Reconstituting American Federalism: The Marshall Court and the Contract Cases

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Introduction

In the late eighteenth and early nineteenth centuries, debates over the meaning and scope of the constitutional provision prohibiting states from passing any “Law impairing the Obligation of Contracts” figured prominently in America’s political-economic landscape.[[2]](#footnote-2) Much like debates over the Due Process Clause in the late nineteenth and early twentieth centuries or debates over the Commerce Clause during the New Deal,[[3]](#footnote-3) early American debates over the Contract Clause were fundamental in defining the contours of American federalism, the extent of the individual economic rights, and the power of courts to strike down democratically enacted legislation. Federalists, National Republicans, and Whigs were proponents of a vigorous and expansive Contract Clause, protecting individual rights. They found voice in the advocacy of Daniel Webster and the judicial opinions of Chief John Marshall and Justice Joseph Story. In opposition, Anti-Federalists, Jeffersonian Republicans, and Jacksonian Democrats supported a narrow Contract Clause, securing economic regulatory powers to the states. These views found their clearest expression through Chief Justice Roger Taney.

The importance of the early Contract Clause debates to American constitutional development has been inadequately understood, and scholars have tended to gloss over the substantial differences that separated the opposing participants in these debates.[[4]](#footnote-4) One purpose of this paper is to act as a corrective to the view that early American nationalist parties, influential on the Marshall Court, and early American localist parties, dominant on the Taney Court, were of the same mind when it came to the Contract Clause. A second purpose of this paper is to highlight how congressional inaction in the fields of commerce and bankruptcies shaped Supreme Court jurisprudence in the early nineteenth century. Much has been written on the Court and its power to review acts of Congress, but how Congress’s constitutional nonfeasance has shaped judicial decision-making is an area of constitutional thought that requires greater elaboration and theorization.[[5]](#footnote-5) A third purpose of this paper is to explore early iterations of the police powers doctrine and the states’ rights doctrine. It is commonly thought that the police powers doctrine was primarily the creation of Jacksonian-era courts.[[6]](#footnote-6) And of course, the South Carolinian statesman John C. Calhoun—who served as vice president, senator, representative, secretary of state, and secretary of war—most fully developed the states’ rights doctrine in his writings.[[7]](#footnote-7) This paper will help refine these views by showing how the Marshall Court and then the Taney Court created proto-doctrines of police powers and states’ rights to cope with congressional nonfeasance and with state regulation of contracts to a great extent than the Constitution’s framers had anticipated or than constitutional nationalists wanted.

To these ends, this paper proceeds as follows. The first section will give an overview of the Contract Clause, the Bankruptcy Clause, and their complementary role in the Constitution of 1787. The second section will cover competing views on the meaning of the Bankruptcy Clause that existed in late eighteenth and early nineteenth centuries. The third section will discuss the Bankruptcy Act of 1800 and that law’s repeal once Jeffersonian Republicans gained control of the federal government. The fourth section will address the adoption of state bankruptcy and insolvency laws—to fill the gap left by the Bankruptcy Act’s repeal—and the Marshall Court’s Contract Clause decisions in *Sturges v. Crowninshield*[[8]](#footnote-8) and *Ogden v. Saunders*, where state bankruptcy laws were ultimately upheld.[[9]](#footnote-9) The fifth and final section will discuss how the Supreme Court, in subsequent cases, developed early notions of police powers and states’ rights in an effort to theorize constitutional law and justify constitutional practice in the aftermath of its landmark bankruptcy and contract decisions. In this last section, some attention will be paid to the *Charles River Bridge* case,[[10]](#footnote-10) which marked the demise of the Contract Clause as a potential source of extensive individual rights and as a support for federal power.

I. The Constitution’s Contract and Bankruptcy Clauses[[11]](#footnote-11)

The Constitution’s Contract Clause provides: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]”[[12]](#footnote-12) While today, the Clause receives little judicial attention[[13]](#footnote-13) and hardly any scholarly attention,[[14]](#footnote-14) it was once considered a central, if not the most important, constitutional provision. Indeed, in the nineteenth century and especially before the Civil War, the Contract Clause was the most litigated provision of the Constitution. It “was the constitutional justification for more cases involving the validity of state laws than all of the other clauses of the Constitution together.”[[15]](#footnote-15) More than any other clause, the Contract Clause was the site for disputation over such issues as the balance between federal and state power, judicial and legislative power, and government regulation and individual economic freedom.[[16]](#footnote-16)

Speaking before South Carolina’s ratification convention in 1788, constitutional framer Charles Pinckney expressed his view that the Contract Clause lay at the Constitution’s core:

This section I consider as the soul of the Constitution,—as containing, in a few words, those restraints upon the states, which, while they keep them from interfering with the powers of the Union, will leave them always in a situation to comply with their federal duties—will teach them to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness.[[17]](#footnote-17)

By binding people to their contractual obligations—and thereby prohibiting the states from making anti-creditor, debtor-relief laws, which were endemic during the 1780s’ economic recession—Pinckney thought the Contract Clause, the Constitution’s “soul,” would help foster the conditions necessary for stability in national credit markets and long-term national economic growth. Rather than state governments, where the framers thought demagogic politicians were more likely to hold legislative power,[[18]](#footnote-18) the federal government ought to have the sole power to discharge or restructure debts. Under the Constitution, this power over debts was withheld from states by the Contract Clause and affirmatively granted to Congress by the Bankruptcy Clause.[[19]](#footnote-19) Without a Contract Clause holding back state legislatures and a Bankruptcy Clause empowering the national legislature, the framers thought Americans would hesitate to form commercial and other contracts, especially across state lines. Citizens needed the inducement of a constitutional guarantee that the laws on contracts and debts would be constant, national, and uniform.[[20]](#footnote-20)

In *Federalist* No. 62, James Madison drove this point home, rhetorically asking:

What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful [by some act of a state legislature] before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady stream of national policy.[[21]](#footnote-21)

Likewise, Secretary of the Treasury Alexander Hamilton, in a 1790 letter to President George Washington, stressed the Contract Clause’s centrally important role:

The Constitution of the United [S]tates interdicts the States individually from passing any Law impairing the obligation of contracts. This, to the more enlightened part of the community, was not one of the least recommendations of that Constitution. The too frequent intermeddlings of the state Legislatures, in relation to private contracts, were extensively felt and seriously lamented; and a Constitution which promised a preventative, was, by those who felt and thought in that manner, eagerly embrac’d.[[22]](#footnote-22)

Whatever else the framers might have intended when they drafted the Contract and Bankruptcy Clauses in 1787 and whatever else the ratification conventions might have thought when they consented to the framers’ handiwork in 1787–1790,[[23]](#footnote-23) the framers and the ratification conventions foremost sought to take away from the state governments their traditional power to regulate debts and to hand that power over to the federal government. The federal government, they thought, would be a safer repository for that power—less influenced by transitory popular passions and better able to consider the interests and needs of the nation as a whole. The Contract Clause and the Bankruptcy Clause, alongside the Commerce Clause and other constitutional provisions, embodied a political-economic vision far different from the vision of the Articles of Confederation—a vision, in some ways and to varying degrees, still held by Anti-Federalists and later by their Jeffersonian Republican and Jacksonian Democratic successors.[[24]](#footnote-24)

II. Competing Views on the Bankruptcy Clause

One of the first problems presented by the new Constitution was its implementation. It is no easy feat to establish a new national government, especially where no genuine national government, other than a deliberative assembly (the Confederation Congress) with limited legislative powers and no executive powers, had existed beforehand. The Constitution, among other powers, gave the revamped Congress the powers to lay and collect taxes for the general welfare, to organize a standing army and navy for national defense, to regulate commerce among the states and with foreign nations, to establish a system of federal courts, and importantly here, to pass “uniform” legislation on bankruptcies “throughout the United States.”[[25]](#footnote-25) What the Constitution did not make clear—and what would be a topic of significant debate—was how the federal government’s new powers fit with traditional state powers, existing since the colonial era and exercised by states under the old Articles of Confederation. How would the United States transition from the Articles of Confederation to the Constitution?[[26]](#footnote-26)

*A. An Exclusive Power of the Federal Government?*

One view, endorsed by many staunch Federalists, was that the Constitution’s enumerated powers are exclusive to the federal government. No state government could exercise a power that the Constitution assigned to the federal government, such as the power to make laws concerning bankruptcies, without violating the Constitution. In *Olden v. Hallet*,[[27]](#footnote-27) for example, New Jersey’s Supreme Court of Judicature adopted this position. Under the Constitution, it held, “[C]ongress has the exclusive power of making laws upon the subject of bankruptcies,” and any state law purporting to discharge “a debtor from his debts, without payment, if not a bankrupt law, is a law impairing the obligation of contracts, the power of making which is, by the said [C]onstitution, expressly forbidden to the individual states.”[[28]](#footnote-28) This Federalist position, providing as it did an absolute and clear answer to a difficult constitutional dilemma, was normatively attractive. The problem was that it left the law in limbo. What to do in the absence of a federal statute—before Congress had acted on a subject? By what rules were early courts to decide cases falling within their jurisdictions, not only on bankruptcies but on all matters assigned to Congress?[[29]](#footnote-29)

*B. A Concurrent Power of the Federal and State Governments?*

A second view, endorsed by many Anti-Federalists and then by many Jeffersonian Republicans, was that the powers of Congress and the states are concurrent. And where the Constitution does not expressly prohibit a power to the states, they argued, the states could exercise it. A version of this position appears most famously in a case that was not about bankruptcies, *McCulloch v. Maryland*.[[30]](#footnote-30) All scholars and students of the Constitution are probably familiar with the first part of the Supreme Court’s unanimous decision. There, Chief Justice John Marshall upheld Congress’s chartering of a national bank as a valid exercise of the power to make necessary and proper laws.[[31]](#footnote-31) The second, less famous part of that decision, however, is the part relevant here. After establishing the constitutionality of the national bank, the Court had to decide whether Maryland’s attempt to tax that bank was constitutional. Maryland had argued that it could tax the national bank because nowhere did the Constitution expressly forbid to states such a taxation power. Chief Justice Marshall wrote:

[T]axation is said [by Maryland] to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction.[[32]](#footnote-32)

As the *McCulloch* Court construed the Constitution, its text did not expressly forbid states from levying taxes on federal instrumentalities. But allowing any state to do so would upset federal purposes. “[T]he power to tax involves the power to destroy,” said Chief Justice Marshall.[[33]](#footnote-33) If Maryland were permitted to tax the bank, then it could control and destroy the bank, and “there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another.”[[34]](#footnote-34) The principles of the Constitution and its structure, not its express provisions, prevented Maryland from levying its discriminatory tax.

As to bankruptcies, the Jeffersonian Republican argument was similar to Maryland’s argument in the taxation context. Many Jeffersonian Republicans thought the power to legislate on bankruptcies was a concurrent power, simultaneously held by the federal government and the state governments. Nowhere did the Constitution expressly forbid state bankruptcy laws, and the states had long enjoyed the power to pass legislation on the subject. Functionally, it is not clear how Jeffersonian Republicans thought concurrent federal and state bankruptcy systems would work. One possibility, I imagine, is that insolvent debtors would have the choice to declare their bankruptcies in federal or state court. If they declared in a federal court, the discharge of debts would at least be good as to actions in federal courts. And if they declared in a state court, the discharge would at least be good as to actions in the courts of that state. Whether state courts would recognize federal discharges, whether federal courts would recognize state discharges, and whether states would recognize each other’s discharges were matters left up in the air. Perhaps Congress, using the Full Faith and Credit Clause,[[35]](#footnote-35) could resolve such eventualities.[[36]](#footnote-36)

*C. A Dual-Federalist Conception of the Power?*

Yet a third view, drawing on the old laws of England, sought to draw a line between debtors under federal jurisdiction and debtors under state jurisdiction. According to this dual-federalist view, the federal government had jurisdiction over some debtors and creditors, whereas the state governments had jurisdiction over others. As the proponents of this view construed English law, *bankruptcy* was “a compulsory form of process confined to traders,” whereas *insolvency* applied to ordinary people unable to pay their debts.[[37]](#footnote-37) Transported across the Atlantic, proponents thought, the federal government had a *bankruptcy* power to discharge the debts of traders, or people engaged in interstate commerce, while the states had an *insolvency* power to discharge the debts of non-traders, or people whose debtor–creditor relations were purely within a single state.

This third view, though, had two major problems. First, as one commentator has pointed out, the formalistic distinction between *bankruptcy* and *insolvency* was already “obsolescent in England, as everybody interested in matters [of] English [law] could know from the monumental study of one of the English commissioners of bankruptcy published a few years before the Constitutional Convention opened.”[[38]](#footnote-38) By 1787, bankruptcy and insolvency had merged and become synonymous under English law. Second, as the famous legal scholar Charles Warren observes, “Nowhere in the States, other than Pennsylvania, . . . does there seem to have been the clear line of demarcation which [had] existed in England between a bankruptcy system and an insolvency system[.]”[[39]](#footnote-39) Thus, when the Constitution’s framers gave Congress the power to legislate “on the subject of Bankruptcies throughout the United States,”[[40]](#footnote-40) they almost certainly intended to cover all debtors and not just traders. To maintain the contrary position, one would have to show that the framers believed in an artificial distinction that, by 1787, England had abandoned and that twelve out of the thirteen states had abandoned as well.

If English law and the laws of almost all the states were not evidence enough, then compare the language of the Bankruptcy Clause, which applies “throughout the United States,” with the language of the neighboring Commerce Clause, which applies “among the several States.”[[41]](#footnote-41) Looking at both dictionaries then and dictionaries today, one will find that the word *throughout* has a broader meaning than the word *among*. And, what is more, the term *United States* surely signified a more expansive power than the term *several States*. Consider also that one of the main concerns that motivated the Constitutional Convention was improvident and inconstant debtor-relief laws in the states. Indeed, debtor-relief legislation was the primary reason for the framers to draft the Contract Clause, limiting state regulatory authority.

*D. A Dormant Power of the Federal Government?*

The fourth major view of the Bankruptcy Clause, in the years following ratification, held that Congress’s bankruptcy power lay dormant until Congress exercised it. This view solved the transition problem: how to move from the old Articles of Confederation to the new Constitution of 1787 without creating a gap—an interregnum where no law governed in certain fields. Under this conception, state bankruptcy laws would remain effective until Congress created a national bankruptcy law, replacing state bankruptcy laws. Several states and some courts quickly adopted this view. And Congress appears to have tolerated or even legitimized this position, for in 1790, the First Congress, which did not pass a federal bankruptcy statute, “enacted legislation that gave the federal government a priority in [state] bankruptcy proceedings.”[[42]](#footnote-42)

One example of the dormant-power view was the decision of Connecticut’s Superior Court in the 1795 case *Pettit v. Seaman*.[[43]](#footnote-43) Petit and Seaman were citizens of New York, and there, Petit had become indebted to Seaman by about £350 (about $15,000 today). When Petit was visiting Connecticut, Seaman filed for a writ of attachment and had Petit imprisoned in the “common gaol” at Fairfield. Petit sought to be released from the debtors’ prison, arguing that a New York court had discharged his debt to Seaman in 1793, more than a year earlier.[[44]](#footnote-44) The Connecticut court agreed, first holding:

[B]y the Constitution of the federal government, to which all the states are parties, full faith and credence [sic] is to be given, by each state to the laws, records and judicial proceedings of the other states; we are therefore bound to respect the laws and judicial proceedings of the state of New York, respecting the inhabitants residing under their government and the contracts entered into under its laws.[[45]](#footnote-45)

Next, the Connecticut court rejected Seaman’s argument that New York’s discharge of Petit’s debt to him was unconstitutional. The court wrote:

As to the objection made to the constitutionality of the act of the state of New York, respecting insolvency, drawn from the Constitution of the federal government having vested Congress with the sole power of making general laws of bankruptcy, that never can be understood and construed, to supersede the power of the state governments, to make and to continue in force and exercise their respective insolvent laws, until Congress shall exercise the powers vested in them, by making and promulgating general laws of bankruptcy through the states, which will be the supreme law of the land. This not having been done at this time, the law of the state of New York is in force.[[46]](#footnote-46)

Thus, notwithstanding the Bankruptcy Clause, which admittedly “vested Congress with the *sole power* of making general laws of bankruptcy,” and the Contract Clause, which the opinion did not specifically cite but which prohibited state laws impairing contractual obligations, the Connecticut court upheld New York’s bankruptcy and insolvency system. That system, to be sure, was not meant to be a permanent solution but a stopgap—a temporary measure remaining “in force . . . until Congress shall exercise the powers vested in them.”[[47]](#footnote-47)

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In sum, four major views about the bankruptcy power prevailed in the years following the Constitution’s ratification. First, the most ardent Federalists held that Congress’s power over bankruptcies was exclusive and that all state bankruptcy and insolvency laws were therefore unconstitutional. If debtors wanted their debts to be discharged, then they had to persuade Congress to pass a general bankruptcy statute as soon as possible. Second, many Jeffersonian Republicans argued that the bankruptcy power was concurrently held by the federal government and state governments because no provision of the Constitution expressly prohibited the states from making such laws. According to this view, insolvent debtors could have their debts discharged under a federal system or a state system. What was unclear was whether these systems would honor and enforce each other’s decisions. The third and fourth views, held by moderates in both parties, sought out “a kind of muddled, middle-ground position.”[[48]](#footnote-48) Under the third view—a dual-federalist position—the federal government held constitutional power as to some debtors, primarily traders and other persons engaged in interstate commerce, while the states held power to discharge everyone else’s debts. Under the fourth and final view, which this paper has termed the dormant-power position, Congress was thought to hold exclusive power to make bankruptcy laws, as with the hardline Federalist position. However, the chief difference with the hardline Federalist position was that state bankruptcy and insolvency systems would remain in place until Congress exercised its power and created a national system.

Of course, implicit in this last, dormant-power view was the belief that Congress would, in fact, pass a general bankruptcy law soon after the Constitution’s ratification, at which point the state systems would disappear. This did not happen, and the Supreme Court was forced to cope with Congress’s nonfeasance, in landmark Contract Clause cases, through a creative re-theorization of constitutional law and justification for constitutional practice. Early versions of the police powers doctrine and the states’ rights doctrine were the results. These doctrines both conceded to the states an inherent or residual sovereignty, preexisting the Constitution and continuing under the Constitution. Whatever one thinks of these doctrines, they undoubtedly worked a transformation in American federalism. They reconstituted the federal system that the Federalist framers had envisioned in the Constitution of 1787. These doctrines shifted the balance of power between the federal government and the states in lasting ways.

III. The Bankruptcy Act of 1800 and Its Repeal

* Panic of 1796–1797 and Quasi-War with France cause widespread indebtedness.
* After several failed attempts, Congress passes Bankruptcy Act in 1800.
* John Marshall, as Virginia congressman, is Act’s principal author.
* The Act applies only to merchants—see dual-federalist view above.
* Commercial interests, represented by Federalists, support the legislation, whereas agricultural interests, represented by Republicans, oppose the legislation.
* Mostly party-line votes: 49 to 48 in House, 16 to 12 in Senate.
* Election of 1800: Jefferson wins presidency, Republicans win House.
* Election of 1802: Republicans win convincing Senate majority.
* 1803: Republican Congress repeals Bankruptcy Act of 1800 with 99 to 13 votes in the House and 17 to 12 votes in the Senate; Jefferson signs the repeal into law.

IV. The Court’s Ratification of State Bankruptcy Laws

* In aftermath of 1803 repeal, states retain or pass new bankruptcy statutes.
* 1812: Justice Story, riding circuit, dodges state bankruptcy question.
* 1814: Justice Washington, riding circuit, holds PA statute unconstitutional.
* 1816: U.S. circuit court strikes down SC statute as unconstitutional.
* 1817: Justice Livingston, riding circuit, upholds NY statute, creating a split.
* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819): Supreme Court, speaking through Chief Justice Marshall, delivers extremely vague decision; holds that NY statute, as applied, violates Contract Clause; endorses dormant-power position.
  + Question: Is power still dormant if Congress exercised it in 1800–1803?
  + See Charles Warren book, citing confusion among newspapers about the decision’s meaning and its implication for other state bankruptcy systems.
* Over next eight years, lower courts basically ignore *Sturges*’ existence, applying state bankruptcy statutes as if there’s nothing unconstitutional about them.
* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827): Supreme Court again considers constitutionality of NY’s bankruptcy statute; Daniel Webster argues case on behalf of creditors; this time, the Court upholds the statute in a 4–3 decision; all four justices in the majority write their own opinions; the swing vote is Justice Washington, who flips from Federalist side to Republican side between his 1814 opinion (see above) and his 1827 opinion here; Chief Justice Marshall writes strong dissenting opinion, joined by Justices Duvall and Story; Chief Justice Marshall argues that state bankruptcy laws violate a natural right to contract, protected by the Contract Clause.

V. The Emergence of the Police Powers and States’ Rights Doctrines

* Three weeks after *Ogden v. Saunders*, Supreme Court coins “police power” in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (a taxation and commerce case).
* In subsequent cases, mostly Contract Clause cases, the Supreme Court builds up police powers doctrine, implicitly admitting residual sovereignty in states.
* 1826 elections: Jacksonian Democrats take Congress a few months before *Ogden* and *Brown* decisions, discussed above.
* 1828 election: Jackson wins presidency.
* 1829–1836: Jackson replaces five out of seven justices.
* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837): less than a year into the Taney Court, five justices, all appointed by Jackson, gut the Contract Clause; both justices who are not Jackson appointees, including Justice Story, dissent.
  + Analogy to Supreme Court in 1937—100 years later?
* Congressional inaction, rather than action, constrained Court in 1803–1820s.
  + If Court had struck down state bankruptcy laws, then legal vacuum and potential backlash from both Congress and the White House.
  + So Court upheld state bankruptcy laws, against Constitution’s text.
* Jackson’s Supreme Court appointees dealt final blow to the Federalist political-economic vision with their *Charles River Bridge* decision in 1837—inaugurated a new jurisprudence, where states were central actors in the federal system.
* Comprehensive federal bankruptcy system not created until 1898—demands of industrialization eventually forced Congress’s hand.

Conclusion

* 19th century decisions 🡪 federalism we have today.
  + Other influences: Reconstruction, New Deal.
* Congressional inaction 🡪 innovations in Supreme Court doctrine.
* Congressional inaction 🡪 states fill the vacuum left by Congress.
* Comparisons with contemporary issues: climate change? immigration?
  + If federal government doesn’t act, can/should states?

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2. U.S. Const. art. I, § 10, cl. 1. [↑](#footnote-ref-2)
3. For discussions on the Due Process Clause debates, see generally Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993); David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2011). On the Commerce Clause debates, see generally Bruce Ackerman, *We the People: Volumes 1 & 2* (Cambridge, MA: Harvard University Press, 1991 & 1998); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998). [↑](#footnote-ref-3)
4. Robert McCloskey’s *The American Supreme Court* is but one illustrious example. In his view, the Marshall and Taney Courts were more alike than unalike. McCloskey criticizes the “Webster-Story fraternity” and their “legend of Taney and his brethren as radical democrats, hostile to property rights, nationalism, and Marshall’s memory.” He writes further, “It is true that the basic dogmas of Marshall’s contract-clause interpretation were not challenged and that in some cases the Taney Court was as dogmatic about the sanctity of contracts as even Marshall had been.” Robert McCloskey, *The American Supreme Court*, 6th ed., revised by Sanford Levinson(Chicago: University of Chicago Press, 2016), 54–55. This paper will not say that the Taney Court justices were radical democrats and hostile to property rights. Quite the contrary, they were oligarchic and fond of a peculiar species of property. But I will defend the “Webster-Story fraternity” in its view that the Taney Court was against economic nationalism and turned against Marshall’s views respecting the extent of individual rights and contract rights in particular. [↑](#footnote-ref-4)
5. [As I build out this paper, I wish to develop the idea of congressional nonfeasance and to distinguish it from congressional decisions to shift decision-making authority to the executive branch or the judicial branch. With respect to the executive branch, there is a sizable literature on the administrative state and the nondelegation doctrine. On congressional deference to the courts, see especially Mark A. Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7(1): 35–73 (1993).] [↑](#footnote-ref-5)
6. See generally chapter 1, “The Origins of *Lochner* Era Police Powers Jurisprudence,” in Gillman, *The Constitution Besieged*, 19–60. “[J]udges in the age of Jackson . . . transformed the [founding] ethos of market liberty and equal rights into constitutional law,” specifically the police powers doctrine. Ibid., 45. [↑](#footnote-ref-6)
7. See John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States*, ed. Richard K. Crallé (Columbia, SC: A. S. Johnston, 1851). [↑](#footnote-ref-7)
8. 17 U.S. (4 Wheat.) 122 (1819). [↑](#footnote-ref-8)
9. 25 U.S. (12 Wheat.) 213 (1827). [↑](#footnote-ref-9)
10. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). [↑](#footnote-ref-10)
11. This section mainly draws on another paper I have written. Austin R. Nelson, “Commercial Republicanism and the Origin of the Contract Clause” (unpublished manuscript on file with the author). [↑](#footnote-ref-11)
12. U.S. Const. art. I, § 10, cl. 1. [↑](#footnote-ref-12)
13. In the past quarter-century, the Supreme Court has heard only one Contract Clause case. Sveen v. Melin, 138 S. Ct. 1815 (2018) (8–1 decision) (upholding Minnesota’s revocation-on-divorce law as applied retroactively). [↑](#footnote-ref-13)
14. In 2016, the University Press of Kansas published James W. Ely Jr.’s *The Contract Clause: A Constitutional History*. Before that, the most up-to-date book on the Contract Clause had been Benjamin Fletcher Wright Jr.’s *The Contract Clause of the Constitution* (Cambridge, MA: Harvard University Press, 1938), published 78 years earlier. [↑](#footnote-ref-14)
15. Wright, *The Contract Clause*, xiii. [↑](#footnote-ref-15)
16. On the importance of “sites” in political development, see Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 19–26. Other important sites for early-nineteenth-century American constitutional development included the Commerce Clause and the Fugitive Slave Clause, which were debated both within and without the courts. [↑](#footnote-ref-16)
17. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2nd ed., vol. 4 (Washington: Congress of the United States, 1836), 333. [↑](#footnote-ref-17)
18. See *The Federalist* No. 10 (1787) (James Madison). [↑](#footnote-ref-18)
19. U.S. Const. art. I, § 8, cl. 4. [↑](#footnote-ref-19)
20. See generally Nelson, “Commercial Republicanism.” [↑](#footnote-ref-20)
21. *The Federalist* No. 62, at 379 (1788) (James Madison) (Clinton Rossiter ed., 2003). [↑](#footnote-ref-21)
22. Letter from Alexander Hamilton to George Washington (May 28, 1790), http://founders.archives.gov‌/documents‌/Hamilton‌/01-06-02-0313 (missing comma added). [↑](#footnote-ref-22)
23. See generally Nelson, “Commercial Republicanism,” which outlines the two prevailing interpretations of the Contract Clause and puts forward a third interpretation, rooted in the views of leading Federalists. [↑](#footnote-ref-23)
24. Ibid. On the cognitive dissonance of the Anti-Federalists, who simultaneously desired more robust national commerce but wished to maintain a weak central government, see generally Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981). On the success of the Anti-Federalists’ political successors in revitalizing the Anti-Federalists’ constitutional vision, in reframing the Constitution of 1787, and in claiming the authority of the framers as their own, see chapter 2, “Founding: The Anti-Federal Appropriation,” in Jeffrey K. Tulis and Nicole Mellow, *Legacies of Losing in American Politics* (Chicago: University of Chicago Press, 2018), 29–67. [↑](#footnote-ref-24)
25. U.S. Const. art. I, § 8. [↑](#footnote-ref-25)
26. This section draws heavily on the research of Charles Warren and Stephen J. Lubben; although, its categorization, or typology, of the major views on the Bankruptcy Clause’s meaning is novel. See Charles Warren, *Bankruptcy in United States History* (Cambridge, MA: Harvard University Press, 1935), 3–46; Stephen J. Lubben, “A New Understanding of the Bankruptcy Clause,” *Case Western Reserve Law Review* 64(2): 340–54 (2013). [↑](#footnote-ref-26)
27. Olden v. Hallet, 5 N.J.L. (2 Southard) 466 (1819). [↑](#footnote-ref-27)
28. Ibid., 469. [↑](#footnote-ref-28)
29. In his historical analysis of the Bankruptcy Clause, Lubben alternatively calls the above position the “Hamiltonian view,” “Hamiltonian interpretation,” “Hamiltonian position,” “Hamiltonian reading,” or “Hamiltonian perspective.” Lubben, “A New Understanding,” passim. [↑](#footnote-ref-29)
30. 17 U.S. (4 Wheat.) 316 (1819). [↑](#footnote-ref-30)
31. Interpreting the Necessary and Proper Clause, Chief Justice Marshall wrote, “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.” Ibid., 421. [↑](#footnote-ref-31)
32. Ibid., 427. [↑](#footnote-ref-32)
33. Ibid., 431. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. The Clause provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1. [↑](#footnote-ref-35)
36. See Lubben, “A New Understanding,” 340–41 (citing Kurt H. Nadelmann, “On the Origin of the Bankruptcy Clause,” *American Journal of Legal History* 1(3): 219–20, 224, 226–28 (1957)). [↑](#footnote-ref-36)
37. Warren, *Bankruptcy in United States History*, 6. [↑](#footnote-ref-37)
38. Nadelmann, “On the Origin of the Bankruptcy Clause,” 227. [↑](#footnote-ref-38)
39. Warren, *Bankruptcy in United States History*, 7. [↑](#footnote-ref-39)
40. U.S. Const. art. I, § 8, cl. 4. [↑](#footnote-ref-40)
41. U.S. Const. art. I, § 8, cl. 3–4 (emphasis added). [↑](#footnote-ref-41)
42. Lubben, “A New Understanding,” 341–42. [↑](#footnote-ref-42)
43. Pettit v. Seaman, 2 Root 178 (Conn. Super. Ct. 1795). [↑](#footnote-ref-43)
44. Ibid., 178–79. [↑](#footnote-ref-44)
45. Ibid., 180. [↑](#footnote-ref-45)
46. Ibid. [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Lubben, “A New Understanding,” 324. [↑](#footnote-ref-48)