

# A Look Back at the Contract Clause\*

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## **I. INTRODUCTION**

The history of the Contract Clause,<sup>1</sup> illustrates, in microcosm, the transformation that has occurred in this nation with respect to presuppositions about the role and purpose of government. It discloses a transformation from a presupposition that governments are instituted among men to secure “unalienable Rights” granted to men by their Creator,<sup>2</sup> to one that governments exist to advance or protect “broad societal interest[s],”<sup>3</sup> the “economic interests of the State,”<sup>4</sup> “the good of the whole”<sup>5</sup> “the general good of the public”<sup>6</sup> or “the common weal,”<sup>7</sup> to which individual rights, particularly in the economic sphere, are subordinated. It captures in miniature the drift away from the principles enunciated in the Declaration of Independence upon which the Constitution is based.<sup>8</sup>

## **II. LEGISLATIVE HISTORY: SPARSE AND INCONCLUSIVE**

The Contract Clause appears in the first paragraph of article I, section 10 and is set forth here in that context

*No State shall enter into any Treaty, Affiance, 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.*<sup>9</sup>

Notwithstanding its brevity and surface simplicity, the meaning of the Contract Clause is far from clear. Its key terms - “impairing,” “obligation” and “contracts” - are undefined in the Constitution, and the record of its consideration by the Convention is both brief and inconclusive.<sup>10</sup>

The clause was written and adopted against a backdrop of economic and political dislocations following the War for Independence. Many citizens were in debt, particularly farmers who had speculated on land during a period of rising prices. Professor Peltason describes the setting:

Property and debtor laws were extremely harsh. Defaulting debtors were thrown into jail and deprived of all their holdings. In many states, the legislatures, responsive to the pressure of the farmers, passed laws to alleviate the lot of debtors. Paper money was made legal tender for the payment of debts, bankruptcy laws were passed, and sometimes the courts were closed to creditors. These laws, in turn, aroused the creditor classes, who, feeling that their rights had been infringed, demanded action to put a stop to such “abuses” of power by the state legislatures. Creditors, in fact, were foremost among the groups that brought the Constitutional Convention about; the prevention of such interferences with private rights by the state legislatures was one of the major purposes of the Convention.<sup>11</sup>

Peltason concludes that section 10 was the “principal result” of this concern.

Though such a setting suggests numerous concerns that influenced the adoption of the various

portions of section 10, it sheds little light on the intended scope of the cryptically worded Contract Clause. The same can be said of the writings of the Federalists. The author of *The Federalist* No. 44<sup>12</sup> excoriated the states' practice of printing paper money, and lamented the "pestilent effects of paper money, on the necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people, and on the character of Republican Government."<sup>13</sup> Prohibition of the states' issuance of bills of credit was seen as a way to prevent further occurrence of those evils. But with respect to the Contract Clause, which *The Federalist* No. 44 treated in the same paragraph with bills of attainder and *ex post facto* laws, the author wrote only in the most general terms, applicable collectively to the three prohibitions.<sup>14</sup> The failure to isolate the Contract Clause for particular comment means that no clear insight regarding the scope of the clause can be gleaned from *The Federalist* No. 44.

*The Federalist* No. 10<sup>15</sup> dealt with the evils of faction and strongly condemned interest group legislation. Its author identified as the "most common and durable source of factions ... the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination."<sup>16</sup>

Professor Richard Epstein, in an insightful article<sup>17</sup> observes that although *The Federalist* No. 10 and No. 44 are not phrased in the language of economics, the concern they express about the evils inherent in the legislative process of governmental redistribution of opportunities has in recent years been captured in that language.

[A]ny grant of legislative power will invite "rent-seeking" behavior; each group will try to use that legislative power to expropriate the wealth of its rivals. Economic rents are measured by the difference in value to the owner derived from the best use of a given asset and the value derived from its next best use. Where that gap is large there is a target for expropriation by legislative activity, as a well-aimed tax or regulation can reduce the return to the private owner without inducing him to shift to his next best activity.<sup>18</sup>

The effect of such rent-seeking behavior is not only wealth redistribution but also a misallocation of resources from ordinary productive activities to non-productive (in the economic sense) lobbying and counter-lobbying activities.<sup>19</sup> The "rentseeking" tendency, expressed in terms of man's fallen nature, could be put this way: If fallen man can obtain wealth by having government take it from another and give it to him, rather than by working for it himself, expect him to make every effort to induce the government to do so.

However, though the fear of faction and special interest economic legislation was so clearly expressed in *The Federalist* No. 10, it was done in the context of defending the structure of the national government. The cure that it asserted the Constitution gave was a republican form of government.<sup>20</sup> *The Federalist* No. 10 made no reference to any direct prohibition against the states enacting such economic special interest legislation. In fact, in its next-to-last paragraph, *The Federalist* No. 10 stated:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States:... a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such malady is more likely to taint a particular county or district, than an entire State.<sup>21</sup>

Thus, although an expansive reading of the Contract Clause would be consistent with the rhetoric of denunciation in *The Federalist* No. 10 of the evils of factions and special interest legislation, its scope is not directly implicated by that document. Likewise, the writings of the Anti-Federalists during the ratification period<sup>22</sup> and the actual references to the clause in the ratifying conventions<sup>23</sup> are sparse and quite inconclusive with respect to the scope of the clause.

### **III. THE CLAUSE IN LIGHT OF THE DECLARATION AND THE CREATION MANDATE**

The Declaration of Independence, the cornerstone upon which the Constitution was founded, also provides support for a limitation upon governmental interference with persons entering into agreements, not unlawful in nature, with the expectation that such will be enforced by civil government. As a shorthand reference, we will refer to such activity as the “right to contract.” Neither the “right to contract” nor the “right of property” is among the unalienable rights identified in the Declaration, but each is fairly encompassed within the broader terms used. In fact, the Declaration’s statement that among the unalienable rights are “Life, Liberty and the pursuit of Happiness” appears to be a shorthand or summary version of section 1 of the June 12, 1776, Bill of Rights of the Constitution of Virginia, which declared:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>24</sup>

That, coupled with the Declaration’s presupposition that governments are instituted to secure, not to hamper, men’s rights, would suggest that some constitutional limitation upon the power of government, including the power of the federal government, against interference with the right to contract, would be consistent with the principles of the Declaration. However, the Declaration does not provide the gauge for judging the scope intended for the particular words chosen for the Contract Clause.

Such a limitation on government would also be consistent with what may be called a Biblical model.<sup>25</sup> That model begins with God as the Creator of all things and, therefore, Lord over all Creation.<sup>26</sup> It recognizes that man is created in the image of God, and that man thus owes his very existence to God and has a duty to honor and obey God.<sup>27</sup> It recognizes what might be termed the Creation Mandate - God’s command to man to be fruitful, multiply, fill the earth and take dominion

over all of its resources, all to God's glory.<sup>28</sup>

One of the ways man carries out the Creation Mandate is by entering into agreements with his fellows. Such agreements are possible because, in creating man in His own image, God has endowed man with language, the ability to communicate with words. In particular, God has given man ability to communicate with words of a special quality - words of promise - which in the very nature of things instill in the one who hears them a confidence, an expectation, that they will be kept.<sup>29</sup>

Because man is wholly accountable to his Creator for the way he conducts himself toward God, toward himself, toward his fellows and toward his environment, self-government is the first level of government in the Biblical model. Created in God's image and the recipient of the Creation Mandate, man has a duty to God to govern his own life and to steward all that he is and has in a way that glorifies God. In carrying out the Creation Mandate in society, among man's duties to God is the duty to recognize that his fellow human beings bear the image of God and likewise operate under the Creation Mandate.

When man carries out the Creation Mandate in recognition of the image of God in his fellows and without interfering with their efforts to do the same, he fulfills his duty to God and does no harm to them. When he fails to so govern himself and instead interferes with his fellows carrying out the Creation Mandate in their lives, he is not only a sinner toward God but also an evildoer toward his fellows.

The Biblical model also recognizes that God has established the institution of civil government and has granted it authority to punish evildoers and to provide a quiet and tranquil environment so that man may carry out his duties to God in all godliness and dignity.<sup>30</sup> In the contract setting, this authority of government is appropriately brought to bear to enforce promises, that is, to take action against the promise-breaker (evildoer) whenever his breach of faith has adversely affected the stewardship/dominion position of the promisee or whenever it undermines sanctity of promise as a vehicle for carrying out the Creation Mandate.

Civil government does not act within its authority if it dictates directly or indirectly the terms upon which the parties can or cannot contract, save to the extent of prohibiting bargains that are antithetical to the Creation order.<sup>31</sup> If civil government attempts to limit or proscribe the substance to which parties might independently agree in otherwise lawful bargains, it acts not in its authorized role as an avenger against evildoers and a facilitator of an environment in which each person can carry out his Creation Mandate duties to God, but rather in a dominion role that has never been assigned to it. If it does so, it also undermines the Creation order primacy of self-government and the principle of individual accountability to God.

But though a Biblical model supports a significant limitation on civil government with respect to contracts, it - like the legislative history of section 10, twentieth century economic theory and the Declaration - does not settle the question of the intended scope of the words chosen for the Contract Clause.

#### **IV. THE EARLY YEARS: EXPANSIVE APPLICATION**

In its early appearances before the Supreme Court, the Contract Clause was given an expansive reading. In *Fletcher v. Peck*,<sup>32</sup> Chief Justice Marshall, writing for the Court, ruled that the clause applied not only to executory contracts, but also to those which had been executed, including grants of property rights; and that it applied not only to contracts between private parties, but also to contracts to which a state was a party. Those conclusions dictated the holding that the clause prohibited a subsequent Georgia legislature from annulling an earlier grant of land title made by a previous legislature to private parties who in turn had sold the land to bona fide purchasers.

Within the decade the Marshall Court confirmed that the clause applied to all public contracts, whether they be in the form of agreements, grants or charters. In *The Trustees of Dartmouth College v. Woodward*,<sup>33</sup> Marshall delivered the opinion of the Court holding that the clause prevented the terms of a charter of incorporation from the crown to a private educational institution from thereafter being modified by the state in which such corporation operated. Of the *Dartmouth College* holding James Kent in his *Commentaries* observed

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 the government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country.<sup>34</sup>

It certainly cultivated confidence within the business community and was followed by our unprecedented proliferation of commercial corporations in the nation.

Between the decisions in *Fletcher v. Peck* and *Dartmouth College*, the Court, in another Marshall opinion, *New Jersey v. Wilson*,<sup>35</sup> ruled that the Contract Clause precluded the state of New Jersey from withdrawing a tax exemption that had previously been included in a grant of land to an Indian tribe. The effort to withdraw the exemption came after the tribe had decided to move out of the state and sold the land to private parties. On the authority of *Fletcher v. Peck* the grant was a contract within the meaning of the clause and thus the term, even though it was one that deprived the state of its power to tax the particular land, could not be unilaterally altered by the state.

In its 1923 decision in *Green v. Biddle*,<sup>36</sup> the Court, speaking through Justice Washington, ruled that the clause applied to compacts between two states and rendered unconstitutional a Kentucky statute that diminished or altered the landowners' rights in certain lands according to the terms of a compact between Virginia and Kentucky ceding such lands to the latter. Making it clear that the clause did not merely proscribe laws which permitted obligors to escape their obligations,<sup>37</sup> the Court stated

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 these which are, however, minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its

obligation.<sup>38</sup>

### **V. OGDEN v. SAUNDERS: LIMITATION OF THE CLAUSE TO RETROSPECTIVE LEGISLATION**

The real test for whether the Contract Clause would become a full-fledged guarantor of the right to contract came in the case of *Ogden v. Saunders*.<sup>39</sup> Notwithstanding a forceful effort by Chief Justice Marshall, the Court declined, 4-3, to accord the clause that role. The case involved the application of a state insolvency statute that discharged a debtor from a contract which had been formed subsequent to the enactment of the law. Years earlier, in *Sturges v. Crowninshield*,<sup>40</sup> the Court had determined that a state insolvency law which discharged a debtor from a contract entered into *prior* to the enactment of the law was repugnant to the Contract Clause and of no legal effect. *Ogden v. Saunders* presented the clear question whether a state insolvency law made applicable to contracts formed after its enactment was also constitutionally impermissible because of the Contract Clause. Marshall, in his only dissent on constitutional matters, concluded that the clause prohibited such prospective, as well as retrospective application, while the four justices in the majority held the clause prohibited only such laws as would operate retrospectively, that is, upon contracts formed prior to the enactment of the law.

Marshall's effort to make the clause applicable to state legislation operating prospectively employed analysis that was both insightful and consistent with a Biblical model with respect to the source of "obligation" of contract, and quite deft in demonstrating how the obligation of contract could be "impaired" by a law already in existence at the time of its formation.

However, the difficulty that most troubled his colleagues on the majority,<sup>41</sup> and the one that in the end proved insurmountable for Marshall, was how those few words could operate to prohibit states' interfering with the right of contract without at the same time prohibiting them from enacting and enforcing laws such as statutes of limitation, statutes of fraud and usury laws, which all members of the Court believed were valid and desirable. On that difficult point Marshall's analysis was unpersuasive and even carried its own seeds for destroying the protection of the clause.

With regard to the source of contractual "obligation," Marshall strongly disagreed with his colleagues who concluded it was derived from the positive law of the state - that contract is merely a creature of society which derives all of its obligation from human laws. On that point Marshall took a position consistent with a Biblical model and with the Declaration of Independence. He wrote, in pertinent part:

So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies on the idea of a *pre-existing obligation* on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion,

from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know any thing, evince the idea of a *pre-existing intrinsic obligation which human law enforces*. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to *exist anterior to, and independent of society*, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, *are not given by human legislation*.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? *If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used.* It is no objection to the principle, that the injured party may be the weakest. In society, the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying, that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form

a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? *Government cannot exercise this power for individuals.* It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be, that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be, that neither has ever been made; that *individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it.* The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy.

... [T]he right to contract is the attribute of a free agent, and ... he may rightfully coerce performance from another free agent who violates his faith. *Contracts have, consequently, an intrinsic obligation.* When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. *It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it.*<sup>42</sup>

Marshall's analysis of the source of "obligation" is premised on the inherent sanctity of promise, upon a belief that the authority to use promises to engage the cooperation of others belongs, by nature, to man, not to government, and upon a belief that the proper role of government is to enforce such promises. It mirrors what could be described in Biblical terms as the sanctity of promise, which derives from man being created in the image of God, the grant of the Creation Mandate to individuals and families prior to the Fall and the institution of civil government, and the authority of civil government to punish evildoers and to provide an environment in which man may carry out his Creation Mandate duties to God. Marshall's analysis of the right to contract as a "natural right, brought with man into society," and which is "not surrendered" by his entering into society, but rather that which is to be enforced by government finds striking parallel with the Declaration's premise of unalienable rights secured by civil government.

With respect to the "impairment" issue, Marshall's colleagues in the majority concluded there could be no impairment except of contracts already in existence at the time the law was passed by the legislature, either because every contract is made with reference to and is governed by existing law,<sup>43</sup> or because existing law forms a part of the obligation to every contract.<sup>44</sup> Justice Thompson's focus upon "impairment" as something that must occur, if at all, at the time the law is passed, is

illustrative: “The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying, that a law impaired, or in any manner whatever modified or altered, what did not exist.”<sup>45</sup> For Justice Washington, who believed existing law “form,[ed] a part of the contract, and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.”<sup>46</sup>

Marshall countered that “[t]he time to which the word ‘impairing’ applies, is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition.”<sup>47</sup> He explained:

The [insolvency] law, at its passage, has no effect whatever on the contract [at its formation].... When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation.... A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.<sup>48</sup>

To the proposition that existing law becomes a constituent part of the obligation of contract or that all contracts are made subject to existing laws, Marshall made several arguments, among them the following. First, even assuming for argument those propositions to be correct, they nevertheless beg the question. For such propositions assume a valid law. Yet, if one law (for example, an insolvency law) enters into or governs all subsequent contracts, so also does every other law that relates to the subject, including article I, section 10 of the Constitution. But if that section prohibits the states from passing such a statute, the statute is not a valid law and thus is neither incorporated into nor governs subsequent contracts.<sup>49</sup>

On the other hand, to say that notwithstanding section 10, any legislative act is a sort of “master term” that enters into or governs all subsequent contracts, reduces the Contract Clause from one introducing the great principle of protection of the right to contract without state interference, to a restriction which every state may elude at pleasure.<sup>50</sup> Marshall saw the consequences of a “master term” theory:

A legislative act ... declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions.

... The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless.<sup>51</sup>

Professor Epstein comments with regard to the “master term” theory that it “is a way to annihilate

the clause, not to interpret it. Suppose, for example, the state passed a law which read in full: ‘Any private contract entered into after the passage of this statute shall be subject to abrogation or modification by subsequent legislation.’”<sup>52</sup> A literal application of the “master term” theory would thus free the state in the future to pass laws that operated both prospectively and retrospectively. Though Epstein believes such a law would be recognized as a “transparent attempt to claim for the state power that the Constitution removes from it, and could not withstand serious constitutional [sic] scrutiny,”<sup>53</sup> he notes the appeal to some “master term” in other less expansive but nonetheless intrusive state interference with contract terms likewise “subverts the relationship between the Constitution and state legislation. It allows the legislature to expand its powers as long as it acts quickly, and it converts the ideal of contract from a source of private right based upon private volition into yet another object of legislative faction.”<sup>54</sup>

The “master term” theory, which renders legislation that operates prospectively “non-impairing” by definition, flows easily and predictably from the majority’s conclusion with respect to the source of contractual “obligation.” For, as justice Trimble, of the majority, put it, once it is determined that the obligation connotes of nothing more than the efficacy which the civil law attaches to it, the “necessary corollary” is

that the obligation of a contract made within a sovereign State, must be precisely that allowed by the law of the State, and none other.... If the positive law of the State declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such contract.<sup>55</sup>

Or as justice Johnson, of the majority, put it after concluding that obligation could not exist independently from the laws of society:

[A]ll the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights they give us over each other can be justly asserted.

Why may not the community set bounds to the will of the contracting parties in [the insolvency area] as in every other instance. That will is controlled in the instances of gaming debts, usurious contracts, marriage, brokage [sic] bonds, and various others . . . . Who can doubt the power of the State to prohibit her citizens from running in debt altogether? ... And if to be prohibited altogether, where is the limit which may not be set both to the acts and the views of the contracting parties?<sup>56</sup>

Such language seems a far cry from that contained in the Declaration. Perhaps in part at least it is the result of the perceived predicament in which the justices found themselves. They had before them the Contract Clause, which was part and parcel of the first paragraph of section 10, a paragraph phrased in absolute prohibitory terms with respect to all matters addressed in it. But they also had before them the knowledge that there were state statutes, for example, statutes of fraud, statutes of

limitation, usury laws, laws prohibiting gambling contracts, and the like, of which they (even Marshall) approved and could not conceive of a society being without. How could the Contract Clause operate to prohibit legislation that operated prospectively as well as retrospectively and yet permit survival of these state laws of which they approved?

Marshall argued that the states' authority to enact statutes of limitation could be saved by making a distinction between "obligation" and remedy, since such laws related only to remedy and therefore were not proscribed.<sup>57</sup> That artificial distinction ignored not only the teachings of respected legal commentators such as Blackstone,<sup>58</sup> but also the contrary position Marshall himself had taken in *Marbury v. Madison*,<sup>59</sup> and common sense as well. For if Marshall were really serious about that distinction, the clause would be powerless against both prospective and retrospective encroachments by the states. Marshall himself conceded that under his obligation/remedy distinction it might be possible for a state, if it were "sufficiently insane to shut up or abolish its Courts, and thereby withhold all remedy,"<sup>60</sup> to annihilate effectively all remedy for a breach of contract. Yet he mentioned that such action would not annihilate the obligation of contract. Would such a law withholding all remedy offend the Contract Clause? The most Marshall was willing to do with that question was to dodge it, stating whether the Constitution would interpose a shield against such an attempt to violate the spirit while evading its letter "will depend on the law itself which shall be brought under consideration."<sup>61</sup> He added, "The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature."<sup>62</sup> It is no wonder his colleagues on the majority were unpersuaded by Marshall's obligation/remedy distinction.<sup>63</sup>

Marshall's argument to save statutes of fraud, recording statutes and usury laws was equally unpersuasive and in fact forfeited the strong position he had taken with regard to the source of obligation. He stated:

[W]e readily admit, that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the State legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances, on which the original validity of a contract shall be made to depend. If the legislative will be, that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several States, and which are acknowledged to flow from the proper exercise of State sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore,

are most clearly not within the prohibition of the constitution,

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.<sup>64</sup>

But previously Marshall had argued that “obligation” arises from the agreement of the parties, that it pre-exists society and government, that the right to contract is not granted by society, but brought into it.<sup>65</sup> And, significantly, Marshall suggested no limiting principle which could keep government from legislating, for example, that there is no original obligation whenever government says so.

## **VI. OGDEN v. SAUNDERS AND A BIBLICAL ANALYSIS**

Could Marshall have done better? Perhaps the cryptic language of the clause itself - “No state shall ... pass any ... law impairing the obligation of contracts” - presents virtually insurmountable obstacles to a principled holding that would make the clause a prohibition against all state insolvency legislation which operated prospectively, but would also save state statutes of fraud, statutes of limitation and statutes prohibiting certain types of contracts. But a Biblically principled approach would have supported the broad principle of right to contract that Marshall’s “obligation” analysis suggested, would have more satisfactorily addressed the knotty problem of existing state statutes and rules of law related to contracts, and could have provided a basis for prohibiting at least some types of state insolvency legislation.

The first error such an approach would avoid is starting the analysis with “downstream” observations, that is, since states have historically passed laws relating to contracts, the states must have authority to do so and those laws must be valid. A Biblically principled approach would instead start “upstream,” at the beginning, with God as Creator, man created in His image, the Creation Mandate to man, and the subsequent institution of civil government with God-given, but limited authority. From that perspective Marshall might then have analyzed the particular statutes that were troublesome to determine whether there was a principled basis for their existence which was consistent with man’s duties under the Creation Mandate and the God-given authority of civil government.

For example, it would appear that appropriately drafted statutes of fraud<sup>66</sup> and other rules relating to evidentiary matters reflect or are at least consistent with the Biblical “two or three witnesses” principle,<sup>67</sup> which itself is a recognition not of the power of civil government, but rather of its lack of omniscience and for that reason its justifiable need to act with caution in wielding the sword in judgment. Likewise, statutes of limitation, to the extent they find their basis in the desire to provide an occasion for the presentation of disputes for judgment while evidence and witnesses are still available and memories have not faded, in order that the true facts can be found by an imperfect factfinder, reflect not an unprincipled grab for power by civil government, but rather a principled recognition of its inherent lack of omniscience and the grave responsibility it has for making accurate judgments.

A Biblically principled basis, consistent with Marshall's "obligation" analysis, also supports the propriety of state laws prohibiting gambling contracts, bribery contracts and the like. For because such agreements are antithetical to the Creation Mandate, even in a state of nature they would give rise to no right in the promisee or obligation in the promisor. Gambling contracts, for example, rather than being an exercise of dominion in accordance with the Creation Mandate, are an abandonment of control over one's resources to mere chance. Bribery contracts are a form of stealing, endeavoring to enlist another to breach his trust and use his position to transfer a gain or advantage from one who has rightfully been carrying out his dominion duties to the briber who has not. Even in a state of nature such agreements would raise no right in the promisee and no obligation in the promisor. And thus prohibition of the same by statute does no more than reflect the law of nature. Contrary to Marshall's suggestion, it is not the statute in such cases that prevents the obligation from occurring. Rather, it is the very nature of the agreement itself that prevents the obligation from occurring.

Had Marshall used a Biblical analysis with regard to state usury laws, he may well have concluded such laws were beyond the authority of civil government and in conflict with the Creation Mandate. Such a conclusion might well have deterred him from attempting an artificial and inconsistent argument to save them. Although in the nation of Israel God had forbidden lending to a fellow Israelite, at least to a poor one, at any interest,<sup>68</sup> the Bible contains no general prohibition against lending at interest. To the contrary, lending to foreigners at interest was expressly sanctioned in Israel.<sup>69</sup> In parables, Christ used interest as an illustration of an apparently lawful way in which gain on property could be achieved.<sup>70</sup> These suggest that when one lends at interest he is not an evildoer whom civil government is authorized to punish or restrain. Laws that limit the rate of interest one can charge impinge upon the decision-making duties of both lender and borrower who, under the Creation Mandate, are to be individually accountable for their stewardship and dominion choices. Such laws encourage borrowers to rely upon government to keep them from making what the government believes would be an improvident agreement, and may actually foster the false impression upon borrowers that anything up to the legal limit is good stewardship. They may prevent lenders from obtaining the true market value for the loan, and thus constitute an artificial limitation upon the exercise of their dominion duties.

Had Marshall used a Biblically principled analysis with respect to bankruptcy laws, he might well have determined that there is a Biblical basis for enactment by government of some types of bankruptcy law. For the nation of Israel God established the law of jubilee,<sup>71</sup> which required in every fiftieth year reversion of land and houses in unwalled cities, and sabbatical year laws,<sup>72</sup> which required remission of debts of fellow countrymen every seven years. Though the jubilee's provision for reversion of the land may be seen as unique to the nation of Israel and typological,<sup>73</sup> perhaps a principle of general application can be seen in Israel's sabbatical debt remission laws. Although such debt-remission cycle applied only with respect to fellow Israelites (citizens), which might suggest it was unique to that nation and typological,<sup>74</sup> it may well be an illustration of a law that civil government acting within its Biblical authority may enact in furtherance of its function of providing an environment in which its citizens may carry out their duties to God in all godliness and dignity. A bankruptcy law patterned after the sabbatical year cycle would discourage significant debt formation and the potential for its accompanying bondage,<sup>75</sup> and would reflect the command of the

Creation Mandate to take dominion over the earth and its resources, but not over one's fellow human beings. Such would also conform to the principle that government is to act impartially,<sup>76</sup> in that it would establish a uniform standard consistent with the Creation Mandate under which financial relationships among its citizens would be established.

But the state bankruptcy statute presented to the Court in *Ogden v. Saunders* was not of the sabbatical cycle type. Rather it was a statute directed to relief from individualized business failures. If Marshall had concluded that when the state passed such a bankruptcy statute, it acted outside its Biblical authority in that such a statute encouraged significant indebtedness and bondage of one man to another and impermissibly showed partiality in granting relief from such indebtedness to some but not all while exposing some but not all creditors to loss, he would have had no difficulty holding that its unauthorized action impaired the obligation of contract. Put another way, on Biblical principles such interference with contractual obligations could not be justified.<sup>77</sup>

However, if Marshall had believed there was a Biblical basis for civil government enacting such individualized debtor relief statutes,<sup>78</sup> then from a Biblical analysis the only remaining questions would be: (1) had the national covenant, the Constitution, taken that power to pass bankruptcy laws from the states and placed it exclusively in the hands of the national government; (2) if not, had the Constitution by the Contract Clause prohibited its exercise? The first question had been answered in the negative in *Sturges v. Crowninshield*.<sup>79</sup> *Sturges* had held the states had authority to pass insolvency laws in the absence of congressional bankruptcy legislation, or in the case of such legislation, as long as they were not inconsistent with the national power to do so.

As to the second question, unless one were willing to adopt an arbitrary theory of an "implied exception for bankruptcy laws," the cryptic language of the Contract Clause seems incapable of a reading that both permits the states to pass all laws consistent with Biblical principles and yet prohibits the states from passing bankruptcy laws.

## **VII. DEMISE OF THE CLAUSE EVEN AS TO RETROSPECTIVE APPLICATION**

The failure in *Ogden v. Saunders* to extend the application of the clause to legislation that operates prospectively helps explain the development of a couple of other channels of constitutional law: substantive due process and the negative, or dormant, commerce clause. Professor Epstein puts it well:

Because prospective limitations can be as mischievous as retroactive ones, strong principles of substantive due process were seized upon toward the end of the nineteenth century in order to fill the gap created by *Ogden's* narrow interpretation. Had the contract clause been construed to apply prospectively, state minimum wage, maximum hour laws and the like could have been scrutinized under that provision without the Court incurring the charge that it had arrogated unto itself control of substantive issues entrusted to the legislature.<sup>80</sup>

With respect to the negative commerce clause, Epstein states:

As drafted, the commerce clause seems only to confer power upon Congress and not to impose any limitations upon the state.... If the contract clause is given prospective application, then there is far less need to worry about the negative implications of the commerce clause. The necessary restrictions upon state power are found elsewhere in the Constitution. But if the contract clause is confined to the protection of existing contracts, then the structural coherence of the Constitution is weakened, as there are no necessary institutional limitations that work against the petty, provincial, and retaliatory trade practices that spurred the original ratification of the Constitution. It is therefore not surprising that the gap in the constitutional structure created by *Ogden* was filled by the growth of the negative commerce clause ....<sup>81</sup>

But the negative commerce clause is helpless to prevent purely intrastate exploitation of one group by another through legislative enactments.

Though the *Ogden* Court narrowly held the Contract Clause had no application to prospective state legislation, it asserted that where the clause did apply to retrospective legislation, its ban was absolute. Justice Trimble expressed that position:

The great principle intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed and was recognised by the laws in force at the time the contracts were made. It furnished to the legislatures of the States a simple and obvious rule of justice, which, however theretofore violated, should, by no means, be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation, or such qualified obligation as, in their opinion, may consist with sound policy, and the good of the people; it prohibits them from retrospectively upon existing obligations, upon any pretext whatever.<sup>82</sup>

As will be evident from what follows, the great principle of inviolability, even in the retrospective realm left by *Ogden* to the Contract Clause, evaporated in the years following its bold proclamation.

Some erosion was manifested ten years later in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*,<sup>83</sup> wherein Chief Justice Taney announced the appropriate rule of construction that would henceforth be applied in public charters. Grants in such charters were to be construed narrowly and any ambiguities were to be resolved in favor of the state.<sup>84</sup> Such a rule of construction permitted the Court to find that the grant of a charter to build and operate a toll bridge over the Charles River did not prevent the state from thereafter issuing a charter for the construction and operation of a second bridge built so closely as to virtually duplicate the service of the original and whose operation cut deeply into the traffic and tolls of the original grantee.

A more serious encroachment appeared in the Court's *West River Bridge Co. v. Dix*<sup>85</sup> decision. The dispute arose when the state of Vermont sought to condemn a bridge that it by charter had previously authorized the West River Bridge Company to build and operate. The Court rejected the bridge company's assertion that such action unconstitutionally impaired its one hundred year exclusive

franchise, which still had over fifty years to run. It held the state's right of eminent domain in no way interfered with the inviolability of contracts. Justice Daniel for the Court reasoned as follows:

[I]nto all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition.<sup>86</sup>

This was shades of the *Ogden* majority, but in an expanded version that impinged upon all contracts. While the *Ogden* majority found contracts formed subsequent to the enactment of legislation subject to and impliedly limited by such legislation, the analysis in *Dix* required no legislation; it merely required the Court's recognition of an inherent power of government. What the *Ogden* majority did to subsequently formed contracts by its "implied terms" or "subject to" theories, the *Dix* Court, with its "inherent power" theory, did to all contracts.

While the Declaration of Independence and Marshall's treatment of the Contract Clause had focused upon unalienable rights of individuals, the *Dix* Court stressed what may be termed the unalienable powers of governments. Certain powers are inherent in government, and government cannot by contract divest itself of them. Any attempt by government to do so is void.

Eminent domain was one such power. Were there others? The power to tax apparently was not, based upon the earlier Marshall Court decision in *New Jersey v. Wilson*.<sup>87</sup> But the police power was such a power, as the Court made clear in *Stone v. Mississippi*.<sup>88</sup> In *Stone*, when the state repealed an irrevocable twenty-five year charter to operate a lottery, the recipients claimed such action violated the Contract Clause. Chief Justice Waite disagreed. He asserted the police power could not be bargained away by the state.<sup>89</sup> For justice Waite the police power encompassed at least all matters affecting the public health or the public morals. For him the essence of government was to protect the public health and morals, that is, "[g]overnment is organized with a view to their preservation, and cannot divest itself of the power to provide for them."<sup>90</sup>

In the context of *Stone*, justice Waite also employed *Ogden*-like reasoning: "Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity . . . may [reassert their power to stop such activities] at any time when the public good shall require ...."<sup>91</sup> Such an "implied understanding" theory was capable of application not only with respect to governmental grants, but also with respect to private contracts.<sup>92</sup>

Perhaps Justice Holmes made its application in the private contract context as bluntly as anyone. In *Hudson County Water Co. v. McCarter*,<sup>93</sup> where the Court was confronted with a Contract Clause challenge to legislation that interfered with private contract water rights, Justice Holmes rejected the challenge, finding the state's conduct was an appropriate exercise of its police power. He stated:

The limits set to property by other public interests present themselves as a branch of what is called the police power of the State....

... One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry the infirmity of the subject matter.<sup>94</sup>

And in *Marcus Brown Holding Co. v. Feldman*,<sup>95</sup> Holmes put the matter even more curtly: “[C]ontracts are made subject to this exercise of the power of the State when otherwise justified ....”<sup>96</sup>

### **VIII. GROWTH OF POLICE POWER AND EVISCERATION OF THE CONTRACT CLAUSE**

It is the police power that has really proved to be the clause's undoing. When the police power was perceived as a limited authority of government to protect the public health, safety and morals in the traditional sense, it posed a significant but not debilitating limitation upon the application of the clause to protect existing contract rights. But as the scope of the police power expanded to include, as well, the authority to “provide for the general welfare,”<sup>97</sup> and as that latter undefined term has come to take on greater and greater scope, the police power has virtually eclipsed the Contract Clause.

Professor Schwartz traces the expansion of the police power to a changing perception of the role of government

Originally ... the police power may have been concerned only with the preservation of public peace, safety, health, and morals. But that was the case only because those were the primary social interests to be vindicated under the essentially negative theory of government that then prevailed. A century ago, the State acted merely as policeman, soldier, and judge. “Leviathan hath two swords: war and justice,” stated Hobbes in a famous passage. When the governmental armory included only those two weapons, the police power itself could scarcely be more sweeping.

Modern public opinion has more and more required the State to assume an affirmative duty to eliminate the excesses and injustices that are the inevitable concomitants of a wholly unrestrained industrial economy. In addition, the State has had to bring ever-increasing parts of the population directly under its fostering guardianship. From the turn of the century at least, government has become increasingly positive in a new sense.

As government has come to be conceived of in positive terms, the same has come to be true of the police power. In this sense, the police power has been necessarily an expansive power, changing to meet new conceptions of the governmental role .... What was a century ago regarded as an improper exercise of the police power may now, because of such changes, be recognized as legitimate.<sup>98</sup>

One need not agree with Schwartz's conclusion that the state "had to" move into its present expansive guardianship and regulation role to agree with his conclusion that as society believes the ends of government expand to include an ever-widening range of social interests, the police power expands accordingly, at the expense of previously recognized private rights.<sup>99</sup>

Expansion of the role of government and, correspondingly, of the scope of the police power in the economic sphere has drained most of the life from the Contract Clause. The Court's 5-4 decision in *Home Building & Loan Association v. Blaisdell*<sup>100</sup> reflects that expansive perception of the proper role of government and illustrates a view of the Contract Clause which stands in sharp contrast to that espoused by the majority in *Ogden v. Saunders* who believed the clause stood as a firm barrier against any form of retrospective debtor relief legislation, remedial or otherwise. The legislation in question was the Minnesota Mortgage Moratorium Law, which purported to alter the pre-existing contractual rights of mortgagees to foreclose on their mortgages or collect deficiency judgments against the mortgagors. It was conceded by all that the legislation impaired the obligations of pre-existing mortgages, but it was asserted that such impairment was a permissible exercise of the police power of the state, notwithstanding the Contract Clause. Chief Justice Hughes delivered the opinion of the Court upholding the legislation against the Contract Clause challenge. Although the setting was identified as an emergency one, the language of the Court's opinion was quite expansive with regard to the role of government, the power of the Supreme Court, scope of the police power, and the diminished position of the Contract Clause and private rights. Consider the following:

Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." . . . Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, - a government which retains adequate authority to secure the peace and good order of society.<sup>101</sup>

After referring to the cases showing a "progressive recognition" of an ever-expanding authority of government to impair pre-existing contracts, the Court observed: "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."<sup>102</sup> For Chief Justice Hughes, the "question [was] not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation

is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.”<sup>103</sup> He concluded that the statute, which was addressed to a broad economic problem and which impaired but did not destroy all of the mortgagees’ rights, satisfied his standard.<sup>104</sup> The Chief justice justified the propriety of the Court’s establishing this reasonableness standard, notwithstanding the absolute language of the clause, as follows:

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning - “We must never forget that it is a constitution we are expounding” ... - “a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” ... When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>105</sup>

Of that justification, Professor Epstein has aptly observed:

The passage contains some of the most misguided thinking on constitutional interpretation imaginable. The operative assumption seems to be that questions of constitutional law are to be answered according to whether or not we like the Constitution as it was originally drafted. If we do not, we are then free to introduce into the document those provisions that we think more congenial to our time.<sup>106</sup>

And of *Blaisdell* and its teaching, Professor Epstein says, it “trumpeted a false liberation from the constitutional text which has paved the way for massive government intervention that undermines the security of private transactions.”<sup>107</sup>

The strong government thrust of Hughes’ *Blaisdell* opinion was repeated by him three years later in *West Coast Hotel Co. v. Parrish*,<sup>108</sup> wherein he effectively buried substantive due process, making it also succumb to the expanded police power: “[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”<sup>109</sup> The views expressed by Hughes in those opinions are striking illustrations of the change in perception that had occurred in the first century and a half following ratification about the nature of society and about governmental authority, to say nothing of the change in the perceived role of the Court and the purpose of the constitutional document.

To Hughes.... society is best viewed as a complex, interconnected whole, and not as an amalgamation of discrete individuals. Thus, contractual liberty can no longer be merely a private matter.... [P]ositive government intervention is required both for the protection of the individual and in order to serve collective purposes. In particular, freedom of contract must sometimes be suppressed. This is necessary both because of the individual’s subordination to the group, and because overriding collective concerns may demand it.<sup>110</sup>

In the years that have followed *Blaisdell*, the perception Hughes reflected has not only persisted, but has expanded, prompting Professor Epstein’s accurate observation that “[t]oday the police power exception has come to eviscerate the contracts clause.”<sup>111</sup>

Nor has the “successful” application of the clause in a couple of recent cases altered that fact. In its 4-3 decision in *United States Trust Co. v. New Jersey*,<sup>112</sup> the Court held that the clause prohibited New Jersey’s retroactive repeal of a 1962 statutory covenant limiting the use to which revenues generated by the Port Authority’s operation of a passenger rail transportation system could be applied during the time bonds for construction and operation of that system were still outstanding. By 1974 the New Jersey legislature had determined the most appropriate use of some of the revenues from the passenger rail systems financed by the bonds would be to pay for additional mass transit, and passed the repealer.

The Court’s holding that such was impermissible by no means suggests the return of a revitalized and robust Contract Clause. For Justice Blackmun emphasized:

Although the Contract Clause appears literally to proscribe “any” impairment, the Court observed in *Blaisdell* that “the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.” . . . Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution.<sup>113</sup>

He further acknowledged that his analysis of the clause's applicability in this particular case was also premised on the propositions that even with respect to a state's financial obligations, "[t]he Contract Clause is not an absolute bar to subsequent modification,"<sup>114</sup> and "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."<sup>115</sup> Only after an analysis under the "reasonable and necessary" standard did the Court narrowly determine that the repealer was barred as "a much more serious impairment"<sup>116</sup> than that which the Court had previously permitted, that the impairment chosen was more drastic than would have been necessary to accomplish the state's purpose, and that perhaps the state could have accomplished its purpose without impairing the bonds at all.<sup>117</sup> Though perhaps the case marked somewhat of a departure from the highly deferential philosophy the Court had shown to state legislation in the years following *Blaisdell*,<sup>118</sup> the test stated here, as well as the test stated in *Allied Structural Steel Co. v. Spannaus*<sup>119</sup> the following year, show the meaning of the clause is malleable enough to permit the conclusion that it still operates primarily at sufferance of the Court.

In *Spannaus*, with justice Stewart writing for the Court in its 5-3 decision, the clause was held to prevent the operation of a Minnesota statute that would have compelled an immediate vesting of pension fund rights in certain employees of Allied Structural Steel contrary to the terms of Allied's pension plan.<sup>120</sup> The statute targeted companies with more than one hundred employees who closed their Minnesota offices. Its application to Allied required an immediate "pension funding charge of approximately \$185,000."<sup>121</sup>

Stewart prefaced his analysis with the now-standard homage to the police power and the stated assumption that the apparently "unambiguously absolute" language of the clause cannot mean what it says. But in order for the clause "to retain any meaning at all,"<sup>122</sup> he concluded that "it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."<sup>123</sup> He derived those limitations primarily from *Blaisdell* and a series of other Depression era cases, determining that if the legislation did not substantially impair the obligation, the clause might be no bar at all; but that if it did substantially impair the obligation, then legislation would be valid or not depending upon a number of factors.<sup>124</sup> Those included: whether it was enacted "to protect a broad societal interest"<sup>125</sup> or "to deal with a broad, generalized economic or social problem,"<sup>126</sup> and whether it "operate[d] in an area already subject to state regulation"<sup>127</sup> at the time the contract was made. Stewart concluded the legislation in this case was barred by the clause since it did substantially impair Allied's obligation, that it was too narrowly directed, focusing only on companies with one hundred or more employees who sought to close their offices in Minnesota or to terminate their pension plans, that the problem of employers' closing their offices and leaving the state was not a broad, generalized economic or social problem, and that the state had not been regulating pension funds at the time this fund was established.

Referring to the kind of decision-making required by the "tests" in *U.S. Trust* and *Spannaus*, Professor Phillips appropriately observed: "Such determinations are clearly of a broadly 'legislative' character, and resemble the sort of socioeconomic judgments common during the reign of economic substantive due process."<sup>128</sup>

The susceptibility of the clause in its current form to manipulation or even to being blatantly ignored is well illustrated by the Court's most recent pronouncements. In *Energy Reserves Group v. Kansas Power & Light Co.*,<sup>129</sup> the Court was presented with the claim by an energy company that a Kansas statute which prohibited the implementation of "governmental price escalation" clauses in its contracts with a public utility constituted an unlawful impairment contrary to the Contract Clause. The governmental price escalation clauses in its contracts permitted Energy Reserves Group (ERG) to increase prices if a "governmental authority . . . shall ... fix a price" higher than that specified in the contract. When the federal government thereafter subjected interstate natural gas sales to regulation and established the maximum lawful price at a level higher than that specified in ERG's contracts with Kansas Power and Light, ERG sought to increase its prices to that buyer.

The Court acknowledged that the ERG-KP & L contract itself and the applicable federal statute were capable of interpretation such that the "governmental escalation clause" was not triggered by federal regulation which merely set a maximum limit on pricing and did not actually fix or require a particular price to be charged by ERG. Three justices concurred in denying ERG's claims on that limited basis. However, Justice Blackmun, writing for the Court, addressed the constitutional question and concluded the Contract Clause provided no protection for ERG even if the federal regulation had triggered its contractual right to increase prices.

For Justice Blackmun, whether the "substantial impairment" showing had been made by ERG turned not on what the parties had written but rather upon what ERG's reasonable expectations probably were at the time the contracts made.<sup>130</sup> And the fact that the parties operated in a heavily regulated industry had a significant bearing on those expectations. That made it "foreseeable" that the state "would alter contractual obligations,"<sup>131</sup> and thus ERG's reasonable expectations were not impaired by the Kansas statute. One can only wonder if the Contract Clause has any life with regard to contracts made in industries subject to regulation.

Perhaps as disconcerting was justice Blackmun's analysis of the "significant and legitimate state interests." Though unnecessary to resolution of the constitutional claim because of the prior conclusion that there was no substantial impairment, Blackmun reasoned that even if there had been substantial impairment it would have been justified by the exercise of the state's "police power to protect consumers from the escalation of natural gas prices" resulting from deregulation.<sup>132</sup> He concluded the "legitimate public purpose" for the exercise of the police power could be predicated upon the state's reasonably finding "that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes."<sup>133</sup> If that means "legitimate public purpose" is equated with helping the many at the expense of the few, then as Professor Clarke so aptly observes, it "turn[s] the contract clause on its historical head. After all, the primary purpose of the clause was to prevent debtor classes from passing special interest legislation to relieve them of the burden of their debts."<sup>134</sup>

That such is what the clause now means is reinforced by the Court's decision in *Exxon Corp. v. Eagerton*.<sup>135</sup> Therein the Court rejected Exxon's assertion that the Contract Clause made impermissible legislation which prohibited Exxon from passing through a severance tax to its customers, notwithstanding Exxon's express right to do so under pre-existing contracts. Justice

Marshall, for a unanimous Court, found that the legislation prohibiting the pass-through “nullified *pro tanto* the purchasers’ contractual obligations” to reimburse Exxon.<sup>136</sup> But he concluded the nullification was valid as an appropriate exercise of the state’s police power because

the pass-through prohibition 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,” [citing *Allied Structural Steel v. Spannous*]: protecting consumers from excessive prices. The prohibition applied to all oil and gas producers, regardless of whether they happened to be parties to sale contracts that contained a provision permitting them to pass tax increases through to their purchasers. The effect of the pass-through prohibition on existing contracts that did contain such a provision was incidental to its main effect of shielding consumers from the burden of the tax increase.<sup>137</sup>

*Eagerton* confirms that the police power is broad enough to sustain any kind of state economic regulation, for all legislation produces winners and losers.<sup>138</sup> If all that is required to demonstrate proper exercise of the police power is merely a showing that some segment of society is benefitted by the legislation, one can hardly imagine any instance in which that showing cannot be made. And if that were not sufficient to nullify the operation of the Contract Clause, Marshall’s conclusion that the clause does not bar legislation with retroactive application so long as it also has prospective application, surely is.<sup>139</sup>

Such a conclusion effectively nullifies the majority’s position in *Ogden v. Saunders*, which had held retrospective application of general debtor protection legislation absolutely barred by the clause.<sup>140</sup> *Eagerton* was, to use the words of Professor Epstein, a textbook case that required “judicial nullification of legislation, even by a court that denies the contract clause any prospective application,” but which instead produced, by way of manipulation of the clause and the police power doctrine, “judicial nullification of the constitutional text.”<sup>141</sup>

## **IX. CONCLUSION**

In concluding his discourse on the jubilee of the Constitution delivered on the fiftieth anniversary of the inauguration of George Washington, John Quincy Adams reflected upon the parallels between the Biblical account of the children of Israel’s mountains respectively of curses (Mount Ebal) and blessings (Mount Gerizim) and the American experience under the Articles of Confederation and the Constitution. He observed:

When the children of Israel, after forty years of wanderings in the wilderness, were about to enter upon the promised land, their leader, Moses, who was not permitted to cross the Jordan with them, just before his removal from among them, commanded that when the Lord their God should have brought them into the land, they should put the curse upon Mount Ebal, and the blessing upon Mount Gerizim. This injunction was faithfully fulfilled by his successor Joshua. Immediately after they had taken possession of the land, Joshua built an altar to the Lord, of whole stones, upon Mount

Ebal. And there he wrote upon the stones a copy of the law of Moses, which he had written in the presence of the children of Israel: and all Israel, and their elders and officers, and their judges, stood on the two sides of the ark of the covenant, borne by the priests and Levites, six tribes over against Mount Gerizim, and six over against Mount Ebal. And he read all the words of the law, the blessings and cursings, according to all that was written in the book of the law.

Fellow-citizens, the ark of your covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States. In that scene of tremendous and awful solemnity, narrated in the Holy Scriptures, there is not a curse pronounced against the people, upon Mount Ebal, not a blessing promised them upon Mount Gerizim, which your posterity may not suffer or enjoy, from your and their adherence to, or departure from, the principles of the Declaration of Independence, practically interwoven in the Constitution of the United States.<sup>142</sup>

Adams well understood that the Articles had become a Mount Ebal for the nation because they had been based upon the perceived sovereignty not of the people but of each state, a “departure from the self-evident truths of the Declaration of Independence; the natural rights of man, and the exclusive, sovereign, constituent right of the people.”<sup>143</sup> The Constitution, on the other hand, had been infused with the “virtue” of those

principles which had been first proclaimed in the Declaration of Independence - namely, the self-evident truths of the natural and unalienable rights of man, of the indefeasible constituent and dissolvent sovereignty of the people, always subordinate to a rule of right and wrong, and always responsible to the Supreme Ruler of the universe for the rightful exercise of that sovereign, constituent, and dissolvent power.<sup>144</sup>

Because the drafters of the Constitution had been faithful to the principles of the Declaration, Adams believed the Constitution would prove itself to be for the people as Mount Gerizim.

On this two-hundredth anniversary of the Constitution, Adams’ warning uttered a century and a half ago of the consequences flowing from departure from the principles of the Declaration seems almost prophetic. Judicial nullification of the Contract Clause, designed to protect unalienable rights of individuals, accomplished by the Court’s application of an ever-expanding police power doctrine with its foundation upon the unalienable powers of government, seems a clear disregard of Adams’ warning. Today the parallel with Mount Ebal and Mount Gerizim can also be drawn. However, on the basis of the history of the Contract Clause that reflects the great transformation which has occurred with respect to presuppositions about unalienable individual rights and the role and power of government, such a parallel would be drawn differently. To paraphrase Adams, it would be more appropriately said today: Fellow-citizens, the ark of your covenant is the Declaration of Independence. Your Mount Gerizim is the written Constitution. And your Mount Ebal is the judicially revised Constitution, which is fashioned not upon the self-evident truths of the Declaration

of Independence - namely the natural and unalienable rights of man, the indefeasible sovereignty of the people, always subordinate to a rule of right and wrong, and always responsible to the Supreme Ruler of the universe for their rightful exercise; but rather upon the unalienable powers of government, the indefeasible sovereignty of the state, guided by expediency upon a sea of shifting values, and responsible for its exercise not to the Supreme Ruler of the universe but only to the Supreme Court.

Adams' closing admonition urged his fellow citizens to adhere to the principles of the Declaration "as to the cords of your eternal salvation."<sup>145</sup> Were he speaking today he would modify his admonition to urge them to return to those principles so that "your children's children [at the Tri-Centennial celebration of the Constitution may] celebrate it again in the full enjoyment ... of all the blessings promised to the children of Israel upon Mount Gerizim, as the reward of obedience to the law of God."<sup>146</sup> Let it be so.

#### ENDNOTES

1. U.S. Const. art. 1, § 10, d. 1.
  2. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ... .
- The Declaration of Independence para. 2 (U.S. 1776).
3. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978).
  4. *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 437 (1934).
  5. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 282 (1827) (Johnson, J., opinion).
  6. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).
  7. *Id.*
  8. *See generally* Titus, *The Law of Our Land*, 6 J. Christian Jurisprudence 57 (1986); J.Q. Adams, *The Jubilee of the Constitution: A Discourse Delivered at the Request of the New York Historical Society* (Apr. 30, 1839), reprinted in 6 J. Christian Jurisprudence 1, 18-19 (1986).
  9. U.S. Const. art. 1, 5 10, cl. 1 (emphasis added).

10. 2 The Records of the Federal Convention of 1787, at 439-40, 448-49, 619 (M. Farrand ed. 1966) (Madison's record of the debates at the Constitutional Convention on August 28 and 29 and on September 14); *Constitutional Chaff - Rejected Suggestions of the Constitutional Convention of 1787 with Explanatory Argument* 80-810. Butzner ed. 1941); C. Rossiter, *1787: The Grand Convention* 230 (1966).

The idea of prohibiting states from interfering with contracts first appears in the convention records in the form of a motion from the floor by Mr. Rufus Icing of Massachusetts. He moved to add to the article under discussion (which eventually became part of article 1, section 10) the words used in the Northwest Ordinance. The language used by Congress in the Northwest Ordinance was: "[N]o 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." Northwest Ordinance art. II (U.S. 1787) (emphasis added). The last two words of the Ordinance make it clear that it was designed to prohibit only laws with retrospective application. Although Mr. Icing's motion was defeated, he, as one of five delegates appointed to the committee on style, was able to persuade his colleagues on that

committee to add a clause prohibiting states from interfering with contracts. The language emerging from the committee on style, however, was not that of the Northwest Ordinance, but rather the more cryptic language presently found in article I, section 10.

11. J. Peltason, Corwin and Peltason's *Understanding the Constitution* 81 (7th ed. 1976); see also C. Beard, *An Economic Interpretation of the Constitution of the United States* 178-81 (2d ed. 1935).

12. *The Federalist* No. 44 (J. Madison) (J. Cooke ed. 1961).

13. *Id.* at 300.

14. The three matters prohibited were collectively described as "contrary to the first principles of the social compact, and to every principle of sound legislation." *Id.* at 301. The author stated that of these three matters, bills of attainder and *ex post facto* laws

are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not in so doing as faithfully consulted the genuine sentiments, as the undoubted interest of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that legislative interference, is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

*Id.*, at 301-02.

15. *The Federalist* No. 10 (J. Madison) (J. Cooke ed. 1961).

16. *Id.* at 59.

17. Epstein, *Toward a Revitalization of the Contract Clause*, 51 *U. Chi. L. Rev.* 703 (1984).

18. *Id.* at 713. Epstein gives the following example:

[S]uppose that the best use of a given asset yields its owner \$100 while its next best use yields but \$50. A tax of \$25 on the preferred use will not induce the owner to redeploy his asset and will net the beneficiaries of the tax or regulation \$25. By contrast, a tax of \$60 will net the legislature nothing, as the owner prefers the \$50 derivable from the second best activity to the \$40 left to him from the first.

19. *Id.*

20. *The Federalist* No. 10, *supra* note 15.

21. *Id.* at 64-65.

22. *See, e.g.*, General Information Delivered by Luther Martin to the General Assembly of the State of Maryland (1788), reprinted in 2 *The Complete Antifederalist* 27, 64-65 (H. Storing ed. 1981) [hereinafter Storing] (opposing the Contract Clause because it would prevent the state governments from "passing laws totally or partially stopping the courts of justice, or authorising the debtor to pay by instalments [sic], or by delivering up his property to his creditors at a reasonable and honest valuation" even in times of "great public calamities and distress"); *Essays of Brutus* MV (Mar. 6, 1788), reprinted in 2 Storing, *supra*, at 433, 436 (linking the Contract Clause with the prohibition against emission of bills of credit and tender laws and praising the provision, stating, These prohibitions give the most perfect security against those attacks upon property which . . . some of the states have but too wantonly made, by passing laws

sanctioning fraud in the debtor against his creditor”); Essay by Deliberator (Feb. 20, 1788), reprinted in 3 Storing, *supra*, at 176, 180 (asserting that, because of the bankruptcy clause and the Contract Clause, “[n]o state can give [sic] relief to insolvent debtors, however distressing their situation may be”).

23. *See, e.g.*, Debate by James Wilson at the Pennsylvania Convention (Dec. 4, 1787), reprinted in 2 The Debates in the Several Conventions on the Adoption of the Federal Constitution 471, 486 (J. Elliot 2d ed. n.d. & reprint 1968) [hereinafter Elliot] (praising the “restraints placed on the state governments” regarding the emission of bills of credit, tender laws and laws impairing the obligation of contracts, stating that “[f]atal experience has taught us ... the value of these restraints”); Debate by Patrick Henry at the Virginia Convention (June 15, 1788), reprinted in 3 Elliot, *supra*, at 473, 473-74 (speaking against the Contract Clause, stating it might invalidate an act of the legislature “for scaling money” and require “paper money [to] be discharged, shilling for shilling”); Debate by George Nicholas at the Virginia Convention (June 15, 1788), reprinted in 3 Elliot, *supra*, at 476, 476 (stating the Contract Clause could not “hinder” the states from “interfer[ing] with Continental debts” because the states “never could do it”); Debate by Edmund Randolph at the Virginia Convention (June 15, 1788), reprinted in 3 Elliot, *supra*, at 477, 478 (stating that the scaling of money was still possible since “Congress, and not [the states], have [sic] contracted to pay it” and that Congress “is not affected by this clause at all”); Debate by James Galloway at the North Carolina Convention (July 29, 1788), reprinted in 4 Elliot, *supra*, at 190, 190-91 (arguing that the Contract Clause would require the state, which had issued public securities, to “make good the nominal value of [those] securities” and to redeem the “full nominal value ... in gold and silver” even though speculators had purchased them for “a very trifling consideration”); Debate by William R. Davie at the North Carolina Convention (July 29, 1788), reprinted in 4 Elliot, *supra*, at 191, 191 (countering Galloway’s argument by stating that the clause did not “ves[t] the general government with power to interfere with the public securities of any state” but “refer[red] merely to contracts between individuals”); Debate by Charles Pinckney at the South Carolina Convention (May 20, 1788), reprinted in 4 Elliot, *supra*, at 333, 333-36 (staunchly defending article I, section 10, stating that it was “extremely improper” that states “should ever be intrusted with the power of emitting money, or interfering in private contracts; or, by means of tender-laws, impairing the obligation of contracts” and that “this restraint” was “extremely useful and advantageous ... to those states which mean to be honest, and not to defraud their neighbors”).

24. Va. Const. of 1776, pt. 1, § 1, reprinted in 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3812, 3813 (F. Thorpe ed. 1909 & photo. reprint 1977).

25. G. Amos, *Defending the Declaration* 105-08 (1989).

26. Genesis 1:1-31.

27. Genesis 1:27.

28. Genesis 1:28.

29. 1 Kings 8:56; Psalm 105:42; 2 Corinthians 1:18-20; Hebrews 13:8.

30. Romans 13:1-7; 1 Peter 2:12-17; 1 Timothy 2:22.

31. G. Amos, *Government by the Book* 121-23 (October 1987) (unpublished manuscript).

32. 10 U.S. (6 Cranch) 87 (1810).

33. 17 U.S. (4 Wheat.) 518 (1819).

34. 1 J. Kent, *Commentaries* \*418.

35. 11 U.S. (7 Cranch) 165 (1812).

36. 21 U.S. (8 Wheat.) 1 (1823).

37. In *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), the Court ruled as unconstitutional under the Contract Clause state insolvency legislation which purported to discharge a debtor from all liability for a debt waived prior to the passage of such legislation.

38. 21 U.S. at 84.
39. 25 U.S. (12 Wheat.) 213 (1827).
40. 17 U.S. (4 Wheat.) 122 (1819).
41. 25 U.S. at 261-62 (Washington, J., opinion); *id.* at 286-88 (Johnson, J., opinion); *id.* at 299-302 (Thompson, J., opinion); *id.* at 323-27 (Trimble, J., opinion). This was the same matter that was of concern to some at the Constitutional Convention. *See supra* note 10.
42. 25 U.S. at 344-47, 350 (Marshall, C.J., dissenting) (emphasis added).
43. 25 U.S. at 298-99 (Thompson, J., opinion).
44. 25 U.S. at 259-60 (Washington, J., opinion).
45. 25 U.S. at 303 (Thompson, J., opinion).
46. 25 U.S. at 260 (Washington, J., opinion).
47. 25 U.S. at 337 (Marshall, C.J., dissenting).
48. *Id.*
49. *Id.* at 338-39.
50. *Id.* at 339-40.
51. *Id.* at 339, 355.
52. Epstein, *supra* note 17, at 727. 53. *Id.*
54. *Id.*
55. 25 U.S. at 320 (Trimble, J., opinion).
56. 25 U.S. at 282, 289-90 (Johnson, J., opinion).
57. 25 U.S. at 348-53 (Marshall, C.J., dissenting).
58. 3 W. Blackstone, Commentaries \*23.
59. In *Marbury v. Madison*, Marshall stated:

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right.

\* \* \*

[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.
- 5 U.S. (1 Cranch) 137, 163, 166 (1803).
60. 25 U.S. at 351 (Marshall, C.J., dissenting).
61. *Id.* at 353.
62. *Id.*

63. 25 U.S. at 323-28 (Trimble, J., opinion).

64. 25 U.S. at 348 (Marshall, C. J., dissenting) (emphasis added).

65. *See id.* at 344-47.

66. *See, e.g.*, U.C.C. § 2-201(3)(b) (1987), which provides for the enforcement of a contract for the sale of goods which does not satisfy the statutory writing requirement if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made. Such a rule appears consistent with a Biblical purpose for a writing requirement. It stands in contrast to the earlier sale of goods statute of frauds provision which barred the enforcement of an oral contract for sale even if the party against whom enforcement was sought admitted that the oral contract had been made.

67. Deuteronomy 17:6; 19:15; Matthew 18:16.

68. Deuteronomy 23:19; Exodus 22:25; Leviticus 25:36-37.

69. Deuteronomy 23:20.

70. Matthew 25:27; Luke 19:23.

71. Leviticus 25:8-10.

72. Deuteronomy 15:1-6.

73. "Like many of the laws of the old Testament the jubilee laws were typological. The fulfillment of the jubilee is to possess Jesus Christ." 2 G. DeMar, *God and Government: Issues in Biblical Perspective* 227 (1984).

74. Perhaps that limitation suggests sabbatical debt remission was instituted as an ever-present reminder that God had rescued His people from the bondage of Egypt and did not want them to be in a position of bondage (to overwhelming debt) again. Perhaps it might be thought as well that God, who alone rules over the hearts of men, instituted the debt remission laws as a reminder to His people of the love they were to show to each other and as an external guard against the relationship among His people changing from one of mutual love to one of domination and subjugation. *See also R. Rushdoony, The Institutes of Biblical Law* 144-45 (1973):

The sabbath means rest, forgiveness, the cancellation of debt and weariness. It means fresh life. Since the unbeliever is by nature a slave, he is not released from debts: [quoting Deuteronomy 15:1-6]. God's goal is a debt-free society which is also poverty-free, and this is only possible in terms of His law.

\* \* \*

... The Sabbath release confers life, but, to those alien to God, neither the sabbath nor its release can have their true meaning.

75. Proverbs 22:7.

76. Leviticus 19:15; Deuteronomy 16:18-19.

77. However, Marshall might have been reluctant to conclude that bankruptcy laws directed to relief from individual business failures were contrary to the proper role of government because of the constitutional grant of authority to the national government to pass uniform laws on the subject of "bankruptcies" and the likely understanding which the drafters had of that word which certainly included their awareness of the English bankruptcy laws which were directed to individual business failures.

78. It might be urged that the sabbatical debt remission law is illustrative of a larger principle analogous to the forty stripes limitation for non-capital corporal punishment, that is, lest "your brother [created in the image of God.] be degraded in your eyes." Deuteronomy 25:1-3. Could such a degrading occur if a person unable to pay a lawfully incurred debt were subjected to a permanent condition of bondage leading to despair and sense of hopelessness, or were subjected to physical abuse because of his inability to pay?

Perhaps Justice Johnson, of the Ogden majority, had something like that in mind when he gave his desert island illustration:

Two men, A. and B., having no previous connexion with each other, (we may suppose them even of hostile nations,) are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here, that B. subjects himself to something more than the moral obligation of his contract, and that the law of nature, and the sense of mankind, would justify A. in resorting to any means in his power to compel a compliance with this contract. But if it should appear that B., by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B. would be followed with the indignation of mankind. He has carried the power conferred on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn.

25 U.S. at 282-83 (Johnson, J., opinion). He concluded that in society the public (civil government) duty to enforce by providing a remedy is the substitute for the right of self-help which individuals possessed in a state of nature. He reasoned:

[I]f, even in a state of nature, limits were prescribed by the reason and nature of things, to the exercise of individual power in enacting the fulfilment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency - in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy, the one without benefitting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power exercised by governments in favor of insolvents. it grows out of the administration of justice, and is a necessary appendage to it.

Id. at 283-84. However, one must not be too quick to make the analogy to the “forty stripes” limitation, since the stripes are clearly exacted as retribution for a wrong done and though they may have a restitutionary, restorative effect upon the wrongdoer, they are not a limit on the restitution to be accorded the victim of the crime. Cancellation of a debt because the debtor is unable to pay directly affects the restitution (amount to be paid) owed the creditor in the bankruptcy setting. Additionally, governmental cancellation of the debt of particular poor persons implicates the impartiality principle in a way that the forty stripes limitation does not.

79. 17 U.S. (4 Wheat.) 122 (1819).

80. Epstein, *supra* note 17, at 729.

81. Id. at 729-30.

82. 25 U.S. at 327 (Trimble, J., opinion) (emphasis added).

83. 36 U.S. (11 Pet.) 420 (1837).

84. *See id.* at 546-48.

85. 47 U.S. (6 How.) 507 (1848).

86. Id. at 532-33.

87. 11 U.S. (7 Cranch) 164 (1812). But the Court in *Stone v. Mississippi*, 101 U.S. 814, 820 (1880) noted that “[n]o government dependent upon taxation for support can bargain away its whole power of taxation, for that would be substantially abdication.”

88. 101 U.S. 814 (1880).
89. *Id.* at 817.
90. *Id.* at 819.
91. *Id.* at 821.
92. *See* Phillips, *The Life and Times of the Contract Clause*, 20 *Am. Bus. L. J.* 139, 152-53(1982).
93. 209 U.S. 349 (1908).
94. *Id.* at 355, 357.
95. 256 U.S. 170 (1921).
96. *Id.* at 198.
97. 2 B. Schwartz, *A Commentary on the Constitution of the United States: The Rights of Property* 44 (1965); *Manigault v. Springs*, 199 U.S. 473, 480 (1905). Compare with Alexis de Tocqueville's observation of an earlier era: "Nothing is more striking to a European traveler in the United States than the absence of what we term the government, or the administration." 1 A de Tocqueville, *Democracy in America* 70 (Bradley ed. 1945).
98. 2 B. Schwartz, *supra* note 97, at 42-43.
99. *Id.* at 285.
100. 290 U.S. 398 (1934).
101. *Id.* at 434-35 (emphasis added).
102. *Id.* at 437 (emphasis added).
103. *Id.* at 438 (emphasis added).
104. *See id.* at 445-46.
105. *Id.* at 442-43 (emphasis added).
106. Epstein, *supra* note 17, at 735-36.
107. *Id.* at 738.
108. 300 U.S. 379 (1937).
109. *Id.* at 391.
110. Phillips, *supra* note 92, at 162.
111. Epstein, *supra* note 17, at 738.
112. 431 U.S. 1 (1977).
113. *Id.* at 21.
114. *Id.* at 25.
115. *Id.*
116. *Id.* at 28.
117. *Id.* at 29-30 & n.28.

118. 431 U.S. at 59 (Brennan, J., dissenting).

119. 438 U.S. 234 (1978).

120. The plan expressly stated:

No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner.

Id. at 238.

121. Id. at 239.

122. Id. at 242.

123. Id. (emphasis the Court's).

124. Justice Stewart stated:

The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Id. at 245.

125. Id. at 249.

126. Id. at 250,

127. Id.

128. Phillips, *supra* note 92, at 172.

129. 459 U.S. 400 (1983).

130. Id. at 415-16.

131. Id. at 416.

132. Id. at 417.

133. Id

134. Clarke, The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation, 39 U. Miami L Rev. 183, 204 (1985).

135. 462 U.S. 176 (1983).

136. Id at 189.

137. Id. at 191-92.

138. Epstein, *supra* note 17, at 739.

139. Id.

140. See *supra* note 39 and accompanying text.

141. Epstein, *supra* note 17, at 740.

142. J.Q. Adams, *supra* note 8, at 55-56.

143. Id. at 12.

144. Id. at 25 (emphasis in the original).

145. Id. at 56.

146. Id.