the concept of police power was understood in terms of promoting health, safety, or moral interests, there was little danger that the exception would devour the clause. It bears emphasis that the police power cases discussed above all involved morals or health regulations. In the twentieth century, however, the definition of the police power was enlarged to include an amorphous notion of public welfare. Once it became clear that legislative determinations of

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[62] 97 U.S. 659 (1878).
[63] 101 U.S. 814 (1880).
[64] *Id.* at 819–20 (declaring that "[t]he contracts which the Constitution protects are those that relate to property rights, not governmental").
[65] 111 U.S. 746 (1884) (Miller, J.).
[66] Although the Court's opinion in *Butchers' Union* was grounded on a public health rationale, there was no discussion of how destruction of the slaughtering monopoly helped to improve public health. The constitutional amendment at issue seemed animated largely by anti-monopoly concerns. WARREN, *supra* note 59, at 620–21.

public welfare could override the security of agreements, the Contract Clause would be dramatically reduced in constitutional significance.[67]

Of course, the Contract Clause did not wither away overnight. Both federal and state courts continued to invoke the clause to invalidate state laws. Nonetheless, the Supreme Court ceased to interpret the clause in an innovative manner and increasingly relied on other constitutional provisions to safeguard economic interests. This change became evident during the pivotal tenure of Melville W. Fuller as Chief Justice between 1888 and 1910.[68] The Fuller Court earned a reputation as a champion of property and contractual rights, but the Contract Clause was of diminished importance in the Court's property-conscious jurisprudence. This development was especially striking because the Fuller Court simultaneously placed its seal of approval on the emerging liberty-of-contract doctrine under the Due Process Clause of the Fourteenth Amendment.

It has been estimated that almost twenty-five percent of the cases questioning the constitutionality of state laws heard by the Fuller Court involved the Contract Clause.[69] Fuller and his colleagues upheld the vast majority of challenged state actions, but they invoked the Contract Clause to invalidate state laws in at least twenty-eight cases.[70] Thus, at first glance, the Supreme Court under Fuller would appear to have vigorously enforced the Contract Clause. Following the path of its predecessors, the Court closely reviewed state laws altering debtor-creditor relations. It twice struck down debtor-relief legislation that infringed prior mortgage contracts.[71] The Justices also invoked the Contract Clause to bar attempts by Virginia to repudiate its bonded debt.[72] In *Mobile and Ohio Railroad Co. v. Tennessee* (1894), moreover, the Fuller Court upheld a tax immunity granted to a railroad against an effort by the state to levy a tax on the carrier.[73]

In several respects, however, the Fuller Court placed a surprisingly crabbed interpretation on the protection afforded contractual obligations under the Contract Clause. It adhered to the long-standing rule that legislative grants should be strictly construed. This tendency was apparent in the railroad rate cases. Even where the terms of a corporate charter apparently granted a railroad company the right to determine its own charges, the Fuller Court invariably concluded that the language was not sufficiently definite to constitute a rate contract.[74] In marked contrast to the

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[67] *See* Kmiec & McGinnis, *supra* note 17, at 540–41.
[68] For an account of the Fuller court, see ELY, *supra* note 2.
[69] WRIGHT, *supra* note 4, at 95–96.
[70] ELY, *supra* note 2, at 111.
[71] Bradley v. Lightcap, 195 U.S. 1 (1904); Barnitz v. Beverly, 163 U.S. 118 (1896).
[72] This litigation involved legislative efforts to undermine the value of tax-receivable coupons attached to state bonds. McGahey v. Virginia, 135 U.S. 662 (1890); Cuthbert v. Virginia, 135 U.S. 698 (1890).
[73] 153 U.S. 486 (1894); *see also* Stearns v. Minnesota, 179 U.S. 223 (1900) (attempt by state to tax certain real property owned by railroads impaired contract governing method of taxing carriers).
[74] ELY, *supra* note 2, at 115.

expansion of due process review of state-imposed railroad rates during the 1890s,[75] Fuller and his colleagues never found a railroad rate to conflict with the Contract Clause.

The Fuller Court also enlarged the police power exception to the Contract Clause in ways that facilitated regulation of business activity. In *New York and New England Railroad Co. v. Bristol* (1894),[76] for instance, Fuller rejected a Contract Clause challenge to a state law directing the removal of a railroad grade crossing annually at the sole expense of the company. He reasoned that the Contract Clause was "not violated by the legitimate exercise of the legislative power in securing the public safety, health, and morals."[77] Further, in several cases Fuller and his colleagues adopted a view of the police power that moved well beyond the traditional focus on public health, safety, and morals. The case of *Pearsall v. Great Northern Railway Co.* (1896) highlights this tendency.[78] A railroad company was expressly authorized in its charter to consolidate with other railroads running in the same direction. Thereafter, the Minnesota legislature enacted a statute prohibiting mergers between railroads with parallel lines. The company argued that enforcement of this measure affected its rights under the charter and ran afoul of the Contract Clause. Justice Henry Billings Brown, in a murky opinion, emphasized that charter grants by the states should be strictly construed. Noting the existence of strong public sentiment against monopolies, he ruled that since the power to consolidate had not been executed, such authority "is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public."[79] It was competent for the legislature, Justice Brown continued, "to declare that [the corporate] charter should not be used for the purpose of stifling competition and building up monopolies."[80] The case suggests that the police power encompassed anti-monopoly concerns and that the Contract Clause did not bar legislative control of corporations in the public interest.[81]

As we have seen, the cases that first established the police power as a limitation on the scope of the Contract Clause involved alleged impairments of state-granted corporate franchises by later legislation. The doctrine permitted state legislatures to modify public contracts to which the state was a party. As Benjamin Fletcher Wright, Jr., pointed out, the reserved police power "had been developed to deal with contracts to which a state was a party, that is, to public contracts, or to contracts between private persons where the subject matter of the contract was

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[75] *See* RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 77–124 (1993); JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 96–99 (2001).
[76] 151 U.S. 556 (1894).
[77] *Id.* at 567.
[78] 161 U.S. 646 (1896).
[79] *Id.* at 673–74.
[80] *Id.* at 675.
[81] *See* WRIGHT, *supra* note 4, at 140, 159; *see also* HOVENKAMP, *supra* note 43, at 33 (pointing out that in late nineteenth century, business corporations lost most Contract Clause arguments before Supreme Court).

deemed to be of unusual public importance."[82] Yet the Fuller Court, without any discussion, applied the police exception to the quite distinct situation of a private agreement among individuals. At issue in *Manigault v. Springs* (1905) was an agreement between private parties to remove an existing dam and to allow a creek to remain unobstructed.[83] Subsequently, a state statute authorized one of the contracting parties to build a dam across the stream for the purpose of land drainage. Brushing aside an argument that the statute was an impairment of contract, the Supreme Court insisted that the state police power "was paramount to any rights under contracts between individuals." It added that "parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."[84] The Court recognized that the statute under review was not an ordinary exercise of the police power to protect the health and morals of the community, but concluded that the measure promoted "the general welfare of the people" by reclaiming swampy land. Perhaps the Justices reasoned that a strong legislative concern for control of public waterways justified interference with private contracts, although such a rationale was not articulated. In any event, the upshot of *Manigault* was a diminishment of the protection given to private agreements under the Contract Clause.[85] If legislative determinations about the exigencies of public welfare could trump private contractual arrangements, there was little force left to the once-powerful Contract Clause. Ironically, *Manigault* was decided in the same year as the Fuller Court affirmed the liberty of contract in *Lochner*.

By the early twentieth century, the Contract Clause had manifestly slipped into secondary constitutional status. Starting in the 1890s, attorneys relied less often on the Contract Clause as the principal basis to attack state regulatory legislation. They were increasingly inclined to join a Contract Clause claim with an allegation that the challenged state law amounted to deprivation of property without due process.[86]

The later history of the Contract Clause can, for our purposes, be quickly told. The clause figured less prominently in constitutional litigation during the 1920s[87] and received a near-fatal blow in *Home Building and Loan Ass'n v. Blaisdell* (1934), a controversial decision which upheld a temporary moratorium on the foreclosure of mortgages.[88] The statute was similar to debtor-relief measures the Court

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[82] WRIGHT, *supra* note 4, at 211.
[83] 199 U.S. 473 (1905).
[84] *Id.* at 480.
[85] *See* Robert L. Hall, *The Supreme Court and the Contract Clause* (pt. 2), 57 HARV. L. REV. 621, 673–74 (1944).
[86] *See* ELY, *supra* note 2, at 115.
[87] *See* WRIGHT, *supra* note 4, at 97 ("During the twenties . . . the proportion of contract cases is barely a fourth as high as it had been before 1890.").
[88] 290 U.S. 398 (1934). For sharp criticism of *Blaisdell*, see Kmiec & McGinnis, *supra* note 17, at 129–32; Epstein, *supra* note 51, at 735–38; Charles A. Bieneman, Note, *Legal Interpretation and a Constitutional Case:* Home Building and Loan Association v. Blaisdell, 90 MICH. L. REV. 2534, 2535 (1992) (concluding that *Blaisdell* "was wrongly decided under any theory of interpretation"). During the 1930s some state courts struck down state laws imposing a moratorium on mortgage foreclosures as a violation of Contract

had frequently struck down throughout the nineteenth century. Some scholars believe that Chief Justice Charles Evans Hughes, who spoke for a sharply divided Supreme Court in *Blaisdell*, intended to allow the states room to deal with the economic emergency of the Great Depression, while at the same time maintaining the Contract Clause as a meaningful restraint on state power.[89] Whatever Hughes may have hoped, *Blaisdell* had the effect of virtually gutting the Contract Clause. Adopting a balancing approach to the interpretation of the Contract Clause, Hughes suggested that a state's interest in regulating economic conditions could justify interference with private agreements. With this reasoning, the police power exception had simply swallowed the Contract Clause.[90] Any vitality remaining in the clause was soon swept away with the triumph of New Deal constitutionalism and the emergence of the regulatory state. After the constitutional revolution of 1937, the Supreme Court abandoned its traditional commitment to protecting property and contractual rights, and deferred to legislative judgments about economic policy.[91] The general eclipse of property rights affected the Contract Clause, which fell into disuse by the Supreme Court for decades. For all practical purposes, the guarantee of the Contract Clause was now subordinated to state regulatory authority.[92]

In the late-1970s, the Supreme Court briefly seemed poised to breathe new life into the Contract Clause. It struck down two state laws on Contract Clause grounds.[93] But the Court failed to show any sustained interest in a revival of the Contract Clause and to date has not again voided any state enactments under the provision.[94] It should be noted, however, that some state and lower federal courts

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Clauses in state constitutions. *See, e.g.*, First Trust Co. of Lincoln v. Smith, 277 N.W. 762 (Neb. 1938) (invalidating extension of state mortgage moratorium law); Travelers' Ins. Co. v. Marshall, 76 S.W.2d 1007 (Tex. 1934) (distinguishing and declining to follow *Blaisdell*).

[89] *See* Richard A. Maidment, *Chief Justice Hughes and the Contract Clause: A Reassessment*, 8 J. LEGAL HIST. 316 (1987); Samuel R. Olken, *Charles Evans Hughes and the* Blaisdell *Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 591–600 (1993) (arguing that *Blaisdell* decision "was actually quite narrow," and that Hughes "did not intend to eviscerate the constitutional protection of vested contract rights"); 2 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 475 (7th ed. 1991) ("Hughes's opinion skirted close to the proposition that an emergency might empower government to do things which in ordinary times would be unconstitutional."). Notwithstanding *Blaisdell*, the Supreme Court struck down several state relief laws during the 1930s as violative of the Contract Clause. *See* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) (Cardozo, J.); W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934) (Hughes, C.J.) (distinguishing *Blaisdell*).

[90] Epstein, *supra* note 51, at 738 ("Today the police power exception has come to eviscerate the contracts clause.").

[91] ELY, *supra* note 16, at 126–34.

[92] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 211–13 (1990).

[93] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241–42 (1978) (insisting that Contract Clause "is not a dead letter"); United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977) (invalidating state effort to change terms of its bonded obligations and denying "that the Contract Clause was without meaning in modern constitutional jurisprudence").

[94] The Supreme Court rejected Contract Clause challenges in *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

have recently invoked the Contract Clause in federal and state constitutions to declare state legislation unconstitutional.[95]

Origins of Liberty-of-Contract Doctrine

The growth of freedom of contract as a constitutional right protected by the Due Process Clause of the Fourteenth Amendment can be traced to several sources. Like jurisprudence under the Contract Clause to safeguard existing agreements, the notion of contractual freedom had deep roots in the legal culture. Although it bore some relationship to Contract Clause doctrine, the concept of liberty of contract was distinct and more far-reaching. As discussed above, private law had long exalted the capacity of private parties to make economic bargains for themselves. In the late nineteenth century, courts began to constitutionalize this right to enter contracts in a free market.

Chief Justice Marshall's dissenting opinion in *Ogden v. Saunders* (1827) is a useful starting place for our analysis.[96] Marshall took the position that the prohibition of the Contract Clause was directed at prospective as well as retrospective legislation impairing the obligation of contract. He grounded contractual rights in preexisting natural law rather than state law. To Marshall, the right to make agreements was "anterior to, and independent of society."[97] He insisted 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."[98] Marshall was unable to win acceptance of his comprehensive vision of the Contract Clause, but his view of the fundamental nature of contractual freedom eventually found a home in the Due Process Clause. Had Marshall's opinion prevailed, it is entirely possible that the right to enter agreements in the future would have been protected against state interference under the Contract Clause.[99]

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[95] *E.g.*, Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 849–62 (8th Cir. 2002) (finding that state law impaired obligations of pre-existing dealership agreements in violation of Contract Clause); *In re* Workers' Comp. Refund, 46 F.3d 813 (8th Cir. 1995) (state statute governing distribution of excess compensation premiums impaired contracts with insurers); Earthworks Contract, Ltd. v. Mendel-Allison Constr. of Cal., Inc., 804 P.2d 831 (Ariz. App. 1990) (holding that application of license requirement to work performed by contractor before effective date of statute ran afoul of Contract Clause of both Arizona and United States constitutions); Fed. Land Bank of Wichita v. Story, 756 P.2d 588 (Okla. 1988) (striking down mortgage foreclosure moratorium as violation of Contract Clause in both federal and state constitutions).

[96] 25 U.S. 213 (1827).

[97] *Id.* at 345.

[98] *Id.* at 346–47.

[99] *See* WRIGHT, *supra* note 4, at 50 (observing that Marshall's opinion "might have given to the court a power of supervision over legislation under the Contract Clause comparable with that developed late in the century under the Due Process Clause").

Natural law theory about the right to make contracts was reinforced by the ideology of the anti-slavery movement.[100] Congress saw the right to make contracts and acquire property as critical to the ability of former slaves to participate in the market economy.[101] Accordingly, the Civil Rights Act of 1866 specifically listed the rights "to make and enforce contracts" and to acquire property among the liberties guaranteed to freedpersons.[102] The Fourteenth Amendment was designed in part to resolve doubts about the constitutionality of the 1866 act and thus to secure the economic rights of former slaves. Little wonder that many observers understood that the Fourteenth Amendment protected substantive economic rights.[103] The unresolved question was how these rights should be defined.

Justice Stephen J. Field, the most influential jurist of the Gilded Age, was instrumental in laying the groundwork for due process protection for liberty of contract.[104] In a series of famous dissenting and concurring opinions, starting with the *Slaughterhouse Cases* (1873), he urged recognition of the right of individuals to pursue common occupations without governmental interference.[105] Although Field initially spoke in dissent on the Supreme Court, his views gained currency among state courts in the 1880s. In the leading case of *In re Jacobs* (1885), for example, the New York Court of Appeals struck down an act that outlawed the manufacture of cigars in residential apartments in New York City.[106] The court found that the law did not promote public health and amounted to a deprivation of property and liberty without due process.[107] It reasoned that the statute trammeled the right of individuals to use their property to carry on a lawful trade and denied them the liberty to pursue ordinary callings. Once courts determined that persons had a constitutional right to earn a livelihood and to acquire property without arbitrary state interference, it was a short step to safeguard freedom of contract to obtain these goals.[108]

State courts soon began to invalidate legislation as an infringement of a constitutional right to enter agreements. In *Godcharles v. Wigeman* (1886), the Su-

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[100] Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1862–1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 22–33 (tracing liberty-of-contract doctrine to pervasive "free labor" ideology of Civil War era).

[101] HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND THE CIVIL WAR ERA 109–10 (1978).

[102] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–1982 (2004)).

[103] Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 394–98 (1988).

[104] For a helpful study of Field, see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997).

[105] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 754–60 (1884) (Field, J., concurring); Munn v. Illinois, 94 U.S. 113, 136–54 (1877) (Field, J., dissenting); Slaughterhouse Cases, 83 U.S. 36, 83–111 (1873) (Field, J., dissenting).

[106] 98 N.Y. 98 (1885).

[107] For an analysis of *Jacobs*, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1579–81 (2003).

[108] *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 126–27 (1993) (discussing how recognition of right to acquire property was linked to protection of contractual freedom).

preme Court of Pennsylvania voided a statute requiring that iron-mill employees be paid in money.[109] Without mentioning any particular constitutional provision, the court emphatically declared: "[A]n attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."[110]

In the same vein, the Supreme Court of Illinois in *Ritchie v. People* (1895) found that a statute limiting the hours of work of women in factories amounted to a deprivation of property and liberty without due process of law.[111] They considered at length the constitutional status of contracting:

> The privilege of contracting is both a liberty and property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to use, buy, and sell property and contract in respect thereto is protected by the Constitution . . . . In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer.
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> . . .
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> The right to acquire, possess, and protect property includes the right to make reasonable contracts.[112]

The Supreme Court of Arkansas in *Leep v. St. Louis, Iron Mountain, and Southern Railway Co.* (1894) agreed that the right to acquire property necessarily encompassed the right to contract, adding: "Of all the 'rights of persons' it is the most essential to human happiness."[113] Other state courts similarly stressed the vital importance of freedom of contract, often in the context of protective labor legislation.[114]

Hence, the idea that contractual freedom was constitutionally protected against arbitrary state abridgement was widely accepted as an aspect of state constitutionalism before the Supreme Court addressed the question.[115] Of course, the right to make contracts was not unlimited. It was generally recognized that the government could control contracting in the exercise of its police power to prevent fraud or to prohibit agreements by parties deemed incapable. "In a variety of

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[109] 6 A. 354 (Pa. 1886).
[110] *Id.* at 356.
[111] 40 N.E. 454 (Ill. 1895).
[112] *Id.* at 455.
[113] Leep v. St. Louis, Iron Mountain & S. Ry. Co., 25 S.W. 75, 77 (Ark. 1894).
[114] *E.g.*, Johnson v. Goodyear Mining Co., 59 P. 304 (Cal. 1899); Commonwealth v. Perry, 28 N.E. 1126, 1127 (Mass. 1891) ("The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."); State v. Loomis, 22 S.W. 350 (Mo. 1893); Low v. Rees Printing Co., 59 N.W. 362, 366–68 (Neb. 1894).
[115] LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 25, (2002) (noting that "there were important forerunners of *Lochner* on the state level. It was in the state supreme courts that some important doctrines of constitutional law first saw the light of day—doctrines of due process, or liberty of contract.").

ways," historian Morton Keller has pointed out, "late nineteenth century courts and legislatures contained freedom of contract."[116] Still, courts treated freedom of contract as the baseline and required legislators to justify restrictions on contractual freedom.

The freedom-of-contract doctrine was one component of what would later be termed "substantive due process." This phrase is anachronistic when used to describe decisions rendered during the nineteenth and early twentieth centuries. Courts did not distinguish between procedural and substantive due process until the New Deal era.[117] The unitary concept of due process fell apart in the late 1930s, but no Supreme Court justice employed the term "substantive due process" until 1948.[118] During the 1940s, commentators also began to use the phrase, often as a pejorative label designed to stigmatize the entire line of economic rights cases decided under the Due Process Clause.[119] Since the judges who fashioned the liberty-of-contract principle never employed the phrase "substantive due process," I have endeavored to avoid the term in this article.

The Supreme Court and Freedom of Contract

The Supreme Court was relatively slow to adopt the liberty-of-contract principle. An early intimation by the Court of a constitutional right to make contracts came in *Frisbie v. United States* (1895).[120] In that case, Justice David J. Brewer, writing for the Court, asserted: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal."[121] After noting the power of government to prevent certain types of contract, he declared that such governmental authority "in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."[122] Although a harbinger of emerging freedom-of-contract jurisprudence, Brewer did not expressly ground this freedom in the Due Process Clause of the Fourteenth Amendment and stressed that such liberty did not extend to all contracts.

In *Allgeyer v. Louisiana* (1897),[123] the Court gave an expansive reading to the scope of "liberty" protected by the Due Process Clause of the Fourteenth Amendment and for the first time adopted freedom of contract as a constitutional norm. At issue in *Allgeyer* was a state law that prohibited an individual within Louisiana

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[116] MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 416 (1977).
[117] *See* Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood*, 82 KY. L.J. 397, 404 (1993–1994) ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.").
[118] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).
[119] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 206–07 (2004); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 241–46 (2000).
[120] 157 U.S. 160 (1895).
[121] *Id.* at 165.
[122] *Id.* at 166.
[123] 165 U.S. 578 (1897).

from affecting an insurance contract with an out-of-state company not qualified to do business in Louisiana. Allgeyer, a Louisiana resident, was convicted of notifying a New York insurance company of a shipment of cotton covered by a marine insurance policy obtained in New York. Justice Rufus W. Peckham, speaking for a unanimous Court, reversed the conviction and broadly asserted:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[124]

He proceeded to link the freedom of contract to "the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property."[125]

Several observations are in order with respect to the outcome of *Allgeyer*. Justice Peckham certainly did not rule out any role for the states in governing contractual freedom. Indeed, he remarked that, pursuant to state police power, contracts could be "regulated and sometimes prohibited" when they conflicted with state policy set forth in a statute.[126] The *Allgeyer* holding was also complicated by the fact that the challenged statute had direct implications for business activity across state lines.[127] Peckham pointedly declared that state power did not extend to prohibiting contracts made outside the jurisdiction.[128] The Supreme Court had long sought to guard the national market from state interference, and *Allgeyer* must be partially seen in this light.[129] Finally, the *Allgeyer* case contradicts the misleading hypothesis fashioned by the Progressives that the Supreme Court adopted the freedom-of-contract principle to aid the propertied and business interests. "The distributional effect of the decision," as Kermit L. Hall has pointed out, "was hardly to protect the rich from the poor, because the measure opened to citizens of the state the opportunity to engage an effective competitor to insurance companies within the state."[130]

Despite the potentially sweeping reach of the freedom-of-contract doctrine, the Supreme Court did not invoke this principle again for a number of years. In a line of cases, the Justices rejected the contention that state laws regulating the terms

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[124] *Id*. at 589.
[125] *Id*. at 591.
[126] *Id*.
[127] *See* HOVENKAMP, *supra* note 43, at 178 ("The legislature probably enacted the statute in *Allgeyer* to protect in-state insurance companies from out-of-state competitors.").
[128] *Allgeyer*, 165 U.S. at 591.
[129] The Supreme Court under Fuller frequently invoked the dormant commerce clause to void state-imposed barriers to commerce across state lines. *See* ELY, *supra* note 2, at 140–48.

and conditions of employment abridged contractual freedom. They sustained the constitutionality of a Utah statute that limited work in underground mines to eight hours a day in *Holden v. Hardy* (1898).[131] Writing for the Court, Justice Brown emphasized that working conditions in mines were unhealthy. He significantly added that mine owners and their employees "do not stand upon an equality, and that their interests are, to a certain extent, conflicting."[132] Under this rationale, state intervention could be justified both to address dangerous workplace conditions and to protect the interests of a party with considerably less bargaining power.

Along the same lines, the Supreme Court in *Knoxville Iron Company v. Harbison* (1901) upheld a Tennessee law that required employers who paid their workers in scrip to redeem the same in money upon request.[133] Persuaded that the statute would foster good employment relations, the Court observed that contractual freedom was not absolute. Nor were the Justices impressed with the argument advanced in *Atkin v. Kansas* (1903) that a state law limiting the hours of work on state and municipal projects infringed the liberty of contract.[134] Justice John Marshall Harlan, writing for the Court, declared that "it cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State."[135] The Supreme Court was also disinclined to apply the freedom-of-contract doctrine in cases regarding business regulations. Two examples illustrate this tendency. In *Nutting v. Massachusetts* (1902), the Court held that a state could ban the sale of insurance within its jurisdiction by unlicensed brokers.[136] The justices likewise looked favorably on state regulation of the commodity and stock markets. In *Otis v. Parker* (1903), for example, they brushed aside a liberty-of-contract contention and upheld a provision of the California Constitution that outlawed contracts for the sale of corporate stock on margin for future delivery.[137]

As this record suggests, by 1905 an observer might well have concluded that the Supreme Court largely paid lip service to the idea of a constitutional right to make contracts free of state oversight. Indeed, Justices Peckham and Brewer, the most stalwart champions of contractual freedom on the Fuller Court, were relegated to frequent dissents. In sharp contrast to a hesitant Supreme Court, state

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[130] KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 236 (1989).
[131] 169 U.S. 366 (1898).
[132] *Id.* at 397.
[133] 183 U.S. 13 (1901).
[134] 191 U.S. 207 (1903).
[135] *Id.* at 222.
[136] 183 U.S. 553 (1902).
[137] 187 U.S. 606 (1903).

courts continued to aggressively strike down laws that violated the liberty-of-contract norm, especially in the employment context.[138]

Then the Supreme Court seemingly put sharp teeth in the liberty-of-contract doctrine with its famous and much-maligned decision in *Lochner v. New York* (1905).[139] The case involved a challenge to a state law that limited work in bakeries to ten hours a day or sixty hours a week. Writing for a 5-4 majority of the Court, Justice Peckham struck down the measure as an infringement of contractual freedom. He maintained: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." He conceded that a state could impose "reasonable conditions" on the enjoyment of both liberty and property.[140] Peckham also agreed that the state could inspect bakeries and enact measures to improve workplace conditions. He drew the line, however, at regulations governing working hours. Peckham was not persuaded that baking was an unhealthy trade, and he could see no relationship between hours of work and the health of bakers. Consequently, he asserted that the "real object and purpose" of the law was to regulate labor relations, not to achieve the purported goal of safeguarding health.[141] Declaring that bakers were capable of looking out for their own interests, Peckham characterized maximum-hours statutes as "mere meddlesome interferences with the rights of the individual."[142]

Justice Harlan, writing for three Justices, likewise endorsed the liberty-of-contract doctrine. "Speaking generally," he stated, "the [S]tate in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone."[143] He differed with the majority only over the application of this principle to the facts of the case. Stressing that contracts were subject to health and safety regulations, Harlan pointed to evidence that prolonged work in bakeries endangered employee health. Harlan's disagreement with the majority turned on the scope of the police power and the degree of deference that should be accorded legislative judgments regarding questions of health and safety.

Only Justice Oliver Wendell Holmes, Jr., in one of his most well-known dissents, repudiated the idea that contractual freedom was protected by the Due

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[138] *E.g.*, *In re* Morgan, 58 P. 1071 (Colo. 1899) (finding law limiting hours of work in mines to violate freedom of contract); People v. Orange County Rd. Constr. Co., 67 N.E. 129 (N.Y. 1903) (invalidating legislative restrictions on hours of work on city projects).

[139] 198 U.S. 45 (1905). For the background of the *Lochner* ruling, see PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990).

[140] *Lochner*, 198 U.S. at 53.

[141] *Id.* at 64.

[142] *Id.* at 61.

[143] *Id.* at 65 (Harlan, J., dissenting).

Process Clause of the Fourteenth Amendment.[144] Since for decades thereafter scholars committed to the welfare and regulatory state echoed Holmes's critique of the *Lochner* majority,[145] the Holmes dissent warrants careful attention. Charging that the case was "decided upon an economic theory which a large part of the country does not entertain,"[146] Holmes quipped that the Fourteenth Amendment did not enact the views of Social Darwinist Herbert Spencer. This was a classic straw man argument. Justice Peckham made no reference to Spencer, whose leading treatise, *Social Statics*, was published more than fifty years before *Lochner* was decided, and there is no evidence that the majority justices paid any heed to the tenets of Social Darwinism.[147] "Ironically," as legal historian David E. Bernstein has pointed out, "the one Justice who showed clear signs of having his jurisprudence influenced by Darwin's evolutionary concepts was Justice Oliver Wendell Holmes . . . ."[148] Reflecting his majoritarian outlook, Holmes further insisted that courts should defer to "the right of a majority to embody their opinions in law."[149] He amplified this thought, declaring that

> the word 'liberty,' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[150]

The Holmes dissent in *Lochner* begs a number of questions. What statute enacted by an elected legislature would not meet his test? Any measure that could gain majority support is bound to be deemed reasonable by a large body of opinion. It would therefore follow that under the Holmes formulation there would be a highly restricted role for judicial review. What was the precise nature of Holmes's quarrel with the majority? Could "a rational and fair" person believe that the statute challenged in *Lochner* abridged "fundamental principles"? That was the position advanced by Justice Peckham. How should we define "fundamental principles"? Holmes does not even attempt to address this issue.

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[144] *Id.* at 74–76. Holmes had long expressed skepticism about claims that contractual freedom enjoyed constitutional protection against legislative regulation. Commonwealth v. Perry, 28 N.E. 1126, 1127–28 (Mass. 1891) (Holmes, J., dissenting).

[145] *See, e.g.*, RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 5–6 (rev. ed. 1955); ROBERT GREEN MCCLOSKEY, AMERICAN CONSERVATION IN THE AGE OF ENTERPRISE, 1865–1910, at 26–30 (1951).

[146] *Lochner*, 198 U.S. at 75.

[147] BARNETT, *supra* note 119, at 215 (declaring that Holmes charge "was as unfair as it was memorable"); HOVENKAMP, *supra* note 43, at 99–100.

[148] Bernstein, *supra* note 1, at 8. For the Darwinian influence on Holmes, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000); Yosel Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 251 (1964).

[149] *Lochner*, 198 U.S. at 75.

[150] *Id.* at 76.

At first, the *Lochner* decision aroused little public interest.[151] Prominent figures in the Progressive Movement of the early twentieth century, however, came to view the ruling as a setback to their agenda of legislative reform of working and social conditions. Roscoe Pound, a leading proponent of sociological jurisprudence, and former President Theodore Roosevelt both lashed out at *Lochner*.[152] So notorious did the decision eventually become that scholars have somewhat loosely used the phrase "*Lochner* era" to characterize an entire period of Supreme Court history.

Yet such a description is misleading on several counts.[153] First, historians have a difficult time determining just when the supposed *Lochner* era actually started. Some point to 1897, when *Allgeyer* was decided. Others consider *Chicago, Milwaukee & St. Paul Railway v. Minnesota* (1890),[154] in which the Supreme Court signaled its willingness to review the reasonableness of state-imposed railroad rates, as the beginning of the *Lochner* era. One commentator has logically mentioned 1905 as the starting point.[155] There is also uncertainty about the end of the so-called *Lochner* era. Traditionally, scholars viewed the Supreme Court's decision in *West Coast Hotel v. Parrish* (1937), part of the constitutional revolution of that year, as marking the termination point. More recently, Barry Cushman has argued that the elusive *Lochner* era actually ended earlier in the 1930s.[156] To further complicate matters, it has been persuasively suggested that the *Lochner* era should be subdivided into three distinct phases.[157] In short, it is not clear that the idea of a *Lochner* era has any chronological coherence.

A second and more fundamental problem with the notion of a *Lochner* era is that it conveys a false impression of the Supreme Court's dedication to the liberty-of-contract doctrine. Judges of the *Lochner* era, we are still frequently told, sought to impose their laissez-faire ideology on the polity.[158] Revisionist scholar-

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[151] KENS, *supra* note 139, at 128 (noting that "initial public reaction to the Court's ruling was very subdued").

[152] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 479–81 (1909); Theodore Roosevelt, *The New Nationalism* (Aug. 31, 1910), *in* SOCIAL JUSTICE AND POPULAR RULE (1926).

[153] *See* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 841 (1998) ("By 1916 *Lochner* seemed to represent not an era but a moment.").

[154] *See* Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890).

[155] Jerold S. Kayden, *Charting the Constitutional Course of Private Property: Learning from the 20th century*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 36 (Harvey M. Jacobs ed., 2004) (claiming *Lochner* era lasted from 1905 to 1937).

[156] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 84–87 (1998) (arguing that liberty-of-contract doctrine was undermined by *Nebbia v. New York*, 291 U.S. 502 (1934)).

[157] *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 6–23 (1991) (contending that in reality there were three *Lochner* eras between 1870 and 1937 divided by how rigorously the Supreme Court reviewed state legislation).

[158] *See, e.g.*, FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986) (charging that Supreme Court justices "steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution"); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123–24 (1988) ("*Lochner* has become in modern times a sort of negative touchstone . . . . We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature.").

ship has destroyed much of this once conventional story.[159] In fact, the *Lochner* decision was not typical and was never consistently followed by the Supreme Court.[160] Instead, the Court infrequently invoked the freedom-of-contract principle and found that most regulatory legislation passed constitutional muster. The Justices began almost at once to move away from *Lochner*. In *Muller v. Oregon* (1908), they upheld a state law restricting the number of working hours for women in factories and laundries, albeit in an opinion that reflected paternalist assumptions about the place of women in society.[161] A year later the Court brushed aside a freedom-of-contract objection and upheld a coal-weighing statute requiring that miners' wages be calculated by the weight of coal mined before screening. Analogizing the measure to laws preventing fraud, the Court noted that statutes mandating honest weights "have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract."[162] Likewise, the Supreme Court found no merit in a liberty-of-contract challenge to the Federal Employers' Liability Act, which abolished common law negligence defenses for railroad employees in interstate commerce.[163] Along the same lines, the Justices dismissed a contention that a workers' compensation law violated "the fundamentals of constitutional freedom of contract."[164] Even more telling was *Bunting v. Oregon* (1917), in which the Court sustained a state law mandating a ten-hour workday in factories for men as well as women.[165] It is difficult to reconcile *Bunting* with *Lochner*, and the outcome of *Bunting* scarcely suggests that the Supreme Court was vigorously enforcing the freedom-of-contract norm.

Rather than acting as a consistent champion of contractual freedom, the Court was inclined to hold the doctrine in reserve and bring it out for occasional application. In *Adair v. United States* (1908), for instance, Justice Harlan, writing for the majority, invalidated a congressional statute that banned so-called yellow dog

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[159] A group of scholars has contended that *Lochner* was correct and has defended the liberty-of-contract principle. *See, e.g.*, BARNETT, *supra* note 119, at 211–14 (emphasizing that *Lochner* simply required state to bear burden of showing necessity for restriction on liberty of contract); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR RELATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 114–17 (2001) (arguing that liberty-of-contract doctrine assisted racial minorities in face of discriminatory labor laws); Hadley Arkes, Lochner v. New York *and the Cast of Our Laws*, *in* GREAT CONSTITUTIONAL CASES 94–129 (Robert P. George ed., 2000); Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 13–20 (1988); Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453, 492–97 (1985); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1370–71 (1990). This rich literature stresses economic liberty and raises questions beyond the scope of this article.

[160] ELY, *supra* note 2, at 100–01; HALL, *supra* note 130, at 242 ("The *Lochner* decision was in many ways an aberration with limited impact.").

[161] 208 U.S. 412 (1908).

[162] McLean v. Arkansas, 211 U.S. 539, 550 (1909); *see also* Rail Riser Coal Co. v. Yapple, 236 U.S. 338 (1915).

[163] Second Employers' Liability Cases, 223 U.S. 1 (1912).

[164] N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 206 (1917) (admitting that "the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment," but holding that it was reasonable exercise of police power concerning compensation for injury suffered in course of hazardous employment).

[165] 243 U.S. 426 (1917).

contracts on railroads.[166] Such contracts made it a condition of employment that workers not join a labor union. Citing *Lochner,* Harlan affirmed "the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation."[167] Finding no health or safety rationale for the statute, he pronounced it an arbitrary abridgement of the right of employers and employees to bargain over the terms of employment. During the 1920s, moreover, the Supreme Court wielded the freedom of contract to overturn state efforts to establish a minimum wage. At issue in the leading case of *Adkins v. Children's Hospital* (1923) was a District of Columbia minimum wage law for women.[168] Justice George Sutherland, writing for the Court, offered a classic defense of contractual freedom. He famously insisted that "freedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[169] The minimum wage law, according to Sutherland, ignored "[t]he moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence . . . ."[170] In addition, he reasoned that such laws cast upon employers a welfare function that should be assigned to society at large. Although *Adkins* is often pictured as a high water mark for strict application of the liberty-of-contract principle, Sutherland was careful to note that contractual freedom was not unlimited. "[T]here is, of course," he cautioned, "no such thing as absolute freedom of contract. It is subject to a great variety of restraints . . . . The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good . . . ."[171]

Even during the 1920s, then, the conservative majority on the Supreme Court was hardly dogmatic in its freedom-of-contract jurisprudence. It continued to reject a number of challenges to economic regulation based on liberty-of-contract grounds. Hence, the Court in *Radice v. New York* (1924) found that a state statute limiting night work for women did not constitute an arbitrary interference with the freedom of adults to make contracts.[172] Indeed, the numerous limitations on contractual freedom made consistent application difficult and helped to weaken the doctrine.

Whereas the Contract Clause gradually withered, the reign of the liberty of contract as a right protected by the due process norm came to an abrupt end during the New Deal period. In *West Coast Hotel v. Parrish* (1937), Chief Justice Hughes, writing for a 5-4 majority, upheld the constitutionality of a Washington State mini-

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[166] 208 U.S. 161 (1908).
[167] *Id.* at 174. The same analysis was subsequently applied to invalidate a state law outlawing yellow-dog contracts. Coppage v. Kansas, 236 U.S. 1 (1915).
[168] 261 U.S. 525 (1923). For a spirited defense of Sutherland's opinion in *Adkins*, see HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 70–81 (1994).
[169] *Adkins*, 261 U.S. at 546.
[170] *Id.* at 558.
[171] *Id.* at 546, 561.

mum wage law for women and overruled *Adkins*.[173] Hughes emphasized that "the Constitution does not speak of freedom of contract."[174] Although not denying that contractual freedom was a constitutional right, he pointed out that legislators had "power under the Constitution to restrict freedom of contract" in order to advance community welfare.[175] Decrying the "exploitation of a class of workers who are in an unequal position with respect to bargaining power," Hughes took the position that laws to redress inequality in the bargaining process were within the state's regulatory authority.[176]

Chief Justice Hughes was, of course, correct to note that the Due Process Clause does not expressly mention liberty of contract. But this observation only carries us so far. Indeed, in hindsight it seems rather curious. Once liberty was understood to encompass more than just freedom from arbitrary restraint, the extent of constitutional protection of liberty became a matter of interpretation. As is well known, in the late nineteenth century liberty in the context of due process was read to include substantive rights associated with the concept of privacy. As Michael J. Phillips has tellingly remarked:

> On its face, liberty is a capacious word, one easily broad enough to include freedom of contract. By now, moreover, it has been read as including the right to an abortion. If so nontraditional a right resides within due process liberty, why should freedom of contract not dwell there as well?[177]

Notwithstanding possible criticism of Hughes' opinion, the *West Coast Hotel* case marked the demise of freedom of contract as a viable constitutional doctrine before the Supreme Court. The Justices have never again invoked the liberty of contract to strike down legislation. Ironically, despite the triumph of New Deal constitutionalism and the rejection of contractual freedom as a right, some scholars bemoan the continued efficacy of freedom of contract in the polity. Although the Supreme Court no longer policed the line between free bargaining and legislative regulation, it never took the initiative in imposing duties on contracting parties.[178] Judicial support for contractual freedom as a constitutional right, however, persisted somewhat longer at the state court level.[179]

Yet the idea of bargaining, even stripped of constitutional protection, has enjoyed a striking resilience in American contract law. Indeed, Arthur F. McEvoy

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[172] 264 U.S. 292 (1924).
[173] 300 U.S. 379 (1937).
[174] *Id.* at 391.
[175] *Id.* at 392.
[176] *Id.* at 399.
[177] MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, at 156 (2001).
[178] Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 193–97 (Harry N. Scheiber ed., 1998).
[179] *See* Emma Dewald, Lochner *in the Lower Courts, 1930–1960*, 37 COLUM. J.L. & SOC. PROBS. 211 (2003).

has stated: "Freedom of contract thus remained a powerful norm in the late twentieth century United States, in spite of the New Deal's effort to loosen the doctrine's stranglehold over the legal system."[180] Another commentator has recently observed:

> [F]reedom of contract is experiencing a revival in American law. The bargain principle has proven remarkably durable . . . . These developments reflect a new formalism that promises (or threatens) to restore the libertarian virtues of contract's classical past.[181]

This ongoing commitment to freedom of contract bears some resemblance to pre-1937 jurisprudence, but there is a crucial difference. The Supreme Court has played no role in defending the freedom-of-contract concept in modern law. Instead, the continued vitality of contractual freedom reflects values deeply engrained in American society.

Explanations for Why the Due Process Clause Largely Superseded the Contract Clause

Scholars have remarked upon the concomitant rise of liberty of contract under the Due Process Clause and erosion of the Contract Clause in the late nineteenth century, but they have rarely investigated the question in detail. It therefore remains to consider the apparent paradox in how contractual rights were treated under these two constitutional provisions. Why should rights arising from existing contracts – sheltered by the Contract Clause – begin to receive less protection at the very time that courts were extending the notion of liberty to encompass the making of contracts? This section explores possible reasons for this puzzling development. These hypotheses are more in the nature of historical speculations than firm conclusions.

1. Due Process Clause Seen as Better Vehicle to Review State Laws

A common hypothesis holds that the Contract Clause was eclipsed by the Due Process Clause because the latter had a broader reach and thus afforded courts a more comprehensive basis on which to review the growing wave of economic regulations.[182] This argument was adopted by Benjamin Fletcher Wright, Jr., in his study of the Contract Clause. Wright explained:

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[180] Arthur F. McEvoy, *Freedom of Contract, Labor, and the Administrative State*, *in* THE STATE AND FREEDOM OF CONTRACT, *supra* note 178, at 232.

[181] Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1530 (2002) (questioning whether freedom-of-contract doctrine ever disappeared as cardinal tenet of contract law).

[182] JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 139 (1998) ("Increasingly this search for some type of federal constitutional check on the actions of states regulating the individual property right led to the Fourteenth Amendment with its generalized language protecting the right of property from abridgement without due process of law."); 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 503 (2d ed. 2002)

> The displacement of the Contract Clause by due process of law is but an incident in the continuous development of an idea. The former clause had become too circumscribed by judicially created or permitted limitations, and its place was gradually taken by another clause where the absence of restrictive precedent allowed freer play to judicial discretion. That the concept of contract had been carried over into the newer principles is shown not only by the extremely individualistic trend of many of the due process opinions but more specifically by the 'freedom-of-contract' doctrine which was expressed in some of the most significant decisions involving the Due Process Clause.[183]

Another scholar recently opined: "The Contract Clause—once the most invoked constitutional limit on state action—was not particularly well-suited to protect against new waves of prospective regulatory interference with property, given its focus on safeguarding vested rights from retrospective legislative interference."[184] These comments suggest that courts consciously preferred an expanded interpretation of the Due Process Clause over the Contract Clause as a bulwark of property interests.

Certainly the limits on Contract Clause coverage lend some credence to this view. In the first place, the clause by its express terms is binding only on the states and provides no safeguard from congressional regulations of contracts.[185] This was not a major problem for the courts so long as the states were the principal source of economic regulation, but the clause was of little avail as Congress become more active in regulating business in the late nineteenth century. Moreover, as discussed above, the Contract Clause safeguarded existing agreements from impairment but offered no protection to the right to make future agreements. This limitation became more acute as the pace of governmental intervention in the economy accelerated. The Contract Clause arguably provided an inadequate basis to challenge

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("But to defend property, bench and bar needed newer and more powerful concepts. The Contract Clause had only limited value . . . .").

[183] WRIGHT, *supra* note 4, at 258.

[184] Collins, *supra* note 2, at 95.

[185] Over time both jurists and scholars have intimated that a Contract Clause-like regard for agreements would also restrain the federal government. In *Hepburn v. Griswold*, 75 U.S. 603 (1870), one of the cases arising from the issuance of legal tender notes during the Civil War, Chief Justice Salmon P. Chase noted that the Contract Clause did not apply to the United States, but he argued that the framers of the Constitution "intended that the spirit of this prohibition should pervade the entire body of legislation." He maintained that "a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." *Id.* at 623. Linking the Contract Clause to due process, Christopher G. Tiedeman, a leading constitutional commentator, declared that congressional action impairing the obligation of contract "would likewise be unconstitutional, because it would deprive one of his property without due process of law." TIEDEMAN, *supra* note 39, at 516. Subsequently, the Supreme Court in *Lynch v. United States*, 292 U.S. 571 (1934), adopted the position that valid contracts by the United States are a constitutionally protected form of property under the Fifth Amendment. In some situations, the Court reasoned, the Due Process Clause prohibits Congress from abrogating contracts. *See also* United States v. Winstar Corp., 518 U.S. 839, 876 (1996) ("Although the Contract Clause has no application to acts of the United States . . . , it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights . . . .").

comprehensive economic regulations. Then, too, courts diluted the scope of the Contract Clause in a number of other ways. As we have seen, they distinguished between the substantive rights under a contract and the legal remedies for the enforcement of agreements. States were free to alter available remedies so long as a reasonable means of enforcement remained. Courts also insisted that public contracts, most notably corporate charters, should be narrowly construed in favor of the state. Of greater significance, judges recognized an inalienable police power exception to the Contract Clause, holding that states could not bargain away their authority over public health, safety, and morals.

Consequently, there is a superficial plausibility to the notion that courts may have developed liberty of contract under the due process norm as a kind of improved substitute for the Contract Clause. Not only would constitutionalized freedom of contract bind the federal government as well as the states, but it would permit courts more far-reaching scrutiny over regulations that impacted prospective contractual opportunities.

Nonetheless, there are problems with such an interpretation. It harks back to the old Progressive histories, which presented judges as lackeys of business interests. It rests upon supposition because there is no direct evidence that judges saw the liberty-of-contract doctrine as a replacement for the Contract Clause. Emphasis on the supposed economic motives of the judges fails to address the freedom-of-contract principle on its own terms as an aspect of individual liberty. Further, if courts were desirous of limiting state regulatory activity, the most obvious solution would be to give greater breath to the Contract Clause, following in the path of John Marshall. Bear in mind that the limitations on the scope of the Contract Clause were judicially created. Indeed, a robust Contract Clause could have worked in conjunction with the emerging liberty-of-contract norm. The liberty-of-contract doctrine in practice was rarely applied to invalidate federal legislation, and so the argument that it was fashioned to curtail federal regulatory activity is not compelling. Thus, we are still left with the quandary of why courts increasingly disregarded an express constitutional provision in favor of review under the Due Process Clause.

2. Contract Clause Perceived as Shield for Corporate Special Privilege

Another possible explanation posits that the champions of the liberty-of-contract doctrine had quite different goals in mind than those they believed were served by the Contract Clause. Leading commentators and jurists of the Gilded Age were often skeptical of the protection afforded corporate charters by the Contract Clause. They favored a constitutional system which encouraged economic opportunity rather than guarded exclusive corporate privilege that served to strengthen monopoly power. Consequently, they took special aim at the public law branch of Contract Clause jurisprudence and at the *Dartmouth College* decision. Thomas M. Cooley, a member of the Michigan Supreme Court and the author of the influential

Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States (1868),[186] was instrumental in fashioning the Due Process Clause into a substantive restraint on state power to regulate economic rights. Despite Cooley's towering stature, scholars have given little attention to his thoughts about the Contract Clause. Reflecting his Jacksonian background, Cooley favored the abolition of special privileges and was hostile to monopoly. He sharply criticized use of the Contract Clause as a shield for corporate charters. In the 1871 edition of his *Constitutional Limitations* treatise Cooley warned:

> It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation . . . .[187]

He proceeded to narrowly characterize the Contract Clause as a provision "whose purpose was to preclude the repudiation of debts and just contracts."[188]

Cooley's doubts about the public law dimension of Contract Clause jurisprudence were shared by Christopher G. Tiedeman, an important legal theorist who linked laissez-faire philosophy with constitutional doctrine. His influential 1886 work *A Treatise on the Limitation of Police Power in the United States* (1886) was widely cited by late nineteenth and early twentieth century courts. Tiedeman championed contractual freedom as an integral part of an unwritten natural law guaranteed by the Due Process Clause.[189] In 1890, he applauded "the disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provision of the Constitution."[190] To underscore this constitutional philosophy, Tiedeman advocated a restricted conception of state police power confined to preventing persons from using their property to injure others.

Although sympathetic to judicial enforcement of natural law, Tiedeman adopted a deeply negative attitude toward the public law dimension of Contract

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[186] COOLEY, *supra* note 4.
[187] THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 280 n.2 (2d ed. 1871).
[188] *Id.*
[189] For a helpful analysis of Tiedeman's endorsement of unenumerated fundamental rights upheld by the judiciary and his support for the liberty-of-contract doctrine, see David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990).
[190] CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 81 (1890).

Clause jurisprudence. First, he maintained that the Contract Clause was placed in the Constitution solely for "the prevention of repudiation of public and private debts by State legislation."[191] Tiedeman assailed "the injurious effect of the decision of the Dartmouth College Case" and its "dangerous effect in recognizing the inviolability of charter privileges."[192] He expressed satisfaction that later decisions of the Supreme Court had "substantially modified, if not abrogated altogether" the *Dartmouth College* case.[193]

The animosity of Cooley and Tiedeman toward the public law rulings under the Contract Clause highlights how their intense dislike of corporate privilege stood at odds with their dedication to open competition in a free market. There is, of course, room to question their assumptions. Nothing in the language of the Contract Clause confines its operation to debt-related matters. Both Alexander Hamilton and James Madison felt that the clause covered a wide range of contractual arrangements.[194] Moreover, as discussed above, *Dartmouth College* had already been weakened by (1) the widespread adoption by the states of reservation clauses in corporate charters, (2) the strict construction of charters, and (3) the recognition of a malleable police power exception. By 1890, *Dartmouth College* was a shadow of its former self and hardly deserved the strictures of Cooley and Tiedeman. Yet, however exaggerated, the remarks of Cooley and Tiedeman may help to unravel our puzzle. Put bluntly, they perceived the Contract Clause as a bastion of corporate privilege.

The views of Cooley and Tiedeman were shared on the Supreme Court by Justice Field, a chief proponent of due process review of regulatory legislation. Field agreed with the concerns expressed by Chief Justice Taney in *Charles River Bridge*.[195] He further believed that states could not divest themselves of the authority to tax and regulate business corporations. Field especially disliked special tax concessions and sought to curtail Contract Clause protection for such exemptions. He was also instrumental in developing the public trust doctrine, which weakened the protection afforded state land grants under Marshall's opinion in *Fletcher v. Peck*.[196] At the same time, Field repeatedly urged federal court review of state economic regulations under the Due Process Clause of the Fourteenth Amendment. To Field's mind, these positions were entirely consistent. He was hostile to favoritism

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[191] *Id*. at 54.
[192] *Id*. at 56–57.
[193] *Id*. at 66.
[194] 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 430–31 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980); Ely, *supra* note 18, at 1031–33.
[195] Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 988–95 (1975).
[196] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (Field, J.) (holding that state could not irrevocably alienate land under navigable waters because such land was held in trust for public).

and special advantages, but felt that all individuals were entitled to have their property protected from unreasonable or confiscatory legislation.[197]

The position of Cooley, Tiedeman, and Field, then, indicates that the Contract Clause, insofar as it was seen as a vehicle to secure special corporate privilege, had fallen into disrepute. Leading figures in shaping Gilded Age legal culture were prepared to jettison a good deal of Contract Clause precedent as not in harmony with their vision of American constitutionalism. It should be stressed, however, that reservations about Contract Clause jurisprudence did not extend to laws impairing ordinary contracts. There was no hesitation in defending private bargains from retroactive modification by the states. On the other hand, careful regard for the contractual freedom and the property rights of all parties was fully congruent with a free market economy.[198] The right of individuals to make contracts underscored late nineteenth century belief in individual autonomy and a broad sphere for personal initiative.[199]

3. Courts Only Marginally Protected Contractual Rights Under Either Clause

A third approach postulates that scholars have perhaps been too quick to assume that court decisions enforcing the Contract Clause or invoking the freedom-of-contract doctrine were of great significance in our constitutional history.[200] Contractual obligations, one could argue, were widely respected in American society because such a commitment fit with prevailing economic and political thought. Court opinions dealing with the Contract Clause and the Due Process Clause, while certainly not irrelevant, made only a marginal difference in the legal environment governing contracting parties.

As we have seen, the Contract Clause, despite its language indicating an absolute ban on impairing agreements, was riddled with exceptions long before 1900. No doubt federal and state court rulings enforcing the Contract Clause contributed to the creation of a stable business climate. They also likely helped to curb possible excesses by state legislatures. But the fact remains that during periods of

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[197] In this connection, see Field's revealing opinion in *Butchers' Union Slaughterhouse & Livestock Landing Co. v. Crescent City Livestock Landing & Slaughterhouse Co.*, 111 U.S. 746, 754–60 (1884) (Field, J., concurring). Field readily joined his colleagues in holding that the Contract Clause was no barrier to the repeal of a corporate monopoly privilege, but argued that the act of creating the monopoly in the first place violated the inherent rights of persons to pursue common trades as protected by the Due Process Clause.

[198] Field, dissenting in *Munn v. Illinois*, suggested that the Contract Clause "should be liberally construed." 94 U.S. 113, 143 (1877). Praising Taney's opinion in *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843), Field added that the Contract Clause was "construed to secure from direct attack not only the contract itself, but all the essential incidents which give it value and enable its owner to enforce it." *Munn*, 94 U.S. at 143.

[199] MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910, at 159–65 (2004).

[200] *See generally* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1183 (2001) ("Perhaps it is natural that law professors, who study, teach, and write about Supreme Court decisions for a living, would be inclined to assume that those decisions have dramatic consequences in the world.").

economic distress, state lawmakers continued to enact debt relief measures. Court review under the Contract Clause was sufficiently slow and uncertain that it did not constitute much of a deterrent to the passage of short-term relief legislation. A study of Contract Clause cases during the Early Republic concluded that the "potential for the absolute sanctity of contracts, free from state interference through any form of debtor-relief legislation . . . was not achieved."[201] Conceding that the Contract Clause had some effect in limiting state impairment of agreements, the author nonetheless insisted that "the impact of the ban was smaller than the language of the Constitution would seem to suggest . . . ."[202]

In the same vein, Michael J. Klarman has maintained that historians have exaggerated the significance of the *Dartmouth College* case and the other Contract Clause rulings of the Supreme Court under Chief Justice Marshall.[203] He contends that at the end of the day, the widespread commitment of Americans to property rights and economic growth did more to ensure respect for contractual arrangements than judicial decisions. Bruce A. Campbell has lent support for this proposition. He has demonstrated that Virginia legislators before the Civil War honored the chartered rights of business corporations because of the need to attract private capital for purposes of economic development.[204] As public resentment against perceived favoritism toward business corporations mounted in the late nineteenth century, courts responded by diluting the *Dartmouth College* case and expanding the police power exception. Railroads, for example, were consistently unable to successfully claim exemption from rate regulation by pointing to language in their charters.[205] The Contract Clause, then, posed no significant obstacle to the spread of state business regulations. Protection of private agreements from state impairment continued into the early twentieth century, but then began to erode as well. Since the 1930s there has been no principled or consistent Contract Clause jurisprudence.

Although the rise of freedom of contract under the Due Process Clause occurred at a later point in our constitutional history, the narrative is much the same. Rhetoric aside, state and federal courts never gave more than checkered backing to the notion that parties had broad freedom to make agreements regardless of state law. The reigning view, popularized by the Progressives and their intellectual descendents, of an era of an age of liberty of contract in service of rigid laissez-faire

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[201] Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789–1815*, 44 WM. & MARY Q. 529, 548 (1987).
[202] *Id.*
[203] Klarman, *supra* note 199, at 1144–53.
[204] Bruce A. Campbell, *John Marshall, the Virginia Political Economy, and the* Dartmouth College *Decision*, 19 AM. J. LEGAL HIST. 40–65 (1975).
[205] *See, e.g.*, Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 454–56 (1890) (Blatchford, J.) (brushing aside contention that railroad's charter conferred right to determine rates, but holding that state-imposed charges subject to judicial review under due process); Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 325–31 (1886) (holding that power of state to regulate railroad rates can only be bargained away by express language in charter); Chicago, Burlington & Quincy R.R. Co. v. Iowa 94 U.S. 155, 161 (1877) (Waite, C.J.) (rejecting Contract Clause argument that railroad entitled under terms of its charter to set amount of charges without legislative control).

ideology is largely a myth.[206] Gregory S. Alexander has aptly pointed out that "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle."[207] It is possible, of course, that the impact of the liberty-of-contract doctrine cannot be fully measured by looking at a small number of cases. Perhaps lawmakers were reluctant to enact regulatory measures in light of the court's endorsement of contractual freedom. But even this interpretation is problematic. State and federal legislators enacted a wide range of economic regulations, and the sparing invocation of freedom of contract did not serve as much of a restraint.

In short, state and federal courts did not demonstrate an inclination to impose the sanctity of contracting on an unreceptive society. Courts generally reflect the values of contemporary society. Historians should therefore be cautious not to overstate how far courts defended contracting under either the Contract Clause or the liberty-of-contract doctrine.

Some Final Thoughts

Each of these proposed explanations have some merit, but none can be conclusively established or disproved. History rarely produces tidy answers. Still, it is worth exploring whether a blend of the second and third hypothesis might point us in the right direction. The decline of the public law branch of the Contract Clause, as exemplified by *Dartmouth College*, and the emergence of liberty of contract as protected by the Due Process Clause are actually quite compatible. They represent two sides of the same commitment to opening markets and preserving economic opportunity. The anti-monopoly strain of Gilded Age legal thought found expression in those judicial decisions and scholarly assessments which contracted the scope of corporate privilege safeguarded by the Contract Clause.[208] The anti-paternalism sentiment of late nineteenth century jurisprudence was reflected by the rise of the freedom-of-contract doctrine.[209] Thus, economic liberty as a part of a free market was sheltered against both the threat of undue private economic power in the form of corporate monopoly and governmental regulations, which often produced class legislation and favoritism.

Yet even this tentative conclusion must be tempered with the realization that courts invalidated relatively little legislation under either the Contract Clause

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[206] *See* PHILLIPS, *supra* note 177, at 58 (finding that only fifteen Supreme Court decisions invoked freedom of contract to strike down legislation between 1897 and 1937).

[207] Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 108 (F.H. Buckley ed., 1999).

[208] In a parallel move, concern about monopoly power led to enactment of the Sherman Antitrust Act, ch. 647, §§ 1–8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (2004)).

[209] The legal culture of the age tended to view paternalistic legislation with skepticism. For a classic formulation of this view, see *Budd v. New York*, 143 U.S. 517, 551 (1882) (Brewer, J., dissenting) ("The pater-

or the Due Process Clause and operated largely at the margins of the polity. Activist to a certain extent, judges of the turn of the twentieth century were aware of the need to remain within the contours of dominant public opinion.[210] As Friedman has cogently noted, "the justices, and judges in general, were cautious and incremental. They did not consistently adhere to any economic philosophy. They simply reacted in the way that respectable, moderate conservatives of their day would naturally react."[211]

Further investigation will be required to establish the case for my hypothesis. Hopefully other scholars will tackle the puzzle of the constitutional status of contracts at the end of the nineteenth century. Such inquiry should produce a more nuanced understanding of this pivotal era in American constitutional history.

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nal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty to government.").

[210] *See* Siegel, *supra* note 157, at 108. ("*Lochner* era jurists realized the importance of public opinion in the evolution of constitutional law.").

[211] FRIEDMAN, *supra* note 115, at 24.