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Public Contracts, Private Contracts, and the Transformation of the Constitutional Order

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Modern interpretation of the Contract Clause of article 1, section 10 has created a dual standard of judicial review that bottoms upon the classification of a particular contract as public or private. However, which particular category has received greater deference has changed depending upon the precedential climate. Within his Article, Professor Merrill outlines three modern justifications for affording greater protection to public obligations: "Kantian theory," "process theory," and "utilitarian theory." He argues, however, that none of these theories adequately justify the dual standard of review, and concludes that a unitary analysis of the contract clause that affords no presumptions in favor of either public or private obligation should supersede the dual standard entirely.

INTRODUCTION

FEW PROVISIONS OF the Constitution have experienced more dramatic ups and downs than the contract clause. The clause attracted little attention at the Constitutional Convention of 1787 or in the process of ratification.[1] But under the guiding hand of Chief Justice John Marshall, the early Supreme Court construed the contract clause as affording broad protection against state interference with both private and public obligations.[2] Indeed, in the days before the enactment of the fourteenth amendment, the contract

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1. For example, the *Federalist Papers* devote only one paragraph to justification of the contract clause. *See* THE FEDERALIST No. 44, at 282-83 (J. Madison) (C. Rossiter ed. 1961).

2. *See generally* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 27-61 (1938); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703

clause was the second most frequently litigated provision of the Constitution (after the commerce clause), and was the principal vehicle by which the Supreme Court asserted federal constitutional control over the state governments.[3]

Today, the contract clause is but a pale shadow of its former self. With two exceptions,[4] the Supreme Court has rejected every contract clause contention that has come before it in the post-New Deal era. Although the Court has never formally equated contract clause analysis with the "rationality review" it applies to economic legislation under the due process and equal protection clauses,[5] the tone of recent contract clause decisions approaches this same degree of extreme deference.[6] Surveying the general pattern of the modern case law, it is difficult to quarrel with Justice Black's conclusion that the Supreme Court has "balanc[ed] away the plain guarantee of Art. I, § 10, that 'No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .' "[7]

Yet as we contemplate the demise of the contract clause, one puzzling counter-trend stands out. In *United States Trust Co. v. New Jersey*[8] one of two modern decisions upholding a contract clause challenge, the Court announced that impairments of public contracts, government obligations, would be subject to more search-

(1984); Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

3. B. WRIGHT, *supra* note 2, at xiii, 92, 95.

4. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (Minnesota law levying a charge against the company's pension plan invalid under the contract clause); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (state statute repealing a covenant between a state and bondholder violates the contract clause).

5. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (equal protection); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1. 14-38 (1976) (due process).

6. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987); Exxon Corp. v. Eagerton, 462 U.S. 176, 189-90 (1983) (the Court refused to "strain to reach a constitutional question by speculating that the Alabama courts might in the future interpret the royalty-owner exemption to forbid enforcement of a contractual arrangement to shift the burden of the tax increase" and deemed the pass-through prohibition at issue, although restrictive of "contractual obligations of which appellants were the beneficiaries" as not falling within the ambit of those activities which the contracts clause was intended to prohibit); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416 (1983) (the Court found that because the Energy Reserve Group "knew its contractual rights were subject to alteration by the state price regulation. . . . [Its] reasonable expectations ha[d] not been impaired by the Kansas Act."); *cf.* Nat'l R.R. Passenger Corp. v. Atchinson, Top. & Santa Fe Ry., 470 U.S. 451 (1985) (expressly adopting rationality review in assessing federal contract impairment challenge arising under the due process clause of the fifth amendment).

7. City of El Paso v. Simmons, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (quoting U.S. CONST. art. I, § 10, cl. 1). *Cf. United States Trust*, 431 U.S. at 29 (denying that this has occurred).

8. 431 U.S. 1 (1977).

ing judicial review than impairments of private contracts. Subsequent decisions have gone out of their way to reaffirm this distinction between public and private obligations.[9] This dual standard of review—highly deferential where the state has impaired private contracts, less deferential where the state has impaired public contracts—reflects a curious inversion in constitutional doctrine. For roughly the first 150 years of our constitutional history, the contract clause was viewed as imposing greater restraints on impairments of private rather than public contracts. Today, as we celebrate the Constitution's 200th anniversary, the Court has done an about-face, and has announced that the clause protects public obligations more than private obligations. What accounts for this curious transformation in the constitutional order?

In Part I, I will sketch the history of the relationship between public obligations and private obligations under the contract clause, and show that the dual standard of *United States Trust* is not only of recent vintage, but also contrary to the views of the framers and the contract clause jurisprudence that developed in the nineteenth century. In Part II, I will outline three possible justifications for the modern doctrine affording greater protection to public than to private obligations—what I call the "Kantian theory," the "process theory," and the "utilitarian theory." On close examination, none of these justifications are very persuasive. In Part III, I will reconsider the dual standard of review in light of the general transformation in constitutional law that has taken place in the last fifty years. Although this exercise ultimately yields an explanation for the dual standard, it only compounds the doubts raised in Part II about whether the dual standard is justifiable. In concluding, I will argue that the Supreme Court should abandon the dual standard in favor of a unitary analysis of the contract clause that affords no presumptions in favor of either public or private obligations.

9. *Keystone*, 107 S. Ct. at 1235-36; *Exxon*, 462 U.S. at 192 n.13 ("The statutes under review in *United States Trust Co.* also implicated the special concerns associated with a State's impairment of its own contractual obligations."); *Energy Reserves*, 459 U.S. at 412 n.14 ("In *United States Trust Co.*, but not in *Allied Structural Steel Co.*, the State was one of the contracting parties. . . . In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."); *Allied Structural Steel*, 438 U.S. at 244 n.15 (discussing the distinction between private and public contracts made by the Court in *United States Trust Co.*); *cf. Nat'l R.R. Passenger Corp.*, 470 U.S. at 472 n.24 (holding that the contract at issue was not a public contract, implicitly recognizing that if it were, a different standard of review would apply).

I. THE HISTORY OF THE DUAL STANDARD

Anniversaries inevitably call forth reflections on the past, and it is appropriate to begin by tracing some of the high points in the history of the relationship between public and private obligations under the contract clause. That history contains, to say the least, more than a little irony.

The origins of the contract clause are "shrouded in mystery."[10] The clause was proposed by Rufus King in the waning days of the Constitutional Convention, only to be defeated by a floor vote in favor of the prohibition on ex post facto laws.[11] After some confusion over whether ex post facto laws included civil as well as criminal laws, the five-member committee on style apparently decided that some further check on retroactive civil legislation was needed.[12] It inserted a new version of the contract clause in the final draft of the Constitution, and, without further discussion by the Convention, it became part of fundamental law.[13]

The paucity of recorded debate at the Convention or in the ratification process makes it hard to know what the contract clause was supposed to accomplish. Nevertheless, a fairly strong case can be made that, whatever else it was intended to mean, the clause was *not* thought to impose a general duty on state governments to honor their own obligations. The clause was patterned after a provision in the Northwestern Territory Ordinance of 1787, which by its terms applied only to private contracts,[14] and it was introduced by King as "a prohibition on the States to interfere in private contracts."[15] Moreover, when anti-federalists raised the possibility in the ratification debates that the contract clause would apply to public debts, these claims "were denied by members of the Convention, and their denials were not challenged."[16]

The primary evidence in support of this conclusion, however, is

10. F. MCDONALD, NOVUS ORDO SECLORUM 271 (1985).

11. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439-40 (M. Farrand rev. ed. 1937).

12. F. MCDONALD, *supra* note 10, at 271-72.

13. *Id.* at 272; *see also* B. WRIGHT, *supra* note 2, at 8-12.

14. Northwest Territory Ordinance and Act of 1787, art. II, ch. 8, § 1, 1 Stat. 51. 52 n.(a) (1789). "[I]n the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed." *Id.*

15. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (M. Farrand rev. ed. 1937).

16. B. WRIGHT, *supra* note 2, at 16.

the very absence of significant debate about the clause. Both the Continental Congress and the states had accumulated an enormous public debt during the Revolutionary War. Under existing political arrangements, this debt was of questionable value; it circulated at only a fraction of par, and was the subject of intense speculative trading.[17] Indeed, one of the most controversial issues of the times was whether these public debts would be honored or repudiated.[18] The framers finally dodged the whole issue of public indebtedness with a "declaratory" statement to the effect that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."[19] Had the contract clause been thought to establish the principle that state governments must honor their own obligations, it would have attracted considerably more comment than it did.

Although the validity of public debt was highly controversial, there appears to have been a much broader consensus that some

17. F. MCDONALD, *supra* note 10, at 94-95 (stating that certificates of public debt normally circulated at one-quarter to one-tenth of their nominal value); E. FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790, at 252-53 (1961).

18. F. MCDONALD, *supra* note 10, at 222-23. One powerful group that had an interest in opposing full funding of stated indebtedness was land speculators. Most speculators in western lands purchased property from state governments under long-term sales contracts that permitted payment in public securities. Thus, property nominally worth one dollar an acre could be purchased for ten to twenty-five cents per acre, provided the public securities continued to be deeply discounted. But if state paper was suddenly worth par, or close to par, these speculators would suffer significant losses. F. MCDONALD, *supra* note 10, at 94-95; E. FERGUSON, *supra* note 17, at 339. Because large numbers of influential citizens engaged in land speculation, one would expect to find vocal objection to a clause that would have enforced repayment of public debts.

19. U.S. CONST. art. VI, cl. 1. The provision is described as "merely declaratory" in THE FEDERALIST NO. 43, *supra* note 1, at 278 (J. Madison). In 1790, Alexander Hamilton engineered a program calling for federal assumption of the state war debts, and federal funding of war debts, both state and federal. This action, of course, provided handsome profits to those who had purchased public securities at deep discounts. Charles Beard cited this as circumstantial evidence in support of the thesis that the Constitution was designed to advance paper money interests at the expense of agrarian interests. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 32-40 (1913). But the Constitution itself only created the political mechanism for funding of war debts. Nothing in the text or the ratification debates suggests that this was an inevitable development. Moreover, although the final plan adopted by Congress funded the debt at par, it delayed the payment of interest on a portion of the debt—an action that would have to be considered an impairment of contract. *See* Murray v. Charleston, 96 U.S. 432, 443-46 (1878). Consequently, the settlement of 1790 cannot be interpreted as "confirming" either that the Constitution was a conspiracy of money men, or that the contract clause established the constitutional principle that states must honor their own debts. *See* 1 ANNALS OF CONG. 1129-69 (J. Gales ed. 1790); 2 ANNALS OF CONG. 1324-95, 1526-70, 1575-98, 1638-75 (J. Gales ed. 1790).

restraint should be imposed on the states' power to impair private obligations. The Confederation years had witnessed not only the depreciation, and even repudiation of public securities, but also a rash of private debtor-relief legislation, including stays or postponements of debts, provisions allowing debts to be paid in installments, and statute allowing debts to be paid in commodities.[20] As Chief Justice Marshall later put it, "The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith."[21] The most plausible explanation for the inclusion of the contract clause in the Constitution is that it was designed to prevent states from enacting these types of statutes for the relief of private debtors.[22]

Given the probable understanding of the framers, it comes as a mild surprise to find that the first contract clause case to reach the Supreme Court, *Fletcher v. Peck*,[23] involved the impairment of a public contract. The Georgia legislature, induced by massive bribery, had sold what is today most of Alabama and Mississippi for about one and one-half cents per acre.[24] When the deal was exposed, aroused Georgians elected a new legislature, which promptly rescinded the original grant. Peck was a New England land speculator who had acquired some of the transferred lands. He in turn had transferred a portion of his holdings to Fletcher by a deed which, curiously enough under the circumstances, contained express warranties of Peck's good title, including a warranty that the rescinding act of the Georgia legislature was invalid. Fletcher promptly sued Peck in a federal diversity action, alleging breach of these warranties.

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20. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 454-65 (1934) (Sutherland, J., dissenting); THE FEDERALIST NO. 7, *supra* note 1, at 65 (A. Hamilton); B. WRIGHT, *supra* note 2, at 4-6.

21. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 355 (1827) (Marshall, C.J., dissenting).

22. My own view is that the framers' intent ought to be the foundation of constitutional interpretation, but that this does not necessarily mean that courts are bound by the specific intentions of the framers on matters not addressed by the constitutional text. Rather, I would construe the framers, use of broad language in the Constitution as a delegation of power to federal courts to make law, provided that law-making remains within the confines of the chosen language, and is guided by what can be ascertained about the framers' purposes. *See* Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 59-70 (1985).

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

24. *See generally* C. MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK (1966). Magrath argues that, given the wild state of the land and the difficulties of dealing with Indian claims, the price was not necessarily unfair. *Id.* at 15.

In an opinion by Chief Justice Marshall, the Supreme Court declared that the rescinding act was an unconstitutional impairment of contract. The decision raises a number of fascinating issues: the lawsuit was undoubtedly collusive; difficult questions were raised about the scope of judicial inquiry into the motives of a legislature; and it was awkward to describe a completed grant of property as a contract.[25] For present purposes, however, the importance of the decision lies in the express holding that public contracts are protected by the contract clause no less than private contracts.[26] Marshall noted that the language of the Constitution draws no distinction between public and private contracts; that other provisions of article I, section 10, such as the ex post facto clause, clearly apply to acts of states, and that the provision of article III allowing states to be sued in federal court implied, at least prior to the enactment of the eleventh amendment, that states could be sued for impairment of their own obligations.[27] Marshall further argued that applying the clause to public contracts was consistent with the general purpose of the clause, which he described as an effort to shield property rights "from the effects of those sudden and strong passions to which men are exposed."[28]

Whatever its rationale, *Fletcher* clearly elevated public obligations to parity with private obligations for purposes of contract clause analysis. This holding was to have a profound effect on the future course of American history, as the clause was subsequently held to apply to various forms of nineteenth century "new property," such as tax exemptions[29] and corporate charters.[30]

The next important chapter in the history of the public/private contract distinction begins with *Charles River Bridge v. Warren Bridge.*[31] In general form, the case involved a fact pattern substantially similar to *Fletcher.* At time T_1, the legislature made an implied promise designed to induce reliance on the part of *X.* At time

25. *See generally* D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, 1789-1888, at 128-36 (1985).

26. *Fletcher*, 10 U.S. (6 Cranch) at 139.

27. *Id.* at 137-39.

28. *Id.* at 138.

29. New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (legislature's declaration that Indian land was exempt from taxation is covered by contract clause and therefore not voidable by subsequent legislative act).

30. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (charter granted to college trustees is covered by contract clause and therefore legislative act altering the charter is an unconstitutional impairment of a contract).

31. 36 U.S. (11 Pet.) 420 (1837).

T_2, the legislature changed its mind and reneged on this promise, thereby upsetting *X*'s expectations. In *Fletcher*, the original action was a grant of land, which the state implied it would not rescind, followed by a rescission. In *Charles River Bridge*, the original action was the grant of a charter to build a toll bridge connecting Boston and Charleston, which the state implied was to be exclusive, followed by the grant of a charter to another company to construct a free bridge.

Chief Justice Taney, writing for the Court, framed the question in terms of presumptions: when a corporate charter does not explicitly say that it is exclusive, do we presume it to be exclusive or non-exclusive? His answer: "any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."[32] Justice Story penned a lengthy dissent in which he cited considerable common law authority to the effect that the presumption against implied grants applied only to gratuitous privileges, not to public grants supported by consideration, such as the bridge.[33]

The Taney-Story debate is a classic exposition of the perennial conflict between the need for stability of entitlements, on the one hand, and the need for flexibility and modification of entitlements in light of changed circumstances, on the other. For present purposes, however, the chief significance of the decision is that it modifies the parity between public and private obligations introduced by *Fletcher*. Henceforth, public obligations were to be strictly construed in favor of the promisor—the state. There was no suggestion, however, that such a rule of construction would apply to private obligations. Thus, after *Charles River Bridge*, both public and private contracts were still protected by the contract clause, but there was now a dual standard of review, with public contracts enjoying less protection than private contracts.

Other doctrinal innovations soon emerged that further eroded the protection afforded to public contracts. Under the so-called reserved powers doctrine, the state, by reserving the right to "repeal, alter, or amend" corporate charters, could rescind any promise made to incorporators without incurring any contract clause liabil-

32. *Id.* at 544 (quoting Proprietors of the Stourbridge Canal v. Wheeley, 109 Eng. Rep. 1336, 1337 (K.B. 1831)).

33. *Id.* at 588-603 (Story, J., dissenting).

ity.[34] Under the so-called inalienable powers doctrine, the state was deemed to have certain powers—such as eminent domain and the police power—that it was completely powerless to "contract away."[35] Although technically neither doctrine was limited to public contracts,[36] in practice their impact was largely confined to such obligations. Thus, the reserved and inalienable powers doctrines reinforced the dual standard of review introduced by *Charles River Bridge*, with public contracts being granted less protection than private contracts.[37]

We must move forward to the darkest days of the Great Depression before we perceive a crack in the relationship between public and private obligations established after *Charles River Bridge*. The precipitating event was a series of measures taken in 1933 by the newly-elected President Roosevelt which had the effect of taking the United States off the gold standard.[38] In June of that year, Congress passed a joint resolution declaring all contracts providing for the payment of deferred obligations in gold or in the equivalent value of gold to be "against public policy." This action was taken in anticipation of a devaluation of the dollar that eventually occurred in January 1934. The purpose of the resolution, apparently, was to avoid certain windfall gains and losses that would otherwise follow upon such a devaluation.[39] If the same amount of gold were suddenly worth many more dollars than before, then creditors holding rights to payment in gold or gold equivalent would experience a windfall gain, and debtors required to make payments in gold or

34. *See* B. WRIGHT, *supra* note 2, at 58-60, 84-86, 168-78.

35. *Id.* at 195-213.

36. Chief Justice Marshall, dissenting in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 339 (1827), had suggested how the reserved powers notion might affect private contracts: if the state passed a general statute indicating that all private contracts entered into in the future "should be discharged as the legislature might prescribe," then this reservation of power would immunize the state from any contract clause limitations. Marshall was correct in theory, but no state has enacted such a statute—at least not yet. Moreover, the inalienable powers doctrine also prevents private parties from contracting around certain sovereign powers of the state, such as the power of eminent domain or the police power. *See* Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("One whose rights . . . are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

37. For an excellent analysis of nineteenth century contract clause doctrine that emphasizes the preferred status of "ordinary" contracts, including all private contracts, relative to corporate charters and other "privileges," *see* Siegel, *supra* note 2.

38. *See generally* Buchanan & Tideman, *Gold, Money and the Law: The Limits of Governmental Monetary Authority*, in GOLD, MONEY AND THE LAW (H. Manne & R. Miller, eds. 1975); Dam, *From the* Gold Clause Cases *to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504 (1983).

39. *See* Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 314-16 (1935).

gold equivalent would experience a windfall loss. President Roosevelt was evidently anxious to avoid such sudden shifts in wealth.[40]

In the *Gold Clause Cases*,[41] the Supreme Court, by a vote of five to four, upheld the joint resolution against the allegation that it represented a taking of property without just compensation in violation of the fifth amendment. Chief Justice Hughes, writing for the Court, drew a sharp distinction between the application of the joint resolution to contractual obligations of private corporations and state and municipal governments, and the application of the resolution to the obligations of the United States. As to the former, the resolution was found to be an appropriate exercise of congressional power "[t]o coin money [and] regulate the value thereof. . . ."[42] Hughes implied that no private contractual understanding would be entitled to constitutional protection in the face of a proper exercise of this power.[43]

As to the obligations of the United States, however, Hughes suggested that congressional power was much more limited. He wrote:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. . . . To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligation of our Government.[44]

Notwithstanding this sharp condemnation of any attempt by the

40. The President stated that he wanted "to prevent unfair profits from accruing to a very small group of creditors and the placing of unfair burdens . . . on the corresponding debtors." Proclamation No. 2072 (Jan. 31, 1934), *quoted in* Dam, *supra* note 38, at 521. For a discussion of whether the gains and losses were in fact "unfair," given that bonds containing gold clauses generally paid lower interest than bonds without such clauses, see *id.* at 525-29.

41. Norman v. Baltimore & Ohio R.R. and United States v. Bankers Trust Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935). Justice McReynolds, joined by Justices Van Devanter, Sutherland, and Butler filed a dissent applicable to all four cases under the name *Gold Clause Cases*, 294 U.S. 361 (1935).

42. U.S. CONST. art. I, § 8.

43. *See Norman*, 294 U.S. at 309-10 ("There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt.").

44. *Perry*, 294 U.S. at 350-51.

United States to renege on its own obligations, the claims of the United States' creditors were also denied, on the dubious ground that they had failed to prove any damages.[45]

The *Gold Clause Cases* could not have had an impact on the development of the contract clause. The cases were not decided under the contract clause, but under the fifth amendment. The Court has never "incorporated" the contract clause into the fifth amendment,[46] in the manner, for example, the equal protection clause of the fourteenth amendment has been applied in cases arising under the fifth amendment. Moreover, the obligation of the United States to honor its own debts can be independently grounded in section 4 of the fourteenth amendment—which again does not apply to the states.[47] Finally, because the Court ultimately denied the claims of even the United States' creditors, the suggestion that public contracts are entitled to greater protection than private contracts could be regarded as dictum.[48] Indeed, by the end of the 1960's, when judicial protection of "mere" economic rights had fallen to its lowest ebb, the *Gold Clause Cases* had all but disappeared from sight. In a case involving a challenge to the attempt by the State of Texas to impair its own contractual obligations, the Court did not discuss the *Gold Clause Cases* and analyzed the issue as if it were the same as an impairment of a private contract.[49]

It remained for the modern Supreme Court, in *United States Trust Co. v. New Jersey*,[50] to reincarnate the dual standard implicit

45. The Court reasoned that since private hoarding and trading in gold had been made unlawful, there was no way to determine the market value of a promise to pay in the equivalent value of gold. *Id.* at 357-58. Note that this escape route was available to the Court only because it had implicitly held, in the context of discussing the impairment of private contracts containing gold clauses, that Congress could constitutionally suspend the right of private citizens to buy and sell gold. Thus, although the Congress could not impair its own obligations, when it impaired everyone else's obligations, it simultaneously created the conditions ratifying its own impairment.

46. *See* National R.R. Passenger Corp. v. Atchison, Top. & Santa Fe Ry., 470 U.S. 451, 472 (1985); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984); *cf.* Lynch v. United States, 292 U.S. 571 (1934) (relying in part on contract clause authority in striking down the United States' impairment of war insurance policies).

47. U.S. CONST. amend. XIV, § 4 provides: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." Chief Justice Hughes had referred to this clause in the *Gold Clause Cases*. *See Perry*, 294 U.S. at 354. As noted above, *see supra* notes 14-17 and accompanying text, the original Constitution ducked the question whether the United States was obliged to honor its debts.

48. *See Perry*, 294 U.S. at 359-60 (Stone, J., concurring).

49. City of El Paso v. Simmons, 379 U.S. 497 (1965).

50. 431 U.S. 1 (1977).

in the *Gold Clause Cases*. That case involved bonds issued by a bistate agency, the Port Authority of New York and New Jersey. By way of statutes, both states had promised the agency's bondholders that certain revenues from bridge and tunnel tolls would not be used to subsidize mass rail transportation. This covenant was subsequently repealed, at first only as to future bond issues, and then retroactively as to existing bonds. The trustee for the existing bondholders sued to have the repealing acts set aside.

The Supreme Court, in an opinion by Justice Blackmun, held that retroactive repeal of the statutory covenant violated the contract clause.[51] The Court observed that the contract clause does not prohibit every impairment of contract. If the impairment falls within the reserved or inalienable powers categories, it is constitutionally permissible.[52] Moreover, "[a]s is customary in reviewing economic and social legislation, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[53] This last statement sounds much like the formulaic standards applied in equal protection or substantive due process cases. But then the Court added a new twist. Where public, as opposed to private, contracts are involved, the Court stated:

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[54]

The only case authority cited by the Court for the proposition that impairment of public contracts should be subjected to a stricter standard of review than impairment of private contracts was the *Gold Clause Cases*.[55]

The dual standard of review, first broached in the *Gold Clause Cases* and then adopted by the Court in *United States Trust*, apparently strikes a highly responsive cord in today's Supreme Court. The notion that public contracts should be given greater judicial protection than private contracts has been picked up and repeated with approval in every subsequent case involving the contract

51. *Id.* at 32.
52. *Id.* at 21-22 (reserved powers of the state); *id.* at 23-25 (inalienable powers).
53. *Id.* at 25.
54. *Id.* at 26.
55. *Id.* at 26 n.25.

clause.[56] With this development, the modern Court has in effect turned the contract clause of both the framers and the post-*Charles River Bridge* era on its head. The prior understanding was that private contracts were protected from state interference with *more* rigor than public contracts. As we enter the final decades of the twentieth century, private contracts are given *less* protection than public contracts. Given this remarkable inversion in the understanding of the contract clause, it is important to consider what justification or justifications the Court has advanced for the new dual standard.

II. JUSTIFYING THE DUAL STANDARD

Neither the *Gold Clause Cases*, nor *United States Trust*, nor the recent decisions reaffirming *United States Trust* provides a very clear rationale for giving greater protection to public than to private contracts. Nevertheless, the language of these cases suggests three possible justifications for the dual standard of review. I will call these justifications the "Kantian theory," the "process theory," and the "utilitarian theory." I will describe each of these theories in turn, and suggest some reasons why none is very persuasive.

A. *The Kantian Theory*

The Kantian justification for the dual standard is deceptively simple. It begins with the proposition that it is morally wrong to repudiate one's own promise. Given that it is wrong to repudiate one's own promise, it is wrong for the government to impair its own contract. The opprobrium that attaches to such an act is simply not present, at least not to the same degree, when the government adopts legislation that impairs someone else's promise. Fundamental principles of morality therefore require that impairments of public contracts be reviewed more carefully than impairments of private contracts.

The Kantian theory emerges most clearly in the *Gold Clause Cases*. According to the Court, when Congress abrogated gold clauses contained in bonds issued by private corporations and state and municipal governments, it was not repudiating its own promise. Rather, it was exercising its sovereign authority to establish a uniform monetary policy for the United States. Private and local governmental contracts, the Court reasoned, cannot be allowed to

56. *See United States Trust Co.*, 431 U.S. at 1.

frustrate congressional monetary policy, and Congress could reasonably find that the widespread use of gold clauses in such contracts would frustrate its policy.[57] But when Congress abrogated gold clauses set forth in the United States' own financial instruments, it was undermining "the highest assurance the Government can give, its plighted faith."[58] As applied to its own obligations, the joint resolution was an act of "repudiation, with all the wrong and reproach that term implies . . . ."[59]

One could perhaps quarrel with the premise of the Kantian argument that it is morally wrong to repudiate one's own contract.[60] Holmes' famous dictum to the effect that a contract is not a promise to perform, but a promise to perform or pay damages[61] suggests that the institution of contract rests as much or more on considerations of utility or efficiency as on the morality of promise-keeping. Morever, recent decades have witnessed a sharp decline in belief in freedom of contract, and one could argue that this reflects an erosion in the perceived moral force of obligations based on consent.[62] For purposes of discussion, however, I will assume that it is wrong to repudiate one's own contract. Even so, this does not provide a very persuasive basis for discriminating between impairment of public and private obligations.

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57. The last link in this argument is highly debatable. As previously noted, the gold clauses would affect the distribution of wealth after devaluation, but they would not appear to interfere with the devaluation itself, nor would they necessarily lead to hoarding or exporting of gold, at least as long as gold clauses were interpreted to require payment in the equivalent value of gold rather than gold specie. *See* Dam, *supra* note 38, at 518-19; Buchanan & Tideman, *supra* note 38, at 35-41.

58. *Perry*, 294 U.S. at 351.

59. *Id.* (quoting *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878)); *see also id.* at 352-53 (quoting Lynch v. United States, 292 U.S. 571, 580 (1934)). The Court's moral indignation is doubly ironic. First, the simple syllogism that sustained the joint resolution as applied to private, state, and municipal contracts was also fully applicable to the obligations of the United States, and the Court never explained why Congress could not reasonably conclude that gold clauses in United States' financial obligations also "frustrated" its chosen monetary policy. Second, the Court adopted a clever argument for getting the United States off the hook anyway—finding that the holders of United States bonds with covenants to pay in gold or gold equivalent had not proven any damages. The Court's moral indignation thus has a distinctly hollow ring. *Id.* at 357-58.

60. *See generally* C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (developing the argument that contracts are binding because promises are morally binding).

61. O.W. HOLMES, THE COMMON LAW 236 (M. Howe ed. 1963).

62. *See, e.g.*, P. ATIAGH, THE RISE AND FALL OF FREEDOM OF CONTRACT 726-764 (1979) (discussing British experience); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 483-96 (1985) (discussing the scholarship of Fredrick Kessler). *cf.* G. GILMORE, THE DEATH OF CONTRACT (1974) (noting the trend to assimilate contract law into the law of torts).

First, the goverment can participate in promise-breaking both directly, as promisor, and indirectly, as the agent of some other (private) promisor. Although it may be worse in some sense for the government to engage in promise-breaking directly, the difference is a matter of degree rather than of kind. The point can be illustrated by reference to an analogous argument raised in debate over the death penalty. If we believe in the moral principle that no life should be taken deliberately, then the government should never be a party to the premeditated killing of a human being.[63] By refusing to engage in premeditated killing, the argument runs, the government both respects fundamental moral principles and sets an example that will inspire correct moral behavior on the part of its citizens. Analogously, if we believe in the sanctity of promises, the government should never repudiate its own promises. By strictly following this principle in its own affairs, the state again adheres to fundamental moral law and inspires its citizens to be faithful to their own obligations.

But the death penalty analogy is incomplete. If premeditated killing is wrong, we not only would want the government to desist from taking life itself, we also would want the government to refrain from licensing one private party to engage in the premeditated killing of another. By licensing private executions, the government would in effect be aiding and abetting—and encouraging by example—the very action which we condemn. Similarly, if the moral law requires that promises be kept, the government should not only adhere to its own promises, it should not license private parties to break their promises either. By passing a statute impairing private contracts, the government participates in the same conduct indirectly. Moreover, the picture of the government rigidly fulfilling its own contracts, but acting as an open shop for the repudiation of private contracts, is clearly not one designed to communicate the message that promises should be kept. Kantian morality would therefore seem to require not only that the government refrain from impairing its own promises, but that it not impair private promises either.[64]

63. *See* H. BEDAU, THE DEATH PENALTY IN AMERICA, 352-53, 369-70 (3d ed. 1982).

64. Indeed, the distinction between "repudiation" of promises and "regulation" of promises, which is central to the argument of the *Gold Clause Cases*, does not generally turn, as the Court suggested, on the *source* of the promise. In ordinary language, "repudiation" generally refers to an action taken with the specific purpose of nullifying an obligation—public or private. "Regulation," at least in this context, refers to an action taken for some other purpose that indirectly affects an obligation—again, public or private. Accordingly, it

Second, if the government must keep its own promises, one of the promises it presumably must keep is the guarantee of article I, section 10 of the Constitution which provides that the government will not impair the obligation of contracts. Whatever else this provision means, it was originally intended to include private contracts.[65] Thus, the Kantian principle itself would seem to require that the government respect private obligations as well as public obligations, because the government has promised to respect private obligations in the contract clause.[66]

In short, the Kantian argument for the dual standard is underinclusive. The Kantian idea provides a justification for the contract clause. Indeed, it provides a justification for the move made in *Fletcher*, extending the protection of the clause to public obligations as well as private obligations. But the Kantian rationale supplies at best a weak rationale for systematically granting greater constitutional protection to public than to private contracts.

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is perfectly correct to speak of the government adopting a policy of "repudiating" private obligations. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1934).

> This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community.

Id.

On the other hand, it is also perfectly correct to speak of the government adopting a "regulation," such as an expansion of the money supply or a change in tax rates, that indirectly affects its own contracts. The distinction between repudiation and regulation thus turns not on the source of the obligation, but on the government's *purpose* in undertaking the impairing action. A similar distinction is drawn in the law of eminent domain between regulation and taking of property. *See, e.g.*, Keystone Bituminous Coal Ass'n v. Debenedictis, 107 S. Ct. 1232 (1987); Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-25 (1978) (application of city landmark statute to bar development of property was deemed a permissible regulation of property); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (statute that prohibits mining where surface owners do not own support rights constitutes an unconstitutional taking of property). Indeed, the distinction is implicitly present in any account of the contract clause (or the takings clause) that recognizes an exception for legitimate exercises of the police power. *See* Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 730-40 (1984).

65. *See supra* notes 14-22 and accompanying text.

66. The argument is complicated by the fact that the contract clause appears in the *federal* Constitution and yet it binds only the *state* governments. *See supra* note 47; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 462 nn.1, 2 (2d ed. 1983) (the contract clause is not "appl[icable] to the federal government"). But given that the original thirteen states ratified the Constitution, that the other states agreed to uphold the Constitution upon being admitted to the Union, and that state officers regularly swear to uphold the Constitution as part of their oath of office, it seems fair to say that the states have themselves promised to abide by the contract clause.

B. *The Process Theory*

In general, process theory attempts to judge the constitutionality of government action, not on the basis of the outcome reached, but rather by asking whether fair procedures were followed in reaching that outcome. For process theorists, the hallmark of procedural fairness is adequate representation. Thus, the central command of the Constitution is said to be that individual interests must be fairly and adequately represented in adjudicatory proceedings before courts or administrative agencies, and that group interests must be fairly and adequately represented in proceedings before the legislature.[67] As applied to the contract clause, "process review would inquire whether political processes provided all groups interested in challenged legislation with an effective means of representing their interests."[68]

A fundamental tenet of the fair process theory is that disputes should be resolved by those who do not have an immediate financial stake or interest in the outcome. Although this procedural axiom is most often invoked in adjudicatory contexts, it has also been advanced as a criterion for fair legislation. James Madison wrote in his justly-famous Tenth Paper of *The Federalist*:

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?[69]

The principle that the legislature should not sit in judgment of its own cause suggests a second possible justification for the dual standard of review. When the government impairs a private obligation, it has no direct stake in the outcome, and hence can act as a fair and impartial arbiter between conflicting interests. But when the government impairs its own contract, it is acting as the judge of

67. J. ELY, DEMOCRACY AND DISTRUST 77-104 (1980) (developing a "representation reinforcing" theory of the Constitution); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 235-55 (1976) (discussing the judicial development and enforcement of procedural norms for political processes).

68. Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1638-39 (1980). "In contract clause cases, process review would require the legislature to give full consideration to the interests of the cost-bearing group." *Id.* at 1639.

69. THE FEDERALIST NO. 10, *supra* note 1, at 79 (J. Madison).

its own cause, and thus cannot decide the issue in a neutral manner. In *United States Trust*, the Court appeared to endorse this rationale for the dual standard. As the Court put it, when the state impairs its own obligation "complete deference to a legislative assessment of reasonableness and necessity is not appropriate *because the State's self-interest is at stake.*"[70]

As in the case of the Kantian theory, it is possible to question the premises of the process theory. Why should the contract clause be interpreted in light of the concept of fair representation? On its face, the clause appears to be concerned with a substantive value—the protection of contractual obligations—not with fair procedures.[71] When the framers were concerned with fair procedures, they knew how to express themselves, as when they adopted special protections for the right to jury trial, or the right not to be tried twice for the same crime. No such intention appears on the face of the contract clause. More fundamentally, it may be that it is impossible to interpret the Constitution in purely procedural terms, without invoking, at least implicitly, some set of substantive rights and obligations.[72] Nevertheless, as before, I will accept, for purposes of argument, the premise that the contract clause should be construed in light of the process theory, with its emphasis on fair representation. As in the case of the Kantian theory, however, when we examine the conflict-of-interest idea more closely, the distinction between public and private obligations begins to blur.

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70. *United States Trust Co.*, 431 U.S. at 26 (emphasis supplied). Curiously, although the Yale Note advocating a process theory approach to the contract clause endorses the dual standard of review, it does not do so on the ground that the government has a conflict of interest. Note, *supra* note 68, at 1647-49. Rather, the argument seems to be that when the government impairs public obligations, it should be aware that it is frustrating reliance interests, but when it impairs private contracts it may or may not be aware that it is frustrating reliance interests. As in the case of the Kantian argument, however, this appears to confuse the source of the contract with the government's "mental state" at the time of the impairing action. If the government enacts a general regulation (e.g., of the money supply) that indirectly interferes with public obligations, why should we presume that the government had perfect knowledge of all reliance interests that would be frustrated by its action? On the other hand, if the government intentionally modifies or prevents the enforcement of private obligations, why should we *not* presume that the government is fully aware that it is frustrating previously-formed expections?

71. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 & n.8 (1980) (citing the contract clause as an example of "substantive" rather than "procedural" protection).

72. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 61-145 (1982) (discussing value judgments which may be implied outside the written Constitution); Tribe, *supra* note 71. *But see* J. ELY, *supra* note 67, at 92 ("the original Constitution was principally... dedicated to concerns of process and structure and not to identification and preservation of specific substantive goals and values.").

To be sure, there is a core of truth in the central insight of the process theory—that the legislature will not be wholly impartial when someone proposes to impair a public contract. How could it be otherwise? The legislature is centrally involved in the affairs of the state, and its members will surely attend carefully to arguments concerning the status of its own obligations. But the legislature may be similarly subject to a conflict-of-interest where private obligations are concerned. In this regard, it is instructive to read further in the passage from *The Federalist* No. 10 quoted above:

> [W]hat are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning *private* debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail.[73]

Madison's point seems to be this: If we think of the legislature as a body of individuals, each of them representing private interests and themselves having private interests, then it is obvious that the legislature can potentially have a conflict of interest when it impairs private contracts. If the majority of legislators represent debtors (or creditors), or if the majority of legislators are themselves debtors (or creditors), then how can the legislature act impartially when a proposal is made to impair private debts?

Of course, it is also possible that the legislature would have a conflict of interest when it impairs public obligations. The legislators might be anxious to rid themselves, as representatives of the

73. THE FEDERALIST NO. 10, *supra* note 1, at 79-80 (emphasis supplied). Madison's argument occurs in the context of discussing the *causes* of factions, which are presumably the same at both the federal and the state level. (Madison identified these causes as "diversity in the faculties of men," which leads to unequal distribution of property, and "zeal for different opinions" concerning politics and religion. *Id.* at 78-79.) With respect to containing the *effects* of factions, however, Madison probably would not prescribe the same remedies for the two levels of government. Madison argued that the effects of factions could be controlled at the federal level because of "the greater number of citizens and greater sphere of country over which the latter may be extended." *Id.* at 82. Because of this greater sphere, there would be a "greater variety of parties and interests" making it "less probable that a majority of the whole will have a common motive to invade the rights of other citizens;" and it would be more difficult for those who share the same factional interest "to discover their own strength and to act in unison with each other." *Id.* at 83. At the state level, however, there will tend to be fewer factional interests and lower costs of collective action. Thus, the Madisonian analysis suggests that the *effects* of factions are apt to be worse at the state level than the federal level. This is one possible reason why the states were forbidden to enact legislation impairing contractual obligations, whereas no such limit was imposed on the federal government.

public, of an onerous public debt. But it is also possible that a majority of the legislature, as representatives of those holding government bonds or as holders of government bonds themselves, might be anxious to *secure* the payment of the government debt.[74] The point is that once "the legislature" is seen, not as a hypostatized entity having its own distinct interests, but as a collection of flesh and blood individuals having disparate interests and representing persons having disparate interests, then the conflict of interest point is by no means unique to public obligations. Moreover, as applied to public obligations, the conflict of interest problem does not necessarily favor impairment. It might just as easily bias the legislature *against* impairment.

Furthermore, the "fairness" of the process by which the legislature decides whether or not to impair a contract is not exclusively, or even primarily, a function of whether the government, as an entity, is interested in the outcome. Legislators respond to signals from a variety of sources including the administration, the media, their constituents, their contributors, and various and sundry lobbyists. The "access" of different groups to the legislative process will depend on a variety of factors, such as the size of the group, how well its interests are defined, how well it is organized, and the number of electoral districts in which it has a presence.[75] When these additional factors are considered, it is not at all clear that those holding government obligations are less likely to get a "fair hearing" before the legislature than are those holding private obligations.[76] In fact, from this perspective, the process theory becomes quite indeterminant. Certainly, it becomes problematic to state that, as a general matter, the process that leads to the impairment of

74. Charles Beard, of course, claimed that the framers' ulterior motive was to secure the payment of government debts at par. *See* C. BEARD, *supra* note 19, at 149-51. The Beard thesis has been heavily criticized, however, in part because of lack of evidence and because it ignores the latent conflict between holders of government debt and land speculators who planned to pay for their land in depreciated government paper. *See* F. MCDONALD, *supra* note 10, at 94-95. *See generally* ESSAYS ON THE MAKING OF THE CONSTITUTION (L. Levy ed. 1969).

75. *See, e.g.*, M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL MARKETS (1981); M. OLSON, THE LOGIC OF COLLECTIVE ACTION 135-65 (1965); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 726-28 (1985) (hypothesizing the varying political pressures exerted by diffuse and concentrated groups of minorities).

76. Social security recipients, for example, have been held to have no contractual rights vis-a-vis the government, Bowen v. Public Agencies Opposed to Social Sec., 106 S. Ct. 2390, 2398-99 (1986), Flemming v. Nestor, 363 U.S. 603, 608 (1960), and yet they have been highly successful in avoiding any reduction in benefits.

public contracts is less fair than the process that leads to the impairment of private contracts.

In sum, the process theory explanation for the dual standard, like the Kantian theory explanation, is underinclusive. The process theory suggests that the legislature may not be able to determine in an impartial manner whether to impair a public obligation. But similar considerations suggest that the legislature may not be an impartial arbiter when someone proposes to impair a private obligation. Thus, the process theory provides only a weak foundation for greater judicial scrutiny of public contract impairments.

C. *The Utilitarian Theory*

The third justification for the dual standard of review is utilitarian. This theory reflects the notion that courts should give greater protection to public contracts in order to increase public confidence in the government. Although the point can be generalized to a wide variety of government promises, it is illustrated most easily with respect to government bonds and other financial obligations. If courts refuse to permit governmental entities to impair their financial obligations, this will enhance the security of government debt. The greater the security of government debt, the lower the rate of interest the government will have to pay to borrow money. The less interest the government must pay, the less revenue it will have to raise in taxes. Thus, although politicians might find it expedient in the short run to consider reneging on particular financial obligations, in the long run taxpayers will be better off if there is a constitutional rule, strictly enforced by the courts, that forbids attempts to impair government obligations.

The utilitarian theory is hinted at in the *Gold Clause Cases* as well as in several more recent opinions.[77] But its most prominent advocate is Professor Tribe. As he puts it:

> For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argu-

77. Hughes intimates the utilitarian theory when he theorizes that allowing Congress to "disregard the obligations of the Government at its discretion" would render the credit of the United States "an illusory pledge." *Perry*, 294 U.S. at 350. Blackmun hints at it in *United States Trust* when he emphasizes the "special status of a State's financial obligations . . . ." *United States Trust Co.*, 431 U.S. at 26. Finally, this theme is also stressed in more recent opinions, where it has been noted that "In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 n.14 (1983).

> ment may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*[78]

As with the Kantian and process theory arguments, one can question the validity of the underlying premise of the utilitarian theory: that politicians will be tempted to repudiate government obligations in order to secure short-term gains that produce larger long-term losses. The behavior of governments, like most large institutional borrowers, is carefully monitored by credit-rating agencies like Moody's and Standard and Poor's. If a particular government entity, such as the bi-state agency involved in *United States Trust*, decides to repeal a security provision in its bond agreements, and this decision would materially impair the security of its outstanding bonds, then the monitoring agencies will lower the government's credit-rating.[79] A lower credit rating will translate almost immediately into higher costs of borrowing. If the additional borrowing costs are high enough, and if they come quickly enough to affect the same generation of politicians who decided to impair the security provision, the problem posited by the utilitarian theory should be largely self-correcting.[80]

Again, however, I will assume for the sake of argument that the utilitarian argument has identified a genuine "prisoner's dilemma," a situation where there is a strong temptation for actors to "defect" in the short run, even though the optimal long-run strategy would be to "cooperate."[81] Nevertheless, even on this assumption, the utilitarian argument does not support giving greater protection to public than to private obligations. The basic problem is the same as that encountered with respect to the Kantian and process theories:

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78. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 470 (1978) (emphasis in original) (footnote omitted). Tribe's formulation of the argument, by referring to "notions of fairness," also has overtones of the Kantian argument.

79. In fact, abrogation of the security provision in the Port Authority bonds did not change their rating, which suggests that the security provision was not material. *United States Trust Co.*, 431 U.S. at 19. Alternatively, of course, the rating agencies may have thought that the repeal would be declared unconstitutional, and so they discounted its significance.

80. Justice Brennan made this argument in opposition to the dual standard in *United States Trust*. *United States Trust Co.*, 431 U.S. at 61-62 (Brennan, J., dissenting).

81. *See, e.g.*, J. ELSTER, ULYSSES AND THE SIRENS 19, 21, 47, 120 (1979); R. HARDIN, COLLECTIVE ACTION 22-30 (1982). Strictly speaking, the "game" is here being played between debtors and creditors, not between the legislature and either or both of these parties. In drawing the analogy to game theory, I am assuming that the legislature simply acts as an agent executing the decisions of the principals (although in the case of public contracts, the legislature is in a sense both the principal and an agent).

on close examination, the destinction between public and private contracts disappears.

First, the propensity of politicians to trade short-term gains for long-term losses affects private obligations as well as public obligations. Just as the legislature that impairs public contracts will require the government to pay higher interest rates in the future, and thus will impose higher taxes on future taxpayers, so the legislature that impairs private contracts will require private borrowers to pay higher interest rates in the future (or to pay other costs designed to offset greater risks). The analysis is exactly the same in both cases: the greater the uncertainty of repayment, the higher the rate of interest demanded by creditors.[82] In both cases, "defection" is a more costly strategy than "cooperation," but defection will prevail over cooperation unless the parties are constrained in some manner by application of the contract clause. Indeed, it is possible to push this line of inquiry one step further and ask, in which context is the legislature more likely to ignore long-term costs: when the effect of impairment is to raise taxes, or when the effect is to impose higher interest charges on a diffuse collection of future borrowers? It is not implausible to suppose that the temptation to defect will, if anything, be stronger where private contracts are involved than where public obligations are concerned.

Second, although the utilitarian argument supports the sanctity of contract when the government "enters financial or other markets,"[83] not all public contracts are so clearly utilitarian. In the private sphere, there are obvious examples of nonutilitarian contracts, such as contracts for murder or contracts in restraint of trade. Surely we would not want the contract clause to prohibit regulation of these sorts of agreements. Similarly, the history of the contract clause suggests that many public contracts are of dubious utility. The facts of *Fletcher v. Peck* and *Charles River Bridge* suggest one type of problem. An even more striking illustration is provided by the history of the Crescent City Company, a stockyard and

82. Indeed, the two phenomena—higher interest rates and higher taxes—may have more than a theoretical equivalence. Consider, for example, the probable effect of legislation postponing foreclosure on farm loans. *See generally* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding mortgage moratorium against contract clause challenge). Private lenders would undoubtedly respond to such legislation by demanding a higher rate of interest on future loans to farmers. These higher interest rates would in turn lead to demands for federal loan programs, loan subsidies, or loan guarantees. Taxpayers could thus end up paying the bill either way.

83. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 n.14 (1983).

slaughterhouse operation granted a statutory monopoly in New Orleans by the Reconstruction-era Louisiana legislature.[84] This particular public contract was made in 1869 and effectively repealed in 1879, when a new state constitution was adopted prohibiting monopolies. In the *Slaughter-House Cases*, the Supreme Court held that the original contract did not violate the fourteenth amendment.[85] In *Butchers' Union Co. v. Crescent City Co.*,[86] the Court held that the repeal did not offend the contract clause.[87] In effect, the Court held that such monopolies are revocable licenses. They may be granted by the legislature, but the legislature is free to revoke them at any time.

What would be the utilitarian rule with respect to monopoly charters such as that given to the Crescent City Company? Would it be, as Justices Marshall and Story would probably maintain, that the charter is a property right, protected against subsequent impairment by the contract clause? Would it be, as the Court held, that it is a revocable license? Or would it be the position of Justices Field and Bradley, dissenting in the *Slaughter-House Cases*, that such charters are void *ab initio*, that is, that the government has no power to create them in the first place?[88] Many economists would probably maintain that Field and Bradley had the right approach, and that government-sponsored monopolies should be treated no differently than private contracts in restraint of trade. In any event, the history of the Crescent City Company hardly supports the proposition that it is always utilitarian to enforce public contracts more vigorously than private contracts.

In the end, the utilitarian justification for the dual standard is both underinclusive and overinclusive. Moreover, like the previous theories, it provides a justification for extending the protections of that clause to at least some public contracts. But again, as in the case of the Kantian theory and the process theory, it does not support a general rule giving public obligations greater protection than private obligations.

84. *See* Franklin, *The Foundation and Meaning of the Slaughterhouse Cases*, 19 TUL. L. REV. 1, 23-28 (1943).

85. 83 U.S. (16 Wall.) 36, 81-83 (1873).

86. 111 U.S. 746 (1884).

87. *Id.* at 752-54.

88. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 87-89 (Field, J., dissenting); *id.* at 119-21 (Bradley, J., dissenting).

III. EXPLAINING THE DUAL STANDARD

Whether considered in isolation or cumulatively, the stated justifications for giving greater protection to public than to private contracts seem too weak to support the Supreme Court's resounding endorsement of the dual standard. In this section, I will consider whether, if it cannot be justified, the dual standard can at least be explained in terms of broader trends in constitutional law. The dual standard made its first appearance in the *Gold Clause Cases*, on the eve of a historic confrontation between President Roosevelt and the Supreme Court that is widely regarded as an important turning point in modern constitutional law. Perhaps then the dual standard can at least be rendered comprehensible if we think of it as part of the general transformation in constitutional law that has occurred in the last fifty years.

Although it is a commonplace notion that constitutional law has undergone significant changes since roughly 1937, there are several different ways of characterizing these changes. Most of these characterizations appear to offer no explanation for the dual standard. There is at least one possible characterization, however—what I will call the "death of contract" theory—that can help to make sense of the dual standard. Before turning to that model, however, I will consider other, more common, characterizations of the transformation of constitutional law, and will indicate briefly why I think they lack explanatory power.

First, the transformation in constitutional law is often described in terms of a shift from judicial activism to judicial restraint.[89] Before 1937, in the *Lochner* era[90] the federal courts are considered by some to have engaged in impermissible activism by striking down legislative reforms without having any clear constitutional mandate for doing so. After 1937, with only occasional relapses, courts have generally respected the decisions of the majoritarian institutions in areas where there is no textual justification for judicial intervention.

It is debatable at best whether the contrast between judicial activism and judicial restraint captures the distinction between the *Lochner* era and the present.[91] Whatever its general merit, how-

89. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

90. *See* Lochner v. New York, 198 U.S. 45 (1905).

91. As the controversy surrounding Roe v. Wade, 410 U.S. 113 (1973) suggests, "activ-

ever, the distinction clearly fails to explain either the demise of the contract clause or the rise of the dual standard. Unlike *Lochner* substantive due process, which has been described as a constitutional oxymoron,[92] the contract clause has a highly secure source in the constitutional text—article I, section 10. Moreover, unlike substantive due process, which was at odds with the Court's initial interpretation of the meaning of the fourteenth amendment,[93] the contract clause had been construed almost from the beginning as a potent limitation on state economic regulation.[94] Thus, the dual standard cannot be ascribed to a shift from judicial activism to judicial restraint, but understood as a movement toward greater fidelity to the constitutional text.

Second, the contrast between the *Lochner* era and the present is often described as a turn from judicial preoccupation with "economic rights" to solicitude for "civil rights" (also variously described as "human rights" or "individual rights").[95] According to this view, the central lesson of *Lochner* is that it is dangerous and ill-advised for courts to get involved in controversies about economic theory.[96] Economic issues, it is argued, have no principled answers, at least none that can be discovered by the judicial method. So these matters are best left to legislatures and administrative agencies. Civil rights issues, in contrast, do have principled answers that can be determined, or at least discussed, in the language of litigation. The constitutional transformation of the last fifty years, in this view, represents a gradual judicial awakening to this fundamental insight.

Whatever its merits as a normative standard,[97] the economic rights/civil rights dichotomy also fails to explain the dual standard. Both private contracts and public contracts generally involve what would be considered economic rights. Thus, if the transformation of the last fifty years were simply a matter of judicial preoccupation

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ism," defined as the lack of fidelity to the constitutional text, is still very much a live issue. *See generally* J. ELY, *supra* note 67; M. PERRY, *supra* note 72.

92. J. ELY, *supra* note 67, at 14-18.

93. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

94. *See supra* notes 25-32 and accompanying text.

95. *See* M. PERRY, *supra* note 72; J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-128 (1980).

96. This is the argument of Justice Holmes' dissenting opinion in *Lochner*, 198 U.S. at 74, which is today invariably portrayed as the better view.

97. The distinction has been attacked from both the right, *see* M. FRIEDMAN, CAPITALISM AND FREEDOM, ch. 1 (1962), and the left, *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

with civil rights at the expense of economic rights, one would expect courts to give equal deference to impairments of private and public contracts. The emergence of the dual standard suggests that this has not happened, or at least that the economic rights/civil rights distinction does not tell the whole story.

Finally, the constitutional transformation can be described as a shift from protection of "private rights" to advancement of "public values."[98] Under this view, courts in the *Lochner* era used the Constitution as a shield to protect common law property and contract rights against legislative inference. Today, common law property and contract rights are regarded as appropriate subjects for legislative regulation, and the Constitution is regarded as a sword for the furtherance of public rights—rights derived not from common law but from legislative programs or judicial interpretation of broad constitutional guarantees. This characterization of the change in public law since 1937 can explain a number of developments. Some examples include the demise of the public use limitation on the power of eminent domain,[99] the decline of the nondelegation doctrine,[100] the expansion of standing,[101] the extension of procedural due process rights,[102] the increased use of Section 1983 as a means

98. *See* Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Stewart, *The Reformation of American Administration Law*, 88 HARV. L. REV. 1667, 1671-76 (1975); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1984 SUP. CT. REV. 177, 179-89 (1984).

99. *See* Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 68 (1986).

100. *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 685-88 (1979) (Rehnquist, J., concurring).

101. The old understanding was that standing to sue was largely, if not entirely, limited to those who alleged the deprivation of some common law right of liberty or property. Today, citizens who assert statutorily-created and defined rights not having any common-law analogue also frequently have standing. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (anti-discrimination group has standing to sue under the Fair Housing Act, 42 U.S.C. § 3604 (1982)); United States v. SCRAP, 412 U.S. 669 (1973) (unincorporated association of law students have standing to sue the Interstate Commerce Commission under the Administrative Procedure Act, 5 U.S.C. § 555 (1982)).

102. The old understanding was that due process required the state to provide a hearing before impinging upon an individual's liberty or property rights. *See* Southern Ry. v. Virginia, 290 U.S. 190 (1933) (state statute requiring installation of overhead rail crossings on the order of an administrative officer violates procedural due process because no notice or opportunity for hearing were provided for); Londoner v. Denver, 210 U.S. 373 (1908) (right to file objections to increased tax assessments does not satisfy the due process requirement without notice and opportunity for a hearing). State-created rights, in contrast, were viewed as "privileges," and were afforded no independent constitutional procedural protection. *See* Crowell v. Benson, 285 U.S. 22, 57 (1932) (public rights have no claim to article III protection); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by equally divided Court*, 341 U.S. 918 (1951) (due process does not require that employee of the federal government be

of regulating state and local government affairs,[103] and the use of "structural injunctions" by federal courts to supervise hospitals, prisons, and school systems.[104]

More significantly for present purposes, this characterization of the constitutional transformation may better explain the dual standard of review under the contract clause. Clearly, the idea of the constitution as a shield for the protection of private rights seems consistent with the nineteenth century interpretation of the contract clause. Consequently, legislative impairment of private contracts was subject to rigorous judicial oversight.[105] The public contracts, in contrast, were viewed as the domain of special privileges and monopoly preferences; accordingly, legislatures were given fairly wide latitude, either through the doctrine of strict construction, or through the reserved and inalienable powers doctrines, to overturn existing public contracts.[106] Today, the courts' perception of contractual reality has reversed. With respect to private contracts, market failure is presumed to be a pervasive problem, requiring that states be given broad leeway in policing private contracts. Public contracts, in contrast, viewed as devices for furthering legitimate public policy goals such as "[m]ass transportation, energy conservation, and environmental protection,"[107] may be viewed as much more valuable than they were in the nineteenth century. Thus, public contracts, as a necessary element in the regulatory and redistributive activities of the administrative state, arguably may have become more important than private contracts, and are therefore entitled to greater judicial protection.

On closer examination, however, the private rights/public values distinction also fails as an explanation for the dual standard. When the legislature impairs a private contract, the contractual obligation is clearly a "private right," and the decision to impair the contract presumably reflects "public values." Thus, a judiciary that

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granted a hearing before being dismissed). Today, state-created rights are referred to as "new property," and are often given equal or even greater procedural protection than are conventional rights of private property. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits are a statutory entitlement that cannot be terminated without prior notice and hearing).

103. *E.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978) (City of New York liable under § 1983 for back pay of female employees forced to take maternity leaves before medically necessary).

104. *See, e.g.*, Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

105. *See generally* Siegel, *supra* note 2.

106. *Id. passim*.

107. United States Trust Co. v. New Jersey, 431 U.S. 1, 28 (1976).

views public values as being superior to private rights would be inclined to defer to the legislative decision to impair the contract. But when the legislature impairs a public contract, both the contractual obligation *and* the decision to impair presumably reflect public values. The original obligation was authorized, either directly or through delegation, by the legislature. However, the decision to impair the obligation is also authorized, directly or indirectly, by the legislature. Thus, it is not clear how, if at all, the judicial attitude toward impairment of public contracts would change if the judiciary came to perceive public values as worthy of greater judicial protection than private rights.[108]

Fortunately, there is another characterization of the constitutional transformation, related to and yet distinct from the third, that finally seems to provide an explanation for the dual standard. The change in constitutional law can be seen as part of a general jurisprudential transformation that Grant Gilmore has described as "the death of contract."[109] In this view, the legal system of the *Lochner* era was predicated on a belief in individual accountability and freedom of contract.[110] Consequently, contractual obligations undertaken by consenting adults were entitled to great judicial so-

108. Actually, the matter is slightly more complicated. If the judicial attitude toward impairment of *private* contracts shifted from strongly anti-impairment to strongly pro-impairment, while the attitude toward impairment of public contracts remained basically unchanged, this would yield an alternation in the relative status of private and public obligations. Public contracts would stand higher relative to private contracts than before. But the private rights/public values dichotomy still does not permit one to predict the emergence of the modern dual standard. It would all depend on where the judiciary stood with respect to the impairment of public contracts before the inversion in attitudes toward private contracts took place. If the judiciary took a generally permissive attitude toward impairment of public contracts before the transformation, then the inversion in attitudes about private contracts might leave public contracts on a par with private contracts. Indeed, if as the framers apparently intended, the judiciary viewed the contract clause as imposing no restraints on impairment of public contracts, then even after the inversion private contracts would end up higher on the totem pole than public contracts.

109. *See* G. GILMORE, *supra* note 62, at 95-96. *See also* Priest, *supra* note 62.

110. This is confirmed by comparing *Lochner* with other cases of the same era that upheld legislative interferences with liberty of contract. In *Lochner*, the Court struck down a statute limiting the hours of bakery workers, observing: "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power . . . ." 198 U.S. at 61. However, when the Court encountered statutes limiting the contractual freedom of children, *e.g.*, Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913); women, *e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); or employees in industries, such as mining, where there was little perceived contractual choice, *e.g.*, Holdin v. Hardy, 169 U.S. 366 (1898); it generally upheld the restraint. In the latter situations, the Court did not find the paradigm of individual autonomy applicable.

licitude. Today, the legal system is based on a view of individuals not as autonomous actors responsible for their own decisions, but as holders of certain prescriptive rights and obligations not subject to contractual modification. In common law terms, we have moved from a regime of contract to a regime of tort; in public law terms, we have gone from a philosophy of laissez faire to the philosophy of the welfare state.

At first it might seem that the contract/tort version of the constitutional transformation cannot account for the dual standard any more than the other versions. After all, the dual standard says that at least some kinds of contracts—government contracts—are still entitled to a significant degree of judicial protection, and this seems to suggest that at least some kinds of contracts are not, at least for purposes of constitutional analysis, "dead." But at a deeper level, the demise of constitutional protection for private contracts, combined with the rise of a new level of protection for government contracts, is consistent with the death-of-contracts model. All that is necessary to make the dual standard fit this model is to posit that public contracts are not "really" contracts, in the sense of bargained-for exchange between consenting actors, but rather are a species of government "entitlements." If public contracts are seen from the perspective of the promisee as a form of entitlement, then they become part of the general package of tort-like ascriptive rights and obligations that finds such favor with modern courts.

Do modern courts in fact view public contracts as "entitlements?" At least one line of cases—those concerned with defining the dimensions of procedural due process rights—suggests that they do. Beginning with *Perry v. Sindermann*[111] in 1972, the Supreme Court has consistently held that public contract rights are "property" for purposes of due process. Thus, the government cannot breach its contract without affording the promisee a proper hearing. Significantly, however, the Court has steadfastly refused to apply a traditional contract analysis to determine what sorts of procedures are required. The promisee is not limited to the procedural rights he bargained for in entering into the contract.[112] Instead, the Court has taken the existence of a public contract as an occasion for *prescribing* what the Court considers to be an appropriate package of procedural protection for the promisee.[113] This suggests that public

111. 408 U.S. 593 (1972).

112. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Vitek v. Jones, 445 U.S. 480, 491 (1980); Arnett v. Kennedy, 416 U.S. 134, 166-67 (Powell, J., concurring).

113. For criticism of the Court's noncontractual approach see Easterbrook, *Substance*

contracts, no less than welfare benefits or antidiscrimination laws, are viewed as public entitlements entitled to special judicial protection.

In short, the dual standard can be explained in terms of the death-of-contract interpretation of the general transformation in constitutional law. One aspect of that transformation is a decline in the idea of freedom of contract. This is reflected in the evisceration of the contract clause as it applies to private obligations. Another aspect of the transformation is the rise of entitlements theory. This is reflected in the enhanced judicial protection given to public contracts, viewed as part of the package of rights the citizen has against the government. Indeed, it is possible, if present trends are not reversed, that the contracts clause will come to be viewed as having little or no bearing on legislative interference with private contract and property rights. Instead, the clause will be used as the substantive equivalent of the new property hearing rights, providing additional protection to government licensees, job-holders, and grant recipients beyond whatever rights may be spelled out by statute, regulation, or public contract.

CONCLUSION

Although it is possible, with some effort, to construct an explanation for the dual standard, we are still left with the problem of justification. To say that contract is dead and tort ascendant, and that the Supreme Court has come to view public contracts as a form of entitlements, can render the emergence of the dual standard comprehensible as a matter of intellectual history. But it does not, at least to my mind, answer the demand for a justification.

It is ironic that about the same time legal commentators were declaring the death of contact, and the Supreme Court, in *United States Trust*, was officially adopting the dual standard, officials of the Carter Administration were launching an aggressive program urging the deregulation of much of American industry. The premise of the deregulation movement, which accelerated during the early Reagan years, is that private markets—based of course on private contracts—work much better in allocating resources than does public regulation. Indeed, it is interesting that in many of the areas where contract clause controversies have been most prominent—such as the oil and gas and surface transportation industries—the

and Due Process, 1982 SUP. CT. REV. 85; Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

intellectual case for deregulation has generally been considered to be the strongest. This would suggest that private contracting should work relatively well in these industries, and that the efficiency costs of public regulation would be correspondingly high.

There is another reason why the institution of contract is preferable to a regime of tort. Modern public choice literature has emphasized the dangers of "rent-seeking" inherent in any system where the government uses its power to compel the transfer of resources from one person or group to another.[114] The potential for wasteful competition is clearly enhanced if private contracts may be set aside in favor of a system of ascriptive rights and obligations.[115] Although the terminology of public choice is new, the insight is not. As Madison wrote in *The Federalist*:

> 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 one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the efforts of the proceeding. 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.[116]

And which clause or provision of the Constitution elicited this passage? The contract clause, of course. Madison's diagnosis of the political ills of the day was very close to the modern analysis offered by public choice theory. The protection of previously-formed contracts against subsequent impairment was seen as a healthy antidote to the rent-seeking problem then. There is no reason to think that this analysis is any less valid today.

My own view is that the Court should eschew sweeping presumptions in favor of public contracts as opposed to private contracts, or for that matter, in favor of private contracts as opposed to public contracts. Instead, the contract clause should be applied by asking, in any given context, whether the institution of contract is

114. *See generally* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tellison & G. Tullock eds. 1980); Merrill, *Rent Seeking and the Compensation Principle*, 81 NW. U.L. REV. 1561 (1986).

115. *See* Epstein, *supra* note 2, at 714-17.

116. THE FEDERALIST NO. 44, *supra* note 1, at 282-83 (J. Madison).

more or less likely to advance the welfare of society than is a regime of public regulation. In other words, I would implement the contract clause by asking the courts to engage in a modest exercise in comparative institutional analysis.[117] In some contexts, private contracting should work reasonably well—better at least than public regulation—and in these contexts the contract clause should be enforced. In other contexts, public contracting may work well, in which case the contract clause should be available to protect against subsequent impairment of public contracts. Similarly, in some contexts private contracts are subject to high rates of failure, at least relative to public regulation, and in these circumstances we should permit contracts to be regulated. And of course, public contracts in some contexts can be problematic, in which case we would again want the state to be able to undo the promises of the past.

There are two powerful reasons why private and public contracts should be restored to an even playing field. First, it would restore continuity with our constitutional past. We are all familiar with the phenomenon of constitutional law evolving into something either much broader or narrower than was perhaps originally conceived. But it is one thing to countenance "a judicial oak which has grown from little more than a legislative acorn."[118] It is quite another to contemplate a judicial doctrine which has moved 180 degrees from both the original understanding and the first 150 years of our constitutional history. Although it is probably too late to return to the framers' expectation that public contracts would receive no protection under the contract clause, it is not too late to restore private contracts to at least equal status under the law.

Second, both private and public contacts *should* be protected against most forms of subsequent impairment. As the discussion in Part II suggests, there are good reasons to protect public contracts against later impairment, and these same reasons extend also to private contracts. The insights of the deregulation movement and of

117. *See generally* Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984). The point is a familiar one in law-and-economics literature: what is needed are not sweeping generalizations but hard-headed analysis of the merits of markets versus regulation in different institutional settings. *See* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW & ECON. 1 (1969). *See also* Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985) (level of judicial protection of economic rights should be determined by comparing error rate of judiciary and legislature).

118. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). The Court was speaking of the evolution of securities law, but the metaphor is equally apt with regard to constitutional law.

public choice theory only reinforce these considerations. The contract clause is not an extreme measure, like *Lochner's* substantive due process, that would bar any form of government regulation, whether or not the parties have previously settled their respective rights and obligations by contract. It has long been limited to interference with existing contractual obligations.[119] Given that the parties have already contracted, the only substantial justification for government intervention is to protect the rights of third parties who were not privy to the bargain. Today's dual standard, which essentially permits any private contract to be set aside upon a finding of a legislative "rational basis," promises not only to "impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith."[120]

119. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).
120. *Id.* at 355 (dissenting opinion).