INVENTING THE CLASSICAL CONSTITUTION

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Introduction

One important, recurring call in American constitutional thought is for return to a "classical" understanding, particularly of the federal Constitution.1 "Classical" does not necessarily mean "originalist" or "interpretivist." Some classical views, such as the attempt to revitalize Lochner-style economic due process,2 find little support in the text of the federal Constitution or any of the contemporary state constitutions. Rather, constitutional meaning is thought to lie in a background link between constitution formation and classical statecraft. The core theory rests on the assumption of a constructed social contract to which everyone in some initial position agreed. As is true of any contract, it would make every participant a winner.3 The participants have "rights of liberty and property antecedent to the state," but choose to give up as little of these as needed to empower government.4 Because insisting on either unanimous consent or individual voter participation on every issue is impractical and unwise, republican representative government comes into existence. But then it is essential that this government act consistently with the social contract and not be captured by factions, or special interests. This classical theory applies to both "macro" concerns, such as state monetary or welfare

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3 Epstein, Classical Liberal Constitution, supra note __ at 20 ("The grand social contract ... at every stage ... is meant to produce the same win/win outcomes, just like ordinary contracts.")

4 Id. at 6.
policy; and also to "micro" concerns including liberty of private contract, strong property rights, and the right to engage in business with no more than the bare minimum of State oversight. Finally, it tends toward libertarianism on questions of noneconomic individual rights, as long as their exercise does not harm others excessively.  

The foundational sources claimed for the classical constitution include Locke's writings on government, the political thought of Hobbes, Hume, Montesquieu, the Federalist, in particular James Madison's Federalist #10, and the Anti-Federalist. Important collateral influences include Blackstone's conception of the centrality of the common law, or Adam Smith's views about the importance of the free market over against government interference. Markets have an esteemed place in the classical constitution. They come closer than any institution to realizing the social contract's ideal, namely, the movement of resources only by the unanimous consent of all affected parties.

The result is constitutionalism that is wary of legislation as excessively vulnerable to special interest capture, suspicious of non-unanimous direct democracy tools such as initiatives and referenda because of their propensity to disrespect individual rights, and severely critical of most forms of economic regulation, including protective labor legislation. With this distrust of legislation comes a reliance on judges to get the right answer, striking down statutes as unconstitutional even when the court's mandate is not explicitly stated in any constitutional language. This approach seems quite inconsistent with the federal and most state constitutions, none of which explicitly grant judges the authority to deviate from the ordinary tools of legal textual interpretation. However, this classical


6 See, e.g., EPSTEIN, supra note __ at i-ii, referring to JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1690); BARON DE MONTEESQUIEU, THE SPIRIT OF LAWS (1748); THOMAS HOBBES, LEVIATHAN (1651); David Hume, Of the Original Contract (1748); The Federalist No. 10 (James Madison, Nov. 22, 1787). For the text of the Antifederalist, see http://www.thisnation.com/library/antifederalist/index.html.

7 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769). E.g., EPSTEIN CLASSICAL LIBERAL CONSTITUTION, supra note __, 84, 318, 323

8 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note __ at 150, 582.

9 Id. at 25, 137.
conception does revert to textualism when it supports the purpose at hand -- as when defending a narrow conception of the Commerce Clause\textsuperscript{10} or attacking the delegation of quasi-legislative or judicial power to government agencies.\textsuperscript{11}

The foil for classical liberal constitutionalism is the "progressive" constitution. For example, Richard Epstein writes of a "Progressive Response" that vanquished a classical liberal interpretation of the Constitution that he believes was dominant for roughly 150 years.\textsuperscript{12} This progressive synthesis replaced classicism with broad judicial deference to legislatures on matters of economic regulation, typically under rational basis or other comparatively weak tests. Progressive constitutionalism also favors or is at least benign toward state involvement in the redistribution of wealth, guarantees of entitlements, and economic regulation of markets. It tolerates the use of regulatory agencies to extend executive power into areas traditionally within the scope of the federal Constitution's Article I's legislative power or Article III's judicial power.\textsuperscript{13}

In the 1970s both centrist and more left leaning legal historians began to argue that "classical legal thought" dominated American legal theory in the 1800s and early 1900s, but gradually gave way to "progressive legal thought."\textsuperscript{14} This writing produced a

\begin{footnotes}
\footnotetext[10]{See HOVENKAMP, OPENING, supra note ___ at 295-300.}
\footnotetext[11]{Id. at 284-286.}
\footnotetext[12]{EPSTEIN, supra note __. 34. See also David Bernstein, From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law, 89 NOTRE DAME L.REV. 2029, 2029 n. 1 (2014) (referring to "post-Lochner, pre-New Deal opponents of liberty of contract, and other proponents of government activism, as "Progressives,"...")}
\footnotetext[13]{EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note __, 55.}
\end{footnotes}
paradigm for thinking about the history of elite legal thought in the United States that dominates to this day. It created the impression that "progressives" developed a new approach to legal thought, while conservatives clung to historical classicism. This paradigm is used by both defenders of progressive legal theory and by those who defend the "classical" position while decrying the progressive revolution.  

This dichotomy of ideologies is unfaithful to the history of American legal thought, however. The developers of the classical/progressive model, who were severe critics of classical legal thought, created a false image of reaction, or of conservatives who resisted legal change by clinging to classical ideology. In fact, conservatives and moderates during the early twentieth century were just as revisionist as the people we style "progressives," although their revision often went in different directions.

This article argues, first, that the Constitution was not classical in its inception. Historically it was "pre-classical," particularly on matters of private contract and property rights and government intervention in the economy. That conclusion is consistent with its text, but even clearer from contemporary perspective, as well as early interpretation. Similar developments occurred in private law, where the anti-monopolistic, laissez faire doctrines that characterized nineteenth century legal classicism actually came into existence thirty or more years after the Constitution was ratified.

Second, a more distinctively "classical" perspective on the Constitution came later, as the influence of Adam Smith's *Wealth of Nations* and his English and American followers filtered through American academies. The adoption of classical views largely resulted from the Jacksonian movement, which began in the 1820s. These views took root in federal constitutional doctrine with Jackson's appointment of Chief Justice Roger B. Taney,

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15 E.g., EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra.
16 This is an important theme in HOVENKAMP, OPENING OF AMERICAN LAW, supra note __ (in press).
17 See discussion infra, text at at notes __.
economic liberal. Classical liberal views increasingly influenced both state and federal constitutional thought well into the twentieth century, although state courts interpreting their own constitutions largely led the way. These views included a strong antiregulatory bias favoring private markets, suspicion of monopoly both inside and outside the patent system, legislative capture justifications for judicial review, a strong view of liberty of contract, and the employee-at-will rule that turned the employment relationship into a species of commercial contract. As these doctrines expanded, however, constitutional doctrine began to depart more significantly from constitutional texts. The Jacksonian liberal tradition was much less libertarian on questions of morals, however. Indeed, one of the most visible manifestations of morals regulation during this period was the transfer of authority away from the Church and toward civil government.

Third, one defining element of classical political theory -- the "social contract" -- never captured an important following in American constitutional thought prior to the mid-twentieth century, not even during the early national period or the later heyday of Lochner. While judges and constitutional writers sometimes spoke of a social "contract" or "compact," they were almost always referring to the text of a state constitution, the United States Constitution, or some other authoritative document. They rarely advocated for a social contract doctrine that would enable them to jump off the ratified text to some hidden fundamental principle. Attempts to do so were regularly repudiated. Even the academic and judicial architects of economic substantive due process during the Gilded Age and Progressive Era did not typically rely on the social contract idea, and some of them forcefully rejected it.

Fourth, and concluding, the idea that classical constitutional doctrine was displaced by "progressive" constitutionalism is also wrong, or at least wildly exaggerated. The constitutional revolution that occurred during the first four decades of the twentieth century was certainly supported by self-identified "progressives." But support for change was actually broader and much more centrist, better described by the term "neoclassical" rather than "progressive." "Neoclassical" refers to revolutionary movements in a large number of disciplines, including law, that are derivative of an earlier "classical" period, accepting many of its values and forms, but

20 See HOVENKAMP, OPENING, supra note __ at 268-269.
21 Id. at 254-256.
22 See discussion infra, text at notes __.
contributing something important that is new. Further, the contributions are revisionist, often reformulating well established ideas in ways that the classicists themselves would have rejected. For example, neoclassical economics in the late nineteenth and early twentieth century preserved classicism's faith in markets, although qualified, and even some of its technical doctrine. It rejected classicism's tendency to determine value from past averages, however, substituting a forward looking theory of marginal willingness to exchange. Among the most important effects were a forward looking theory of value based on rational expectations rather than classicism's backward looking and heavily historicist view; much more sophisticated and pervasive ideas about risk and its management; and a broader conception of market failure that was gradually moderated over a half century of neoclassical economic writing. Neoclassical legal thought largely followed the same course, severely qualifying but never rejecting the common law, and doing the same thing for traditional property and contract rights. Business policy, while hardly "progressive" overall, became thoroughly neoclassical. By 1930 or so virtually everyone was a marginalist, although only a subset were progressives. This neoclassical revolution affected constitutional law just as much as it did private law.

The Historical Constitution

The founding parent of classical economic theory in the Anglo-American tradition is of course Adam Smith, whose Wealth of Nations was published in 1776, on the eve of the American Revolution. After examining the record of the Constitution's founding, however, the influential mid-twentieth century historian Clinton Rossiter concluded that "the laissez-faire principles of Adam Smith were no part of the American consensus in 1787." Rossiter's statement was certainly an exaggeration. Nevertheless, the records of the Constitutional Convention include no references to Smith's Wealth of Nations. The book's first American printing was in 1789.

23Hovenkamp, Opening, supra, note __ at 2-4.
24Id at 4-10.
Nor is there any explicit reference to Smith in the Federalist papers. 27 Adam Smith was unpopular among many of the Constitution's Federalist supporters because he was British. 28 By contrast, Thomas Jefferson and James Madison both read and admired The Wealth of Nations, and there is some evidence that Madison relied on him even though he never cited Smith. 29 There is also considerable evidence that contemporaries knew who Smith was and many owned his book. But those who did, such as Hamilton, largely rejected its laissez faire theory in favor of one favoring governmental support for economic development, particularly in his Report on Manufactures. 30

Smith opposed the use of government inducements to encourage economic development, particularly state-sanctioned monopolies or other privileges granted to corporations. 31 Six state delegations to the Constitutional Convention unsuccessfully urged a provision prohibiting the federal government, but not the states, from making monopoly grants. Two years later James Madison successfully resisted attempts to have such a provision included in the Bill of Rights. 32

The most likely source of this early and unsuccessful anti-monopoly movement was the English Statute of Monopolies, which had been enacted in 1623, long before either John Locke or Adam Smith. 33 The states were concerned about a centralized federal

27 Samuel Fleischacker believes there were one or two implicit references, not mentioning Smith's name. Samuel Fleischacker, Adam Smith's Reception among the American Founders, 1776-1790, 59 WM. & MARY Q. 897, 903 (2002).
28 But see Edward G. Bourne, Alexander Hamilton and Adam Smith, 8 Q.J.ECON. 328 (1894) (arguing that Hamilton's Report on Manufactures tracked Smith and paraphrased him, but did not cite him because as an English political economist he was unpopular in Hamilton's circles).
29 Fleischacker, supra, note __. On the two copies of Wealth of Nations in Jefferson's personal library, see http://www.monticello.org/site/research-and-collections/wealth-nations.
31 Fleischacker, supra note __ at 905.
33 English Statute of Monopolies, 21 Jac. 1, c. 3 (1623). See discussion infra, text at notes __.
power to create monopolies that might injure individual states, rather than with state power to create their own monopolies. Indeed, during the post-ratification period nearly all the states, with Massachusetts and New York among the leaders, enthusiastically issued monopoly grants in their own corporate charters.\textsuperscript{34} An anti-monopoly provision did make its way into the contemporary North Carolina constitution.\textsuperscript{35} 

Within two generations things had changed dramatically. The Jacksonian movement sharply heightened the concern about both state and federally-created monopolies, as well as other special privileges for favored business interests. One manifestation was a sharp reaction against Marshall Era Contract Clause jurisprudence, which Jacksonians saw as protecting special monopoly privilege.\textsuperscript{36} Another was the idea that state and federal constitutions should forbid the use of either the eminent domain power or tax revenues for anything other than a judicially determined "public purpose."\textsuperscript{37} A third was a reconstruction of patent law, which narrowed its focus and made it more technical, largely ending its use as an explicit tool of economic development through creation of exclusive rights.\textsuperscript{38} A fourth, which developed in state courts during the mid-nineteenth century and later migrated into federal law, was that constitutions implicitly imposed significant limitations on governmental power to create monopolies or, a little later, to intervene in markets in more modest ways.\textsuperscript{39} As classical economic and political theory developed in the mid-nineteenth century and after, constitutional law became more hostile toward state economic intervention, with an exception for state regulation of health, safety, or morals.\textsuperscript{40}

The United States Constitution was written at an important transitional time in the history of western political thought. To the extent the Constitution reflects a theory of economics and government intervention, it came mainly from the predecessors of classical economic thought. At the time of the Constitutional Convention, Adam Smith’s influence was just beginning to take hold in the United States. Further, what little the Framers’ generation

\begin{itemize}
  \item \textsuperscript{34} See HOVENKAMP, ENTERPRISE, supra note ___ at 17-35.
  \item \textsuperscript{35} Calabresi & Leibowitz, supra note ___ at 1015.
  \item \textsuperscript{36} See HOVENKAMP, ENTERPRISE, supra note ___ at 17-35.
  \item \textsuperscript{37} Id. at 38-41.
  \item \textsuperscript{38} See discussion \textit{infra}, text at notes ___.
  \item \textsuperscript{40} \textit{Ibid}. On the exception for health, safety, and morals, see HOVENKAMP, OPENING, supra note ___ at 243-262.
\end{itemize}
derived from Smith was not the central principles about markets and government that we today associate with classical thought. Rather, Smith's influence pertained to more marginal issues such as the wisdom of having a standing army, which Smith favored; the difference between "direct" and "indirect" taxation, which actually occasioned the Supreme Court's first citation of an economic text; the importance of separation of church and state; the profligacy of monarchs, and Smith's preference for farming over manufacturing. There is also some parallel between Madison's views in Federalist #10 concerning the competition among different interest groups ("factions") and Smith's arguments based on competition among various religious sects in England, although Madison did not cite Smith.

American colleges and schools in the early national period had not developed much in the way of an "indigenous" political economy. The discipline was taught as a branch of moral philosophy, and almost exclusively with British or Continental texts. The economic views that dominated in late eighteenth century America favored active government involvement in managing the economy and creating infrastructure. More *laissez faire* beliefs were outliers.

Daniel Raymond, a Federalist and lawyer by training was also the author of the only serious American treatise on political economy prior to the Jackson era. He defended the monopoly grants:

客人 may be desirous of establishing some useful manufactory, or to open some new source of trade, which is expected to be useful and important to the nation, at some future period; and for the attainment of these objects, it may be expedient to create a private monopoly for a limited period. This monopoly may be granted to a single individual, to a company, to a corporation, or to some particular town; and although the rest of the nation may be excluded from the

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41 Fleischhacker, *supra* note __ at 904.
42 *Id.* at 905. See Hylton v. United States, 3 U.S. 171, 180 (1796), quoting *Wealth of Nations* in the difference between a tax on revenues and a tax on expenses.
43 Fleischhacker, *supra* note __ at 905, 907 (discussing Smith's influence on Madison on church and state).
44 *Ibid*.
45 *Id.* at 906.
46 *Id.* at 910.
benefit of it, still as the object is to promote national interests, and as it is the duty of every citizen to forego his own private advantage for the public good, no one will have a right to complain.\textsuperscript{48}

Alexander Hamilton also believed that beneficial private investment in many forms of enterprise and technology could be facilitated through the use of monopoly grants or other inducements.\textsuperscript{49} By contrast, the anti-Federalists opposed the Constitution in part because they believed that it permitted the federal government to create monopolies.\textsuperscript{50} Both Raymond's and Hamilton's positions were consistent with a long colonial history of using subsidies and exclusive grants in order to further economic development.\textsuperscript{51}

In his later book on \textit{Constitutional Law and Political Economy} Daniel Raymond flatly rejected as "absurd" the ascendant classical view that state sanctioned exclusive privileges benefitted the rich at the expense of the poor. Although monopolies may increase consumer prices these effects are "more than counterbalanced" by their benefits to labor from higher wages.\textsuperscript{52} In his \textit{Commentaries on the Constitution}, Justice Story agreed, arguing that exclusive rights in corporate charters for the construction of toll bridges or other works of public improvement were absolutely essential in order to guarantee an adequate return on investment.\textsuperscript{53}

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\item[48] DANIEL RAYMOND, \textit{THOUGHTS ON POLITICAL ECONOMY, IN TWO PARTS} 326 (1820).
\item[52] DANIEL RAYMOND, \textit{ELEMENTS OF CONSTITUTIONAL LAW AND OF POLITICAL ECONOMY} 223 (4th ed. 1840).
\item[53] 2 JOSEPH STORY, \textit{COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES} 247-248 (2d ed. 1851).
\end{footnotes}
American governments have always been involved in economic development and creation of infrastructure, although both the amount and the nature of their involvement changed over time. Overall, southern states tended to be more laissez faire than the northeastern seaboard, mainly because of the South’s greater reliance on agriculture and slavery. Most government economic intervention in the nineteenth century did not involve direct construction by government agencies, because these did not yet exist. Infrastructure was typically financed through public grants of land, monopoly provisions, tax exemptions, or other perquisites in exchange for a corporate charter. For example, the Massachusetts Constitution of 1780 required the Commonwealth to use “rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures....” Notwithstanding its position during the ratification debates that the federal government should be prohibited from creating monopolies, Massachusetts developed a strong tradition of using monopoly corporate charters in its own grants to encourage economic development. Other states did the same thing. Some public works required more explicitly financial support. In the early national period lotteries were often used to fund public works projects. During the Jackson period lotteries came under severe attack by Christian evangelicals, and governments turned to more secular revenue sources, such as municipal bonds. The bonds were issued to the public and then

54E.g., JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964); WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); OSCAR HANDLIN AND MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS, 1774-1861 (REV. 1969); HOVENKAMP, ENTERPRISE, supra note __.
56HOVENKAMP, ENTERPRISE, supra note __ at 17-41.
58See discussion supra, text at notes __.
59HANDELIN & HANDLIN, COMMONWEALTH, supra note __, at 68-77, 177-179, 212-213.
61See HOVENKAMP, OPENING, supra note __ at 256-259.
used either to purchase corporate stock or else to finance outright grants to corporations for the purpose of construction. Failure rates were very high, creating the impression that bond issuance was nothing more than a boondoggle, largely intended to benefit railroads at the public’s expense. In a very real sense since the municipal bond cases, many of which went to the Supreme Court, soured both citizens and government decision makers about public investment, paving the way for economic substantive due process doctrine. But these were mid-century developments, occurring many decades after the Constitution had been ratified.

The Origins of the Classical Constitution

One unifying theme of the classical constitutional revolution, which began in the 1830s and 1840s, was that people should have maximum freedom to bargain and to keep the property they lawfully acquired, consistent with the state’s obligation to control immoral conduct or protect health and safety. A second theme that government must get out of the business of creating monopoly, with patent and other intellectual property rights as a narrow exception. Over time, however, the concept of “monopoly” became very broadly defined to include many government interventions in the unregulated market, whether or not they actually created or threatened monopoly. For example, in 1910 the New York Court of Appeals invalidated a law that required an apprenticeship and license for undertakers, citing the threat of monopoly. While the Act added a training requirement, it did not limit the number of people who could be undertakers, and the court cited no fact that suggested monopoly would result.

Giving effect to classical ideas required a significant departure from the Contract Clause doctrine created under Chief Justice Marshall. Revision was thought necessary in order to restrain government power to limit contracts prospectively, rather than simply upsetting contracts that had already been made. Property rights were expanded so as to go beyond the traditional concerns of eminent domain law. At both the state and federal levels, an important constitutional hook for executing these changes was the rise of a “substantive” interpretation of “due process” that carried that idea’s meaning beyond its traditional concern with fair procedure, or

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62 Hovenkamp, Enterprise, supra note ___ at 36-41.
64 People v. Ringe, 197 N.Y. 143, 151 (1910).
decisions made in accordance with the existing "law of the land." Yet another change came in patent law, switching the focus away from monopoly grants for the purpose of promoting economic develop, and towards invention adequately described by a set of technical rules.65 Commerce Clause jurisprudence also had to be rewritten, disavowing Chief Justice Marshall's broad interpretation that the commerce power extended to activities "affecting commerce," thus creating a substantial overlap between federal and state power to intervene in the economy. Fearing the as yet largely unrealized threat of federal regulatory power, the classical interpretation substituted "dual federalism," or the idea that the Commerce Clause creates a hard although somewhat indistinct line between intrastate activities that are out of Congress' reach, and interstate commerce that is exclusively in Congress' control.66

The rise of Substantive Due Process doctrine in the state courts during the mid-nineteenth century and its Gilded Age migration into federal law has been assessed many times.67 Significantly, even those who give it the earliest possible date trace it back no further than the mid 1850s in both state and federal courts.68 The balance of this section looks at some of the other ways that the interpretation of state and federal constitutions changed in order to reflect classical ideas.

**Contract Clause and Substantive Rights Jurisprudence**

The Contract Clause of the Constitution is one of the few express imitations on state power in the original Constitution, including the Bill of Rights prior to incorporation. Significantly, the Contract Clause does not place any limit on state power to control contracts to be made in the future. Rather, it prohibits a state from

65See discussion infra, text at notes ___.
68 Principally, Bloomer v. McQuewan, 55 U.S. 539 (1852) in the United States Supreme Court, and Wynehamer v. New York, 13 N.Y. 378 (1856) in a state court. On Bloomer, see discussion infra text at notes __.
impairing an existing obligation created by a contract that was lawful at the time it was made.

Contract Clause jurisprudence quickly divided into two branches. A “private” branch was applied to agreements between private parties, most particularly creditor-debtor agreements. Under this Branch the Marshall Court substantially limited state debtor relief laws or statutes that were thought to interfere with federal bankruptcy law.69 During the Taney period the Supreme Court did not relent from close scrutiny of such statutes, frequently striking them down.70

By contrast, the “public” branch of Contract Clause jurisprudence dealt with grants made by a state or subdivision to a private entity. Initially, Fletcher v. Peck (1810) held that a deed to land was a contract that the state could not later rescind.71 In the Dartmouth College case in 1819 the Marshall Court extended this rule to a corporate charter, holding that once a charter had been granted it could not be altered in a way disadvantageous to the grantees.72

Dartmouth College supported an important pre-classical theory of economic development. In order to finance infrastructure many states chartered private corporations to build such facilities as toll roads, bridges and later railroads. States typically provided “inducements” in these charters, ranging from grants of free land, monopoly rights or other special privileges, including eminent domain power. All of this was quite consistent with pre-classical, Hamiltonian statecraft which believed that capital would not naturally flow into profitable enterprises. Rather it had to be induced by active government policy. Acting under Dartmouth College, many states granted corporate charters that either expressly or implicitly contained exclusive rights.73 Later in the century, after Dartmouth College had been significantly weakened, states switched to more direct forms of financial inducement, typically financed by public

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70E.g., Gantly's Lessee v. Ewing, 44 U.S. 707 (1845); Bronson v. Kinzie, 42 U.S. 311 (1843).
71Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
bonds. The courts also limited these grants under the "public purpose" doctrine.  

In sharp contrast, classicists believed that capital would flow naturally into profitable projects and that state initiatives were improper for two reasons. First, even when they were well intentioned, states were not as good as markets in determining if a particular project would be profitable. Second, politics inevitably biased the state’s selection of recipients of this largesse.

By the early 1820s a broad and diverse political movement opposed state grants of monopoly charters and other special privileges. The opposition was clearly reflected in the four-party Presidential election of 1824, where Andrew Jackson captured 41.4% of the popular vote, against 30.9% for John Quincy Adams, 13% for Henry Clay, and 11.2% for William H. Crawford. The election went to the House of Representatives, where the "corrupt bargain" between Adams and Clay gave Adams the presidency and Clay the position of Secretary of State. Four years later Andrew Jackson got his revenge, winning the presidency with 56% of the popular vote to Adams’ 43%.

The classical constitutional era had begun. It was abetted in no small part by Jackson's 1836 appointment of his former Attorney General, Maryland Catholic Roger Brooks Taney, to be Chief Justice of the Supreme Court. Probably no decision symbolizes the change better than the Charles River Bridge case, where the new Chief Justice debated with Justice Story on the question whether corporate charters for the creation of public works should imply a monopoly right protecting the investment from competition. Against Taney's conclusion for the majority that "in grants by the public, nothing passes by implication," Story protested that:

... I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, that to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success, for a single moment. If the government means to invite its citizens to enlarge the public

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74 See discussion infra, text at notes __.
76 Id. at 545
comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant; and that success will not be the signal of a general combination to overthrow its rights and to take away its profits. 77

In contrast with the Marshall Court, the Taney Court used every device at its disposal to limit monopoly grants. Indeed, when he was Attorney General to President Jackson Taney had written a legal opinion concluding that states did not have the power to grant monopoly rights. 78

By Reconstruction, the Dartmouth College holding had been almost completely dismantled. To see how classical the Constitution's theory of economic development had become one need only compare the Charles River Bridge case with the Slaughter-House Cases thirty-five years later. In Charles River Bridge the plaintiff's made a serious challenge and obtained agreement from the Court's aging Federalists and Whigs that a corporate charter implied a monopoly provision. By contrast, in the Slaughter-House Cases the plaintiff's obtained significant support for the view that the Constitution forbid a state from placing a monopoly grant in a corporate charter for a slaughterhouse. 79

In sum, classical political economy did not become embedded in American statecraft until well into the nineteenth century. The significance of the change in constitutional doctrine is clear in the writings of the more distinctly classical law treatise writers, who did their most important writing in the late 1860s and after. Their target was not progressive regulatory legislation, which was not yet underway. Rather, they attacked the “vested rights” doctrine – in particular the Dartmouth College decision.

The principal Reconstruction and Gilded Age theorists of what came to be economic due process were Thomas M. Cooley, John F.

77 Id. at 608.
78 Opinion of Mr. Taney, Attorney General of the United States, on the Validity of the Law of New Jersey, Under Which the Camden & Amboy Railroad, and the Delaware and Raritan Companies, Claim a Monopoly. See also Dodd, American Business Corporations 125 (1954); Carl Swisher, Roger B. Taney 363-367 (1935). Taney was Attorney General from 1831 to 1833.
Dillon, Christopher Tiedeman, and Francis Wharton. At the same time these writers were developing liberty of contract doctrine they also worked mightily to diminish the public branch of Marshall Era Contract Clause jurisprudence. What is not always appreciated is that they devoted as many intellectual resources to undermining Dartmouth College as they did to creating the infrastructure for constitutional liberty of contract.

Economic substantive due process originated in the state courts and reflected a strong anti-regulation bias in Jacksonian democracy. Thomas M. Cooley, whose highly influential treatise on Constitutional Limitations began to develop the doctrine, was Chief Justice of the Michigan Supreme Court from 1864 to 1885. He had begun his career as a Jacksonian democrat but later became an abolitionist and switched to the Republican party. The first edition of Constitutional Limitations was published in 1868, the same year that the Fourteenth Amendment was ratified. While it addressed both federal and state constitutional law, its stated concern was with limitations on the power of the states, not the federal government, and with state as well as federal constitutional law. Indeed, Cooley's discussions often mixed the two, not making clear whether the principle he was developing came from the federal or from a state constitution.

In the views of constitutional scholars such as Cooley and

80THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868); CHRISTOPHER TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES (1900); CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886); JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS (2D ED. 1873); FRANCIS WHARTON, COMMENTARIES ON LAW (1884). See also JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (1886); [Isaac Parker], Constitutional Law, 94 N. AM. REV. 435-463 (1862). The work of others is summarized in Hovenkamp, Political Economy, supra note __, 40 Stan. L. Rev. at 397-398.

Wharton the Contract Clause in particular had become the vehicle for capture by powerful interest groups. Historically, Marshall's extension of the term "contract" to a legislatively granted corporate charter reflected the dominant Framers' concern with legislative attempts to renegade on previously held rights. To that extent the Contract Clause operated similarly to the constitutional provisions prohibiting bills of attainder and *ex post facto* laws, all of which were grouped together in Article I, § 10.  

At the same time, however, the history of the contract clause reflects a predominant concern with state attempts to interfere with private debtor-creditor relations, not with state-created grants used to encourage economic development. In any event, the Dartmouth College's application of the Contract Clause to a corporate charter was not regarded as particularly controversial when it issued. Over the balance of the nineteenth century some ninety percent of Contract Clause decisions involved corporate charters. In general, the trend of Marshall Court decisions was to expand the protections given under corporate charters, while the trend of Taney Era decisions was to diminish them, beginning with Chief Justice Taney's conclusion in the Charles River Bridge case that a monopoly provision would not be recognized unless it was explicit in the grant.

Cooley added this footnote to the second edition of his treatise on *Constitutional Limitations*:

82 U.S. Const., Art. I, § 10, cl. 1:

No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts....


[U]nder the protection of the decision in the *Dartmouth College Case* the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence. Every privilege granted or right conferred -- no matter by what means or on what pretence -- being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless or corrupt legislation. . . .

In addition, Cooley argued, the legislature should be deemed powerless to contract away its police power. The Supreme Court agreed in 1905, concluding that government construction of a dam was not rendered impermissible by an earlier contract providing for the dam’s removal, and on which the grantee relied in building his rice field. The Court noted that building of the dam was itself within the state’s power to control wetlands flooding. Writing as Chief Justice of the Michigan Supreme Court, Cooley also held in the *East Saginaw* case that a state statute intended to further investment in salt manufacturing by paying a ten cent bounty on each bushel of salt and exempting salt-producing land from property taxes could be repealed, even if the statute were construed as a contract with the complainant. Cooley concluded:

It cannot fail to strike the mind when this claim is put forth, that the most serious and alarming consequences may flow from it, should it receive the sanction of the courts. The demand of exemption is made under that clause of the Constitution of the United States, which forbids the States to pass any laws violating the obligation of contracts; and the argument is, that the corporation, by accepting the offer which the State made to those who should engage in the development of its resources, in salt, and by actually obtaining a productive well, has thereby entered into a contract with the State, by which, in consideration of continued manufacture, the State for all time

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87 Cooley, *Constitutional Limitations*, *supra* note ___ at 335 (2d ed. 1871).
88 Id. at 333-339.
89 Manigault v. Springs, 199 U.S. 473 (1905)
so ties up its hands as to preclude the exercise of the power of taxation in regard to all property which complainant may employ in the business. 91

Francis Wharton went even further in his 1884 Commentaries, suggesting that the Dartmouth College case reflected an obsolete theory of statecraft and should no longer be regarded as the law:

The policy of irrevocably granting away public franchises, and fixing social rights in a constant perpetual mould, has become far more questionable with the lapse of years than it was at the time the business of the country was only slowly recovering from the paralysis produced by the war of 1812.... In those days..., when an apparently permanent type had been assumed by society, there was nothing startling in the position that an adjustment of social rights made by any particular legislature should bind forever. Now, however, we have been taught by the great inventions of steam and of the telegraph, by the marvelous improvements of machinery by which industries of all kinds have been remodeled, and by the introduction of new staples displacing old, that the stationary and apparently immutable condition of society during the first quarter of the present century was exceptional, and that the normal type of social life, as of all other kinds of life, is mutability tending to development. 92

In an 1876 article Francis Wharton attacked both the notion that a pre-existing charter immunized a corporation from subsequent state action inconsistent with the grant, and that states had the power to regulate the prices charged by private firms. 93 The target of the first attack was Dartmouth College, and Wharton concluded that every corporate charter contains an implied right by the state to amend or repeal it. The target of Wharton's second attack, however, was the evolving jurisprudence of price regulation. A year later the Supreme Court would decide Munn v. Illinois, which upheld state regulation of the rates charged by grain elevators. 94 Wharton concluded, first, that if a state had the police power over a certain

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91 Id. at 273.
92 WHARTON, COMMENTARIES, supra note __ at § 483, pp. 554, 556.
93 Francis Wharton, Retrospective Legislation and Grangerism, 3 INT'L REV. 50 (1876);
94 Munn v. Illinois, 94 U.S. 113 (1877).
regulatory area, then it could regulate even if a previously granted charter had provided to the contrary. Second, however, did the state have the power to regulate the prices of an incorporated firm? Here, Wharton took the position that the corporate charter was an implied promise authorizing the firm to raise money and earn returns with no restrictions other than those stated in the original grant. By granting a charter the state says "Lend this money, and you shall have this security; and as part of the security is the power vested in the corporation to levy tolls to pay your debt." Wharton was effectively arguing that a corporate entity had a right protected by the Contract Clause to be free from price regulation, provided that the regulation was not written in the original charter.

Christopher Tiedeman, another architect of economic due process, wrote in his 1900 treatise on constitutional rights:

... the intention of a legislature to place a private corporation beyond the reach of the police power of the State -- to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted -- is so manifestly unreasonable, that we cannot suppose that the legislature so intended, unless this extraordinary privilege is expressly granted.

Subsequent to the Slaughter-House Cases, mentioned above, the New Orleans slaughterhouse monopoly became unpopular. Riding the crest of popular anger about monopoly, the state adopted a new constitution in 1879 forbidding most monopoly charters. The state then withdrew the slaughterhouse charter, thus inviting the inevitable Contract Clause challenge. The second

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95 Id. at 55.
96 Id. at 61.
97 2 TIEDEMAN, TREATISE ON STATE AND FEDERAL CONTROL, supra, note ___ at 952-953.
98 Slaughter-House Cases, 83 U.S. 36 (1874). See discussion supra, text at notes ___.
99 La. Const (1879), Art. 2: "The monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished...."
100 Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent
Supreme Court decision, this time by Justice Miller, held that one legislature could not "bargain away by a contract" a later legislature's power to repeal a monopoly grant. Both the sixth edition of Cooley's *Constitutional Limitations* (1890) and Tiedeman's *Police Power* (1886), enthusiastically agreed. First, Cooley chastised the majority holding in the first case because "the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England; and it would be impossible to defend and sustain it...." He then fully embraced the holding in the second *Slaughter-House* decision, concluding that "the legislature could not by a grant of this kind make an irrepealable contract." Tiedeman took the same approach, concluding that the "State cannot barter away its police power."

An important theme in the Jacksonian reaction to preferences created in corporate grants was suspicion of special interest capture. Economic substantive due process doctrine came to reflect the same concerns. They emerged full blown during the *Lochner* era, which often struck down economic regulations based on a suspicion that the statute in question was passed at the behest of a favored interest group. But the concern was already expressed in Taney Era Contract Clause decisions. The Federalist statecraft that dominated the early national period had given undue largesse to a small number of the wealthy or well connected. In 1853, near the end of his career as Chief Justice, Taney addressed the connection between monopoly grants and special interest capture, concluding that almost every bill of incorporation:

is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act.

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101 Id. at 654.
103 Id. at 342.
104 Id. at 343 n. 1.
105 CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 582 (1886).
106 HOVENKAMP, OPENING, supra note ___ at 266-267.
On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money.\textsuperscript{107}

The classical view, expressed in a variety of doctrines, was quite simply that legislatures could not be trusted.

\textit{The "Public Purpose" Doctrine}

Classical statecraft insisted that most human interactions be "private." The State could intervene only in furtherance of a properly defined "public" purpose or use. At the policy level the idea gradually evolved into the notion that government intervention was appropriate only in the event of a market "failure," although none of its nineteenth century advocates used that term. Judically, the doctrine developed in a wide variety of contexts, including the proper scope of the eminent domain power, the taxing power, or the power to regulate prices or other terms in market transactions. The only clause in the Constitution that can be construed to create such a limitation is the Takings Clause of the Fifth Amendment, providing that "... nor shall private property be taken for public use, without just compensation."\textsuperscript{108} While the federal Takings Clause was not applied against the states until the 1890s, state constitutions had their own takings clauses. Further, federal law began to recognize a "public purpose" doctrine that was not explicit in the Constitution but that served to limit the range of government action.

The public purpose doctrine never became as far reaching or durable within Constitutional doctrine as economic due process doctrine was to become. Its high point was the 1875\textsuperscript{109} Topeka holding that a municipality could assess a tax to support a privately owned but incorporated railroad bridge. Justice Miller's opinion for

\begin{footnotesize}
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  \item \textsuperscript{107}Ohio Life Insurance & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 435-436 (1853).
  \item \textsuperscript{108}U.S. Constitution, Amend. 5.
  \item \textsuperscript{109}Loan Assn. v. Topeka, 87 U.S. (20 Wall.) 655 (1875); see City of Parkersburg v. Brown, 106 U.S. 487, 501 (1883) (manufacturing subsidy bonds held invalid under state law as taxation for private purpose); Cole v. City of La Grange, 113 U.S. 1, 6 (1885) (subsidy for iron company held improper taxation for benefit of private person). See Herbert Hovenkamp, \textit{The Classical Corporation in American Legal thought}, 76 GEO.L.J. 1593, 1635-1636 (1988).
\end{itemize}
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the Court relied on John Dillon's treatise on Municipal corporations as well as *Constitutional Limitations*, where Justice Cooley had declared:

> [T]axation having for its legitimate object the raising of money or public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized.  

Cooley himself had cited several decisions for that proposition, although they all came from state courts interpreting their own constitutions. The strongest language was dicta from an 1865 Wisconsin decision stating that "the legislature cannot create a public debt, or levy a tax... in order to raise funds for a mere private purpose" where "the public interest or welfare" is "in no way connected with the transaction." Nevertheless, the court went on to uphold as sufficiently "public" a tax intended to compensate Civil War draftees for the expense of buying themselves out of the draft, as federal draft legislation prior to 1865 generally permitted. Other decisions that Cooley cited either stood for the opposite proposition that Cooley was asserting, or else they were not on point at all. In sum, Cooley largely invented the "public purpose" taxation doctrine, without support from either constitutional texts or case law.

In any event, the *Topeka* doctrine did not have a lengthy

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111 Cooley, *Constitutional Limitations*, *supra*, note __ at 488.
112 Brodhead v. City of Milwaukee, 19 Wis. 624, 652 (1865). Cooley also cited Tyson v. Halifax Tp. School Directors, 51 Pa. 9 (1865) (striking down a similar provision on the grounds that it was judicial action disguised as state legislation).
114 E.g., Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853) (upholding tax assessed for purpose of purchasing shares in a railroad corporation)
115 E.g., Morford v. Unger, 8 Iowa 82 (1859) (upholding municipal annexation of adjacent land over protest by farmers that their taxes would increase); Freeland v. Hastings, 92 Mass. 570 (1865) (rejecting taxpayer's challenge to tax on ground that its purpose had not been adequately specified. The court stated that that every citizen has a right "to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation." But the court was referring to taxes that were not authorized by state law. Since municipalities have only the authority granted to them by their state, the court was saying only that a municipality cannot assess a tax that the state has not authorized.).
By the late nineteenth century, prior to *Lochner*, it had fallen into disuse.\(^{117}\)

**Trespassory and Consequential Losses from Economic Development:**

*The Rise of Inverse Condemnation*

Just as Contract Clause jurisprudence, shifts in eminent domain "takings" doctrine reflected changing attitudes toward State involvement in economic development, as well as the potential for legislative capture. The classical position is easily stated although difficult to apply. First, the market can generally be trusted to produce socially valuable investments. If an investment needs a government inducement, it is not likely to be worth its costs in any event. Second, if an investment is in fact socially valuable it should be able to bear all of the costs it imposes on others who might be affected. For example, part of the cost of building a coal fired power plant (whether public or private) is the injuries imposed on downwind property owners. The best way to insure that investments are efficient is to require the developer to compensate all those who are injured. Further, in measuring injury of this sort the distinction between "trespassory" injuries that involve expropriation of property or invasion over boundary lines, and "nontrespassory" losses, is really not very important. Both types of injury can be very real.\(^{118}\) John Lewis, America's most prominent Gilded Age scholar of eminent domain, reached these conclusions in the 1880s.\(^{119}\)

Judicial doctrine under the federal Takings Clause never followed this reasoning very closely, not even during the economic due process era. Under federal law government trespasses can be unlawful takings even if the harm they cause is miniscule.\(^{120}\) By contrast, nontrespassory land use restrictions that impose significant economic harms are often found not to require either the exercise of the eminent domain power or compensation to injured land

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\(^{116}\)The subsequent history is traced in Hovenkamp, *Classical Corporation*, *supra*, note ___ at 1638-1640.


\(^{119}\)See discussion *infra* text at note __.

owners.\textsuperscript{121} Gilded Age state constitutions that included "taking or damaging" provisions, discussed below, reached much further.\textsuperscript{122}

Nineteenth century law involving economic development and state and federal takings clauses largely focused on two questions. First was the range of government interferences in property rights for which compensation must be paid. The second was the right of land owners to initiate proceedings against the government for invasions or injuries that did not result from an express exercise of the eminent domain power. Because the Fifth Amendment was not applied to the states until very late in the century,\textsuperscript{123} the cases almost all involved state constitutions.

The common law rules for trespassory harms caused by private parties were thought to be fairly absolute. A physical appropriation or actual invasion of land could be protected by common law actions for ejectment or trespass. "Nontrespassory" injuries were much more difficult to evaluate. The common law doctrine of nuisance developed the largely useless principle of \textit{sic utere tuo ut alienum non laedas}, or "use your own property so as not to injure that of another." The phrase was widely criticized as unhelpful. In his 1869 treatise on torts Francis Hilliard concluded that nuisance law covered an "undefined injury" and resorted to a simple list of activities that courts had condemned as nuisances.\textsuperscript{124} Holmes regarded the \textit{sit utere} principle as no more than a "benevolent yearning."\textsuperscript{125}

As the amount and variety of economic development expanded in the second half of the nineteenth century, American courts had to confront the facts that development can cause significant market injury to property even when no trespass or expropriation occurs. Secondly, however, requiring compensation for every injury that resulted from nontrespassory economic activity would stop development altogether and, in any event, would be a


\textsuperscript{122}See discussion \textit{infra}, text at notes _.

\textsuperscript{123}Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897); Santa Clara Co. v. S. Pacific R.R., 118 U.S. 394, 396 (1886).

\textsuperscript{124}FRANCIS HILLIARD, \textit{THE LAW OF TORTS OR PRIVATE WRONGS} 66 (1859).

\textsuperscript{125}Oliver Wendell Holmes, Jr., \textit{Privilege, Malice, and Intent}, 8 HARV. L.REV. 1, 3 (1894).
much more strenuous requirement than nuisance law had ever imposed on private parties. The "trespassory" formulation of traditional eminent domain, which limited legal redress to actions that actually expropriated property or invaded its boundaries, had the distinct advantage of creating a relatively clear line between compensable and noncompensable harms. It had the equally distinct disadvantage that it left many significant injuries uncompensated. One important element in classical liberalism's antistatism is its insistence that government-caused injury be compensated.\textsuperscript{126}

During the Federalist period the principle of just compensation was not well established in American law, not even under the Revolutionary Era state constitutions. The period emphasized the use of government power to facilitate development much more than it concerned itself with compensation for injured property owners. Many states authorized the taking without compensation of undeveloped land for the creation of roads or streets.\textsuperscript{127} Some states recognized a presumption that grants of land from the sovereign included a six percent excess that could later be taken back without compensation for road construction.\textsuperscript{128} An 1802 Pennsylvania decision applied this doctrine in favor of a private chartered turnpike company, which had been authorized to build a toll road from Philadelphia to Lancaster and given eminent domain power. The court rejected the land owner's argument that the Pennsylvania Constitution contained a takings clause that required compensation to be paid."\textsuperscript{129} It also rejected an objection that the turnpike company was unjustly enriched because it was able to charge tolls for those using the road but was not required to


\textsuperscript{127} See HORWITZ, TRANSFORMATION OF AMERICAN LAW (1977), supra note ___ at 66 et seq.

\textsuperscript{128} Mcclenachen v. Curwen, 6 Binn. 509, 3 Yeates 362 (Pa. 1802) (each grant of land contains a 6 percent overage subject to later condemnation for roads without compensation); Feree v. Meily, 3 Yeates 153 (1801) (six acres out of every hundred). Cf. Lindsay v. East Bay Street Com'rs, 2 Bay 38, 2 S.C.L. 38 (Const. Ct. App. S.C. 1796) (divided court; inherent in sovereignty is the right to take back a portion of property for public streets and roads).

\textsuperscript{129} Mcclenachen, 6 Binn. at 511 ("The validity of the act is impeached by its being repugnant to the constitution of Pennsylvania, which directs that no man's property shall be taken for public use, without his own consent or that of his legal representatives, nor without compensation.").
compensate land owners for their loss. A Louisiana decision from 1816, four years after it became a state, held that the Fifth Amendment of the United States Constitution did not apply to Louisiana, and no state law required compensation when the government widened a canal, taking some of the plaintiff's property.\(^{130}\)

As in the Pennsylvania turnpike case, most state courts held that a taking could be for a "public purpose" even though the condemnor and recipient of the property was privately owned. A significant debate developed, however, over the nature of uses that could support private assertion of an eminent domain power. Turnpikes and canals were common carriers, open to everyone, and their development was regarded as a quasi-state function. By contrast, the early mill-dam acts passed by many states early in the nineteenth century extended the eminent domain power to takers who were not common carriers or transportation utilities. Under them a landowner could build a dam for water power even if it flooded upstream land, provided that compensation was paid to the injured property owners.\(^{131}\) Further, those building the mills did not ordinarily have their prices regulated, nor did they operate under the universal service obligations traditionally imposed on common carriers. For example, the Commonwealth of Massachusetts applied its statute in favor of textile mills for purely private manufacturing in order to facilitate the support of "labour saving machines."\(^{132}\)

By the 1830s the mill-dam acts occasioned a significant debate between Federalist and Whig interests, who favored their expansive use, and Jacksonians. The core of the dispute concerned whether the mill dam floodings were for a public use. Traditional "grist" mills, or cereal mills, were used for the grinding of food grains. These mills had traditionally been regarded as enterprises "affected with the public interest," required to serve all customers.\(^{133}\) Further, their prices could be regulated.\(^{134}\) By contrast, saw mills and paper mills, which also ran on water power, were ordinary businesses that

\(^{130}\)Renthorp v. Bourg, 4 Mart (o.s.) 97 (S.Ct. La. 1816).

\(^{131}\)E.g., Com. v. Ellis, 11 Mass. 462 (1814); Stowell v. Flagg, 11 Mass. 364 (1814); Town of Lebanon v. Olcott, 1 N.H. 339 (1818); Cave's Executor v. Calmes, 10 Ky. (3 A.K. Marsh) 36 (Ky. 1820).

\(^{132}\)See HANLIN & HANLIN, COMMONWEALTH, supra, note __ at 127.

\(^{133}\)E.g., Sadler v. Langham, 34 Ala 311 (1859) (relying on state statute declaring grist mills to be common carriers); State v. Edwards, 86 Me. 102 (1893)

\(^{134}\)HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 at 94-98 (1938, reprint, 2000).
operated under common law rules entitling them to deal or not at their volition.\textsuperscript{135} In the 1820s and 1830s courts began to hold that state statutes authorizing the flooding of land for creating a grist-mill for food could not be applied to the creation of a sawmill and paper mill, because there were not of a public character.\textsuperscript{136} An 1858 Alabama decision struck down a mill dam statute that purported to cover all types of mills on public use grounds.\textsuperscript{137} In 1860 the Supreme Court of Wisconsin considered a Mill-Dam Act that had been previously enacted and upheld by the state supreme court, repealed and then reenacted. The court acknowledged that if it had to decide the issue anew it would rule the statute unconstitutional. However, there had been so much investment in reliance on the provision, as well as the judicial decision upholding it, that it was unwilling to cause such a costly dislocation.\textsuperscript{138}

Post-Civil War decisions commonly struck the statutes down. For example, in Ryerson v. Brown Justice Thomas M. Cooley wrote the opinion condemning a Michigan statute that authorized the developers of dams to flood upstream property. The statute was not limited to grist mills, which Cooley acknowledged might be considered matters of "necessity." After summarizing cases from many states he concluded that the market should be sufficient to guarantee a suitable number of dams:

> An examination of the adjudged cases will show that the courts, in looking about for the public use that was to be accommodated by the statute, have sometimes attached considerable importance to the fact that the general improvement of mill-sites, as property possessing great value if improved, and often nearly worthless if not improved, would largely conduce to the prosperity of the state. This is especially true of the decisions in those states where water power is most abundant, and where, partly because of a somewhat sterile soil, manufacturers have attracted a larger

\textsuperscript{135} Although sawmills may also have been classified as public utilities during and prior to the Revolution. See \textsc{John Lewis, Eminent Domain} 223-226, 250 (1888).
\textsuperscript{136} Harding v. Goodlett, 11 Tenn. 41 (Tn. Errors & Appeals, 1832).
\textsuperscript{138} Fisher v. Horicon Iron & Mfr. Co., 10 Wis. 351 (1860). \textit{Accord} Jordan v. Woodward, 40 Me. 317, 324 (1855) (upholding mill-dam act only because of "long acquiescence of or citizens in its provisions," making it the "settled law of the state.").
proportion than in other states, of the capital, skill and labor of the community. In this state it is doubtful if such legislation would add at all to the aggregate of property. Numerous fine mill-sites in the populous counties of the state still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe a dam would become a nuisance; and in such cases no permission to take lands, and no condemnation for mill purposes, could protect the parties maintaining a dam against prosecution for the public grievance. 139

Cooley’s discussion introduced what would later become a recurring theme in the debate over the appropriate scope of the eminent domain power. Eminent domain power should be used in the event of a market failure that entitles the sovereign to force a transaction that would not ordinarily be made. The most common failure is “holdout” problems that occur when a landowner can insist on an above market price simply because there are no good alternatives to the condemnor’s use of his property. But if the market is competitive, as Cooley pointed out, and offers ample alternatives, then the power is unnecessary and its exercise cannot be for a public use.

Cooley also suggested that the traditional rule that grist mills are public utilities should be re-examined in light of the railroad, which permitted grains to be transported for long distances, and also of steam engines, which were powering a growing percentage of mills but did not require a dam. In any event, however, using eminent domain to justify flooding in order to create mills required:

the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations. A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him. 140

Writing in the late 1888’s John Lewis concluded that the term "public use" meant that takings by private parties were permissible

140 Id. at 337-338.
only if the taker intended to use them for a public utility or similar firm with a universal service obligation. For example, while a taking for a toll road open to everyone might be permitted, a taking for a private road from which the taker "may lawfully exclude the public" is void.\footnote{141} Lewis quoted at length from an 1868 Iowa Supreme Court decision written by Justice John F. Dillon, who would later write an important treatise on the regulatory power of local government.\footnote{142} The decision held that the exercise of eminent domain power for the creation of a purely private road was void under that state's constitution.\footnote{143}

"Inverse" condemnation refers to challenges when the government does not acknowledge a taking but nevertheless does something the landowner claims to be a taking in fact. The Fifth Amendment eminent domain clause and historically the equivalent clauses in state constitutions provided compensation only for a "taking," which was generally interpreted to refer to a trespass or outright expropriation. The law of trespass required an intrusion that actually crossed the owner's boundary line, such as an easement or flooding. For example, Pumpelly v. Green Bay, a diversity jurisdiction decision in which the Supreme Court applied the Wisconsin Constitution, found a taking in the city's construction project that flooded the plaintiff's property.\footnote{144} Construction or other development that flooded adjoining property was regarded as a trespass at common law.\footnote{145}

An example of an unacknowledged expropriation was \textit{Pennsylvania Coal}, in which the Supreme Court applied the federal Takings Clause, by this time incorporated against the states, to strike down a Pennsylvania statute requiring coal mining companies to provide surface support of underground mining operations.\footnote{146} The decision, during the middle of the \textit{Lochner} era, is interesting because Justice Holmes's opinion for the majority rested on the uniqueness of the Pennsylvania law, which recognized not only a mineral estate and a surface estate in land, but also an independent and transferable "support" estate. Pennsylvania's Kohler Act effectively transferred this entire support estate without compensation from the

\begin{footnotes}
\item[141] Lewis, EMINENT DOMAIN, note \_\_ at 229.
\item[143] Bankhead v. Brown, 25 Iowa 540 (1868).
\item[144] Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166 (1871).
\item[145] E.g., Rowe v. Granite Bridge corp., 38 Mass. (21 Pick) 344 (1838); Sinnickson v. Johnson, 2 Harrison 129 (N.J. S.Ct. 1839); Pratt v. Brown, 3 Wis. 603 (1854).
\item[146] Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).
\end{footnotes}
mining company to the surface owner -- "it purports to abolish what is recognized in Pennsylvania as an estate in land -- a very valuable estate -- and what is declared by the Court below to be a contract hitherto binding the plaintiffs." In his dissent Justice Brandeis played down the significance of Pennsylvania's unique classification system and treated this as simply a case in which a statute had made one piece of property (the surface interest) more valuable and another (the mineral interest) less valuable. In a virtual carbon copy of Pennsylvania Coal in 1987 the Supreme Court largely rejected Holmes's position and adopted Justice Brandeis's.

After the Civil War the scope of takings claims under state constitutions increased dramatically. Several states replaced their constitutions or enacted amendments providing for compensation if property was either taken or "damaged." Illinois went first, including a "damaging" provision in its new constitution of 1870. It was responding to land owner complaints of eminent domain power run amok, particularly as exercised by railroads. John Lewis observed that every state that revised its constitution after 1870 except North Carolina included such a provision. By 1880 eleven states had made this change, and by 1912 half of the states had done so. All but one of the Confederate states readmitted to the Union after 1870 included a "taking or damaging" provision. The Federal Constitution was never amended.

Since there was no history requiring assertion of the eminent domain power for mere market damage, the new provisions greatly increased the number of "inverse" claims. A relatively early example is an 1881 Illinois Supreme Court decision finding an unconstitutional "damaging" when the City of Chicago built a viaduct that limited a property owner's access to heavily travelled Halsted

147 Id. at 414.
148 Id at 417-418.
150 Ill. Const. of 1870, art. II, § 13 ("Private property shall not be taken or damaged for public use without just compensation.").
151 See LEWIS, EMINENT DOMAIN, supra note __ at 296.
152 Colorado (1876), Montana (1889), North Dakota (1889), South Dakota (1889), Washington (1889), Wyoming (1890), Utah (1896), Oklahoma (1907), Arizona (1912), New Mexico (1912), Alaska (1959), and Hawaii (1959). The only state not to include such a provision was Idaho, admitted in 1890. See Robert Brauneis, The First Constitutional Tort: the Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 VAND. L.REV. 57, 119-125 (1999).
153 See LEWIS, EMINENT DOMAIN, supra note __ at 296 - 310.
Inventing Classical Constitution

No portion of the plaintiff's land bordered on Halsted Street and the construction did not encroach on his boundary lines. His claim was that his property was less valuable because the construction raised the street and occupants of his rental property could now access it only by climbing steps. Because the City had never asserted its eminent domain authority, the land owner brought a common law action for trespass on the case for an "indirect" harm. The trial court had rejected the land owner's proposed jury instruction that permitted liability if the "plaintiff's said premises were permanently damaged and depreciated in value by reason of being deprived of such access." Rather, the court gave a traditional instruction that permitted liability only for actual expropriation or physical trespass. The Illinois Supreme Court reversed, noting Illinois' previous 1848 Constitution had applied "only to cases of an actual appropriation of private property by the state," but the "damaging" provision in the 1870 constitution had been intended to change that. At the same time, however, the court observed that many things a municipality does, such as relocating a jail, might have an adverse effect on nearby property values. While it could not permit damages in all such cases, the present one involved a limitation on access.

As John Lewis assessed the new constitutional provisions, the right to damages under them "cannot be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement." Lewis acknowledged that such claims could run very large. Nevertheless, speaking of the aggregate injuries of affected land owners, "why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?"

One interesting thing about the substantive due process era is that the Supreme Court never applied takings law with the same aggressiveness that they applied liberty of contract doctrine. This was true even though the federal Takings Clause was far more explicit than anything the Court relied on to support liberty of contract generally. Most particularly, in Euclid v. Ambler Realty, Justice

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154 Rigne v. City of Chicago, 102 Ill. 64 (1881).
155 Id. at 69.
156 Id. at 71.
157 Id. at 80.
158 LEWIS, EMINENT DOMAIN, supra note __ at 308.
159 Id. at 309.
Sutherland wrote the Court’s 5-4 decision upholding a comprehensive zoning provision, notwithstanding evidence that the negative impact on the plaintiff’s property values was severe.\footnote{Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See HOVENKAMP, OPENING OF AMERICAN LAW, supra note __ at 130-131.} The courts required a far lesser showing in order to sustain substantive due process challenges to protective labor wage and hour statutes, occupational licensing provisions, or even some health regulations.\footnote{See id. at 243-248, 263-266.}

**The Emergence of Classical Patent Law**

Monopoly grants such as those giving railroads exclusive rights of way seem very different from patents on inventions. Monopoly provisions in corporate charters are granted mainly by states, while in the United States today only the federal government issues patents. Only "inventors" can obtain a patent, and can get one even if they never intend to build anything. Unused patents are fully enforceable, although remedies may be limited to damages.\footnote{E.g., eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).} By contrast, monopoly charters are frequently given to firms that have not invented anything but rather have promised to build something with existing technology, such as a bridge or a railroad track. Historically, if a grantee failed to construct or operate the thing contemplated by the grant the legislative body could withdraw it. Further, the right to exclude in a patent is specific to a technology described in the patent. By contrast, a monopoly right in a corporate charter is typically geographic -- for example, giving a private bridge corporation the exclusive right to maintain a toll bridge for a specified distance in either direction.

The Constitution’s Patent Clause grants Congress the power to grant patents to inventors, for limited times,\footnote{U.S. Const, Art. I, § 8, Cl. 8.} but says nothing about whether this federal power is exclusive. There is no evidence that the drafters intended to eliminate the power of the states to create monopoly grants, even those that were technology specific. The predominant early interpretation was that the IP Clause gave Congress the right to reward “inventors” with exclusive rights, while permitting the individual states to create such rights for other reasons. St. George Tucker, editor of the first American edition of Blackstone’s *Commentaries*, understood that “the states may possess some degree of concurrent right within their respective
territories," but concluded that state patent grants would become rare since they could not provide protection beyond their borders, while United States patents extended nationwide. "...[I]t is scarcely probable that the protection of the laws of any particular state will hereafter be resorted to...." Joseph Story agreed in his Commentaries on the Constitution, concluding that while state patent grants continued to be lawful they would be much less appealing than a United States patent. Neither author acknowledged that the power to create local monopolies within a single state could still be quite valuable.

The first federal patent act, passed in 1790, limited its protection to those who "have invented or discovered" something "useful and important." The statute also required a written description of the invention, as well as a model of the invention if practicable. It said nothing about the power of the states to issue patents. To this the Second Patent Act, passed in 1793, added a novelty requirement, stating "that simply changing the form or the proportions of any machine, or composition of matter, in any degree, shall not be deemed a discovery." The second act also made clear that the patent's written description had to be sufficient to enable someone skilled in the art to make or use it. Finally, while the second patent act did not explicitly preclude the states from issuing patents, it did provide that someone who owned a state patent issued before that state had ratified the Constitution could obtain a United States patent on the same thing only by relinquishing the state patent.

Pre-classical theories of economic development relied heavily on exclusive rights in order to create incentives. Patents and copyrights were nothing more than a special case of this general principal. For example, the "patent act" contained in the original


165 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 48 (1833).


167 Ibid. § 2.

168 Patent Act of 1793, Ch. 11, 1 Stat. 318-323, § 2 (February 21, 1793)

169 Ibid., § 3.

170 Patent Act of 1793, supra note __.
English Statute of Monopolies in 1623 was nothing more than an exception to a statute that limited the government’s power to grant monopoly franchises.\textsuperscript{171} Some of the American colonies emulated this provision.\textsuperscript{172}

Classical political economists strongly disputed the general idea that monopoly grants or other privileges were necessary to encourage investment. As Maine’s Chief Justice John Appleton stated the classical position in 1871:

Capital naturally gravitates to the best investment. If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in determining upon the manufacture. But whatever is done, whether by the individual or the corporation, it is done with the same hope and expectation with which the farmer plows his fields and sows his grain,—the anticipated returns.\textsuperscript{173}

Patents found a place in classical political economy, but only if their scope was sufficiently constrained and the granting process free from special interest control. For example, Adam Smith acknowledged the value of patents, but not with much enthusiasm. His \textit{Lectures on Jurisprudence}, written about fifteen years before \textit{The Wealth of Nations}, found exclusive rights generally to be “greatly prejudicial to society.” However, he found the British 14 year exclusive right for patented inventions to be “harmless enough.”\textsuperscript{174}

\textit{The Wealth of Nations} itself has very little on the subject of patents,

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\textsuperscript{171}English Statute of Monopolies of 1623, 21 Jac. 1, c.3, § 6:

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6 (a ). Provided also, that any declaration before mentioned shall not extend to any letters patents (b ) and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm (c ) to the true and first inventor (d ) and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use (e ), so as also they be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient....

\textsuperscript{172}Calabresi and Leibowitz, \textit{supra}, note __ at 1004 (referring to Massachusetts Bodie of Liberties (1641) and similar legislation passed by Connecticut in 1672).

\textsuperscript{173}\textit{In re} Opinion of the Justices, 58 me. 590, 592 (1871).

\textsuperscript{174}ADAM SMITH, \textit{LECTURES ON JURISPRUDENCE} (undated, but delivered between 1762 and1766), p. 83, online edition, available at \url{www.estig.ipbeja.pt/~ac_direito/Smith_0141.06.pdf}.  

other than Smith’s repeated objections to exclusive rights. Speaking of exclusive grants to establish trade with remote nations, he wrote that:

A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author. But upon the expiration of the term, the monopoly ought certainly to determine; the forts and garrisons, if it was found necessary to establish any, to be taken into the hands of government, their value to be paid to the company, and the trade to be laid open to all the subjects of the state.”

Smith also observed that “pecuniary rewards” such as bounties for valuable inventions were theoretically preferable, but in practice they would “hardly ever be so precisely proportioned to the merit of the invention” as the fourteen year term. By contrast, exclusivity for a limited term would vary the reward with the market value of the invention.

American political economists in the classical tradition, such as Brown University’s Francis Wayland, largely took Smith’s position. He simultaneously railed against the evils of exclusive grants generally, but made a limited exception for exclusive rights for limited times for patents and copyrights. By and large, however, these were passing observation and there was little sustained discussion of patent rights. Indeed, one striking feature of Anglo-American economics generally is the small amount of attention devoted to the patent system, a phenomenon that extended through the early decades of the twentieth century. Only in the 1930s did economists such as Arnold Plant at the London School of Economics, Joan Robinson at Cambridge, and Edward Chamberlin at Harvard began to incorporate patents into their theories of business economics.

175 ADAM SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book I, Ch. 10, §§ 72, 80 (1776). See also Bk. IV, Ch. 8, §17 (speaking of "absurd and oppressive monopolies).
176 Id., Book V. Ch. 1, §100.
178 E.g., FRANCIS WAYLAND, ELEMENTS OF POLITICAL ECONOMY 69 (evils of exclusive grants generally); 27 (favoring exclusive grants for limited times for patents and copyrights).
179 Arnold Plant, The Economic Theory Concerning Patents for Inventions, 1 ECONOMICA (n.s.) 30 (1934); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT
During the 1830s and after both Congress and American judges attempted to forge a patent system that simultaneously rejected the pre-classical idea that monopoly was a useful general tool for encouraging enterprise, but also embraced a narrow and increasingly technical exception for inventors. The changes were also intended to remove the patent system from the politics of state-created monopoly, leading to eventual federal supremacy of the patent system. Another and more gradual result, however, was to divorce patent doctrine from concerns about economic development generally. Patent law increasingly became a special case of property law, heavily fixated on boundary problems but much less conscious of any metering relationship between patents and economic growth, and with virtually no attention to how patents functioned in specific markets.  

Patent law was also strongly driven by the historical formality that patents were grants from the sovereign, just as property deeds or corporate charters, and thus should be treated as "property." Under the United States Constitution property rights are so strong that they often take precedence over developmental needs. An ironic result was that patent law in the United States -- the set of legal rules that should be most explicitly concerned with innovation -- developed in relative isolation from economic theories of development or growth. Patent lawyers disputing patent validity and scope have traditionally behaved much more like property lawyers disputing boundaries rather than, say, antitrust laws trying to base legal rules on observations about industrial performance.  

Further, the property right adhered in the patent itself, not in the product, or later, process that the patent described. This eventually led to such anti-developmental doctrines as the one permitting a firm to acquire a patent from someone else, put it to sleep by not using it in production, but bring an infringement action

COMPETITION (1933); EDWARD CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION (1933). See HOVENKAMP, OPENING, supra note __ at 78-79, 198-205.  

180 See HOVENKAMP, OPENING, supra note __ at 184-205.  
183 The phrase comes from economist JOHN MAURICE CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS 146 (1923) (complaining of those who "put
shutting down someone else's use. That was clearly the rule for land, where the owner could enjoin a trespass even if the land was not being used. One result of changing theories about the relationship between exclusive rights and economic development was dramatic changes in the legal attitude toward "unused" patents. An used patent manifested not merely a failure to develop, but if enforcement were permitted it also was a right to prevent someone else from developing. In a country acutely self aware of its relatively undeveloped state such a notion could not be tolerated. For example, in his *Commentsaries* Chancellor Kent concluded that, while the government could not invalidate a United States patent simply because it was not being used, the owner could not maintain an action against an infringer. The gradual evolution of patent law was from early century state law rules that cancelled patents for nonuse, to the Supreme Court's 1908 *Paper Bag* decision, which permitted the acquirer and holder of an unused patent to shut down competing technology.

As noted, the Constitution's Patent Clause did not state that the patent granting power was exclusive of the states. Further, the Tenth Amendment provides that the states retain any power not granted to Congress. The Constitutional patenting power is also expressly restricted to "inventors." By contrast, pre-classical theories of economic growth were much more focused on "developers," or entrepreneurs. What was important was not so much who had invented something, but rather who promised to deploy it to public advantage.

Prior to ratification of the Constitution patents were issued exclusively by individual states. The Articles of Confederation did not confer any patent granting power on the United States. John Fitch's first steamboat patent, probably the best known of pre-Constitution state patents, was created by a special legislative grant from the state of New York in 1787. The patent granted "the sole and exclusive right and privilege of making and using boats, propelled by fire or steam, within the waters of New York State." 

184 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 369 (1826)
185 See discussion infra, text at notes __.
187 U.S. Const, Amend. 10.
The scope of the Fitch grant, covering all "boats propelled by fire or steam," was much broader than anything Fitch had actually invented. At the time of the patent grant he had nothing more than some drawings. Nevertheless, the New York court sustained the patent against a claim that the patent failed to specify its technology sufficiently -- namely, that "[t]he grant in question is not of the exclusive right of a propelling power applied to machinery of an ascertained construction; but is a grant of the propelling power at large, wherever it is possible to create it on the waters of the state, if applied to the purpose of navigating vessels."  

States continued to issue patents after the United States Constitution was ratified. In 1798 New York gave Robert Livingston and Robert Fulton a second patent to make and operate steamboats for up to thirty years. Just as the Fitch patent, the Livingston/Fulton patent was a special grant of the New York legislature. Interestingly, when the Supreme Court eventually struck down a portion of this grant covering a route from New York to New Jersey in Gibbons v. Ogden, it relied on the Commerce Clause. Chief Justice Marshall's opinion never considered whether the Constitution's Patent Clause or the Patent Act preempted state issued patents. A year later a New York court struck down the entire grant, once again under the Commerce Clause, holding that Justice Marshall's strong "affecting commerce" language in Gibbons served to invalidate significant portions of the exclusive grant even as applied to purely intrastate routes.

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decision quoted the complaint:

That on the 19th of March, 1787, the legislature of the state of New-York passed an act... that the said John Fitch, his heirs, administrators and assigns, should be, and they were thereby vested with the sole and exclusive right and privilege of constructing, making, using, employing and navigating, all and every species or kinds of boats, or water craft, which might be urged or impelled through the water, by the force of fire or steam, in all creeks, rivers, bays and waters whatsoever, within the territory and jurisdiction of this state, for and during the full end and term of fourteen years from and after the then present session of the legislature;

189 Livingston, 9 Johns at 516.
190 Ibid. For an excellent discussion, see Camilla A. Hrdy, State Patent Laws in the Age of Laissez Faire, 28 BERKELEY TECH. L.J. 45 (2013).
191 Livingston, 9 Johns at 507.
192 Gibbons v. Ogden, 22 U.S. 1, 221 (1824).
The steamboat patent history indicates that the New York legislature was much less interested in rewarding inventors than in using monopoly grants to promote economic development. First, as part of his application to the legislature, Fitch was required to demonstrate the "great immediate utility and the important advantages" that would result from his invention. This included a lengthy description of the social benefits that would accrue, particularly in western watercourses that had been difficult to navigate.\footnote{William Thornton, Short Account of the Origin of Steamboats 13-14 (1814). \textit{See} Bracha, Owning Ideas, supra note __, ch. 4.} Further, his patent was regarded as a legal commitment to deploy. Unfortunately, Fitch never developed the promised steamboat or routes.

Several years later, with Fitch’s steamboats nowhere in view, Fulton and Livingston demonstrated an actual working steamboat to the New York legislature. It responded by revoking Fitch’s patent for nonuse and issuing a second patent to Fulton and Livingston.\footnote{Livingston, 9 Johns at 509.} At the time neither Fulton nor Livingston had actually invented anything. Rather, they had made a working model from Fitch’s design.\footnote{Hrdy, supra note __ at 78.} Not until 1836 would federal law adopt a rule preventing the patenting of something that had been "described in any printed publication," as Fitch’s drawings had been, prior to filing of the patent application.\footnote{Patent Act of 1836, Ch. 357, 5 Stat. 117, § 7 (July 4, 1836).} In any event, prior to deployment Fulton and Livingston had to make several improvements in order to comply with an additional obligation in the patent grants -- namely, of boats displacing at least twenty tons and capable of going four miles per hour through the ordinary currents of the Hudson river, both upstream and downstream.\footnote{Livingston, 9 Johns at 509-510.} Another clause in the grant provided that for each additional steamboat that the patentees developed their patent term would be extended by five additional years.\footnote{Ibid.} Clearly the New York grant to Fulton and Livingston contemplated actual construction and deployment of steamboats, even specifying their minimum performance.

The Fulton/Livingston patent represented a "promise to develop and deploy" more than an invention actually in the possession of the inventors at the time the patent was issued. One of the reasons that both Justices Yates and Kent gave for upholding
the state's power to issue the patent was that the federal constitution's IP clause gave Congress the power to issue patents only to "authors and inventors." They also noted that the Tenth Amendment mandated that anything not expressly given to Congress was reserved to the states. From that it followed that the state had the power to grant a patent right to someone who was *not* an inventor but rather a developer or promoter.\(^{200}\) The court noted the beneficial effects of the English practice of granting exclusive rights of import to people who were not inventors.\(^{201}\)

This understanding of patents as inducements to development was hardly an oddity at the time. British patents had also been issued not merely to new inventors, but also to those that had migrated an existing manufacture or trade into a new area.\(^{202}\) The American colonies did the same, and continued to do so through special corporate charters well into the nineteenth century. Hamilton's *Report on Manufacturers*, published in 1791, argued in favor of a system that applied not only to novel inventions, but also to those who introduced foreign technology into the United States. Hamilton also acknowledged that the new federal Constitution limited patent protection to "authors and inventors." He suggested the possibility that Congress could legislate additional protection for non-inventing promoters, although its authority to do so was "not without a question."\(^{203}\)

\(200\) *Livingston*, 9 Johns at 560-561 ("Thus it appears, in the exercise of this power, they are limited to authors and inventors only; this clause, therefore, never can admit of so extensive a construction, as to prohibit the respective states from exercising the power of securing to persons introducing useful inventions (without being the authors or inventors) the exclusive benefit of such inventions, for a limited time...."). See also *id.* at 582-583 (Kent, J., agreeing). The New York courts had already agreed, however, that if the patent in question had been issued by the United States, then only the federal courts would have jurisdiction to adjudicate it. Parsons v. Barnard, 7 Johns 144 (N.Y.S.Ct. 1810).

\(201\) *Livingston*, 9 Johns at 561. Justice Thompson simply concluded that the IP clause granted to Congress concurrent rather than exclusive power to issue patents. See *id.* 9 Johns at 563. Chancellor Kent agreed, also citing the Tenth Amendment for the proposition that federal exclusivity should not be implied. *Id.* at 574-575.


In inventing Classical Constitution, written subsequent to the steamboat patent disputes, Joseph Story stated his belief that while the Congressional power to grant patents was limited to inventors, the states retained the power to grant an exclusive right to "the possessor or introducer of an art or invention, who does not claim to be an inventor, but has merely introduced it from abroad...." 204 Chancellor Kent agreed in Livingston, stating the dominant pre-classical view about monopoly grants and economic development:

... [T]he uniform opinion, in England, both before and since the statute of James,205 has been, that imported improvements, no less than original inventions, ought to be encouraged by patent..... [To hold otherwise] would be leaving the states in a condition of singular and contemptible imbecility. The power is important in itself, and may be most beneficially exercised for the encouragement of the arts; and if well and judiciously exerted, it may ameliorate the condition of society, by enriching and adorning the country with useful and elegant improvements.206

The Jacksonian period witnessed the beginning of a technical revolution in patent law. The 1836 Patent Act abandoned the simple "registration" procedure that had existed up to that time with a system that required a patent office official to evaluate patent applications.207 A government examiner now had to look at each "alleged new invention or discovery" and determine whether the thing described in the application "had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant...." 208 In addition, the examiner had to make sure that the subject of the application had not been patented previously or described in a printed publication in either the United States or a foreign country, or had been "in public use or one sale with the applicant's consent prior to the application." 209

The 1836 Act brought about a sea change in the patenting system. Most obviously, it gave to the government rather than the
applicant the basic decision whether the described invention deserved a patent. Second, however, the examination process took concerns of economic development almost entirely out of the picture. While the Act required the Commissioner to make sure that the alleged invention was "useful," that requirement quite quickly became meaningless and, in any event, never referred to marketability or the filling of an important need, things that had been deemed essential to the issuance of early patents.\[^{210}\] Chancellor Kent believed that patents had to be "to a certain degree beneficial to the community, and not injurious, or frivolous, or insignificant."\[^{211}\] By contrast, Justice Story, who generally favored broad monopoly grants, argued that the utility requirement should mean no more than that the invention must not be "frivolous or injurious to the well-being, good policy, or sound morals of society."\[^{212}\] Judicial interpretation under the 1836 Act completely adopted the Story view.\[^{213}\] Increasingly courts rejected inquiries into usefulness in patent validity litigation unless the only purposes to which the challenged device could be put were immoral.\[^{214}\] At the same time, applicants became entitled to a patent unless the examiner concluded that their patent application failed to meet one of the technical criteria for patentability. There was no applicant promise to deploy the patented invention, and nothing limiting a right to bring an infringement suit on an unused patent.

The 1836 Patent Act also introduced the requirement of patent "claims" that "shall particularly specify and point out the part, improvement, or combination, which [the applicant] claims as his own invention or discovery."\[^{215}\] Each claim operated as a kind of "boundary line" specifying exactly what the patentee claimed to be new and patent-worthy in his invention. The rise and rapid expansion of patent claiming doctrine, already underway in judicial decisions prior to 1836, pulled questions about patent validity and scope away from analysis of the central contribution of a patent and toward the precise location of its boundaries. Today the process is described as "peripheral" claiming, emphasizing its focus on

\[^{210}\] E.g., Whitney v. Carter, 29 F.Cas. 1070, 1071-1072 (C.C.D.Ga. 1810) (on the social usefulness of the Whitney cotton gin)
\[^{211}\] 2 KENT, COMMENTARIES, supra note ___ at 369.
\[^{212}\] Lowell v. Lewis, 15 F.Cas. 1018 (C.C.D.Mass. 1817).
\[^{213}\] WILLARD PHILLIPS, THE LAW OF PATENTS FOR INVENTIONS 142 (1837)
\[^{214}\] See BRACHA, OWNING IDEAS, supra note ___, Ch. 4, nn. 81-82 (collecting decisions).
boundary location.\textsuperscript{216}

Patent law became more technical, with more strenuous requirements tied to disclosure of specific technology that was actually in the possession of someone who could show that he was an "inventor." For example, in O'Reilly v. Morse Chief Justice Taney and the Supreme Court upheld most of the early technology that became the modern telegraph system.\textsuperscript{217} The transmitting key, receiver, and "Morse code" were described in detail, together with illustrations. However, the Court famously rejected Morse's patent Claim 8, which provided:

\begin{quote}
I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, \textit{however developed}, for making or printing intelligible characters, letters, or signs, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer.\textsuperscript{218}
\end{quote}

In rejecting this claim Taney pointed out the truly dramatic differences between what Morse had actually invented and illustrated, and the domain of the monopoly he was claiming.\textsuperscript{219} He had sufficiently described a particular device for transmitting electric pulses over long distances over wires, a receiving device that printed corresponding notches on a strip of paper, and a code made up of shorter and longer breaks for translating these pulses into human language.\textsuperscript{220} However, Morse had certainly not invented every alternative, "however developed," for performing this function. As Chief Justice Taney complained:

\begin{quote}
For aught that we now know some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff 's specification. His invention may be
\end{quote}

\textsuperscript{216}The Supreme Court elaborated on peripheral claiming in Merrill v. Yeomans, 94 U.S. 568 (1876).
\textsuperscript{217}O'Reilly v. Morse, 56 U.S. (15 How.) 62 (1853)
\textsuperscript{218}Quoted in O'Reilly, 56 U.S. at 86 (emphasis added).
\textsuperscript{219}Mark A. Lemley, \textit{The Myth of the Sole Inventor}, 110 Mich. L. Rev. 709, 720 (2012). On the breadth and enormous publicity surrounding the Morse patent litigation, see BRACHA, OWNING IDEAS, \textit{supra} note \_, Ch. 4.
\textsuperscript{220}The illustrations and description of the device can be found in BOHANNAN AND HOVENKAMP, \textit{CREATION WITHOUT RESTRAINT}, \textit{supra} note \_ at 123-124.
less complicated — less liable to get out of order — less expensive in construction, and in its operation. But yet if it is covered by this patent the inventor could not use it, nor the public have the benefit of it without the permission of this patentee.  

Patent law survived and even prospered during the heyday of American hostility toward monopoly. It did so, however, by redefining patent law as a narrow and highly technical exception to the emergent classical notion that the free flow of capital rather than monopoly grant is the way to encourage economic development.  

Chief Justice Taney also wrote the Supreme Court’s opinion in Bloomer v. McQuewan, which limited patent rights in a different way and, implicitly tied them back to the Jacksonian concerns of Contract Clause doctrine.  

Bloomer was the Court’s first statement of patent law’s judge-made "first sale" doctrine. It was also the first Supreme Court statement of what later became economic substantive due process.  

Bloomer had licensed a patent on a wood planing machine from its inventor, William Woodworth. The machine’s ability to smooth cut logs into finished lumber made it a significant contribution to that industry. Bloomer licensed others to build the machine with a license agreement that limited the number of machines that could be built and their location, as well as the owner’s ability to transfer the machines to others.  

McQuewan had acquired a license authorizing him to construct and use the machines in Pittsburg and Allegheny County, Pennsylvania. Woodworth was earning substantial royalties from the machines and lobbied Congress for extensions of the patent term. Congress responded twice, first with a provision in the 1836 Patent Act making the extensions retroactive to cover patents that had already been issued. Second, after Woodworth’s death in 1839, his son lobbied Congress and obtained an additional seven year extension that covered only Woodworth’s patent, mentioned by name.  

A federal court in Ohio upheld the

221 56 U.S. at 113.  
222 Bloomer v. McQuewan, 55 U.S. 539 (1852).  
223 Id. at 555-556.  
224 See Frank R. Strong, "Unravelling the Tangled Threatds of Substantive Due Process," 73, 92-95 POWER AND POLICY IN QUEST OF THE LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW (Myres S. McDougal, & Michael Reisman., eds. 1985)  
226 An Act to extend a patent heretofore granted to William Woodworth, 6 Stat.
second extension against a claim that patent terms could only be extended by general legislation. The court observed that Congress had the power to grant public lands and it clearly could grant different parcels for different terms. When Woodworth’s son requested yet another extension there was a large public outcry of unfair monopoly.

To a Jacksonian the retroactive and single-owner term extensions would represent the worst form of legislative capture, recalling all of the evils of the monopoly bridge franchises. Chief Justice Taney’s opinion for the Court rejected Bloomer’s infringement claim. The judge-made “first sale” doctrine that the Court developed, however, was much broader than needed for the purpose at hand. The Court held that “when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly.... The machine becomes his private individual property.” That rule, which survives to this day, does not depend on the lawfulness of any legislative term extension. It can apply to a patented article at any time. Its effect has been to limit the restrictions that patentees can place on technology after a patented product has been sold.

As such, the first sale doctrine has served to limit the scope of the patent "monopoly" in an area where neither the Patent Clause or the Patent Act had anything to say. The doctrine reflects Taney’s strongly classical, antimonopoly position formulated three decades earlier in the Charles River Bridge case: conceding that state grants of monopoly are sometimes permissible, "nothing passes by implication."

Taney was also concerned that retroactive patent extensions could serve to withdraw a property right from someone who had already purchased the patented good in the reasonable expectation that license restrictions would end when the patent expired. Here, in one of his most prescient and important utterances, he invoked the

936 (1845); Bloomer v. Millinger, 68 U.S. 340 (1863) (describing the patent extension and adhering to first sale doctrine).

227 Bloomer v. Stolley, 3 F.Cas. 729 (C.C.D. Ohio 1850) (No. 1,599).

228 Id. at 730-731.

229 See JUDITH McGRAW, EARLY AMERICAN TECHNOLOGY (1994).


232 The cases and economic effects are assessed in Herbert Hovenkamp, Post-Sale Restraints and Competitive Harm, 66 NYU ANN.SURV.AM.L. 487 (2011).

233 Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 608 (1837). See discussion infra, text at notes ___.
Fifth Amendment Due Process Clause:

The right to construct and use these planing machines, had been purchased and paid for without any limitation as to the time for which they were to be used. They were the property of the respondents. Their only value consists in their use. And a special act of Congress, passed afterwards, depriving the appellees of the right to use them, certainly could not be regarded as due process of law.\(^{234}\)

While Congress had the power to grant patents, it did not have the authority "to reinvest in [the patent holder] rights of property which he had before conveyed for a valuable and fair consideration."\(^{235}\) Taney recited a parade of horribles under which innocent purchasers might purchase goods that are out of patent, but that patent rights could then spring up as a result of a retroactive Congressional term extension and limit their usefulness or require payment of a royalty.\(^{236}\)

In anticipating substantive due process doctrine, Taney's discussion reflects a deep suspicion of legislative capture and of the threat to settled expectations in property rights. Of course, he might have added that a retroactive term extension such as the Woodwards obtained from Congress did not serve to incentivize anything, for this patent had already been issued.

Changes in United States patent law during the first half of the nineteenth century were driven by strongly held classical beliefs that monopoly is bad and generally unnecessary for economic development, with invention as a narrow exception. This entailed, first, that the conditions for obtaining a patent had to be narrow and rigorous, limited to actual inventions within the applicant's possession, and adequately disclosed. Second, the system had to be made nondiscretionary and free from politics. Individual patent grants were no longer a matter of legislative prerogative. Rather, the applicant was entitled to a patent if he could make specific showings, nearly all of which pertained to the state of prior technology and use. This second requirement led both Congress and the courts away from relatively open ended policy concerns about economic development, and toward technical specification and boundary clarity. The result was a patent system increasingly detached from questions about economic performance.

\(^{234}\) Bloomer, 55 U.S. at 553-554.

\(^{235}\) Ibid.

\(^{236}\) Id. at 684.
The Social Contract

The classical Constitution is said to embody a social contract based on a presumption of unanimous consent at some a priori point.237 Citizens consent to be governed by legislation that is almost always non-unanimous. This legislation must then be tested against social contract principles, however, considering what those forming the social contract wanted, and what they were willing to give up in order to have it.

The social contract idea has played a much smaller role in American constitutional thought than first appears.238 Historically, when courts used the term they were either referring to a specific text, such as a federal or state constitution, or else the statement was made as dicta but nothing more. Even during the liberty of contract era, judges rarely used the idea of the social contract as a background principle to justify departing from the constitutional text.239

The idea of a fundamental law based on an implied social contract has captured people of very different ideologies, from Richard Epstein, or Buchanan and Tullock on one side, to John Rawls on the other.240 There lies its biggest problem. As a background principle of social ordering it is frustratingly indeterminate because it is so sensitive to assumptions about who the imagined original parties to this contract really were. Did they know about their future stations in life, or were they acting behind a "veil of ignorance."241 Did each person set out to protect only her


238 See Louis Henkin, Revolutions and Constitutions, 49 La. L. Rev. 1023, 1029 ((1989) (social contract rhetoric "served the new nation well at the beginning, but had no further use").


241 See, e.g., BUCHANAN & TULLOCK, CALCULUS OF CONSENT, supra, note __
own interest, or were they outwardly regarding for the welfare of others?242 Did their theory of value depend on past averages or on rational expectations about the future? Answering this last question is critical because whoever the parties to the classical social contract were, they could not possibly have been marginalists. A marginalist would maximize expected individual value by maximizing aggregate value. For example, if economic development of a certain type promised increased social value while taking some individual property rights, the marginalist would favor development. On average, she would come out a winner. A marginalist would maximize the individual value of property rights by considering expected utility and risk. She would even participate in social insurance schemes if the expected value was greater than the risk-adjusted value of not participating. Indeed, depending on the participant's degree of risk aversion, she might participate in programs whose aggregate costs were greater than benefits when not adjusted for risk. For example, even if the provision of universal health insurance produced a deadweight loss of 10% from administrative costs, she would participate if she was adverse to the risk of catastrophic loss that might be caused by a large, uninsured medical event. She would agree to government intervention to correct market failures if she believed that the incremental value produced by the correction exceeded its incremental cost. As a result she would agree to cost-benefit analysis of regulatory provisions. Consistent with that, she might agree to at least certain forms of land use regulation, safety regulation, or regulation of pure foods and drugs or financial institutions. Indeed, if she believed in interpersonal comparisons of utility she might agree to a society in which all wealth was equally divided.243

Of course, tradeoffs might have to be made between shorter-run investments and longer-run payoffs, and that leads to another important assumption. Would the participants in the social contract want to maximize everything for their own immediate generation, not caring about what was left for the next and subsequent generations,

(assuming full information about future status); FISS, TROUBLED BEGINNINGS, note __ at 82 (social contract theory of Lochner era assumed that people knew about their individual wealth and status prior to formation); RAWLS, supra note __ (assuming "veil of ignorance").

242 As an example of the latter, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 26-28 [1762] (George D.H. Cole, trans. 1950); cf. RAWLS, supra note __ (assuming self interest).

243 See HOVENKAMP, OPENING, supra note __, 110-114.
or would they prefer to maximize value over the longer run, deferring short-run value for the sake of children? The most significant implication of marginalist thinking is that values are based on expectations about the future, and "expectations" can refer to a wide variety of things. As a result the "social contract" breaks into a number of different and conflicting ideas about the State, depending on what people value, their degree of risk aversion or optimism about the future.244

Some historians have seen the development of classical constitutional theory in the nineteenth century as reflecting a strong conception of a social contract drawn from the ideology of the framers.245 Those who participated in making the Constitution clearly understood the idea of a social contract, or "compact," although their thought was tempered by Christian doctrine and considerations of republican government.246 At the same time, however, the founders tended to think of the social contract as a set of authoritative texts or "compacts" to which the members of society had given some kind of formal, although not unanimous, consent.247 There is no evidence that any significant group of participants in the making of the Constitution intended for judges to be able to reach beyond the text to a background social contract principle of constitutional decision making.

244Id. at 25-36.

245On the earlier period, see Epstein, CLASSICAL LIBERAL CONSTITUTION, note __; on the Gilded Age and Progressive Era, see Fiss, TROUBLED BEGINNINGS, supra note ___;


247See discussion infra, text at notes __.
By contrast, the social contract in the Lockean theory of classical statecraft is not a single document or written compact or even an historical event in time. Rather, it is an hypothesized *a priori* bargaining position from which government emerges. Blackstone, whose *Commentaries* slightly preceded the Constitution's formation and quickly became the most important legal treatise in the United States, clearly understood the concept of an original social compact. He also understood that it was a conceptual reconstruction rather than an historical event. In Book I of the *Commentaries* Blackstone speculated that there might have been some historical "unconnected state of nature" from which people merged "together in a large plain" and "entered into an original contract" to chose "the tallest man present to be their governor."^249^ Blackstone almost immediately concluded, however, that "This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted." Further, "it is plainly contradictory to the revealed accounts of the primitive origins of mankind," which he described as gradually evolving from families to clans. Nevertheless, he concluded, although there was no such historical compact in fact, the conception of it for the purpose of mutual protection is valuable:

> And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, on other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community....^250^ 

The Social Contract from Locke through Blackstone was

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^250^ Id. at 47.
distinctively "pre-classical." Indeed, one important characteristic of the British classical political economists is the extent to which they either rejected or ignored social contract theory. Adam Smith, whose Wealth of Nations (1776) came to represent the economic ideology of the classical constitution in the mid-nineteenth century, dismissed the social contract and the idea of an early state of nature as a meaningless fiction. For him political development was largely a product of gradually evolving norms. The "invisible hand" that made the economy and the State function was hardly the product of an historical social compact, and Smith consistently rejected its as the raison d'être of civil government. Smith's British followers, including Malthus, Ricardo, and Mill, all defended economic nonintervention strongly, but uniformly ignored or dismissed the idea of a social contract as the basis for their beliefs. John Stuart Mill's Political Economy included a lengthy defense of laissez-faire economic principles, but the social contract never appeared among his defenses. The nineteenth century American political economists very largely did the same thing -- defending laissez faire economic doctrine vigorously, but giving little thought to a social contract as an explanation.

251 Hovenkamp, Cultural Crises, supra note __. For example, Thomas Sowell's masterful study completely ignores the subject. THOMAS SOWELL, ON CLASSICAL ECONOMICS (2006).
254 JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY 941-79 (William J. Ashley ed., 1976) (7th ed. 1871). Mill also rejected social contract theory in his essay ON LIBERTY, Ch. IV (1869) See also JOHN STUART MILL, UTILITARIANISM 55 (George Sher ed., 1988) (1861) (“a favorite contrivance has been the fiction of a contract, whereby at some unknown period all members of society engaged to obey the laws, and consented to be punished for any disobedience to them . . .”).
255 E.g., HENRY C. CAREY, PRINCIPLES OF POLITICAL ECONOMY (1837); HENRY C. CAREY, PRINCIPLES OF SOCIAL SCIENCE (1859); see also THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY (2d ed. 1831); Francis Wayland, The Elements of Political Economy (1837). Wayland's Elements of Moral Science contains a brief discussion, apparently referring to positive law. FRANCIS WAYLAND, ELEMENTS OF MORAL SCIENCE 359-363 (1865). Other nineteenth-century American economists also fail to discuss the
While late eighteenth century courts sometimes spoke of a "social compact" as fundamental law, they almost always used the term in reference to the text of either the U.S. or a state constitution, or occasionally to a treaty or inter-state agreement. In his 1780 draft of the Massachusetts Constitution, John Adams spoke of it as "a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."257 A 1781 Pennsylvania Supreme Court decision spoke in similar terms, referring to the text of the Articles of Confederation.258 In 1782 Virginia’s highest court could declare about its state constitution, "...since we have a written record of that which the citizens of this state have adopted as their social compact, and beyond which we need not extend our researches."259 The social compact was the text, and nothing more. Pennsylvania delegate James Wilson used a social contract analogy at the constitutional convention, arguing that the states were the equivalent to individuals in a state of nature, and that the constitutional text would be their social contract.260 Alexander Hamilton complained in Federalist No. 21 of the lack of sanctions in the "social compact," referring to the Articles of Confederation then in force.261 In Federalist #44, by contrast, James Madison did speak of excessive state power to declare legal tender

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257 8 PAPERS OF JOHN ADAMS 237 (Greg L. Lint et al., eds., 1989).
258 Respublica v. Chapman, 1 U.S. 53, 54-55 (1781). The decision was reported in U.S. reports because Alexander Dallas, the first Supreme Court reporter, grouped Pennsylvania and U.S. decisions together in the first volume.
259 Commonwealth v. Caton, 4 Call 5 (Va. 1782). See also Kamper v. Hawkins, 1 Va. Cas. 20, 3 Va. 20, 58 (Gen.Ct. of Va. 1793) (speaking of period immediately after declaration of independence as prior to the existence of any "social compact," which awaited the formation of either the Articles of Confederation or the Constitution); VanHorne's Lessee v. Dorrance, 2 U.S. 304 (C.C.D.Pa. 1795) ("The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law.")
261 Federalist #21 (Hamilton, signed "Publius, Dec. 12, 1787)
Inventing Classical Constitution

or issue paper currency or make *ex post facto* laws to be "contrary to
the first principles of the social compact, and to every principle of
sound legislation." For that reason the proposed Constitution took
these powers away from the states.\(^{262}\) By contrast, "Brutus," widely
believed to be New York Judge and constitutional opponent Robert
Yates, wrote in the *Antifederalist* that the proposed Constitution was
deficient because "the principles ... upon which the social compact is
founded, ought to have been clearly and precisely stated,... But on
this subject there is almost an entire silence."\(^{263}\)

As John Jay, first Chief Justice of the United States Supreme
Court, put it in Chisholm v. Georgia:

> Every State Constitution is a compact made by and
> between the citizens of a State to govern themselves in a
certain manner; and the Constitution of the United States is
likewise a compact made by the people of the United States
to govern themselves as to general objects, in a certain
manner. By this great compact however, many prerogatives
were transferred to the national Government, such as those of
making war and peace, contracting alliances, coining money,
etc. etc.\(^{264}\)

The closest the Supreme Court ever came to recognizing a
preexisting social contract outside the text of any ratified document
was Justice Samuel Chase's brief discussion in Calder v. Bull,
suggesting that certain fundamental rights trump even the
constitutional text.\(^{265}\) This prompted a debate with Justice James
Iredell who, while concurring in the judgment, rejected Chase's broad
fundamental rights perspective, concluding that natural law principles
apart from the constitutional text would apply "no fixed standard,"
because "the ablest and purest men have differed upon the
subject."\(^{266}\) In Corfield v. Coryell Justice Bushrod Washington, then
riding as a circuit judge, also produced a long list of fundamental

\(^{262}\) *Federalist* #44 (Madison, Jan. 25, 1788).

\(^{263}\) *The Antifederalist* #2 (Brutus, 1 Nov. 1787). Brutus' identity is generally
thought to be Robert Yates, who had been a delegate to the Constitutional
Convention from New York.

\(^{264}\) *Chisholm v. Georgia*, 2 U.S. 419, 471 (1793). The court later concluded
that treaties are also "compacts" Id. at 475. See also Green v. Biddle, 21 U.S. 1
(1823) (repeatedly using the term "compact" to describe the agreement by which
Kentucky was severed from Virginia).

\(^{265}\) *Calder v. Bull*, 3 U.S. 386 (1798).

\(^{266}\) *Id.* at 399; and see DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION*
rights that were not in the text, although he relied on the Privileges and Immunities Clause of Article IV of the Constitution,\footnote{U.S. Const, Art. IV, § 2, Cl. 1.} rather than the assumption of a social contract.\footnote{Corfield v. Coryell, 6 Fed. Cas. 546, #3230 (C.C.E.D.Pa. 1823).}

A half century later Justice Noah Haynes Swayne dissented from the majority's opinion in the Slaughter-House Cases.\footnote{Slaughter-House Cases, 83 U.S. 36 (1874).} The majority had refused to apply the recently ratified Fourteenth Amendment's Privileges and Immunities Clause\footnote{U.S. Const., Amend. XIV, § 1.} to invalidate a New Orleans monopoly given to a slaughterhouse. Justice Swayne's dissent identified the list of rights created by the Privileges and Immunities Clause with "the plainest considerations of reason and justice" and "the fundamental principles of the social compact."\footnote{83 U.S. at 129.} While Swayne's dissent was largely ignored, the dissenting opinions by Justices Field and Bradley were widely cited as rallying cries for the limitation of state power to interfere in the freedom to pursue a lawful occupation. Neither invoked the social contract.

In his Commentaries on the Constitution, conservative anti-Jacksonian Joseph Story acknowledged the theory of a social compact. however, "the doctrine itself requires many limitations and qualifications, when applied to the actual conditions of nations...."\footnote{1 STORY, COMMENTARIES ON THE CONSTITUTION, supra note __, 293, 296} For Story the only meaningful definition of a social contract was the federal and various state constitutions ratified in the wake of the American revolution.\footnote{Id. 284-286.}

Usage from the middle of the nineteenth century to the Gilded Age, while substantive due process was percolating in the state courts, was similar. For example, in his Dred Scott opinion Chief Justice Taney complained that the slave holding states would never have agreed to the Constitution if they believed it would treat slaves as "citizens."\footnote{Scott v. Sandford, 60 U.S. (19 How.) 393, 404-405 (1856) (slave holding states would never have agreed to the Constitution if they believed in incorporated slaves as "citizens"); See DON E. FEHRENBACKER, THE DRED SCOTT CASE 355 (1978). Cf. Prigg v. Com. of Pennsylvania, 41 U.S. 539, 660 (1842) (agreeing that some southern state would have thought slavery to be a part of the social compact). Of course, he was speaking of the Constitutional text. Social contract language did appear more frequently during the...
heyday of substantive due process, but mainly in dicta. Further, the
way the concept was used only suggested how indeterminate and
unhelpful it was as a rationale for constitutional decision making.
One illustration is People v. Budd,

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where a divided New York Court of Appeals upheld a statute regulating the prices charged by
grain elevators. Justice Andrews spoke for the majority concluding
that "the very nature of the social compact" is to recognize
governmental power "to prescribe regulations demanded by the
general welfare for the common protection of all."276 By contrast,
Justice Gray's dissent concluded that the statute "violates the social
compact under which we live," although he did not cite any particular
text in the United States or New York Constitutions that supported
that view.277 A year earlier the United States Supreme Court had
upheld a similar law. At one point in his opinion for the Court Chief
Justice Waite used the term "social compact" to describe Acts of
Parliament and state constitutions. At another point he quoted the
1780 Massachusetts Constitution as a social compact by which
citizens contracted with one another for the "common good."278
Justice Harlan quoted the same language in Jacobson,

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thirty years
later, when the Court upheld a Massachusetts statute mandating
vaccination.279 In Bertholf v. O'Reilly the New York Court of Appeals
upheld a statute that made a landlord liable for permitting an
unlicensed tenant to sell liquor on the property to a man who became
intoxicated and then ran over and killed the plaintiff's horse.280
Justice Andrews wrote for the unanimous court that

[t]he question whether a statute is a valid exercise of
legislative power is to be determined solely by reference to
constitutional restraints and prohibitions. The legislative

275 117 N.Y. 1 (1889).
276 Id. at 7. See also Losee v. Buchanan, 51 N.Y. 476, 484 (1873):

By becoming a member of civilized society, I am compelled to give up
many of my natural rights, but I receive more than a compensation from
the surrender by every other man of the same rights, and the security,
advantage and protection which the laws give me. So, too, the general
rules that I may have the exclusive and undisturbed use and possession of
my real estate, and that I must so use my real estate as not to injure my
neighbor, are much modified by the exigencies of the social state.
277 Budd, 117 N.Y. at 34.
278 Munn v. Illinois, 94 U.S. 113, 124 (1876)
280 Bertholf v. O'Reilly, 74 N.Y. 509 (1878).
power has no other limitation.... The theory that laws may be declared void because deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities.281

In sharp contrast, Loan Ass'n v. Topeka, discussed previously, held that a tax raised to finance a railroad bridge violated a fundamental right in the "social compact" because the monies were not used for a public purpose.282 Here, the term was used as a justification for reaching beyond the Constitutional text, which never limited the state taxing power to public purposes.

Notwithstanding their unanimous support for the Topeka holding, the constitutional law writers that we today regard as the parents of economic substantive due process either disregarded the social contract as a basis for their beliefs or else rejected it. Thomas M. Cooley had almost nothing to say about the matter in his 1868 Treatise on Constitutional Limitations, other than to observe that courts used it mainly to express a conclusion that they had already drawn from an explicit statement in a state or federal constitution.283 John Dillon never mentioned it at all.284 Francis Wharton's 1886 Commentaries contained an extensive discussion but ultimately concluded that law was customary, evolving over several centuries, rather than the product of a single quasi-legislative act.285 Wharton's view reflected the historicist thought of the day, developed particularly in Sir Henry Maine's Ancient Law (1861). Maine rejected the social contract as a basis for society, arguing instead that legal rights and norms had evolved over a long period of social trial and error.286

Christopher Tiedeman, the most libertarian of the substantive due process writers, described social contract theory as "the extreme

281 Id. at 514.
282 Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874). See discussion supra, text at notes __.
283 COOLEY, CONSTITUTIONAL LIMITATIONS (1868), supra note __ at 166 n.1 See also id. at. 35 (using the term to refer to a written declaration of rights).
284 DILLON, MUNICIPAL GOVERNMENT, supra note __.
285 FRANCIS WHARTON, COMMENTARIES ON LAW 78-86, 101-105 (1886).
286 HENRY MAINE, ANCIENT LAW (1861). See HOVENKAMP, OPENING, supra note ___ at 3-5.
limits of absurdity." He drew this conclusion not in his prominent treatise on constitutional regulatory power, but rather in an interesting 1890 monograph entitled The Unwritten Constitution, which was an argument against what he termed "strict constructionists" who believed that the Constitution could have no meaning other than what was explicitly granted by the text. In his Police Power treatise Tiedeman concluded that

"It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitution limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice."

Tiedeman went on to acknowledge, however, that in cases of constitutional ambiguity due deference should be made to questions of natural liberty. For example, one might be deprived of liberty without actually being confined, or of property without actually being subjected to forcible expropriation. These ideas were "glittering generalities" that permitted the judge to reach a little beyond the constitutional text. Then he added this:

If, for example, a law should be enacted, which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizen unnecessarily, and in such a manner that it did not violate any specific provision of the constitution, it may be held invalid, because in the one case it interfered with the inalienable right of property, and in the other case it infringed upon the natural right to life and liberty."

While refusing to embrace the rhetoric of social contract, both Cooley and Tiedeman read the words "property" and "liberty" in the Fourteenth Amendment due process clause in expansive ways, reaching prospective legislation of general application. "Property" came to mean much more than common law property rights, and "liberty" much more than freedom from government restraint. Thus

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288 TIEDEMAN, POLICE POWER, supra note ___.
289 TIEDEMAN, UNWRITTEN CONSTITUTION, id. at 130.
290 TIEDEMAN, POLICE POWER, supra note __ at 7 (1886).
291 Id. at 10.
292 Id. at 11.
Lochner in the Supreme Court or the New York Court of Appeals’ Ringe decision could strike down employee hours regulation or upset a statute requiring people wishing to be undertakers to undergo an apprenticeship and be licensed. These statutes deprived affected persons of both “liberty” and “property” without due process. Neither court mentioned the social contract.293 For his part, Holmes complained in both Lochner and Adkins, nearly twenty years apart, that the Court’s decisions striking down hours and wages regulation could not be shown to depend on any specific provision in the Constitution itself.294

The union of social contract theory and liberal constitutional statecraft or economic policy is hardly a part of the original Constitution. Rather, it is a largely twentieth century phenomenon, originating in post-New Deal attacks on legislation and rational basis constitutional tests,295 but later picked up by welfare liberals as well.296 Its principal twentieth century manifestations are public choice theory on the right and Rawlsian social justice on the left.297 The real source of classical liberal doctrine as reflected in the courts, particularly after the Jackson era, was migration of classical economic theory into legal thought. In that, the social contract never played a significant role.

Conclusion: The Neoclassical Constitution

Classical constitutionalism was an important movement that, from today’s perspective, occupied the middle portion of American constitutional history. The nearly half century period from the Constitution’s making until the establishment of classical theory under the Taney Court came first. Then came roughly a century during which classicism in constitutional law writing grew and took hold. Classicism as a dominant constitutional ideology came to a

293 People v. Ringe, 197 N.Y. 143, 146 (1910)
294 Lochner v. New York, 198 U.S. 45, 76 (1905); Adkins v. Children’s Hospital, 261 U.S. 525, 568 (1923) (objecting that the statute violated no “specific provisions of the Constitution”)
296 E.G. RAWLS, A THEORY OF JUSTICE, note ___.
297 For a good history and discussion of the principal works, including the application of social contract theory to constitutional law, see DENNIS C. MUELLER, PUBLIC CHOICE III 597-640 (2003).
sudden end in the late 1930s and today the "post-classical" constitutional era is approaching 80 years old.

The dominant view today is that the constitutional revolution which brought down the classical constitution was "progressive." When capitalized, that term refers to an important but relatively short lived political movement that lasted from around 1900 to around 1930 and actually ended while Constitutional classicism was still very much alive. When used with a small "p," as it more commonly is in legal history, it refers to a much broader movement that encompasses Progressivism, the New Deal, the Warren Court, the Great Society, and even the agenda of the Democratic Party and very likely many independents and Republicans.

For its critics, describing this movement as "progressive" enables them to go back and discover some lost element of Constitutional law. The fact is, however, that most of the changes in economic policy and the constitutional doctrine the displaced constitutional classicism are not "progressive" at all. They are better described as "neoclassical" or "marginalist," reflecting centrist changes in economic theory embraced by a wide population, including people that would never describe themselves as progressive.\(^{298}\) That is the reason we can never go back.

\(^{298}\) See HOVENKAMP, OPENING, supra note ___ at 1-12.