The Classical Constitution

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Introduction

Conservative and libertarian constitutional writers in the United States have often pined for return to a “classical” constitutional understanding, particularly the federal Constitution.1 “Classical” does not necessarily mean

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1 In recent work, see Richard A. Epstein, The Classical Liberal Constitution (2014); Thomas R. Pope, Social Contract Theory in American Jurisprudence: Too Much Liberty and Too Much Authority (2013); Timothy Sandefur, The
“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.

Much of the core theory of classical constitutionalism 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 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

Constitution, *supra* note 1; David E. Bernstein, Rehabilitating Lochner: 

³ Epstein, Classical Liberal Constitution, *supra* note 1, 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.
questions of noneconomic individual rights, as long as their exercise does not harm others excessively.⁵

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 No. 10, and the Anti-Federalist.⁶ Important collateral influences include Blackstone's conception of the centrality of the common law,⁷ as well as Adam Smith's views about the importance of the free market over against government interference.⁸ 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 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,⁹ 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

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⁷ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769). E.g., EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note 1, at 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 1 at 150, 582.

⁹ EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note 1 at 25, 137.
deviate from the ordinary tools of legal textual interpretation. However, this classical conception does sometimes revert to textualism when it supports the purpose at hand—as when defending a narrow conception of the Commerce Clause\(^\text{10}\) or attacking the delegation of quasi-legislative or judicial power to government agencies.\(^\text{11}\)

Today the most common 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.\(^\text{12}\) 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.\(^\text{13}\)

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.”\(^\text{14}\) This

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\(^\text{10}\) See HOVENKAMP, supra note 5, at 295–300.

\(^\text{11}\) Id. at 284–286.

\(^\text{12}\) EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note 1, at 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,’. . .”).

\(^\text{13}\)EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, supra note 1, at 55.

writing produced a 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.¹⁵

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.¹⁶

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 encouragement of economic development. 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.¹⁷

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¹⁵ E.g., Epstein, Classical Liberal Constitution, supra note 1, at 55.

¹⁶ This is an important theme in Hovenkamp, supra note 5. See also Herbert Hovenkamp, Progressive Legal Thought, 72 Wash. & Lee L. Rev. (forthcoming 2015) (disputing the proposition that the principal counter to classical constitutionalism is progressive legal thought).

¹⁷ E.g., Horwitz, supra note 14 at 31–62 (property rights), 63–74 (just compensation), 74–99 (nuisance, punitive damages and negligence), 160–210 (from equitable to laissez-faire conceptions of contract), 211–252 (negotiability and emergence of commercial law).
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.\(^\text{18}\) These views took root in federal constitutional doctrine with Jackson's appointment of Chief Justice Roger B. Taney, an 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. The evolving positions 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.\(^\text{19}\) As these doctrines expanded, however, constitutional doctrine began to depart more significantly from constitutional texts and collateral historical sources. The Jacksonian liberal tradition was much less libertarian on questions of morals, however. Indeed, the Jackson and post-Jackson periods are characterized by a significant increase in government regulation of morals, compensating for a splintering and more pluralistic Christian Church that was rapidly losing its hegemony on matters of morals.\(^\text{20}\)

In making this argument for a relatively late arising "classical" interpretation of the Constitution, I focus on examples that have been underrepresented in the extensive constitutional literature. One example is the growing hostility of nineteenth century classical constitutionalists to Marshall-era Contract Clause jurisprudence, which limited the State's power to modify contracts that had already been executed. In its place classicists developed a "public purpose" doctrine that applied to prospective contract, as well as the foundation for economic substantive due process. Another was the development of a doctrine of "inverse" condemnation requiring compensation for injuries caused by state-sanctioned economic development when there was no assertion of


\(^{19}\) See Hovenkamp, supra note 5, at 268–269.

\(^{20}\) Id. at 254–256. See also Kyle G. Volk, *Moral Minorities and the Making of American Democracy* 3–5, 37, 58 (2014).
eminent domain power. The principal legal vehicle for this was the common law tort writ of trespass on the case, commonly used to challenge such harms by private defendants. The existence of state constitutional takings provisions served to remove sovereign immunity as a defense. Yet another development was the emergence of a "classical," largely administrative patent law system intended to take the issuance of patent "monopolies" away from state legislatures, where they were excessively prone to special interest capture. In the process, however, the patent system was recast into a set of property rights whose definition and scope were largely isolated from concerns about economic development. That economic isolationism has affected patent law ever since.

*Third,* one element thought to be central to 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 unstated 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.21

*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 contributing something important that is new.22 Further, the contributions were revisionist, often reformulating well-established ideas in ways that the classicists themselves would have rejected. For

21 See discussion infra text at notes 67, 245.

22 HOVENKAMP, supra note 5, at 2–4.
example, neoclassical economics in the late nineteenth and early twentieth century preserved classicism's faith in markets 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 value based on rational expectations. The results were rejection of classicism's backward looking and heavily historicist views, much more sophisticated and pervasive ideas about risk and its management, and a broader conception of market failure. 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.” With a little more qualification, Garry Wills largely agreed.  

Rossiter's categorical statement was 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. Nor is there any explicit reference to Smith in the Federalist papers. Adam Smith was unpopular

23 Id. at 4–10.


26 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).
among many of the Constitution's Federalist supporters because he was British.\(^{27}\) By contrast, Thomas Jefferson and James Madison both read and admired *The Wealth of Nations*, and there is some evidence that Madison relied on Smith even though he never cited him.\(^{28}\) 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*.\(^{29}\)

Smith opposed the use of government inducements to encourage economic development, particularly state-sanctioned monopolies or other privileges granted to corporations.\(^{30}\) Six state delegations to the Constitutional Convention unsuccessfully urged a provision prohibiting the federal government, although not the states, from making monopoly grants in order to further development. Two years later James Madison successfully resisted attempts to have such a provision included in the Bill of Rights.\(^{31}\)

The legal 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.\(^{32}\) The states were concerned about a

\(^{27}\) *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).


\(^{30}\) Fleischacker, *supra* note 26, at 905.


\(^{32}\) English Statute of Monopolies, 21 Jac. 1, c. 3 (1623). *See* discussion infra, text at notes 171, 205.
centralized federal power to create monopolies that might injure individual states, rather than with state power to create their own monopolies, which would benefit the granting states. Indeed, during the post-ratification period nearly all the states enthusiastically issued monopoly grants in their own corporate charters. Massachusetts and New York led the way in state grants of monopoly charters, even though they had opposed federal power to create monopolies.\textsuperscript{33} By contrast, an anti-monopoly provision did make its way into the contemporary North Carolina constitution, although it was apparently never used to strike down an exclusive grant in a corporate charter.\textsuperscript{34}

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{35} 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{36} and -- a little later -- expansion of takings doctrine so as to encompass "regulatory" takings under state law.\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

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\textsuperscript{33} See HOVENKAMP, supra note 14, at 17–35.

\textsuperscript{34} North Carolina Constitution and Declaration of Rights, Art. 23 (1776) (“That perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed”), available at http://www.learnnc.org/lp/editions/nchist-revolution/4330. See Minge v. Giomour, 17 F. Cas. 440, 1 Car. L. Rep. 34 (C.C.D.C.N.Car. 1798) (relying on this provision to hold that the fee tail estate did not exist in North Carolina). See Joshua C. Tate, Perpetuities and the Genius of a Free State, 67 VAND. L. REV. 1823 (2014) (observing South Carolina's unique history as proprietary land grant colony that gave rise to perpetuities issues).

\textsuperscript{35} See HOVENKAMP, supra note 14, at 17–35.

\textsuperscript{36} Id. at 38–41.

\textsuperscript{37} See discussion infra, text at notes 125-170.

\textsuperscript{38} See discussion infra, text at notes 65, 180–84.
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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. As classical economic and political theory developed in the mid-nineteenth century and after, constitutional law became more hostile toward state economic intervention, even if intended to further economic development. The recognized an exception, however, for state regulation of health, safety, or morals.40

The United States Constitution was written at an important transitional time in the history of western political and economic 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 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;41 the difference between “direct” and “indirect” taxation, which occasioned the Supreme Court’s first citation of an economic text;42 the importance of separation of church and state;43 the profligacy of monarchs;44 and Smith's preference for farming over manufacturing.45 Although Madison did not cite Smith, there are also discernible parallels between Madison's views in Federalist No. 10 concerning the competition among different interest groups


40 Id. On the exception for health, safety, and morals, see HOVENKAMP, supra note 5, at 243–262.

41 Fleischacker, supra note 26, at 904.

42 Id. at 905. See Hylton v. United States, 3 U.S. (3 Dall.) 171, 180-181 (1796), quoting Wealth of Nations on the difference between a tax on revenues and a tax on expenses.

43 Fleischacker, supra note 26, at 905, 907 (discussing Smith's influence on Madison on church and state).

44 Id.

45 Id. at 906.
(“factions”) and Smith’s arguments based on competition among various religious sects in England.46

American colleges and schools in the early national period had not developed much in the way of an “indigenous” theory of political economy. The discipline was taught as a branch of moral philosophy, and almost exclusively with British or Continental texts.47 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:

A nation 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 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.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.49 By contrast, the anti-Federalists opposed the Constitution in part because they believed that it permitted the federal

46 Id. at 910.
48 DANIEL RAYMOND, THOUGHTS ON POLITICAL ECONOMY, IN TWO PARTS 326 (1820).
government to create monopolies. 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.

In his later book on 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. In his 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.

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

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50 See 1 JOHN DICKINSON, Letters on the Tea Tax 457–460, in THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS, 1764–1774 (Paul Leicester Ford ed., 1895); [James Winthrop?], Agrippa IX, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, 80 (Paul Leicester Ford ed., 1892) (James Winthrop is believed to be the author, but authorship is not conclusively established); Robert Yates, in 6 THE COMPLETE ANTI-FEDERALIST 112 (Herbert J. Storing, ed., 1981) (Yates writing under pseudonym “Sydney”; he also used the pseudonym “Brutus”).


53 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 247–48 (2d ed. 1851).

to be more laissez faire than the northeastern seaboard, mainly because of the South's greater reliance on agriculture and slavery.\textsuperscript{55} 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.\textsuperscript{56} 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 . . . ”\textsuperscript{57} Notwithstanding its position during the ratification debates that the federal government should be prohibited from creating monopolies,\textsuperscript{58} Massachusetts developed a strong tradition of using monopoly corporate charters in its own grants to encourage economic development.\textsuperscript{59} Other states did the same thing.\textsuperscript{60}

Some public works required more explicitly financial support. In the early national period lotteries were often used to fund public works projects.\textsuperscript{61} 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 used either to purchase corporate stock or else to finance outright grants to corporations for the purpose of construction.\textsuperscript{62} 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 the municipal bond cases,

\textsuperscript{55} See 2 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION 1606-1865 at 527–565 (1946).

\textsuperscript{56} HOVENKAMP, ENTERPRISE, supra note 14, at 17–41.


\textsuperscript{58} See discussion supra, text at notes 31–36.

\textsuperscript{59} HANDLIN & HANDLIN, supra note 54, at 68–77, 177–179, 212–213.


\textsuperscript{61} See HOVENKAMP, supra note 5, at 256–259.

\textsuperscript{62} HOVENKAMP, supra note 14, at 36–41.
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.63 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 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 was that government's role in furthering economic development should be limited and passive, focusing on protection of property rights and not the creation of monopolies or other exclusive privileges. To this, patent and other intellectual property rights were narrow exceptions and their issuance should be removed from legislative discretion. A third theme, which eventually became an obsession, was that many supposed government inducements for economic development were nothing more than "capture" of government processes by special interest groups.

Over time the concept of “monopoly” became broadly defined, however, to include many government interventions in the unregulated market, whether or not they actually 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.64 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.

In addition, property rights in the late nineteenth century were recast as a private right to resist government induced economic development -- or as individual rights that could be asserted notwithstanding public concerns about development. Many of the great takings controversies in post-Fourteenth Amendment Supreme Court jurisprudence have involved either conflicts between private property ownership and a sovereign's claimed power to engage in


64 People v. Ringe, 197 N.Y. 143, 151 (1910).
economic development, or else government control of some of private development's spillovers, such as environmental harm or destruction of historically significant structures.

These changes occurred in several areas of Constitutional law. First, giving effect to classical ideas required a significant departure from the Contract Clause doctrine created under Chief Justice Marshall, which classical critics saw as creating and perpetuating entrenched monopoly. Second, property rights had to be expanded so as to go beyond the traditional concerns of eminent domain law, which were seizure of title or forced occupancy. State constitutional law began to develop a conception of "regulatory takings," which eventually migrated into federal law. Third, 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 decisions made in accordance with the existing “law of the land.” A fourth change came in patent law, switching the focus away from monopoly grants for the purpose of promoting economic development, and towards the creation of a set of property rights that an inventor could assert or not at its pleasure.

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67 See discussion infra, text at notes 76-113.

68 See discussion infra, text at notes 125-170.

69 See discussion infra, text at notes 72-73, 89-90, 244-262.

70 See discussion infra, text at notes 171-280.
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.71

The rise of economic 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.72 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.73 Given the large amount of literature on the rise of economic substantive due process, the balance of this section looks at some other ways that the interpretation of state and federal constitutions changed in order to reflect classical ideas, focusing on the Contract Clause, the "public purpose" requirement for taxation, inverse condemnation, and patent law. It concludes by showing that social contract theory was utterly disregarded or rejected as a justification for constitutional classicism.

**Legislative Capture and the Contract Clause**

Article I's Contract Clause is one of the few express imitations on state power in the original Constitution, including the Bill of Rights prior to


incorporation. 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 impairing an existing obligation created by a contract that was lawful at the time it was made. As a result it never provided a defensible rationale for economic substantive due process doctrine, which limited state power to limit contracts to be made in the future. No clause in the Constitution including any of its subsequent Amendments expressly does that.

Early on, Supreme Court Contract Clause jurisprudence 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. During the Taney period the Supreme Court did not relent from close scrutiny of such statutes, frequently striking them down.

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 state-issued deed to land was a contract that the state legislature could not later rescind. In the Dartmouth College case in 1819 the Marshall Court extended this rule to a corporate charter, holding that once a state granted a charter it could not be altered in a way disadvantageous to the grantees.

While Dartmouth College itself was a dispute over the management of a college, its holding came to support 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

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74 U.S. CONST., art. I, § 10, cl. 1.


76 E.g., Gantly's Lessee v. Ewing, 44 U.S. 707 (1845); Bronson v. Kinzie, 42 U.S. 311 (1843).

77 Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

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. Further, protection from competition was one way of ensuring profitability. Acting under Dartmouth College, many states granted corporate charters that either expressly or implicitly contained exclusive rights. Later in the century, after Dartmouth College had been significantly weakened, states switched to more direct forms of financial inducement, typically financed by public bonds. The courts also limited these grants under the “public purpose” doctrine.

By 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. Maine's Chief Justice John Appleton stated the classical position in 1871, in a decision holding that local governments did not have the authority to grant subsidies to individuals to encourage investment in local industry:

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.

By the 1820s a broad and diverse political movement opposed state grants of monopoly charters and other special privileges in order to induce investment. 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.

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80 See discussion infra, text at notes 114-124.

Crawford. The election went to the House of Representatives, where an infamous “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 in dissent 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 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.

In contrast to the Marshall Court, the Taney Court used every device at its disposal to limit monopoly grants. Indeed, when he was Attorney General to

83 Id. at 545.
84 Id. at 608 (Story, j., dissenting).
President Jackson Taney had written a legal opinion concluding that states did not have the power to grant monopoly rights.85

By the time of Reconstruction, the Dartmouth College holding had been almost completely upended. 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 forbade a state from placing a monopoly grant in a corporate charter for a slaughterhouse.86 The contemporary literature largely ignored a significant public health problem that almost certainly served to justify the price-regulated public utility that the City of New Orleans created, and instead resorted to the explanation that the monopoly had been created by monopoly and corruption.87

In sum, classical political economy did not became 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. Dillon, Christopher

85 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 (Sep. 5, 1833). See also Dodd, American Business Corporations 125 (1954); Carl Swisher, Roger B. Taney 363-367 (1935). Taney was Attorney General from 1831 to 1833.


87 See Hovenkamp, id. at 1303 & n. 228 (on the price regulation), 1296 (on the bribery and corruption claims).
Tiedeman, and Francis Wharton. At the same time these writers were developing liberty of contract doctrine they also worked mightily to dismantle 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 a state constitution.

In the views of Cooley and Wharton the Contract Clause in particular had become the vehicle for capture by powerful interest groups. Historically,

88 THOMAS 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); JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS (2d ed. 1873); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886); 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. 435–63 (1862). The work of others is summarized in Hovenkamp, supra note 39, at 397–98.

Marshall's extension of the term “contract” to a legislatively granted corporate charter reflected the dominant Framers' concern with legislative attempts to renege 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, Section 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, *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 Supreme Court 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.

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90 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 . . . .”).


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

> [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. . . .

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In addition, Cooley argued, the legislature should be deemed powerless to contract away its police power.96 Writing as Chief Justice of the Michigan Supreme Court, Cooley 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.97 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 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.

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That theme would frequently resurface in public choice literature -- namely, that special interest legislation should be viewed as a kind of "contract' with those who obtained it, rather than enactments in the public interest. Writing

95 COOLEY, *supra* note 88, at 335.

96 *Id.* at 333–39.


98 *Id.* at 273.
in 1853, near the end of his career as Chief Justice, Taney elaborated on these concerns. Referring to special privileges in corporate grants he opined that almost every bill of incorporation:

[I]s 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.

On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money.99

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.100

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.101 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,


100 WHARTON, supra note 88, at § 483, 554, 556.

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.\textsuperscript{102} Wharton concluded that if a state had the police power over a certain regulatory area, then it could regulate even if a previously granted charter had provided to the contrary.\textsuperscript{103}

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

\textit{[T]he 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.}\textsuperscript{104}

Subsequent to the \textit{Slaughter-House Cases}\textsuperscript{105} 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.\textsuperscript{106} The state then withdrew the slaughterhouse charter, thus inviting the inevitable Contract Clause challenge.\textsuperscript{107} The second 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.\textsuperscript{108} Both

\textsuperscript{102} Munn v. Illinois, 94 U.S. 113 (1877).

\textsuperscript{103} \textit{Id.} at 55.

\textsuperscript{104} 2 TIEDEMAN, supra note 88, at 952–53.

\textsuperscript{105} Slaughter-House Cases, 83 U.S. 36 (1874). \textit{See} discussion supra, text at note 87.

\textsuperscript{106} L.A. CONST. art. 2 (1879) (“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 . . . .”).

\textsuperscript{107} Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughterhouse Co., 111 U.S. 746 (1884).

\textsuperscript{108} \textit{Id.} at 654.
the sixth edition of Cooley's *Constitutional Limitations* (1890)\(^{109}\) 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....”\(^{110}\) 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.”\(^{111}\) Tiedeman agreed, concluding that the “State cannot barter away its police power.”\(^{112}\)

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.\(^{113}\) The classical view, expressed in a variety of doctrines, was quite simply that legislatures could not be trusted.

**The “Public Purpose” Doctrine, Federal and State**

Classical statecraft insisted that most human interactions be private, and generally by mutual agreement. The State could intervene only in furtherance of a narrowly 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 nineteenth century advocates did not use that term.

Judicially, doctrine limiting public involvement 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

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\(^{110}\) *Id.* at 342.

\(^{111}\) *Id.* at 343 n. 1.

\(^{112}\) CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* 582 (1886).

\(^{113}\) HOVENKAMP, *supra* note 5, at 266–267.
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.”114 While the federal Takings Clause was not applied against the states until the 1890s, state constitutions had their own takings clauses. Further, federal and state law both recognized 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 Topeka holding that a municipality could not assess a tax to support a privately owned but incorporated railroad bridge.115 Justice Miller's opinion for the Court did not cite a single clause from either the federal or Kansas constitution. Rather, he relied on John Dillon's treatise on municipal corporations116 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.117

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

114 U.S. CONST. amend. V.


116 DILLON, supra note 88 (1872).

117 COOLEY, supra note 88, at 488.
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, with no support from either constitutional texts or case law.

In any event, the Topeka doctrine as a federal limitation on taxing power did not have a lengthy run. By the late nineteenth century, prior to Lochner, it had fallen into disuse in the federal courts, and was rejected even by some Justices who embraced economic Substantive Due Process doctrine. Variations of the doctrine retained some traction under state constitutions. For example, the

118 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).


120 E.g., Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853) (upholding tax assessed for purpose of purchasing shares in a railroad corporation).

121 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.).

122 The subsequent history is traced in Hovenkamp, supra note 115, at 1638–40.

123 E.g., Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (Peckham, j., upholding tax to subsidize irrigation of arid California farmland); Green v. Frazier, 253 U.S. 233 (1920) (Day, j., upholding tax to subsidize construction of grain mill and elevator). Justice Peckham was the author of Lochner v. New York, 198 U.S. 45 (1905), while Justice Day was one of four dissenters.
Court considered many challenges to government issued municipal bonds for financing private economic development. These were for the most part diversity cases not implicating federal constitutional law.\(^{124}\)

**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: First, the market can generally be trusted to produce socially valuable investments. If a project requires 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 involving expropriation of property or invasion over boundary lines, and “nontrespassory” losses, is really not very important. Both types of injury can be very real.\(^{125}\) John Lewis, America's most prominent Gilded Age scholar of eminent domain, reached these conclusions in the 1880s, referring mainly to state constitutional law. The Fifth Amendment takings clause was not incorporated against the states until 1897.\(^{126}\)

Judicial doctrine under the federal Takings Clause has never really followed the classical position very closely, not even during the economic due process era. Under federal law government *trespasses* can be unlawful takings

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\(^{126}\) Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226 (1897) (applying Fifth Amendment takings clause against state).
even if the harm they cause is miniscule. 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 landowners. Gilded Age state constitutions that included “taking or damaging” provisions, discussed below, reached much further.

"Public Use"

Nineteenth century law involving economic development and state and federal constitutions largely focused on two questions. First, what is the range of government interferences in property rights for which compensation must be paid. Second, what is the landowner's right 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 yet applied to the states, 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 *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

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129 *See* discussion *infra*, text at notes 157–170.

nuisances. Holmes regarded the *sit utere* principle as no more than a “benevolent yearning.”

As the amount and variety of economic development expanded in the second half of the nineteenth century, American courts increasingly confronted government activity that caused significant market injury to property even when no trespass or expropriation occurred. Nevertheless, requiring compensation for every injury that resulted from nontrespassory economic activity would stop development altogether and, in any event, would be a 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 clear disadvantage that it left many significant injuries uncompensated. One important element in classical liberalism's antistatism was its insistence that the costs of economic development be internalized, and this necessitated that injuries to others be compensated. Further, the range of harms was not limited by property lines.

During the Federalist period the principle of just compensation was not well established in American law, not even under Revolutionary Era state constitutions. Reflecting pre-classical values, the first generation of state constitutions tended to emphasize the use of government power to facilitate development much more than any concern with compensation for injured property owners. Many states authorized the taking without compensation of undeveloped land for the creation of roads or streets. 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. An 1802


132 Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

133 See HORWITZ, TRANSFORMATION OF AMERICAN LAW, *supra* note 14 at 66 et seq.

134 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)
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 landowner's argument that the Pennsylvania Constitution contained a takings clause that required compensation to be paid.\textsuperscript{135} 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 compensate landowners 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.\textsuperscript{136}

As in the Pennsylvania turnpike case, most state courts held that a taking could be for a "public" use or 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 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.\textsuperscript{137} 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

\textsuperscript{135} 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.").

\textsuperscript{136} Renthorp v. Bourg, 4 Mart (o.s.) 97 (S.Ct. La. 1816).

\textsuperscript{137} E.g., Cave's Ex'r v. Calmes, 10 Ky. 36 (Ky. 1820); Town of Lebanon v. Olcott, 1 N.H. 339 (1818); Com. v. Ellis, 11 Mass. 462 (1814); Stowell v. Flagg, 11 Mass. 364 (1814).
Massachusetts applied its statute in favor of textile mills for purely private manufacturing in order to facilitate the support of “labour saving machines.”

By the 1830s the mill-dam acts occasioned a significant debate between Federalist and Whig interests, who favored their expansive use, and Jacksonians, who opposed them. 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. Further, their prices could be regulated. By contrast, saw mills and paper mills, which also ran on water power, were ordinary businesses that operated under common law rules entitling them to deal or not at their volition. 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 these were not of a public character.

An 1858 Alabama decision struck down for lack of public use a mill dam statute purporting to cover all types of mills. 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

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138 See HANDLIN & HANDLIN, supra note 54, 127.

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


141 Although sawmills may also have been classified as public utilities during and prior to the Revolution. See JOHN LEWIS, EMINENT DOMAIN 223–26, 250 (1888).

142 Harding v. Goodlett, 11 Tenn. 41 (Tn. Errors & Appeals, 1832).

provision, as well as the judicial decision upholding it, that it was unwilling to cause such a costly dislocation.\textsuperscript{144}

Post-Civil War decisions commonly struck the statutes down. For example, in Ryerson v. Brown Justice 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 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.\textsuperscript{145}

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 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, using eminent domain to justify flooding in order to create mills required:

[T]he 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 . . .

Writing in the late 1880’s John Lewis concluded that the term “public use” meant that takings by private parties were permissible 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{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.} 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{Bankhead v. Brown, 25 Iowa 540 (1868).}

Inverse Condemnation

“Inverse” condemnation refers to challenges when the government does not acknowledge a taking but nevertheless does something the landowner claims

\footnote{Id.}

\footnote{Lewis, supra note 141, at 229.}

\footnote{John F. Dillon, supra note 88.}
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 outright expropriation or at least an explicit trespass. 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.\textsuperscript{150}

The eminent domain power had never been asserted in Pumpelly, however. An increasing number of courts by this time were allowing common law trespass damages for the "consequential" harms of government development activity.\textsuperscript{151} Pumpelly's action had been brought in "trespass on the case," which was a common law form used for "indirect" injuries that might or might not involve a physical trespass. Through the novel combination of a tort writ and a state takings clause plaintiffs were able to avoid the sovereign immunity defense. Even so, the court had to distinguish several decisions that had found no liability for governmental actors under similar facts.\textsuperscript{152}

A later example of an unacknowledged expropriation was 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.\textsuperscript{153} The decision, during the middle of the \textit{Lochner} era, is

\textsuperscript{150} Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166 (1871).

\textsuperscript{151} \textit{E.g.} Pratt v. Brown, 3 Wis. 603 (1854) (trespass on the case; Mill-dam Act case requiring compensation for excessive flooding); Hooker v. New Haven & Northampton Co., 14 Conn. 146 (1841) (recognizing action in trespass for periodic flooding brought about by canal reconstruction); Sinnickson v. Johnson, 2 Harrison 129 (N.J. 1839) (trespass on the case granting damages for consequential damages caused by government-authorized construction of canal).

\textsuperscript{152} \textit{E.g.}, Alexander v. City of Milwaukee, 16 Wis. 247 (1862) (denying action where city's excavation caused intermittent flooding); Hanson v. City Council of Lafayette, 18 La. 295 (1841) (similar; destruction of private buildings for road construction); Canal Appraisers of New York v. People, 17 Wend. 571 (N.Y. Corr. Errors 1836) (no compensation where river improvements made the plaintiff's mill worthless).

\textsuperscript{153} Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).
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 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.”154 In his dissent Justice Brandeis played down the significance of Pennsylvania's unique classification system. He treated the Kohler Act simply as a safety regulation that incidentally made one piece of property (the surface interest) more valuable and another (the mineral interest) less valuable.155 In a virtual carbon copy of Pennsylvania Coal in 1987 the Supreme Court largely rejected Holmes's position and adopted Justice Brandeis's.156

After the Civil War the scope of takings claims under state constitutions increased significantly, reflecting much more classical concerns about the private costs of government supported economic development. 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.157 John Lewis observed that every state that revised its constitution after 1870 except North Carolina included such a provision.158 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.159 The Federal Constitution was never amended.

154 Id. at 414.
155 Id. at 417–18.
157 Ill. CONST. of 1870, art. II, § 13 (“Private property shall not be taken or damaged for public use without just compensation.”).
158 LEWIS, supra note 141, at 296.
159 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
Since there was so little history requiring assertion of the eminent domain power for mere market damage, the new provisions greatly increased the number of "inverse" claims, generally brought as common law actions in trespass or trespass on the case.\(^{160}\) The Illinois Supreme Court recognized such a claim in 1873, shortly after its state constitution was amended, when municipal railroad construction made excavations adjoining the plaintiff's lot and limited access to it.\(^{161}\) The court also observed that prior to 1870, when the Illinois constitution was amended to include the "damaging" provision, such actions were regularly disallowed.\(^{162}\) 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 Street.\(^{163}\) No portion of the plaintiff's land bordered on Halsted Street and the construction did not encroach on his boundary lines. His claim was simply 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 against him, 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."\(^{164}\) Rather, the court gave a traditional instruction that permitted liability only for actual expropriation or physical trespass. The Illinois Supreme Court reversed, noting that 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

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\(^{160}\) See LEWIS, supra note 141, at 296–310.

\(^{161}\) City of Pekin v. Brereton, 67 Ill. 477 (1873) (excavation adjacent to plaintiff's land obstructed sidewalks and roads).

\(^{162}\) E.g., Roberts v. City of Chicago, 26 Ill. 249 (1861); see also Moses v. Pittsburgh, Ft. W. & C.R. Co., 21 Ill. 516 (1859).

\(^{163}\) Rigney v. City of Chicago, 102 Ill. 64 (1881).

\(^{164}\) Id. at 69.
go further. 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 to very large amounts. 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?”

Even during the height of economic substantive due process the Supreme Court never applied takings law with the same aggressiveness as 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 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. 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.

165 Id. at 71.
166 Id. at 80.
167 LEWIS, EMINENT DOMAIN, supra note 141, at 308.
168 Id. at 309.
169 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (noting plaintiff's claim that land had been worth $10,000 per acre prior to the zoning ordinance's enactment but was subsequently worth only $2500 per acre). See HOVENKAMP, supra note 5, at 130–31.
The Emergence of Classical Patent Law

At the time of the American Revolution the patent was conceived as a tool of economic development, together with other grants of exclusive rights. The Jacksonian, classical critique of this view was that if markets were free and private rights protected, economic development would tend to itself. Under that view the patent gradually changed into a property right that owners could develop or not at their will, just as other property rights.

As noted previously, pre-classical theories of economic development relied heavily on exclusive rights in order to create incentives. Patents were nothing more than a special case of this general principal. For example, the patent provision contained in the original 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.\(^\text{171}\) Some of the American colonies emulated this provision. The Massachusetts Bodie of Liberties (1641) provided that “No monopolies shall be granted or allowed amongst us, but of such new inventions that are profitable to the Country, and that for a short time.”\(^\text{172}\)

Mid-nineteenth century changes in the concept of the patent powerfully reflected the movement in economic statecraft away from an "involved" government toward the view that private action would achieve optimal development, provided that contract and property rights were protected. Further, patent law had to be redefined so as to limit the influence of legislative "capture"

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

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 . . . .

\(^{172}\) Massachusetts Bodie of Liberties, ¶9 (1641), available at http://www.bartleby.com/43/8.html. See also Calabresi and Leibowitz, supra note 31, at 1004 (referring to Massachusetts Bodie of Liberties (1641) and similar legislation passed by Connecticut in 1672).
that Jacksonians believed had thoroughly corrupted the process by which statutory monopolies were created.\textsuperscript{173}

The principal legal change was the rebranding of issued patents as a set of "property" rights, which entailed two things. First was a more ministerial set of rules for determining when patents should be issued, effectively making patent issuance an administrative rather than legislative function. Chief among these rules was the limitation of patents to "inventors," plus a set of criteria for defining inventorship. Second was the emerging idea that patents are property rights with the same set of protections that apply to rights in land or other traditional property. An important corollary was that, once they were issued, patents were subject to the control of their owners but relatively free from government intervention. The decision whether or not to make productive use of the innovation represented in a patent also became purely private, emulating the law of real property. One cannot lose title simply through nonuse, and patent ownership does not create "social" obligations.

By changing its legal profile in this way, patent law largely managed to escape most of the consequences of increased hostility toward monopoly and abhorrence of regulation. As the earlier discussion of takings indicates, property rights were increasingly seen as existing in spite of governmental concerns to further economic development.\textsuperscript{174}

In the process, patent law became much more privatized and divorced from government policy toward economic development. While such concerns were still articulated, they were increasingly relegated to boilerplate. The government's job was increasingly seen as limited to defining the patent property right, with questions about development and use left entirely to the private owner. The value of innovation and its relation to economic progress remained as an important rhetorical justification for the patent system. But these values played an ever diminishing role in legal decisions about the definition or enforceability of patent rights.

At the same time, patent law as a system of property rights evolved into a remarkably different enterprise from, say, antitrust law, which devotes considerable empirical resources to identifying and distinguishing the effects of particular practices in the market in which they occur. Patent law has largely

\textsuperscript{173} See discussion supra, text at notes 76-113.

\textsuperscript{174} See discussion supra, text at notes 150-170.
proceeded as if market characteristics don't matter and the measurement of the actual innovation effects of specific patent rules is largely irrelevant to legal decisions about patent validity and scope.\footnote{See Herbert Hovenkamp, \textit{Antitrust and the Patent System: A Reexamination,} 76 OSU L.J. (forthcoming 2015).}

Patents continued to find a place in classical political economy, provided 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.”\footnote{ADAM SMITH, \textit{LECTURES ON JURISPRUDENCE} (undated, but delivered between 1762 and 1766), p. 83, online edition, available at www.estig.ipbeja.pt/~ac_direito/Smith_0141.06.pdf.} \textit{The Wealth of Nations} itself says very little on the subject of patents, other than Smith's repeated objections to exclusive rights.\footnote{ADAM SMITH, \textit{INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS,} Book I, Ch. 10, §§ 72, 80 (1776); \textit{See also} Bk. IV, Ch. 8, §17 (speaking of “absurd and oppressive monopolies).} Speaking of exclusive grants to establish trade with remote nations, he wrote that:

\begin{quote}
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.\footnote{\textit{Id.}, Book V. Ch. 1, §100.}
\end{quote}

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
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, did not move far from Smith's position. Wayland 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 observations, 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 until 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.

During the nineteenth century 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. They did this mainly by re-conceptualizing the patent as a property right, similar to land grants, which enter the stream of commerce once they are created but thereafter receive little government oversight other than enforcement of boundaries. Further, they are purely "private" in the sense that ownership does not require use or any other sharing with the public. These 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 result, however, was to divorce patent doctrine from concerns about economic development generally. Patent law

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180 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).

181 Arnold Plant, The Economic Theory Concerning Patents for Inventions, 1 ECONOMICA (N.S.) 30 (1934); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933); EDWARD CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION (1933). See HOVENKAMP, supra note 5, at 78–79, 198–205.
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.\textsuperscript{182}

**Patentability: Promoters vs. Inventors**

The Constitution's Patent Clause gives Congress the power to issue patents but says nothing about whether that power is exclusive. Further, the Tenth Amendment provides that the states retain any power not granted to Congress.\textsuperscript{183} The patenting power in the federal Constitution is also expressly restricted to "inventors" and only for "discoveries."\textsuperscript{184} 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.

Today, monopoly grants such as those giving toll bridges or 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. Further, the patent is valid and enforceable, at least by damage actions, even if the patentee never puts the patent into practice.\textsuperscript{185}

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 steamboat line. 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 scope of invention or technology was not an issue. For example, some early decisions had to consider whether the exclusive right to operate a toll bridge over

\textsuperscript{182} See HOVENKAMP, supra note 5, at 184–205.

\textsuperscript{183} U.S. CONST. amend. X.

\textsuperscript{184} U.S. CONST., Art. I, Section 8, cl. 8.

\textsuperscript{185} E.g., eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).
a river at a certain point served to exclude those who crossed over the frozen ice in winter by either walking or driving a sleigh.\textsuperscript{186}

Whether the Constitution's framers intended to eliminate state-issued patents is unclear, although they clearly did not intend to eliminate all state grants of monopoly rights, 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, including grants to developers as opposed to inventors. St. George Tucker, editor of the first American edition of Blackstone's \textit{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 . . .”\textsuperscript{187} As late as the 1830's Joseph Story agreed in his \textit{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.\textsuperscript{188} Neither author acknowledged that the power to create local monopolies within a single state could still be quite valuable.

From the beginning the federal Patent Acts confined patent grants to inventors. The first act, passed in 1790, limited its protection to those who “have invented or discovered” something “useful and important.”\textsuperscript{189} The statute also required a written description of the invention, as well as a model of the invention if practicable.\textsuperscript{190} It said nothing about the power of the states to issue patents. To

\textsuperscript{186} See, e.g., Sprague v. Birsall, 2 Cow. 419 (N.Y. 1823) (denying the bridge a recovery)


\textsuperscript{188} JOSPEH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 48 (1833).


\textsuperscript{190} \textit{Id.} at § 2.
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.”\textsuperscript{191} 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.\textsuperscript{192} 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.\textsuperscript{193} An applicant could presumably obtain either a state or a federal grant, but not both.

**Economic Development and Unworked Patents**

Just as the monopoly grants created in state issued corporate charters, early patent provisions contemplated actual production under the exclusive rights that they permitted. Their purpose was to encourage development, not to create exclusive rights over technology whether or not it was put to use. The patent grant in the Statute of Monopolies conferred the exclusive right on “manufactures,” while the Massachusetts Bodie of Liberties limited exclusive priviliges to “Inventions that are profitable to the Country….” Further, the term "invention," typically used together with the term "discovery," generally referred to the introduction of a new industry into the territory. That is, the emphasis was on developing a new industry in a particular area rather than developing a technology not previously known.\textsuperscript{194}

Many English patents from prior to the American revolution had "working clauses," later called "revocation clauses," which were provisions that required the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{191} Patent Act of 1793, Ch. 11, 1 Stat. 318–323, § 2 (Feb. 21, 1793).
\item \textsuperscript{192} Id. at § 3, stating that the applicant:

\begin{quote}
shall deliver a written description of his invention, and of the manner of using, or process or compounding the same, in such full, clear and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science ... to make, compound, and use the same.
\end{quote}

\item \textsuperscript{193} Patent Act of 1793, \textit{supra} note 178, § 7.
\item \textsuperscript{194} See \textit{Bracha}, supra note 51 at Ch. 1.
\end{enumerate}
\end{footnotesize}
patentee to make use of the technology covered by the invention. Some patents specified a number of years during which the patentee must perfect the invention or put it into use. If the patentee failed to do this the patent would lapse or be revoked. Some patent systems retained working clauses until well into the twentieth century. Obligations to practice, or "work," the patent were also included in many state patent grants during the early national period. By contrast, none of the patent acts of the United States ever included a working requirement, except for a short-lived provision enacted in 1832 that permitted foreign applicants to receive a United States Patent only if they "introduce[d] into public use in the United State the invention or improvement within one year from the issuing thereof...." The provision was removed from the 1836 Act and never reappeared.

Working clauses were a way of guaranteeing that the public would benefit from the grant of an exclusive right. If the patentee did not work the patent, then during the period covered by the grant no one else could do so either. The effective impact of such a patent would be to withdraw its technology or


198 4 Stat. 577 (1832).

manufacture from service -- precisely the opposite of what was intended. The effect was too put the patent "to sleep," in the later words of economist John Maurice Clark.\footnote{JOHN MAURICE CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS 146 (1923).} Eventually working clauses gave way to requirements of disclosure and enablement.\footnote{See E. Wyndham Hulme, On the Consideration of the Patent Grant, Past and Present, 13 L.Q.Rev. 313, 315-318 (1897).} The importance of the difference should not be lost, however. Patent disclosure and enablement are intended to facilitate copying of the innovation by others after a patent expires. Nonuse during the patent period can still result in removal of the technology from the market for the duration of the patent's life.

Depending on available remedies, an unused patent manifested not merely the patentee's failure to develop, but also a right to prevent others from developing until the patent expired. In the United States, a country acutely aware of its undeveloped state, that idea was intolerable. In his Commentaries 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.\footnote{2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 369 (1826).} Over the remainder of the century, however, the gradual evolution was from early century state law rules that cancelled patents for nonuse,\footnote{See discussion infra, text at notes 194–204.} to the Supreme Court's 1908 Paper Bag decision, which permitted the acquirer and holder of an unused patent to shut down competing technology.\footnote{Continental Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405 (1908). See CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 295–300 (2012).} Patents went from explicit tools of economic development to private property rights pure and simple.

Prior to ratification of the Constitution, patents were issued exclusively by individual states, and only by legislative enactment. 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.”

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 it 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

205 Livingston v. Van Ingen, 9 Johns 507, 507–508 (N.Y. 1812). As the decision quoted the complaint (emphasis omitted):

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 . . .

206 Livingston, 9 Johns at 516.


208 Livingston, 9 Johns at 507.
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.

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 -- that is, it wanted a set of working commercial steamboat lines. 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. 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. Fulton's and Livingston's own status as inventors is also open to dispute. They had made a working model by copying liberally from Fitch's design. Not until 1836 would federal law prevent 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. 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

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209 *Gibbons v. Ogden*, 22 U.S. 1, 221 (1824).


212 *Livingston*, 9 Johns at 509.

213 Hrdy, *supra* note 207, at 78.

through the ordinary currents of the Hudson river, both upstream and downstream.\textsuperscript{215} 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.\textsuperscript{216} Clearly the New York grant to Fulton and Livingston contemplated actual construction and deployment of steamboats, even specifying their minimum performance and creating inducements for increasing their number.

The Fulton/Livingston patent represented a “promise to develop and deploy” rather than novel technology 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 a state had the power to grant a patent right to someone who was not an inventor but rather a developer or promoter. Speaking of the federal Patent Act, which by this time was more than twenty years old, Justice Yates observed that under it patent applicants

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...\textsuperscript{217}

Chancellor Kent agreed, stating the dominant pre-classical view about monopoly grants and economic development:

[T]he uniform opinion, in \textit{England}, both before and since the statute of \textit{James},\textsuperscript{218} has been, that imported improvements, no less than

\begin{itemize}
  \item \textsuperscript{215} \textit{Livingston}, 9 Johns at 509–10.
  \item \textsuperscript{216} \textit{Id}.
  \item \textsuperscript{217} \textit{Livingston}, 9 Johns at 560–61. 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. Sup. Ct. 1810).
  \item \textsuperscript{218} Referring to the 1623 Statute of Monopolies. \textit{See supra} note 171.
\end{itemize}
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.\textsuperscript{219}

This understanding of patents as inducements to develop or produce 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.\textsuperscript{220} The American colonies did the same, and continued to do so through special corporate charters well into the nineteenth century. Hamilton's \textit{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.”\textsuperscript{221}

In his \textit{Commentaries} on the Constitution, written subsequent to the steamboat patent disputes, Joseph Story argued 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

\textsuperscript{219} \textit{Livingston}, 9 Johns at 584–85. Justice Thompson simply concluded that the IP clause granted to Congress concurrent rather than exclusive power to issue patents. \textit{See id.} 9 Johns at 563, Chancellor Kent agreed, also citing the Tenth Amendment for the proposition that federal exclusivity should not be implied. \textit{Id.} at 574–75


does not claim to be an inventor, but has merely introduced it from abroad . . .

One of most important developments in the classical propertization of patent law was the gradual weakening and eventual abandonment of the rules requiring patentees actually to develop and market the technology laid out in their patents. Justice Story took the pre-classical view that federal law required patents to be practiced before they could be enforced, concluding that the federal patent act protected "not a mere elementary principle, or intellectual discovery, but a principle put in practice...." In 1868 the Supreme Court held that an improvement patent that had issued was not enforceable against a subsequent developer of the technology when the improvement failed experimental testing and was never brought into practice. And in 1869 the Supreme Court held that a first patent was prior art as to a different inventor's later patent, but only because the first patentee had actually reduced the invention to practice by making a working model that was viewed by witnesses.

The principal nineteenth century patent law treatise writers were not consistent on the issue. Willard Phillips, the most prominent patent law writer of the 1830s, insisted that reduction to practice was a prerequisite to enforcement. "The subject of a patent must be something that has been reduced to practice.; it must be something which has been actually done or produced." Phillips concluded in 1837, citing several British decisions as well as Justice Story's decision in Earle v. Sawyer. George Ticknor Curtis, whose treatise was first published in 1849, never disagreed with Phillips, but neither did he state as a requirement that patents

222 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 50 (1833).


225 Coffin v. Ogden, 85 U.S. 120 (1873).

226 WILLARD PHILLIPS, THE LAW OF PATENTS FOR INVENTIONS 110-12 (1837) ("The patent being for an invention that is described in it, it is not only requisite that the invention should be reduced to practice, but it must be reduced to practice in the way, and produce the effect specified.").
be placed into practice. 227 By contrast, in his important 1890 treatise on patents William Callyhan Robinson declared that patent law required "nothing less than the actual practice or some art, or the construction of some article of manufacture." 228 Robinson expressly rejected the view that a detailed written description sufficient to enable someone to make the invention was sufficient. Indeed, for Robinson not even a "model exhibiting the article in all its parts" was sufficient. 229

But Robinson's views were being displaced even as he wrote. Already in 1872 one federal court had concluded that the idea that a patent is void if it has never been reduced to practice is "wholly unsound" because "no such condition is required by the act of congress." 230 In the 1890's the idea of "constructive" reduction to practice began appearing in the patent case law -- or the idea that a patent should be treated as constructively reduced to practice if its disclosure was specified sufficiently that a knowledgeable person skilled in the art could implement the invention. 231

Once the courts concluded that unworked patents were enforceable they had to confront the issue of a remedy. In real property cases the presumptive remedy for trespass is an injunction, whether or not the property is being used for any productive purpose. No federal patent act ever made injunctions automatic. Rather they provided that such suits should be governed by general equitable principles. 232 While the principles were not explicitly stated in the Acts, among

227 GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS § 2, at 3-4 (1849).

228 I WILLIAM CALLYHAN ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS 181 (1890).

229 Id. at 181-182.


232 Patent Act of 1836, Ch. 357, 5 Stat. 117 §17 (July 4, 1836) (granting federal court in equity the power "to grant injunctions, according to the course and principles of courts of
them were a showing that the public interest would not be disserved by an injunction. Reflecting deep division in thinking about patent as absolute property rights or as a tool of economic development, the courts initially divided on the issue. Some concluded that the remedy for infringement actions on unpracticed patents should not be an injunction, which would keep the technology off the market altogether, while others disagreed.

The question reached the Supreme Court early in the twentieth century, in two decisions concerning the appropriate uses of patents in ways that might limit output. In *Bement* the Supreme Court upheld a patent cross-licensing agreement that included a provision fixing the prices at which agricultural harrows covered by the technology in question were sold. In response to the argument that product price fixing was not in the public interest Justice Peckham replied that a patentee has an absolute right either to use a patented device himself or not to use it, but that decision was purely private. "His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it." With that, the Court reasoned that an owner who had the right not to use a property interest at all also had the right to fix the price at which the patented article could be sold.

Six years later in the *Paper Bag* case it went further, completely embracing the view that an unpracticed patent was both enforceable and that it ...

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234 *Electric Smelting & Alum. Co. v. Carborundum Co.*, 189 F. 710 (C.C.W.D.Pa. 1900) (refusing an injunction); *Hoe v. Knap*, 27 F. 204 (C.C.N.D. Ill. 1886) (conditioning enforcement on a showing that the patentee either practiced the patent itself or permitted others to practice it).


entitled the patentee to an injunction against a competing firm. 237 The patent owner was a dominant manufacturer of paper grocery bags. It was using one type of cutter to make its bags, but purchased a patent on a different type of cutter from an outside inventor. Preferring to stick with its existing technology, the patent owner then brought suit against a rival firm whose technology resembled that in the acquired but unused patent. Not only did the Supreme Court permit the plaintiff to get an injunction shutting down the rival's technology, but it did so under a particularly broad reading of patent law's doctrine of equivalents, which permits infringement claims against technology that do not literally infringe a patent. 238

Even more than Bement, the Paper Bag decision showed how dominant the private conception of patent law had become. The federal district court observed that the patent owner "stands in the common class of manufacturers who accumulate patents merely for the purpose of protecting their general industries and shutting out competitors." 239 Nevertheless, it felt obliged to issue the injunction. The First Circuit affirmed, but Judge Aldrich wrote a strong dissent complaining that in this case "a court of equity is asked not to protect from infringement the statutorily intended monopoly ... but to protect a monopoly beyond and broader...." Further,

The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition which at once contravenes the manifest purpose of the Constitution, and a monopoly of a kind and breadth and for a purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use, and vend under a particular patent. 240

Nevertheless the Supreme Court concluded:

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238 The doctrine was first developed by a divided Court in Winans v. Denmead, 15 How. 330 (1854). See BOHANNAN & HOVENKAMP, supra note 204 at 296-297.


The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.\textsuperscript{241}

*Paper Bag* represents about the high point in the Supreme Court's development of patent doctrine based on private property principles, largely indifferent to concerns about economic development and growth. But the Progressive Era was underway, and a single mention of patents in the 1914 Clayton Act\textsuperscript{242} set the Court on a new course that was far more critical of patents and their potential for abuse.\textsuperscript{243}

**Patents and Special Interest Capture: The First Sale Doctrine and the Origins of Substantive Due Process**

In Bloomer v. McQuewan Chief Justice Taney wrote the Supreme Court's opinion limiting the enforcement of patent rights against someone who had previously purchased a patented product. In the process the Court implicitly tied patent doctrine 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 declaration of what later became economic substantive due process.\textsuperscript{244}

Bloomer had licensed a patent on a rotary wood planing machine from its inventor, William Woodworth, one of the nineteenth century's most litigious patentees.\textsuperscript{245} The machine's ability to smooth all four sides of a wooden board without pulling it to one side or the other as it passed through the machine made it

\textsuperscript{241}*Paper Bag*, 210 U.S. 424. Justice Harlan was the only dissenter, stating that he would have denied the injunction “on grounds of public policy.” Id. at 429.

\textsuperscript{242}14 U.S.C. § 14 (prohibiting tying and exclusive dealing in contracts for goods, “whether patented or unpatented.”).

\textsuperscript{243}See HOVENKAMP, *supra* note 5 at 192-202.

\textsuperscript{244}Bloomer v. McQuewan, 55 U.S. 539 (1852).

\textsuperscript{245}Nathan Rosenberg, “America's Rise to Woodworking Leadership,” in *AMERICA'S WOODEN AGE: ASPECTS OF ITS EARLY TECHNOLOGY* 37 (Brooke Hindle ed., 1975)
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.

As the patent approached expiration Woodworth, whose very substantial royalties were based on the square feet of surface area that went through the machine, lobbied Congress for retroactive extensions of the patent term. Congress responded twice, first with a provision in the 1836 Patent Act extending the patent term and 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 retroactive extension that covered only Woodworth's patent, mentioned by name. A federal court in Ohio upheld the second extension against a claim that patent terms could only be extended by general legislation. Using a land analogy, the court reasoned that Congress had the power to make different public land grants to different grantees and could grant different parcels for different terms. Subsequently, however, when


247 Bloomer, 55 U.S. at 555–56.


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

252 Id. at 730–731.
Woodworth’s son requested yet another extension there was a large public outcry of unfair monopoly.253

McQuewan had constructed the machines in question under the sublicense from Bloomer and paid royalties until the original patent’s expiration. After the term was extended Bloomer insisted on reviving the royalties and sued for infringement when McQuewan refused to pay. To a Jacksonian the retroactive and single-owner term extensions represented 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.”254 That rule, which survives to this day,255 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.

The patent first sale, or "exhaustion," doctrine is a judge made rule that is intended to limit the scope of the patent “monopoly” in an area where neither the Patent Clause nor the Patent Act has anything to say.256 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.”257

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


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

patent expired. Here, in one of his most prescient and important utterances, he invoked the 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.  

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.”  

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.

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. 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.

Although Taney cited "due process" as the rationale for his decision, the facts of Bloomer actually come much closer to the core concerns of Contract Clause doctrine than to what became economic substantive due process. Bloomer's principal concern was retroactive legislation that undermined settled expectations in a sale of property that had already occurred. That was consistent with the Contract Clause, which also condemned ex post facto laws. It was much less consistent with Gilded Age and Progressive era holdings such as

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258 Bloomer, 55 U.S. at 553–554.

259 Id.

260 Id. at 684.

261 U.S. CONST., Art. I, Section 10, cl. 1 (“No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...”).
Lochner, which addressed statutes that limited the range of contracts to be made in the future.262

The Propertization of Patent Law

Changes in United States patent law during the first half of the nineteenth century were driven by 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 be narrow, 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. The "prior art" queries that increasingly dominated questions about patentability focused on what had been available in the past, rather than what economic development might require for the future. This 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.

Increasingly after the Civil War the Supreme Court treated patents as a species of property rights, having the same constitutional protections as other forms of property. For example, it concluded in 1871 that “Inventions secured by letters patent are property in the owner of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.”263 In its 1888 Bell Telephone decision the Supreme Court confirmed that once a patent had been issued it could be revoked only by the courts and upon proof of improper issuance. The Court reached this conclusion by relying almost exclusively on the law of government grants of land titles, rejecting the patentee's objection that the


Court's "reference[s] exclusively to patents for land ... are not applicable to patents for inventions and discoveries."\textsuperscript{264}

These decisions served heavily to limit the government's power to facilitate economic development by metering rights under issued patents. The constitutional structure that emerged gave the government a great deal of discretion to manage patent \textit{issuance}, which was controlled entirely by statute, given that the Constitution's patent clause is so scant. However, once the patent was issued it was transformed into a property right with considerable immunity from subsequent regulatory control.

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 -- have developed in relative isolation from economic theories of development or economic growth. Patent lawyers disputing patent validity and scope have traditionally behaved much more like property lawyers disputing boundaries rather than, say, antitrust lawyers trying to base legal rules on observations about industrial performance.\textsuperscript{265}

An essential part of this transformation was that patent entitlement and issuance must become a ministerial process, but one in which security of titles could be ensured. 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.\textsuperscript{266} The examiner now had to look at each “alleged new invention or discovery” and determine whether the thing...

\textsuperscript{264}E.g. United States v. Am. Bell Tel. Co., 128 U.S. 315, 363, 367 (1888) (United States can have a patent revoked only for fraud in the issuance process:

The patent, then, is not the exercise of any prerogative power or discretion by the president, or by any other officer of the government, but it is the result of a course of proceeding \textit{quasijudicial} in its character, and is not subject to be repealed or revoked by the president, the secretary of the interior, or the commissioner of patents, when once issued


\textsuperscript{265}See Hovenkamp, \textit{supra} note 5, 184–205; Hovenkamp, \textit{Antitrust and the Patent System, supra} note 175.

\textsuperscript{266}Patent Act of 1836, Ch. 357, 5 Stat. 117 (July 4, 1836).
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 ....”267 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.”268

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.269 Chancellor Kent believed that patents had to be “to a certain degree beneficial to the community, and not injurious, or frivolous, or insignificant.”270 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.”271 Judicial interpretation under the 1836 Act increasingly adopted the Story view.272 Increasingly courts rejected inquiries into usefulness in patent validity litigation unless the only purposes to which the challenged device could be put were immoral.273 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

267 Id. at § 7.
268 Id.
270 2 KENT, COMMENTARIES, supra note 201, at 369.
272 WILLARD PHILLIPS, THE LAW OF PATENTS FOR INVENTIONS 142 (1837)
273 See BRACHA, OWNING IDEAS, supra note 51, Ch. 4, nn. 81–82 (collecting decisions).
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,” analogous to the "metes and bounds" in a real property deed. The claims had to “particularly specify and point out the part, improvement, or combination, which [the applicant] claims as his own invention or discovery.” 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 boundary location.

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. 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:

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, 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 discovered.

In rejecting this claim Taney pointed out the truly dramatic differences between what Morse had actually invented and illustrated, and the domain of the

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275 The Supreme Court elaborated on peripheral claiming in Merrill v. Yeomans, 94 U.S. 568 (1876).


277 Quoted in O'Reilly, 56 U.S. at 86 (emphasis added).
monopoly he was claiming.278 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.279 However, Morse had certainly not invented every alternative, “however developed,” for performing this function. As Chief Justice Taney complained:

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 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.280

In sum, the classical patent was no longer be regarded as an inchoate "promise to develop" implicit in the steamboat patents, but rather as a reward for something that was already in the inventor's actual or constructive possession.

The Social Contract

Both proponents and critics of the classical Constitution have argued that it embodied a social contract or "compact," based on a presumption of unanimous consent at some a priori point.281 Citizens consent to be governed by legislation

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278 Mark A. Lemley, 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, supra note 51, Ch. 4.

279 The illustrations and description of the device can be found in Bohannan and Hovenkamp, Creation Without Restraint, supra note 204, at 123–124.

280 O‘Reilly, 56 U.S. at 113.

that is almost always non-unanimous. As a result this legislation must be tested against social contract principles, considering what those forming the social contract would have wanted, and what they were willing to give up in order to have it.

The role of the social contract in American Constitutional theory has been significantly exaggerated, and by both supporters and detractors. 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.

The idea of 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.282 Therein lies one of its biggest problems. As a background principle of social ordering it is frustratingly indeterminate because of its sensitivity 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.”283 Did each person set out to protect only her own interest, or were they outwardly regarding for the welfare of others?284 Did their theory of value depend on past investment 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. Even a completely self interested marginalist would maximize expected individual value by maximizing aggregate value. For example, if economic


283 See, e.g., BUCHANAN & TULLOCK, supra note 1 (assuming full information about future status); FISS, TROUBLED BEGINNINGS, supra note 72, at 82 (social contract theory of Lochner era assumed that people knew about their individual wealth and status prior to formation); contrast RAWLS, supra note 282 (assuming “veil of ignorance”).

284 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 282 (assuming self interest).
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 even agree to a society in which all wealth was equally divided.285 Further, even if the original contracting parties knew about their initial position they would act to minimize risk, and those with something to lose would very likely be more risk averse.286

The original contracting parties would also have to consider tradeoffs 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, or would they prefer to maximize value over the longer run, delaying 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 variety of shorter or longer time horizons. As a result the “social contract” breaks

285 See HOVENKAMP, supra note 5 at 110–114.

into a number of different and conflicting ideas about the State, depending on what people value, their degree of risk aversion or concern about the future.287

The social contract also fares poorly in the historical literature of United States Constitutionalism. A few writers 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.288 Support is minimal, however. The framers of the Constitution clearly grasped the idea of a social contract, or compact, although their thought was tempered by Christian doctrine and considerations of republican government.289 At the same time, however, the founders with few exceptions thought 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.290 That is, while the term “social compact” was frequently used, it almost always referred to an actual enacted or ratified text. 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.

287 HOVENKAMP, supra note 5 at 25–36.

288 On the earlier period, see EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, note 1; on the Gilded Age and Progressive Era, see FISS, TROUBLED BEGINNINGS, supra note 72.


290 See discussion infra, text at notes 300-308.
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 a 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 or document.\(^{291}\) 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 choose “the tallest man present to be their governor.”\(^{292}\)

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

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\(^{291}\) W. **COMMENTS, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. 1, Part 2, Ch. 1** (1767).

\(^{292}\) *Id.* at Bk. 1, Part 1, p. 47. Quotations are from the first full edition of Blackstone published in the United States, edited by St. George Tucker, a professor at the College of William and Mary and a Virginia Judge. **WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA** (St. George Tucker, ed., 1803).
this protection) each individual should submit to the laws of the community . . . .”

The Social Contract from Locke through Blackstone was 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 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, particularly in his lectures on justice. Neither The Wealth of Nations (1776) nor The Theory of Moral Sentiments (1759) ever mentions the subject. 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 argument for laissez-faire economic principles, but the social contract never appeared among his defenses. The

293 Id. at 47.

294 Hovenkamp, Cultural Crises, supra note 89. For example, Thomas Sowell's masterful study completely ignores the subject. THOMAS SOWELL, ON CLASSICAL ECONOMICS (2006).

295 ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE, AND ARMS 11-15 [(1763); Edwin Canaan, ed., 1896]); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).


297 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
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 the justification.\textsuperscript{298} This was true even of Jacksonian political economists such as Henry Vethake.\textsuperscript{299}

While late eighteenth century political leaders and courts sometimes spoke of a “social compact” or "social contract" as fundamental law, they almost always used these terms in reference to the text of either the U.S. or a state constitution, or occasionally to a treaty or inter-state agreement. John Adams spoke of his 1780 draft of the Massachusetts Constitution 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.”\textsuperscript{300} A 1781 Pennsylvania Supreme Court decision spoke in similar terms, referring to the text of the Articles of Confederation.\textsuperscript{301} 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.”\textsuperscript{302} The social compact was the text, and one need not look

unknown period all members of society engaged to obey the laws, and consented to be punished for any disobedience to them . . .”.

\textsuperscript{298} \textit{E.g.}, \textsc{Henry C. Carey}, \textsc{Principles of Political Economy} (1837); \textsc{Henry C. Carey}, \textsc{Principles of Social Science} (1859); \textit{see also} \textsc{Thomas Cooper}, \textsc{Lectures on the Elements of Political Economy} (2d ed. 1831); \textsc{Francis Wayland}, \textsc{The Elements of Political Economy} (1837). Wayland's \textit{Elements of Moral Science} contains a brief discussion, apparently referring to positive law. \textsc{Francis Wayland}, \textsc{Elements of Moral Science} 359–363 (1865). Other nineteenth-century American economists also ignore the social contract or contractarian theories of government. \textit{See, e.g.}, \textsc{Samuel P. Newman}, \textsc{Elements of Political Economy} (1835); \textsc{Willard Phillips}, \textsc{Manual of Political Economy} (1828); \textsc{Amasa Walker}, \textsc{The Science of Wealth: A Manual of Political Economy} (1866).

\textsuperscript{299} \textsc{Henry Vethake}, \textsc{The Principles of Political Economy} (1838).

\textsuperscript{300} \textsc{8 Papers of John Adams} 237 (Greg L. Lint, et al, eds., 1989).

\textsuperscript{301} \textit{Respublica v. Chapman}, 1 U.S. (1 Dall.) 53, 54–55 (Pa. 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.

\textsuperscript{302} \textit{Commonwealth v. Caton}, 4 Call 5 (Va. 1782). \textit{See also} \textit{Kamper v. Hawkins}, 1 Va. Cas. 20, 3 Va. 20, 58 (Gen.Ct. of Va. 1793) (speaking of period immediately after
further. Some delegates, including James Wilson of Pennsylvania as well as Madison, 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. 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. In Federalist 44, by contrast, James Madison did speak of excessive state power to declare legal tender 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. 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.”

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 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.”).


304 Federalist No. 21 (Hamilton, signed “Publius,” Dec. 12, 1787).

305 Federalist No. 44 (Madison, Jan. 25, 1788).

306 The Antifederalist No. 2 (“Brutus,” 1 Nov. 1787). Yates had also been a delegate to the Constitutional Convention from New York.
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.\textsuperscript{307}

The Court later concluded that treaties are also "compacts."\textsuperscript{308} In sum, although these judges and other writers spoke of a social contract or compact, it was nearly always in relation to the text of the proposed Constitution or state constitutions. There was little support for the view that once the Constitution was ratified a social contract consisting of principles not articulated in any text should remain in force.

The closest the Supreme Court ever came to recognizing a social contract apart from the text of any ratified document was Justice Samuel Chase's brief discussion in Calder v. Bull, suggesting that a state legislature lacked the authority to alter fundamental rights even though "its authority should not be expressly restrained by the Constitution, or fundamental law, of the State." Rather, the "purposes for which men enter society will determine the nature and terms of the social compact...."\textsuperscript{309} 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."\textsuperscript{310}

In Corfield v. Coryell, Justice Bushrod Washington, then riding as a circuit judge, concluded that the highly general language of the Article IV Privileges and Immunities Clause, which had been borrowed from the Articles of Confederation,\textsuperscript{311} implied a set of specific rights.\textsuperscript{312} Justice Washington never

\textsuperscript{307} Chisholm v. Georgia, 2 U.S. 419, 471 (1793).

\textsuperscript{308} Id. at 475. \textit{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).

\textsuperscript{309} Calder v. Bull, 3 U.S. 386, 388 (1798).

\textsuperscript{310} Id. at 399. For thoughtful expansion, \textit{see} DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 102–03 (2005).

\textsuperscript{311} U.S. CONST. art. IV, § 2, Cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Cf. Articles of Confederation: "the free inhabitants of each of these States, paupers, vagabonds, and
referred to a social contract or compact, however. Rather, the ideas was that the text of the Constitution recognized these rights, although the term "privileges and immunities" had to be interpreted.

The idea that the highly general language of either the Article IV or, later, the Fourteenth Amendment's Privileges and Immunities clauses actually embodied a list of unarticulated social contract principles obtained a small amount of traction in the nineteenth century. It never claimed a majority position in even a single decision, however. A half century after Corfield, Justice Noah Haynes Swayne invoked the social contract in his dissent in the Slaughter-House Cases. The majority had refused to apply the recently ratified Fourteenth

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The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads:

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

313 Slaughter-House Cases, 83 U.S. 36 (1874).
Amendment's Privileges and Immunities Clause\(^\text{314}\) to invalidate a New Orleans monopoly given to a slaughterhouse. Swayne's argument was that the general term "privileges and immunities" included a list of unenumerated rights contained in a social contract, and among these was the right to pursue a lawful occupation free of monopoly. According to Justice Swayne' these rights accorded with "the plainest considerations of reason and justice" and "the fundamental principles of the social compact."\(^\text{315}\) 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.\(^\text{316}\)

In his *Commentaries* on the Constitution, conservative anti-Jacksonian Joseph Story had acknowledged the theory of a social compact. However, "the doctrine itself requires many limitations and qualifications, when applied to the actual conditions of nations . . . "\(^\text{317}\) 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. His position was contained in a chapter entitled "Nature of the Constitution -- Whether a Compact." He concluded that there may have been a social compact that antedated the United States Constitution, but it "existed in a visible form between the citizens of each state in their several constitutions." As a result, all forms of this compact were "written."\(^\text{318}\) Usage from the middle of the nineteenth century to the Gilded Age, while economic substantive due process was percolating in the state courts, was similar. For example, in *Dred Scott* Chief Justice Taney complained that the slave holding states would never have agreed to the Constitution if they believed it would treat

\(^{314}\) U.S. CONST. amend. XIV, § 1 (ratified 1868).

\(^{315}\) 83 U.S. at 129 (Swayne, J.).


\(^{317}\) 1 STORY, COMMENTARIES, *supra* note 53 at 293, 296.

\(^{318}\) *Id.* at 279, 282, 284–286.
slaves as “citizens.” Of course, he was speaking of the Constitutional text. Neither Taney's opinion for the Court or any of the six concurring opinions or two dissents ever referred to a social contract or compact.

Social contract language did appear more frequently during the heyday of substantive due process, but always in dicta. Further, the way the concept was used only suggested how indeterminate and unhelpful it was as a rationale for constitutional decision-making. A good illustration is People v. Budd, 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.” 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.

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.”


320 117 N.Y. 1 (1889).

321 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.

322 Budd, 117 N.Y. at 34.

323 Munn v. Illinois, 94 U.S. 113, 124 (1876).
quoted the same language in *Jacobson*, thirty years later, when the Court upheld a Massachusetts statute mandating vaccination. In all of these decisions the term "social compact" referred to an enacted text. 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. 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 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.

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. Here, the term was used as a justification for reaching beyond the Constitutional text, which never limited the state taxing power to public purposes. While the "public purpose" doctrine might be viewed as recognition of a right created by the "social compact" aside from the text, the doctrine was short lived.

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, the principle author of the public purpose doctrine, had almost nothing to say on the subject in his 1868 Treatise on

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325 *Bertholf v. O'Reilly*, 74 N.Y. 509 (1878).

326 *Id.* at 514.

327 *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874). *See* discussion *supra*, text at notes 115-117.

328 See discussion *supra*, text at notes 122-124.
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.\(^{329}\) John Dillon never mentioned it at all.\(^{330}\) 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 social agreement.\(^{331}\) 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.\(^{332}\)

One might expect that Christopher Tiedeman, the most libertarian of the substantive due process writers, would be the strongest promoter of social contract theory. But he described social contract theory as “the extreme limits of absurdity.”\(^{333}\) He drew this conclusion not in his prominent treatise on constitutional regulatory power,\(^{334}\) 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.\(^{335}\) 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

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\(^{329}\) COOLEY, CONSTITUTIONAL LIMITATIONS (1868), supra note 88, at 166 n.1 See also id. at 35 (using the term to refer to a written declaration of rights).

\(^{330}\) DILLON, MUNICIPAL CORPORATIONS, supra note 88.

\(^{331}\) FRANCIS WHARTON, COMMENTARIES ON LAW 78–86, 101–105 (1886).

\(^{332}\) HENRY MAINE, ANCIENT LAW (1861). See HOVENKAMP, supra note 5, at 3–5.


\(^{334}\) TIEDEMAN, supra note 88.

\(^{335}\) TIEDEMAN, supra note 333, at 130.
avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice.\textsuperscript{336}

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.\textsuperscript{337} 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.”\textsuperscript{338}

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 \textit{Lochner} and related cases in both state and federal courts could strike down employee hours regulation or upset occupational licensing statutes without ever mentioning the social contract. These statutes deprived affected persons of both “liberty” and “property” without due process.\textsuperscript{339} Even so, Holmes complained in both \textit{Lochner} and \textit{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 provisions" in the Constitution itself, but rather relied only the "vague contours" of the Fifth Amendment.\textsuperscript{340}

\textsuperscript{336} TIEDEMAN, POLICE POWER, \textit{supra} note 88, at 7.

\textsuperscript{337} \textit{Id}. at 10.

\textsuperscript{338} \textit{Id}. at 11.

\textsuperscript{339} People v. Ringe, 197 N.Y. 143, 146 (1910).

\textsuperscript{340} Lochner v. New York, 198 U.S. 45, 76 (1905); Adkins v. Children's Hospital, 261 U.S. 525, 568 (1923). Holmes referenced the Fifth Amendment because the statute in
The union of social contract theory and liberal constitutional statecraft or economic policy is not a part of either the original Constitution or the classical Constitution that emerged several decades later and prevailed through the era of economic Substantive Due Process. The ideology of social contract is largely a phenomenon of the twentieth century, originating in post-New Deal attacks on legislation and rational basis constitutional tests, but later picked up by welfare liberals as well. Its principal twentieth century manifestations are public choice theory on the right and Rawlsian social justice on the left. 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**

Classical constitutionalism was not the doctrine of the founders. It was an important movement, however, that 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. The classical constitution emerged from the Jacksonian coalition's reaction to state involvement in economic development that critics believed was not justified for viable projects, that imposed excessive harms on the property rights of others, and that more often than not represented legislative capture for the benefit of the few.

Classicism as a dominant constitutional ideology came to a sudden end in the late 1930s and today the “post-classical” constitutional era is approaching 80 years. The question was passed by Congress to regulate wages in Washington, D.C. As such it was not covered by the Fourteenth Amendment, which limited state action.

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342 *E.g.* RAWLS, *supra* note 282.

343 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).
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 1920 and actually ended while Constitutional classicism was still very much alive. When used with a small “p,” as is more common in legal history and constitutional thought, 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 some independents and Republicans today.

For its critics, describing this movement as “progressive” enables them to go back and discover some lost element of Constitutional law. In fact, however, most of the changes in economic policy and the constitutional doctrine that displaced constitutional classicism are not “progressive” at all. They are better described as “neoclassical” or “marginalist,” reflecting centrist changes in theories of economics and value embraced by a wide population, including many that would never describe themselves as progressive. For that reason we can never go back.

344 See HOVENKAMP, OPENING, supra note 5, 1–12.