U.S. Department of Justice
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Report to the Attorney General

Economic Liberties Protected by the Constitution

March 16, 1988

REPORT TO THE ATTORNEY GENERAL

ON

ECONOMIC LIBERTIES PROTECTED BY THE CONSTITUTION

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Office of the Attorney General
Washington, D. C. 20530

In June, 1986, it was my pleasure to host the Attorney General's Conference on Economic Liberties at the Department of Justice in Washington, D.C. This conference provided an opportunity for a candid exchange of the very different views held by prominent legal scholars on the scope of constitutional protections afforded to economic rights. The conference served as a catalyst for increased discussion of these issues both within the Department and outside it.

The present study, "Economic Liberties Protected by the Constitution," is a further contribution to that discussion. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues. The report examines both the original meaning of constitutional provisions which address economic freedoms and current scholarly literature on the topic.

This study does not purport to establish ultimate conclusions on the issues presented. It was written in recognition of the fact that there are no easy answers to economic liberties questions, and that reasonable people can take several points of view on those questions. The study will generate considerable thought on a topic of great national importance, and will be of interest to anyone concerned about a provocative and informative examination of the issues.

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Attorney General

Executive Summary

Several provisions of the Constitution prohibit government encroachment on individual economic liberties. In recent years various scholars have advocated that the courts apply those provisions and strike down laws that restrict economic freedoms.

This Report examines the original meaning and surveys the case law development of those constitutional provisions that have been invoked in defense of economic liberties, evaluates scholarly analyses of economic liberties issues, and proposes possible standards that might be applied in analyzing two important constitutional provisions that protect economic liberties: the just compensation clause and the contract clause. The analysis set forth herein is merely tentative. The standards developed in this Report reflect our best assessment of the economic liberty clauses' original meaning; we do not attempt to achieve "desirable public policy results" at any cost. Furthermore, we take no position on the desirability from a public policy standpoint of the results we derive. This Report should be read with the knowledge that principled interpretivists differ (and may well continue to differ) as to the scope of constitutional protection afforded individual economic liberties. Principled analysis of the Constitution's "economic liberties" provisions generates no easy answers. Further discussion and debate is necessary, however.

The founders of the Constitution clearly were concerned with shielding individual economic liberties from governmental assault. They placed special emphasis on protecting property rights, which had been undermined by state special interest laws enacted immediately following the American Revolution. The founders' interest in promoting economic liberties is made manifest in a host of constitutional clauses. The two clauses that explicitly protect particular economic rights are the contract clause and the Fifth Amendment's just compensation clause.

A. The Just Compensation Clause

The Fifth Amendment's just compensation clause forbids the taking of private property for public use without just compensation. Read in a manner consistent with its original meaning, this clause appears to require that individuals be fully compensated for all diminutions in the value of their property rights caused by government action. The Supreme Court has interpreted the Fourteenth Amendment as making the just compensation clause applicable to the states.

A principled interpretation of the just compensation clause, based on original meaning, would find a taking whenever an action or series of actions by the government measurably diminishes the value of an individual's or institution's legally-protected property interest. Government invocation of the "police power" would not excuse the payment of compensation. Government actions aimed at curtailing uses of property that harm third parties would not, however, constitute takings; the harmful uses being curtailed would not qualify as legally-protected property rights. Furthermore, government actions that only very indirectly and tangentially affect property rights may perhaps be too attenuated or insufficiently material to rise to the level of takings. Appropriate compensation would include payment for harm already incurred (based on a reasonable measure of market value) plus payment for future harm attributable to a taking. In lieu of paying future compensation, the government would have the option to rescind an offending law and thereby avoid future harm. Explicit monetary compensation need not be paid when a government action that interferes in property rights bestows benefits upon an aggrieved property owner that more than outweigh the harm to his property (implicit in-kind compensation). Finally, takings that merely benefit a private faction without providing benefits to the general public would not be authorized.

B. The Contract Clause

The contract clause prohibits the states from passing any law impairing the obligation of contracts; it does not apply to federal government action. There is good reason to assume that the framers meant this clause to serve as an essential protection against state retrospective encroachments on contractual obligations. Consistent with this interpretation, the Supreme Court during the 19th century struck down a wide variety of state-created contractual impairments. The Court also crafted an implied "police power" limitation to the contract clause, reasoning that there are certain state police or regulatory powers that cannot be contracted away.

The Court has virtually read the clause out of the Constitution in 20th century holdings, giving the states wide latitude to impair contracts on "public policy" grounds. Recent decisions indicate the clause is still alive, however; various commentators have proposed alternative methods to give the clause "more bite." The Supreme Court currently employs an ad hoc "balancing" approach in deciding whether an impairment is

justifiable -- an approach that ignores the Constitution's failure to limit the contract clause's application to "unreasonable" impairments.

A preferable approach would strike down state laws having the direct and primary effect of placing certain parties in a preferred contractual position by materially diminishing, lessening, or otherwise materially altering the legally binding effect of preexisting public or private contracts. This approach recognizes that the framers' primary concern was the abuse of factions, which had generated state laws (such as debtor relief statutes) that used contractual impairments to redistribute income.

C. Other Constitutional Provisions that Protect Economic Liberties

Five other constitutional provisions might be invoked in defense of economic liberties: the due process clause, the "negative commerce" clause, the uniformity clauses, the ex post facto clauses, and the equal protection clause.

The Fifth Amendment's due process clause prohibits the federal government from depriving an individual of "life, liberty, or property without due process of law." On its face the clause affords procedural protection; it does not embody substantive rights. Little can be gleaned from the limited debate at the time of the clause's enactment. Nevertheless, the historical association of "due process" with "law of the land" strongly suggests that the framers viewed the clause as affording procedural, rather than substantive, protections. Accordingly, "substantive due process" is an oxymoron; "substantive" invocation of the due process clause in defense of economic liberties is inconsistent with a jurisprudence of original meaning.

The commerce clause authorizes Congress to regulate interstate commerce. Courts have applied this clause in a "negative fashion" to strike down state laws that "unduly burden" or "unduly discriminate against" interstate commerce. This provision is not, we believe, an especially good vehicle for vindicating economic liberties. The text of the clause does not prohibit the states from passing laws impinging on interstate commerce in the absence of congressional legislation; it merely grants Congress the authority to "regulate commerce." In short, while case law precedents justify reliance on the "negative commerce" clause,

we believe that textual analysis counsels against ready invocation of that clause.

The uniformity clauses require that indirect taxes and bankruptcy laws enacted by Congress have a "uniform" impact. These statutes have a narrow focus. Thus, the uniformity provisions have at best a very limited role to play in advancing economic liberties.

The ex post facto clauses prohibit Congress and the states from passing "ex post facto laws." Those clauses do not appear to be directed at the defense of economic rights; they have long been viewed as applying to criminal, not civil, laws. Moreover, even assuming *arguendo* that those clauses originally were meant to apply to civil laws (a matter open to question), judicial precedent is well-entrenched that the clauses apply only to criminal laws.

The Fourteenth Amendment prohibits the states from denying any person the equal protection of the laws. The Supreme Court usually applies a deferential "rational basis" standard to uphold economic regulatory statutes that are challenged on equal protection grounds. Nevertheless, the Court occasionally strikes down "egregious" economic statutes whose discriminatory classifications have "no other purpose" than arbitrary favoritism for special interests. Equal protection should not be used expansively to invalidate "unreasonable" state economic regulatory laws; such an expansive application of "equal protection" has no firm constitutional basis.

Conclusion

The contract clause and the just compensation clause are the constitutional provisions specifically designed to vindicate economic liberties. Properly interpreted, they protect basic economic rights without inappropriately interfering with state and local authority.

Table of Contents

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

Report to the Attorney General on
Economic Liberties Protected by the Constitution

> "Yesterday the active area in this field [constitutional analysis] was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may again be 'property.' Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?"
>
> Justice Felix Frankfurter[1]

Introduction

Justice Frankfurter's statement is but a modest affirmation of principle that has long been recognized by political philosopher economic liberties are essential to the survival of personal freedom; th latter cannot exist when the former are extinguished. Reflecting th understanding, a growing body of legal scholarship advocates that th federal courts act decisively to vindicate individual economic liberti thought to be guaranteed under the Constitution.[2] This researc emphasizes the solicitude for individual property rights and freedom c contract shown by the founders of the Constitution and made manifest i a variety of constitutional provisions. Proponents of an "economi liberties" approach to constitutional interpretation argue that the court should enforce the contract clause, the just compensation clause, and th due process clause to restrain federal and state government interferenc in private enterprise and the enjoyment of property. Widesprea acceptance of such an approach would mark a shift in judicial attitudes inasmuch as the federal courts have accorded substantial deference t federal and state "economic" legislation since the New Deal.

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[1] F. Frankfurter, *Of Law And Men* 19 (1956).

[2] The seminal work in this field is B. Siegan, *Economic Liberties and the Constitution* (1980). A comprehensive recent treatment of property rights and the takings clause i found in R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) Professors Bernard Siegan and Richard Epstein are the two most prolific contributors t the economic liberties literature.

In this Report, the Office of Legal Policy analyzes the original meaning of the Constitution's economic liberties clauses and surveys the economic liberties literature, paying particular attention to the just compensation clause, the contract clause, and the due process clause. This Report starts from the premise that the principled vindication of economic liberties must be based on the text of the Constitution -- not on judge made standards that cannot be linked to the Constitution's words. Accordingly, as we have done in other studies of constitutional provisions, we attempt to carefully analyze the text of the economic liberties clauses.

Part I of the Report sets the stage for subsequent analysis of the historical basis for the protection of economic liberties. This examination demonstrates that the founders of the Constitution clearly intended to protect certain economic liberties from encroachment by government. Parts II and III discuss the original meanings of the just compensation clause and the contract clause, respectively. Parts II and III conclude that compelling evidence exists from the Constitution's text and history for concluding that the just compensation and contract clauses accord substantial protection to property rights and contractual relations. Part IV briefly surveys other constitutional provisions that bear on the protection of economic liberties, placing particular emphasis on the due process clause. Part IV concludes that, in light of the text of the Fourteenth Amendment, the arguments for reinvigorating substantive due process protection of economic rights are unconvincing. An endorsement of economic substantive due process theory would ignore the plain procedural meaning of the term "due process." Part IV also briefly explains why we believe that the "negative" commerce clause, the uniformity clauses, the ex post facto clauses, and the equal protection clause are not well designed to vindicate substantive economic rights. Part V concludes that the just compensation clause and the contract clause are the constitutional vehicles best directed at the vindication of individual economic rights. Appendices summarize the case law development of and academic commentaries pertaining to the two key economic liberties provisions: the just compensation clause and the contract clause.

The views set forth herein are tentative. Their aim is to stimulate public discussion, not to establish ultimate conclusions on matters of constitutional law. We take no position on the desirability from a public policy standpoint of the results we derive.

I. Historical Background Concerning the Protection of Economic Liberties

The founders of the Constitution clearly were concerned with protecting individual economic liberties from encroachment by the powers of government.[3] Professor Benjamin Wright, the leading historian of the contract clause, has described those state legislative actions that inspired the Constitution's founders to protect property rights:

> Most of these laws took the form of providing for the issuance of paper currency, with the frequent addition of the requirement that this currency be accepted as legal tender in the payment of private debts. In addition there were "stay laws" (statutes staying or postponing the payment of private debts beyond the time fixed in contracts), installment laws (acts providing that debts could be paid in several installments over a period of months or even years rather than in a single sum as stipulated in the agreement), and commodity payment laws (statutes permitting payment to be made in certain enumerated commodities at a proportion, usually three-fourths or four-fifths, of their appraised value). Naturally the creditors preferred to receive payment at the stipulated time, and in money rather than in land, cattle, tobacco, slaves, flour, hemp, or whatever the state in question saw fit to make legal tender. We have the contemporaneous statement of Madison to support the conclusion that "the evils issuing from these sources" contributed heavily toward preparing the public mind for a general reform. The Fathers were undoubtedly opposed to the continuance of state legislation of this kind.[4]

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[3] A substantial body of scholarly research supports this conclusion. *See, e.g.*, D. Epstein, *The Political Theory of the Federalist* (1984); C. Beard, *An Economic Theory of the Constitution of the United States* (1913); 1 Farrand, *The Records of the Federal Convention of 1787* 424, 533-34 (1911) (hereinafter cited as "Farrand") (protection of property recognized by the framers as "the main object of society" and the "primary object of society"); B. Schwartz, *The Rights of Property* 18-22 (framers viewed property as important as liberty); Siegan, *The Economic Constitution in Historical Perspective*, in *Constitutional Economics* 39-53 (R. McKenzie ed. 1984); Plattner, *American Democracy and the Acquisitive Spirit*, in *How Capitalistic is the Constitution* 1-21 (R. Goldwin and W. Schambra eds. 1982); B. Wright, *The Contract Clause and the Constitution* 4-5 (1938).

[4] B. Wright, *supra* note 3, at 4-5 (citations omitted). For a survey of state legislation interfering with property rights enacted under the Articles of Confederation, see A.

According to Alexander Hamilton, as a result of these laws "creditors had been ruined, or in a very extensive degree, much injured, confidence in pecuniary transactions had been destroyed, and the springs of industry had been proportionately relaxed".[5] John Marshall put it plainly at Virginia's federal constitutional ratifying convention: state enactments under the Articles of Confederation eliminated "the incitements to industry by rendering property insecure and unprotected."[6]

Mindful of state law abuses, the writers of *The Federalist* stressed the significance of preserving individual property rights.[7] *The Federalist* Number 10, which elaborates the theory of the "large republic" as the solution to the diseases of popular government, accords primary importance to government protection of property interests:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results.[8]

In short, *The Federalist* Number 10 emphasizes that government should protect both existing property and also the ability to acquire additional property -- despite the inequality in outcomes this inevitably entails. The governmental protection of individual property rights is ringingly endorsed in *The Federalist* Number 54, where Madison writes that

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Nevins, *The American States During and After the Revolution, 1775-1789*, at 386, 390, 404, 457, 525, 532, 533, 537, 549, 570-71 (1924).

[5] 25 *The Papers of Alexander Hamilton* 479 (H. Syrett ed. 1977).

[6] A. Beveridge, 1 *The Life of John Marshall* 416-17 (1916).

[7] *The Federalist* is replete with condemnations of state laws that undermined property rights and violated contracts. It deplores "such atrocious breaches of moral obligation and social justice"; "an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it"; "practices . . . which have . . . occasioned an almost universal prostration of morals"; "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project." *The Federalist* No. 7, at 65 (C. Rossiter ed. 1961); *id.* No. 44, at 281-82; *id.* No. 85, at 521-22; *id.* No. 10, at 84.

[8] *Id.* No. 10, at 78.

"[government] is instituted no less for the protection of property, than of the persons of individuals."[9]

In order to secure the rights of property, the framers placed restrictions on the powers of government:

> By consistent division of authority, the Founders sought to prevent concentration of governmental power against property rights. Under such division, the polity "will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." The very structure of government would ensure that the rights of property would not be nullified "by the superior force of an interested and overbearing majority."[10]

This respect for property interests evidenced in *The Federalist*[11] reflected a general consensus among American political thinkers at the time the Constitution was drafted that property rights must be safeguarded from government.[12]

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[9] *Id.* No. 54, at 502. The framers' belief in the sanctity of property rights undoubtedly reflects the influence of John Locke, whose writings were well known to the Federalists. Locke's views on property are set forth in his Second Treatise; Locke believed that "The great and chief end therefore, on Men uniting into Commonwealths, and putting themselves under Government, is the preservation of their property." J. Locke, *Second Treatise* ch. 9, §124, in J. Locke, *Two Treatises of Government* (P. Laslett rev. ed. 1965) (3rd ed. 1698).

[10] B. Schwartz, *supra* note 3, at 21 (citing *The Federalist* Nos. 51 and 10, respectively) (citations omitted).

[11] Admittedly, *The Federalist* only sets out the views of three men (Madison, Hamilton, and Jay) -- not of all the framers. Nevertheless, there is general agreement that *The Federalist* is a very good (albeit not perfect) reflection of the framers' thinking. There is "no more authoritative source than The Federalist" for the "political and economic thought of the framers of the Constitution". Plattner, *supra* note 3, at 2. Plattner points out that "[e]ven Thomas Jefferson, some of whose own views might seem to be in conflict with the Federalist, referred to it as a work 'to which appeal is habitually made by all, and rarely declined or denied by any of those who accepted the Constitution of the United States, on questions as to its genuine meaning'. Plattner, *id.*, *citing* Diamond, *The Federalist*, in *American Political Thought* 52 (M. Frisch and R. Stevens eds. 1971) (quoting Thomas Jefferson).

[12] "The inviolability of the rights of property appears to have been accepted by the full range of American political thinkers of the constitutional era -- anti-Federalists as well as supporters of commerce and manufacturing." Plattner, *supra* note 3, at 16, *citing The*

The framers fashioned a variety of specific constitutional provisions aimed at protecting property rights and preserving economic liberties. These include Article I, section 2, clause 3, which requires that direct taxes be apportioned among the several states according to population (subsequently modified by the Sixteenth Amendment's authorization of income taxes); Article I, section 8, clause 1, which specifies that all duties, imposts, and excises shall be uniform throughout the United States; Article I, section 8, clause 3, which authorizes Congress to regulate "commerce among the several states" (thereby diminishing the states' commercial powers); Article I, section 9, which contains an ex post facto clause that applies to the federal government; Article I, section 10, which prohibits the states from issuing bills of credit, from creating their own currency, from passing ex post facto laws or laws impairing the obligation of contracts, and from levying duties on imports or exports without congressional consent; the Fifth Amendment, which prohibits federal takings of property without just compensation and imposes a federal due process requirement; the Second Amendment, which protects the right to bear arms; the Third Amendment, which limits the quartering of soldiers in private homes; the Fourth Amendment, which prohibits unreasonable searches and seizures; and the Eighth Amendment, which prohibits excessive bails and fines.[13] The remainder of this report will focus primarily on those constitutional provisions that have been most frequently and prominently invoked for the protection of economic liberties: the just compensation clause and the contract clause.[14]

Antifederalists xxvii (C. Kenyon ed. 1966) and E. Johnson, *The Foundations of American Economic Freedom* 191-92 (1973). That staunch anti-Federalist, Jefferson, expressed the wish that "equality of rights be maintained, and that state of property, equal or unequal, which results to every man from his own industry, or that of his fathers." Jefferson, *Second Inaugural Address*, in *The Life and Selected Writings of Thomas Jefferson* 344 (A. Koch and W. Peden eds. 1944).

[13] *See* Siegan, *The Constitution and the Protection of Capitalism*, in *How Capitalistic is the Constitution* 106-126 (R. Goldwin and W. Schambra eds. 1982); B. Siegan, *Constitutional Limitations on the Taking of Private Property* (unpublished manuscript distributed at Attorney General's Conference on Economic Liberties, Washington, D.C., June 14, 1986).

[14] Part V of this Report also briefly addresses five provisions that appear at best to be of limited practical utility for the vindication of economic liberties: the due process clause, the "negative" commerce clause, the uniformity clauses, the ex post facto clauses, and the equal protection clause of the Fourteenth Amendment.

II. The Just Compensation Clause

The just compensation clause of the Fifth Amendment declares: "nor shall private property be taken for public use, without just compensation."[15] In order to explore the parameters of the just compensation clause, one must proceed initially by determining what is meant by a "taking" of "property".

A. The Meaning of "Property"

Blackstone -- whose eighteenth century legal *Commentaries* were widely disseminated and extensively relied upon by the founders -- defined property expansively:

> The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.[16]

In short, according to Blackstone, property consists of a bundle of rights encompassing the possession, use ("enjoyment"), and disposition of one's acquisitions. Any limitation ("control" or "diminution") on those rights, save by the laws of the land, is an unjustified interference with property.[17]

Blackstone implicitly qualifies his definition of property, however, by suggesting that an individual's property rights include those interests that inhere exclusively in him:

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[15] U.S. Const. amend. V.

[16] W. Blackstone, *Ehrlich's Blackstone* 51 (J. Ehrlich ed. 1959) (original ed. 1765) (hereinafter cited as "W. Blackstone"). Blackstone was the standard authority upon law in late 18th century America. *See* J. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in *Essays in the History of Early American Law* 451-57 (D. Flaherty ed. 1969) (citing authorities attesting to Blackstone's importance); L. Friedman, *A History of American Law* 88-89 (1973) (discussing the widespread dissemination of Blackstone's *Commentaries*). According to Blackstone, when "the laws of the land" are applied to take property, they work "[n]ot by absolutely stripping subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." W. Blackstone, *supra*, at 52.

[17] By way of comparison, the just compensation clause specifies that the government may, according to "the laws of the land," take property for a public use. If it does so, however, it must pay "just compensation."

> [P]roperty [is] . . . that sole and exclusive dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[18]

Thus, it follows from Blackstone that a man's use of his possessions in a manner that harms his neighbor's rights presumably would not qualify as the exercise of a property right. Such a use would not be "in total *exclusion* of the *right* of any other individual in the universe"; rather, it would involve *interference with* the rights of another. In short, property rights extend to those uses of one's acquisitions that do not impinge on the rights of third parties.

Giles Jacob's *New Law Dictionary*, a source frequently consulted by 18th century British and American lawyers, sets forth a similar view of property:

> Property is the highest right a man can have to anything; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's curtesy; . . . For preserving Property the law hath these rules, 1st, No man is to deprive another of his Property, or disturb him in enjoying it. Secondly, Every person is bound to take due care of his own Property, so as the neglect thereof may not injure his neighbor. Thirdly, all persons must so use their right, that they do not, in the manner of doing it, damage their neighbor's Property.[19]

This definition of property is consistent with Blackstone's formulation: property is the full set of rights ("the highest right") a man can have in his tenements, goods, or chattels. Those rights do not, however, encompass actions that deprive or disturb another in the enjoyment of his property, nor do they allow property to be used in a way that damages the property rights of a third person. Thus, for example, it would appear to follow that the use of property in a way that creates a nuisance (the disposal of waste, say, in a manner that pollutes a neighbor's land or air) does not involve the exercise of "property rights" that are recognized by law.

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[18] W. Blackstone, *supra*, at 113.

[19] G. Jacob, *New Law Dictionary* (9th ed. 1772).

The concept of property propounded by Blackstone and Jacob appears to reflect the framers' understanding of property rights. James Madison, who drafted the just compensation clause, stated that property

> means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*[20]

Madison's statement is significant for two reasons. First, by beginning with a quotation from Blackstone, it suggests that Madison shared Blackstone's understanding of the nature of property rights. Second, the statement indicates that Madison (as did Blackstone and Jacob) understood that the bundle of legally recognized property rights did *not* extend to the use of property in a manner that impinges on the rights of others; such a use would *not* "leave to every one else the like advantage."

In sum, 18th century sources indicate that the framers viewed property not as "a right, singular" but as "a complex and subtle combination of many rights, powers, and duties".[21] As understood in the 18th century, these rights and powers allowed an individual to use, enjoy, and dispose of his lands and possessions, in any manner that did not impose harm on other individuals.[22]

B. The Meaning of "Taking"

Citing Blackstone's *Commentaries,* Jacob's *New Law Dictionary* defined an "unlawful taking" by stating that "whoever . . . dispossesses me of [goods or chattels] is guilty of a transgression against the laws of society, which is a kind of secondary law of nature."[23] Similarly, Samuel

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[20] *Property*, Nat. Gazette, Mar. 27, 1792, in 14 J. Madison, *The Papers of James Madison* 266 (R. Riland ed. 1977) (emphasis in the original).

[21] F. McDonald, *Novus Ordo Seclorum* 13 (1985).

[22] While Blackstone indicated that property rights were subject to "the laws of the land," he stated that the taking of property by law must be accompanied by "full indemnification." W. Blackstone, *supra*, at 52.

[23] G. Jacob, *New Law Dictionary, supra.* The *New Law Dictionary* defined two classes of takings: "unlawful takings" and "felonious takings." A "felonious taking" is a theft: it "must be done . . . with an intent to steal." *Id.*

Johnson's 18th century English dictionary defines "taking" as "seizure; distress".[24] Accordingly, a "taking" of "goods and chattels" is a "dispossession" of those items. It logically follows that a "taking" of "property" is a "dispossession" of any of the "rights" of possession, use, and disposition that property embodies.[25] As the previously analyzed definitions of "property" indicate, such a "dispossession" or "seizure" may be read to mean a "diminution", "deprivation", or "disturbance" of property rights. While takings could be accomplished through eminent domain in the 18th century, "the restrictions imposed by regulation could sometimes amount to taking".[26]

In sum, an examination of 18th century sources suggests what may have been meant by the term "taking" of "property": property is taken whenever any of the legally-protected rights to use, possess, or dispose of one's acquisitions are diminished, deprived, or disturbed.[27] This definition does not suggest that every interference (no matter how slight) in an individual's use of his property always constitutes a taking. Government actions that only very indirectly and tangentially affect property rights may perhaps be too attenuated or insufficiently material to rise to the level of takings. Furthermore, as the previous discussion demonstrates, uses of property that impinge on the rights of third parties are not legally-protected property rights. Accordingly, government action that prevents an individual from using his property in a manner that injures

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[24] S. Johnson, *A Dictionary of the English Language* (2d ed. 1755).

[25] Our conclusion that a "taking" of "property" is a dispossession of *any* of the rights of property (not necessarily the "entire bundle" of property) follows from the fact that Blackstone referred to "free use, enjoyment, and disposal" as different elements of property, and from Madison's recognition that property "embraces every thing to which a man may . . . have a right".

[26] F. McDonald, *supra*, at 20 (summarizing the impact of 18th century regulatory laws on property rights).

[27] Alternatively, it might be argued that the term "taking" refers to the *willful* appropriation of property, on the ground that the synonym "seizure" (employed by Samuel Johnson) connotes willful, intentional conduct. According to this logic, the government would only be found to have "taken" property if it actually intended to do so; government actions that only incidentally (and unintentionally) diminished property values would not be takings. We have not, however, found any additional textual or historical evidence (apart from the possible reading that might be accorded the word "seizure") to support this alternative interpretation. Indeed, we believe that the terminology employed by Blackstone and Giles Jacob encompasses *all* interferences in property rights, intentional or not. Thus, we believe that the better interpretation does not limit the term "taking" to willful, intentional dispossessions of property.

others is not a "taking" of that individual's property. The prohibited use was not a "property right" of the individual.

C. The Treatment of Takings for a "Non-Public Use"

The just compensation clause allows property to be taken for a "public use" when "just compensation" is paid. Before addressing the meaning of the terms "public use" and "just compensation," one should briefly address the status of those takings of property not covered by the clause: takings for a "non-public use." While the words of the takings clause are silent on the question of whether the federal government[28] may take property for a use that is "non-public", the better legal view would appear to be that it may not. After all, the federal government, as a government of enumerated powers, can act only where the constitution authorizes it to act and we are aware of no provision that would authorize a taking for private use.

This textual argument is supported by the framers' intent to create a just government and their view that takings for a "non-public use" were unjust actions that were beyond the scope of properly constituted governments.[29] For example, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), Justice Chase stated that

> The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean . . . . A law that takes property from A. and gives it to B. . . . is against all reason and justice, for a people to entrust a legislature with

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[28] Because the just compensation clause, as part of the Fifth Amendment, applies only to the federal government, it refers only to takings made pursuant to that government's limited enumerated powers. The framers did not craft the just compensation clause as a limitation on state powers; the just compensation principle was not applied to the states until after the passage of the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (Fourteenth Amendment's due process clause requires that a state's taking of property must be for a public use and must involve the payment of just compensation).

[29] *See* F. McDonald, *supra*, at 22 (citing the widely recognized principle that the taking power could be exercised only for bona fide public purposes, *not* including government-mandated transfers from one private party to another).

such powers; and, therefore, it cannot be presumed that they have done it.

James Madison, the just compensation clause's author, reasoned along somewhat similar lines in his essay on *Property*, published shortly after the ratification of the Bill of Rights:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.[30]

This limited historical evidence is consistent with our textual analysis: (1) that the just compensation clause only allows the federal government (acting pursuant to its enumerated powers) to take property in a just manner (involving "just compensation") for a constitutionally-recognized goal (a "public use") and (2) that no other provision seems to authorize nonpublic takings. According to this view, any attempt by the government to take property for a purely private, "non-public use" would be void. We also note that this interpretation appears to be generally accepted by judges and legal scholars alike.

D. The Meaning of "Public Use"

We now must consider the meaning of "public use". This term was not specifically defined in 18th century legal commentaries or dictionaries. Accordingly, an analysis of the original meaning of this phrase should begin with a perusal of the meaning of the words "public" and "use".

Samuel Johnson's 18th century dictionary defined "public" as "belonging to a state or nation; not private . . . general . . . regarding not private interest, but the good of the community."[31] Neither Johnson nor other 18th century sources we have examined define the term "use." Nevertheless, we believe that a good approximation of that word's 18th century meaning can be gleaned from Noah Webster's 1828 *American Dictionary of the English Language*, as well as *The Oxford English*

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[30] J. Madison, *Property*, *supra*, at 267 (emphasis in the original).

[31] S. Johnson, *A Dictionary of the English Language* (2nd ed. 1755).

Dictionary, which derives its definitions from historical sources. Webster defined "use" in its legal sense as "the benefit or profit of lands and tenements."[32] Citing Blackstone, *The Oxford Dictionary* defines "use" in its legal sense as "[t]he act or fact of using, holding, or possessing land or other property so as to derive revenue, profit, or other benefit from such."[33] Putting these definitions together, the "public use" of property can be interpreted as meaning the beneficial employment of property in a manner that promotes the general good of the community -- not of a mere private faction.

Historical information pertaining to the taking of property is consistent with the dictionary meaning of the phrase "public use". According to one noted constitutional historian, the principle that a taking "could be exercised only for bona fide public purposes (hence government could not take property from one private party and give it to another private party)" was well-established in 18th century English and American law.[34] The Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787, respectively, recognized that compensation should be paid whenever property was taken "for the use of the public", for "public uses", and for "public exigencies".[35]

The acknowledgement of the "public use" principle must, however, be reconciled with the fact that eminent domain was frequently invoked to effect transfers between private parties in 18th century America:

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[32] N. Webster, *American Dictionary of the English Language* (1828) (reissued 1967).

[33] *The Oxford English Dictionary* 468 (4th ed. 1978).

[34] F. McDonald, *supra*, at 22.

[35] *See* Vermont Constitution of 1777, *reprinted in* B. Poore, 2 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1859 (2nd ed. 1878) (hereinafter cited as "B. Poore"); ("whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money"); Massachusetts Convention of 1780, part I, art. X, *reprinted in* 1 B. Poore, *supra*, at 958; ("whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore"); Northwest Ordinance of 1782, art. 2, *reprinted in* 32 *Journals of the Continental Congress* 340 (R. Hill ed. 1936) ("should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same").

> There were numerous instances in various states in which eminent domain was permitted even for transfers between private individuals, usually because such activities had been going on since colonial times, or because they were perceived as serving some desirable public end in furthering the development of the country. Examples of such transactions that transferred property from one individual to another include the colonial Mill Acts, which carried over after the American Revolution; the practice in certain states of granting eminent domain powers to landlocked owners to take land for access roads; and such other uses as irrigation, drainage, reclamation of wetlands, mining operations, lumbering, and clearing a disputed title.[36]

Presumably the framers were aware of the widespread use of eminent domain to transfer property from one private party to another. It appears unlikely that the framers intended to prohibit all such transfers merely through reliance on the term "public use." We believe it is more plausible that the framers desired to limit governmentally-mandated transfers between private parties to those exchanges that provide benefits to the public at large -- rather than merely to the private beneficiaries of the transfer. This interpretation reconciles the widely accepted practice of private-private transfers with the framers' concern (expressed eloquently by Madison in *The Federalist* Number 10) for preventing "the abuse of factions." The framers were concerned about government actions that merely favored one *private* faction over another. The "public use" limitation seems to have been directed at this concern. There is no evidence that it was directed at limiting "benign", justly compensated takings that advanced the "*public* welfare" -- albeit through exchanges that left property in new private hands.[37]

In sum, construed in a manner consistent with its original meaning, the phrase "public use" does not appear to prohibit takings that place

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[36] Paul, *Public Use: A Vanishing Limitation on Governmental Takings*, 4 Cato J. 835, 837 (1985) (citation omitted), *citing* P. Nichols, *The Law of Eminent Domain* §7.62 (3d ed. 1980).

[37] Admittedly, the concept of "benign" takings aimed at advancing the "public welfare" is ill-defined, and, thus, subject to abuse. Nebulous "public policy" grounds may, for example, be cited in favor of takings that, in reality, accrue primarily to the benefit of narrow special interest groups.

property in private hands or otherwise benefit particular private constituencies, as long as the takings are of a sort that benefit the general public.[38]

E. The Meaning and Measure of "Just Compensation"

1. *The Meaning of Just Compensation*

The term "just compensation" was not specifically defined in 18th century legal treatises or dictionaries. Nevertheless, helpful information concerning that phrase can be gleaned from 18th century meanings of the

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[38] Consistent with this analysis, the noted constitutional commentator Thomas Cooley recognized that transfers to private parties qualify as "public uses" if they provide genuine benefits to the public: "on the principle of public benefit, not only the State and its political subdivisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished." T. Cooley, *A Treatise on the Constitutional Limitations* 776 (7th ed. 1903) (citation omitted). In a similar vein, Professor Richard Epstein argues that takings benefiting private parties pass "public use" muster if the property taken retains "public good" characteristics -- *i.e.*, the property is operated under "common carrier" conditions, generating services that are publicly available on a nondiscriminatory basis. *See* R. Epstein, *Takings* 166-69 (1985).

Of course, the concept "benefit to the public" is subject to being construed in an extremely expansive, arguably abusive, fashion. For example, in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Supreme Court upheld the Hawaii Land Reform Act of 1967, which allowed the state to take real property from lessors for just compensation. According to the Court, that Act yielded public benefits by correcting real estate market "deficiencies" and by alleviating "social problems" stemming from "land oligopoly." In Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455 (Mich. 1981), the Supreme Court of Michigan (construing the Michigan Constitution's just compensation clause) upheld Detroit's eminent domain acquisition of land in a Detroit's residential neighborhood for construction of a General Motors auto assembly plant. The Court reasoned that the acquisition would benefit the public by "alleviating unemployment" and "revitalizing the economic base of the community." *Midkiff* and *Poletown* might be criticized on the ground that the takings in question primarily benefited particular private constituencies (certain tenants and one auto manufacturer, respectively), rather than the general public. Nevertheless, it cannot categorically be stated that the "public benefits" cited in those cases (the "alleviation of land oligopoly" and "revitalization of the local economy," respectively) are inconsistent with the meaning of the term "public use" -- even though those holdings stretch that term rather far.

words "just" and "compensation". Samuel Johnson's 18th century *Dictionary of the English Language* defines "just" as "exact; proper; accurate; ... equally retributed ... complete without superfluity or defect."[39] "Compensation" is "something equivalent; amends."[40] Taken together, these definitions tend to indicate that "just compensation" signifies an exact, accurate, complete payment, made to recompense an individual by rendering to him an amount equivalent to what he has lost. According to this interpretation, "just compensation" involves full payment for the harm an individual has sustained -- payment that leaves the individual as well off as if no harm had been inflicted in the first place.[41]

This interpretation of the meaning of just compensation is consistent with a discussion found in Blackstone's *Commentaries*. In discussing takings by government for the public good, Blackstone stresses that government cannot take "by absolutely stripping subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[42] In short, Blackstone's analysis of what constitutes appropriate compensation for a taking (full indemnification for the injury sustained) fully squares with a textual analysis of the phrase "just compensation". This tends to support the

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[39] S. Johnson, *Dictionary of the English Language* (ed. 1755).

[40] *Id.*

[41] Alternatively, it might be argued that "just compensation" means "fair" rather than "full" compensation -- in Johnson's terminology, a "proper" amount to make "amends" for a harm suffered. According to such an alternative interpretation, the government might, for example, be empowered to determine what is a "fair" amount to be paid for a taking; an amount fully equivalent to the diminution in the aggrieved individual's property value might not be required. That interpretation, however, is hard to square with Johnson's specific references to "just" as "something equivalent" and to "compensation" as "complete". Compensation that is less than the taking-related drop in property value, would appear to be neither "equivalent" nor "complete." This conclusion is further buttressed by the fact that Johnson defines the verb "compensate" as "to be equivalent to". In sum, the better interpretation appears to be that "just compensation" originally meant "full compensation" that equals the taking-related diminution in the value of an individual's property rights.

[42] W. Blackstone, *supra*, at 52. Given the framers' respect for Blackstone, it is certainly plausible to suggest that, in fashioning the just compensation clause, the framers may have been attempting to guarantee the result that Blackstone praised. If so, it is not at all surprising that the plain meaning of the words the framers employed ("just compensation") appear to yield an outcome identical to the one described by Blackstone.

proposition that "just compensation" meant in the 18th century what it means today.

A review of the historical development of the "just compensation principle" serves as a further check on our conclusion regarding the meaning of "just compensation." The following historical analysis suggests that the plain textual analysis of the term "just compensation" is indeed accurate.

The earliest recognition of the government's right to take property -- together with a requirement that compensation be paid therefor -- is found in Chapter 28 of the Magna Carta of 1215, which reads, "No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller."

Several English sewer statutes, enacted beginning in 1427, yield further evidence of an early acknowledgement of the power of the government to take private property.[43] Stating that ancient gutters, walls, ditches, bridges, and lowlands had fallen into disrepair, one statute appointed commissioners to supervise their repair and maintenance.[44] These commissioners were given the power to take land for this purpose "where shall need of new to make." Neither condemnation nor compensation procedures were specified. In practice, however, compensation was often expected, and usually paid, for such takings.[45] Indeed, in addressing the reach of these sewer statutes in 1622, a contemporary jurist stated that

> where any man's particular interest and inheritance is prejudiced for the Commonwealth's cause, by any such new erected [sewer] works, That part of the Country be ordered to recompence the same which have good thereby, according as is wisely and discreetly ordered by two several Statutes . . .

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[43]Stat. 6 Hen. 6, c. 5 (1427); *see also* Stat. 9 Hen. 6, c. 9 (1430); Stat. 18 Hen. 6, c. 10 (1439); Stat. 23 Hen. 6, c. 8 (1444-45); Stat. 12 Edw. 4, c. 6 (1472); Stat. 4 Hen. 7, c. 1 (1488-89); Stat. 6 Hen. 8, c. 10 (1514-15).

[44]Stat. 6 Hen. 6, c. 5 (1427).

[45]*See* Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 576-77 (1972).

> [which] may serve as good Rules to direct our Commissioners [of sewers] to imitate upon like occasion happening.[46]

The first recorded statutory compensation provisions are found in the sixteenth century. In 1514, a statute authorized the city of Canterbury to improve a river channel, but required compensation for the accompanying unavoidable destruction of mills and dams.[47] Other similar statutes required cities or counties to pay for land taken in river improvements efforts.[48] In the seventeenth and eighteenth centuries, compensation for takings of property became a more regular component of English parliamentary acts, with each statute providing its own compensation scheme.[49]

Based upon this statutory history, it has been argued that compensation for takings of property was recognized as a customary practice during the American colonial era.[50] Consistent with this observation, a variety of highway statutes adopted by American colonial legislatures provided compensation for land taken for roads, if the land taken had previously been either improved or enclosed. It was almost universally recognized that no compensation was to be paid for takings of unenclosed or unimproved lands.[51] Nevertheless, it has been posited that the practice of paying only for takings of enclosed or improved lands did not deny the general right of compensation. Those who have conducted a thorough analysis of colonial history contend that, because there was an overabundance of unimproved land, the colonials simply presumed that a new road over unimproved or unenclosed land would always give more value to the landowner than the land it occupied.[52]

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[46] Stoebuck, *supra*, at 577, *citing* R. Callis, *Reading Upon the Statutes of Sewers* (1685).

[47] Stat. 6 Hen. 8, c. 17 (1514-15).

[48] *See* Stat. 31 Hen. 8, c. 4 (1534); Stat. 27 Eliz., c. 20 (1585); Stat. 27 Eliz., c. 22 (1585).

[49] *See* Stoebuck, *supra*, at 561-62, nn. 28-32.

[50] *Id.* at 579. The 17th century European legal theorists Hugo Grotius and Samuel Pufendorf also advocated the payment of just compensation for the taking of property. *See* H. Grotius, *De Jure Belli ac Pacis*, Bk. II, ch. XIV, VII, VIII (F. Kelsey translation 1925); S. Pufenderf, *De Jurce Naturaeet Gentium*, BK. VIII, ch. 5, §7 (C. and W. Oldfather translations 1934).

[51] The only documented exception to this practice was Massachusetts, which compensated for takings of unimproved land. *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 695 (1985).

[52] *See* Stoebuck, *supra*, at 583.

The Vermont Constitution was one of ten state constitutions adopted in 1776 and 1777, and was the only one to include a just compensation clause. While there are no surviving records of the Vermont Constitutional Convention,[53] one historian believes that the impetus for the clause can be found in that state's "tangled history of property holdings."[54] The land had been settled primarily by colonists holding land grants from New Hampshire. When King George III awarded the area to New York in 1764, the New York legislature refused to recognize the claims of the New Hampshire settlers. Focusing on these problems and evidencing a clear lack of trust in the legislature, the preamble of the Vermont Constitution recited "the legislature of New York ever have, and still continue to disown the good people of this state, in their landed property . . ."[55] It further specified that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."[56] In contrast to the accepted practice in most other states, the Vermont Constitution provided for the payment of compensation for *all* takings of land, even that which was unimproved or unenclosed.

The inclusion of a just compensation clause in the Massachusetts Constitution of 1780 similarly reflected a lack of trust in legislatures and heightened concern for individual rights. Concern about the potential for legislative attacks on property was particularly intense in Massachusetts, where battles between interest groups had dominated state politics. Fear that an unrestrained legislature would undermine individual property interests animated Theophilus Parsons and many others in mercantile eastern Massachusetts.[57] Moreover, the failure to provide adequate

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[53] Apparently there was little time for discussion of the proposed constitution. In the face of an expected British attack, the convention convened, accepted a constitution, and adjourned on the same day. *See* W. Slade, *Vermont State Papers* xv, xvii (W. Slade ed. 1823). While the Vermont Constitutional Convention refers to the "State of Vermont", Vermont was not one of the 13 original colonies, nor was it one of the original ratifiers of the United States Constitution.

[54] Note, *supra*, 94 Yale L.J. at 702.

[55] Vermont Constitution of 1777, *reprinted in* 2 B. Poore, *supra*, at 1859.

[56] *Id.*, ch. I, art. II.

[57] *See* R. Peters, *The Massachusetts Constitution of 1780* 143-47 (1978), for an analysis of this fear.

protection for private property was a major reason why Massachusetts voters rejected the proposed state constitution of 1778.[58]

The Massachusetts Constitution of 1780 included the following just compensation clause:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.[59]

After ratification, the Massachusetts Constitution's just compensation clause was held to require compensation for the taking of real property, *Gedney v. Tewksbury*, 3 Mass. 306 (1807) (land taken for public road), and personal property, *Perry v. Wilson*, 7 Mass. 393 (1811) (logs taken for use in canal construction).

The mistrust of the legislature that led to the just compensation clause in the Massachusetts Constitution also prompted the inclusion of such a clause in the Northwest Ordinance. Powerful members of Congress had earlier blocked bills for the governance of the Northwest Territories because they had feared the creation of a territorial legislature that would rescind land grants. The inclusion of a just compensation clause in the Northwest Ordinance of 1787 apparently addressed these concerns. The Ordinance declared that:

> [N]o man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same . . . .[60]

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[58] *See* O. Handlin & M. Handlin, *The Popular Sources of Political Authority* 1, 22 (O. Handlin & N. Handlin eds. 1966).

[59] Massachusetts Constitution of 1780, part I, art. X, *reprinted in* 1 B. Poore, *supra*, at 958.

[60] Northwest Ordinance of 1787, art. 2, *reprinted in* 32 *Journals of the Continental Congress* 340 (R. Hill ed. 1936).

There is little recorded information regarding the history of these three just compensation clauses. Nevertheless, the words they employed help clarify their meaning. First, they refer to "property" in general terms. Thus, on their face, they apply to all interests encompassed by the term "property." Second, they suggest that when government takes property, it must pay that amount of compensation that leaves the property owner as well off as if there had been no taking. This can be inferred from the Vermont Constitution's requirement that the property holder "receive an *equivalent* in money," and from the Northwest Ordinance's command that "*full* compensation shall be made". The Massachusetts Constitution's reference to "reasonable compensation" is far more ambiguous. *Black's Law Dictionary* defines "reasonable" as "being synonymous with . . . equitable",[61] a reading which suggests that "reasonable compensation" may be synonymous with "equitable compensation." The term "equitable compensation," which suggests a concept of fairness, is rather vague. While it is not necessarily inconsistent with "compensation that leaves the property holder as well off as before," it certainly does not compel such a reading. In sum, the Vermont Constitution and the Northwest Ordinance logically can be read to require *full* compensation for any harm to private property interests. The Massachusetts Constitution neither clashes with -- nor compels -- such an interpretation.

Subsequent to the drafting of the Constitution, there were serious and repeated demands for the addition of a Bill of Rights.[62] While every other provision contained in the ratified Bill of Rights had been specifically requested by at least two states, none sought the inclusion of a just compensation clause.[63] In fact, to the extent that compensation for governmental takings of private property was discussed at all, there was some significant concern that such a clause would be interpreted to impose burdens on the states, rather than on the federal government.[64]

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[61] *Black's Law Dictionary* 1138 (5th ed. 1979).

[62] *See* 2 M. Farrand, *Records of the Federal Convention* 582, 637 n. 140 (1911); J. Madison, *Notes of Debates in the Federal Convention* 630 (A. Kodi ed. 1969).

[63] *See* E. Dumbauld, *The Bill of Rights and What It Means Today* 161-63 (1957) (listing amendments proposed by the states).

[64] *See* J. Main, *The Antifederalists* 157 (1961); *Essays of Brutus, reprinted in* 2 *The Complete Anti-Federalist* 358, 429 (H. Storing ed. 1981).

On June 8, 1789, James Madison presented his draft of twelve proposed amendments to the first session of Congress. His seventh, which became the fifth in the ratification process, contained double jeopardy, compulsory testimony, and due process clauses, followed by this original just compensation provision: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[65]

The accounts of the congressional debate over the Bill of Rights provide no evidence as to why Madison sought the inclusion of this particular provision, or why the text was changed. Nevertheless, it is possible to shed some light on the reason that Madison saw fit to include such a provision in his original draft of the Bill of Rights. During his legislative career in Virginia, Madison had championed the interest of property. He had opposed state seizures of loyalist property,[66] proposed and secured passage of the first road bill requiring compensation for unimproved land,[67] and opposed attempts to forestall debt collection.[68] For Madison, society was characterized by conflicts among interest groups, and those conflicts were often over property. "[T]he most common and durable source of factions," he wrote, "has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."[69] The inclusion of a clause to protect private property from being taken arbitrarily and without recompense (and thus making its owner bear an unfairly large share of the cost of government) can be seen as an attempt strictly to limit the manner in which the government could divest persons of their property, and thus their stature in society.[70]

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[65] *Annals of Congress*, 1st Cong., 1st Sess., cols. 433-36.

[66] *See, e.g.*, Bill Prohibiting Further Confiscation of British Property (submitted Dec. 3, 1784), *reprinted in* 8 J. Madison, *The Papers of James Madison* 173 (R. Rutland & D. Rachal eds. 1973).

[67] *See* An Act Concerning Public Roads, Va. Stats. ch. LXXV (1785).

[68] *See* Letter from James Madison to James Madison, Sr. (Dec. 12, 1786), *reprinted in* 9 *J. Madison, supra*, at 205-06.

[69] *The Federalist No. 10, reprinted in* 10 *J. Madison, supra* at 263, 265.

[70] Indeed, such an interpretation can be supported by historical reference to the almost universally recognized right of the states to seize loyalist property. *See* A. Nevins, *The American States During and After the Revolution* 507 (1924).

Madison's concern for the full protection of property rights is consistent with the hypothesis that "just compensation" means full compensation that leaves the property holder as well off as before the taking. Also consistent with this hypothesis is a reference in Madison's essay on *Property*, published in the wake of the Bill of Rights' enactment. In *Property*,. Madison indicates that a just government "maintain[s] the inviolability of property; . . . provides that none shall be taken *directly* even for public use without indemnification to the owner".[71] Because this language clearly tracks the just compensation clause, it is not implausible that Madison may have viewed "indemnification" as being on a par with "just compensation."[72]

2. *The Measure of Just Compensation*

It seems to follow from the previous discussion that, when taking property for a public use, the government is obliged fully to compensate affected property holders for the harm stemming from the taking. In other words, the government should endeavor to pay property holders an amount that equals the taking-related diminution in their property rights.[73] Consistent with that principle, the following discussion analyzes standards for measuring just compensation. The following analysis follows logically from what we believe is the best reading of the just compensation clause's original meaning. Alternative interpretations of that clause's original meaning might yield somewhat different measures

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[71] *Property*, *supra*, at 267 (emphasis in the original). There is no clear explanation for Madison's use of the term "directly". This unexplained term was not, of course, included in the just compensation clause. If the framers had intended to apply the clause only to "direct" takings (whatever those are), they could have inserted that word in the text. They chose not to do so. This observation demonstrates the difficulty of seeking to elucidate constitutional text by means of nonconstitutional rhetoric.

[72] Throughout this Report, of course, arguments based on textual analysis are given precedence over mere inferences (such as this one) drawn from historical references.

[73] This presumes, of course, that some vehicle for the payment of compensation is available. The United States can, of course, authorize the payment of just compensation by statute. The right to just compensation is, however, constitutionally -- not just statutorily -- based. A recent Supreme Court decision holds that the Fifth Amendment, by its own terms, directly mandates the payment of compensation. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 107 S. Ct. 2378 (1987), the Supreme Court held that the just compensation clause *constitutionally* entitles a property owner to monetary damages for loss of value when government regulation "takes" property. In so holding, the Court stressed the "self-executing" character of the just compensation clause. *See* 107 S. Ct. at 2385-88.

of "just compensation" (such as "fair compensation," rather than "full compensation").

"Market value" -- the price that property would fetch in the market -- frequently is considered an accurate measure of just compensation. A market price objectively reflects the value that property would fetch in its highest-valued use -- a price at which sellers would be willing to sell and buyers would be willing to buy. Because, theoretically, willing sellers would be willing to part with their property at the market price, it can be presumed that the receipt of market value fully makes up for the objectively ascertainable drop in property value caused by a taking. Accordingly, when a market price is readily ascertainable, it generally can be presumed that the payment of market value to an individual whose property has been taken fully compensates him for his diminution in property value.[74] Under those circumstances, the market price is a fairly accurate measure of just compensation.[75]

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[74] It may be that the affected individual would not have been willing to part with his property at the market price, because, unlike willing sellers, he subjectively assigns a value to his property that exceeds its highest-valued use. The true price at which such an individual voluntarily would sell his property cannot, however, accurately be determined, given that individual's incentive to dissimulate and exaggerate his valuation of property. Moreover, because the market price is widely recognized as a fair standard of compensation, reliance on market valuation arguably comports with the requirement that compensation be "just". Accordingly, in order to facilitate compensation calculations when the government takes property for public use, the objective, generally reliable market measure of value should be relied upon.

[75] Richard Epstein takes the position that market value generally should be the standard measure of just compensation. He admits, however, that market value may understate the real subjective "use value" of property. R. Epstein, *Property* 182-84 (1985). *See also* Knetch and Borcherding, *Expropriation of Private Property and the Basis for Compensation*, 29 U. Toronto L.J. 237 (1979) (subjective value assigned property by seller *or* buyer may be greater than market price); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 736-37 (1973) (advocating payment of a bonus value greater than market value upon condemnation of property); Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 243, 245 (1978) (arguing that condemnees in private takings be paid 150% of the market value of the land acquired). Richard Epstein also believes that "market value" should include payment for all consequential damages stemming from a taking. R. Epstein, *supra*, at 55, 74-92, 182. We note by way of interest that this position seemingly is at odds with present day case law. *See* United States v. Bodcaw Co., 440 U.S. 202, 204 (1979) (denying the payment of property assessment costs to condemnee on the ground that a landowner is not entitled to compensation for all condemnation-related costs).

In certain situations, however, there may be no market price. When the maximum price prospective buyers would pay for property is lower than the minimum price prospective sellers would accept, no market transactions will occur, and a "market price" does not exist. When the government takes property for which no market price exists, the just compensation requirement possibly may require that affected individuals be paid for the full loss of property value they have sustained -- not some smaller amount that prospective sellers would have been willing to pay. Although it is, admittedly, seemingly at odds with the case law,[76] this rule appears to follow from the fact that "just compensation" is compensation that leaves an individual whose property has been taken as well off as in the absence of a taking. Thus, for example, if no prospective buyer would pay more than $5,000 for a small strip of land taken from homeowner Z's front yard -- but the taking of such a strip would lower Z's property value (house plus lot) by $100,000 -- there is a strong argument that the government must pay Z $100,000 for such a taking.[77] The payment of a lesser amount would not fully compensate Z for the diminution in property value he had suffered due to government action.[78]

As explained below, we also believe that the government must compensate the property owner for interim and future taking-related restrictions placed on the use of his property, to the extent that such restrictions diminish his property value.[79] A failure to compensate for

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[76] *See* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (compensation is tendered only for the "property taken" and not for the losses sustained by the owner). Under *Monongahela*, the price prospective buyers would pay for property might be deemed to represent a "fair valuation" of the property taken.

[77] Professor Richard Epstein's writings are consistent with this approach to compensation; Epstein stresses that "it is the *loss* to the owner which functions as the proper measure of compensation". R. Epstein, *Takings* 53 (1985) (emphasis in the original).

[78] Proponents of the position that "just compensation" merely means "fair" (not necessarily "full") compensation might argue that if the small strip could only be sold in the market for $5,000, just compensation measured by fair market price should only be $5,000. Such an interpretation, however, would ignore the fact that the diminution in the value of the owner's property rights would equal $100,000, *not* $5,000. As previously discussed, "just compensation" is best understood as originally having meant "full", "complete", "equivalent" payment that recompenses an individual for harm sustained. (This definition is based on Samuel Johnson's *Dictionary* and Blackstone's *Commentaries*.) In this example, a full payment for the harm done to the individual's property value clearly equals $100,000.

[79] The Supreme Court recently held that a property owner is entitled to interim damages for the period before it is finally determined that a regulation constitutes a taking. First

such interim and future restrictions seemingly would violate the principle that the former property owner must be left as well off in his property value as if there had been no taking. Thus, if a court determines, only at the end of litigation lasting several years, that burdensome regulation takes property, the property owner should be paid for the diminution in property value (if any) during the pendency of the litigation. A decision to rescind the regulation after the court's judgment is rendered would not relieve the government of its responsibility to pay for the losses stemming from this "interim taking"; it would merely terminate the taking and relieve the government of future financial responsibility. If, on the other hand, the government elected *not* to rescind the offending regulation, it would have to pay the owner for the present loss of value due to any future restrictions on property rights stemming from the continuing regulatory taking. The analogy to the taking of land through eminent domain is straightforward. If the government takes land, then subsequently rescinds the taking (returning the land to its former owner), it should be liable only for any interim diminutions in market-determined use value that occurred during the time it held the land.[80] If instead the government does not rescind the taking of land, it should pay the owner the full value of what he has lost, just as it apparently should pay full compensation for continuing regulatory takings.

Property owners need not always be paid explicitly when government action interferes with their property rights. The theory of "implicit in-kind compensation" may obviate the need for direct government payments.[81] This theory is straightforward: Compensation need not be paid when an interference in property rights yields an increase in value equal to or greater than the value that has been diminished. In other

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English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 107 S. Ct. 2378 (1987). Douglas Kmiec has argued that interim damages and permanent damages must be paid for losses of value occasioned by regulatory takings. *See* Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 Ind. L.J. 45 (1982). *See also* Krier, *The Regulation Machine*, 1982 Sup. Ct. Econ. Rev. 1 (arguing that compensation must be paid for interim and permanent losses stemming from regulatory takings).

[80]The aggrieved property owner would have to do more than baldly assert that the government's "interim taking" deprived him of a lucrative opportunity. He would have to prove, based on market information, that he was deprived of a specific, objectively measurable, potential higher-valued use of the property during the period covered by the interim taking.

[81]The theory of implicit in-kind compensation has been eloquently articulated by Richard Epstein. *See* R. Epstein, *Takings* 192-215 (1985).

words, because it bestows benefits upon aggrieved property holders, which benefits equal or exceed the harm stemming from a taking, implicit in-kind compensation qualifies as just compensation; the property owner is left at least as well off as he was before the taking. Thus, for example, a business zoning ordinance that restricts the size, configuration, and storefront displays of shops may yield net benefits to each store owner, by creating a pleasant commercial area that attracts shoppers. (Absent the ordinance, no individual store owner could require his fellow merchants to observe the uniform standards that bring shoppers to the area.) This example does not suggest that all regulatory actions escape just compensation clause scrutiny; whenever net property values are measurably diminished, compensation must, of course, be paid. It merely highlights the fact that takings for a public use require the payment of compensation *only* when property values are reduced.

In summary, we believe the just compensation requirement directs that the government leave an affected property holder as well off in his property as in the absence of a taking. Market value generally is an accurate measure of just compensation. If a market price is not, however, ascertainable, just compensation seemingly should be measured by the diminution in value suffered by an individual whose property has been taken -- not by the price prospective sellers would have paid for the property. Our textual analysis of the just compensation clause also suggests that compensation must be paid for the interim as well as the permanent effects of a taking, if the property owner (consistent with the meaning of just compensation) is to suffer no net loss in the value of his property rights. Compensation need not, however, invariably involve an explicit transfer of funds to a property owner. Explicit monetary compensation need not be paid when a government action that interferes in property rights bestows benefits upon an aggrieved property owner that more than outweigh the harm to his property (implicit in-kind compensation). Finally, when an interference in property rights yields an increase in value equal to or greater than the value that has been diminished, explicit compensation seemingly need not be paid; the property owner is left at least as well off as he would have been in the absence of government action.

F. The "Police Power" Limitation

Before examining the just compensation clause as a whole, we must first deal with the judicially crafted "police power" exception to the just compensation clause.[82] This court-created exception authorizes the government to make uncompensated takings when acting pursuant to its "police power," rather than under eminent domain.

The "police power" limitation should be rejected on constitutional grounds.[83] The just compensation clause does *not* state that just compensation must be paid "except when the state acts pursuant to its police power." Quite the opposite, the clause contemplates compensation when takings occur for the "public use" -- a phrase that would seem by definition to encompass police power takings. Both eminent domain and the police power may be invoked to further similar public goals; there is no reason to shield from constitutional reach takings premised on police power grounds. Moreover, there are no indications in the historical record that the framers contemplated a "police power" exception to the just compensation requirement.

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[82]The just compensation clause applies by its terms to the federal government, not to the states. The term "police power" is not, however, necessarily limited to the reserved sovereign attributes of the individual states, according to Professor Richard Epstein. He defines the "police power" as involving "those grants of power to the federal and state government that survive the explicit limitations found in the Constitution." R. Epstein, *Takings*, *supra*, at 107. The scope of the "police power," however, generally has arisen in the context of takings by state and local governments -- not by the federal government. Even though the just compensation clause originally applied to the federal government, it was made applicable to the states through the Fourteenth Amendment's due process clause in the 19th century. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897). Without regard to the Fourteenth Amendment, the just compensation principle is well-entrenched as a matter of state law. Forty-nine of the 50 state constitutions include some version of the just compensation clause; many of the state provisions closely track the federal just compensation clause's language. *See Constitutions of the United States: National and Federal (1980)*, *passim*, for a description of the various state just compensation clauses.

[83]This position is also taken by Professor Susan Wright. *See* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. 612 (1983) (arguing that just compensation must be paid for regulatory takings pursuant to the police power).

G. The Meaning and Application of the Entire Clause

Having examined the original meaning of its component parts, we can now ascertain the original meaning of the just compensation clause, taken as a whole. The just compensation clause seems to require that whenever the government directly interferes in (deprives, diminishes, or disturbs) the legally-protected possession, use, or disposition of any form of private property, it must pay the property owner the full value of the property right that has been undermined, in order to leave the owner as well off as if there had been no taking.[84] Government actions that only very indirectly and tangentially affect property rights may perhaps be too attenuated or insufficiently material to rise to the level of takings. Explicit compensation need not be paid, however, if the government interference bestows benefits upon the aggrieved property holder that outweigh the harm imposed on his property (implicit in-kind compensation). Moreover, compensation need not be paid when the government enjoins uses of property that harm third parties (such as public nuisances); such uses are not legally-protected property rights. Permissible takings are those that provide benefits to the general public; takings that merely provide private benefits are impermissible, whether or not compensation is paid. It matters not whether a taking for a public use is

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[84] This statement should be slightly qualified. Federal or state taxes that are otherwise constitutionally permissable do not constitute compensable takings. Such taxes certainly take property without rendering compensation to the individuals taxed. Nevertheless, the just compensation clause should not be read to reach such taxes. The Constitution expressly delineates Congress' taxing powers. *See* U.S. Cont., art. 1, §2, cl. 3; art. 1, §8, cl. 1; art. 1, §9, cl. 4 and 5; amend. XVI. These provisions are discussed in R. Rotunda, J. Nowak, & J. Young, 1 *Treatise on Constitutional Law* §§ 5.2.-5.11 (1986). The requirement that government compensate all individuals for the value of tax assessments would render nugatory government's taxing powers. Such a result would read all taxation provisions out of the Constitution, thereby eliminating the ability of the state and federal governments to maintain themselves. The disappearance of government would, of course, render meaningless the entire constitutional structure, including the just compensation clause.

pursuant to eminent domain or to the police power:[85] when there is a taking, compensation must be paid.

We are now in a position to apply the just compensation clause to interferences in property rights by government. The following description of just compensation clause applications is suggestive; it is intended to illustrate the broad scope of the clause, not to exhaust its possibilities. The theme that undergirds the examples set forth below is that government takings for a public use must be accompanied by compensation equal to the value of the property right that has been taken. The value of that right is determined by reference to prices prevailing in the relevant market. Thus the mere unsupported assertion that government action had diminished an individual's property value by a specified amount would not be sufficient to trigger the just compensation requirement. Rather, a property owner requesting compensation would have to show that, based on current market values, the governmental taking of some aspect of his property reduced by a fairly ascertainable amount the value that the owner could realistically have expected to realize from the exercise of his previous property rights. It should be emphasized that preexisting governmental restrictions are not "takings" vis-a-vis the new owner of property; the permissible scope of property rights is established subject to legal constraints that exist at the time of acquisition.[86]

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[85]The Supreme Court elected not to address the question of the conditions under which "police power" regulations amount to takings in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 107 S. Ct. 2378 (1987). That case potentially raised the question of whether a municipal flood plain ordinance that prevented a property owner (here, a church) from rebuilding a campsite amounted to a "public health and safety" regulation that was exempt from the just compensation requirement. The Court in *First English* avoided that question, stating that it had "no occasion to decide whether . . . the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use [of church property] was insulated as a part of the State's authority to enact safety regulations." 107 S. Ct. at 2384-85.

[86]Thus, for example, the buyer of a plot of land in a low-lying area cannot claim that a preexisting flood plain ordinance "takes" his property by precluding him from building on the land. His initial property rights in the plot were subject to an ordinance-induced ban on building that existed at the time of purchase. On the other hand, individuals who own low-lying plots at the time an applicable flood plain ordinance is enacted seemingly could raise a taking claim; their initially established property rights did not limit their right to build on their property. The flood plain ordinance example illustrates the point that regulatory policies may reduce the property values of a general class of property holders (here, all those who owned low-lying property at the time a flood plain

The clause requires compensation for eminent domain actions that dispossess an individual of his land. If, for example, the government takes a 100 acre farm, it must pay for the farm's full value; if it merely takes one acre, it must pay for the diminution in the farm's value attributable to that taking, unless market value could be ascertained for an acre-by-acre transaction.

Governmental interferences in subsurface and air rights are covered by the clause. When government action floods land, the landowner must be paid for the diminution in land value attributable to the flooding. When overflights of government planes damage a farmer's crops, the farmer must be made whole. Cognizable interferences in subsurface and air rights need not involve a physical trespass. When the government prohibits an owner from engaging in previously allowable subsurface mining, full payment must be made for the market value of the foregone mining rights.[87] Similarly, when the government changes its laws to prevent a building owner from constructing any addition to the existing structure, the owner should, we believe, be paid the full increment in total property value that would have been attributable to the highest market-valued use of the foregone property interest. (This would be measured by the market value of the highest-valued building addition the owner otherwise could have constructed.)

Government regulatory actions may involve compensable takings. Thus, for example, if a zoning ordinance prohibits a property owner from constructing buildings (thus taking from the owner a right of property that he previously possessed), the owner must be paid for the diminution in the value of his land, measured by the property's value in its highest market-valued use. What if the government entity subsequently rescinds the offending ordinance? It still must pay the owner for his loss of value, if any, during the period when the ordinance was in effect.[88] Without

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ordinance was promulgated). Thus, a single governmental act may take the property of all members of an affected class, not merely a single individual's property.

[87] More precisely, the mine owner must be paid for the diminution in the value of the overall property attributable to the prohibition on mining. *See*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (statute prohibiting the mining of coal in such a manner as to cause the subsidence of certain types of improved property deemed an uncompensated taking). *But see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (law that limited total amount of coal a miner could extract (so as to prevent harm to surface property) held not to be a taking).

[88] Consistent with this conclusion, The Supreme Court's recent holding in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal., 107 S. Ct.

such payment, the owner would be left worse off than he would have been had the ordinance not been enacted in the first place.

Government actions affecting the uses of private property do not require the payment of compensation if legally-protected property rights are not infringed, or if the benefits of such actions outweigh the costs to property owners. Thus, for example, when government requires by regulation that a property owner abate a nuisance (for example, a rendering plant that severely pollutes the neighborhood), compensation need not be paid. No property was taken, because the owner had no right to use his property in a manner that harmed other people. If instead the government takes this property by eminent domain, it has to pay the owner for the highest market-valued property use that does not constitute a nuisance. This follows from the fact that while the government has not "taken" non-protected uses of the property (uses that constitute a nuisance), the exercise of eminent domain has prevented the previous owner from dedicating his property to legally-protected, non-harmful, benign uses. Thus, for example, if the property's value as a rendering plant is $100,000, but its highest-valued non-harmful use is $50,000, the government must pay the former owner $50,000 when it invokes eminent domain.

2378 (1987), established that a property owner is entitled to interim damages for harm suffered in the period before it is determined that a regulation constitutes a taking. The property owner may have suffered no loss of value during the period when the ordinance was in effect; if so, he receives no interim compensation. If, on the other hand, the regulation prohibited the owner from taking advantage of a valuable business opportunity in the interim (such as the short-term rental of property for a specialized use at a "higher than normal" price), we believe that the owner must be paid the market value of the foregone opportunity in order to be made whole.

Figure 1

APPROACHING ISSUES ARISING UNDER THE JUST COMPENSATION CLAUSE

Original Meaning Principle		*Clause Result*
1. Have government actions directly and measurably diminished the value of an individual's property?		
Yes	No	No compensation need be paid.
2. Did the government's actions provide the property owner with "implicit in-kind" benefits that outweighed the diminution in his property value?		
No	Yes	No compensation need be paid.
3. Was the government action that diminished the property interest aimed at preventing harm to third parties' property interests?		
No	Yes	No compensation generally need be paid.[89]

[89] Compensation only need be paid if non-harmful uses of the property are prohibited, and the effect of the prohibition is to impose costs on the property owner that outweigh the benefits he derives. In that case, compensation equal to the difference between the value of the property in its highest-valued foregone non-harmful use and the current value of the property must be rendered to the property owner.

4 Has the government rescinded its action and restored the property to its owner?

Yes — Compensation equal to the interim reduction (if any) in property's market value must be paid.

No — Compensation equal to the full diminution in property's market value must be paid.

H. Case Law Divergence from Original Meaning

The Supreme Court's current just compensation clause jurisprudence departs in several respects from what we believe to be the original meaning of that clause. This section of the report briefly surveys the nature of those differences.

The Court has repeatedly invoked a "police power" exception to excuse the payment of just compensation when government action has reduced property values. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928) (state statute requiring owners to cut down diseased trees without compensation upheld on the ground that the public interest required the state to prevent contagion from spreading); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning ordinance that greatly reduced landowner's property value upheld, on the ground that there was a sufficient public interest in segregating incompatible land uses to justify the reduction in property values); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance preventing quarry owner from excavating below the water line upheld as "reasonably necessary" to protect the "public interest"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987) (state law that prohibited company from mining certain coal deposits upheld on ground that it furthered public interests in health, the environment, and fiscal integrity). The Court very recently rejected California's police power justifications for imposing a public access easement as a condition to the granting of a building permit to beach front property owners. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987). The *Nollan* Court nevertheless opined that the proper invocation of "legitimate police power functions" would justify the uncompensated burdening of property, if the burden were "reasonably related" to the public policy ends sought to be achieved. Thus, the "police power exception" remains very much alive. *Schoene* and *Goldblatt* appear to be justifiable on the ground that there is no taking when the government prevents property from being used in a manner that will harm third parties. Rather than citing this rationale, however, the Court appeared to tie these decisions to the "police power" and the "public interest." Thus the Court chose not to adopt the principle that the just compensation requirement applies to property taken pursuant to the police power as well as to property taken through eminent domain.

The Court also occasionally appears to have applied a balancing test of unknown derivation in determining whether a compensable taking has occurred. In *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), *rehearing denied* 439 U.S. 883 (1978), the Court applied an ad hoc balancing test and determined that New York's landmark preservation regulations were a reasonable means of promoting "general welfare" interests in environmental control and historic preservation. Accordingly, application of those regulations to prevent the erection of a multistory building atop Grand Central Station did not constitute a taking, even though the Station's owner thereby suffered a substantial reduction in property value. We believe that this test is somewhat misconceived. The text of the just compensation clause does not, we believe, permit the compensation requirement to be weighed against the strength of the government's interest in carrying out actions that attenuate property rights.[90]

Consistent with original meaning analysis, the Supreme Court very recently held explicitly that compensation must be paid for the interim effects of takings. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 107 S. Ct. 2378 (1987), the Supreme Court held that the just compensation clause entitles a property owner to monetary damages (through inverse condemnation) for the interim loss of value stemming from temporary regulatory takings. In doing so the Court for the first time clearly established inverse condemation proceedings as constitutionally protected remedies for regulatory takings. Previously, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court had declined on ripeness grounds to review the California Supreme Court's decision that an aggrieved property owner could not sue in inverse condemnation to receive compensation for a

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[90] A theory that upholds denial of compensation on the ground that the compensation requirement is "outweighed" by government "public policy interests" is, we believe, no more justifiable than a theory that suggests vague "public policy concerns" may justify governmental abridgement of free speech. The plain words of the Fifth Amendment's just compensation clause, like the plain words of the First Amendment's free speech clause, in no way contemplate a "balancing away" of the protected right. As Justice Black put it, "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Konigsberg v. State Bar of California, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting). Similar sentiments could be expressed concerning the plain words of the just compensation clause.

regulatory taking (the property owner could only sue for rescission). This California decision held that a California landowner could not be made whole for interim property losses stemming from a subsequently rescinded regulation. The next year, in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), the Supreme Court again refused on jurisdictional grounds to review the California Court of Appeals' application of the "*Agins* rule." Applying that rule, the California court held that a utility could not receive damages for inverse condemnation when an open space zoning plan had destroyed the value of the utility's property. Justice Brennan's *San Diego Gas* dissent, joined by three other Justices (Stewart, Marshall, and Powell), rejected the jurisdictional holding and argued that the California Supreme Court's *Agins* rule ran afoul of the Constitution's command that compensation must be paid for all takings -- including interim, temporary takings. The *First English* decision explicitly rejected the *Agins* rule in adopting the reasoning of the *San Diego Gas* dissent. 107 S. Ct at 2387-88.

Also consistent with original meaning, the Supreme Court at times has held that the quantum of just compensation is determined by market value, measured by "what has the owner lost, not what has the taker gained". *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1915). Unfortunately, however, we believe that the Court at other times unnecessarily has confused the compensation issue. In *United States v. Fuller*, 409 U.S. 488 (1973), the Supreme Court stated that the overall compensation standard is governed by basic equitable principles of "fairness". Accordingly, the Court held in *Fuller* that the government as a condemnor was not required to pay for elements of the property's market value that the government had created by granting the landowner a revocable permit to graze his animals on adjoining federal lands. Determining what elements are included in "equitable" compensation has involved ad hoc case-by-case inquiries.[91] It is not always clear

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[91] *See, e.g.*, United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943), *mandate conformed* 138 F.2d 343 (4th Cir. 1943), *cert. denied* 321 U.S. 773 (1944) (in condemning land federal government need not consider in valuing property the loss of business opportunity dependent on owner's privilege to use state's power of eminent domain); United States v. Bodcaw Co., 440 U.S. 202 (1972), *on remand* 594 F.2d 169 (5th Cir. 1979) (per curiam) (appraisal fees incurred by landowner in connection with condemnation proceeding not constitutionally compensable interests); United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (private nonprofit organization whose recreational camp was condemned not entitled to replacement cost

whether these ad hoc inquiries are consistent with a market value standard of compensation.[92]

Finally, the Court has sharply limited the "public use" limitation as a restriction on governmental takings. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court unanimously (by an eight to nothing vote) upheld a Hawaii statute that allowed the state to transfer real property from lessors to lessees (putatively for just compensation), in order to "reduce land oligopoly." The Court's opinion claimed that the public use requirement is "coterminous with the scope of a sovereign's police powers." In short, the reasoning of *Midkiff* would allow virtually any governmental "public policy" claim to satisfy the public use criterion.

Midkiff's unlimited deference to government policy determinations is justified if one believes that the public use requirement is met whenever government claims that benefits (no matter how indirect or speculative) are being conferred on the public. The *Midkiff* principle may have unfortunate policy consequences, but it cannot be said that it clearly clashes with original meaning. While textual and historical analysis suggests that takings for a public use must provide benefits to "the public at large," that analysis does not reveal whether the "public benefits" standard is narrow or expansive. Accordingly, the expansive *Midkiff* standard is not clearly precluded; we cannot claim that a return to original meaning would require the judicial rejection of *Midkiff*, whatever our views on the wisdom of its policy.

In sum, in order to be faithful to original meaning, we believe that judicial analysis would have to change in several respects. The courts would have to: (1) recognize that a taking occurs whenever government action directly and measurably diminishes the value of legally-protected property rights; (2) eschew reliance on a balancing test of unknown origin in determining whether a taking has occurred; and (3) recognize

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for the camp; replacement cost would have been higher than market value); United States v. 50 Acres of Land, 105 S.Ct. 451 (1985) (federal government not required to pay for cost of substitute facility taken from a state or local government; state and local governments, like private parties, only entitled to market value of property taken).

[92] This does not necessarily mean that the ad hoc inquiries have yielded incorrect results. In *Fuller*, for example, the "taking" of a government-conferred benefit (a revocable permit) presumably did not amount to the "taking" of "property", inasmuch as the landowner originally did not have a protected property interest in the receipt of the foregone benefit.

that takings pursuant to the police power as well as takings pursuant to eminent domain trigger the just compensation requirement.

III. The Contract Clause

A. Textual Analysis of the Contract Clause

The contract clause is found in the first paragraph of Article I, Section 10 of the Constitution, which provides that

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

This paragraph, along with the two following paragraphs in Section 10, recites the primary substantive limitations the original Constitution places on the authority of states. Section 10 is immediately preceded by Article I, Section 9, which recites the primary substantive limitations the Constitution places on the power of Congress, and Article I, Section 8, which recites the enumerated powers the Constitution grants to Congress.

Extracted from its surrounding provisions, the "contract clause" of Article I, Section 10 provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." Understanding the meaning of this provision requires that we analyze the words of the clause as they were originally understood by those who drafted, adopted, and ratified them.

1. *The Meaning of "State"*

The text, context, and history of the contract clause indicate clearly and without the need for further elaboration that the word "state" refers to the component commonwealths and states of the United States, both those in existence at the time of the 1787 Convention and those that might be added in the future.[93] Thus, the first and most obvious

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[93] *See generally Black's Law Dictionary* 1262 (5th ed. 1979).

conclusion with respect to the meaning of the contract clause is that the clause applies against state governments[94] and not against the federal government.[95]

2. *The Meaning of "Pass no Law"*

The Supreme Court has consistently held that the words "pass no law" in the contract clause refer to legislative, and not to judicial or administrative, action.[96] This interpretation of the words "pass no law" is fully consistent with the historical definition of the word "pass," which is described in Webster's 1828 *American Dictionary of the English Language* in its relevant sense as meaning "to be enacted; to receive the sanction of a legislative house or body by a majority of votes."

This interpretation of the words "pass no law" also is consistent with the context of the contract clause. For example, the word "pass" is used in Article I, Section 7 of the Constitution to describe the result of agreement by the House of Representatives and/or the Senate to a bill,[97]

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[94] Local governments also are subject to the contract clause, since they derive their authority entirely from their respective state governments. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 575 ("[p]olitical subdivisions of States -- counties, cities, or whatever -- never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions").

[95] Although the Supreme Court has acknowledged this principle in its application of the contract clause, *see, e.g.*, Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 n.9 (1983), the Court has imposed restrictions substantially similar to those of the contract clause against the federal government under the Fifth Amendment's Due Process Clause. *See, e.g.*, National R.R. Passenger Corp. v. Atchinson, Topeka Co., 105 S. Ct. 1441 (1985); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Perry v. United States, 294 U.S. 330 (1935). These decisions amount to nothing more than a type of judicial regulation of economic activity under the concept of substantive due process, a theory that is textually unjustifiable for the reasons stated at part IV of this Report, *infra*, and that the Court has rightly rejected for some time now in other settings, *see* R. Rotunda, J. Nowak, & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 15.9, at 106 (1986) (citing cases).

[96] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 260 (1953); Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924).

[97] Article I, Section 7, sentence two provides that "every bill which shall have *passed* the House Representatives and the Senate, shall, before it become a Law, be presented to the President . . . " (emphasis added). The third sentence of Section 7 provides that if, after a presidential veto two thirds of the house in which the bill originated "shall agree to *pass* the Bill, it shall be sent, together with the [President's] objections, to the other

referring unmistakably to the legislative process. By contrast, Articles II and III, which pertain to the executive and judicial branches, respectively, do not refer to "passing" laws as being included within the functions of those branches. Similarly, the term "law" in Article I refers to rules that are "established,"[98] "made"[99] and "passed"[100] by the legislative branch, suggesting that the word "law" in the Constitution was originally understood to refer to the product of legislative action.

Although the above cited instances of the words "pass" and "law" in the Constitution relate to the federal government, there is no reason to believe the Founders understood the phrase "pass no law" to mean something different in the contract clause as applied to state governments. Although the Constitution leaves the states generally free to structure their own governments as they wish, all of the state constitutions in existence around the time of the 1787 Convention expressly or impliedly provided for a separation of powers among three branches -- legislative, executive, and judicial -- and expressly or impliedly vested the power to pass laws in the legislative branch alone.[101] While state courts at that time did have general common law authority, unlike the federal courts, the exercise of that authority was not commonly referred to as "passing laws." Therefore, it appears that the Founding society generally understood the phrase "passing laws" as referring to a *process* that was

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House . . . " (emphasis added). Article I, Section 9, sentence three, which recites two of the substantive limitations on the power of Congress, similarly provides that "no bill of attainder or ex post facto law shall be *passed.*" (emphasis added).

[98] *See* Art. I, §8, sentence 4 ("The Congress shall have power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States").

[99] *See* Art. I, §8, sentence 18 ("Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"); Art. I, §9, sentence 7 ("no money shall be drawn from the Treasury, but in consequence of appropriations made by law").

[100] *See* Art. I, §9, sentence 3 ("no bill of attainder or ex post facto law shall be passed").

[101] *See generally* B. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (1878) (collecting state constitutions). For example, Article I of the Georgia Constitution of 1777 provided that "The legislative, executive, and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," and Article VII of the Georgia Constitution provided that the "house of assembly" -- referring to the legislative department -- "shall have power to make such laws and regulations as may be conducive to the good order and well- being of the State . . ."

uniquely engaged in by the legislative branches of government -- both federal and state -- existing at that time.

Professor Epstein nevertheless argues that the contract clause should be applicable not only to state legislative action, but also to state judicial and administrative action that is a "close substitute for legislation."[102] Epstein argues that the text of the Constitution is dominated by "considerations of function" such that when courts and executives act in ways that the framers would have regarded as legislative, they effectively exercise the legislative function described by the Constitution. For example, Epstein says that state courts exercise legislative functions subject to the restrictions of the contract clause when they engage in outright judicial nullification of contractual rights on supposed grounds of public policy.[103]

Although interesting and perhaps sound as a matter of policy, Epstein's argument strays too far from the plain meaning of the words of the contract clause. As we have seen, the words "pass no law" in the Constitution refer to a *process* -- specifically, the process by which bills are passed, presented, and approved by elected representatives -- that courts, federal and state, were originally understood as unable to undertake and that they do not undertake today even in reaching *results* that arguably should accrue from legislative enactment.

Thus, even though state judicial nullification of contracts on public policy grounds not articulated by state legislatures is unfortunate, as this Administration has pointed out on numerous occasions,[104] it would be improper to misinterpret the contract clause in order to correct such excesses. Instead, the proper resolution is to encourage the states to address this problem within the framework of their own chosen structures of government.

Similarly, if concluding that the contract clause applies only to state *legislative* action would allow the states to circumvent the restrictions of the clause merely by having their courts do what their legislatures could

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[102] *See* Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 748 (1984).

[103] *See* Epstein, 51 U. Chi. L. Rev. at 749.

[104] *See, e.g.*, Richard K. Willard, Remarks to the Texas Alumni of Harvard Law School (June 20, 1986) (copy on file at OLP).

not do, this is only because the Framers did not protect against that potential abuse. Again, the proper method of addressing this problem is not to ignore or misinterpret the words of the contract clause, but tc amend the clause or to seek other solutions that are principled as well as desirable.[105]

3. *The Meaning of "Impair"*

The Supreme Court in an early contract clause case held that the obligations of a contract are "impaired" by a law that renders them invalid, or releases or extinguishes them.[106] Later cases have been less than precise in their application of this term, however, sometimes assuming that the words "alter" and "modify" are interchangeable with "impair" without explaining why this substitution is proper.[107]

Samuel Johnson's 1755 Dictionary defines the word "impair" as "to diminish; to injure; to make worse; to lessen in quantity, value or excellence." Webster's 1828 American Dictionary similarly defines "impair" as to make worse; to diminish in quantity, value, or excellence." These historical definitions are generally consistent with our current understanding of the term, which is "to damage or make worse by or as if by diminishing in some material respect."[108]

The word "impair" as so defined differs from the word "alter," which the Framers deleted from an earlier version of the contract clause.[109] "Alter" is defined in Johnson's 1755 Dictionary as "to change,

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[105] We also note that, under some circumstances, it may be possible that rules or regulations will be the product of a state's "legislative process," as that phrase is used in this Report.

[106] Sturges v. Crownshield, 17 U.S. (4 Wheat.) at 197-98 (1819). *See also* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934).

[107] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245-46 (1978).

[108] *Webster's New Collegiate Dictionary* 574 (9th ed. 1983). In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Supreme Court held that an impairment must be "substantial" in order to trigger contract clause scrutiny. *Id.* at 245. This holding is consistent with Webster's current definition of the word "impair," which includes "materiality" as a part of that definition. Materiality or substantiality may also be fairly implicit in Webster's 1828 definition of "impair," since it reasonably can be argued that immaterial or insubstantial diminishings do not involve any real "injury," "making worse," or "lessening."

[109] On September 12, 1787, the Committee of Style reported to the Convention a version of the contract clause which provided that no state shall pass "laws altering of

to make otherwise than it is," or "more properly to imply a change made only in some part of a thing." In Webster's 1828 American Dictionary, "alter" is defined as meaning "to make some change in; to make different in some particular; to vary in some degree, without an entire change." Webster's current definition of "alter" similarly defines the term as "to make different without changing into something else." Thus, the historical and present day definitions of the word "alter" do not explicitly involve the diminishing or lessening that is part of the meaning of the word "impair."

Whether this distinction makes a difference with respect to the meaning of the contract clause is not immediately apparent. On the one hand, some have argued that the word "impair" applies only to state laws that relieve one party of the obligation to perform a contractual duty.[110] Under this interpretation, state laws that impose additional contractual duties on one or both parties would not diminish or lessen the obligation of the party or parties to perform the duties originally agreed to.

On the other hand, the word "impair" also could be read as synonymous with the word "alter" in the contract clause. Under this interpretation, any law that changes the duties of one or both parties to a contract -- either by diminishing or increasing those duties -- would "impair" the obligation of that contract.[111]

In our view, this broader interpretation of the word "impair" in the contract clause is supported, and indeed required, by the context of the clause. As we will discuss later in more detail, the word "contracts" in the clause refers to an agreement between two or more parties to do or not to do certain acts.[112] Given this definition of contract, we believe that when a state law materially alters in any manner the acts one or more of the parties to a contract have agreed to perform, the law "impairs" the obligations of that contract by negating the agreement of the parties to its

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impairing the obligation of contracts." *See* 2 Farrand, *Records of the Federal Convention* 587 (1911). Two days later, the Convention deleted the words "altering or" from that version of the clause. *Id.* at 619. There appears to be no record of why the Convention took this action.

[110]This was the position advanced by Justice Brennan in his dissenting opinion in Allied Structural Steel Co. v. Spannaus, 438 U.S. at 258-60 (1978).

[111]This was the position advanced by the five-member majority in Allied Structural Steel. *See* 438 U.S. at 244 n.16.

[112]See pp. 47-48, *infra*.

terms and either substituting a new agreement (along with a new obligation to perform it) or leaving no agreement in force.[113]

The Supreme Court acknowledged the force of this reasoning in an early contract clause case, *Green v. Biddle*,[114] where the Court said:

> Any deviation from [a contract's] terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.[115]

Restating the point in simpler terms, every alteration in the terms of a contract "impairs" the obligation of the contract by nullifying the contract as it was agreed to. Thus, we believe the context of the contract clause suggests that the word "impair" should be understood as equivalent to the word "alter" for purposes of the clause.

This understanding of the word "impair" also finds support in the fact that increasing the duties on one side of a contract normally has the effect of diminishing the duties on the other side of the contract.[116] For example, a law that increased the rate of interest contract borrowers must pay above that provided for in a loan contract would not only increase the duties of the borrower, but also could be described as decreasing the duties of the lender, since the law would relieve the lender from having to bring to the contract the additional consideration

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[113] For example, a law increasing the rate of interest contract borrowers must pay above that provided for in the contract would "impair" the obligation of any pre-existing loan contract by destroying it (along with the obligation to perform it) as agreed to by the parties and by substituting a new contract having different terms.

[114] 21 U.S. (8 Wheat.) 1 (1823).

[115] *Id.* at 84.

[116] The five-member majority of the Supreme Court in *Allied Structural Steel* relied upon a similar point in support of its interpretation of the word "impair." *See* 438 U.S. at 244 n.16 (arguing that "in any bilateral contract the diminution of duties on one side effectively increases the duties on the other"). *See also* B. Schwartz, *Old Wine in New Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 116-17 (arguing that the converse of the point made by the majority in *Allied Structural Steel* also is true; "increasing the burdens of one party to a contract normally has the effect of diminishing the obligation of the other").

typically necessary to obtain an increased rate of interest in such a situation.

The history of the contract clause is not inconsistent with this broader interpretation of the word "impair." Since there is no historical evidence explaining whether the Convention's deletion of the words "altering or" from the contract clause was substantive or merely stylistic, for example, it would be improper to draw any conclusion about the meaning of the clause from this evidence. Similarly, although state laws relieving one type of contracting party -- contract debtors -- from the obligation to perform their contractual duties appear to have been the principal historical evil the contract clause was designed to address,[117] there is no historical evidence to suggest that the Framers did not also understood the clause as forbidding other types of state legislative alterations of contracts as well.

In fact, the only historical evidence that is at all probative in this context tends to support interpreting "impair" as equivalent to "alter" for contract clause purposes. Shortly after the ratification of the Constitution, Alexander Hamilton, who was then a practicing lawyer, provided a client with a legal opinion concluding that the contract clause "must be equivalent to saying no state shall pass a law revoking, invalidating, or *altering* a contract."[118] This evidence tends to suggest that Hamilton viewed the words "impair" and "alter" as interchangeable for contract clause purposes. Although this historical evidence probably would be insufficient by itself to support the conclusion that "alter" and "impair" were originally understood as equivalent for contract clause purposes, this evidence does tend to confirm our arrival at that conclusion based on the text and context of the clause.

Thus, in sum, we believe the text, context, and history of the contract clause support defining the word "impair" in the clause as equivalent with the word "alter."

4. *The Meaning of "Obligation"*

In the early case of *Sturges v. Crowninshield*,[119] the Supreme Court

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[117] For a discussion of the above-mentioned state debtor-relief laws and the relationship of those laws to the historical meaning of the contract clause, see pp. 53-54, *infra*.

[118] *See* Wright, *supra*, at 22 (quoting Hamilton) (emphasis added).

[119] 17 U.S. (10 Wheat.) 122 (1819).

held that the word "obligation" in the contract clause means "the law [which] binds [a party] to perform his agreement."[120] The Supreme Court has generally adhered to this definition in later contract clause cases.[121]

The Supreme Court's definition of "obligation" is consistent with the etymology of the word and with its general historical understanding around the time the Constitution was ratified. According to Webster's 1828 Dictionary, the word "obligation" is derived from the Latin word "obligo," which means "to bind."[122] Reflecting this etymology, Webster's 1828 Dictionary defines "obligation" as "the binding power of a vow, promise, oath, or contract." Samuel Johnson's 1755 Dictionary similarly defines obligation as "the binding power of an oath, vow, duty, contract."[123] Based on all the above sources, we believe the term "obligation" in the contract clause probably was originally understood as referring to the legally binding effect of a contract.

5. *The Meaning of "Contract"*

The Supreme Court has held that the word "contract" in the contract clause should be understood in its "usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts."[124] This definition is generally consistent with the common understanding of the word "contract" at the time the Constitution was drafted and ratified. For example, Blackstone -- whom the members of the Constitutional Convention expressly consulted on a variety of matters -- defined the word "contract" to mean "an agreement, upon sufficient consideration, to do or not to do a particular thing."[125] Samuel Johnson's 1755 *Dictionary of the English Language* similarly defined the word contract to mean "an act whereby

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[120] *Id.* at 197.

[121] *See, e.g.*, Home Building and Loan Ass'n v. Blaisdell, 290 U.S. at 429.

[122] N. Webster, *American Dictionary of the English Language* (1828).

[123] S. Johnson, *A Dictionary of the English Language* (1755).

[124] Crane v. Hahlo, 258 U.S. 142, 146 (1922); *see* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) (defining "contract" as "a compact between two or more parties").

[125] W. Blackstone, *Ehrlich's Blackstone* 389 (J. Ehrlich ed. 1959) (hereinafter cited as "W. Blackstone").

two parties are brought together; a bargain; a compact."[126] Both the 1729 and 1772 editions of Giles Jacob's *New Law Dictionary* are to the same effect, defining the term "contract" as "a covenant or agreement between two or more persons, with a lawful consideration or cause."[127]

B. Textual and Historical Analysis of Contract Clause Issues

Having thus reviewed the general historical meanings of the individual words of the contract clause, we are now prepared to analyze the meaning of the clause as a whole. This Section will perform that analysis by reference to several contract clause issues that are central to the clause's meaning.

1. *Retrospective/Prospective Applicability*

The first important contract clause issue is whether the clause forbids states to pass laws that impair the obligation of contracts not yet formed (prospective applicability) as well as the obligation of contracts already in existence (retrospective applicability). Beginning as we must with the language of the clause, we should first note that the clause is phrased in general terms, with no express mention of retrospectivity, prospectivity, or any other such temporal element. This generality of language led Chief Justice Marshall and two other dissenters in *Ogden v. Saunders*[128] to argue that the clause is applicable both retrospectively and prospectively.[129]

The majority in *Ogden* rejected Chief Justice Marshall's conclusion, arguing that a "retrospective only" interpretation of the clause is necessary because "[t]here would be no propriety in saying, that a law impaired, or in any manner whatever modified or altered, what did not

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[126] S. Johnson, *A Dictionary of the English Language* (1755).

[127] Webster's 1828 *American Dictionary* similarly defines the word "contract" as "an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to do what the other promises; a mutual promise upon lawful consideration or cause, which binds the parties to a performance; a bargain; a compact."

[128] 25 U.S. (17 Wheat.) 213 (1827).

[129] *Id.* at 332 (opinion of Marshall, C.J., Duvall & Story, JJ.).

exist."[130] Phrased alternatively, this argument holds that a contract inconsistent at the time of its making with the prevailing law creates no "obligation" to be impaired because such a contract never had any legally binding effect.

Crosskey rejects this argument as "pure juristic metaphysics," arguing that the "obligation of a contract" can be as easily impaired by a law passed before the making of the contract as after.[131] Crosskey's position appears to be that a law that renders future contracts illegal impairs the obligation of those contracts by preventing them from attaining legally binding effect.[132]

As thus articulated, Crosskey's argument appears to rest on the unstated assumption that a contract "obligation" can arise from a source other than the positive law of the state.[133] Although Crosskey does not specify what this alternative source might be, the most likely candidate would appear to be natural law,[134] which played a prominent role as a general matter in the Founders' discussions of what to include in the Constitution.

For the following reasons, we believe it is unlikely that contract "obligations" under the contract clause can arise by virtue of natural law

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[130] *See* 25 U.S. (17 Wheat.) at 303 (opinion of Thompson, J.). The three other members of the plurality in *Ogden* expressed their agreement with the above conclusion in separate opinions. *See* 25 U.S. (17 Wheat.) at 254 (opinion of Washington, J.); *id.* at 271 (opinion of Johnson, J.); *id.* at 313 (opinion of Trimble, J.).

[131] *See* W. Crosskey, 1 *Politics and the Constitution* 353-54 (1953) (hereinafter cited as "Crosskey").

[132] Crosskey relies solely on several hypotheticals that he thinks are analogous to the language of the clause and that he says would obviously be prospective as well as retrospective. For example, Crosskey argues that a provision stating that "no state shall pass any law impairing the actionability of violent torts" would obviously apply, in his view, not only to violent torts committed previous to the enactment of such a law, but also to torts committed subsequent to the passage of such a law. *See* 1 Crosskey, *supra*, at 353-54. These matters do not appear as obvious as Crosskey believes them to be, especially given the substantial textual and historical support for the alternative interpretation put forward by Justice Thompson in *Ogden*.

[133] Positive law refers to law actually and specifically enacted or adopted by proper authority. *Black's Law Dictionary* (5th ed. 1979). Positive law thus refers to the common law as well as to the enacted law of a state.

[134] Natural law refers to rules of conduct that, independently of positive law, can be discovered by the rational intelligence of man. *Black's Law Dictionary* (5th ed. 1979).

as well as by virtue of positive law. To begin, there is no specific support in the text or history of the contract clause for the proposition that contract "obligations" for purposes of the contract clause can arise by virtue of natural law. The Founders may have believed in the concept of natural law, but there is no specific textual or historical evidence that they designed the contract clause to authorize courts to engage in the process of natural law reasoning.

The context of the contracts clause also tends to refute Crosskey's natural law thesis. Since natural law is law derived by human reason,[135] unaided by arguments from written authority, it would be anomalous for a written, positive constitution to confer natural law jurisdiction on courts.[136] This is particularly true since the Supremacy Clause makes positive federal law, not natural law, the supreme law of the land. Thus, we believe the general context of the contract clause suggests that "obligations" under the clause can arise only by virtue of positive law, and not by virtue of natural law. As a result, we believe Crosskey's argument in support of the prospective applicability of the clause, which rests on the assumption that obligations can arise by virtue of natural law, should be rejected in favor of the retrospective-only interpretation adopted by the majority in *Ogden.*

Other evidence with respect to the context of the contract clause is not inconsistent with this conclusion. Although all the other civil provisions found in Article I, Section 10 of the Constitution are both retrospective and prospective,[137] the contract clause's more immediate companion provisions (the ex post facto and bill of attainder clauses) are retrospective only. Thus, depending on how one reads the contract clause in light of its surrounding provisions, one could as easily support a retrospective-only interpretation of the clause as an interpretation by which the clause would have both prospective and retrospective applicability.[138]

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[135] *See generally* B. Wright, *American Interpretations of Natural Law* 339 (1931) (analyzing natural law in American History and concluding that "natural law has had as its content whatever the individual in question desired to advocate").

[136] *See generally Original Meaning Jurisprudence: A Sourcebook* (Office of Legal Policy memorandum, March 12, 1987) (copy on file at OLP).

[137] The other civil provisions included in Article I, Section 10 prohibit the states from coining money, emitting bills of credit, or issuing paper money.

[138] Thus, even with respect to homogeneous constitutional groupings, the common factor underlying the grouping can sometimes be difficult to pinpoint.

Having reviewed the text and context of the contract clause, we believe that the best reading is that the clause is retrospective only. Consequently, it is not strictly necessary to review the enactment history of the clause to resolve that question. Nevertheless, since the history of the clause has been the object of extensive analysis in the contract clause literature, and since much of that analysis is subject to question, we believe it would be useful to review the history of the clause concerning this issue as a matter of general interest.

In our view, the history of the contract clause is equivocal with respect to whether the clause is prospective as well as retrospective. For example, even assuming that the contract clause included in the Northwest Ordinance was retrospective only,[139] the Framers' awareness of that clause at the time they were considering the Article I contract clause does not necessarily mean that they intended the Article I clause to have the same meaning as the Northwest Ordinance clause.[140] In fact,

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[139]The text of the Northwest Ordinance contract clause, which was passed by Congress under the Articles of Confederation approximately six weeks after the Convention assembled in Philadelphia, is as follows:

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

See Northwest Territory Ordinance and Act of 1787, art. II, 1 Stat. 51, 52 n.(a) (1789), *reprinted and discussed in* Wright, *supra*, at 6-8. Professor Epstein assumes that the words "previously formed" mean that the clause applied only to retrospective impairments of contract. *See* Epstein, *supra*, 51 U. Chi. L. Rev. at 724. Arguably, a more natural reading of the Clause would have the words "previously formed" modify the words "and without fraud," since the former words immediately follow the latter without any intervening punctuation. Under this interpretation, the Northwest Ordinance contract clause would be open to a construction by which it would have prohibited states from interfering -- retrospectively or prospectively -- with private contracts or engagements that were (1) *bona fide* and (2) without fraud in their formation.

Despite the phraseology of the Northwest Ordinance's contract clause, Epstein's interpretation probably is the better one, since the words "previously formed" most likely were not a proper way of referring to fraud in the formation of a contract at that time. Epstein's interpretation also is supported by the statement of purpose provided in the beginning of the Clause, which, by referring to "the just preservation of rights and property," implies that the Clause was intended to protect vested property rights from impairment by subsequent laws.

[140]The Founders' awareness of the Northwest Ordinance contract clause is revealed, among other sources, by Representative King's explicit reference to that clause in his

since the Framers drafted the Article I contract clause in terms completely different than those used in the Northwest Ordinance clause, and since there is no historical evidence to suggest that they intended to make implicit in the Article I clause the "retrospective only" limitation that was explicit in the Northwest Ordinance clause, comparison of the two clauses appears to have little if any probative value with respect to the prospectivity/retrospectivity issue.

The retrospectivity/prospectivity issue surfaced on at least two occasions in the Convention and ratification debates, with inconsistent results. Less than the two weeks after the Convention approved the contract clause, Convention delegates Sherman and Ellsworth wrote a letter to the Connecticut Governor expressly describing the Clause as retrospective only.[141] By contrast, George Mason's notes made during the 1787 Convention appear to suggest that Mason held a different view[142] and that in his judgment the Convention may have shared this understanding.[143]

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opening remarks to the Convention introducing his draft of the Article I contract clause. According to Farrand, on August 28, 1787, Representative King "moved to add, in the words used in the ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts." Farrand, 2 *Records of the Federal Convention* 439 (1911). By this statement, King referred to the Northwest Ordinance contract clause. *See* Wright, *supra*, at 8.

[141] Sherman and Ellsworth's letter stated that the "restraint on the legislatures of the several states respecting . . . impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected." Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), *reprinted in* 13 *Commentaries on the Constitution: Public and Private* 471 (J. Maminski and G. Saladino eds. 1981). Sherman was a prominent Connecticut delegate to the Constitutional Convention who subsequently published several Federalist essays; he voted to adopt the Constitution. Ellsworth was a Connecticut lawyer who served in Congress (from 1778 to 1783) and was a member of the Constitutional Convention's Committee of Detail; he also voted to adopt the Constitution.

[142] Mason's notes indicate that he moved to have the word "previous" inserted into the text of the contract clause after the words "obligation of" and to have the provision against ex post facto laws deleted, and that his motion was rejected. *See* 2 Farrand, *supra*, at 619, 636.

[143] Crosskey views Mason's notes as conclusive evidence that the Convention specifically rejected the idea that the contract clause should be retrospective only. *See* 2 Crosskey, *supra*, at 357-58 (1953). What Crosskey fails to consider, however, is that several other interpretations of the significance of Mason's notes also are possible. For example, Mason might have presented his proposed change to the contract clause and his

The course of events in the Convention that include (1) Wilson's statement in the Committee of Detail that the initial version of the contract clause proposed by Rufus King would have been retrospective only, (2) Madison's response asking whether the prohibition against state impairments of the obligation of contracts was not already provided for in the prohibition of ex post facto laws, (3) Dickinson's subsequent reading of Blackstone to show that was not the case, and (4) the Committee of Style's later inclusion of an express contract clause provision[144] also does not prove that the Framers intended the clause to be retrospective only. The argument for a retrospective-only interpretation of the clause based on this evidence would be that the Committee of Style decided to reinsert a contract clause in the Constitution because they agreed with Dickinson's reading of Blackstone and because they thought a contract clause therefore would be necessary to reach ex post facto civil laws.

This argument is highly speculative, however, since the cited evidence does not exclude the possibility that the Committee might have been disturbed not only by ex post facto civil laws, but also by state laws that impaired the obligation of contracts prospectively. Such a possibility is supported by the fact that many of the state debtor-relief laws existing at the time of the 1787 Convention, which laws were among the principal evils the contract clause was designed to address,[145] appear to have been prospective as well as retrospective.[146] Of course, such laws would have a

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proposed deletion of the prohibition of ex post facto laws in a single motion, and the Convention may have rejected the motion not because they thought the contract clause should be prospective, but because they wanted to retain the prohibition against ex post facto laws. Alternatively, the Convention may have thought the contract clause was retrospective as reported by the Committee of Style, and that Mason's proposed change would therefore be unnecessary.

[144] These events are recorded in 2 Farrand, *supra*, at 439-40, 448-49, and are quoted in Wright, *supra*, at 9-10.

[145] For citations to historical evidence in support of this conclusion, see n. 184, *infra*.

[146] Chief Justice Marshall made this point in *Ogden v. Saunders*, but he failed to specify which state debtor-relief laws were prospective as well as retrospective. *See* 25 U.S. (12 Wheat.) at 357. At least one authoritative general historical source concerning this issue, Allan Nevins' book *The American States during and after the Revolution, 1775-1789* (1924), tends to support Marshall's contention, although this is not entirely beyond dispute. For example, Nevins' description of a South Carolina law prohibiting suits for the recovery of debts until 10 days after the next General Assembly should meet implies but does not explicitly state that the law applied to debts incurred after the passage of the law as well as to debts previously incurred. *See* Nevins, *supra*, at 370.

more intrusive effect on the freedom of contract in their retroactive application than they would when applied prospectively, since in the latter circumstance the parties could take the economic effect of the law into account in negotiating the terms of their contract.[147]

In summary, then, we believe the enactment history of the contract clause is ambiguous concerning the retrospectivity/prospectivity issue. As previously mentioned, however, we believe the better argument based on the text and context of the contract clause is that the clause applies only to contracts already in existence (retrospective-only).

2. *Public/Private Contracts*

One of the first issues the Supreme Court faced in applying the contract clause was whether the clause applies to public contracts as well as to private contracts. In *Fletcher v. Peck*,[148] the Court, per Chief Justice Marshall, held that an act of the Georgia legislature selling a large area of land to four private land companies created a "contract" for purposes of the contract clause. This ruling, which the Supreme Court has consistently reaffirmed, stands for the more general proposition that the contract clause applies not only to private contracts, but also to contracts in which one of the parties is a state.[149]

Similarly, Nevins' description of South Carolina's "Pine Barren Act," which authorized the tender of lands to satisfy a debt, does not suggest the Act was only retrospective. *Id.* at 405, 525-26. The same is true with respect to Nevins' description of a New Hampshire tender law that authorized a debtor to offer real or personal property in satisfaction of his obligation. *Id.* at 537. Unfortunately, Nevins neglected to provide citations to any of his sources.

Some state laws described by Nevins were clearly retrospective only. For example, South Carolina passed a law in 1782 that suspended suits for all debts antedating the spring of that year until 1786, when one-quarter of the debt would become payable. *See* Nevins, *supra*, at 525.

[147] This point also tends to undercut, at least to some degree, the force of Professor Epstein's argument that the contract clause should be interpreted as being prospective as well as retrospective because state legislation impairing the obligation of future contracts can present opportunities for legislative "rent-seeking" behavior as well as state legislation impairing the obligation of existing contracts. *See* Epstein, 51 U. Chi. L. Rev. at 724. As we explain in more detail at pp. 65-66, *infra*, legislative "rent-seeking" is Professor Epstein's description of the relevant evil of the state debtor-relief laws the contract clause was designed principally to prohibit.

[148] 10 U.S. (6 Cranch) 87 (1810).

[149] *Id.* at 136-39.

Chief Justice Marshall's opinion in *Fletcher* relied almost exclusively on the text of the contract clause in support of this ruling, arguing that the words of the Clause are "general, and are applicable to contracts of every description" and "contain no . . . distinction" between public and private contracts.[150] Marshall's conclusion is consistent with the generally-accepted dictionary definition of the term "contract" at the time of the 1787 Convention. This definition, as we have seen, did not include any explicit distinction between public and private contracts.[151]

Marshall's argument also finds support in the history of the contract clause. For example, Wilson and Paine argued prior to the Convention that a state legislative act chartering a bank was a contract binding upon the state according to the rules of good faith. Though not directly relevant to the original understanding of the contract clause, Wilson's and Paine's argument does tend to suggest that the founding generation may have considered state repudiations of contracts as a significant evil prevailing at the time of the 1787 Convention, and as a likely subject for remediation in the contract clause.

Wilson and Paine's pre-Convention statements concerning the responsibility of the states to live up to their contractual obligations were later reiterated with respect to the contract clause in particular. Shortly after the ratification of the Constitution, Alexander Hamilton -- then a private lawyer practicing in New York -- provided a legal opinion concluding that the Georgia legislature's sale of land to certain private land companies was a contract within the meaning of the contract clause.[152] At approximately the same time, the only contemporaneous

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[150] Fletcher v. Peck, 10 U.S. at 137. Marshall also vaguely analogized to the clauses prohibiting states from passing ex post facto laws and bills of attainder, arguing that since these clauses were applicable against the state governments, so should be the contract clause. *See* Fletcher v. Peck, 10 U.S. at 138-39.

[151] See pp. 47-48, *supra*.

[152] For a more complete description of the events described above and of Wilson's and Paine's arguments, see Wright, *supra*, at 17-18. The relevant text of Hamilton's opinion is as follows:

> [T]he Constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligations of contract. This must be equivalent to saying no state shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to be that taking the terms of the Constitution in their large sense, and giving them

judicial decision on point, *Van Horne's Lessee v. Dorrance*,[153] also declared the clause applicable to public contracts, ruling that a Pennsylvania statute repealing a prior statute that had confirmed the title of certain Pennsylvania lands in one of the opposing two private litigants violated the contract clause.[154] This evidence tends to confirm that the contract clause was originally understood as applying to public as well as private contracts.

The public/private contracts issue also received some attention in the debates in the state legislatures concerning the ratification of the Constitution. In the Virginia ratification debates, for example, Patrick Henry argued that the contract clause would render the states unable to redeem outstanding currency at less than par value because he thought the clause "includes public contracts as well as private contracts between individuals."[155] Governor Randolph, however, responded by stating that the contract clause was included in the Constitution because of the "frequent interferences of the state legislatures with private contracts."[156] Similarly, in the North Carolina ratification debates, Mr. Galloway objected to the contract clause because he thought it would require the state to "make good the nominal value" of a substantial amount of state-

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effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so.

See Wright, *supra*, at 22.

[153] 2 U.S. (2 Dall.) 304 (1795).

[154] *See* Wright, *supra*, at 18-20. Justice Patterson, who was an influential member of the Constitutional Convention, explained the Court's holding as follows:

> But if the confirming act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles, which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons of their just rights; rights ascertained, protected, and secured by the Constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from Pennsylvania; how then on the principles of contract could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

[155] 3 *Elliot's Debates* at 474.

[156] 3 *Elliot's Debates* at 477-78.

issued securities that had been "sadly depreciated for years."[157] Mr. Davie immediately replied that "the clause refers merely to contracts between individuals."[158]

Wright argues that because Randolph and Davie had been members of the Convention and Henry and Galloway had not, and because the arguments of the former were not subsequently challenged, the Virginia and North Carolina legislatures probably deferred to the understanding of the clause articulated by Randolph and Davie, respectively.[159] This conclusion is subject to serious question, however, because neither of the inferences relied upon by Wright is persuasive and because the more obvious conclusion based on these debates is that there was a general and unresolved disagreement in the Virginia and North Carolina legislatures concerning the meaning of the contract clause in this respect. Thus, in our view, the references to the public/private contract issue in the Virginia and North Carolina ratification debates are not very helpful in determining the original understanding with respect to the public/private contracts issue.

That the Northwest Ordinance contract clause was expressly applicable only to private contracts also does not necessarily mean the Article I contract clause is so limited.[160] Since the Framers drafted the Article I contract clause in wholly different terms than the Northwest Ordinance clause, and since there is no historical evidence to suggest that the Framers meant either to reproduce or to change the meaning of the Northwest Ordinance clause in this respect, it would be improper to draw any conclusion about the meaning of the Article I clause from this historical evidence.

As a practical matter, we should note that the effect of holding the contract clause applicable to public contracts, which would be to create a federal constitutional cause of action for every breach of contract by a state legislature, may be somewhat inconsistent with the Framers' general concern for protecting the interests and functions of state governments. Holding the contract clause applicable to public contracts also would have the effect of giving the prevailing party against a state in

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[157] 4 *Elliot's Debates* at 190.

[158] 4 *Elliot's Debates* at 191.

[159] *See* Wright, *supra*, at 16.

[160] The text of the Northwest Ordinance's contract clause is reproduced at n. 139, *supra*.

a contract clause suit a right to specific enforcement of his claim under the same, albeit limited, circumstances as when he would be entitled to specific performance in a suit against a private party.

Nevertheless, we believe that the text and history of the contract clause require that the clause be interpreted as applying to public contracts as well as to private contracts.

3. *Agreements between States*

If the contract clause applies to contracts between a state and a private party, does it also apply to agreements between states? The plain meaning of the language of the clause seems to require an answer in the affirmative, since the historical definition of the term "contract" does not exclude agreements between states, and since there is no such exclusion implicit in the other words of the contract clause.[161]

This conclusion appears to find additional support in the context of the contract clause. The third clause of Article I, Section 10 of the Constitution provides that "[n]o state shall, without the consent of Congress, . . . enter into any agreement or compact with another state."[162] Since a "contract" is only one type of an agreement, and since the words "contract" and "compact" were used more or less synonymously at the time of the 1787 Convention,[163] the compact clause seems to confirm that states would be able to enter into "contracts" within the meaning of the contract clause: if states can enter into "compacts," and if "contracts" and "compacts" are synonymous, it follows that states also are able to enter into "contracts."

On the other hand, Wright argues that the compact clause suggests something entirely different -- namely, that agreements between states are not subject to the contract clause because the framers addressed agreements between states under the compact clause.[164] Wright's argu-

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[161] The Supreme Court held an agreement between Kentucky and Virginia subject to the contract clause in Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

[162] This clause allows an exception from the requirement of Congressional consent to agreements among states only when states are "actually invaded, or in such imminent danger as will not admit of delay." U.S. Const. art. I, §10, cl. 3.

[163] For example, Johnson's 1755 dictionary lists "compact" as an accepted definition of the term "contract."

[164] *See* Wright, *supra*, at 47.

ment has some support in that the compact clause does not apply to another type of agreement between states -- treaties -- since Article I, Section 10, cl. 1 entirely forbids the states from entering into treaties. Nevertheless, since the Constitution does not similarly prohibit the states from entering into a contract (another form of an agreement), and since the plain meanings of the words "contract" and "compact" appear to have been equivalent at the time of the adoption of the Constitution,[165] we believe the compact clause is best understood as confirming that agreements between states are contracts subject to the restrictions of the contract clause (as well as compacts subject to the restrictions of the compacts clause).

The history of the contract clause is not inconsistent with this conclusion. Although there appear to be no references to contracts between states in the history of the contract clause, and although there are a number of references to the contract clause's applicability to private contracts,[166] this does not necessarily mean the Founders understood the clause as inapplicable to agreements between states. Instead, it may be that the Founders failed to express their understanding that the clause would reach such agreements, or failed to consider that possibility.

Thus, in summary, we believe the language and context of the contract clause suggest that agreements between states probably are "contracts" subject to the clause.[167]

4. *Unilateral State Action: Charters, Licenses, and Grants*

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[165] See p. 50, *supra*.

[166] *See The Federalist* No. 44 (Madison) (referring to contract clause as a "constitutional bulwark in favor of personal security and private rights"); *The Federalist* No. 7 (Hamilton) (referring to laws "in violation of private contracts" as a probable source of hostility among the states at the time of the 1787 Convention); Wright, *supra*, at 14, n. 29 (quoting 1787 letter from Madison criticizing a Virginia bill because "unhappily, it is clogged with a clause installing all debts among ourselves, so as to make them payable in three annual portions").

[167] By contrast, "agreements" between state governments and subordinate governmental entities probably do not constitute "contracts" within the original meaning of the contract clause, as the Supreme Court has held in a number of cases. *See, e.g.*, Trenton v. New Jersey, 262 U.S. 182, 187-88 (1923). Since local governments are entirely subject to the authority and control of state governments, they probably do not constitute distinct "parties" capable of entering into "contracts" within the meaning of the contract clause.

Assuming that contracts entered into by state and local governments are subject to the substantive provisions of the contract clause, it is necessary to determine what forms of state action give rise to contracts subject to the clause. This matter is especially problematic, and especially important, with respect to the regulatory functions of state and local governments. Does a state government enter into a contract subject to the restrictions of the contract clause every time it enacts a tax measure, decides to build a public road, or sets aside public land for recreation purposes? If so, the contract clause might have a potentially devastating effect on the regulatory discretion of state and local governments.

The Supreme Court has never decided as a general matter what types of state action give rise to contracts subject to the contract clause, preferring instead to address this question on a case-by-case basis. In three of the Court's more famous early contract clause cases, the Court held that states entered into contracts subject to the contract clause when they sold public land to private parties, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136-37 (1810); issued a corporate charter to a private university, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 651-55 (1819); and granted a property tax exemption to an Indian tribe as part of an agreement whereby the tribe promised to withdraw certain other land claims, *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166-67 (1812).

The Supreme Court's holdings in *Fletcher* and *Dartmouth College* have some specific support in the history of the contract clause. For example, with regard to the state land sale in *Fletcher*, Blackstone referred to a grant as an executed contract,[168] and an early federal judicial decision held the clause applicable to state legislative acts confirming title to lands in private parties.[169] Similarly, with regard to the state's grant of a corporate charter in *Dartmouth College*, Paine and Wilson argued prior to the 1787 Convention that Pennsylvania could not revoke a previously granted bank charter consistent with the "rule of good faith,"[170] and an early state judicial decision held that "rights vested in a corporation cannot be controlled or destroyed by a subsequent statute."[171]

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[168] *See* 2 W. Blackstone, *Commentaries* *388.

[169] *See* Wright, *supra*, at 17-18.

[170] *See* Wright, *supra*, at 19-20.

[171] *See* Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795).

Of course, these specific historical analogues do not explain as a theoretical matter why the state action in *Fletcher* and *Dartmouth College* gave rise to "contracts" within the original meaning of the contract clause. Referring to the original understanding of the word "contract",[172] the theoretical issue in those cases was whether the state, by its action, manifested an agreement to do or not to do certain acts, and whether there was sufficient consideration on the other side of the agreement.

Although we have not attempted to determine the original understanding of the concepts of agreement and consideration prevailing at the founders' time, we believe the states' action in *Fletcher*, *Dartmouth College*, and *New Jersey v. Wilson* probably satisfied both of those elements. In particular, we believe that the states' action in those cases reasonably could be viewed as having manifested an agreement on the part of those states to do or not to do certain acts,[173] and as being supported by sufficient consideration on the other side of the contract.[174]

At least two commentators have suggested that, in addition to the factors of agreement and consideration, it also is proper to analyze whether the state's action is proprietary or regulatory. In the view of these authors, state proprietary action gives rise to contracts subject to

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[172] As explained at p. 50, *supra*, the word "contract" in the contract clause probably was originally understood to mean an agreement between two or more parties, upon sufficient consideration, to do or not to do certain acts.

[173] With respect to *Fletcher*, when a state sells land, it reasonably can be thought to have agreed that it will relinquish all title to the land sold and treat the buyer as the legal owner of the land from then on. With respect to *Dartmouth College*, when a state grants a corporate charter, it reasonably can be thought to have agreed that it will continue to allow the corporation to do business as long as it complies with the terms of the charter (and as long as subsequent, valid police power needs do not intervene). With respect to *New Jersey v. Wilson*, when a state promises not to tax certain land in exchange for the landowner's promise to withdraw certain other land claims, it reasonably can be thought to have agreed that it will not tax the land at least for as long as the landowner owns it.

[174] In *Fletcher*, the consideration on the other side of the contract was the money paid for the land sold by the state. In *Dartmouth College*, the consideration was the corporation's agreement to abide by the provisions of the charter. In *Wilson*, the consideration was the Indian tribe's agreement to waive its claim to ownership of other lands.

the contract clause, whereas state "regulatory" action does not.[175] Specifically, Douglas Kmiec and John McGinnis have eloquently articulated the position that the state's prerogative as sovereign to establish the structures that are appropriate for doing business in its territory should be distinguished from the state's powers to contract, like any other entity, for goods or services supplied by private individuals. According to Kmiec and McGinnis, only when the state is acting as a proprietor (not as a sovereign regulator) and receiving consideration for its actions are the compacts between the state and a private individual comparable to private contracts. In short, Kmiec and McGinnis emphasize that a state's proprietary actions may create contractual rights; a state's actions as a sovereign create privileges or licenses.

Although there is some specific historical support for this proposition in the pre-Convention writings of Thomas Paine,[176] we believe this historical evidence is insufficient by itself to prove that a proprietary/regulatory distinction is implicit in the original understanding of the contract clause. For one reason, a regulatory/proprietary distinction might not always be consistent with the original meaning of the terms "agreement" and "consideration" in the clause. For example, some state actions that could be viewed as "regulatory," such as the state's issuance of a corporate charter in *Dartmouth College*, would appear to involve all the elements necessary to create a "contract" within the original meaning of the contract clause. Moreover, as a purely practical matter, the courts have had great difficulty in deriving principled distinctions between state "proprietary" actions and state "regulatory" actions. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (suggesting that, for Tenth Amendment purposes, the attempt to draw the boundaries of "traditional governmental functions" is unworkable);

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[175] *See* D. Kmiec & J. McGinnis, *Contract Clause: A Return to the Original Understanding* (n.d. unpublished manuscript on file at OLP) 32; Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918, 934-37.

[176] In arguing that Pennsylvania's 1785 grant of a corporate charter to a bank was a contract the state was bound to honor, Paine distinguished the making of statutes from the legislature's transaction of the state's business. According to Paine, the latter type of legislative act, "after it has passed the house, is of the nature of a deed or contract, signed, sealed and delivered; and subject to the same general laws and principles of justice as all other deeds and contracts are; for in a transaction of this kind, the state stands as an individual, and can be known in no other character in a court of justice." *See* Wright, *supra*, at 17-18 (quoting T. Paine, "Dissertations on Government, the Affairs of the Bank, and Paper Money," in 1 *Writings* 365-413 (1837 ed.)).

Community Communications Co., Inc. v. City of Boulder, Colo., 455 U.S. 40 (1982) (state's "guarantee of local autonomy" to home rule municipalities did not render city's cable television moratorium ordinance a sovereign "act of government" exempt from federal antitrust scrutiny). For these reasons, we decline to adopt the Kmiec-McGinnis "sovereign/proprietary" contract clause distinction, though we acknowledge its intellectual appeal.

5. *Police Power Exception*

In a number of cases, the Supreme Court has consistently reaffirmed the existence of a police power exception to the contract clause.[177] Unfortunately, the Court has never explained how that exception is derivable from the text or the history of the clause, relying instead on a host of unexplained assumptions.[178]

Certainly the language of the clause does not explicitly create a police power exception. A state law can diminish or lessen ("impair") the legally binding effect ("obligation") of an agreement between two or more parties to do or not to do a thing certain ("contract"), even though its principle purpose is to achieve a valid police power goal. For example, a law rendering invalid all contracts to engage in prostitution would undoubtedly impair the obligation of any preexisting contract of prostitution even if the law were enacted to protect the public morals, since the contract would be legally enforceable before the enactment of the "no prostitution contracts" law but not after.

As a result, those who support the existence of a police power exception to the contract clause do not seriously attempt to explain how that exception can be derived from the language of the clause. Professor Epstein, for example, believes that the language of the clause is

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[177] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987); Exxon Corp. v. Eagerton, 462 U.S. 176, 190 (1983); United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977); Stone v. Mississippi, 101 U.S. 814 (1880).

[178] These unexplained assumptions include the assumption that all contracts are subject to the implied condition of the exercise of the state's police power, a sovereign right of the state that is superior to an individual's contract rights; and the assumption that one who enters into contracts in an area of enterprise that is already generally regulated impliedly consents to further legislation affecting his agreements. *See* Schwartz, *Old Wine in New Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 100; Note, *The Role of the Contract Clause in Municipalities' Relations with Creditors*, 1976 Duke L.J. 1321, 1338-39.

hopelessly vague, and that a police power exception to the clause is justified based on the history of the clause, which, in his view, demonstrates that the clause was intended to prohibit legislative "rent-seeking" or income-redistributive laws.[179] Douglas Kmiec and John McGinnis similarly find a police power exception justified by the history of the clause, which, as they see it, shows that the clause was not aimed at state laws designed to regulate the morals of citizens.[180]

The Supreme Court has defended the police power exception to the contract clause based on practical, rather than textual reasons. Specifically, the Court has pointed out that failing to recognize a police power exception to the contract clause would allow private parties to insulate themselves from the effect of future laws enacted to protect the peace, health, safety and morality of the public merely by enshrining their actions in a contract.[181]

Though lacking any principled basis as a matter of constitutional interpretation, the Court's portrayal of the practical consequences of failing to recognize a police power exception to the contract clause is accurate. Given that state courts generally refuse to enforce contracts that are inconsistent with prevailing law, any state police power law enacted subsequent to an otherwise valid contract will violate the contract clause by rendering that contract unenforceable. Therefore, since the apparent remedy for a contract clause violation is an injunction barring the state from enforcing its law,[182] the state would be powerless in such a circumstance to enforce its police power law against the private party.

We doubt that the Founders would have understood the contract clause to limit the states' police powers in such a manner. As a result, we are reluctant to conclude that there is no police power exception to the contract clause. Neither do we think it proper, however, to ignore the text of the clause in favor of its history or in favor of perceived practicalities. Consequently, we believe the only possible conclusion at

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[179] *See* Epstein, 51 U. Chi. L. Rev. at 706, 732 (1984) (police power needed to allow states to protect health, safety, and third party interests).

[180] *See* Kmiec and McGinnis, *supra*, at 35 (police power properly can be advanced by a state to further a health, safety, or morals interest).

[181] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. at 241-42; Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

[182] *See* p. 67, *infra*.

this point is to say that further consideration needs to be given to the textual basis for the police power exception to the contract clause.

Given the apparent absence of any explicit textual support for the existence of a police power exception to the contract clause, it is not surprising that articulating a principled limitation to that exception is equally troublesome. Certainly the Supreme Court has not produced much useful thinking along those lines; as Professor Epstein has observed, the Supreme Court cases have made "no principled effort to define the proper scope of the police power."[183]

Assuming there is a police power exception to the clause, we can be reasonably certain that such an exception would not authorize states to pass debtor-relief type laws, since those laws probably were the principal historical evil the contract clause was designed to address.[184] This conclusion, of course, still leaves us to determine what were the relevant evils of those state debtor-relief laws.

Based on what he describes as the "structure of the Constitution," Professor Epstein argues that the state debtor- relief laws in question were merely one form of a more general historical evil the Constitution was designed to correct, that evil being the abuse of legislative factions.[185] Referring in particular to Federalist No. 44's condemnation of the state legislative battles prevailing at the time of the Constitution's framing aimed at the redistribution of opportunities and wealth between factions, Epstein argues that the contract clause was an effort by the Founders to prevent legislative "rent-seeking behavior."[186] Based on this historical analysis, Epstein argues that the police power exception to the contract clause should not extend to the "transfer of wealth by special interest politics."[187]

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[183] *See* Epstein, 51 U. Chi. L. Rev. at 735.

[184] The historical evidence upon which this conclusion is based is well documented in a number of sources. *See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-29 (1934); *id.* at 453-72 (Sutherland, J., dissenting); Ogden v. Saunders, 25 U.S. (17 Wheat.) 213, 354, 355 (1827) (opinion of Marshall, C.J.); Wright, *supra*, at 3-26.

[185] *See* Epstein, 51 U. Chi. L. Rev. at 710-17.

[186] *See id.*

[187] *Id.* at 740; *see also* D. Kmiec & J. McGinnis, *supra*, at 17, 35 (contract clause applies only to state "redistributive" laws).

In our view, the principal historical evil of the state debtor-relief laws in question is that they placed certain parties in a preferred contractual position. Although this formulation may not actually differ in substance from Epstein's "rent-seeking" formulation, we believe our formulation may be at least semantically superior to Epstein's given that the most obvious effect of the state debtor-relief laws in question was that they adjusted the terms of contracts in a manner that had the direct effect of placing one of the parties -- contract debtors -- in a more advantageous contractual position.[188] Therefore, we believe a principled limitation to the police power exception should begin by providing that any state law that has the direct and primary effect of placing one or more contracting parties in a preferred contractual position falls outside the police power exception.

Unfortunately, we have to acknowledge that whether placing a party in a preferred contractual position is the "direct and primary" effect of any particular state law is so vague that, without further elaboration, this standard actually may not advance the analysis very far.[189] We have been unable as yet to discover any principled way of elaborating on the "direct and primary effect" standard. For example, requiring the state to adopt the most economically efficient means to achieve a police power goal might uncover some situations in which the state's chosen method of regulation appears plainly "too far removed" from the state's asserted police power goal. In most cases, however, such a "most efficient means" principle would merely authorize courts to engage in precisely the sort of substantive economic second-guessing of state legislatures that the Supreme Court has rightly rejected for some time now in other contexts.

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[188]Those state debtor-relief laws included "stay laws" (statutes staying or postponing the payment of private debts beyond the time fixed in contracts), installment laws (acts providing the debts could be paid in several installments over a period of months or even years rather than in a single sum as stipulated in the agreement), and commodity payment laws (statutes permitting payment to be made in certain enumerated commodities at a proportion, usually three-fourths or four-fifths, of their appraised value). *See* Wright, *supra*, at 4. For a further description of some of the state debtor-relief laws existing at the time of the ratification of the contract clause, see n. 145, *supra*.

[189]The same might be said of limiting the police power exception to the clause by concluding, in Epstein's terms, that the clause only applies to legislative "rent-seeking" behavior. All legislation helps some more than others; the problem is determining when legislation helps some more than others to a degree or in a manner that is unconstitutional under the contract clause.

Another possibility for solving this problem would be to reject the "direct and primary effect" element of the above-suggested police power limitation in favor of a "primary purpose" test.[190] Under this test, the question would be whether the primary purpose of the state law is to place certain contracting parties in a preferred contractual position.

This alternative test has its own problems, however, including most notably the problems of distinguishing between legislative purpose and subjective legislative motivation and of allowing federal courts to roam about in the history of a state statute in search of extra-textual statutory purposes. Additionally, given that it will almost always be possible for the state to articulate some valid health, safety, welfare, or morals justification for its law, a court applying a purpose test will be confronted by precisely the same problem as a court applying the "direct and primary effect" test -- namely, how to determine whether the valid police power purpose is "primary" enough.

Thus, in sum, we believe the textual basis of the police power exception to the contract clause, and the proper limitation of that exception, are both in need of further consideration. It may be that the founders simply failed to provide a police power exception to the clause. Given the practical results of such a conclusion, however, we should not reach that conclusion precipitously.

6. *Remedy for a Contract Clause Violation*

The Supreme Court apparently has never focused as a general matter on the issue of what remedies are appropriate for a violation of the contract clause. The text of the clause, which provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts," clearly is phrased in terms of a disability on state legislatures. Consequently, the text of the clause would appear to authorize a declaratory judgment proclaiming unenforceable any state law that violates the clause[191] or an injunction barring the implementation of any such state law.[192]

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[190]Several commentators appear to have adopted this approach. See Epstein, *supra*, at 732-40; Kmiec and McGinnis, *supra* , at 33-36.

[191]*See, e.g.*, United States Trust Co. v. New Jersey, 432 U.S. 1, 32 (1976) (reversing district court's judgment in suit for declaratory relief; holding that contract clause prohibited New Jersey's retroactive repeal of prior statutory covenant).

[192]*See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250-51 (1978)

By contrast, there is no indication in the language or history of the contract clause that a successful claimant is entitled to damages either in place of, or in addition to, injunctive or declaratory relief. Thus, the contract clause is textually distinguishable from the just compensation clause, which includes express language ("nor shall private property be taken for public use, *without just compensation*") that appears to make the payment of money appropriate under that clause.

C. *Summary of Principles*

In summary, our analysis of the text and history of the contract clause suggests that a valid claim under the clause must include each of the following elements: (1) state legislation that (2) materially diminishes, lessens, or otherwise materially alters (3) the legally binding effect (4) of pre-existing contracts, public or private. Additionally, assuming that a police power exception to the contract clause is somehow textually justifiable, the history of the clause appears to suggest that the scope of that exception should not extend to debtor-relief laws or to other laws that similarly have the direct and primary effect of placing certain parties in a preferred contractual position. Figure 1 on the following page displays these principles in the form of a flow chart that illustrates how Department officials might approach contract clause issues consistent with original meaning principles.

(reversing district court's dismissal of plaintiff's suit for injunctive and declaratory relief in contract clause case).

Figure 2

APPROACHING ISSUES ARISING UNDER THE CONTRACT CLAUSE

Original Meaning Principle		*Contract Clause Probable Result*
1. Is there a contract, public or private?		
Yes	No	No violation
2. Has the state passed a law that materially diminishes, lessens, or otherwise materially alters the legally binding effect of the contract?		
Yes	No	No violation
3. Did the contract have legally binding effect previous to the enactment of the law?		
Yes	No	No violation
4. Assuming that a police power exception to the contract clause is textually justifiable, does the law have the direct and primary effect of placing certain parties in a preferred contractual position?		
	No	No violation
	Yes	Violation

D. Application of Proposed Contract Clause Principles to Contract Clause Cases

The purpose of this Section is to describe briefly the Supreme Court's approach to the Contract Clause and to consider that approach in light of the original meaning principles articulated and explained in Parts A, B, and C of this Section, above. The Section will begin by addressing the Court's most recent decisions in this area and conclude by addressing certain of the Court's earlier rulings. A more complete discussion of the Supreme Court's contract clause jurisprudence is contained in Appendix A to this Report.

1. *Recent Supreme Court Contract Clause Cases*

In four recent cases, the Supreme Court has undertaken a major reevaluation of its prior jurisprudence under the contract clause.[193] In the first three of those cases, the Supreme Court explicitly adopted and applied a balancing of interests approach to the contract clause. Thus, in the 1977 case of *United States Trust Co. v. New Jersey*,[194] the Court ruled that a state law that impairs the obligation of a contract may nevertheless be valid if it is "reasonable and necessary to serve an important public purpose."[195] Similarly, in the 1979 case of *Allied Structural Steel Co. v. Spannaus*,[196] the Court found the state's asserted interest was insufficient to outweigh the infringement on private contract rights because, among other reasons, the state law in question applied only to a "narrow class" of contracting parties.[197]

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[193] A very recent case, Keystone Bituminous Coal v. DeBenedictis, 107 S. Ct. 1232 (1987), deals with the contract clause only in passing. *See* note 203, *infra*. We do not view Keystone as a particularly significant contract clause decision.

[194] 431 U.S. 1 (1977).

[195] *Id.* at 25. Applying the above test, the Court held that parallel New York and New Jersey statutes retroactively repealing a previous statutory covenant which had limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the Port Authority violated the contract clause. *Id.* at 28-32.

[196] 438 U.S. 234 (1978).

[197] *Id.* at 247-51. In *Spannaus*, the Court held that a Minnesota statute requiring

The Court further refined its balancing test for the contract clause in the 1983 case of *Energy Reserves Group v. Kansas Power and Light*,[198] setting forth the following comprehensive three-part standard for evaluating contract clause claims:

> 1. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.
>
> 2. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation.
>
> 3. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the "rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Unless the State itself is a contracting party . . . "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[199]

Applying this test, the Court held that a state law that placed a statutory ceiling on the price increases a natural gas supplier could charge a public utility under the price escalator clause of a pre-existing contract did not violate the contract clause because the law was a narrowly-tailored means of promoting the important state interest of safeguarding consumers from market price imbalances caused by federal disruption.[200]

There is no support in the text or history of the contract clause for the balancing approach developed by the Supreme Court in the above cases. More particularly, there is no textual or historical support for the idea that severity of a contract impairment should increase the level of

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corporations with pension plans to pay pension benefits to employees whose pension rights had not yet vested under those plans violated the contract clause. *Id.*

[198] 459 U.S. 400 (1983).

[199] *Id.* at 410- 13.

[200] *Id.* at 413-19.

contract clause scrutiny,[201] nor is there any textual or historical support for the Court's "significant and legitimate" public purpose and least restrictive means requirements.[202]

The Supreme Court's most recent significant contract clause case, *Exxon Corporation v. Eagerton*,[203] seems to suggest that the Court may no longer be satisfied with balancing principles it developed in *United States Trust, Allied Structural Steel,* and *Kansas Power and Light.* Most notably, the Court in *Eagerton* failed to mention the comprehensive three-part balancing test articulated in *Kansas Power and Light.* Instead, the Court in *Eagerton* upheld a state law prohibiting producers from passing through to consumers state severance taxes on oil and gas because (1) the law did not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance a "broad societal interest," and (2) the effect of the law on existing contracts that contained a pass-through provision was incidental to its main effect of shielding consumers from the burden of the tax increase, a legitimate police power goal related to promoting the general welfare.[204]

The first of the Court's above-mentioned reasons for sustaining the state law in *Eagerton* properly eschews a balancing approach, but appears to be unprincipled for other reasons. Specifically, holding that a state law can violate the contract clause only if its *sole* aim is to impair contractual obligations imposes a limitation not found in the text or history of the clause. The words of the clause plainly forbid the states to

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[201] Indeed, the clause explicitly forbids impairment of any degree. See pp. 45-49, *supra.*

[202] There also is no textual or historical support for the Court's holding in *United States Trust* that state impairments of the obligations of public contracts should be subjected to stricter review under the contract clause than state impairments of the obligations of private contracts, 431 U.S. at 1. For a more elaborate criticism of the Court's holding in *United States Trust* on this point, see Kmiec & McGinnis, *supra,* at 46-47.

[203] 462 U.S. 176 (1983). The Supreme Court very recently addressed the contract clause in passing in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). In *Keystone* a five Justice majority rejected a contract clause challenge to a Pennsylvania law that prohibited a coal mining company from holding surface owners to their contractual waiver of liability for surface damage due to mining activity. The Court acknowledged that the law substantially impaired contractual relations. It reasoned, nevertheless, that the state's "police power" interest in preventing harm to surface structures justified the contractual impairment. *Keystone* is discussed in greater detail in Appendix C of this Report, *infra.*

[204] *Id.* at 191-92.

pass *any* law that impairs the obligation of contracts, without providing any exception for laws that also have other, non-contract-impairing effects.[205]

The second of the Court's reasons for sustaining the state law in *Eagerton*, which focuses on the direct and incidental effects of the state law, is more consistent in theory with the original meaning of the contract clause.[206] Unfortunately, the outcome in *Eagerton* reveals the dangers of applying a "direct and primary effect" test without additional guidance concerning what the words "direct" and "primary" mean. If the state law in *Eagerton* is constitutional because its direct effect was to protect the economic interests of third parties to the contract in question (oil and gas consumers), the debtor-relief laws the contract clause was designed primarily to prohibit also would be constitutional if reenacted today, since they also could be defended as necessary to protect the economic interests of third parties (such as the families of contract debtors) or to prevent debtors from becoming public charges. Thus, *Eagerton* illustrates the enormous difficulties in applying a police power exception to the contract clause that has no apparent justification in the text of the clause.

2. *Earlier Supreme Court Contract Clause Cases*

Without attempting to discuss each of the numerous contract clause case decided by the Supreme Court prior to the cases discussed above, we can briefly suggest how the original meaning principles articulated in Section A above might apply to the most important of the Court's earlier cases. To begin, the Court's early holdings that the contract clause applies retrospectively but not prospectively[207] and that the clause applies to public contracts as well as to private contracts[208] seem to be fully consistent with the clause's original meaning. Similarly, we believe the Court probably was correct in finding that state grants of corporate

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[205] *See* Epstein, 51 U. Chi. L. Rev. at 740 (words "pass any law" in the contract clause encompass general legislation as well as legislation favoring single producer).

[206] For a discussion of the historical basis for the "direct and primary effect" standard, see pp. 70-71, *supra*.

[207] *See* Ogden v. Saunders, 25 U.S. (17 Wheat.) 217 (1827).

[208] *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812); Fletcher v. Peck, 10 U.S. (6 Cranch) 187 (1810).

charters,[209] state sales of public land,[210] and state grants of property tax exemptions in exchange for withdrawal of land claims[211] are contracts subject to the contract clause, since each of these forms of state action reasonably represents an agreement on the part of the state to be bound by its action and since each form of state action in those cases were accompanied by sufficient consideration on the other side of the contract.[212]

Additionally, it seems reasonably clear that *Home Building and Loan Ass'n v. Blaisdell*[213] and *East New York Savings Bank v. Hahn*,[214] when the Court upheld the constitutionality of state mortgage moratorium legislation almost exactly resembling the state debtor-relief laws the contract clause was designed especially to prohibit, were incorrectly decided. Whatever the scope of the assumed police power exception to the contract clause may be, surely it does not extend to the principal historical evil that led the framers to enact the contract clause.[215]

Blaisdell is particularly notorious for its explicit rejection of the idea that the Constitution should be interpreted according to the original meaning of its words. Despite Justice Sutherland's articulate defense of the original meaning approach in his dissenting opinion, the five-member majority in *Blaisdell* preferred to rely on its own perceived wisdom concerning how the contract clause of the Constitution should be reconciled with competing public interests. Indeed, *Blaisdell* is probably one of the most explicitly unprincipled Constitutional decisions ever rendered by the Court.

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[209] *See* Dartmouth College v. Woodward 17 U.S. (4 Wheat.) 518 (1819).

[210] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) at 136-37.

[211] *See* New Jersey v. Wilson, 11 U.S. (7 Cranch) at 166-67 (1812).

[212] For a more detailed discussion of these cases, see pp. 64-66, *supra*.

[213] 290 U.S. 398 (1933).

[214] 326 U.S. 230 (1945).

[215] For a further discussion of the facts of *Blaisdell* and the inconsistency of the Court's reasoning and holding in that case with the original meaning of the contract clause, see Appendix C.

IV. Other Constitutional Provisions Protecting Economic Liberties

A. The Due Process Clause

1. *Origins of the Clause*

The due process clause of the Fifth Amendment specifies that: "No person shall be. . . deprived of life, liberty, or property without due process of law."[216] The words of the due process clause do not prohibit the deprivation of "life, liberty, or property." Rather, they provide that any deprivation must be accorded "due process of law."[217] On its face the phrase "due process of law" has a strictly procedural connotation. Noah Webster's 1828 Dictionary stressed the procedural nature of "process," which it defined as "[i]n law, the whole course of proceedings, in a cause, real or personal, civil or criminal, from the original writ to the end of the suit."[218] In short, "due process" is the "process that is due," *i.e.*, "the process *required* by law".[219] As Professor Crosskey has pointed out, "if the words of the clause are heeded, there is, of course, no right [under the clause] to review the substantive acts of Congress at all." This conclusion ineluctably follows from the very structure of the clause. As long as "proper procedures" ("due process") are followed, a deprivation unquestionably may be effected, without regard to the substantive merits of the action that brings about the deprivation. In short, a plain reading of the due process clause demonstrates that it affords procedural, not substantive, protections.[220]

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[216] U.S. Const. amend. V. The following brief overview of the due process clause's origins and original meaning does not purport to be comprehensive.

[217] In Professor Crosskey's words, the due process clause "is, in short, a general guaranty of 'due,' or 'appropriate,' 'process' in all cases where 'life, liberty, or property' is at stake." W. Crosskey, *supra*, at 1107. This is "the *whole* meaning of the Due Process Clause of the Fifth Amendment." *Id.* (emphasis in the original).

[218] N. Webster, *American Dictionary of the English Language* (1828) (reissued 1967).

[219] W. Crosskey, *supra*, at 1108.

[220] The plainly procedural meaning and history of the due process clause are addressed in some detail in R. Berger, *Government by Judiciary* 193-220 (1977). In Berger's opinion, "[i]t has been convincingly shown that due process was conceived in utterly procedural terms, specifically, that a defendant must be afforded an opportunity to answer by service in proper form, that is, in due course." *Id.* at 197.

The evidence that exists concerning the framers' intentions is fully in accord with a plain reading of the due process clause. The clause evoked very little commentary during the debates over adoption of the Bill of Rights.[221] James Madison, who drafted the clause, undoubtedly was influenced by the English tradition that equated "due process" with "according to the law of the land."[222] Madison's use of the term "due process" instead of "the law of the land" merely may have been aimed at avoiding confusion; the Supremacy Clause uses the phrase "law of the land" in placing federal written law above state constitutions and laws.[223]

An interpretation that views the phrase "due process" as closely related to "the law of the land" suggests that the clause be interpreted to afford procedural protection. The thesis that the clause is procedural in nature arguably also is bolstered by its placement within the Bill of Rights:

> The due process clause seems to be a general clause, certainly more general than the clauses on self-incrimination and just compensation, which immediately precede and follow it. But it is just because due process is surrounded both within the Bill of Rights and within the Fifth Amendment by other, more specific clauses, that it is difficult to construe its general terms with the generality many people (and the American constitu-

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[221] The historical origins of the Fifth Amendment's due process clause are explored in R. Mott, *Due Process of Law* 143-167 (1926). According to Mott, due process was not even mentioned once during the Constitutional Convention of 1787. *Id.* at 145. The lack of discussion over the meaning of "due process" during the debates over the Bill of Rights, chronicled *id.* at 154-167, strengthens the case for looking to historical antecedents.

[222] *See* Marshall, *Due Process in England*, in *Due Process* 69-89 (J. Pennock and J. Chapman eds. 1977). "Due process" was specifically linked to "the law of the land" in the Petition of Right of 1628 and in the writings of Sir Edward Coke. *Id.* at 69. According to Mott, the identification of "due process of law" with the "law of the land" dates to the time of Edward II. R. Mott, *supra*, at 25. Mott traces the development of the concept of due process in England (at 30-86) and in the American colonies (*id.* at 106-124). Mott states that "it was but natural that procedure should have been uppermost in the minds of the colonists in connection with due process of law. The words themselves imply a judgment by the regular process of common law." *Id.* at 123. Alexander Hamilton also equated "due process" with the "law of the land"; he viewed these interchangeable phrases as being strictly procedural in nature. *See* W. Crosskey, *supra*, at 1103.

[223] *See* Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in *Due Process* 3-68, at 11.

> tional tradition) have accorded it. To judge by its location -- and this becomes more important when considering the meaning of due process in the Fourteenth Amendment -- the federal due process clause is neither an introduction to nor a concluding summary of specific guarantees. . .[224]

In short, there exists textual and historical evidence in support of the proposition that the due process clause, unlike certain other constitutional provisions (such as the just compensation clause), does not provide specific substantive guarantees. In light of this fact, we believe that it is sensible to view the clause as embodying procedural, rather than substantive, protections.[225] Such an interpretation restrains the courts from employing "due process" as a tool to justify striking down laws based on their substance.

2. *Case Law Development*

In *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court confirmed that the Fifth Amendment's due process clause applies only to the federal government. Prior to the Civil War, the Supreme Court invoked the due process clause on only one occasion to invalidate a federal government action. In the landmark case of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Court invalidated the Missouri Compromise. Chief Justice Taney's opinion indicated that because the Constitution had not empowered Congress to interfere with an owner's "vested" right in his slaves, the Missouri Compromise unconstitutionally deprived a slaveowner of his rights without due process.

In 1868, the Fourteenth Amendment to the Constitution was ratified. This Amendment, by its terms, made due process applicable to the states by specifying "nor shall any State deprive any person of life, liberty, or property without due process of law."[226]

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[224] *Id.* at 11. This argument, in and of itself, is not, we believe, particularly compelling. The mere fact that a constitutional clause is surrounded by narrow, specific provisions does not mean that the clause must be read to be narrow and specific. The text of the clause, not its placement, is the key to its meaning, although understanding the immediate textual context of a provision can be enlightening.

[225] Raoul Berger's research supports such a procedural approach. *See* Berger, *supra*, at 193-220.

[226] U.S. Const., amend. XIV, §1.

The Supreme Court at first opted for a strictly procedural interpretation of the Fourteenth Amendment's due process clause. In the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court rejected the butchers' due process attack on a Louisiana statute that prohibited livestock yards and slaughter houses within New Orleans and its vicinity. The Court held that the due process clause only guaranteed that states follow procedural due process in enacting laws. Because the clause did not guarantee the substantive fairness of laws passed by the states, the butchers had not been deprived of due process.

The Court continued to follow a policy of noninterference in legislative judgments until 1887. In *Mugler v. Kansas*, 123 U.S. 623 (1887), in upholding the constitutionality of a Kansas law prohibiting the sale of alcoholic beverages, it stated that the judiciary must examine the substance of the laws to see if the legislature has surpassed its authority.

Ten years later, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court struck down a Louisiana statute prohibiting anyone from taking out marine insurance on any Louisiana property if the insurance company that issued the policy had not complied in all respects with Louisiana law. Allgeyer was convicted of violating the statute when he mailed a letter advising a New York insurance company about the shipment of some insured goods. The company was not registered to do business in Louisiana. The Court overturned Allgeyer's conviction on the grounds that Louisiana had no jurisdiction over foreign contracts and had violated due process. It reasoned that the Fourteenth Amendment guaranteed that a person would be free to use "all his faculties . . . in all lawful ways." 165 U.S. at 589. To ensure that a person could enjoy "all his faculties," the Court stated that the Fourteenth Amendment permitted a person to seek any type of employment or to pursue any type of avocation. The Louisiana statute had abridged these liberties by depriving Allgeyer of his liberty to contract "which the state legislature had no right to prevent. . ." 165 U.S. at 591.

Allgeyer ushered in a forty year period during which the Court invoked the "substantive due process" doctrine to void economic and social legislation that it believed unreasonably infringed on the liberty to contract. The most famous case to employ this approach, of course, was *Lochner v. New York*, 198 U.S. 45 (1905), where the Court invalidated a New York law limiting to 60 the number of hours a baker could work per week. Dissenting on the ground that the due process clause does not force certain economic policies on the states, Justice Holmes made his

famous remark that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics". 198 U.S. at 75. During the era of economic substantive due process, the Court adopted an ad hoc approach, striking down laws that "unduly interfered" with freedom of contract but upholding those laws that were deemed "proper exercises" of the state's "police power" to provide for the public health and safety. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining state legislation regulating the number of hours women could work); *Nebbia v. New York*, 291 U.S. 502 (1934) (sustaining law establishing regulatory board authorized to fix prices for the retail sale of milk); *Morehead v. New York ex rel. Tipado*, 298 U.S. 587 (1936) (invalidating law establishing a minimum wage for women).

In 1937, the Court sounded a retreat from economic substantive due process in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In upholding Washington's minimum wage law for women, the Court stated:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.
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> 300 U.S. at 391.

In the wake of *West Coast Hotel*, the Court began routinely to employ a deferential standard of review that upheld state economic legislation as long as some "rational basis" could be found for the legislature's action. *See, e.g., Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding state's "right-to-work" law); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding law prohibiting anyone other than a state-licensed ophthalmologist or optometrist from fitting eyeglass lenses).

Although the Court in recent years has shown little solicitude for *Lochner*-style economic substantive due process arguments, it has recognized that persons having property rights are entitled to minimal

levels of procedural regularity, despite contrary state law.[227] In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), the Court, per Justice Stewart, recognized that:

> a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

The Court's actions in subsequent cases backed up the Court's stated determination to "take property rights seriously" in the procedural sense. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court required notice and hearing before prejudgment replevin; state law requirements to the contrary were found to violate due process. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court invalidated garnishment of a corporate bank account without a probable cause hearing, despite a contract conditioning the corporation's property interest in the bank account upon relinquishment of the right to demand such a hearing. According to the Court, the fact that the "debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause." 419 U.S. at 606. Unlike substantive due process, procedural due process acts as a "safeguard of the security of interests that a person *has already acquired* in *specific* benefits", *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972) (emphasis added).[228]

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[227] *See* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 597-99 (1981).

[228] This is not to suggest that "procedural due process" does not acquire an undesirably activist and substantive flavor when it is employed to "discover" existing property rights that merit "protection." For example, federal courts have transformed government welfare benefits and employment rights into "new property entitlements" that may be protected by procedural due process review. *See Treatise on Constitutional Law, supra*, §17.5, at 234-245. Under more traditional notions of property, a property right either would not have been found to exist in the first place in those situations, or the "right" would have been defined as conditioned upon *whatever* procedural conditions attached ("the bitter with the sweet"). *See* Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (Rehnquist, J.) ("where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet").

In short, the Supreme Court has largely reverted to its original 19th century tradition of according state economic regulation deferential review under the due process clause. The Court has, however, recognized that existing property rights deserve to be safeguarded from abusive procedures. Thus, it has occasionally sought to vindicate these rights through procedural due process review. The Court does not appear to be about to revive the economic substantive due process standards of the *Lochner* era, even though it increasingly has seen fit to invoke substantive due process in the "civil liberties" area.

3. *Economic Liberties Analysis of Substantive Due Process*

The substantive due process cases of the *Lochner* era displayed a great solicitude for the economic rights of the individual. It is certainly correct that individual economic liberties enjoy substantial constitutional protection. Nevertheless, we believe that reliance on an unbounded due process clause approach to vindicate those liberties is at odds with a jurisprudence of original meaning.

First, as this Report has demonstrated, the contract and just compensation clauses, correctly interpreted, provide substantial protection for economic liberties. It is clearly inappropriate to advance those substantive liberties by invoking a clause (due process) that was designed to afford only *procedural* protections. Once procedural requirements have been met, the due process clause plainly allows deprivations of "life, liberty, or property."

Furthermore, a facially incorrect "substantive" reading of the due process clause is troublesome because it lacks standards and stopping points. "Due process" is in our view a procedural term that contains no language limiting its substantive application. Because it rests on no clearly demonstrable textual or historical principle of the Constitution, substantive due process yields an unprincipled jurisprudence, in which courts uphold or overturn legislative determinations based on an ad hoc policy calculus of the "reasonableness" of a law's interference with economic liberties. This approach finds no support in the Constitution.

A number of interpretivist scholars have expressed their opposition to substantive due process. Chief Justice Rehnquist, for example, has expressed his belief that the due process clause does not embody

"fundamental economic rights."[229] Justice Scalia has written that reliance on the due process clause to promote "economic constitutional guarantees mistakes the nature of the constitutionalizing process."[230] Moreover, Justice Scalia bemoans the adverse "effect of constitutionalizing substantive economic guarantees on the behavior of the courts in other areas: There is an inevitable connection between judges' ability and willingness to craft substantive due process in the economic field and their ability and willingness to do its elsewhere."[231] Judge Bork has argued that economic substantive due process "works a massive shift away from democracy and toward judicial rule . . . without guidance from the interpreted Constitution."[232] Economically restrictive laws presumably would not violate due process, according to this test. Finally, Judge Easterbrook rejects substantive due process on the ground that "judges have not been charged with imposing their social views on the economic system."[233]

In sum, it is the view of several prominent interpretivist judges and scholars that the old economic substantive due process was unprincipled. They view *Lochner*-era due process theory as involving impermissible judicial usurpation of the legislature's role. We agree with this point of view. Substantive due process analysis is inappropriate because it clashes with the original meaning of the words of the due process clause (which refer to procedure, not substance). Moreover, substantive due process invites unbridled judicial activism: it places no obvious limitation on the scope of "fundamental liberties" that are to be protected.

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[229] *See generally* Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 Hastings L.J. 875 (1985).

[230] Scalia, *On the Merits of the Frying Pan*, 9 Regulation, No. 1, at 10-14 (Jan.-Feb. 1986).

[231] *Id.* at 12.

[232] R. Bork, *The Constitution, Original Intent, and Economic Rights* 12 (unpublished manuscript distributed at the Attorney General's Conference on Economic Liberties, Washington, D.C., June 14, 1986). *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 6 (1971) (judges should adhere to the text and the history of the Constitution, and not manufacture new rights lacking a constitutional basis).

[233] Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 60 (1984). *See also* Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85.

4. *Conclusion*

The due process clause of the Fourteenth Amendment was relied upon by the Supreme Court to strike down a host of state economic regulatory laws during the early 20th century. A few scholars have advocated that "economic substantive due process" be revived and used as a weapon to invalidate laws that invade economic liberties. Evidence of original meaning, however, indicates that the due process clause affords procedural, not substantive, protection. Substantive protection for economic rights is afforded instead by the just compensation and contract clauses.

The rejection of substantive due process does not, however, suggest that the due process clause has no role to play in vindicating economic liberties. The due process clause can and should be applied to afford procedural protection to persons whose property rights are threatened. While the scope of this protection is rather limited, it is not insignificant. Procedural due process review does serve partially to rein in government by requiring it to follow accepted procedures whenever it attempts to impinge on a person's economic rights.

B. The Commerce Clause

The commerce clause of the Constitution provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[234] "Negative" or "dormant" implications of the commerce clause have been judicially invoked to strike down state or local laws that restrain economic freedom by impermissibly burdening interstate commerce:

> The commerce clause has been recognized since the time of Chief Justice Marshall as having a negative implication which restricts state laws that burden interstate commerce. When the Court strikes down a state or local regulatory act as inconsistent with the "dormant" commerce clause, it is interpreting the silence of Congress to hold that, in the absence of federal legislation, the state or local law creates a trade barrier or imposes a burden on interstate commerce that is inconsistent with the principle that one state should not be able to gain an

[234] U.S. Const. art. I, §8, cl. 3.

> economic advantage by shifting costs for its local benefits to out-of-state persons or interests, particularly through the elimination of competition.[235]

In short, the courts employ the dormant commerce clause to strike down economic special interest legislation that excessively burdens interstate commerce or that discriminates against economic activity by out-of-state parties. As Professor Siegan notes, the courts interpret the "negative commerce clause" as meaning "that a state may not (1) discriminate against interstate commerce, (2) unreasonably burden it, or (3) regulate commerce which is essentially interstate in character. The key question in these cases is whether a local measure inhibiting the flow of interstate commerce can be justified by effectuating a legitimate public purpose."[236]

As the Supreme Court admitted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the "legitimate public purpose" test leads to an ad hoc balancing approach:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" benefits and burdens.

An argument for some sort of negative commerce clause limitation on the states is difficult to square with the text of the commerce clause alone. The wording of the clause includes no limitation on the states to enact laws impinging on interstate commerce in the absence of legislation; it merely grants Congress the authority to "regulate commerce."

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[235] *Treatise on Constitutional Law, supra*, §11.5, at 588. The scope of the negative commerce clause is surveyed *id.*, §§ 11.1-11.10, at 583-622.

[236] B. Siegan, *supra* note 1, at 243.