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# THE OBLIGATION CLAUSE OF THE UNITED STATES CONSTITUTION: PUBLIC AND/OR PRIVATE CONTRACTS

Robert L. Clinton\*

It is now common to think that at the Philadelphia Convention in 1787, when the Founders adopted the clause prohibiting states from passing laws "impairing the obligation of contracts,"<sup>1</sup> the Founders intended the prohibition to extend only to contracts between private individuals, and not to contracts between individuals and states. In other words, the Founders did not intend for the prohibition to extend to "public" contracts.<sup>2</sup> Yet this was not the understanding of the Marshall Court in the formative years of the Republic when the legal community first brought the meaning of the clause into question. Nor was it the understanding of the early writers on the Constitution, whom the community called upon to expound the instrument not amid the heated atmosphere of a courtroom squabble, but in rather more academic settings.

As Wallace Mendelson recently pointed out, the widespread acceptance of the modern view of the obligation clause is probably due largely to the influence of Benjamin Wright's *The Contract Clause of the Constitution*, published in 1938 on the heels of Franklin Roosevelt's court-packing scheme.<sup>3</sup> Mendelson further suggests that the "public-private" dichotomy sprang from "Progressive 'muck-raking' of the Constitutional Convention roughly a century after the fact."<sup>4</sup>

It might have appeared, in the wake of the Supreme Court's virtual emasculation of the obligation clause in the 1930's, that its range

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1. U.S. CONST. art. 1, § 10.

2. See JOHN MARSHALL: MAJOR OPINIONS AND OTHER WRITINGS 119-21, 132-34 (J. Roche ed. 1967). See also G. GARVEY, CONSTITUTIONAL BRICOLAGE 76 (1971).

3. Mendelson, *B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era*, 38 W. POL. Q., 262 (1985); B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938).

4. Mendelson, *supra* note 3, at 262. For an argument against Professor Mendelson's view of the origin of the "public-private" distinction, and a rejoinder by Mendelson, see Melone, *Mendelson v. Wright: Understanding the Contract Clause*, 41 W. POL. Q. 791 (1988); Mendelson, *Boostraps v. Evidence: A Response to Professor Melone*, 41 W. POL. Q. 801 (1988).

of application was of merely historical interest.<sup>5</sup> Yet one prominent author recently laid the blame for that very emasculation at John Marshall's doorstep,<sup>6</sup> and another complained that Marshall's "elevation" of public contracts to a constitutional status of equality with private ones has led to a dual standard of review under the obligation clause which "promises not only to 'impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith'."<sup>7</sup>

Whatever one thinks of these observations, it seems clear—at least from the perspective of *stare decisis*—that something must have gone badly wrong in the historical development of the contract clause. It is my contention, however, that the problem lies not in the history, but in the historiography. The "public-private" distinction, *as we presently understand it*, is traceable not to John Marshall, but to a group of relatively obscure legal writers in the 1870's. Their work constitutes the beginning of a major transformation in academic orientation to the Supreme Court, a transformation which did not reach its culmination until some forty years later. Before reaching the 1870's, it is necessary to conduct a brief historical survey.

#### THE CONTRACT CLAUSE IN THE FOUNDING PERIOD

There was very little discussion of the contract clause at the Philadelphia Convention of 1787, and equally little at the various state ratifying conventions which followed in the ensuing months. Rufus King introduced the original motion at Philadelphia on August 28, in terms virtually identical to those in Article II of the Northwest Ordinance, passed by the Confederation Congress earlier in the same year, evidently upon prodding of "land speculators in and out of Congress

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5. See *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

6. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631 (1987). Palmer argues provocatively that Marshall's protection of state land grants against impairment in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), necessarily led to the recognition of reserved state powers, which then had to be "balanced" against private rights in a succession of nineteenth-century cases. The State police power finally overcame private right completely in *Blaisdell*, 290 U.S. 398 (1934), when the Supreme Court upheld a state debtor-relief law, arguably the very kind of law specifically intended by the Founders to be precluded by the contract clause.

7. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. 597, 630 (1987) (quoting *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 355 (1827) (Marshall, C.J., dissenting)). The "dual" standard refers to the Court's recent announcement in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), that impairment of public obligations would be "subject to more searching judicial review than impairments of private contracts." Merrill, *supra* at 598-99. Merrill believes that such a declaration essentially stands Article 1, § 10 on its head.

who wished to make the western areas attractive to prospective settlers.”<sup>8</sup> The clause in the Ordinance read as follows:

[I]n the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.<sup>9</sup>

After a brief discussion, during which members of the Convention raised several objections to King’s motion, James Wilson argued that the “answer to these objections is that retrospective interferences only are to be prohibited.”<sup>10</sup> Madison then followed with the opinion that retrospective interferences with contracts would be taken care of by the provision prohibiting *ex post facto* laws, which he apparently thought covered both civil and criminal cases.<sup>11</sup> Madison’s view was not challenged, so Rutledge then moved to replace King’s original motion with one prohibiting retrospective laws, and the new motion passed without further discussion.<sup>12</sup> However, Madison had been wrong about the identity of “retrospective” and *ex post facto*, for Dickinson announced on the following day that *ex post facto* referred to criminal cases only (after searching Blackstone’s *Commentaries* the previous evening). About two weeks later Mr. Gerry moved to extend the provision to civil cases, but his motion failed.<sup>13</sup>

The final development in the Convention occurred on September 12 when the Committee on Style presented its report, having changed the wording of the clause to read that no state shall pass laws “altering or impairing the obligation of contracts.”<sup>14</sup> Two days later the Convention dropped the word “altering” without discussion, leaving the clause in its present form.<sup>15</sup> We may conclude from this brief review that the proceedings at Philadelphia offer no basis for believing that the Founders intended to make a sharp distinction between pub-

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8. C. SMITH, JAMES WILSON: FOUNDING FATHER 243 (1956).

9. THE FEDERAL CONVENTION AND THE FOUNDATION OF THE UNION OF THE SEVERAL STATES 292 n.7 (W. Solberg ed. 1958).

10. *Id.* at 293.

11. *Id.*

12. *Id.*

13. *Id.*

14. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 9 (1938). Interestingly, neither Merrill nor Palmer comment on the deletion of the word “private” from the final draft of the clause. They appear to have assumed that the Founders so thoroughly accepted the “private contract” interpretation of the provision that there was simply no need to place the term in the text. Given their arguments, that is a very large assumption, indeed.

15. *Id.*

lic and private contracts. In fact, the record appears to indicate the opposite, since the word "private" in King's initial motion was subsequently deleted from the clause.

With respect to subsequent discussions in the various state ratifying conventions and in the *Federalist*, the record is equally scanty. The only straightforward discussion of the clause in the *Federalist* is that by Madison in number forty-four, in which he says that "laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation . . . . Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights."<sup>16</sup> This tells us very little, since, except in the very special case of contracts between governmental units, the "rights" affected by state impairment of public contracts are always private ones. The only other reference to contracts in the *Federalist* is Hamilton's in number seven, in which he specifically mentions "private contracts." He did this *not* while discussing the *contract* clause but, rather, while discussing the monetary clauses in general.<sup>17</sup>

There are only two relevant discussions of the clause in state ratifying conventions, one favorable to each interpretation. In Virginia, Patrick Henry argued that the clause "includes public contracts, as well as private contracts between individuals."<sup>18</sup> The answer came from Governor Randolph, who stated that he was "still a warm friend of the prohibition, because it must be promotive of virtue and justice, and preventive of injustice and fraud."<sup>19</sup> Although Randolph subsequently points to state interferences with private contracts as a source of great calamities, he nowhere denies Henry's contention as to the meaning of the clause.<sup>20</sup>

The other mention of the clause in a state ratifying convention occurred in North Carolina. Here, members of the convention raised the question as to whether the clause had reference to contracts of the states. W.R. Davie, a member of the Federal Convention, answered that it did not.<sup>21</sup> So far as I know, Davie's statement is the only *definite* reference in this period by a member of the Philadelphia Convention which took this position as to the *intentions* of the men there.

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16. THE FEDERALIST No. 44 at 301 (J. Madison) (J.E. Cooke ed. 1961).

17. THE FEDERALIST No. 7 at 42 (A. Hamilton) (J.E. Cooke ed. 1961).

18. W. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION 112 (1919).

19. *Id.* at 113.

20. *Id.*

21. *Id.*

The only other reference which might be cited is Luther Martin's address to the Maryland Legislature in which he explained that he voted against the adoption of the clause because he wanted the states to have the power to pass debtor's relief legislation in extreme circumstances and he thought the clause would prevent that.<sup>22</sup> However, Martin nowhere mentions "state" contracts in the course of his address.

#### THE CONTRACT CLAUSE IN THE EARLY SUPREME COURT

The United States Supreme Court had little occasion to interpret the contract clause prior to the year 1810. In that year, the Court decided the important case of *Fletcher v. Peck*.<sup>23</sup> In the majority opinion of the Court, John Marshall held that a state legislature's grant of land to an individual, having been completed in the form of a conveyance by the governor, was a contract within the meaning of the obligation clause and that a subsequent statute repealing the grant was therefore unconstitutional.<sup>24</sup> Two crucial principles were established here: (1) that a grant, completed by a conveyance (an "executed" contract), gives rise to an implied "executory" (not completed) contract on the part of the grantor to refrain from reasserting his right to the thing granted; and (2) that a contract between a state and an individual is a contract within the meaning of the Constitution. At the bottom of the latter holding is the idea that there is no distinction between "public" and "private" contracts. As to the first principle, we shall have occasion to return later.

Between 1810 and 1823, the United States Supreme Court handed down several important interpretations of the contract clause, all of which expanded the *Fletcher* doctrine to some extent. In *New Jersey v. Wilson*<sup>25</sup> the Court held that a state's grant of immunity from taxation was a contract within the meaning of the obligation clause. In *Trustees of Dartmouth College v. Woodward* the Court held that a charter of incorporation was a contract within the meaning of the clause, thereby extending *Fletcher's* protection of the contract rights of "natural" persons to "artificial" ones as well.<sup>26</sup> Finally, in *Green v. Biddle* the Court protected a contract between two states from impairment.<sup>27</sup>

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22. *Id.* at 114.

23. 10 U.S. (6 Cranch) 87 (1810).

24. *Id.*

25. 11 U.S. (7 Cranch) 164 (1812).

26. 17 U.S. (4 Wheat.) 518 (1819).

27. 21 U.S. (8 Wheat.) 1 (1823).

In juxtaposition to the cases involving "public" contracts, were, of course, some cases involving "private" ones. In *Sturges v. Crowninshield* the Court held that a state bankruptcy law was unconstitutional with respect to contracts made *prior* to its enactment,<sup>28</sup> and in *McMillan v. McNeill* the Court did the same with respect to contracts made *subsequent* to a state's insolvency law,<sup>29</sup> a principle which the Court overruled in *Ogden v. Saunders* over Marshall's dissent.<sup>30</sup>

It should be said here that there were few objections from the bench to the Marshall Court's early interpretations of the obligation clause in its relation to public contracts. Justice Johnson dissented from the Court's reasoning but not from its decision in *Fletcher*, stating that, while he had no problem declaring that a state could not revoke its grants, he would do it "on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."<sup>31</sup> In other words, Johnson thought that the Constitution incorporated natural law and evidently felt that invocation of "general principles" would better insure the security of contracts, whether public or private, than would resort to a clause which contained words of "equivocal signification."<sup>32</sup>

Early decisions of the Marshall Court holding that the clause protected public contracts as well as private ones are not altogether without precedent. Although the Court did not base its decisions in *Fletcher*, *Wilson*, and *Dartmouth* directly on these grounds, there are "several early cases in the Federal circuit courts and at least one of importance in the state courts which throw light upon the attitude of the bench toward the contract clause long before Marshall was given the opportunity in *Fletcher v. Peck* to express his interpretation of that part of the Constitution."<sup>33</sup> For example, in *Vanhorne's Lessee v. Dorrance*,<sup>34</sup> Justice Paterson, an influential member of the Federal Convention, speaking for the circuit court held that a Pennsylvania statute repealing a previous act confirming the title of some claimants to land in that state was invalid as violative of the obligation clause. The similarity of this ruling to Marshall's in *Fletcher* is obvious.

Another circuit court case decided in 1799, of which there is evidently no official record, invalidated a Vermont law authorizing town

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28. 17 U.S. (4 Wheat.) 122 (1819).

29. 17 U.S. (4 Wheat.) 209 (1819).

30. 25 U.S. (12 Wheat.) 213 (1827).

31. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810).

32. *Id.* at 144.

33. B. WRIGHT, *supra* note 3, at 18-19.

34. 2 U.S. (2 Dallas) 304 (1795).

selectmen to seize church lands; and the court did so on contract clause grounds.<sup>35</sup> Some similarity with *Dartmouth* is apparent here. In *Wales v. Stetson*,<sup>36</sup> a case not decided on contract clause grounds, the Massachusetts Supreme Court said that "rights legally vested in a corporation cannot be controlled or destroyed by a subsequent statute, unless a power be reserved to the legislature in the act of incorporation."<sup>37</sup> It is interesting that Benjamin Wright, clearly an opponent of Marshall's early contract clause decisions, cannot find a *single* early case in the state or lower federal courts which would support his position. All of the cases which he cites in this era would have supported *Marshall's* position, had Marshall chosen to use them.<sup>38</sup>

#### THE CONTRACT CLAUSE IN THE LATE MARSHALL AND TANEY ERAS

If the years between the drafting of the United States Constitution and 1827 represented a period of broadening application of contract clause doctrine with respect to public contracts, the period extending from 1827 to the Civil War was a period where its applicability was, to some extent, narrowed. *Ogden v. Saunders*, decided in 1827, has already been mentioned, but it did not involve a state contract.<sup>39</sup> Beginning in 1829, before the end of the Marshall era, the Court began to confine the operation of the clause within the limits of the developing doctrine of reserved state powers: police, taxation, and eminent domain.

The first case worthy of mention is *Willson v. Blackbird Creek Marsh Co.*<sup>40</sup> Although not itself a contract clause case, Marshall's opinion upholding a state-authorized swamp drainage scheme foreshadows the subsequent development of the state "police power" doctrine, much later articulated in *Stone v. Mississippi*.<sup>41</sup> This doctrine ultimately was to become the chief constraint upon the operation of the contract clause. The process finally culminated in the famous Minnesota Mortgage Moratorium Case of the depression era.<sup>42</sup> In *Providence Bank v. Billings*,<sup>43</sup> the Court (per Marshall) held that a

35. B. WRIGHT, *supra* note 3, at 20.

36. 2 Mass. 143 (1806).

37. Quoted in B. WRIGHT, *supra* note 3, at 20-21 (discussing *Wales v. Stetson*, 2 Mass. 143 (1806)).

38. *See id.* at 18-22.

39. *See supra* text accompanying note 30.

40. 27 U.S. (2 Pet.) 245 (1829).

41. 101 U.S. 814 (1880).

42. *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

43. 29 U.S. (4 Pet.) 514 (1830).



state's relinquishment of the power of taxation over a corporation is never to be implied, since a corporate charter merely gives "individuality" to a group, and "[a]ny privileges which may exempt it from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."<sup>44</sup>

In *Charles River Bridge v. Warren Bridge*,<sup>45</sup> Chief Justice Taney's first important contract clause decision, the Court applied the principle enunciated in *Providence* to cover state grants of monopolistic privileges, saying that public grants are to be strictly construed, with nothing passing by implication.<sup>46</sup> Finally, in *West River Bridge Co. v. Dix*,<sup>47</sup> the Court held that all contracts are made subject to the state's power of eminent domain.

There are many other important contract cases during this period, but the main lines of development in early-nineteenth century law respecting state contractual obligations are suggested in those cases mentioned above. The point of crucial importance for this inquiry is that, far from being neglectful of the necessity for states to possess adequate powers to govern, as some of his latter-day detractors have suggested, John Marshall himself laid the foundation for the subsequent development of the doctrine of reserved power. In none of the pre-Civil War cases which imparted broader scope to these powers was the notion of the applicability of the obligation clause to public contracts seriously questioned.<sup>48</sup>

The same may be said of treatises written by legal scholars on both constitutional law and contract law in the period extending from 1820 to 1870. I have been unable to find a *single* statement during this period directly challenging Marshall's assertion of the Framers' intention to include public contracts within the scope of the obligation clause. In general, the evaluations of the early contract clause decisions are positive, though some of these writers do not take a clear-cut position on the question of the intentions of the Founders with respect to public contracts.

For example, John Taylor suggested in 1820 that the contract clause, along with those clauses prohibiting bills of attainder and *ex post facto* laws, were introduced to prevent "usurpations" and "evils,"

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44. *See id.* at 562.

45. 36 U.S. (11 Pet.) 420 (1837).

46. *See id.* at 544.

47. 47 U.S. (6 How.) 507 (1848).

48. *See* B. WRIGHT, *supra* note 3, Ch. 3.

without saying exactly what these were.<sup>49</sup> Theron Metcalf, in 1828, claimed that the Framers intended to prevent not only the recurrence of evils already endured (those that had come about as a result of the Revolutionary War, most of which evidently had to do with a shortage of capital), but "also to guard against the happening of similar evils; 'to establish justice,' and the most perfect faith in agreements, and to ensure the sanctity of private property, so far as these objects can be secured by legislative enactments."<sup>50</sup> Peter Du Ponceau, in 1834, suggested an even broader reading of the clause, holding that it was intended to apply to all contracts "absolutely and unconditionally."<sup>51</sup>

Chancellor Kent is seemingly in full agreement with the early Court's view of the contract clause. He summed up his discussion of the *Dartmouth* decision in 1826:

The decision in that case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country.<sup>52</sup>

In fact, Kent not only thought that public contracts properly fell within the meaning of the clause but also that the principle of strict construction of state grants, announced in the *Charles River Bridge* case, was "deeply to be regretted."<sup>53</sup>

Joseph Story, while speaking of the *Dartmouth College* case, said that the preservation of corporate rights may not have been directly within the contemplation of the Framers and that they might have had in mind more "pressing" mischiefs.<sup>54</sup> He then went on to say that the prohibition itself was more general:

It is applicable to all contracts, and not confined to the forms then most known, and most divided. Although a rare or peculiar case may not of itself be of sufficient magnitude to induce the establishment of a constitutional rule; yet it must be governed by that rule,

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49. J. TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 73-74 (1820).

50. T. METCALF, PRINCIPLES OF THE LAW OF CONTRACTS 318 (1828 & reprint 1868).

51. P. DUPONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES 43 (1834).

52. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 418 (6th ed. 1840).

53. 3 J. KENT, COMMENTARIES ON AMERICAN LAW 459 (6th ed. 1840).

54. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 263 (1833).

when established, unless some plain and strong reason for excluding it can be given. It is not sufficient to show, that it may not have been foreseen, or intentionally provided for. To exclude it, it is necessary to go further, and show, that if the case had been suggested, the language of the convention would have been varied so, as to exclude and except it.<sup>55</sup>

In addition to the foregoing early references, there are the following later ones: Francis Hilliard, in 1848, said that the obligation clause "received from the Supreme Court its fullest and most satisfactory exposition, in vindicating the charter of Dartmouth College from legislative interference and assumption."<sup>56</sup> Timothy Walker discussed the contract clause extensively, along with its basis in the Northwest Ordinance, and spoke as if there was never any doubt about its application to state contracts.<sup>57</sup> William Duer, in 1856, thought that the Framers intended an even broader scope for the clause than that given to it by the Marshall Court.<sup>58</sup>

The only writers in this period whose statements can be interpreted as doubting that the Framers intended inclusion of public contracts within the scope of the obligation clause are Theophilus Parsons (1855),<sup>59</sup> George Ticknor Curtis (1858),<sup>60</sup> and Thomas M. Cooley (1868),<sup>61</sup> and the case is weak in each instance. Parsons simply says that the Framers' intent is not certain on this point, but he goes on to say that whatever their motives, it is nevertheless quite settled that no distinction between public and private contracts exists, so far as the Constitution is concerned.<sup>62</sup>

Curtis claims that the contract clause in the Northwest Ordinance is more "stringent" than that in the Constitution,<sup>63</sup> which some have interpreted as a denial that the Founders intended state contracts to be covered by the clause.<sup>64</sup> However, there is a more straightforward interpretation available, since the Framers substituted the term "impairing" (in the Constitution) for the words "in any

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55. *Id.*

56. F. HILLIARD, *THE ELEMENTS OF LAW* 44 (1848).

57. T. WALKER, *INTRODUCTION TO AMERICAN LAW* 200 (1869).

58. W. DUER, *CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 347 (1856).

59. 2 T. PARSONS, *THE LAW OF CONTRACTS* (1855).

60. 2 G. CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* (1858).

61. T. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868).

62. T. PARSONS, *supra* note 59, at 530.

63. G. CURTIS, *supra* note 60, at 366.

64. *See, e.g., Hill, The Dartmouth College Case*, 8 AMER. L. REV. 189, 196 (1874).

manner whatever, interfere with or affect" (in the Ordinance).<sup>65</sup> Clearly, the latter phrase is much more "stringent" than the former; yet, in the Ordinance, this more stringent phrase is applied only to *private* contracts, not to public ones. Because the Founders likewise specifically deleted the word "private" from the original clause, as we have seen, it is not unreasonable to assume that Curtis meant nothing more than this.

Cooley doesn't address the question of the Founders' intentions specifically. In discussing *Fletcher*, he says only that the decision in that case settled the crucial points that executed contracts are within the operation of the clause and that a state's contract with an individual is within it also.<sup>66</sup> He seemed to have no problem with the inclusion of public contracts in the clause in 1868; but, in a short treatise first published some twelve years later, he says, referring to the period of the constitutional convention, that "[a]pparently nothing was in view at the time except to prevent the repudiation of debts and private obligations, and the disgrace, disorders, and calamities that might be expected to follow."<sup>67</sup> Now, one can read this statement as saying the same as that of Story, quoted before: that what was "in view" is not necessarily what was "intended."<sup>68</sup> Yet the absence of the remark in the earlier treatise is nonetheless interesting, especially in view of the apparent shift in attitudes toward the contract clause that took place in the period between them. To this subject we shall now turn.

### THE SHIFT

As we have seen, examination of prominent legal treatises written prior to the Civil War produced no clear-cut challenge to the Marshall Court's early view that the obligation clause bound the states to performance of their contracts. Apparently, state and lower federal courts in the pre-*Fletcher* era adopted this theory as well. But after the Civil War-Reconstruction period this view was brought into question. The first definitive statement in a major legal treatise, to the effect that the Framers intended the clause to apply only to "private debts and obligations," is evidently that of Cooley in 1880, mentioned above. One may find numerous such statements in treatises, articles,

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65. See *supra* notes 9-15 and accompanying text.

66. T. COOLEY, *supra* note 61, at 275.

67. T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 328 (3rd ed. 1898).

68. See *supra* note 54 and accompanying text.

textbooks, and judicial opinions published after 1880, as we shall soon see.

Between 1874 and 1879 a number of articles appeared in the *American* and *Southern Law Reviews*, all of which were highly critical of the Marshall Court's early contract clause decisions. Clement H. Hill, Assistant Attorney-General of the United States in the Grant administration, published the first of these in 1874 in the *American Law Review*.<sup>69</sup> R. Hutchinson published the second critical article in the *Southern Law Review* in 1875,<sup>70</sup> and the *Southern Law Review* published the rest in a series of articles between 1875 and 1879, written by John M. Shirley.<sup>71</sup> Shirley published all of his articles, with some additional materials, in book form in 1879.<sup>72</sup> These works, taken together, embody a literal plethora of arguments designed to show that Marshall's early contract decisions (especially *Fletcher*, *Wilson*, and *Dartmouth*) misinterpreted the Constitution from several standpoints. Since *each* of these works contains *most* of the negative judgments (especially Hill's and Shirley's), one can consider these works taken together as constituting the turning point in the scholarly interpretation of the obligation clause in nineteenth-century law. Without going into all the details, I shall try to state briefly the various lines of argument found in them.

The first type of argument against Marshall's early view (found in both Hill and Shirley) revolves about the assertion that James Wilson was the real author of the obligation clause. The basic idea is that, since Wilson was the only Founder thoroughly conversant with the civil law tradition, and since the phrase "obligation of contract" apparently had its *linguistic* origin in the Latin *obligatio ex contractu*, widely used in Roman law, it follows that Wilson must have authored the clause and, furthermore, must have intended the adoption of the civil law *meaning* of the phrase, which, in early Roman law, referred only to "private debts and obligations."<sup>73</sup> In support of this view, both Hill and Shirley refer to the argument of Mr. Hunter, counsel in *Sturges v. Crowninshield*, which is the first instance I know of where someone actually urged the view upon the Court. Marshall and his

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69. See *supra* note 64 and accompanying text.

70. Hutchinson, *Laws Impairing the Obligation of Contracts*, 1 S.L. REV. 401 (1875).

71. 2 S.L. REV. (pts. 1-4) 22, 247, 500, 661 (1876); 3 S.L. REV. (pts. 5 & 6) 62, 185 (1877); 4 S.L. REV. 857 (1878). See also 5 S.L. REV. 879 (1880), for confirmation of Shirley's authorship of the articles listed above.

72. J. SHIRLEY, *THE DARTMOUTH COLLEGE CAUSES* (1879).

73. Hill, *supra* note 64, at 196-97.

colleagues evidently rejected the argument.<sup>74</sup>

The second line of argument concerns an implication of the civil-law obligation. Since in civil law there are only "contracts" and "quasi-contracts," since no "real" obligation arises from a quasi-contract, and since in civil law "implied" contracts are merely a species of quasi-contract, it follows that no real obligation can arise from a contract merely implied. This means, of course, that the implied executory contract which Marshall held to have arisen out of the *Fletcher* land grant was really no contract at all, and therefore it should not have been protected by the Constitution even if state contracts were within the scope of the clause.<sup>75</sup> In other words, according to this view, any additional obligation which arises from an executed contract must itself be by express covenant and cannot be implied. As concerns the subject of public contracts, the gist of this argument seems to be that, if Marshall had not made a mistake on this fundamental point (executed contracts), then he would not have been able to set the precedent with respect to state contracts for which *Fletcher* became justly famous, and which served as the major groundwork of the *Dartmouth College* decision: the decision which both Hill and Shirley are most interested in attacking.

The third type of argument produced in the attack on Marshall's view concerns the source of the distinction between public and private contracts. Both Hill and Shirley hold that this distinction is based not upon the origin of the contract but rather upon the objects for which it was created. This was the view expressed by Mr. Sullivan (counsel for Woodward) in his argument before the New Hampshire Supreme Court at Exeter, a view which Chief Justice Richardson accepted in his majority opinion there and which Marshall's *Dartmouth* opinion later overruled.<sup>76</sup> According to this theory, if a state grants a charter of incorporation (or a land grant, perhaps) for the accomplishment of important public purposes, then it is a "public" contract, and if one accepts the Hill-Shirley view, this "public" contract is not protected by the obligation clause. Conversely, if there are no significant "public" purposes involved, then it is a merely "private" contract, even if a state is one of the parties. Hill makes the latter point in his discussion of *Fletcher*, the land grant in which he argues might at least plausibly be construed a "private" contract in this sense; though it seems quite evident to him (and to Shirley) that the *Dartmouth* charter cannot be

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74. 17 U.S. (4 Wheat.) 122, 151 (1819).

75. Hill, *supra* note 64, at 198.

76. J. SHIRLEY, *supra* note 72, at 188.

so construed.<sup>77</sup>

Related to the "object-origin" argument, Marshall's critics produced a fourth type of argument: whatever constitutes the obligation of a contract, it is a creature of positive law, and it is therefore an absurdity to hold that a state (which, after a fashion, creates all contracts, since all contracts are made subject to its laws) can be obligated by its own contracts. This would be somewhat like saying that God is obligated by the Ten Commandments. The view at least implies that a state cannot contract with respect to objects within its essential (sovereign) powers, and it would seem especially to bring into question Marshall's holding in *New Jersey v. Wilson*, that a state may grant perpetual tax exemptions.<sup>78</sup> The real point of this argument seems to be that Marshall must have, in fact, based his early contract decisions upon natural law, rather than positive law and that the men at the Philadelphia Convention could have never intended such a basis for judicial decisions. For empirical evidence in support of this position, Marshall's critics often refer to his famous statement in the *Fletcher* opinion to the effect that "the State of Georgia was restrained, either by *general principles* which are common to our free institutions, or by the *particular provisions* of the Constitution of the United States."<sup>79</sup>

Hutchinson put forward a fifth argument which this Article will consider: that the Founders (or perhaps those in the various state ratifying conventions) could not possibly have intended both (1) that the obligation clause would have the effect of binding the states to perform their contracts, and (2) that the federal courts would possess the jurisdiction over state courts that Marshall held the former to have, according to the twenty-fifth section of the Judiciary Act of 1789, in *Cohens v. Virginia*.<sup>80</sup> The idea here seems to be that the Founders could not reasonably have expected the states to be willing to surrender so much power to the national government in general, and to the federal courts in particular. In other words, from the states' point of view, one might concede either *Fletcher* or *Cohens*, but not both.

Finally, Shirley adduces a rather large and complex set of historical-biographical arguments against Marshall's *Dartmouth College* ruling, most of which are hardly worthy of consideration. Here is a

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77. Hill, *supra* note 64, at 193.

78. See *supra* text accompanying note 25.

79. J. SHIRLEY, *supra* note 72, at 403.

80. 19 U.S. (6 Wheat.) 264 (1821); see Hutchinson, *supra* note 70, at 401.

sample of these arguments: (1) that the King never really granted the Dartmouth charter—rather, the royal governor granted it without the King's knowledge;<sup>81</sup> (2) that Webster and Mason (counsel for the college) never really had much faith in the obligation clause argument, anyway—shown by the fact that only about one-tenth of Webster's argument before the Court was devoted to it;<sup>82</sup> (3) that the Dartmouth dispute was really not a "legal" dispute at all—but rather a political dispute between Federalists and Antifederalists (or a religious dispute between Calvinists and non-Calvinists), resulting in a perversion of the Constitution in favor of the "Federalist" notion of the sanctity of private property.<sup>83</sup>

Here, then, are the major arguments expressed by the trilogy of critics. It seems clear that their real concern is not with the substance of the Marshall Court's early contract clause decisions but rather with the consequences of these decisions in terms of later legal, political, and economic developments in the nineteenth century.<sup>84</sup> Whatever one thinks about such consequences, before deciding to hold the Marshall Court responsible for all of them, one should evaluate the arguments on their own merits.

#### THE ARGUMENT AGAINST MARSHALL'S CRITICS

First, no real evidence exists of Judge Wilson's alleged authorship of the clause. Neither Hill nor Shirley nor Hutchinson cite any source other than "tradition" in support of this view, and it seems implausible since Wilson was not a member of the Committee on Style at the Philadelphia Convention from which the clause, in its final form, emerged.<sup>85</sup> Coupled with this, Rufus King, who introduced the clause in the original form of the Northwest Ordinance, was a member of this Committee.<sup>86</sup> Curtis, in fact, seems to have thought that King's authorship of the clause was unquestioned.<sup>87</sup>

Nor is it clear what the proponents of this view would have proven if they showed that Wilson authored the clause. Although Wilson had no opportunity while on the Bench to construe the clause directly (a fact which both Shirley and Hill bemoan), a passage from

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81. J. SHIRLEY, *supra* note 72, at 52-53.

82. *Id.* at 208.

83. *Id.* at 79.

84. *See, e.g.*, Hill, *supra* note 64, at 192.

85. *See* B. WRIGHT, *supra* note 3, at 11.

86. *Id.*

87. 1 G. CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* 548 (1897).



his *Works* seems to show a marked affinity for the kind of view later expressed by Marshall. Speaking of the state, Wilson says:

It is an artificial person. It has its affairs and its interests; it has its rules; it has its obligations; it has its rights. It may acquire property, distinct from that of its members; it may incur debts, to be discharged out of the public stock, not out of the private fortunes of individuals: it may be bound by contracts and for damages arising quasi ex contractu.<sup>88</sup>

And in arguing against repeal of the Charter of the Bank of North America in 1785, he says:

I am far from opposing the legislative authority of the state: but it must be observed, that, according to the practice of the legislature, publick acts of very different kinds are drawn and promulgated under the same form . . . surely it will not be pretended, that, after laws of those different kinds are passed, the legislature possesses over each the same discretionary power of repeal. In a law respecting the rights and properties of all the citizens of the state, this power may be safely exercised by the legislature . . . . Very different is the case with regard to a law, by which the state grants privileges to a congregation or other society . . . . Still more different is the case with regard to a law, by which an estate is vested or confirmed in an individual: if, in this case, the legislature may, at discretion, and without any reason assigned, divest or destroy his estate, then a person seized of an estate in fee simple, under legislative sanction is, in truth, nothing more than a solemn tenant at will.<sup>89</sup>

It should also be said that Wilson himself was a product of the Scotch-Moralist school of philosophy and, following this tradition, held a profound belief in natural law, which recognized no distinction between obligations arising out of public, as contrasted with private, contracts.<sup>90</sup> This would certainly explain the statements quoted above, and it is therefore unclear, all things considered, why Marshall's critics think that they are gaining anything by claiming that Wilson authored the contract clause, even if he was familiar with the civil law. Perhaps Hill, Shirley, and others can cite Wilson's civil-law training while ignoring his natural law background only because virtually everyone in the late-eighteenth century shared the latter belief. Many scholarly works devoted to understanding the moral basis of

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88. Quoted in W. HUNTING, *supra* note 18, at 47.

89. 2 THE WORKS OF JAMES WILSON 833-34 (R. McCloskey ed. 1967).

90. See C. SMITH, *supra* note 8, Ch. 22.

early American law have pointed this out.<sup>91</sup>

One can find the most definitive rebuttal of the Hill-Shirley-Hutchinson view of the implications of Wilson's alleged authorship of the clause, however, in Wilson's concurring opinion in *Chisholm v. Georgia*.<sup>92</sup> Though the Court did not directly address the obligation clause in that case, Wilson, buttressing his argument, refers to it anyway: "What good purpose could this constitutional provision secure, if a state might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power?"<sup>93</sup> This statement appears to be conclusive evidence that, had Wilson had the opportunity presented to Marshall in the early contract cases, Wilson would have construed the clause in precisely the same way, as would have most in his time.<sup>94</sup> Far from refuting Marshall by recurring to Wilson, the critics appear to have refuted themselves, since Wilson's statement in *Chisholm* is probably the first mention of the contract clause from the federal Bench, and it comes from one whose prestige at the Philadelphia Convention was second to none, save perhaps Madison.

The argument from the civil law obligation of contracts is not much better. In fact, it seems on the surface to be self-defeating. Even if Wilson was the only Founder familiar with this tradition (which seems implausible), how can one say that the Convention, taken as a whole, could have "intended" such a meaning? This would be to say that the Framers intended to adopt a reading of the clause of which they could only have been dimly aware, in light of the paucity of discussion that evidently took place regarding it there. It is not clear that such a notion of intention is even comprehensible, let alone sufficient as a basis for constitutional interpretation.

Finally, even a cursory reading of the development of the civil law from ancient to modern times fails to support the notion of a civil law obligation as put forward by Hill and Shirley. Apparently the latter view is based upon a very narrow conception (or perhaps ignorance) of civil law development. In early Roman law, *obligatio ex contractu* referred only to private debts, as we have seen; yet, according to at least one prominent modern authority, the civil law obligation of contracts developed *away* from the strict Roman law

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91. See, e.g., Isaacs, *John Marshall on Contracts: A Study in Early American Juristic Theory*, 7 VA. L. REV. 413 (1921); F. STITES, PUBLIC INTEREST AND PRIVATE GAIN: THE DARTMOUTH COLLEGE CASE, Ch. 9 (1972); see also W. HUNTING, *supra* note 18, at 48.

92. 2 U.S. (2 Dall.) 419 (1793).

93. *Id.* at 465.

94. See *supra* note 91 and accompanying text.

conception of obligation to a much broader notion which subsumed the concept under natural law, a development which took place between the thirteenth and seventeenth centuries.<sup>95</sup> Unless fundamental principles of American constitutional law rest upon ancient precedents, ignoring their subsequent development in light of relatively more modern conditions, it would seem that the Hill-Shirley theory is simply unfounded.

If one can say that the Founders were not cognizant of the development of the civil law tradition, one certainly cannot say that they were unfamiliar with the theory of contract in the common law. What is important for this inquiry is that, while it may be true that "quasi-contract" and "implied contract" are the same in the civil law tradition, this is not the case in the common law.<sup>96</sup> Whereas in the former case, only "express" contracts give rise to "real" obligations; in the latter, both "express" and "implied" contracts are obligatory. This may explain why both Hill and Shirley place so much reliance on the civil law theory; the only other possibilities are the common law, in which case Marshall was right in saying that grants give rise to implied executory agreements, or natural law, in which case Marshall was right in saying that states are obligated by their contracts. Both of these points Hill and Shirley must deny in order to make their argument plausible.

The truth of the matter seems to be that the development of both civil and common law contract doctrines between the thirteenth and seventeenth centuries was in the direction of increasing acknowledgment of autonomy (free will) as the basis for obligation.<sup>97</sup> During most of this period, however, absolutism prevented inclusion of the "state" into the widening domain of responsibility. With the demise of absolutist governments, government itself came to be seen increasingly as a kind of "autonomous" entity capable of making contractual agreements and being held accountable for them. This "Kantian" development was retarded somewhat in Continental Europe, though not completely so.<sup>98</sup> In England, it took the form of the principle that the Crown could not revoke its grants and charters. The fullest expression of the notion of autonomy was found in the United States in the idea that even legislatures could not impair the obligations arising from contracts they themselves had entered into.

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95. A. VON MEHREN, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAWS* 580-84 (3rd ed. 1977). A similar view is taken by Hunting.

96. *BLACK'S LAW DICTIONARY* 293 (5th ed. 1979).

97. A. VON MEHREN, *supra* note 95, at 578-79.

98. *Id.* at 586-88.

As to the "origins-objects" argument, its ahistoricity seems evident. To hold that a public contract is one in which "public," as distinct from "private," purposes are manifest, is to presuppose a world view which includes a sharp distinction between public interests and private rights. But it is not likely that the Founders possessed such a view of their world. Rather, it is more likely that they shared an opinion "that society existed to preserve the rights an individual possessed before he entered society and the corollary that society benefitted or prospered in direct proportion to the protection afforded individual rights."<sup>99</sup> According to Francis Stites:

Protection of the basic right, property, either of private individuals or groups of private individuals would encourage the productive labor necessary to open the continent and develop the economy. Nineteenth-century American law absorbed this belief in the tie between individual rights and public welfare.<sup>100</sup>

In short, if the Founders believed that construction of a legal and political framework for protection of *private* rights best served the *public* interest (recalling Madison's statement about the obligation clause in Federalist No. 44), then no sharp distinction between public and private contracts is possible. The Hill-Shirley view finds such a distinction only because it assumes motives which could only be based on feelings not widely shared in 1787, though they came to be widely shared at a later time. Any argument that goes, then, from an "objects-origins" distinction to a "public-private" distinction simply begs the question. No one predisposed to deny that the Founders intended to distinguish public from private contracts would accept the idea that they intended to distinguish contracts having a "public purpose" from those that did not.

The argument drawn from the positive-law theory of obligation fares no better, and for the same reason. The idea that a state cannot contract with regard to its essential powers of sovereignty is closely related to the idea that contracts embodying important public purposes are subject to impairment by the state. For what are "essential powers of sovereignty" if they are not those powers which may, at all times and places, override private claims in the public interest? As Nathan Isaacs has shown, however, the Framers were steeped in the natural-law tradition of the eighteenth century, and one must read Marshall's early contract decisions in that light.<sup>101</sup> Even professor

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99. F. STITES, *supra* note 91, at 99.

100. *Id.* at 99-100.

101. *See supra* note 91 and accompanying text.

Corwin, arguably not one of Marshall's greatest admirers, criticizes those who would place the blame for all the social and economic ills of the late nineteenth century on these decisions.<sup>102</sup> Indeed, we have seen that Marshall himself laid some of the groundwork for the later development of reserved state powers in the *Willson* and *Providence Bank* decisions,<sup>103</sup> and this *well before* the revolution in nineteenth century jurisprudence led by John Austin and his followers.<sup>104</sup>

Nevertheless, Marshall's late nineteenth century critics insist upon the Great Chief Justice's complicity (conscious or otherwise) in a conservative scheme designed for "subordinating the public good to the benefit of a privileged few."<sup>105</sup> While Shirley's view is extreme, Hill's view is more moderate; but Hill, in the following passage, leaves little doubt as to where his concerns lie:

A legislature, in a fit of benevolence, inserts in the charter of a charitable institution . . . that it shall be exempt from taxation. A great railway company wheedles . . . privileges,—perchance coupled with a release from public burdens,—which enables it to hold whole communities in a state of vassalage more galling and more durable than any established by the feudal system; or it combines with a ring of bad men, corrupts the judiciary, and plunders the commercial capital of the country at pleasure. Or, to use a more painful illustration, the perhaps most shamelessly corrupt and contemptible body of men that ever called themselves a legislature, grant to a corporation . . . the exclusive monopoly . . . of killing butchers' meat in a great city and its suburbs. To rescind the exemption from taxation, when it proves burdensome to the State; to attempt to limit the powers uncautiously granted to the railway company, when shown to be mere instruments of oppression and extortion; to repeal the monopoly of furnishing an essential article of food, even to save two hundred thousand people from starvation,—are not wise and beneficent acts of legislation, but laws impairing the obligation of contracts, breaches of public faith so contrary to sound principles of government that they are classed with *ex post facto* laws and bills of attainder! Chief Justice Mar-

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102. E. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* Ch. 7 (1919).

103. See *supra* text accompanying notes 40-43.

104. Austin's jurisprudence emphasized the primacy of positive law, the importance of legislation as the main agency for articulating positive law, and a utilitarian foundation for legislation derived from his friend and neighbor Bentham. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (1832 & reprint 1954). Especially useful is the introductory essay by H.L.A. Hart in this volume, as well as the bibliographic note and synopsis of lectures which follows Professor Hart's essay. See J. AUSTIN, *supra* at pp. vii-xxxii.

105. Isaacs, *supra* note 91, at 165 (remarking on Shirley's book).

shall did not mean this; but his decision means this to the present generation.<sup>106</sup>

But apparently the Great Chief Justice *did* mean that! And so, it seems, did the Founders. Madison, himself, made no clear-cut distinction between ex post facto laws and laws impairing the obligation of contracts, as we have already seen. Be that as it may, one must interpret the foregoing passage in light of the understanding of Hill's role as an Assistant U.S. Attorney General during a period in which the proportion of contract clause cases which resulted in holdings of unconstitutionality reached an all-time high: the period between 1865 and 1873.<sup>107</sup> It was during this period that state governments began to suffer the consequences of ill-advised concessions granted to private corporations prior to the Civil War, consequences which probably seemed insufferable in its aftermath. In light of the ever-present human temptation to blame the dead for the sins of the living, the Hill-Shirley view is at least understandable, albeit incorrect.

Finally, it should be pointed out that full development of the doctrine of "police" powers (as a qualification of the contract clause) had not quite received its clearest formulation at the time Hill and Shirley wrote the works we are now considering. This was to take place in *Stone v. Mississippi*,<sup>108</sup> just one year after the publication of Shirley's work. This means that the critics of the 1870's were attacking the contract clause doctrines of the Marshall Court, because of the "unfittingness" of their application to the period in question, *before* the Supreme Court had had time to develop a proper "fit." Underlying this view is an idea that the judicial process embodies an essentially *legislative* function, one which would be ever-ready to respond to conflicting demands arising from changing circumstances, according to perhaps novel conceptions of what is "just" or "prudent."

As to the argument that the Founders could not have intended the *conjunction* of federal jurisdiction over state courts (*Cohens*) with the principle that states were obligated by their contracts, little discussion seems necessary. If the Framers had intended that federal courts would exercise such jurisdiction, what could be its content if not such specific provisions of the Constitution as the limitations set forth in article I, section 10? On the other hand, if they had intended that states should be obligated by their contracts, it is absurd to think that they would then have sought to render such obligation nugatory

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106. Hill, *supra* note 64, at 192.

107. See B. WRIGHT, *supra* note 3, at 93.

108. 101 U.S. 814 (1880).

through deprivation of enforcement potential. Wilson's opinion in *Chisholm* seems definitive on this point.<sup>109</sup>

### EFFECTS OF THE SHIFT

We have discovered the origin of the modern idea that the Founders intended a sharp distinction to be drawn between public and private contracts in the writings of some relatively obscure authors whose works appeared between the years 1874 and 1879. We have likewise seen that these authors based this idea upon serious misinterpretations of early sources, serious misconceptions about the nature of the judicial process, and an undisguised preoccupation with the ultimate effects (some merely imagined) of the Marshall Court's early obligation clause decisions.

As already noted, when viewed from the perspective of the late nineteenth century reformers, such preoccupations are easily understood. These critics were responding, in part, to the widespread economic insecurity and consequent agitation for monetary reform occasioned by the currency crises of the early 1870's,<sup>110</sup> and in part, to the apparent eagerness of the Supreme Court to protect the fruits of improvident legislative grants (made, for the most part, prior to the Civil War) via the contract clause between 1865 and 1873.<sup>111</sup>

At the same time, ideas respecting the nature of judicial decision-making were changing. The Court's 1869 decision in *Hepburn v. Griswold*,<sup>112</sup> invalidating a *federal* law on contract clause grounds, had given way to a dramatic reversal just two years later<sup>113</sup> and had caused many to question the traditionally accepted notion that judicial decisions are based upon "findings" of the law.<sup>114</sup> Oliver Wendell Holmes, in the early 1870's, had advanced an idea that the process of judging was complex and that there was a sense in which judges had "made" the law, as well as a sense in which they had "found" it.<sup>115</sup> Armed with much hostility toward the contemporaneous Supreme Court and a new theory of judicial law-making rooted in an oversim-

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109. See *supra* text accompanying notes 92-93.

110. See, e.g., L. GOODWYN, *THE POPULIST MOMENT* 15-18 (1978), for a brief but excellent discussion of this situation.

111. B. WRIGHT, *supra* note 3, at 93.

112. 75 U.S. (8 Wall.) 603 (1869).

113. 79 U.S. (12 Wall.) 457 (1870).

114. See, e.g., C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT: 1862-1890* 174 (1939).

115. O. Holmes, Jr., *The Gas Stoker's Strike*, 7 *AMER. L. REV.* 583 (1873). See also M. WHITE, *SOCIAL THOUGHT IN AMERICA* Ch. 8 (1957).

plification of the Holmes idea, Hill, Shirley, and Hutchinson read their own experience and theory into their commentaries on Marshall, concluding that when Marshall's Court rendered its famous contract decisions, it "made the law" in "activist" fashion.<sup>116</sup>

As suggested before, the critics had their effect. In marked contrast with earlier periods, numerous statements reflecting the Hill-Shirley-Hutchinson "private debts and obligations" view of the Marshall Court's contract decisions appear after Cooley's apparent adoption of the view in 1880.<sup>117</sup> Between 1880 and 1938—the year in which B.F. Wright published his influential book on the contract clause,<sup>118</sup> treatises on the law of corporations,<sup>119</sup> contracts,<sup>120</sup> and the Constitution<sup>121</sup> challenged Marshall's "public contracts" approach. On the other hand, a number of authors continued to applaud Marshall's approach.<sup>122</sup> After 1938, however, the cheering stops, perhaps

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116. See, e.g., J. SHIRLEY, *supra* note 72, at 400-10.

117. See *supra* note 67 and accompanying text.

118. See *supra* note 14.

119. 2 V. MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 1005 (1882). Morawetz challenges the *Dartmouth* decision, thinking it difficult to support the theory that a charter of incorporation is a contract.

120. 2 C. BEACH, JR., A TREATISE ON THE MODERN LAW OF CONTRACTS 2116 at n.1 (1896) (introduction of the clause was due to the financial condition of the country and the repudiation of private debts). 6 W. PAGE, THE LAW OF CONTRACTS 6295 (1905) (clause was introduced "to prevent states from passing laws repudiating private debts"). 3 W. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS 875 (1913) (the "purpose of the provision, no doubt, was to correct a practice that had been quite prevalent in some of the states after the revolution and before the adoption of the [C]onstitution"). This is a rather puzzling statement, in view of the fact that Elliott nowhere says what the "practice" was, but it nonetheless suggests a narrow interpretation of the Framers' intentions respecting the contract clause.

121. C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES 575 (1886). Tiedeman here refers to Clement Hill's argument as "ingenious," interpreting Hill's position to be that we must look to the Roman or civil law phrase *obligatio ex contractu* for the true meaning of the clause. C. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 54 (1890) ("if the intention of the framers of the Constitution is to furnish the true [rule of] construction, we must conclude that nothing would be included within the operation of this prohibition but debts and [the] other obligations issuing out of contracts"). See also 1 THE CONSTITUTIONAL DECISIONS OF JOHN MARSHALL 346-50 (J. Cotton ed., 1911). Cotton is highly critical of Marshall's early decisions, especially *Dartmouth*, accusing the Chief Justice of personal bias in holding that a charter of incorporation was a contract. E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION Ch. 6 (1919). Corwin thinks that Marshall *should* have made a distinction between public and private contracts, but that he didn't because it would have been insulting to the states, since to have made such a distinction would have been to declare that state contracts carried a lesser obligation than contracts between individuals. See also 1 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 240-41 (1893); 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 137-39 (1893); see also E. ERICKSON & D. ROWE, AMERICAN CONSTITUTIONAL HISTORY 346-49 (1933).

122. 1 S. WILLISTON, THE LAW OF CONTRACTS 3-5 (1920). Williston discusses the differ-



in testament to the influence of Professor Wright's book.<sup>123</sup> Only recently can one clearly discern movement toward refurbishing Marshall's reputation in this area.<sup>124</sup>

More significantly, the Marshall critics, who had launched a major historiographical assault upon the early Supreme Court, set the stage for subsequent criticism of that Court which erupted in the 1890's on the heels of the Court's famous decision in the *Income Tax Case*.<sup>125</sup> When the Fuller Court invalidated the federal tax in *Pollock*, supporters of the tax attacked the very principle of judicial review, claiming that Marshall had "usurped" legislative authority in *Marbury v. Madison*.<sup>126</sup> Though from a strictly technical standpoint, the

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ence between "implied contracts" and "quasi-contracts," asserting that they are *not* the same thing. Recall that the argument against Marshall based upon the civil law interpretation of the contract clause presumes that there is no distinction between these. W. HUNTING, *THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION* Ch. 5 (1919). Hunting makes a puzzling assertion on the last page of his book to the effect that there is not reason to believe that the Founders meant the clause to cover anything more than private contracts. In view of the facts (1) that Hunting's entire work is devoted to vindication of the Marshall Court's early contract decisions, and (2) that the final chapter of the book is devoted to showing that the exact intention of the Framers is *not clear*, the only reasonable way to interpret Hunting's final assertion is to say that he must have had Story's notion of the Founders' motive in mind—that what was *immediately* present to their minds (pressing financial difficulties, etc.) did not necessarily circumscribe their *intentions*. See also T. NORTON, *THE CONSTITUTION OF THE UNITED STATES* 91-93 (1930); H. LYON, *THE CONSTITUTION AND THE MEN WHO MADE IT* 195-98 (1936).

123. E. CORWIN & J. PELTASON, *UNDERSTANDING THE CONSTITUTION* 86-87 (1958). Corwin and Peltason here state that "[T]he framers, when they spoke of 'contracts' whose obligations could not be impaired by state law, had in mind the ordinary contracts between individuals, especially contracts of debt. However, the meaning of the word was early expanded by judicial interpretation to include contracts made by the states themselves, including franchises granted to corporations." This is a very clear statement, in a very influential book, of the modern version of the Framers' intentions and the Marshall Court's decisions—yet a view which apparently did not exist prior to the 1870's. See also A. KELLEY AND W. HARBISON, *THE AMERICAN CONSTITUTION* 275-76 (4th ed., 1970). Kelley and Harbison think that the principal objective of the Founders was to prevent stay and tender laws. See also JOHN MARSHALL: *MAJOR OPINIONS AND OTHER WRITINGS* 119, 121 (J. Roche ed., 1967). Roche says that the *Fletcher* decision is "eccentric," and that there "is no evidence to support the proposition that the Founders had intended to subsume land grants under the contract clause." Roche also specifically accepts Shirley's version of the *Dartmouth* decision. G. GARVEY, *CONSTITUTIONAL BRICOLAGE* 76 (1971), asserts that Marshall "elevated" property into a sacred right. The major exception to these views is found in 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION OF THE UNITED STATES* Ch. 12 (1953). Crosskey is generally supportive of the Marshall Court's doctrines in both the areas of contract and commerce.

124. See W. Mendelson, *supra* note 3; see also C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* Ch. 2 (1986). Referring to the Mendelson article, Wolfe suggests that the latter makes a "stronger defense of Marshall's contract clause cases," than he (Wolfe) would attempt but that he finds it nonetheless "persuasive." C. WOLFE, *supra*, at 360.

125. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895).

126. 5 U.S. (1 Cranch) 137 (1803). For a lengthy list of references to those making this

Marshall Court's contract decisions have little to do with *Marbury* or any of its holdings; the assertion that Marshall "read" public contracts "into" article 1, section 10, in order to lay a foundation for legal protection of property rights, is of the same form as the later assertion that Marshall read the idea of judicial review into the Constitution in order to bring co-equal branches of government under judicial control. The idea was to pin the "activist" label on Marshall. That the effort was successful is reflected little more than a decade later, when the alleged pro-property activism of Marshall and the Federalist party is made the basis for a conspiracy theory of the Constitution of the United States.<sup>127</sup>

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claim, see R. Clinton, *Eakin v. Raub: Refutation or Justification of Marbury v. Madison*, 4 CONSTITUTIONAL COMMENTARY 81-92, nn.50-51 (1987).

127. See, e.g., J. SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (Strout ed., 1967).

