GEORGE MASON LAW REVIEW

VOL. 33 MAY 2026 NO. 1

ARTICLE

"Passing a Complete Code": The Framers' Failed Effort to Nationalize Contract Law

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Abstract. That contract law is generally state law is well-accepted. Students mostly study state law, lawyers mostly cite state law, and judges mostly apply state law. Federal contract law exists, but as the Erie *doctrine teaches, it is rarely relevant and applies in very few circumstances (e.g., government procurement contracts). In recent years, scholars have opened two lines of attack against this sort of account and have argued in favor of broader conceptions of federal authority. Some scholars have argued that the enumeration doctrine is flawed and that congressional powers are not strictly limited to those listed in the Constitution. Other scholars have argued that* Erie *was wrongly decided and should be overruled. However, recognizing the federal government's general power in the discrete area of contract law does not require going so far. Assuming the enumeration doctrine and the* Erie *doctrine are both correct, historical evidence strongly suggests that the Constitution's Commerce and Contract Clauses jointly empower Congress and the federal courts to superintend contract law throughout the nation.*

This Article recovers a forgotten episode in America's constitutional, political, and legal history: the framers' failed effort to nationalize contract law. By revisiting the making of the Constitution, the ratification debates, and the Rules of Decision Act debate in the First Congress, this Article shows that the Constitution's supporters and opponents broadly anticipated that the Constitution would enable

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the federal government to assume control of American contract law, or a substantial portion of American contract law, from the states. This recovered history has important implications for modern law. Among other things, it shows that Congress's commerce power is more expansive than commonly believed and that federal courts have the power to review state contract regulations and set them aside, or not enforce them, if they contravene national or general contract law norms. Moreover, Congress has the power to enact a national code of contract law. Congressional enactment of a national code, such as the Uniform Commercial Code, could help clarify federal contract law. And if Congress wanted, it could go even further and enact a "complete code" to govern contracts between private parties. A complete code of the kind the framers envisioned would serve a number of important legal values, including certainty, uniformity, judicial economy, equality, autonomy, competition, and federalism.

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Introduction

That contract law is generally state law is well-accepted.[1] Law students studying contract law mostly read state cases,[2] lawyers practicing contract law mostly cite state cases,[3] and judges or arbitrators deciding contract disputes mostly apply state law, as construed by state courts.[4] Federal contract law exists but is rarely relevant,[5] and it has been this way since *Erie Railroad Co. v. Tompkins*.[6]

This conventional account of American contract law is so well-accepted that, over time, it seems to have acquired something like quasi-constitutional status.[7] So the thinking goes, contract law is state law not only because successive generations of Americans have treated it as state law but also because the Constitution makes it so. When the

1 *See* Louisville Gas & Elec. Co. v. FERC, 988 F.3d 841, 847 n.1 (6th Cir. 2021) ("[C]ontract law *is* state law." (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))); Farshad Ghodoosi & Tal Kastner, *Big Data on Contract Interpretation*, 57 U.C. DAVIS L. REV. 2553, 2578 (2024) (referring to "the fact that contract law is state law"); Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191, 198 (2020) ("Contract law is generally understood as common law rules developed by state courts and supplemented by state statutes designed to address particular types of transactions and contracting parties."); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 267 n.4 (2015) ("[C]ontract law is state law . . . ."); Stephen E. Sachs, *Five Questions After* Atlantic Marine, 66 HASTINGS L.J. 761, 767 (2015) (observing that "substantial academic opinion" holds that "contract law is state law"); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 436 (2009) ("[C]ontract law is state law . . . .").

2 *See* Michael E. Solimine, *Activism and Politics on State Supreme Courts*, 57 U. CIN. L. REV. 987, 987 (1989) (book review) (observing that "in legal education common law subjects (contracts, torts, property) are taught mainly through analysis of published state court decisions").

3 In modern practice, the parties themselves often choose which state's laws should control and govern their contract. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (A.L.I. 1988); U.C.C. § 1-301(a) (A.L.I. & UNIF. L. COMM'N 2025).

4 If there is not a controlling state case on point, a federal judge applying state law sometimes will look to federal cases that apply the same state's law. *See generally* 19 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 4507, Westlaw (section updated May 21, 2025) (describing how federal courts approach the "difficult task" of applying state law when state law is unclear—the "*Erie* guess").

5 For example, federal contract law controls the federal government's contracts. *See* Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party." (citing United States v. Seckinger, 397 U.S. 203, 209–10 (1970))). To give another example, federal contract law also controls tribal–state compacts under the Indian Gaming Regulatory Act. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California, 618 F.3d 1066, 1073 (9th Cir. 2010) (citing *Kennewick*, 880 F.2d at 1032).

6 304 U.S. 64 (1938).

7 In other words, it is not clear on the face of the constitutional text whether contract law principally belongs to the federal government or the state governments, but the norm that states make contract law has gradually assumed an "intermediate place in our [federal] system's normative hierarchy." Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 859 (2012). State contract law has become the rule, federal contract law the exception.

Constitution's framers met in Philadelphia in 1787, they divided powers between the federal and state governments. The federal powers were to be "few and defined," whereas the state powers were to be "numerous and indefinite."[8] The power to make "general contract law," as the Supreme Court has called it,[9] is not among the enumerated federal powers.[10] Therefore, this power must be reserved to the states, acting within their own separate spheres of authority.[11] Outside the very narrow categories to which federal contract law applies,[12] state contract law must control.[13]

Indeed, the notion that contract law is reserved to the states has more than theoretical significance. Constitutional concerns about federal overreach and the preservation of state authority contributed to Congress's failures to enact a Federal Sales Act in the early twentieth century and the Uniform Commercial Code (UCC) in the mid-twentieth century,[14] despite protests from Karl Llewellyn, Arthur Corbin, and other supporters of the proposed federal legislation.[15]

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8 THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

9 Priebe & Sons v. United States, 332 U.S. 407, 411 (1947).

10 U.S. CONST. art. I, § 8.

11 U.S. CONST. amend. X.

12 *E.g.*, Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989).

13 This sort of account is not unique to general contract law. For example, the Supreme Court has also held that the federal government lacks power to make general domestic relations law. *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1629 (2023) ("It is true that Congress lacks a general power over domestic relations, and, as a result, responsibility for regulating marriage and child custody remains primarily with the States." (citations omitted)); United States v. Windsor, 570 U.S. 744, 767 (2013) ("[T]here is no federal law of domestic relations." (quoting De Sylva v. Ballentine, 351 U.S. 570, 580 (1956))).

14 *See* Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIA. L. REV. 351, 371 (1983) ("The [Uniform Law Commission] and the [American Law Institute] debated whether the [Uniform Commercial] Code should be presented to Congress for enactment; indeed, the Code was drafted so that it could have been suited for national legislation with only a few changes. But the sponsoring organizations concluded that congressional enactment would be only a partial remedy; it was doubtful that federal authority over interstate commerce would reach the multitudinous commercial transactions covered by the Code."); Frank R. Kennedy, *Federalism and the Uniform Commercial Code*, 29 BUS. LAW. 1225, 1229 (1974) ("Proponents of federal enactment [of the UCC] nevertheless shrink from proposing preemption of the field of commercial law by Congress."); William A. Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 232 (1966) ("A federal Code could not, of course, apply to all commercial transactions without an amendment to the Constitution of the United States, but it could be made applicable to all transactions within the jurisdiction of Congress under the commerce clause."); William A. Schnader, *Why the Commercial Code Should Be "Uniform,"* 20 WASH. & LEE L. REV. 237, 238 (1963) ("[T]o give Congress power to enact a statute like the Uniform Commercial Code which would be universally applicable throughout American jurisdictions, a constitutional amendment expanding the power of Congress to regulate commerce would be necessary.").

15 *See, e.g.*, Arthur L. Corbin, Book Review, 62 YALE L.J. 1137, 1142 (1953) ("What a difference the recognition of general legislative power in Congress would have made in the matter of Uniformity of

In recent years, two lines of attack have emerged against this sort of account, which tries to carve out certain spheres of law for the states. On one hand, some constitutional scholars have argued that the federal government's powers are not strictly limited to those that the Constitution specifically enumerates. Instead, the enumerated powers are a non-exhaustive list, merely illustrative of the types of things the federal government may do. If the federal government wants to legislate, it may displace state law on almost any subject matter.[16] On the other hand, some scholars have questioned whether *Erie* was correctly decided and have suggested that the federal government—particularly the federal courts—actually does have general authority to find law in certain areas, such as contracts or torts, which the states have traditionally controlled.[17] Although the skeptics of enumeration and the skeptics of *Erie* may not have much in common, their views converge on an enlargement of federal authority and an expansion of federal law. As a practical matter, rejecting enumeration would enhance the role of Congress in relation to state legislatures while, similarly, rejecting *Erie* would enhance the role of federal courts in relation to state courts.

Commercial Law! And how large a reduction of litigation in the field of Conflict of Laws! The new Uniform Commercial Code would need but one legislative enactment, instead of forty-nine separate ones."); K.N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 561 (1940) ("This is no trespass on States' Rights."); Comment, *Federal Sales Act: Constitutional Comment*, 26 VA. L. REV. 688, 694 (1940) ("[I]t seems certain that Congress can validly pass the proposed Federal Sales Act under its commerce power."). *See generally* Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 L. & CONTEMP. PROBS. 100 (1951) (discussing the debate on the UCC and several earlier debates).

[16] *See generally* RICHARD PRIMUS, THE OLDEST CONSTITUTIONAL QUESTION: ENUMERATION AND FEDERAL POWER (2025) (challenging the prevailing view that Congress's authority is limited to the Constitution's enumerated powers); Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971 (2024) (disputing the originalist case for enumerationism); Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019) (arguing that Congress enjoys "plenary authority over four discrete areas," namely national defense, foreign relations, interstate disputes, and the national economy); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017) (theorizing a doctrine of "capable federalism" that posits a general federal power to address "national problems"); Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005) (arguing that the Constitution's enumerated powers are not exhaustive but illustrative of the types of actions that the federal government may undertake); *see also* David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857 (2022) (arguing that even if the enumerationist view of Congress's powers is correct, the General Welfare Clause affords Congress the authority "to legislate for any national purpose," including purposes not enumerated).

[17] There is significant overlap between scholarship that is critical of *Erie* and recent scholarship on general law. *See generally* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024) (arguing that the concept of general law that was criticized in *Erie* is the proper lens for viewing the Fourteenth Amendment); STEPHEN E. SACHS, LIFE AFTER *ERIE* (2023), https://perma.cc/U92L-LY7G (refuting *Erie*'s critique of general law); Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019) [hereinafter Sachs, *Finding Law*] (refuting critiques of traditional common-law reasoning such as those made in *Erie*); *see also* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1255 (2017) ("[T]he rejection of *Erie* is the beginning of wisdom.").

However, recognizing the federal government's general power in the discrete area of contract law does not require going so far. Assuming that (1) federal powers are limited to the Constitution's enumerated powers and (2) *Erie* was correctly decided, there is still strong historical evidence that Congress and the federal courts, working together, may superintend contract law throughout the nation. This general power over American contract law has seldom been exercised and never to its fullest extent, but that does not mean the power does not exist. That contract law is generally state law, rather than federal law, is not a constitutional command but a political choice. It is a choice the First Congress made and to which later Congresses have consciously or unconsciously acquiesced.

This Article recovers a forgotten episode in America's constitutional, political, and legal history: the framers' failed effort to nationalize contract law. Part I revisits the making of the Constitution, the ratification debates, and the Rules of Decision Act[18] debate in the First Congress. It shows that many Federalists—supporters of the Constitution—believed that together the Constitution's Commerce Clause[19] and Contract Clause[20] would enable the federal government to develop a national or general law of contracts. It also shows that many Anti-Federalists—opponents of the Constitution—held the same belief but sought to defeat contract law's nationalization. After the Constitution's ratification, Federalists were unable to develop or draft any concrete plan. Their nationalist project never got off the ground. Instead, the First Congress deferred the issue and, in the meantime, allowed the states to retain their own separate laws of contracts. Deference toward separate state laws morphed into congressional inaction. Then, after anti-federal, or pro-state, Jeffersonian Republicans won the 1800 elections, they put to rest the idea that contract law ought to be nationalized.

Part II draws out some modern implications of this recovered history. First, it argues that when Congress tries to regulate contracts, the Commerce Clause gives it expansive authority. Though the precise meaning of the Commerce Clause is frequently contested,[21] the historical

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18 The modern Rules of Decision Act is codified at 28 U.S.C. § 1652.

19 U.S. CONST. art. I, § 8, cl. 3.

20 U.S. CONST. art. I, § 10, cl. 1. Sometimes, scholars use the term "Contract Clause" to refer to the whole of article I, section 10, clause 1. Other times, scholars use the term "Contract Clause" to refer to the portion of clause 1 that prevents states from "impairing the Obligation of Contracts." This Article will use the term in the second, narrower sense.

21 *See generally* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6 (2010) (arguing that "commerce" extends to all "interaction[s] and exchange[s] between persons or peoples[,]" whether economic or non-economic); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005) (arguing that "commerce" has "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets"); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001) (arguing that "commerce" refers to "the trade or exchange of goods (including the means of transporting them)"); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold*

record supports Congress's authority over all or nearly all contract law. Next, this Article argues that the judiciary's power to review state contract law under the Contract Clause is broader than present-day doctrine recognizes. When the Constitution prohibited the states from passing laws "impairing the Obligation of Contracts,"[22] state laws that retrospectively abolished or altered contractual relationships were the main target, but they were not the only target. The clause broadly authorized the courts to review all state regulations on contracts for compliance with national or federal norms, or general contract law. Finally, this Article argues that the modern Congress should consider adopting a national code of contract law, such as the UCC, for federal purposes. At present, federal contract law is common law in the broadest sense[23]: an amalgam of traditional legal principles, treatises, federal cases, and state cases that the federal courts consider persuasive.[24] By adopting a national code, like the UCC, Congress could help clarify the law to be applied in cases within federal contract law's purview. Congressional adoption of a code would ensure greater uniformity across the federal courts and, from the outset, provide greater certainty to federally contracting parties. Alternatively, Congress could pursue the more ambitious project of passing a complete code of the kind the framers contemplated—a code applicable to contracts between private (non-government) parties. A complete code would advance a number of legal values that are widely considered important, including certainty,

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Federal Commercial Regulations but Preserve State Control over Social Issues, 85 IOWA L. REV. 1, 9 (1999) (arguing that "commerce" refers to "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests"); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987) (arguing that "commerce" means "interstate transportation, navigation and sales, and the activities closely incident to them"); *see also* United States v. Lopez, 514 U.S. 549, 558–59 (1995) ("identif[ying] three broad categories of activity that Congress may regulate under its commerce power": (1) "use of the channels of interstate commerce;" (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "activities having a substantial relations to interstate commerce"); *id.* at 580 (Kennedy, J., concurring) (suggesting that Congress's power extends to "conduct [that] has a commercial character" or "an evident commercial nexus," so long as it does not "intrude upon an area of traditional state concern"); *id.* at 585 (Thomas, J., concurring) (calling on the Court to "reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause"); *id.* at 616–18 (Breyer, J., dissenting) (arguing that Congress may regulate any "local activity" that "will likely have a significant effect upon interstate commerce," alone or "cumulative [with] all similar instances").

[22] U.S. CONST. art. I, § 10, cl. 1.

[23] *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *63–64 (defining "common law").

[24] *In re* Deepwater Horizon, 786 F.3d 344, 354–55 (5th Cir. 2015); Minidoka Irrigation Dist. v. Dep't of Interior, 154 F.3d 924, 926 (9th Cir. 1998); United States v. Nat'l Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996); *see also* Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982) ("There is no statutory code of federal contract law . . . .").

uniformity, judicial economy, equality, autonomy, competition, and even federalism.

I. The Failure to Nationalize Contract Law

Following the Revolution, American contract law was a patchwork. All states, except Connecticut and Rhode Island, had incorporated or received English law into their domestic laws, but they did so on different dates and to varying extents.[25] The result was that, as Americans moved between states or made contracts with parties from other states, the laws governing their contracts differed, often in ways they could not easily anticipate and against which they could not readily protect themselves.[26] Compounding these uncertainties, the confederated states were suffering from a "severe economic depression" that rivaled the twentieth century's Great Depression.[27] Rather than cooperate, some states decided to engage

[25] *See* James Madison, The Report of 1800 (Jan. 7, 1800), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/DQH5-DVAE ("The common law was not the same in any two of the colonies; in some, the modifications were materially and extensively different."); Thomas Jefferson, Observations on the Common Law and Hardin's Case (Nov. 11, 1802), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/9RJM-ZJXU ("As the different States were settled at very different periods, and the adoption for each State was the laws of England as they stood at the moment of the adoption by the State, it is evident that the system as adopted in 1607 by Virginia, was one thing, as by Pennsylvania was another thing, as by Georgia, in 1759, was still a different one."); *id.* ("In the case of Connecticut, they did not adopt the common law of England at all as their basis, but declared by an act of their own, that the law of God, as it stood revealed in the Old and New Testament[s], should be the basis of their laws, to be subject to such alterations as they should make."); Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1130 n.97 (2011) ("Most states [adopted or reaffirmed English law] almost immediately after independence. Two laggards were Rhode Island, which did not receive the common law until 1798, and Connecticut, which passed a reception statute in 1818.").

[26] Choice-of-law clauses were not yet a feature of American contract law. They started appearing in foreign maritime contracts around 1800 and in non-maritime contracts around 1869. John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1156 n.19 (2020). But they only became common in the 1960s. *Id.* at 1174–75. Thus, during the Confederation period, Americans were at the mercy of state conflict-of-law rules, which themselves were not well-developed and were subject to state public policy exceptions. *See* William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, *in* 62 COLONIAL SOC'Y OF MASS., LAW IN COLONIAL MASSACHUSETTS: 1630–1800 419, 441–42 (Daniel R. Coquillette, Robert J. Brink, Catherine S. Menand & Frederick S. Allis, Jr. eds., 1984) (describing how the existence of "thirteen [state] legislatures and thirteen [state] supreme courts . . . threatened to destroy the unity of substantive law that had existed throughout the colonial period and to subject Americans with interstate connections to uncertainty about the rules of law which would govern their conduct"); *id.* at 442 (commenting that some state courts began to "exercise[] a residual power to reject [out-of-state] law when it came into conflict with their own local law or local policy").

[27] MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 75 (2016). Economic historians John J. McCusker and Russell R. Menard estimate that in the years following the Revolution, the American economy suffered a 46% decline. JOHN J. MCCUSKER & RUSSELL R. MENARD, THE ECONOMY OF BRITISH AMERICA, 1607–1789, at 373–75 (1991).

in "economic warfare" with their neighbors and "related forms of interstate exploitation."[28] The most pervasive laws were debtor-relief laws, mostly enacted by state legislatures that represented large debtor populations.[29] These laws sought to help struggling debtors by forcing (mostly out-of-state and foreign) creditors to accept inflated paper currencies at face value, postponing payments until later dates, allowing debtors to pay off their debts in installments, or allowing them to pay in commodities, such as flour or tobacco.[30] Needless to say, such legislation vexed the "citizens of sister states and, even worse, foreign creditors."[31] Debtor-relief laws destabilized credit markets and risked retaliation.[32]

As this Part discusses, the Federalists' answer to patchwork state laws, unneighborly debtor-relief laws, and the failure of American credit markets (i.e., an inability to obtain credit) was a greater nationalization of American contract law. Through their proposed Constitution's Commerce Clause and Contract Clause, as well as its Bankruptcy Clause,[33] the Federalists sought to bring federal power to bear on the common economic crisis that confronted the American people. The Anti-Federalists shared the Federalists' view about what the Constitution would do, and they thought it went too far. Anti-Federalists tried to derail the Federalist project and to keep contract law in the states, where it had traditionally resided.[34]

"As a point of reference, during the Great Depression, between 1929 and 1933, real per capita gross national product declined by 48 percent." *Id.* at 374.

28 AMAR, *supra* note 21, at 122.

29 Justice William Johnson later described these sorts of laws as the youthful follies of newly independent states, unaccustomed to managing their own economic affairs:

> For a century, the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State [Great Britain]; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in judgment).

30 BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 4 (1938).

31 AMAR, *supra* note 21, at 123.

32 *See id.* (mentioning the risk of foreign retaliation); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 177 (2002) (discussing the rising cost of credit among New York and Philadelphia merchants).

33 U.S. CONST. art. I, § 8, cl. 4.

34 This Article follows the convention of labeling the Constitution's proponents the "Federalists" and its opponents the "Anti-Federalists." *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 9–10 (1981) (explaining the origin of these labels). That said, the labels varied during the ratification debates. Early on, for example, these groups were sometimes called the "Constitutionalists" and the "Anti-Constitutionalists." *E.g.*, Letter from William Lewis to Thomas Lee

A. *Federalist Support for National Contract Law*

The United States' first national constitution, the Articles of Confederation, entered into force in 1781.[35] The Articles declared that the states were in "a firm league of friendship with each other"[36] and that each state's "free inhabitants" were entitled to "all privileges and immunities of free citizens in the several states," including "all the privileges of trade and commerce."[37] But these declarations were more aspirational than real.[38] As early as 1782, future Federalists began to complain publicly that the Articles were inadequate to meet the nation's needs.[39]

One of the Articles of Confederation's earliest and most outspoken opponents was Alexander Hamilton. In a series of essays, *The Continentalist*, he contended that reformation or replacement of the Articles was a political and economic imperative. In his most insightful essay, Hamilton argued that "vesting Congress with the power of regulating trade ought to have been a principal object of the confederation." Unless the states submitted to "a common directing power," their commerce and revenues would remain disorganized. Hamilton rejected the "wild speculative paradox[]" that the states were competent to regulate their own commerce.[40] He wrote:

> Perhaps it may be thought, that the power of regulation will be left placed in the governments of the several states, and that a general superintendence is unnecessary. If the states had distinct interests, were unconnected with each other, their own governments would then be the proper and could be the only depositaries of such a power; but as they are parts of a whole with a common interest in trade, as in other things, there ought to be a common direction in that as in all other matters.[41]

To be sure, Hamilton's primary concern was trade with foreign nations, but his views applied with "nearly the same operation" to "the intercourse between the states, as in that between the different parts of

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Shippen (Oct. 11, 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/8FHH-XUYL.

35 *Articles of Confederation (1777)*, NAT'L ARCHIVES (Oct. 23, 2023), https://perma.cc/5W4T-J5DW.

36 ARTICLES OF CONFEDERATION OF 1781, art. III.

37 *Id.* art. IV, para. 1.

38 *See* James Madison, *supra* note 25; AMAR, *supra* note 21, at 123; and text accompanying notes 28–32, *supra*.

39 Private complaints about the Articles preceded their entry into force. *See, e.g.*, Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/2F4E-FDTW ("The fundamental defect [in the Articles] is a want of power in Congress.").

40 Alexander Hamilton, The Continentalist No. V (Apr. 18, 1782), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/K63C-ZFHK.

41 *Id.*

the same state."[42] As contrasted with state legislatures, "[i]t is to be presumed, that Congress will be in general better composed for abilities, and as well for integrity as any assembly on the continent."[43]

In the same essay, Hamilton praised "the abilities and indefatigable endeavours of the great [Jean-Baptiste] COLBERT. He laid the foundation of the French commerce, and taught the way to his successors to enlarge and improve it."[44] Although Hamilton's precise reasons for praising Colbert (the highest-ranking minister in France during Louis XIV's reign) are not entirely clear, it is noteworthy that Colbert oversaw the creation of France's 1673 commercial code—the world's first general commercial code.[45]

Joining Hamilton's calls, James Madison proposed a resolution in Virginia's legislature in 1785. The resolution claimed that "the relative situation of the United States" had shown the necessity of "uniformity in their commercial regulations, as the only effectual policy for obtaining [improved foreign trade] . . . [and] preventing animosities, which cannot fail to arise among the several States from the interference of partial and separate regulations."[46] And in 1786, a congressional committee, chaired by Charles Pinckney,[47] proposed seven amendments to the Articles.[48] The first proposal would have granted Congress "the sole and exclusive power of regulating the trade of the States as well with foreign Nations as with each other."[49]

In September 1786, delegates from five states gathered in Annapolis to discuss the Articles' deficiencies and suggest reforms.[50] A delegate from Virginia, Madison went to the convention with no "other plan than that of investing Congress with full powers for the regulation of commerce

42 *Id.*

43 *Id.*

44 *Id.*

45 Francesca Trivellato, *"Amphibious Power": The Law of Wreck, Maritime Customs, and Sovereignty in Richelieu's France*, 33 L. & HIST. REV. 915, 924 (2015).

46 James Madison, Resolution Calling for the Regulation of Commerce by Congress (Nov. 14, 1785), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/TEK2-KVHY.

47 CHARLES WARREN, THE MAKING OF THE CONSTITUTION 21 (1928).

48 31 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 494–98 (John C. Fitzpatrick ed., Libr. of Cong. 1934).

49 *Id.* at 495. The "sole and exclusive power" language did not make its way into the Constitution, so it remained an open question whether Congress's commerce power was exclusive of or concurrent with states' powers. *Cf.* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1881, 1905–14 (2011) (arguing that the text and history of the Commerce Clause better support an exclusive view than a concurrent view).

50 *See* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 494–98 (1995) (discussing the Annapolis Convention).

foreign and domestic."[51] With only five states represented, however, the delegates soon concluded that they could not fulfill their purpose to suggest reforms to the nation's government. They resolved that in 1787, a new convention should meet in Philadelphia to determine, among other objects, whether "an uniform system" of commercial regulation would promote the "common interest and permanent harmony" of the United States.[52]

As the Philadelphia (or Constitutional) Convention approached, Madison wrote letters to Thomas Jefferson, Edmund Randolph, and George Washington that outlined his plans for a new federal constitution. A "new system" was needed, in Madison's view, for "[o]ver & above the positive power of regulating trade and sundry other matters in which uniformity is proper."[53] The new federal government would exist "not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority."[54] Madison insisted that "no material sacrifices ought to be made to local or temporary prejudices."[55] He wrote, "Let it be tried then whether any middle ground can be taken which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful."[56] According to Madison, "the national Government should be armed with positive and compleat [sic] authority in all cases which require uniformity; such as the regulation of trade."[57]

In April 1787—one month before the Philadelphia Convention—Madison wrote a memorandum, *Vices of the Political System of the United States*, that identified a dozen of the Confederation's worst failures.[58] Among these failures were the inability of the Confederation to combat debtor-relief laws that may "be deemed aggressions on the rights of other States" and "foreign nations"; "[t]he practice of many States in restricting

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51 WARREN, *supra* note 47, at 19–20 (quoting a letter, written on September 3, 1786, from Rufus King to Jonathan Jackson).

52 *Proceedings of Commissioners to Remedy Defects of the Federal Government*, AVALON PROJECT (Sept. 14, 1786), https://perma.cc/2D6K-8TK5 (quoting the commissions given by New York, Pennsylvania, Virginia, and New Jersey).

53 Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/6SCG-M9AC.

54 *Id.*

55 Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/D3AZ-8QDF.

56 *Id.*

57 Letter from James Madison to George Washington (Apr. 16, 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/U2PN-T8NV.

58 James Madison, Vices of the Political System of the United States (Apr. 1787), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/J358-JDWF.

the commercial intercourse with other States"; the "want of concert in matters where common interest requires it," especially "in the state of our commercial affairs"; and the "multiplicity and mutability of [state] laws."[59] The solution to these failures, according to Madison, was to consolidate power in the federal government. "[C]ontrary to the prevailing Theory," Madison thought an extended republic, not a league of small republics, would better protect the "public Good" and "private rights" by making "combinations" among factions "less easy to be formed."[60]

At the Philadelphia Convention, the delegates quickly decided that the better path would not be to revise the Articles of Confederation but, instead, to draft a new Constitution altogether. Virginia Governor Edmund Randolph told the Convention that its goal should be to establish "a strong, consolidated union, in which the idea of States should be nearly annihilated."[61] Hamilton made the same point: "[W]e must establish a general and national government, completely sovereign, and annihilate the State distinctions and State operations; and, unless we do this, no good purpose can be answered."[62] Again, a main object of the delegates, though not their sole object, was to bring the states into greater alignment on commercial matters.

That Congress should have greater power to regulate commerce was never in dispute,[63] but the delegates deeply disagreed about the best way to ensure the states' compliance. One proposal was to grant Congress the power to negative, or veto, state laws contrary to national policy goals. This proposal failed by votes of seven states to three states.[64] An alternative proposal was to give the federal government the power to appoint state governors who, in turn, could veto state bills that violated national policy goals.[65] This proposal failed on a procedural vote—six states to five states.[66] Eventually, the Convention settled on federal courts, "almost but not quite by default."[67] Rather than vest the power of review in the federal

59 *Id.* (fourth, fifth, ninth, tenth, and eleventh vices).

60 *Id.* (eleventh vice).

61 ROBERT YATES, SECRET PROCEEDINGS AND DEBATES OF THE FEDERAL CONVENTION 101 (John Lansing ed., 1839).

62 *Id.* at 141.

63 *See* Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 423 (2008) ("[T]here was universal agreement that the power over interstate commerce had to be transferred from the states to Congress.").

64 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 168 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; 2 *id.* at 28; YATES, *supra* note 61, at 116.

65 1 FARRAND'S RECORDS, *supra* note 64, at 293; YATES, *supra* note 61, at 146.

66 2 FARRAND'S RECORDS, *supra* note 64, at 391.

67 Michael P. Zuckert, *Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM 67, 68 (Steven Kautz, Arthur Melzer, Jerry Weinberger & M. Richard Zinman eds., 2009).

legislature or federally appointed state governors, the Convention would task federal judges with monitoring the states and securing their compliance.[68]

The Convention's choice of judicial review over congressional or gubernatorial review "stemmed not from an elitist preference for judges over politicians, but from an institutional preference for legal rather than political settlement of conflict arising from the federal system."[69] The power of federal judges would not be a discretionary political power but a legal power to decide in particular cases whether the states had followed specific constitutional commands.[70] For present purposes, the most relevant command was the restriction on state contract regulations.

The Constitution's Contract Clause was loosely modeled on a similar clause in the Northwest Ordinance. Enacted by the Confederation Congress, the Ordinance organized the Northwest Territory, constituted its government, and enumerated certain rights for residents.[71] Within the Ordinance's bill of rights was a clause to protect contracts: "[I]n the just preservation of rights and property[,] it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed."[72] On August 28, 1787, Massachusetts delegate Rufus King proposed to the Convention "a prohibition on the States to interfere in private contracts" according to "the words used in the Ordinance."[73] The delegates briefly debated King's proposal, but they appear not to have voted on it.[74] Instead, they approved a ban on state "bills of attainder" and "retrospective laws."[75]

On September 8, the delegates elected a five-member Committee of Style to "revise" and "arrange" the Convention's resolutions into a draft constitution. Among the members elected were Hamilton, King, and Madison.[76] Comparing resolutions adopted by the Convention with the draft constitution produced by the Committee, scholars have long recognized that the Committee liberally construed its mandate to "revise."

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68 *See* Matthew S. Brogdon, *Political Jurisprudence and the Role of the Supreme Court: Framing the Judicial Power in the Federal Convention of 1787*, 6 AM. POL. THOUGHT 171, 178–86 (2017) (discussing the delegates' debates and their choice of judicial review).

69 *Id.* at 176.

70 Zuckert, *supra* note 67, at 76.

71 *See* NORTHWEST ORDINANCE OF 1787 arts. II–V. Notably, the Ordinance recognized not only the rights of white settlers but also the rights of Indians. *Id.* art. III. The Ordinance further prohibited slavery in the Territory. *Id.* art. VI.

72 *Id.* art. II.

73 2 FARRAND'S RECORDS, *supra* note 64, at 439.

74 *Id.* at 439–40.

75 *Id.* at 440 (footnote omitted).

76 *Id.* at 553.

Despite its name, the Committee of Style made not only *stylistic* revisions but also *substantive* revisions to the draft constitution.[77] In the case of the Contract Clause, the Committee introduced into the Constitution a provision that the Convention never approved.[78]

On September 12, the Committee delivered its report to the Convention. The report's draft constitution included the following provision: "No state shall . . . pass any . . . laws altering or impairing the obligation of contracts . . . ."[79] On its face, this provision departed in two significant ways from the Northwest Ordinance's contract clause. First, the Ordinance's clause applied only to "private contracts,"[80] whereas the Committee's clause applied to "contracts."[81] This change presumably meant the new Constitution would extend to public contracts as well.[82] Second, the Ordinance's clause covered only regulations on contracts "previously formed."[83] The Committee's clause did not include this caveat. This change suggested that both past and future contracts would receive protection. The new Constitution would restrain the states, to at least some extent, from regulating contracts retrospectively and prospectively.[84]

By September 14, the words "altering or" had been removed, and the Contract Clause now banned any state "law impairing the obligation of contracts."[85] Massachusetts delegate Elbridge Gerry proposed that a "like prohibition[]" be imposed on the federal government, but no one

77 *See, e.g.*, WRIGHT, *supra* note 30, at 9–10 (commenting that the Committee likely debated "the desirability of a clause protecting contracts"); Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1648 (2012) ("[W]e might be advised to refer to the Committee of *Revision*, not of *Style*."). *See generally* David S. Schwartz, *The Committee of Style and the Federalist Constitutio*n, 70 BUFF. L. REV. 781 (2022) (criticizing the "Style doctrine," or the view that the Committee's revisions were purely stylistic); William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021) (documenting fifteen substantive changes the Committee made).

78 William Michael Treanor, *Gouverneur Morris and the Drafting of the Federalist Constitution*, 21 GEO. J.L. & PUB. POL'Y 1, 16–17 (2023).

79 2 FARRAND'S RECORDS, *supra* note 64, at 596–97.

80 NORTHWEST ORDINANCE OF 1787, art. II.

81 2 FARRAND'S RECORDS, *supra* note 64, at 597.

82 *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (invalidating Georgia's attempt to claw back lands conveyed in the Yazoo land scandal); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 650 (1819) (invalidating New Hampshire's attempt to reorganize Dartmouth College, contrary to the college's 1769 charter).

83 NORTHWEST ORDINANCE OF 1787, art. II.

84 *But see generally* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (reaching the opposite conclusion—that the Contract Clause prohibits only retrospective impairments of contracts—in four seriatim opinions and over the dissenting votes of Chief Justice Marshall, Justice Duvall, and Justice Story).

85 2 FARRAND'S RECORDS, *supra* note 64, at 619.

seconded his motion.[86] Then, on September 15, the Virginia delegate and soon-to-be Anti-Federalist George Mason noticed that the clause did not include the same caveat as the Northwest Ordinance. He proposed adding the word "previous" before "contracts."[87] The Convention did not adopt his motion either.[88] By the time the Convention finally adjourned on September 17,[89] the final version of the Contract Clause read: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[90] Whatever this phrasing meant and whatever the delegates might have intended, the Contract Clause appeared to go further than its source material. It was based on the Northwest Ordinance, but its scope seemed broader.

After the Convention, many Federalists, as they would soon become known,[91] began campaigning for ratification of the Constitution. They extolled the Constitution's virtues and downplayed some of its more controversial features, which could hinder their effort.[92] Pinckney felt the proposed overhaul of the nation's commercial-regulatory structure was a virtue. In October 1787, Pinckney wrote and had published a pro-ratification pamphlet.[93] This pamphlet, *Observations on the Plan of Government*,[94] was not reticent by any stretch of the imagination. It laid bare some of the Federalists' (or at least Pinckney's) most nationalist or consolidationist aims. Pinckney wrote:

> I apprehend the true intention of the States in uniting, is to have a firm national Government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign State. The members which compose the superintending Government are to be considered merely as parts of a great whole, and

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86 *Id.*

87 *Id.* at 636.

88 *Id.* For further discussion on Mason's failed proposal to insert the word "previous," see WRIGHT, *supra* note 30, at 9 n.20; 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 357–58 (1953) [hereinafter CROSSKEY, POLITICS AND THE CONSTITUTION]; and William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248, 253 (1968).

89 2 FARRAND'S RECORDS, *supra* note 64, at 649.

90 U.S. Const. art. I, § 10, cl. 1.

91 STORING, *supra* note 34, at 9–10.

92 *See* JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS 38 (2018) (describing the Federalists' "assuaging strategy").

93 Lynn Uzzell, *The Deep South's Constitutional Con*, 53 ST. MARY'S L.J. 711, 724 (2022).

94 CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION (1787). The style in which Pinckney wrote his pamphlet is unique. He presents his views on the Constitution in the form of a speech, dated May 28, 1787. As the pamphlet's original title page concedes, Pinckney never gave such a speech. Instead, the pamphlet reflects his ideas "[d]elivered at different Times in the course of [the delegates'] Discussions." *Id.* at 1. In short, the pamphlet is the speech that Pinckney wishes he had given, had his views been fully formed at the beginning of the Convention.

> only suffered to retain the powers necessary to the administration of their State Systems. The idea which has been so long and falsely entertained of each being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a Government. The States should retain nothing more than that mere local legislation, which, as districts of a general Government, they can exercise more to the benefit of their particular inhabitants, than if it was vested in the Supreme Council; but in every foreign concern, as well as in those internal regulations, which respecting the whole ought to be uniform and national, the States must not be suffered to interfere.[95]

Later in his pamphlet, Pinckney clarified that, by ratifying the Constitution, the people of the states would "surrender[] to the Federal Government, the complete management of our commerce."[96] Put another way, the Constitution would establish an American common market, regulated by a common government.[97]

Among the Federalist essayists, Pinckney was not alone in his belief. In their more famous series of essays, *The Federalist Papers*, Hamilton, Madison, and John Jay—writing under the joint pseudonym "Publius"—made similar arguments, albeit in less explicit terms. In *Federalist* No. 7, for instance, Hamilton lamented that "[l]aws in violation of private contracts" were "aggressions on the rights of those States whose citizens are injured by them" and a "probable source of hostility" among the states.[98] In *Federalist* No. 10, Madison predicted that, compared with the states, the federal government would "be less apt" to forgive debts, seize property, or engage in "any other improper or wicked project."[99] In *Federalist* No. 11, Hamilton said that the Constitution would bring about "unrestrained intercourse between the States."[100] He insisted, "A unity of commercial, as well as political, interests can only result from a unity of government."[101] Continuing the same theme in *Federalist* No. 22, Hamilton argued that "no object . . . more strongly demands a federal superintendence" than the "power to regulate commerce."[102] He wrote:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national

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95 *Id.* at 12.

96 *Id.* at 17–18.

97 The term "American common market," which evokes thoughts of the European common market, has been around for some time. *See, e.g.*, Williams, *supra* note 63, at 409; Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 HARV. J.L. & PUB. POL'Y 119, 119 (1982).

98 THE FEDERALIST NO. 7, at 59 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1961).

99 THE FEDERALIST NO. 10, at 77–79 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

100 THE FEDERALIST NO. 11, at 84 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1961).

101 *Id.* at 85.

102 THE FEDERALIST NO. 22, at 139 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1961).

> control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.[103]

In *Federalist* No. 44, Madison specifically addressed the Contract Clause. He argued that "laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation." He called the clause a "constitutional bulwark in favor of personal security and private rights." He said the clause would help end "the fluctuating policy which has directed the public councils" and the "sudden changes and legislative interferences, in cases affecting personal rights." The clause would "banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."[104]

And in *Federalist* No. 62, Madison renewed his criticisms of state lawmaking. He complained that state laws were inconstant, unclear, and too numerous and that they discouraged economic actors from making long-term investments. He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?
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> . . . .
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> . . . [G]reat injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.[105]

And this, of course, was the whole point of the Federalist political-economic agenda: to eliminate separate, partial, mutable, and voluminous regulations that thirteen different states imposed and to replace them with a single, steady system of national regulation—a system that would

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103 *Id.* at 140.

104 THE FEDERALIST NO. 44, at 278–79 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961). Read alone, "Madison's defence of the contract clause [in *Federalist* No. 44] does not help a great deal in defining its scope." WRIGHT, *supra* note 30, at 15. To make sense of the clause, it must be read in the broader context of the Federalists' commercial agenda.

105 THE FEDERALIST NO. 62, at 379–80 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

encourage, rather than discourage, the merchant, the farmer, and the manufacturer. By empowering Congress to regulate commerce and the federal courts to supervise state regulations affecting contracts, Madison and his Federalist allies hoped to achieve a national common market.

In the state ratification debates, several Federalists spoke about the new commercial-regulatory structure that the Constitution sought to erect, but only two did so at any great length. In South Carolina, Pinckney emphasized the importance of the Contract Clause and the judiciary's role in enforcing it. According to Pinckney, the federal judiciary was "at once the most important and intricate part of the system."[106] He asserted, "[F]rom the extensiveness of its powers, it may be easily seen that, under a wise management, this department might be made the keystone of the arch, the means of connecting and binding the whole together . . . ." The nation "would always depend upon the energy and integrity of the judicial [department] than on any other part of the government." One "duty" of the federal judiciary "would be not only to decide all national questions which should arise within the Union, but to control and keep the state judicials [sic] within their proper limits."[107]

In a later speech, Pinckney discussed Article I, Section 10 of the Constitution, in which the Contract Clause appears. He said that he considered this section "the soul of the Constitution" because it would prevent the states "from interfering with the powers of the Union," force the states "to comply with their federal duties," and "teach them to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness."[108] Pinckney commented that Anti-Federalists had "objected to" the Contract Clause. He thought these objections were misconceived. "If we consider the situation of the United States as they are at present, either individually or as the members of a general confederacy, we shall find it extremely improper they should ever . . . interfer[e] in private contracts . . . ."[109] Once the Constitution was ratified and the Contract Clause became supreme law, Pinckney insisted that it would facilitate interstate and international exchange:

> How extremely useful and advantageous must this restraint be to those states which mean to be honest, and not to defraud their neighbors! Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts. The citizen of South Carolina will then be able to trade with those of Rhode Island, North Carolina, and Georgia, and be sure of receiving the value of his commodities. Can this be done at present? It cannot! . . .

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[106] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

[107] *Id.* at 258.

[108] *Id.* at 333.

[109] *Id.* at 334.

> But above all, how much will this section tend to restore your credit with foreigners—to rescue your national character from that contempt which must ever follow the most flagrant violations of public faith and private honesty! . . . No more shall the widow, the orphan, and the stranger, become the miserable victims of unjust rulers. Your government shall now, indeed, be a government of laws. The arm of Justice shall be lifted on high; and the poor and the rich, the strong and the weak, shall be equally protected in their rights. Public as well as private confidence shall again be established; industry shall return among us; and the blessings of our government shall verify that old, but useful maxim, that with states, as well as individuals, honesty is the best policy.[110]

Pinckney's old but useful maxim—that honesty is the best policy—clearly reflected a traditional or promissory view of contractual relationships, in which one's voluntary assent to an agreement imposes a moral duty.[111] For Pinckney, the Contract Clause constitutionalized this moral conception of contract law, prevented the states from undermining it, and tasked the federal courts with directly enforcing it on parties or else ensuring that the states enforced it within their own courts. If contracts were faithfully kept, then, argued Pinckney, commerce would flourish.[112]

In North Carolina, William Richardson Davie addressed the same issue. He argued that "a general controuling Judiciary" was necessary to ensure that contracts would be enforced. Without a general court system, "laws might be made in particular states to enable [their] citizens to defraud the citizens of other states." Davie gave examples of state debtor-relief laws as the gravest violations. He asked, "Where then are we to look for justice?" He answered, "To the Judiciary of the United States." Davie said that the federal judiciary would combat the "contracted and narrow-minded regulations of the individual states, and their predominant disposition to advance the interests of their own citizens to the prejudice of others." He continued, "The people of the United States have one common interest—they are all members of the same community, and

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110 *Id.* at 335–36.

111 *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015) (defending the "classical" view of contract law against its modern alternatives). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 1 (A.L.I. 1981) ("A contract is *a promise or a set of promises* for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." (emphasis added)); RESTATEMENT (FIRST) OF CONTRACTS § 1 (A.L.I. 1932) (same). *But see Contract*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"); U.C.C. § 1-201(b)(12) (A.L.I. & UNIF. L. COMM'N 2023) ("[T]he total legal obligation that results from the parties' agreement as determined by [the UCC] as supplemented by any other applicable laws."); *id.* § 2-609 cmt. 1 (commenting "that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit"); Randy E. Barnett, *Some Problems with Contract As Promise*, 77 CORN. L. REV. 1022, 1024 (1992) ("summariz[ing] some of the problems that arise from adhering to a promise theory of contract").

112 Among economists, historians, and political scientists, one of the classic works espousing this view is Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (arguing inter alia that judicial independence promotes contract enforcement and that contract enforcement promotes prosperity).

ought to have justice administered to them equally in every part of the continent, in the same manner, with the same dispatch, and on the same principles."[113]

As Part I(B) shows, the Anti-Federalists' objections to the Constitution mirrored the Federalists' aspirations. Federalists and Anti-Federalists broadly agreed that the Constitution would transform the nation's commercial-regulatory structure. It would take power away from the states and give it to the federal government. Indeed, this was the Anti-Federalists' strongest reason for opposing ratification. In late 1788, when the ratification debates were still fresh in mind, Madison wrote to Jefferson: "The articles relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive & negative put together."[114] Even though ratification succeeded, understanding Anti-Federalist opposition serves to highlight what the Constitution, in the view of its earliest contemporaries, was designed to do.[115]

B. *Anti-Federalist Opposition to National Contract Law*

The Anti-Federalists' opposition to the Constitution's provisions on commerce and contracts stemmed from their distrust of the federal government, their trust in the state governments, or some combination of both these factors. As bad as state regulation might have been, Anti-Federalists worried that federal regulation would be even worse—and not only worse but also less accountable. "The Anti-Federalists stood . . . in opposition to what they called the consolidating tendency and intention of the Constitution—the tendency to establish one complete national government, which would destroy or undermine the states."[116] Nowhere was this tendency greater than in the Constitution's transfer of commercial-regulatory power to the federal government.

Luther Martin, who had served as a Maryland delegate at the Philadelphia Convention, was one of the Constitution's most vocal

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113 PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA 182 (1789).

114 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/64YK-SL5B.

115 The extent to which Anti-Federalist opinion matters is largely dependent on one's preferred mode of constitutional interpretation. If one ascribes controlling weight to the framers' intention(s), then Anti-Federalist opinion matters very little because the Anti-Federalists were not framers. But if one ascribes controlling weight—or any weight at all—to the general public's original understanding(s), then Anti-Federalist opinion matters a great deal. After all, the Anti-Federalists were a sizeable minority of Americans in the late 1780s. *See* Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1694 (2012) (arguing that, in determining the Constitution's original meaning(s), we have no "reason to assume that antifederalist writings are any less *credible* than *The Federalist*").

116 STORING, *supra* note 34, at 10.

opponents during the ratification debates. He objected to the Contract Clause, in particular, because he thought it would prevent the states from adequately responding to economic emergencies. In his anti-ratification pamphlet, *Genuine Information*, Martin wrote:

> [T]here might be times of such great public calamities and distress, and of such extreme scarcity of specie as should render it the duty of a government, for the preservation of even the most valuable part of its citizens in some measure to interfere in their favour, by passing laws totally or partially stopping the courts of justice, or authorising the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind necessary in most, or all of the States, to prevent the wealthy creditor and the monied man from totally destroying the poor though even industrious debtor—Such times may again arrive. I therefore, voted against depriving the States of this power, a power which I am decided they ought to possess, but which I admit ought only to be exercised on very important and urgent occasions.[117]

Martin warned that when the next economic crisis arrived, the federal government would use its taxation power to raise revenue from struggling Americans "as you would squeeze the juice from an orange, till not a drop more can be extracted."[118] Then, to add insult to injury, the federal government would "let loose upon them their private creditors, to whose mercy it consigns them, by whom their property is to be seized upon and sold."[119] For Martin, the Constitution was an unholy alliance between the political and creditor classes. Federal politicians would attack unfortunate citizens from one side, private creditors from the other.

The most skilled orator of his generation, Patrick Henry spoke out against the Constitution at Virginia's ratification convention. He warned that the Constitution's "consolidating tendency" was "not imaginary" but "a formidable reality." "This government," said Henry, "will operate like an ambuscade. It will destroy the state governments, and swallow the liberties of the people . . . ."[120] He continued:

> Sir, I ask you, and every other gentleman who hears me, if he can retain his indignation at a system which takes from the state legislatures the care and preservation of the interest of the people. One hundred and eighty representatives, the choice of the people of Virginia, cannot be trusted with their interests. They are a mobbish, suspected *herd*. This country has not virtue enough to manage its own internal interests. These must be referred to the chosen ten. If we cannot be trusted with the private contracts of the citizens, we must be depraved indeed.[121]

Henry's claim that the Constitution would take private contracts out of the hands of Virginia's state legislators and give that power to a chosen

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117 LUTHER MARTIN, THE GENUINE INFORMATION DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND RELATIVE TO THE PROCEEDINGS OF THE GENERAL CONVENTION LATELY HELD AT PHILADELPHIA 62 (1788) (emphases omitted).

118 *Id.* at 63.

119 *Id.*

120 3 ELLIOT'S DEBATES, *supra* note 106, at 156.

121 *Id.*

ten is a somewhat obscure reference to the Venetian Republic's Council of Ten. In the late 1780s, Venice was a republic in name, but in practice, it was ruled by ten oligarchs who represented its most powerful families.[122] It is unclear whether Henry's assertion that the Constitution would lead to an oligarchy was authentic or rhetorical, but it comfortably fit within the broader Anti-Federalist narrative: the federal government would be less representative of and responsive to the American people than their state governments were.[123]

Later in his speech, Henry returned to contract regulation. He complained:

> You are not to have the right to legislate in any but trivial cases; you are not to touch private contracts; you are not to have the right of having arms in your own defence; you cannot be trusted with dealing out justice between man and man. What shall the states have to do? Take care of the poor, repair and make highways, erect bridges, and so on, and so on? Abolish the state legislatures at once. What purposes should they be continued for?[124]

Henry's prediction that the Constitution would remove important matters from state legislatures and leave only trivial matters, such as poor relief, highway repair, and bridge maintenance, was not far-fetched.[125] Recall, for example, Madison's view that the Constitution should "support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful."[126] Or Randolph's desire to establish "a strong, consolidated union, in which the idea of States should be nearly annihilated."[127] Or Pinckney's opinion that "[t]he States should retain nothing more than that mere local legislation, which, as districts of a general Government, they can exercise more to the benefit of their particular inhabitants, than if it was vested in the Supreme Council."[128] By these lights, Henry was not being hyperbolic. He simply agreed with his Federalist adversaries about the Constitution's probable consequences.[129]

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122 *See* EDWARD MUIR, CIVIC RITUAL IN RENAISSANCE VENICE 20 (1981) (describing the Council of Ten). Venice is also mentioned in THE FEDERALIST NO. 39, at 236–37 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

123 *See* STORING, *supra* note 34, at 17–18 (discussing this theme).

124 3 ELLIOT'S DEBATES, *supra* note 106, at 171.

125 Of course, the federal government is now involved in these areas as well. Consider the Department of Health and Human Services, Department of Housing and Urban Development, and Department of Transportation. If Henry's prediction was erroneous, maybe it was erroneous because it did not go far enough.

126 Letter from Madison to Randolph, *supra* note 55.

127 YATES, *supra* note 61, at 101.

128 PINCKNEY, *supra* note 94, at 12.

129 *See* Connor M. Ewing, *Publius' Proleptic Constitution*, 118 AM. POL. SCI. REV. 1131, 1140–43 (2024) (arguing that expansions of federal power are not inconsistent with the Federalists' original aims and that "popular sentiment" was thought to be the strongest check on federal overreach).

In addition to Martin and Henry, the Anti-Federalists included a number of pseudonymous essayists who, like Publius, tried to persuade Americans to come to their side.[130] A self-described moderate, Federal Farmer acknowledged that the Articles of Confederation were flawed, that they contributed to "uneasiness among creditors and mercantile men,"[131] and that "several legislatures" had "abuse[d]" their powers in passing debtor-relief laws.[132] Still, he argued that the Constitution went too far toward "one consolidated system" and would wrongly deprive states of their control over "the internal police of the country."[133]

Another essayist, Agrippa, argued that "our small and separate governments" were "remarkably successful in practice" and that if the Constitution were adopted, it would "consolidate the whole empire into one mass" and "reduce all to one standard."[134] Specifically, Agrippa expressed concern that federal common law or federal statutory law would displace state law. He wrote:

> Causes of all kinds, between citizens of different states, are to be tried before a continental court. This court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in a state court. The rule which is to govern the new courts, must, therefore, be made by the court itself, or by its employers, the Congress.[135]

And that was not all. Because the Constitution declared "that the continental laws shall be the supreme law of the land," state judges and state officers would be bound to apply these laws to disputes between their own state citizens. "[I]t clearly follows," warned Agrippa, "that all questions between citizens of the same state are to be decided by the general laws and not by the local ones."[136]

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130 Scholars have not firmly established the identities of the Anti-Federalist essayists. Accordingly, this Article will use their pseudonyms. It will also use masculine pronouns on the assumption that most of them were men. That said, at least one Anti-Federalist essayist, A Columbian Patriot, was a woman, Mercy Otis Warren. *See Observations on the New Constitution (1788)*, NAT'L CONST. CTR., https://perma.cc/Q69D-RJQA. However, she did not write about the commerce and contract issues that this Article addresses.

131 FEDERAL FARMER NO. V, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST *2.8.62 (Herbert J. Storing ed.).

132 FEDERAL FARMER NO. I, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *2.8.6.

133 *Id.* at *2.8.7. In the 1780s, the term "internal police" had no fixed meaning. *See* Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 27, 1784), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/AX7Y-SS7V ("Congress, say our political jugglers, have no right to meddle with our internal police. They would be puzzled to tell what they mean by the expression. The truth is, it has no definite meaning . . . .").

134 AGRIPPA NO. V, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *4.6.18.

135 *Id.* at *4.6.19.

136 *Id.*

In other words, Agrippa believed the Constitution would give federal courts jurisdiction over disputes between citizens of different states. In deciding these disputes, federal courts would apply federal statutory law or, in the absence of federal statutory law, their own federal common law. State courts would retain their jurisdiction over disputes between state citizens. But because the Constitution declared federal law the supreme law of the land, state courts would be obliged to decide their own cases according to federal statutory law or federal common law, as construed by federal courts. To borrow modern terminology, Agrippa worried the new Constitution would make every state case a "reverse-*Erie*" case.[137] The state courts' only role, in deciding state cases, would be to apply "the general laws" that federal courts had announced for federal cases.[138]

Though less detailed than Agrippa, the essayist Centinel also predicted that, under the new Constitution, federal law would displace state law to at least some extent. Centinel complained that "[c]ontracts made under the acts of the states respectively, will come before [federal] courts acting under new laws and new modes of proceeding, not thought of when [the contracts] were entered into." With respect to interstate debt collection, Centinel feared that the federal court system would be a "needless interference with the judicial rights of the separate states." The federal courts would be either too distant from the parties (e.g., if there was only one federal court in each state) or so numerous that they would impose an "enormous" financial burden on the public (e.g., if there was one federal court in each county). Centinel seemed to argue that debt collection, in particular, should remain a state issue.[139]

Finally, Anti-Federalist dissenters published minority reports following the Pennsylvania and Maryland ratification conventions. Each report recommended the adoption of a constitutional amendment that would ensure continuing state control over some portion of contract law. The Pennsylvania amendment proposed that Congress "shall not have power to enact laws, which shall alter the laws of descents and distribution of the effects of deceased persons, the titles of lands or goods, or the regulation of contracts in the individual states."[140] The Maryland amendment proposed that for "all actions on debts or contracts[,] . . . the State courts . . . [would] have a concurrent jurisdiction with the federal

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137 *See generally* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006) (discussing the application of federal law to cases arising in state courts).

138 AGRIPPA NO. V, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *4.6.19. Agrippa's argument can be expressed in the form of a syllogism: All federal laws are the supreme law of the land. Federal court decisions are federal laws. Therefore, federal court decisions are the supreme law of the land.

139 CENTINEL NO. II, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *2.7.46.

140 THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *3.11.13 [hereinafter PENNSYLVANIA MINORITY REPORT].

courts." Furthermore, if there were an appeal from a state court "to the supreme federal court," the supreme federal court would have jurisdiction only if the amount in controversy were sufficiently large.[141]

The proposed amendments in Pennsylvania and Maryland are important for two reasons. First, the amendments implicitly conceded that the Constitution would transfer some power over contracts from the states to the federal government. By not reserving the whole subject of contract law to the states, the amendments implicitly acknowledged that, in an increasingly national marketplace, some federal contract law was appropriate (e.g., where the contracting parties came from different states or where the amount in controversy was sufficiently large).[142] Second, the fact that the amendments were proposed at all evinces an Anti-Federalist fear that, in the future, the federal government would stretch its authority beyond large, interstate commercial contracts and begin regulating smaller contracts within individual states.[143]

On the whole, Anti-Federalist attacks on the Constitution's commerce and contract provisions closely tracked Federalist expectations. Both sides thought the Constitution would deprive state legislatures and state courts of their traditional authority over contract law and grant most or all of this authority to Congress and federal courts. Following ratification, Congress would have the power to regulate contracts between citizens of different states and maybe contracts between citizens of the same state. Meanwhile, in federal cases, federal courts would apply statutes enacted by Congress and, in the absence of such statutes, their own federal common law. Together, federal statutory law and federal common law would form a general law of contracts—a national standard against which separate state laws could be judged, particularly under the Contract Clause.

C. *The First Congress and the Rules of Decision Act*

Once the Constitution was ratified, the monumental task of implementing it largely fell to the First Congress. The First Congress's first

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141 ADDRESS OF A MINORITY OF THE MARYLAND RATIFYING CONVENTION, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *5.4.6.

142 Compare with the modern diversity jurisdiction statute: 28 U.S.C. § 1332(a).

143 The Pennsylvania amendments strongly resemble the Bill of Rights. Assuming the former influenced the latter, one purpose of the Tenth Amendment may have been to reserve probate law, property law, and *some* contract law to the states. *Compare* PENNSYLVANIA MINORITY REPORT, *reprinted in* 3 THE COMPLETE ANTI-Federalist, *supra* note 131, at *3.11.13, *with* U.S. CONST. amends. I–X, *and* ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.").

legislative priority[144] was to establish the new system of federal courts that the Constitution authorized.[145] In the House of Representatives' debate on the First Judiciary Act,[146] contract law emerged as an issue. Representatives expressed apprehension about how debt collection, especially interstate debt collection, would work with parallel and possibly competing systems of federal and state courts. Their main concern was that debtors would face conflicting obligations, imposed by federal and state laws. Unless the two systems cooperated, such conflicts would be unavoidable.[147]

Congressman Samuel Livermore, an ally of President Washington and soon-to-be member of Hamilton's Federalist Party,[148] put his concern this way:

> [A]n objection, in my mind, . . . is, that you establish two jurisdictions in the same place. The bill proposes that the State courts shall have concurrent jurisdiction with the district courts. Now under these two establishments debtors may be worried and distressed more than is necessary for the plain and simple administration of justice. A debtor may be in the custody of a State officer, or he may be committed to prison; at the same time there comes an officer from the continental court, what is to be done with the unfortunate person? Is the man to be divided, that one half may appear in one court, the other in another? Can you force the prison, and take him into other custody? [O]r can you compel him to attend a court on the return of the writ, if he is not in your power? If this can be done, your system will furnish opportunities for collusion. A person may be in confinement for an actual debt sued in the State courts, when the marshal of the district shall wrest him out of the hands of the sheriff for a fictitious debt, intended to operate as a rescue. Perhaps gentlemen may think the same jail will answer for both; but you cannot have two keepers of the same jail, and one will refuse to obey a foreign authority. If these objections could be obviated, I should think more favorably of the bill. But, for my part, I cannot see how it is possible.[149]

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144 *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49 (1923) ("THE Federal Judiciary Act of September 24, 1789, was Senate Bill No. 1, in the First Session of the First Congress."). Warren's article is famous, not least because it influenced the Supreme Court in *Erie*. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72–73 & n.5 (1938) (discussing Warren's article); *id.* at 86–87 (Butler, J., dissenting) (criticizing the article and the Court's reliance on it); *id.* at 91 (Reed, J., concurring in part) (agreeing with the article but disagreeing with the Court's constitutional discussion).

145 U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

146 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

147 Scholars have long acknowledged that the First Judiciary Act is a difficult object of research. The bill originated in the Senate and was principally drafted by two senators: future Chief Justice Oliver Ellsworth and future Justice William Paterson. However, the Senate's debates were closed to the public and were not recorded, so inferences about the bill's intentions must mainly be drawn from the bill itself, the record of the House's debates, and various other materials. Warren, *supra* note 144, at 49–51; Tyler S. Moore, *Trimming the Least Dangerous Branch: The Anti-Federalists and the Implementation of Article III*, 56 TULSA L. REV. 1, 4 (2020). Here, only the House's debates are relevant.

148 *Livermore, Samuel*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://perma.cc/N66C-CXVG.

149 1 ANNALS OF CONG. 827 (1789) (Joseph Gales ed., 1834).

Livermore's allusion to King Solomon[150] and his suggestion that federal courts would order debtors to be halved were obviously intended to be humorous. His humor, however, should not obscure the substance of his concern. As Parts I(A) and I(B) discussed, the federal judiciary was being established, in part, to obviate state debtor-relief efforts and facilitate debt collections. But if federal and state courts were to have concurrent jurisdiction over the same places, if federal and state laws were eventually to differ, and yet Congress had not enacted relevant federal laws, then the judiciary bill would need to supply a rule in the interim.

Congressman Egbert Benson, who would also become a member of Hamilton's Federalist Party,[151] acknowledged Livermore's concern. "The gentleman has stated a case, in supposing that process shall issue from the State and continental courts, and both be served upon the defendant at the same time, and then asks what is to be done. Is the man to be divided?"[152] But Benson thought the concern was exaggerated because the Constitution supplied the relevant rule. The Supremacy Clause provided that when federal law and state law conflicted, federal law would control.[153] Benson asked the chamber, "[I]s the United States to abandon all its powers and jurisdiction, because the exercise of it may be attended with some inconvenience? As well might we ask individual States to abandon theirs, because there is some clashing with the Federal Judiciary." Benson argued that it should be "endeavor[ed] to administer both [systems] with as little inconvenience to either as was practicable," but if conflicts happened to arise, the superiority of the federal system was clear.[154]

Congressman Fisher Ames, another Federalist,[155] agreed in some respects:

> The branches of the judicial power of the United States are the admiralty jurisdiction, the criminal jurisdiction, cognizance of certain common law cases, and of such as may be given by the statutes of Congress. The constitution, and the laws made in pursuance of it, are the supreme laws of the land. They prescribe a rule of action for individuals. If it is disputed whether an act done is right or wrong, reference must be had to this rule; and whether the action is compared with the rule of action in a State or Federal court, it is equally out of the power of the judges, to say that right is wrong, or that wrong is right. If a man is restrained of his liberty, and for that sues the officer of the General Government in a State court, the defendant shows that he was a marshal, and served a precept according to the law of the United States; then he must be cleared, otherwise the law of the United States would not be the law of the land. *But there is a substantial difference between the jurisdiction of the courts and the rules of decision.*[156]

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150 *See 1 Kings* 3:25 (ordering the division of a child into halves).

151 *Benson, Egbert*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://perma.cc/Y9NM-M4ZJ.

152 1 ANNALS, *supra* note 149, at 835.

153 U.S. CONST. art. VI, cl. 2; *see* Allison H. Eid, *Preemption and the Federalism Five*, 37 RUTGERS L.J. 1, 31 (2005) (summarizing the "conflict-of-laws" view of the clause).

154 1 ANNALS, *supra* note 149, at 835.

155 *Ames, Fisher*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://perma.cc/6QBV-S9N4.

156 1 ANNALS, *supra* note 149, at 838 (emphasis added).

This distinction that Ames drew—between the *jurisdiction* of federal courts and their *rules of decision*—was the distinction troubling congressmen, or at least Federalist congressmen. Everyone admitted that federal courts were superior to state courts, and everyone admitted that federal laws were superior to state laws. The matter in dispute was whether federal courts, possessing *jurisdiction*, should apply as their *rules of decision* the not-yet-existent federal laws or the already-existent state laws. If a creditor sued a debtor from a different state in federal court, was the federal court free to discover federal common law or bound to apply state law?[157]

As one modern scholar has commented, "[j]udges can only find law if there's something there to find."[158] If federal judges, circa 1789, had opened up the federal statute books, they would have found blank pages regarding contract law and debt collection because no federal statutes had been enacted yet. And if these same judges had opened up the federal case reporters, they also would have found blank pages because no federal cases had been decided yet. The dilemma that confronted Livermore, Benson, Ames, and their colleagues was clear. Until Congress wrote and passed substantive laws on contracts, debt collection, and other matters within its purview, federal judges would have to look somewhere. In a common-law system, they would need some authoritative source of law.

The next speaker, Congressman Michael Jenifer Stone, apparently missed the distinction that Ames had drawn. He suggested that disagreements between federal and state courts regarding creditors' rights and debtors' obligations would become a cause for war. He gave the example of a debtor sued by two creditors:

> Suppose an alien has a right to a man's property, and a citizen the same, they lay their executions at the same time, the jurisdictions do not know each other, they take no cognizance of each other's proceedings, the land is taken by the State court, and the possessor turned out; if it is taken by the officer of the Continental court, the possessor is turned out also, and an action is brought to determine again who has a right to the property; the State court says the citizen, and the Continental court the alien: What is to be done? [Th]ere is no tribunal to determine between them; it can only be determined by the sword.[159]

By contrast, Congressman William Loughton Smith, a Federalist,[160] did not believe the anticipated clashes between federal and state courts would be any more bothersome than the clashes that already occurred

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157 Ames observed that there were "many causes" in which the federal and state courts would share jurisdiction and that "suitors would have their choice of courts." *Id.* "The State judges are to judge according to the law of the State, and the common law." *Id.* at 839. But what law would the federal judges apply? This question had to be answered by Congress.

158 Sachs, *Finding Law*, *supra* note 17, at 532.

159 1 ANNALS, *supra* note 149, at 842–43.

160 *Smith, William Loughton*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://perma.cc/8EQ7-NLBF.

between courts within the same state. "[I]t is now asked, with equal pleasantry, whether the marshal of the district, and the sheriff of the State court, who have taken the same debtor in execution, are to cut him in halves?"[161] The answer was obviously no. Rather than halving debtors, Smith said the federal system should follow the state systems' example:

> [I]t may now be answered, that there are at present, in some of the States, state courts, county courts, and [municipal] corporation courts; and that these are found convenient, and unaccompanied with the clashing so much apprehended. They keep within their particular spheres, and have their limits ascertained. But in answer to one supposition, allow me to state another; suppose a state sheriff and a county sheriff should seize the same debtor, would he be parcelled out between them? Would not the execution that was first served take effect? Is not this the practice at present, and will it not be so under this system? It is very easy for gentlemen, in the warmth of their imaginations, to suppose a variety of cases, and raise a multiplicity of objections against any system of jurisprudence whatever.[162]

Smith's recommendation—that the execution first served take effect—is similar to the modern rule. Today, when "duplicative cases" are filed in two courts, the first court that obtains jurisdiction ordinarily hears and decides the case, and the second court ordinarily defers to the first court as a matter of comity.[163] In 1789, a rule like this apparently obtained and worked well enough for clashes between state, county, and municipal courts. Smith thought it would also work for federal–state clashes. If the federal court obtained jurisdiction first, it would decide the case; but if the state court obtained jurisdiction first, it would decide the case instead.[164]

In the rules-of-decision debate, several possible rules were on the table: (1) King Solomon's rule (a running joke among congressmen), (2) a federal supremacy rule (albeit with almost no federal statutes and no federal court decisions), (3) determination by the sword (Stone's feared result), (4) a rule giving priority to the first court that obtained jurisdiction (a race to the courthouse), or (5) reliance on existing state laws.[165]

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161 1 ANNALS, *supra* note 149, at 848.

162 *Id.*

163 Sandra L. Potter, *The First-Filed 'Rule' and Moving to Dismiss Duplicative Federal Litigation*, 33 REV. LITIG. 603, 606–08 (2014); Jean D. Renshaw, Third Circuit Review, EEOC v. University of Pennsylvania *(1988)*, 34 VILL. L. REV. 583, 583–84 (1989); *accord* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976) ("It has been held . . . that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.").

164 *But see* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16 (1983) (citing *Colo. River*, 424 U.S. at 818–19, and describing a multi-factor approach—the approach that currently controls in clashes between federal and state courts).

165 In the alternative, Congress, like many state legislatures that preceded it, conceivably could have enacted a reception statute, incorporating English law into federal law. *See supra* note 25 and accompanying text. If Congress had done this, then federal courts, possessing jurisdiction, would have applied as their rules of decision the laws of England, as of some chosen date. This alternative, however, appears either not to have been contemplated or not to have been proposed. Perhaps,

By this point, the solution that Congress chose should be evident. Federal courts would not order debtors to be halved; they would not write law on a blank slate; they would not allow parties or their states to resort to trial by combat or on the battlefield; and a race to the courthouse would not be decisive. Rather, Congress would direct federal courts to apply the state laws that already existed. If a creditor sued a debtor and the case came within a federal court's *jurisdiction*, its *rule of decision* would be supplied by existing state law. The Rules of Decision Act, as it came to be known, read: "[T]he laws of the several states, *except where the constitution, treaties or statutes of the United States shall otherwise require or provide*, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[166]

The excepting clause, italicized above, left the door open to future federal legislation. If Congress wanted to legislate on contracts or debt collection, it could do so in the future. Until then, Congress directed federal courts to apply state laws as a stopgap and gap-filler.[167] So understood, the Rules of Decision Act was "in the nature of a compromise."[168]

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That Congress's compromise crystallized into a quasi-constitutional rule (i.e., contract law is state law) is an accident of history more than anything. The Constitution's text did not require this result, both Federalists and Anti-Federalists expected the opposite result, and the First Congress entertained and never rejected the possibility of national contract law. Although a concrete proposal for a national code was never drafted, the framers, the First Congress, and their contemporaries foresaw the possibility and regarded it as unproblematic, constitutionally speaking. In 1802, President Jefferson reflected on the rules-of-decision debate. He wrote:

> By the Constitution, the General Government has jurisdiction in all cases arising under the Constitution, under the (constitutional) laws of the United States, and under treaties;

congressmen worried that the enactment of a reception statute would exceed the powers granted by the Constitution to Congress.

166 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (emphasis added). *Compare id.*, *with* 28 U.S.C. § 1652. As Warren mentions, the Rules of Decision Act (section 34) was a late addition to the First Judiciary Act. Warren, *supra* note 144, at 81. This addition was made in the Senate. *Id.* However, because the Senate's debates were not recorded, it is difficult to discern what senators intended, so scholars often look to the House's debates as a proxy. *See id.* at 49–50. Implicit in this approach is an assumption that senators and representatives had similar thoughts about the law's various provisions.

167 Congressman James Madison later commented on this provision. He said that it would require federal judges to "have a familiar acquaintance with the laws of every State," and he predicted that federal judges' "studies [into such matters] will absorb a great deal of their time." 1 ANNALS, *supra* note 149, at 937. Still today, *Erie* questions are some of the most difficult questions that federal judges decide. *See generally* 19 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 4507, Westlaw (section updated May 21, 2025).

168 Warren, *supra* note 144, at 131.

> in all cases, too, of ambassadors, of admiralty jurisdiction, where the United States is a party, between a State or its citizens, or another State or its citizens, or a foreign State or its citizens.
>
> The General Government, then, had a right to take under their cognizance all these cases, and no others. This might have been done by Congress, by passing a complete code, assuming the whole field of their jurisdiction, and applying uniformly to every State, without any respect to the laws of that State. But, like the State legislatures, who had been placed before in a similar situation, they felt that it was a work of too much time and difficulty to be undertaken. Observing, therefore, that (except cases of piracy and murder on the high seas) all the cases within their jurisdiction must arise in some of the States, they declared by the act [of] Sept. 24, 1789, c. 20, § 34, "That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at *common law* in the courts of the United States in cases where they apply."
>
> Here, then, Congress adopt[s] for each State the laws of that State; and among the laws so adopted were portions of the common law, greater or less in different States, and in force, not by any innate authority of its own, but by the adoption or enacting of it by the State authority.[169]

Indeed, under the Constitution, Congress had the authority to make laws pursuant to its enumerated powers, such as its commerce power and its necessary-and-proper power, and perhaps also laws concerning persons from different states or foreign nations.[170] Read as a whole, the Constitution enabled Congress to "pass[] a complete code, assuming the whole field of their jurisdiction, and applying uniformly to every State, without any respect to the laws of that State."[171] The only reason "a complete code" was never realized was its practical and political complexity. Congress "felt that it was a work of too much time and difficulty to be undertaken."[172]

After Jefferson and Jeffersonian Republicans prevailed in the 1800 elections, the likelihood that Congress would pass a complete code greatly diminished.[173] Given Jefferson's and Republicans' support for states'

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[169] Jefferson, *supra* note 25.

[170] U.S. CONST. art. I, § 8, cls. 3, 18; art. III, § 2, cl. 1. For an informative discussion on congressional power under the Necessary and Proper Clause(s), see generally John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

[171] Jefferson, *supra* note 25; *see* Letter from Thomas Jefferson to William Johnson (June 12, 1823), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/3DN5-JFGW ("[T]he capital and leading object of the Constitution was to leave with the states all authorities which respected their own citizens only, and to transfer to the [United States] those which respected citizens of foreign, or other states: to make us several as to ourselves, but one as to all others."). *But see* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 918–19 (1986) (raising concern that if Congress ever used its necessary-and-proper power to make *substantive* law governing diversity actions, Article I's list of enumerated powers "would be rendered meaningless").

[172] Jefferson, *supra* note 25.

[173] In the early United States, the last serious proposal for a congressionally enacted "uniform" commercial code appears to have been made in 1801. *See* 1 CROSSKEY, POLITICS AND THE

rights,[174] leaving state laws in place and requiring federal courts to apply them gradually became ingrained. The next time that nationalists won firm control of the federal government was in 1840, when the Whigs defeated the Democrats.[175] By this time, politicians, judges, lawyers, litigants, and others had grown accustomed to the federal application of state law.[176] Any perceived inconveniences caused by this arrangement were lessened by the Supreme Court's 1842 decision in *Swift v. Tyson*.[177] The *Swift* doctrine held that when federal courts heard contract cases between citizens of different states (or foreigners) *and* state statutory law was unclear, federal judges would look "not in the decisions of the local [i.e., state] tribunals, but in the general principles and doctrines of commercial jurisprudence."[178] State statutory law, supplemented by general or federal common law, would persist until the Supreme Court's 1938 decision in *Erie*. Ever since *Erie*, federal courts have applied state statutory law, supplemented by *state* common law[179]—a subtle but consequential shift.[180]

CONSTITUTION, *supra* note 88, at 37 (referring to James Sullivan's proposal); TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 20, 33 (1981) (same).

174 *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221 n.23 (2000) (noting that Jeffersonian Republicans, who supported states' rights, defeated Hamiltonian Federalists); Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 241 (2001) (describing Jefferson's 1800 election as "vindicat[ing] states' rights" and Jeffersonian Republicans as committed "to limit[ing] the powers of the federal government and defend[ing] the rights of the states").

175 *See* Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1389 (2020) ("The 1840 elections . . . were a landslide victory for the Whigs, and a catastrophe for the Democrats, who handed over unified control of the federal government." (citing MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR (1999))); H. Jefferson Powell, *Joseph Story's* Commentaries on the Constitution: *A Belated Review*, 94 YALE L.J. 1285, 1300 (1985) (identifying Whigs as "the nationalist opponents of Andrew Jackson").

176 Also, in the decades since the Revolution, the Confederation, and the Constitution's ratification, the federal courts had developed a clearer conflict-of-laws jurisprudence to determine which state's laws would apply when multiple states had connections to a case. *See* Roger Michalski, *Fractional Sovereignty*, 13 U.C. IRVINE L. REV. 683, 704–11 (2023) (summarizing the "traditional," "vested-rights," or "territorial" approach to conflict of laws).

177 41 U.S. (16 Pet.) 1 (1842).

178 *Id.* at 19.

179 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

180 *See, e.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 378 (6th ed. 2002) ("It is impossible to overstate the importance of the *Erie* decision."); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1657 (2008) (calling *Erie* "the most important federalism case of the twentieth century").

II. Implications for Modern Law

Assuming the views of the Federalists, Anti-Federalists, and First Congress should have at least some bearing on the Constitution's modern meaning and application,[181] the history discussed in Part I suggests that, with respect to contract law, Congress does not exercise and has never exercised its full authority. It further suggests that, contrary to modern doctrine, the federal courts have broad authority to superintend state contract law and review state regulations for compliance with national or federal norms. Parts II(A) and II(B) explore these implications more fully. In light of these implications, Part II(C) recommends that Congress adopt a national code to clarify federal contract law and possibly expand its ambit.

A. *Congress's Commerce Power over Contracts*

This Article does not attempt to provide a complete account of the Commerce Clause's meaning at the Constitution's adoption. That said, the history in Part I suggests that, in the specific area of *contract law*, Congress's authority was thought to be expansive. Most Federalists and Anti-Federalists anticipated the Constitution would grant Congress the power to regulate contracts between citizens of different states (or with foreigners). Some Federalists and Anti-Federalists, such as Hamilton,[182]

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[181] Depending on one's approach to constitutional interpretation or construction, these historical intentions, understandings, or expectations may or may not be controlling. *See* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 63 (2024) ("[A]lmost everybody makes arguments from original intention, original meaning, original purpose, or original understanding from time to time, whether they are devoted to originalism or fervently opposed to it."); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1753 (2015) ("Appeals to history . . . occur nearly ubiquitously in constitutional law. For the most part, these appeals occasion little specific notice or methodological controversy."). *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (articulating and defending the positive or descriptive proposition that originalism is the approach to constitutional interpretation that American courts already follow). *But see* Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 52 (2016) (responding to Baude's argument and suggesting that American courts' appeals to the Constitution's "original meanings" might be more "discursive" than reflective of actual judicial decision-making).

[182] *See* Hamilton, *supra* note 40 (mentioning congressional regulation of "intercourse between the states" and also "between the different parts of the same state").

Pinckney,[183] Henry,[184] and Agrippa,[185] hinted that Congress's power could extend even further—to contracts between citizens of the same state.

The question whether Congress could regulate contracts within a single state hinges less on the historical evidence, which is underdeterminate,[186] and more on (1) the placement of the burden of proof—or, in other words, what the presumption should be—and (2) the relevance of other evidence. With respect to the burden of proof, a skeptic of federal power—a modern-day Anti-Federalist—could adopt a rule like this: "In the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power."[187] By contrast, an enthusiast of federal power—a modern-day Federalist—could adopt the opposite rule: "[I]f the constitutional text underdetermines the result in a particular case, then judges should defer to legislatures and executive officials."[188] For what it is worth, the latter rule more nearly approximates the rule of the Marshall Court in the early nineteenth century.[189] As for other evidence, factors such as precedent and subsequent tradition might or might not be important considerations.[190]

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183 *See* PINCKNEY, *supra* note 94, at 12 (arguing that the states, "as districts," should be responsible for "mere local legislation" and that the "general Government" should make "internal regulations" that are "uniform and national"); *id.* at 17–18 (arguing that the states would "surrender[] to the Federal Government, the complete management of our commerce").

184 *See* 3 ELLIOT'S DEBATES, *supra* note 106, at 156 (arguing that the Federalists must have considered the states "depraved" because the Constitution sought to deprive the states of their traditional power over "the private contracts of the citizens"); *id.* at 171 (suggesting that contract law would become a federal matter and that the states would be left with only "trivial" matters, such as the maintenance of highways and bridges).

185 *See supra* notes 134–138 and accompanying text (arguing that the Supremacy Clause would require state courts in state cases to apply not their own state laws but rather the federal laws that federal courts applied in federal cases).

186 *See generally* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (explaining "underdeterminacy" and the "construction zone").

187 Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012) (emphases omitted).

188 Solum, *supra* note 186, at 511.

189 *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) ("The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J.) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."). On the Ellsworth Court, Justice Samuel Chase advocated a similar rule of deference to legislators. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.) ("[I]f the court have such power [to declare an act of Congress void], I am free to declare, that I will never exercise it, *but in a very clear case*.").

190 In the constitutional theory scholarship, there are many variations on this theme, especially during the past decade. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 445 (2023) (clarifying the concepts *history* and *tradition* and drawing a distinction between them); Marc O. DeGirolami, *The*

Whichever view of congressional power over contract law one adopts (i.e., the narrower or broader view), it is clear that contract law need not be state law. Neither the Federalists, nor the Anti-Federalists, nor the First Congress saw contract law this way. The mistaken view that contract law must, in general, be state law appears to trace back to Justice Louis Brandeis's majority opinion in *Erie Railroad Co. v. Tompkins*. There, Justice Brandeis explained that the Supreme Court was overruling *Swift v. Tyson* not merely as a "statutory construction" of the Rules of Decision Act but as a construction of the Constitution itself. He wrote, "*Congress* has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[191] Justice Brandeis continued:

> [N]otwithstanding the great names which may be cited in favor of the [*Swift*] doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence. . . .
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> . . . .
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> . . . In disapproving [the *Swift*] doctrine[,] we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 [i.e., the Rules of Decision Act] or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.[192]

Given the history discussed in Part I of this Article, Justice Brandeis's praise of state autonomy and independence, his criticism of federal supervision, and his suggestion that the Constitution reserves common law subjects, such as torts and contracts, to the states seem misplaced.[193] With much force, Justice Pierce Butler dissented and attacked Justice Brandeis's constitutional analysis.[194] Concurring in part, Justice Stanley

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Traditions of American Constitutional Law, 95 NOTRE DAME L. REV. 1123, 1135 (2020) (arguing that "a genuine political or cultural practice of long and consistent duration" can help determine the meaning of a constitutional provision); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (describing the view that "postenactment historical practice" can settle constitutional meaning).

191 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

192 *Id.* at 78–80; *see* U.S. CONST. amend. X (reserving powers to the states).

193 One can imagine that Justice Brandeis's apparent belief that contract law was state law, as a constitutional matter, was influenced by his opposition to the "*Lochner* era" precedents against state contract regulations. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 52–53 (1905) (striking down a mandatory 60-hour workweek for bakers); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (setting aside a state conviction under a law banning "yellow-dog" contracts).

194 *Erie*, 304 U.S. at 87–90 (Butler, J., dissenting).

Reed stated that he agreed with Justice Brandeis's statutory construction of the Rules of Decision Act but disagreed with his constitutional analysis.[195]

Even if one accepts that *Erie* reached the correct result based on its view of the Rules of Decision Act, one may join Justice Reed in rejecting its view of the Constitution. Arthur Miller observes that *Erie*'s constitutional discussion "has perplexed the commentators" more than any other part of the decision, and "most" commentary has been "critical." Still, the Supreme Court has "confirmed the constitutional status of *Erie*" in later decisions, and "[o]ther federal courts also have confirmed its constitutional basis."[196]

More than fifty years ago, John Hart Ely ably criticized the "misapprehension" or "myth," which often arises, that the *Erie* decision approved some "sort of enclave of 'local affairs' committed exclusively to state regulation" or "carried some special constitutional magic of a sort that transcended ordinary issues of federal power."[197] In making his argument about *Erie*, Ely relied almost wholly on other Supreme Court decisions, including decisions construing Congress's commerce power.[198] This Article reaches a similar conclusion, albeit by a different path. Not only Supreme Court doctrine, as Ely then argued, but also the history of the Constitution's drafting and ratification, as this Article shows, supports the conclusion that there is no special or unique domain of local affairs, over which the states have exclusive authority.[199] This Article bolsters the view that Congress's commerce power extends at least to contracts, if not other "common law subjects" that the states have traditionally controlled.[200]

A related misapprehension or myth, shared by more than a few scholars and lawyers, is the idea that Congress, probably at some point during the New Deal, blew past the Constitution's original upper limit on

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195 *Id.* at 90–91 (Reed, J., concurring in part).

196 19 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 4505 & nn.3, 35, Westlaw (section updated May 21, 2025) (collecting authorities).

197 John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 701, 705 (1974).

198 *Id.* at 700–06.

199 *Contra* United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (referring to "area[s] of traditional state concern"); United States v. Alabama, 691 F.3d 1269, 1295–96 (11th Cir. 2012) (stating the view that "the field of contract law . . . is a matter of traditional state concern"); Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000) ("[W]here a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power."); WSB Elec., Inc. v. Curry, 88 F.3d 788, 791 (9th Cir. 1996) ("It is well settled that wages are a subject of traditional state concern . . . .").

200 The traditional "common law subjects" are contracts, property, and torts. *See, e.g.*, Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1294 (2015) (naming these three subjects).

the commerce power and continues to legislate beyond this limit today.[201] On the contrary, the history in Part I shows that Congress has never reached the Constitution's original upper limit, at least not in the area of contract law. When the Constitution was being debated, Federalists and Anti-Federalists broadly agreed that it would afford Congress expansive control over contract law, and the First Congress assumed as much during its debate on the Rules of Decision Act. In short, the history discussed here refutes the notion that Congress acts outside its original constitutional bounds. At least in this one particular area, Congress has plenty of room to run.[202]

B. *Federal Judicial Review of State Contract Law*

The history in Part I also sheds light on the Contract Clause's meaning. As discussed earlier,[203] the Contract Clause was loosely modeled on a similar clause in the Northwest Ordinance. The Ordinance provided that "in the just preservation of rights and property[,] it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed."[204] At the Philadelphia Convention, the Committee of Style removed the word "private," which presumably extended the clause's coverage to public or government contracts. The Committee also removed the words "previously formed," which presumably extended the clause's coverage to future contracts, or contracts not yet made. Late in

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201 Indeed, this misapprehension underpins many—though not all—originalist *and* living-constitutionalist accounts of Commerce Clause doctrine. The former set of views suggests that the New Deal was illegitimate, whereas the latter set of views seeks to legitimize the New Deal by updating the Constitution, sans constitutional amendment. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE 103 (1991) (claiming that the American people, without ratifying a formal amendment, "reallocated plenary power over the economy from the states to the national government" during the New Deal); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 53 (1990) (criticizing the New Deal for its "sudden and enormous centralization of power in Washington over matters previously left to state governments or left in private hands"); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 n.3 (1988) ("With the 1937 expansion of the commerce clause, the system of enumerated powers collapsed . . . ."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987) (claiming that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place").

202 Congress's reliance on the Commerce Clause to regulate non-contractual matters is beyond this Article's immediate scope. This Article does not address, for example, gun control, United States v. Lopez, 514 U.S. 549 (1995); sexual violence, United States v. Morrison, 529 U.S. 598 (2000); or marijuana use, Gonzales v. Raich, 545 U.S. 1 (2005). Federal legislative authority may or may not extend so far.

203 *See supra* notes 71–75 and accompanying text.

204 NORTHWEST ORDINANCE OF 1787, art. II.

the Convention, the Anti-Federalist George Mason noticed the second change and attempted to reverse it. His attempt failed. When the Constitution was sent to the state conventions for ratification, "[t]he articles relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive & negative put together."[205] The Federalist Charles Pinckney referred to the Contract Clause as "the soul of the Constitution" and argued that it embodied "that old, but useful maxim . . . [that] honesty is the best policy."[206] Other contemporaries who commented favorably on the clause were less clear about its purpose.[207] However, one near-unanimous expectation among Federalists and Anti-Federalists was that the courts would hold against *state* debtor-relief laws.[208]

Here, it will be helpful to return to the Contract Clause's language: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[209] The phrase "Obligation of Contracts" was not novel. The Committee of Style probably borrowed it from William Blackstone's *Commentaries on the Laws of England* and certainly not, as has often been supposed, Roman law.[210] Blackstone had written:

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205 Letter from Madison to Jefferson, *supra* note 114.

206 4 ELLIOT'S DEBATES, *supra* note 106, at 333, 336.

207 *See* WRIGHT, *supra* note 30, at 15 (criticizing the ambiguity of *Federalist* No. 44); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 2–3 (Sanford Levinson ed., 6th ed. 2016) ("No one was sure how the 'ex post facto' clause or the 'contract clause' would restrict state inroads on the rights of property-holders. Some had hopes and others had suspicions about the meaning of these and other enigmatic phrases in the document. But if either the hopes or the suspicions had been fully warranted by clear language in the Constitution itself, it seems most unlikely that ratification would have been possible.").

208 If Congress wanted to provide *federal* debtor relief, it had ample authority to do so. U.S. CONST. art. I, § 8, cl. 4 (Congress's bankruptcy power); *see, e.g.*, Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803) (affording limited relief to select classes of debtors after the Panic of 1796–1797 and the Quasi-War); *see generally* Austin R. Nelson, America's Bankrupt Constitution: Contract Rights, Insolvent Debtors, and the Foundations of American Federalism, ch. 3 (Aug. 2025) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with author) (discussing competing interpretations of the Bankruptcy Clause and explaining Congress's motivations for passing the Bankruptcy Act of 1800).

209 U.S. CONST. art. I, § 10, cl. 1.

210 For generations, scholars have speculated that the phrase "obligation of contracts" came from Roman law. Benjamin Fletcher Wright's classic book on the Contract Clause is largely to blame. There, Wright repeated a long-standing belief that Roman law could be used to better understand what counted as an "obligation" of contract. *See* WRIGHT, *supra* note 30, at 10 ("Because of the peculiar phrasing employed, it has been suggested that the Framers borrowed their terminology from the Roman Law."). Later scholars have often followed Wright down the Roman rabbit hole. *See, e.g.*, John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law*,*"* 17 GEO. J.L. & PUB. POL'Y 79, 88 n.55 (2019) (collecting authorities on Roman law but not expressly endorsing them); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 709 & n.16 (1984) (discussing Roman law and citing Wright's book). As far as I can tell, the Contract Clause's Roman origin myth derives from two simple facts. First, the English word *obligation*

> As to *general customs, or the common law*, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and *obligation of contracts*; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires.[211]

When the Committee of Style borrowed from Blackstone's *Commentaries* and wrote, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts,"[212] the Committee, which included Hamilton and Madison, likely sought to protect contract rights and secure enforcement of contract duties (obligations), as contract rights and duties were understood under the "general customs, or the common law."[213] Although the general customs inherited from England may have had some

comes from the Latin word *obligātiō*, which means the same thing (add the letter "n"). When judges and lawyers in the nineteenth century—the heyday of Contract Clause jurisprudence, WRIGHT, *supra* note 30, at xiii—encountered vague words, they often turned to those words' etymologies. Still, some judges and lawyers use this strategy today. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 807 (2018) ("[J]udges sometimes turn to other grounds for their assessment of ordinary meaning, looking up a word in a dictionary or even turning to the word's etymology."). If *obligation* came from *obligātiō*, it seemed sensible to interpret American law with reference to Roman law. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 222 (1827) (oral argument of Henry Wheaton). Second, in oral argument for the 1819 Supreme Court case *Sturges v. Crowninshield*, one of the lawyers, named Hunter, made the following claim: The judges of the State Courts, and of this Court, have confessed that there is in these words, "impairing the obligation of contracts," an inherent obscurity. Surely, then, here, if any where, the maxim must apply, *semper in obscuris quod minimum est sequimur*. They are not taken from the English common law or used as a classical or technical term of our jurisprudence in any book of authority. No one will pretend, that these words are drawn from any English statute, or from the States' statutes before the adoption of the constitution. Were they, then, furnished from that great treasury and reservoir of rational jurisprudence, the Roman law: we are inclined to believe this. The tradition is, that Mr. Justice Wilson, who was a member of the Convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase. If, then, these terms were borrowed from the civil code, that code presents us with a system of insolvency in its *cessio bonorum*; and yet, as it is said by [Edward] Gibbon, "the Goddess of Faith was worshipped, not only in the temples, but in the lives of the Romans." The rights of creditors, we know, were protected by them, with the utmost vigilance and severity. 17 U.S. (4 Wheat.) 122, 150–51 (1819) (footnote omitted). Hunter's claim—that the words *obligation of contracts* "are not taken from the English common law, or used as a classical or technical term of our jurisprudence in any book of authority"—was factually inaccurate the day he made it and remains so today. *Id.* at 151. In sum, scholars have often pointed to Roman law while interpreting the Contract Clause because the English word *obligation* comes from the Latin word *obligātiō*, and in an 1819 Supreme Court case, a lawyer inaccurately argued that "obligation of contracts" did not come from English but Roman law. Again, the true source of the phrase "obligation of contracts" was Blackstone.

[211] 1 BLACKSTONE, *supra* note 23, at *68 (emphases added).

[212] U.S. CONST. art. I, § 10, cl. 1.

[213] 1 BLACKSTONE, *supra* note 23, at *68.

relevance, the more important general customs would have been those of the United States.[214]

This reading of the Contract Clause, which emphasizes America's general *customs*, almost immediately rules out one interpretation that has often been offered: that the clause was designed to protect a natural right to contract.[215] To be sure, the framers and most other early Americans were deeply influenced by natural-rights theory.[216] This theory held that when human beings exited the state of nature (a world without government) and entered a state of society (a social contract), they brought certain rights with them.[217] "Americans often broadly categorized natural rights as consisting of life, liberty and property, or life, liberty and the pursuit of

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[214] According to founding-era Americans, the United States received English common law only so far as it applied to American conditions, and where the common law or general customs of England and America differed, those of America took precedence. *See, e.g.*, Edmund Randolph's Notes on the Common Law (c. Sept. 1799), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/P9DT-JN6E (stating that Americans adopted English common law only "where it was applicable in principle to our situation"); Madison, *supra* note 25 (stating "that particular parts of the common law, may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases"); *id.* (arguing that the First Amendment standard for a free press should not be English common law but "the standard of its freedom, in the United States"); *id.* ("The practice in America must be entitled to much more respect."); Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL 23, 23–24 (Charles F. Hobson ed., 1990) ("My own opinion is that our ancestors brought with them the laws of England both statute & common law as existing at the settlement of each colony, so far as they were applicable to our situation."); Letter from John Adams to John Manners (July 15, 1819), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/7877-PYQ3 ("[W]e have in America Customes[,] unwritten laws, or what we may call a Common Law; which have Originated since the Migration of Our Ancestors . . . [and which are] not conformable to the Common Law of England."); *see also* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *472 (stating that Americans adopted English common law "as far as it [was] applicable to our situation and government"). Indeed, it would have been strange to have preferred English to American general customs when construing *American* constitutional provisions.

[215] *See, e.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 346 (Marshall, C.J., dissenting) ("[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it."); *see also* Epstein, *supra* note 210, at 727–28 (discussing the Contract Clause and natural law).

[216] *See generally* MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION (1996) (explaining natural rights and social contract theory as understood by the founding generation).

[217] *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918–22 (1993) (explaining early Americans' theory of natural rights and collecting numerous authorities).

happiness."[218] Thus, the idea that the framers or early Americans believed in a natural right to contract is facially plausible, if not probable.[219]

Nonetheless, the idea that the Contract Clause recognized a natural right to contract falters for at least two reasons. First, the Committee of Style borrowed the Contract Clause's language from Blackstone, and Blackstone identified the "obligation of contracts" with "general customs, or the common law."[220] General customs, or common law, do not exist in the state of nature. They can only exist in a particular society.[221] Second, if the Contract Clause, which applies only to the states, sought to protect a natural right to contract, the Philadelphia Convention likely would have imposed a similar prohibition on the federal government. One of the Convention's delegates, Elbridge Gerry, made this very proposal, but no one seconded his motion.[222] And the Convention did impose parallel prohibitions, protective of purported natural rights, on the state and federal governments in other instances. For example, the Constitution contains two Ex Post Facto Clauses, two Bill of Attainder Clauses, and two Title of Nobility Clauses.[223] The inclusion of only one Contract Clause, applicable only to the states, was a feature of the Constitution, not an oversight. It reflected the framers' belief that sometimes "impairments of the obligation of contract . . . would be necessary" and that Congress

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218 *Id.* at 919.

219 *See, e.g.*, Benjamin Franklin, Argument for Making the Bills of Credit Bear Interest (Jan. 13–14, 1764), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/NJK7-7J8R ("All Contracts, Sir, are between two or more Parties, and intended by each for his own Advantage; the Parties are free Agents, they have their Eyes open and know what they do. . . . I do not mean to say, the Government has nothing to do with private Contracts; it ought undoubtedly to have a Power over them, but it is to enforce the Observance of them—that's all—unless the People were all Minors and Ideots [sic].").

220 1 BLACKSTONE, *supra* note 23, at *68.

221 In late eighteenth-century Anglo-American thought, *natural law* was the law that governed people in the state of nature. *Common law* was a type of human law that could govern people after they entered a society. Natural law established a baseline against which human law, including common law, could be judged as moral or immoral. The state of nature did not have common-law courts or other tribunals. In the state of nature, all individuals served as their own enforcers. *See* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 545–46 (2007) (summarizing John Locke).

222 2 FARRAND'S RECORDS, *supra* note 64, at 619.

223 U.S. CONST. art. I, §§ 9–10; *see, e.g.*, Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/D5VJ-JXP7 ("[T]he sentiment that ex post facto laws are against natural right is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. [T]he federal constitution indeed interdicts them in criminal cases . . . ."). *But see* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 576 (2017) (describing the prohibitions against ex post facto laws as protecting "positive rights" rather than "natural rights").

would be the institution best positioned to make these difficult judgment calls.[224]

This reading of the Contract Clause, which emphasizes America's *general* customs, also cuts against the modern doctrine. Modern doctrine construes the Contract Clause rather narrowly.[225] According to the Supreme Court, the clause merely prevents states from imposing regulations that "substantially impair *pre-existing* contractual arrangements."[226] A substantial impairment is one that "undermines the contractual bargain, interferes with a party's reasonable expectations, [or] prevents the party from safeguarding or reinstating his rights."[227] If a substantial impairment is found, the Court proceeds to a second step. At step two, the Court will allow the challenged regulation to stand if it "appropriate[ly] and reasonab[ly]"[228] advances "a significant and legitimate public purpose . . . such as the remedying of a broad and general social or economic problem."[229] Throughout the inquiry, the Court determines contractual obligations and measures contractual impairments by looking at a state's own laws before and after the state changed them. In other words, the state's old laws are the comparator against which its new, challenged law is judged.[230]

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224 Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 286 (1988).

225 *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502 (1987) ("Unlike other provisions in the [tenth] section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally." (citing W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934))).

226 Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018) (emphasis added). *But see* Walker v. Whitehead, 83 U.S. (16 Wall.) 314, 318 (1872) (stating the Court's former view that "[a]ny impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution").

227 *Sveen*, 138 S. Ct. at 1822.

228 *Id.* (internal quotation marks omitted).

229 Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (citations omitted).

230 The key decision establishing this point is *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), which did not result in a majority opinion but, instead, in four seriatim opinions. *See id.* at 259 (Washington, J.) ("It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced . . . unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made . . . ."); *id.* at 297 (Thompson, J.) ("[P]arties must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed, and controlled, by such laws."); *id.* at 300 ("[T]he obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made."); *id.* at 318 (Trimble, J.) ("[T]he obligation of the contract consists in the *power and efficacy* of the law which applies to, and enforces performance of the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere, and subsist in the contract itself,

The modern doctrine on the Contract Clause is problematic for several reasons. First, the view that the clause protects only "*pre-existing* contractual arrangements"[231] effectively amends the clause in the manner that Mason wanted. It reintroduces into the clause the "previously formed" language that the Northwest Ordinance contained but that the Committee of Style excised at the Philadelphia Convention.[232]

Second, ascertaining contractual obligations and impairments by examining a state's own laws before and after a state changed them runs against Blackstone's view, which the Committee of Style seems to have borrowed, that a contract's obligation should be ascertained in light of "*general* customs, or the *common* law."[233] Elsewhere in his *Commentaries*, Blackstone distinguished the "general customs" of the nation from "the particular customs of certain parts."[234] A state's own laws are not general or common in any meaningful sense and should in no case form the basis for judging whether a *state* has violated a *federal* constitutional right. A state's own laws are uncommon, or particular to itself.[235]

Third (and this point may be pedantic), the modern doctrine's means-ends balancing approach (step two) misconstrues what was meant by the term "obligation." The obligation that attached to a contract was the obligation that the nation's general customs, or common law, recognized. If the general customs, or common law, recognized that "a significant and

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proprio vigore, but in the law applicable to the contract."); *id.* at 327 ("The great principle intended to be established by the constitution, was the inviolability of the *obligation* of contracts, as the obligation existed and was recognised by the laws in force at the time the contracts were made."). Since *Ogden*, the Court has repeatedly reaffirmed its view that a state's own laws are the comparator for Contract Clause purposes. *See* U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429–30 (1934); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866).

231 *Sveen*, 138 S. Ct. at 1822.

232 NORTHWEST ORDINANCE OF 1787, art. II.

233 1 BLACKSTONE, *supra* note 23, at *68 (emphases added).

234 *Id.* at *63 (emphasis omitted).

235 Modern Supreme Court doctrine partakes of the same confusion with respect to property rights as contract rights. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2075–76 (2021) ("As a general matter, it is true that the property rights protected by the Takings Clause are *creatures of state law*." (emphasis added)). Almost no one would advocate this approach for any other constitutional rights, such as civil or political rights. For example, if Alabama's legislature passed an election law that arguably impaired the right to vote, U.S. CONST. amend. XV, a court would not ask whether the election law violated voting rights *for Alabama*. If New York's legislature passed a firearm law that arguably impaired the right to bear arms, *id.* amends. II, XIV, a court would not ask whether the firearm law violated gun rights *for New York*. So too, when any state passes a contract or property law that arguably impairs contract or property rights, *id.* art. I, § 10, cl. 1; amends. V, XIV, a court should not ask whether the contract or property law violates contract or property rights *for that state*. Instead, the standard to which the court holds the state's law should be a *national* or *general* standard that applies equally across states. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (arguing that the Bill of Rights and the Fourteenth Amendment reflect "a national commitment to [a] minimum level of protection" for rights).

legitimate public purpose" was at stake,[236] then no obligation would attach to the contract in the first place. To illustrate with a more familiar right, one might say that the state appropriately and reasonably advances a significant and legitimate public purpose when it suppresses the freedom of speech of a person who "falsely shout[s] fire in a theatre and caus[es] a panic."[237] From a different point of view, one might say that the person who falsely shouts fire is not exercising freedom of speech to begin with. Making false and panic-inducing shouts in theaters is not part of the right denominated "freedom of speech."[238] Similar to this latter view of free speech, a "contractual obligation" that was contrary to some substantial public good was not considered a contractual *obligation* at all. For early Americans, purported contracts of this sort were regarded as void from their inception and not obligatory.[239] The very term "obligation," which serves to distinguish an enforceable "contract" from an unenforceable agreement, incorporates a conception of the public welfare.[240]

By way of critiquing both the natural-rights position and the modern doctrine, something like an interpretation of the Contract Clause now emerges.[241] That is, when the Philadelphia Convention (or the Committee of Style) placed the Contract Clause in the Constitution, it sought to prevent the states from legislating against the obligations created by contracts that were made in accordance with the general customs, or

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236 Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983).

237 Schenck v. United States, 249 U.S. 47, 52 (1919).

238 This, at least, seems to have been the opinion of most early Americans. *See* Hamburger, *supra* note 217, at 955 ("Americans frequently assumed that their restraints on speech and press—including the laws of defamation, fraud, and obscenity—comported with natural law and therefore did not abridge or diminish the freedom of speech and press.").

239 *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259 (1827) (Washington, J.) (stating that a contract is not obligatory "where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal [for enforcement] is made"); Seidenbender v. Charles's Adm'rs, 4 Serg. & Rawle 151, 173 (Pa. 1818) (Duncan, J.) ("All contracts which have for their object any thing which is [1] repugnant to justice, or [2] against the general policy of the common law, or [3] the provisions of a statute, are void . . . . The principle which courts of justice must go upon is to enforce the performance of contracts not injurious to society; and it would be absurd to say, that a court of justice shall be bound to enforce contracts contrary to and against the public good; for no man shall come into a court of justice and say, give me a sum of money which I desire to have contrary to law." (emphasis omitted)).

240 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 160 (1977) (stating that in eighteenth-century American law, "contractual obligation [was] derived from the inherent justice or fairness of an exchange"); *id.* at 166 ("[T]he community's sense of fairness was often the dominant standard in contracts cases."); *see also* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 568 n.17 (2012) ("Contracts, by definition, are agreements that carry legal obligations. Contracts voided on public policy grounds carry no legal obligations, therefore eviscerating their status as contracts. They are merely agreements.").

241 A more complete exposition would require a more extensive investigation and discussion.

common law, or in more modern parlance, "general contract law."[242] This clause applied to past and future contracts. America's general customs, common law, or general contract law was not static, or "crystallize[d]."[243] Rather, this common law, like the English common law that preceded it, was fluid and adaptable to changing circumstances.[244] The principal organ for adaptation was intended to be Congress, which unlike the states, was not bound by the Contract Clause and had the power to pass contract regulations that were "uniform and national."[245] Publius described the project this way:

> The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draught will every year become both easier and fewer. Past transactions of the government will be a ready and accurate source of information to new members. The affairs of the Union will become more and more objects of curiosity and conversation among the citizens at large. And the increased intercourse [read: commerce] among those of different States will contribute . . . to a general assimilation of their manners and laws.[246]

So understood, the Contract Clause was imposed against the state governments, though not the federal government, because the framers of the Constitution wanted to commercially assimilate the states over time through "formation of a federal code."[247] If the First Congress or another early Congress had enough votes, it "might have . . . pass[ed] a complete code, assuming the whole field of their jurisdiction, and applying uniformly to every State, without any respect to the laws of that State."[248] The Contract Clause was one cog in the wheel of the framers' grand commercial vision. It authorized the federal courts, as well as state courts acting under the Supremacy Clause, to supervise and combat state contract regulations that were contrary to this vision. In more concrete terms, the Contract Clause gave federal and state judges the power to set aside, or not enforce, state laws that impaired the obligations of contracts,

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242 Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947).

243 1 CROSSKEY, POLITICS AND THE CONSTITUTION, *supra* note 88, at 355.

244 *See* Baude et al., *supra* note 17, at 1248 (observing in a different legal context that "[t]he general law [was] shaped by legally recognized custom and practice; its contours [could] change as those practices change[d]"); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 188 (observing that early Americans largely adopted Sir Matthew Hale's conception of common law, wherein common law "exhibit[ed] the flexibility and adaptability that is needed to keep up with social change"); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 450 (1996) ("[T]he principle of precedent was a dynamic and not a static one; it looked to the future as well as the past.").

245 PINCKNEY, *supra* note 94, at 12.

246 THE FEDERALIST NO. 53, at 331 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

247 *Id.*

248 Jefferson, *supra* note 25.

as construed under the general customs, common law, or general contract law of the United States.[249]

The Commerce and Contract Clauses, then, were also structurally connected. Just as the Constitution's first article grants Congress the power to tax imports (section 8) but restricts the states from taxing imports (section 10), grants Congress the power to coin money (section 8) but restricts the states from coining money (section 10), and grants Congress the power to raise and support armies (section 8) but restricts the states from keeping troops (section 10), so too did the Constitution grant Congress the power to regulate commerce (section 8) but restrict the states from regulating contracts (section 10).[250] The Contract Clause may not have been "the soul of the Constitution,"[251] but it was one of two lungs.[252]

In sum, the Commerce and Contract Clauses were designed to work together. The first clause empowered the legislative branch, and the second clause empowered the judicial branch, but both clauses aimed toward a common goal. The framers and their opponents anticipated that Congress would use its commerce power to gradually wrest control of contract law from the states and, in the process, promote improved commerce among the states and with foreign nations. Meanwhile, the courts would use their power of judicial review to prevent state interferences with this nationalist project. For the states, the eventual outcome would be "a general assimilation of their manners and laws."[253] A "steady system of national policy" would replace separate state policies and finally produce certainty for the merchant, the farmer, and the

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249 In some sense, the question posed in Part II(A) is immaterial. Whether Congress has the power to regulate all contracts or only contracts between citizens of different states (or with foreigners), the Constitution granted courts the power to uniformize state contract law, or hold state contract law to national standards, by way of the Contract Clause. When Agrippa warned "that all questions between citizens of the same state are to be decided by the general laws and not by the local ones," AGRIPPA NO. V, *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 131, at *4.6.19, his warning was more prophetic than alarmist. He correctly understood the goals of the framers and the intended role of the courts in the new constitutional system.

250 U.S. CONST. art. I, §§ 8, 10.

251 4 ELLIOT'S DEBATES, *supra* note 106, at 333.

252 As mentioned earlier, the Bankruptcy Clause may also enter the mix. U.S. CONST. art. I, § 8, cl. 4. But during the Constitution's framing and ratification, this clause was widely regarded as a sort of appendage to the Commerce Clause, almost like a subclause. *See, e.g.*, THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce . . . that the expediency of it seems not likely to be drawn into question."). It was almost as if the commerce power were labeled as clause 3 and the bankruptcy power as clause 3(a). The same could be said for Congress's powers regarding coinage, weights and measures, counterfeits, post offices and roads, and copyrights and patents. U.S. CONST. art. I, § 8.

253 THE FEDERALIST NO. 53, *supra* note 246, at 331.

manufacturer.[254] "The States [w]ould retain nothing more than that mere local legislation, which, as districts of a general Government, they can exercise more to the benefit of their particular inhabitants, than [the federal government can] . . . ."[255]

C. *Congressional Adoption of a National Code of Contract Law*

The likelihood that federal courts, despite *Erie*'s constitutional analysis, would uphold congressional legislation regulating contracts (qua contracts) seems high,[256] whereas the likelihood that federal courts, at any point in the foreseeable future, will entirely rethink their Contract Clause jurisprudence is admittedly low. Regardless, the history of the framers' failed effort to nationalize contract law holds clues about what could be done today. Assuming the framers' commercial ends are still worth pursuing, the modern Congress could take legislative action to promote greater uniformity in contract law and thus further America's economic integration. As a first step, Congress could pass the Uniform Commercial Code (UCC) or a code of its own design to clarify federal contract law.

In the federal courts, the UCC is already ubiquitous. Given that every state has adopted the UCC, at least in part,[257] the UCC frequently comes up in contract litigation under federal diversity jurisdiction (i.e., in lawsuits between citizens of different states). In the smaller number of government contract cases, where "federal contract law" applies, the UCC is also relevant. Caleb Nelson explains:

> To determine the federal government's contractual rights and obligations, courts use "standard principles of contract law" accepted in most states. The relevant principles include those articulated in the Uniform Commercial Code (UCC)—not because the statutes adopted by any particular state directly control the federal government's rights and obligations under contracts authorized by federal law, but because so many states have adopted the UCC that its provisions have become part of the applicable "general" law.[258]

[254] THE FEDERALIST NO. 62, at 380 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (1961).

[255] PINCKNEY, *supra* note 94, at 12. The kinds of "mere local legislation" that Pinckney had in mind likely included state regulations designed to promote health, safety, or morals—that is, "police power regulations," as they would later become known. *See* Nelson & Pushaw, *supra* note 21, at 26–28 (describing police powers and collecting authorities). A major task for the courts, then, would be to distinguish between legitimate local or police power legislation, which may incidentally affect contracts, and illegitimate legislation, which directly impairs the obligation of past or future contracts, as understood under the general customs, common law, or general contract law of the United States.

[256] Ely, *supra* note 197, at 703 n.62.

[257] Nelson & Pushaw, *supra* note 21, at 163.

[258] Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 510 (2006) (footnotes omitted).

Absent a de jure federal code, federal courts rely on the UCC as a convenient stand-in. The UCC is de facto American contract law, along with the principles, comments, and illustrations in the Restatements of Contracts.[259]

Three problems with this current state of affairs immediately present themselves. First, the UCC, despite its name, is not actually a uniform code.[260] It is a model code.[261] The states and territories all have their own local variations of the UCC.[262] Part of this disuniformity is attributable to the UCC itself. Sometimes, the UCC does not choose a rule but, instead, offers legislatures a menu of options.[263] All legislatures have been forced to choose some options over others, many legislatures have tweaked language in the UCC, and other legislatures have passed significant amendments to adapt the UCC to local conditions.[264]

Second, implicit adoption of the UCC through federal court decisions is less certain, or less predictable, than explicit adoption through an act of Congress. Right now, there are thirteen federal circuit courts, and although their bodies of case law are similar, they are not identical. The Supreme Court rarely decides federal contract law cases, so circuit splits and other uncertainties are allowed to persist.[265] If the UCC were made

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259 *See, e.g.*, Wallach v. Eaton Corp., 837 F.3d 356, 367–68 (3d Cir. 2016) (citing the First and Second Restatements and endorsing their use "as a guidepost to define federal common law"); *In re* Peanut Crop Ins. Litig., 524 F.3d 458, 470 (4th Cir. 2008) ("[T]he Restatement of Contracts reflects many of the contract principles of federal common law." (quoting Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1245 (Fed. Cir. 2007))); Curtin v. United Airlines, Inc., 275 F.3d 88, 93 n.6 (D.C. Cir. 2001) (noting that federal judges "often look to the U.C.C. and Restatement when deciding questions of federal common law" (collecting authorities from four circuits)).

260 *See* Gerald T. McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 LOY. L.A. L. REV. 691, 691–95 (1993) (discussing the UCC's lack of uniformity and identifying three principal causes: (1) "State as opposed to federal legislation," (2) "State common-law supplementation," and (3) "Lack of a referee mechanism").

261 Timothy R. Holbrook, *Liability for the "Threat of a Sale": Assessing Patent Infringement for Offering to Sell an Invention and Implications for the On-Sale Patentability Bar and Other Forms of Infringement*, 43 SANTA CLARA L. REV. 751, 781–82 (2003) (quoting Linear Tech. Corp. v. Micrel, Inc., 275 F.3d 1040, 1048 (Fed. Cir. 2002)).

262 *See generally* WESTLAW, UNIFORM COMMERCIAL CODE LOCAL CODE VARIATIONS, Westlaw (database updated November 2025) (collecting local variations).

263 *See, e.g.*, U.C.C. § 2-318 (A.L.I. & UNIF. L. COMM'N) (West, Westlaw through 2025) (giving three alternatives).

264 George A. Hisert, *Uniform Commercial Code: Does One Size Fit All?*, 28 LOY. L.A. L. REV. 219, 221–22 (1994).

265 *See, e.g.*, Cole v. Gen. Motors Corp., 484 F.3d 717, 726 (5th Cir. 2007) (identifying "a clear split of authority" about "whether a buyer must show reliance" to establish that an express warranty exists under U.C.C. § 2-313); George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 481 (2008) ("Federal circuit courts have taken a divided approach in applying the elusive concept of unconscionability, a doctrine used to invalidate outrageously lopsided contracts. Many courts require the demonstration of both procedural and substantive unconscionability before they will annul a contract. Other jurisdictions, however, find that just one type of unconscionability corrupts the

federal statutory law or if Congress appointed an internal committee or outside commission to draft a new code for federal purposes, circuit splits and other uncertainties could be mitigated, even if not entirely avoided.

Third, a democratic deficit attends Congress's decision not to pass a federal code. The organizations responsible for the UCC, namely the Uniform Law Commission (ULC) and the American Law Institute (ALI),[266] are not publicly elected (as with representatives and senators) nor publicly appointed (as with federal judges) and, hence, are not directly accountable to the American people. When Patrick Henry spoke out against the Constitution in 1788, he raised the legitimate concern that, in the future, control over contract law could pass from legislators to a "chosen ten."[267] Henry's prediction was not far off the mark. Drafting of the original UCC was overseen by an editorial board of five members,[268] and today's board has eleven members.[269] If Congress followed the path already trodden by state and territorial legislatures, and it debated and possibly amended the UCC when appropriate, then it would confer greater legitimacy on federal courts' ongoing use of the UCC in federal contract law cases.[270] In sum, congressional enactment of the UCC or a new and improved code of Congress's own design would help uniformize, legitimize, and make explicit in the United States Code what is already implicit in the Federal Reporters.

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If Congress, however, wanted to go further and pass a *complete* federal code—a code that extends beyond the narrow categories currently designated as "federal contract law"—it likely has the constitutional power to do so, and the political will could now exist too. Since the days of the framers and the early Congresses, two changed circumstances may have rendered a complete federal code more palatable. The first change is the

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agreement." (footnotes omitted)); U.C.C. § 2-302(1) (A.L.I. & UNIF. L. COMM'N) (West, Westlaw through 2025) (not specifying the type of unconscionability that must be shown).

266 *Uniform Commercial Code*, UNIF. L. COMM'N, https://perma.cc/D8GX-F2VV.

267 3 ELLIOT'S DEBATES, *supra* note 106, at 156.

268 The members were Herbert F. Goodrich, Karl N. Llewellyn, John C. Pryor, William A. Schnader, and Harrison Tweed. William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIA. L. REV. 1, 4 & n.4 (1967).

269 Most recently, the UCC's Permanent Editorial Board had a chair and ten other members. *Permanent Editorial Board for Uniform Commercial Code*, UNIF. L. COMM'N, https://perma.cc/8DRA-YFJ6.

270 One could argue that the UCC is already legitimate because its drafters and editors possess technical expertise in matters of contract law. *Cf.* Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 934–38 (2024) (outlining the argument that administrative agencies are legitimized by their technical expertise). This argument has some normative force. Thus, this Article simply contends that Congress's adoption of the UCC as a statute would render it *more* legitimate than at present. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1842 (2005) ("Because the Constitution creates Congress . . . [its] legal legitimacy is generally unquestioned.").

transformation of the American economy. In the early United States, the economy was mainly local and agricultural.[271] By contrast, the modern economy is much more national, industrial, and technological.[272] If many Americans thought a federal code was desirable in the 1780s and 1790s, it would likely be even more popular in the 2020s, when commerce among the states and with foreign nations is more common than in the past.[273] The second change, less obvious but no less fundamental from a legal point of view, is the emergence and widespread adoption of choice-of-law clauses (i.e., provisions whereby the parties themselves choose the jurisdiction whose laws should control and govern their contracts).[274] In the early United States, choice-of-law clauses were virtually non-existent, and they did not become routine until the 1960s.[275]

Importantly, if the modern Congress ever decided to pass a complete code, the code need not be mandatory. Rather, the default law that governs a contract, absent an effective choice-of-law clause, could remain the law of the *state* having "the most significant relationship to the transaction and the parties."[276] Put more simply, a new federal code could be an opt-in system. The particulars of this system would, of course, have to be determined by Congress (and maybe eventually the Supreme Court). But, at minimum, the federal code could be made available, for choice-of-law purposes, to parties (1) who are citizens of different states, (2) who are citizens and foreigners, or (3) whose contracts "substantially affect interstate [or foreign] commerce."[277]

One possible objection to an opt-in federal code is that it would swell the federal courts' already-crowded dockets due to their federal-question

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[271] *See* Thomas Weiss, *U.S. Labor Force Estimates and Economic Growth, 1800–1860*, *in* AMERICAN ECONOMIC GROWTH AND STANDARDS OF LIVING BEFORE THE CIVIL WAR 19, 37, 51 (Robert E. Gallman & John Joseph Wallis eds., 1992) (showing that, in 1800, the American economy had about 1,712,500 workers, of whom about 1,273,500 workers were employed as farm laborers—i.e., 74.4% agricultural).

[272] *See* Kathleen Kassel, *Agriculture and Its Related Industries Provide 10.4 Percent of U.S. Employment*, U.S. DEP'T OF AGRIC.: ECON. RSCH. SERV. (Nov. 3, 2023), https://perma.cc/2QSN-CCXR ("In 2022, 22.1 million full- and part-time jobs were related to the agricultural and food sectors—10.4 percent of total U.S. employment.").

[273] Even if one holds that "commerce" does not include "agriculture," as the framers themselves sometimes suggested, *e.g.*, THE FEDERALIST NO. 12, at 86 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1961), the scope of Congress's commerce power still will have expanded because the "commercial" (non-agricultural) sector has expanded from 25.6% to 89.6% of the economy. *See* Weiss, *supra* note 271; Kassel, *supra* note 272.

[274] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. a (A.L.I.) (West, Westlaw through October 2024); U.C.C. § 1-301(a) (A.L.I. & UNIF. L. COMM'N) (LexisNexis, LEXIS through 2025).

[275] *See* Coyle, *supra* note 26, at 1156, 1156 n.19, 1174–75.

[276] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (A.L.I.) (West, Westlaw through October 2025).

[277] United States v. Lopez, 514 U.S. 549, 558–59 (1995).

jurisdiction.[278] But the federal-jurisdiction statute has not always been so liberal as today. "When Congress enacted the first general grant of federal question jurisdiction in 1875, it imposed the same amount-in-controversy requirement it had for diversity of citizenship cases."[279] If Congress passed an opt-in federal code in the future, it could simultaneously amend the federal-jurisdiction statute and exclude federal-code cases from federal-question jurisdiction. That way, parties could bring cases in or remove cases to federal court only if they met the requirements for diversity jurisdiction, including the minimum amount in controversy.[280] Cases between non-diverse parties or cases for smaller sums would need to be filed in and decided by state courts under a "reverse-*Erie*" framework.[281] Such cases would presumably be no more difficult nor exotic for state courts than many current cases where state courts apply other states' laws.[282] In many respects, the reverse-*Erie* case would be simpler.[283]

An opt-in federal code would probably produce other benefits. For one, a federal code would likely reduce the number of *Erie* cases that federal courts have to decide. Under a dual system, where parties could choose their state UCCs or the federal code to govern their contracts, many parties would likely choose the federal code. If a case between diverse parties and involving a larger sum of money later arose in federal court, the court would not have to "guess" what a state court would do.[284]

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278 28 U.S.C. § 1331.

279 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3561.1, Westlaw (section updated May 21, 2025).

280 28 U.S.C. §§ 1332, 1441 (setting the amount in controversy at $75,000 and requiring complete diversity between plaintiffs and defendants).

281 *See* Clermont, *supra* note 137, at 20 ("The reverse-*Erie* question is a relatively simple one if the Constitution or Congress . . . actually chose to displace state law in state court. If the lawmaker expressly or impliedly made federal law applicable in state court, that choice to preempt is binding on the state courts under the Supremacy Clause, provided that any such choice was valid under the rest of the Constitution.").

282 *See* Charles A. Weiss, *Drafting Choice of Law and Choice of Forum Provisions for U.S. Agreements*, HOLLAND & KNIGHT (Aug. 16, 2021), https://perma.cc/SDC6-YTR2 ("U.S. courts routinely apply laws of other jurisdictions. When the other jurisdiction is a different U.S. state, doing so is straightforward: the court will read the statutes and caselaw of the other state that are cited to it by the parties' respective attorneys, just as it would read its domestic statutes and cases in applying its own law.").

283 For example, a New York state court would presumably become more familiar, over time, with a federal code than with the UCCs of Alaska, Idaho, or even Vermont. In the state courts, federal-code cases would very likely outnumber cases under any other state's UCC, except possibly New York's.

284 A federal judge once described the problem this way:

> Finding the applicable state law . . . is a search that often proves elusive. Difficulty arises when the federal courts must predict how the highest court of the state would decide the issue. Even when there is a state supreme court decision on point, the direction is not always crystal clear.

Instead, it would apply the parties' choice of law and the law with which it would be best acquainted: the federal code. A federal code would therefore promote federal judicial economy. It would help conserve "the [federal] judiciary's time and resources."[285]

Another probable benefit of having a federal code would be a leveling of the playing field between parties from different states. "The traditional explanation for the grant of diversity jurisdiction in federal trial courts has been that the Founding Fathers feared possible unfairness by state courts, state judges and juries, against outsiders."[286] This fear of local bias was and likely still is more imaginary than real.[287] But a closely related form of unfairness, which is real, remains: the epistemic imbalance between parties' lawyers. An example will help illustrate: Imagine that an Oregon citizen and a Georgia citizen want to form a contract. At present, they probably have at least two possible choices of law, including Oregon or Georgia law. If the parties choose Oregon law, then the Georgia citizen's retained counsel will likely be disadvantaged in future litigation; and if the parties choose Georgia law, then the Oregon citizen's retained counsel will likely be disadvantaged.[288] Empirical evidence on interstate litigation strongly suggests that "well-resourced litigants," such as large business corporations, can insulate themselves from such disadvantages. They can better afford lawyers in different states—and better lawyers too.[289] Meanwhile, less-resourced litigants, such as sole proprietors and other small businesses, often stick with their ordinary (in-state) retained counsel, who can obtain *pro hac vice* admission or join with an out-of-state lawyer to assist them (e.g., sign filings). If the Oregon citizen or the Georgia citizen, in the illustration given here, is not a well-resourced litigant but wants to achieve some parity with its out-of-state counterpart, the parties could agree to a clause that chooses the federal code. Neither party's ordinary counsel would have an inherent epistemic advantage over

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Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675–76 (1992) (footnote omitted). Lawyers and law professors who have clerked for federal judges have likely experienced the same feeling of elusiveness at some point, and law students who will clerk for federal judges can look forward to these feelings. The same goes for lawyers who practice in federal courts and handle *Erie*-guess cases.

285 *Judicial Economy*, BLACK'S LAW DICTIONARY (12th ed. 2024).

286 Sloviter, *supra* note 284, at 1672 (internal quotation marks omitted).

287 *See* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 293–95 (2019) (reviewing available evidence and concluding that "actual state bias against out-of-state parties is extremely rare").

288 Oregon lawyers presumably know Oregon law better than Georgia lawyers do, and Georgia lawyers presumably know Georgia law better than Oregon lawyers do. Even if their clients' case is litigated in a "neutral" forum, such as a federal district court, the Oregon (or Georgia) lawyers will have a head start if Oregon (or Georgia) law controls.

289 Kyle C. Kopko & Christopher J. Devine, *Home Court Advantage? An Empirical Analysis of Local Bias in U.S. District Court Diversity Jurisdiction Cases*, 125 W. VA. L. REV. 543, 559–61 (2022).

the other. If there were litigation, both sides would start from equivalent positions.

An opt-in federal code would serve other legal and political values as well. To the extent that modern choice of law rests on "the concept of party autonomy,"[290] an opt-in federal code would be autonomy-enhancing. It would give parties who, for one reason or another, are dissatisfied with their existing options an additional option about which law should control and govern their own contracts.[291] It would expand, at least at the margins, the "market for contracts" that already exists in the United States.[292]

And to the extent that "democratic experimentalism" is a constitutional value,[293] an opt-in federal code would enhance experimentation because it would introduce "vertical competition,"[294] which does not currently exist, between Congress and state legislatures. The federal code and the state UCCs could vie for parties' choices of law. If the federal code were better adapted to parties' needs, parties would choose it over an available state UCC; but if the state UCC were better adapted to parties' needs, they would choose it instead. The traditional power of states over contract law would diminish only so far as the states

[290] Coyle, *supra* note 26, at 1152.

[291] The value that stands in opposition to "party autonomy" is "state sovereignty." William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 711 (2001). Historically speaking, modern support for party autonomy resembles the Federalists' commercialism, whereas modern support for state sovereignty resembles the Anti-Federalists' emphasis on states' rights. *See supra* Part I. Readers may decide for themselves which set of values should rank higher: (1) party autonomy and Federalism or (2) state sovereignty and Anti-Federalism.

[292] *See generally* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) (explaining that sophisticated commercial actors, such as large public firms, routinely choose New York as the jurisdiction whose law they want to govern their contracts). Of course, not all parties are sophisticated commercial actors with connections to New York. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (A.L.I.) (West, Westlaw through October 2024) ("The forum will not apply the chosen law [of the parties] to determine issues the parties could not have determined by explicit agreement directed to the particular issue if the parties had no reasonable basis for choosing this law.").

[293] *See, e.g.*, BRIAN E. BUTLER, THE DEMOCRATIC CONSTITUTION: EXPERIMENTALISM AND INTERPRETATION 1–2 (2017); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267–68 (1998).

[294] *See* Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1846–47 (2018) ("Federal-state competition, or 'vertical competition,' was a crucial aspect of 'the framers' vision of the federalist system.' The expectation was that federal-state competition would be natural in a system of overlapping regulatory powers and would produce salutary consequences, as fear of losing power to state or federal entities would incentivize officials to improve performance." (footnotes omitted)); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 360 (2003) ("The primary purpose of vertical competition, as the Framers envisioned it, is to enable citizens to distribute regulatory power in the manner that best serves their interests.").

might fail to serve the needs of parties, as parties themselves perceive them.

The sort of vertical competition described here is consonant with the framers' constitutional design. Indeed, Hamilton predicted that, in "matter[s] of an internal nature," the federal and state governments would regularly compete for the people's support and that their support would "commonly be proportioned to the goodness or badness of [each government's] administration."[295] A bad federal code would not win anyone's support, and parties would continue to choose state UCCs in their contracts. By contrast, a good federal code would gradually supplant the state UCCs in practice, by way of individual parties' choices.[296]

Again, Congress would have to determine the particulars of any new system. For example, it could make the UCC the federal code, it could enact an amended UCC, or it could appoint an internal committee or outside commission to draft an entirely new code, which departs from the UCC in minor or major ways.[297] Provided the federal code respected the right of parties to opt in (choose federal law) or opt out (choose state law), it would fulfill the commercial goals of the Constitution's framers; advance uniformity in contract law; reduce *Erie*-guessing and promote judicial economy in federal courts; help level the playing field for less-resourced parties, both with each other and with well-resourced parties; enhance the autonomy of parties; and foster vertical competition between Congress and state legislatures, conducive to improved commerce.

Conclusion

The framers' failed effort to nationalize contract law is interesting in itself, but it also has important implications for modern law. Among other things, this history shows that contract law's status as state law is not a constitutional command but a political choice that the First Congress made and that later Congresses have followed. Next, this history sheds light on the meanings of the Constitution's Commerce and Contract Clauses, as the Federalists, Anti-Federalists, and First Congress saw them. The Commerce Clause granted Congress expansive authority, and early

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295 THE FEDERALIST NO. 27, at 170 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1961).

296 This form of federalism, emphasizing the parties' freedom of choice, differs from "coercive federalism," where the federal government compels states and individuals to submit to its policy choices. John Kincaid, *The Eclipse of Dual Federalism by One-Way Cooperative Federalism*, 49 ARIZ. ST. L.J. 1061, 1068 (2017); John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 933–34 (1995).

297 The UCC is "[n]ot [c]omprehensively [c]ommercial." McLaughlin, *supra* note 260, at 693. There are "gaps in the comprehensiveness of the [UCC's] coverage." *Id.* If Congress wanted to pursue its own code, different from the UCC, the new code could extend to more subject matters (more areas of contract law). For example, a new code could cover both goods and services.

Americans generally believed that Congress could or would use this authority to wrest control of contract law from the states. The Contract Clause complemented the Commerce Clause and empowered the courts to review state contract legislation for compliance with America's general customs, common law, or general contract law. Finally, the First Congress decided not to pass a federal code of contract law, not because it thought it lacked the authority to do so, but because of internal policy disagreements and the practical complexities that would have attended such an ambitious project.

If the modern Congress wanted to enact a federal code, such as the UCC, no constitutional impediment stands in its way. Achieving greater commercial uniformity in the United States (or achieving uniformity more expeditiously than the state-by-state UCC process allows) does not require an abandonment of the enumeration doctrine,[298] and it does not require the Supreme Court to overrule the *Erie* doctrine.[299] It also does not require the Constitution to be a living and breathing document, as some scholars suggest,[300] and it does not require a constitutional amendment, as others argued in the early and mid-twentieth century.[301] The power to pass a complete code (or any lesser reform of American contract law) has always been in the Constitution. Congress simply has not used it yet.

298 *See supra* note 16 and accompanying text.

299 *See supra* note 17 and accompanying text.

300 *See supra* note 201.

301 *See supra* note 14.