

Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp

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I. DISCOVERING THE CLASSICAL LIBERAL CONSTITUTION: HISTORICAL AND ANALYTICAL FOUNDATIONS	57
II. THE COMMERCE CLAUSE	65
III. THE CONTRACT CLAUSE AND LEGISLATIVE CAPTURE.....	72
IV. PUBLIC USE AND PUBLIC PURPOSE	80
V. INVERSE CONDEMNATION AND PHYSICAL TAKINGS.....	83
VI. CONCLUSION	90

I am very grateful to the editors of the *Iowa Law Review* for giving me the opportunity to respond to Herbert Hovenkamp’s extended and thoughtful article *Inventing the Classical Constitution*, which has as one of its major topics a critical examination of my book of not quite the same name, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*, which was published in 2014. His title omits the word “liberal” and unavoidably works at cross-purposes with my book. In one sense, it should be evident that Professor Hovenkamp is a master of 19th-century sources, both federal and state, and both academic and political. If I had had the benefit of reading his article before I published my book, it would have been even longer than its nearly 700 pages. It would be foolish for me to battle with Professor Hovenkamp on the fine points of historiography. But it is important that I express my strong reservations about much of the analytical structure on which his critique rests. There is a powerful difference between a “classical Constitution” that has no

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clear linkage to political theory and a classical liberal Constitution, which speaks not only of the time of its adoption but also to the structure of its argument.

To highlight my disagreements with Hovenkamp, it is helpful to follow, with one deviation, the course of action that Hovenkamp sets out in his critique. He begins with a discussion of the origins of the historical Constitution, and ends with a more theoretical discussion of the limitations of the ideal of a social compact theory. As these two elements seem to be heavily interdependent, I shall talk about them together. Once those fundamental questions are addressed, I shall then turn to his specific claims, all of which revolve around the assertion that the Constitution picked up its classical liberal patina only somewhere during the course of the 19th century, long after the Founders had passed from this earth. In making this argument, Hovenkamp first examines several key clauses that are relevant both to the federal structure and to the strong protection of property and contract rights that lie at the heart of the classical liberal ideal. His discussion of federalism centers on the evolution of the Commerce Clause in the antebellum period. Next, he examines the Contract Clause in relationship to the problem of faction and legislative capture. Third, he looks at the public purpose doctrine as it applies to takings and taxation at both the state and federal levels. And last, he deals with a somewhat diffuse category of consequential losses from economic development, which are always with us no matter what we do. In all of these areas, he concludes that the classical liberal Constitution came at least two generations after the Founding period, starting with the Jackson presidency of 1829 to 1837.

My bottom line is that his work adds greatly to our understanding of the doctrinal ebbs and flows during the 19th century. Yet at the same time, he largely ignores the parallel doctrinal developments in the Progressive Era, which ran roughly from 1900 up to the election of Franklin D. Roosevelt in 1932. In addition, he makes an assertion, which I could never claim for myself, namely that he writes “here as a legal historian and (as best I can) take no position on substantive questions of political ideology or constitutional interpretation.”¹ But ending his historical inquiry early on, he does not offer any close reading of the New Deal cases that transformed constitutional doctrine as it extended from the Founding period to the tumultuous October 1936 term of the Supreme Court. In that sense our two projects work at cross-purposes with each other. He seeks to decompose historical evolution prior to the New Deal revolution. I largely ignore the 19th-century crosscurrents on these critical topics in order to concentrate on the epochal differences that mark the transition between two contrasting eras. But now that he raises the challenge, I hope to show that, writ large, the classical liberal label adequately captures the entire period and not just the Jacksonian movement (about

1. Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1, 4 (2015).

which I said nothing in *The Classical Liberal Constitution*) with its strong, and often-misguided anti-monopoly program.² My basic thesis holds true, I believe, not only about the particular provisions Hovenkamp addresses, but also about the overall enterprise of constitutional theory and interpretation, a point to which he, by design, devotes virtually no attention.

I. DISCOVERING THE CLASSICAL LIBERAL CONSTITUTION: HISTORICAL AND ANALYTICAL FOUNDATIONS

My disagreements with Hovenkamp begin with the title to his article, *Inventing the Classical Constitution*. My first objection is with his choice of terms. An “invention” connotes, as in patent law, the creation of some new device or substance that did not exist prior to its creation.³ But in this instance, his chosen term puts the wrong spin on the relevant historiography. The second disagreement concerns the omission of the term “liberal” in describing a classical Constitution, without which it is impossible to set the institutional and analytical questions aright. There is a literal sense in which the term “classical liberal” cannot apply to the Founding Period or any of its intellectual antecedents. The term “classical liberal” was invented by later thinkers to describe an earlier movement that at one time traveled under the banner of liberal, as opposed to Tory. The term described those who thought that sound state craft required a limited government that devoted itself to the protection of individual rights of property, of contract, and, of course, of conscience and association. As Michael McConnell put it: “The classical liberal tradition emphasizes limited government, checks and balances, and strong protection of individual rights.”⁴

That tradition—and no tradition is defined as a single point in time—rests on all the usual suspects, including most notably the lawyers Edward Coke and William Blackstone;⁵ the political philosophers Thomas Hobbes,⁶

2. *Id.* at 4–6.

3. *See* 35 U.S.C. § 101 (2012).

4. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2391 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)). Even the title of Justice Breyer’s book is incorrect. Our Constitution was conceived as republican, in opposition to democratic, where the former involved a complex system of divided authority, and the latter a simple system of majority rule, which vastly increased the risk of faction. The point is evident from the number of places in the Constitution where specific powers are given to the legislature and not to the public, most notably in the indirect election of senators and in setting the time, place, and manner rules for elections. The Guarantee Clause, moreover, provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. CONST. art. IV, § 4. The stark opposition between republican and democratic did not survive the 1800 election battle between John Adams and Thomas Jefferson, when they were hopelessly muddled.

5. *See* WILLIAM BLACKSTONE, *COMMENTARIES*.

6. *See* THOMAS HOBBS, *LEVIATHAN* (1651).

John Locke,⁷ and David Hume;⁸ Baron de Montesquieu⁹ on the separation of powers; Adam Smith on both moral theory and the wealth of nations; and, of course, the home-grown Alexander Hamilton and James Madison in *The Federalist* and elsewhere. None of these thinkers could have described himself as a classical liberal, because that terminology became popular only after the rise of 20th-century liberalism created an unbearable ambiguity in the key term “liberal.”

The key question therefore is not terminology, but relates only to the question of whether the Constitution itself, and the early cases decided, fit that definition even before the Jacksonian period that Hovenkamp identifies as the political and ideological focal point of the movement. On this question, I do not think that it is a close call. The first point to note is that the Constitution is not a hard-line libertarian document because it makes explicit provisions for taxation, eminent domain and the government operation of key services, such as the Post Office, which could have been run by private parties. But once it accepts these various government institutions, it is wary of their exercise. The structural provisions of the Constitution call for some popular participation in the selection of government officials at all levels, and thus navigate a delicate line between the absolutism of a monarchy and the popular sovereignty of a democratic government that operates on a principle of majority rule at every power. The Constitution also structures a coherent sense of judicial power which will allow courts, and more specifically federal courts, to protect the substantive rights in question.¹⁰

The governance structure itself features both divided powers, with checks and balances at the federal level, and a system of enumerated powers to Congress in Article I, Section 8, of which the broadest is the commerce power, which I shall have more to say about in the next Part of this Article. The point of these provisions is to slow down the production of new legislation, which in turn is best understood as resting on a presumption against new legislation that is consistent with a strong concern with potential abuses of state power. Hovenkamp notes that I find congenial the doctrine of judicial review in *Marbury v. Madison*,¹¹ and although he does not discuss it, *Martin v. Hunter's Lessee*¹² is a critical part of the overall picture that shows the effort of Joseph Story in particular to make sure that the Supreme Court has the last word over

7. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

8. See DAVID HUME, A TREATISE OF HUMAN NATURE (1739).

9. See BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., Robert Clarke & Co. vol. 2, 1873) (1748).

10. The role of federal courts is not part of Hovenkamp's discussion, but it weighed very heavily on the courts.

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

12. *Martin v. Hunter's Lessee* 14 U.S. (1 Wheat.) 304 (1816).

matters of interpretation of the Federal Constitution,¹³ and, moreover, to see that the lower federal courts also have an active role to play in enforcement of the Constitution.¹⁴

The concern with structure overlapped of course with the protection of individual rights. More concretely, the enumeration of particular individual rights in both the 1787 Constitution and the 1791 Bill of Rights is not exhaustive, but its key provisions accord with what came to be called the “classical liberal Constitution.” It incorporates an extensive set of procedural protections in the criminal law, which are not discussed in my book, but which help establish the basic limited government slant to our institutions of government, dealing with unreasonable searches and seizures, warrants, self-incrimination, procedural due process, the right to the assistance of counsel, confrontation of witnesses, jury trials, and cruel and unusual punishments. All of these protections advance the end of limited government by placing sensible constraints on how the federal government can exercise its powers against individual people. For the most part, it was agreed that these provisions did not bind the states,¹⁵ except where specifically provided, as with the Contracts and Ex Post Facto Clauses in Article I, Section 10.¹⁶ The same classical liberal orientation is evident in the explicit defense of private property in the Takings Clause,¹⁷ and in the protections afforded to freedom of speech, the press, the right to peaceful assembly, and the Free Exercise and Establishment Clauses in the First Amendment. To be sure, the full implications of these provisions were not fully grasped at the time of their adoption, but no serious student of the Constitution could write that it reflected the absolutism of Jean Bodin,¹⁸ or the social contract theory of Jean Jacques Rousseau,¹⁹ let alone the views of Karl Marx and Friedrich Engels on private property. What matters here is substance, not description.

This basic message is reinforced by early judicial decisions under the Constitution, both by the Supreme Court and lower courts. Hovenkamp supplies us with a synopsis of some of the key decisions that addressed the origins of the social compact. He writes:

13. I discuss my doubts about Story’s logic in RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 87–100 (2014) (noting the technical weaknesses of *Martin v. Hunter’s Lessee*, but defending the outcome as part of the “prescriptive constitution” that is so embedded in our constitution tradition that it would be foolish to seek to overturn it).

14. On this development, see, for example, ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

15. See, e.g., *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

16. See U.S. CONST. art. I, § 10.

17. See *id.* amend. V.

18. See JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., Barnes & Noble 1967) (1576).

19. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (George D.H. Cole trans., 1947) (1762).

In 1782 Virginia's highest court declared about its state constitution, "since we have a written record of that which the citizens of this state have adopted as their social compact[,] and beyond which we need not extend our researches."²⁰ The social compact *was* the text, and one need not look further. Some delegates, including James Wilson of Pennsylvania as well as Madison, used a social contract analogy at the constitutional convention, arguing that the states were the equivalent to individuals in a state of nature, and that the constitutional text would be their social contract.²¹ Alexander Hamilton complained in *Federalist No. 21* of the lack of sanctions in the "social compact," referring to the Articles of Confederation then in force.²²

Nearby he makes additional references to *Kemper v. Hawkins*,²³ which referred to the period between the signing of the Declaration of Independence in 1776 and the acceptance of the Articles of Confederation in 1781 as occurring prior to the "social compact." That last stage was only reached with the adoption of either the Articles in 1781 or the Constitution in 1787. Hovenkamp also quotes the famous passage from *Vanhorne's Lessee v. Dorrance*: "The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law."²⁴ And further to the even more famous decision in *Calder v. Bull*, in which Justice Chase insisted that any state legislature lacked the authority to alter fundamental rights even if "its authority should not be expressly restrained by the Constitution, or fundamental law, of the State."²⁵

Hovenkamp tries to downplay the force of these passages by insisting that they do not refer to some general theory but only to the *text* of the Constitution proper and not some judicial gloss or diffuse social theory. Now there is a trivial sense in which any constitution establishes a social compact by simply binding its signatories. But what matters in this case is not that there is *some* social compact, but that there is *this* social compact, which at every point stresses the theory of strong rights of property, contract, and conscience that all individuals possess against their government. Including all these

20. Hovenkamp, *supra* note 1, at 45 (alteration in original) (quoting Commonwealth v. Caton, 4 Call 5, 7 (Va. 1782)).

21. *Id.* (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 90, 97-98 (Adrienne Koch ed., 1966); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 315 (Max Farrand ed., 1911)).

22. *Id.* (citing THE FEDERALIST NO. 21, at 101 (Alexander Hamilton, Dec. 12, 1787) (Oxford Univ. Press 2008)).

23. *See* *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (Va. 1793).

24. *See* Hovenkamp, *supra* note 1, at 45 n.247 (quoting *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795)).

25. *See* Hovenkamp, *supra* note 1, at 46 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

commitments in the basic text only fortifies the basic position of *The Classical Liberal Constitution*.

In this venture, the Founders had very complex theories of textual interpretation that trace their origins in Roman Law.²⁶ These rules of interpretation always started with an explicit text, which was then explicated with reference to the basic political theory that animated the initial provision. Thus, by way of example, the police power *has to be read* into the Constitution, which nowhere contains those words. Otherwise, the government would be powerless to stop the force and fraud whose dangerous consequences drove individuals into a social contract that, in Hume's famous formulation, demanded a mutual renunciation of force.²⁷ Social contract theory is thus embedded in the text. The force of Hovenkamp's observation is to confirm that classical liberal theory is woven into the very fabric of the Constitution.

Hovenkamp's other claim is that the tradition of social contract theory that emerged before the adoption of the Constitution could not reflect the marginalist revolution in social theory—a theory that evaluates each transaction at the margin, at which point it becomes possible to make precise judgments about social welfare—which did not come into existence until much later. He also makes the claim that the hopeless division in various social contract theories makes it a weak reed on which to rest an overall system. In a forceful passage he puts the claim as follows:

The idea of fundamental law based on an implied social contract has captured people of very different ideologies, from Richard Epstein, or Buchanan and Tullock on one side, to John Rawls on the other. Therein lies one of its biggest problems. As a principle of social ordering it is frustratingly indeterminate because of its sensitivity to assumptions about who the imagined original parties to this contract were and what they valued. Did each person set out to protect only her own interest, or were they outwardly regarding for the welfare of others? Did their theory of value depend on past

26. See, e.g., Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 705–19 (1992); see also John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (discussing the dominance of semantic meaning over political purpose, without developing consistent rules for implication).

27. DAVID HUME, *THEORY OF POLITICS* (1953) (“A TREATISE OF HUMAN NATURE, BOOK III, Of the Rules Which Determine Property”). Hume stated:

I first consider men in their savage and solitary condition; and suppose that, being sensible of the misery of that state and foreseeing the advantages that would result from society, they seek each other's company, and make an offer of mutual protection and assistance. I also suppose that they are endowed with such sagacity as immediately to perceive that the chief impediment to this project of society and partnership lies in the avidity and selfishness of their natural temper; to remedy which they enter into a convention for the stability of possession and for mutual restraint and forbearance.

Id.

investment or on rational expectations about the future? Relatedly, did they know about their future stations in life, or were they acting behind a “veil of ignorance?” Only the assumption of at least a limited veil of ignorance is consistent with a marginalist theory of rational expectations. An assumption of full knowledge about future status eliminates risk from the calculus and as a result has no relevance to the world we actually live in.²⁸

Let’s take these concerns one at a time. A social contract theory cannot afford to exclude anyone from the mix, so all individuals who are subject to the government have as of right a voice in the outcome. There is, of course, an empirical question as to what territory any particular social contract covers, which in the real world requires any social contract theorist to decide which rights have to be accorded to all individuals and which are reserved to citizens. That question, ironically, is answered in a powerful way by the Fourteenth Amendment, which draws the appropriate distinction between persons and citizens. The former get protection of arbitrary imprisonment and loss of life, as well as protection against confiscation of property. But only citizens get the right to vote, the right to enter into gainful occupations and the right to acquire property. That solution not only holds in the United States, but also works a reasonably good approximation around the world, where it is commonplace to impose additional requirements for those who seek to work within a country.²⁹

Nor is it necessary to put any restraint on what people value in order to make the system work. All that need be assumed is that each person will seek to maximize subjective value, which is hard to determine about the particular mix of goods and services. But social contract theory works best when it focuses on self-preservation, and the control of force and fraud, because survival and the protection of liberty and property are essentials in every classical liberal theory, whether of Roman or common-law origins.

The differences between these systems lie on matters of procedure and formalities and the fine points of law. The correct relationship is set out by Gaius in an introductory paragraph of his Institutes, entitled “Concerning Civil and Natural Law”:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that

28. Hovenkamp, *supra* note 1, at 40–41 (footnotes omitted).

29. See, e.g., *Work Permits*, SWI, <http://www.swissinfo.ch/eng/work-permits/29191706> (last visited Sept. 20, 2015) (detailing the conditions that noncitizens have to satisfy in order to obtain a work permit). The lead sentence of this Swiss authority states: “Obtaining a permit to work in Switzerland depends on many factors, including where you are from, the skills you have and quotas.” *Id.*

ciuitas (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.³⁰

After years of studying Roman law, I have come to the conclusion that Gaius is right: the embrace of the natural-law tradition is much more potent than the skepticism expressed by James Iredell, who insisted that there are no natural-law principles outside the text because judges and political theorists have “no fixed standard” by which to guide their decisions, given that “the ablest and purest men have differed upon the subject.”³¹ But he does not mention the scope of these disagreements. To Gaius, certain relationships are fundamental.³² There is no legal system that can do without some notion of marriage for the protection of the young and the propagation of the species. There is no society that can treat individual happiness as its sole objective, given the need to raise the next generation. It is therefore clear that no social system can survive if all individuals disregard the welfare of others, a notion confirmed by the biological literature on inclusive fitness, which stresses the necessary interdependence of utilities that depend on genetic connection on the one hand, and love on the other.³³

The arguments can be taken further. The two most important features of any society are that individuals not kill each other and that they cooperate to ensure gains from trade.³⁴ It is here that the law of tort and contract emerge. One way to deflect this point is to insist, as does H.L.A. Hart, that there is at most some “minimum content” to the natural law, which leaves huge discretion on other areas.³⁵ But I have long argued that this position is a mistake, and that even these so called minimum conditions shape all the essential social relations that any legal system must respect.³⁶

As a matter of general political theory, it is looking at trifles to ask the choice between negligence and strict liability, or between bargains and promissory estoppel. What can differ are the forms by which marriages are

30. 1 THE INSTITUTES OF GAIUS 3 (Francis De Zulueta trans., 1946).

31. *Id.* at 399.

32. For a discussion of these points, see generally Richard A. Epstein, *From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, 100 IOWA L. REV. 1743 (2015) (tracing the transition of natural law rules to modern social welfare theory).

33. See, e.g., W.D. Hamilton, *The Genetical Evolution of Social Behaviour. I*, 7 J. THEORETICAL BIOLOGY 1 (1964); W.D. Hamilton, *The Genetical Evolution of Social Behaviour. II*, 7 J. THEORETICAL BIOLOGY 17 (1964).

34. See generally RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 71–111 (1995).

35. H.L.A. HART, THE CONCEPT OF LAW 189 (1961).

36. See, e.g., Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005).

performed, property transferred, or promises rendered enforceable. But the key categories remain constant. Not only are there key rules close to those in common-law countries on point after point, but both systems tend to face the same hard choices, and often make the same mistakes. It is one of the great blunders of modern lawyers to pooh-pooh the notions of natural law, as if they had no determinable contract, or were not subject to some coherent theory. The reason why constitutions work, and why people aspire to abide by them, is that common concerns about the basic structure of human relationships make it possible to reconstitute with more sophisticated justifications the general principles of natural law.³⁷

Nor do these principles exclude some appreciation of marginalist principles in at least an inchoate fashion. *Justinian's Digest* XVIII, 1, begins with an account of how the contract of sale allows people to exchange goods they have in excess for those they want.³⁸ The detailed account of mutual gains from trade in David Hume shows a keen implicit awareness of the marginalist principle in connection with gains from trade.³⁹

To discover these necessities and interests, we must consider the same qualities of human nature, which we have already found to give rise to the preceding laws of society. Because men are naturally selfish, or endowed only with a confined generosity, they are not easily induced to perform any action for the interest of strangers, except with a view to some reciprocal advantage, which they had no hope of obtaining but by such a performance.

Nor is this an isolated passage. Hume, a Scotsman, was well versed in Roman law, and much of his *Treatise* makes explicit reference to Roman categories that worked as well then as in Roman times, and work every bit as well today. His analysis of property is organized into four categories: "Occupation, Prescription, Accession, and Succession," which all derive straight from Roman law.⁴⁰ It is not enough for Hovenkamp, or indeed any modern realist, to praise the massive indeterminacy of natural law, or the social contract theory with which it is so closely allied. They have to show it by

37. For extended defenses, see, for example, *id.*; Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

38. Justinian's Digest, 18.1.

The practice of barter was the source from which buying and selling arose. In early times there was no money, and the distinction between 'commodity' and 'price' was unknown: a man simply exchanged things useless to him for thing useful, as his needs and circumstances demanded, it being commonly the case that one man lacks something which his neighbor has to spare.

THE ROMAN LAW OF SALE § (James Mackintosh trans., 2d ed. 1907). Note that the use of the word "useless" (*inutilitia*) does not capture the marginalist principle, because people will trade that which has value to them for that which they believe has greater value. But it is clear that Paulus is within a stone's throw of articulating the general proposition that both sides to a voluntary transaction have gains from trade.

39. See HUME, *supra* note 27.

40. *Id.*

a patient examination of legal rules across time and places. And that is a demonstration they cannot make out.

In sum, I think that Hovenkamp is profoundly wrong both on the history and theory of legal systems. Historically, a tradition does not rise and fall in a day, and the classical legal tradition describes most of the historical arc of legal evolution between the Founding period and the 1936–1937 constitutional revolution. Analytically, social contract theory, at least one that operates in connection with traditional notions of natural law, is far more constant and powerful than Hovenkamp suggests. So it is on to particular cases. It is just this solid foundation that makes it possible to understand the specific issues that follow.

II. THE COMMERCE CLAUSE

To defend his thesis of the belated emergence of the classical liberal Constitution, Hovenkamp first turns to Chief Justice Marshall's famous decision in *Gibbons v. Ogden*,⁴¹ which he claims offers a broad interpretation of the Commerce Clause. I shall not go through each of the passages that he cites here, for I have commented at length on many of them in my 1987 article, *The Proper Scope of the Commerce Power*,⁴² to which Hovenkamp does not refer. Methodologically, any characterization of a decision as broad or narrow always needs a reference point. In *Gibbons*, Marshall took dead aim at the 1812 opinion of Chancellor Kent in *Livingston v. Van Ingen*,⁴³ which had denied that the commerce power extended to intrastate navigation, insisting instead that the commerce power allowed the federal government only some limited powers over actions that took place at the borders between states. He followed that decision in *Ogden v. Gibbons*,⁴⁴ which raised many of the issues that later came up in the Supreme Court. In Kent's view, the Federal Coasting Act of 1793, which played a key role in the Supreme Court, only meant that American boats did not have to pay the higher fees that were charged to foreign vessels—an early version of American protectionism that is all too consistent with the foreign commerce power.⁴⁵ On the preemption issue, I

41. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

42. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

43. *Livingston v. Van Ingen*, 9 Johns. 507, 579 (N.Y. 1812). *Livingston* states:

Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licences to retail spirituous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens?

Id. For a discussion of *Van Ingen*, see Epstein, *supra* note 42, at 1405.

44. *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N.Y. Ch. 1819).

45. On this point, see THE FEDERALIST NO. 11, at 55–56 (Alexander Hamilton) (Oxford Univ. Press 2008) (“By prohibitory regulations, extending, at the same time, throughout the

think that Chancellor Kent has the better of Chief Justice Marshall when he writes:

The license only gives to the vessel an *American* character, while the right of the individual procuring the license to use the vessel, as against another individual setting up a distinct and exclusive right, remains precisely as it did before. It is neither enlarged nor diminished by means of the license: the act of the collector does not decide the right of property. He has no jurisdiction over such a question.⁴⁶

The narrowness of Kent's definition led him to grant an injunction to Ogden that prohibited Gibbons from operating his ferry in New York waters. It is in comparison with this account that Marshall's reading of commerce to cover all navigation and all other forms of "intercourse" between states marks a major expansion of the scope of the power—one that necessarily limits the powers of all states. Marshall wrote: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one."⁴⁷

This definition is surely broader than the one used by Kent. But it is not nearly so broad as Hovenkamp makes out. Hovenkamp reads the term "concerns" in this passage as if it means "affects," or "something in which they have an interest."⁴⁸ The subtext is that it is proper to read *Gibbons* in harmony with the New Deal cases that talk of "affecting commerce." But at this point, he blinks because he never tells us whether he agrees with the two key New Deal Cases, *National Labor Relations Board v. Jones & Laughlin Steel Co.*⁴⁹ or *Wickard v. Filburn*,⁵⁰ both of which go far beyond anything that Marshall said or meant in his opinion.

That Hovenkamp severely overreads *Gibbons* is confirmed by multiple sources. The first is the language used in *Gibbons* itself. Hovenkamp's account attaches no weight to the words "properly be restricted," which are intended

States, we may oblige foreign countries to bid against each other, for the privileges of our markets."). The same desire to regulate foreign commerce is found in 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 15 (abridged ed. 1833), where Story struggles to have a strong protectionist Constitution in foreign trade coupled with a free trade zone internal to the United States, understanding full well that the Union could fall apart if Congress could prevent the shipment in interstate commerce of goods made by slave owners. For discussion of these twists and turns, see Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 28 (Nathan Persily et al. eds., 2013).

46. *Ogden*, 4 Johns. Ch. at 157.

47. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824); see also *N. River Steamboat Co. v. Livingston*, 3 Wheeler C.C. 483 (C.C.N.Y 1825) (divided (22–9)).

48. Hovenkamp, *supra* note 1, at 16.

49. *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

50. *Wickard v. Filburn*, 317 U.S. 111 (1942).

to narrow the scope of the words that follow. That point is reinforced by Marshall's insistence that "[t]he completely internal commerce of a State, then, may be considered as reserved for the State itself."⁵¹ That sentence in turn sets the stage for the many types of laws that remain within the exclusive power of the State:

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.⁵²

None of these strictures about the limited reach of federal power is consistent with Hovenkamp's broad reading of the term "concerns." In fact, by using the words "remote and considerable influence"⁵³ as insufficient to attract federal power, Marshall takes the opposite position. Of course, the citizens of one state have a deep interest in what goes on in other states, with whom they interact on the one hand and with whom they compete on the other, but that is *not* sufficient to establish the federal power. What is clear from context is that the term "concerns" is better read to mean those activities that take place wholly within the boundaries of the state, regardless of the ripple effects elsewhere.

To give an analogy, when we say in property law that something "concerns" a person or something "interests" him, we mean that he has an ownership interest in the property, be it a lien or a mortgage. It does not mean that people who own one piece of property are concerned with what happens to another parcel nearby. That broader definition of "concerns," like the broader definition of "harm," is a progressive conception that allows the state to institute the codes of fair competition found under the National Industrial

51. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

52. *Id.* at 203.

53. *Id.*

Recovery Act (“NIRA”),⁵⁴ and which Chief Justice Hughes distinguished sharply from traditional notions in *A.L.A. Schechter Poultry Corp. v. United States* by noting that at common law fair competition “is a limited concept. Primarily, and strictly, it relates to the palming off of one’s goods as those of a rival trader.”⁵⁵ This account fits neatly into the classical prohibition on force and fraud. The broader definition of “unfair competition,” like the broader definition of “coercion and harm,” uses the term “fairness” to justify minimum price levels and to define unfair labor practices that support the kind of cartel-like behavior to which the classical liberals were deeply hostile.

Hovenkamp’s ahistorical reading of the term “concerns” is also falsified both by the historical context of the Constitution and the long line of cases that adapts a narrow reading, relative to modern conceptions, of Marshall’s account of commerce in *Gibbons*. Two clauses in the Constitution that do reflect a social compact, but do not reflect a classical liberal Constitution, are the Fugitive Slave Clause⁵⁶ and the Three-Fifths Clause.⁵⁷ But it is a huge mistake to think that these were the only clauses crafted with an eye to the pressing problem of the day—how to keep the union together when some states were free and some were not.

Two other provisions also helped keep the uneasy truce between free and slave states. The first of these is the Privileges and Immunities Clause, which provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁵⁸ One key consequence of this Clause was that free states could not ban goods and services from citizens of slave states or otherwise discriminate against them. The Clause received a broad construction in *Corfield v. Coryell*,⁵⁹ which was decided by Justice Bushrod Washington shortly after *Gibbons* was handed down. The second consequence was that the Commerce Clause, even under Marshall’s broad interpretation, in no way allowed the federal government to regulate manufacturing or agriculture in slave states, lest congressional intervention precipitate a huge political clash over the persistence of slavery. Indeed, it is no accident that the real pressures for a broad reading of the Commerce Clause only coalesced *after* the Civil War, when slavery was no longer in the picture, and the key question was whether the federal government could bar from interstate commerce goods made by firms that used child labor, not slave

54. National Industrial Recovery Act, Pub. L. No. 73–67, 48 Stat. 195 (1933). The law contained titles that dealt with codes of fair competition, the agricultural adjustment act, oil regulation, public works and construction projects, and emergency relief.

55. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531 (1935) (citation omitted).

56. U.S. CONST. art. IV, § 2, cl. 3.

57. *Id.* art. I, § 2, cl. 3.

58. *Id.* art. IV, § 2, cl. 1.

59. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

labor. Before the New Deal, in *Hammer v. Dagenhart*,⁶⁰ which Hovenkamp does not discuss, the answer was “no,” but only by a 5–4 vote. After the expansion of the Commerce Clause, the “yes” answer endorsed in *United States v. Darby*⁶¹ seemed like a simple truism—in a huge expansion of federal power to which Hovenkamp again pays no attention.

The 19th-century cases interpreting the Commerce Clause were fully faithful to Marshall’s conception—be it broad or narrow—in *Gibbons*. The first case to address its implications was *Corfield v. Coryell*, where one question was whether the breadth of the commerce power in *Gibbons* precluded New Jersey from regulating the collection of oysters by citizens of other states in the Maurice River Cove. In language that freely copied from *Gibbons*, the answer was “no”:

But this power [to regulate commerce], which comprehends the use of, and passage over the navigable waters of the several states, does by no means impair the right of the state government to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do not interfere with the regulations of congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and regulating turnpike roads, ferries, canals, and the like.⁶²

The way to understand this decision is that state powers of the police are only limited where they block or hamper navigation, which can happen when state bridges or dams can block the free flow of traffic. Under Hovenkamp’s broad rendering of the term “concerns,” *Corfield* becomes largely unintelligible when in fact it sets the stage for virtually all the 19th-century decisions, of which I shall mention only a few here.

The first of these notable cases is *Propeller Genesee Chief v. Fitzhugh*,⁶³ which arose out of a collision of two boats on Lake Ontario. Neither of these boats was on a journey between two states, so the Supreme Court held that Congress could not pass legislation regulating their behavior pursuant to the Commerce Clause, even if it wanted to, which it did not.⁶⁴ But the Court filled

60. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

61. *United States v. Darby*, 312 U.S. 100 (1941).

62. *Corfield*, 6 F. Cas. at 550.

63. *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

64. *Id.* at 452 (“It is evident, therefore, from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive their authority from that article of the Constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the Constitution; and which we have no reason to suppose it deemed itself authorized to exercise. Indeed it would be inconsistent with the plain

the gap by extending the admiralty jurisdiction of the district courts, which had previously been limited to coastal activities along the ocean and to rivers that were subject to the influence of the tides.⁶⁵ *Genesee* marked conscious departure from the English rule that admiralty jurisdiction went only so far as the tides, which had earlier been adopted in 1833 by Justice Story in *Peyroux v. Howard*.⁶⁶ The entire case is unintelligible under Hovenkamp's reading of *Gibbons*.

The first chink in the armor around *Gibbons* came in the 1870 case—post-Civil War—of *The Daniel Ball*, where the precise question under the Commerce Clause was:

Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.⁶⁷

Justice Field first gave a broad definition of navigability along a river, which made it possible to find that the case fell within the constitutional definition of “navigation.”⁶⁸ The defendants argued that they were only engaged in internal commerce within one state, and of course they were right, for even if the goods in question are destined by their owner for shipment to another state, it hardly follows that the ship that works autonomously within one state falls within the purview of interstate commerce. By that logic a local taxicab service is engaged in interstate commerce even if some fraction of its passengers are intending to enter interstate commerce, which is a conclusion stoutly resisted in *Gibbons*, which distinguished movement before and movement within interstate commerce. To get the broader result, Justice Field did insist that this was only commerce entirely within one state so long as it “does not extend to or affect other States.”⁶⁹ *The Daniel Ball* thus marks a clear extension of the notion of navigation into the state because it holds that one vessel is in interstate commerce solely because some of the goods on it move across state lines, which was no part of the Marshall definition.

This decision represents the first step in the long erosion of Marshall's flat injunction against the regulation of the internal commerce of a single

and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce.”).

65. The Act was entitled: “An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same.” *Id.* at 451.

66. See *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833).

67. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

68. See *id.*

69. *Id.* at 565.

state. Some years later, in the *Shreveport Rate Cases*,⁷⁰ the Court held that an intrastate railroad that was in competition with an interstate railroad fell within the commerce power—yet another extension beyond *Gibbons*—on the grounds that

[Congress’s] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.⁷¹

Note that this expansion, however, was confined to “interstate carriers as instruments of interstate commerce,”⁷² which does not carry with it the federal control over manufacture and agriculture within the several states. That point was indeed clear from the full range of Supreme Court decisions that kept separate manufacture from commerce. Thus, *Kidd v. Pearson*, which dealt with the importation and consumption of foreign intoxicating liquors, made it crystal clear in 1888 that the power to regulate commerce did not include the power to regulate manufacturing, agriculture, and mining, among other activities that were undertaken within the state.⁷³ Often times the distinction was phrased in the unhelpful language of “direct” and “indirect,” following on the use of similar terms in *Gibbons*. But the muddiness of the terminology is less important than the clarity of the result. As was insisted in *United States v. E.C. Knight Co.*, commerce was distinct from manufacture.⁷⁴ And the point

70. *Shreveport Rate Cases*, 234 U.S. 342 (1914).

71. *Id.* at 351.

72. *Id.*

73. *Kidd v. Pearson*, 128 U.S. 1, 20–21 (1888). The Court noted:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?

Id.

74. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

was well understood by Congress. For instance, as I noted in *The Classical Liberal Constitution*, the Pure Food and Drug Act of 1906 authorized Congress to regulate the shipment of goods between states, and the manufacture of goods within the territories, but *not* within the states.⁷⁵ There is no doubt that some expansion of the Commerce Clause, as with *The Daniel Ball* and the *Shreveport Rate Cases*, took place prior to the transformative decisions in *Jones & Laughlin* and *Wickard*. Yet the New Deal developments extended Congress's powers miles beyond the earlier cases, so great was the gap between the earlier classical liberal and progressive readings of the clause.

III. THE CONTRACT CLAUSE AND LEGISLATIVE CAPTURE

Before the adoption of the Fourteenth Amendment in 1868, the Constitution contained few provisions that imposed direct substantive limitations on the actions of the State. The general reticence to deal with that issue stemmed from the simple fact that the states, which formed the national union, were loathe to trample too much on their local prerogatives, even as they recognized the need for centralized authority far stronger than that ceded to the United States under the Articles of Confederation. So, unsurprisingly, they added a president, a judiciary, and the power to tax and to borrow. Nonetheless, the Framers did impose some specific limitations on state powers, including Article I, Section 10, which provides that "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."⁷⁶ It should be immediately clear that the only clause capable of a broad reading would be that dealing with impairing the obligation of contracts. Bills of attainder are specific attacks against certain individuals, and thus cannot be the basis of an attack on general economic legislation. Ex post facto laws were quickly confined to criminal laws,⁷⁷ and thus could be pressed into service for that end. And the titles of nobility provision was a backward looking provision about royal power that was virtually self-enforcing.

It is commonly agreed that the immediate inspiration for the Contract Clause was to make sure that states would not pass debtor relief statutes that would amount to a transfer of wealth from some individuals, often poor, to other individuals, often of means.⁷⁸ The two implicit limitations on this

75. EPSTEIN, *supra* note 13, at 160.

76. U.S. CONST. art I, § 10, cl. 10.

77. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798).

78. See THE FEDERALIST NO. 44 (James Madison, Jan. 25, 1788) (Oxford Univ. Press 2008). *The Federalist No. 44* states:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation, that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one

reading were this: first, that the Contract Clause did not apply to state regulation that dealt with the obligations on contracts yet to be made, and second, that the Contract Clause did not deal with contracts made by governments, often in the form of charters, to particular individuals or groups for the privilege of conducting certain forms of business or charitable activities. I do not spend too much time in *The Classical Liberal Constitution* on this clause, as I confine my discussion there to the revocation of the corporate charter at issue in *Dartmouth College v. Woodward*.⁷⁹ But I have addressed some of the questions about the clause that Hovenkamp raises in an earlier article, *Toward a Revitalization of the Contract Clause*.⁸⁰ I shall, therefore, explain both my agreements and disagreements with Hovenkamp's position on the two areas of disputed extension.

The initial Supreme Court foray into public contract was its 1810 decision in *Fletcher v. Peck*, which grew out of the Yazoo land scandal of the late 1790s.⁸¹ Georgia had entered into a set of sweetheart deals in which it parted with some 35 million acres of Georgia land to a group of speculators who paid the below-market sum of \$500,000 in total.⁸² Peck had purchased some of this land from one of the original speculators, and had in turn sold it off to Fletcher, who sued to rescind the contract of sale on the ground that Peck could not convey marketable title to the property.⁸³ In the interim, the Georgia legislature, in response to intense public pressure, rescinded the original grant. That step could do wonders so long as the original speculators had possession of the land. But it did not address the question of what should happen when the speculators had passed it on at market prices to third persons who took it in good faith. One such buyer was Peck, who then resold the land to Fletcher, who brought suit to rescind the agreement.⁸⁴ In denying the action for rescission, it appeared as though Marshall had to deny the validity of the repealing statute on the ground that it impaired the original charter that transferred property from Georgia to the speculators.

Marshall's decision is not clear as to the exact grounds on which he proceeds. But the correct analysis of the problem, in my view, rests on the correct application of the general principles of corporate law, where in this

legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

Id. at 223.

79. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 519 (1819).

80. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

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

82. *Id.* at 87–91.

83. *Id.*

84. *Id.*

instance the state representatives act as fiduciaries to the public at large. On this view, the transaction in question was clearly not an exercise of bona fide business judgment, and may well have been contaminated by extensive levels of self-dealing between members of the Georgia legislature and the individual speculators. At this point, it seems clear that ordinary principles governing fiduciary duties allow for the rescission of the sale to the speculators so long as they are in possession of the land, just as in a corporate situation. By the same token, that remedy of rescission is lost against any good-faith purchaser from the original buyers, including Peck or Fletcher (if either had that status). Hence the title he conveyed to Fletcher should be good, even if the original transaction is tainted as between the original parties to the deal. The residual remedy, as in all cases of good-faith purchasers, should be for damages from the initial speculators, which in this instance can be set at the amount received for the sale of land to Peck, plus interest. This solution is as classical liberal as it can get, because it imposes the same fiduciary duties on public lawmakers as it does on private directors. On this analysis then, Marshall has engaged in a stretch to apply the Contract Clause to transactions by government actors. But that extension does not do any violence to principles of good government or create some dangerous precedent for future cases.

Hovenkamp does not do much with *Fletcher*,⁸⁵ but treats it as a set up line for the 1819 case of *Dartmouth College v. Woodward*, which was decided under quite different circumstances. There, New Hampshire gave Dartmouth College a special charter for its activities, which it thereafter sought to revoke in order to turn the college into a public institution.⁸⁶ At this point, there was no question of third party interests, only the question of the proper construction of the grant. Once again, if New Hampshire were treated as a private grantor, its effort to rescind the charter could be fiercely resisted in the absence of a showing that the College had been in material breach of its key provisions. Yet New Hampshire made no showing of that sort. The contrast with the Yazoo land scandal in *Fletcher* could not be more pronounced. In *Fletcher*, Georgia had cause to rescind against its grantee. With *Dartmouth College*, New Hampshire had none. The decision thus seems clearly correct.

And yet, throughout his discussion, Hovenkamp treats the decision as standing for, or at least morphing into, a doctrine capable of far greater mischief. He writes: "The *Dartmouth College* doctrine quickly produced case law holding that state inducements given to business corporations are irrevocable, except as limited by the express terms of the grant."⁸⁷ He then uses that operation to show how the expansion of vested rights under the Contract Clause paved the way for the creation of illegal monopolies that could operate

85. See Hovenkamp, *supra* note 1, at 19.

86. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 519, 524-37 (1819).

87. Hovenkamp, *supra* note 1, at 19.

to the detriment of the public interest, and cites passages from Thomas Cooley and Christopher Tiedeman that rail against that abuse.⁸⁸

But what he does not explain is how any of these abuses stemmed from *Dartmouth College*. That case raised no issue of monopoly power at all. The original 1769 charter appointed twelve persons, “granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.”⁸⁹ There was no intimation that no other college or university could obtain a charter from the state. Indeed, even if that provision were included in the charter, the proper response would not be to rescind the grant, but to make it clear that future charters could be issued to other colleges and universities. It is for good reason that Marshall made no reference to “monopoly” in *Dartmouth College*. No such issue was raised.

It was indeed just this issue that was raised in the *Charles River Bridge Case*, which gave rise to a fierce dispute between Andrew Jackson’s new Chief Justice, Roger Taney, and the now old-line federalist, Joseph Story.⁹⁰ In this situation the question of monopoly was clearly raised. The Massachusetts legislature had given the Charles River Bridge Company a license to build a bridge over the Charles River.⁹¹ Shortly thereafter, Massachusetts issued a second charter to the Warren Bridge Company to build a bridge (both are still standing and in use) next to Charles River’s Bridge, on which it was authorized to charge tolls for three years to recover costs, and would then become a “free” bridge thereafter.⁹² Charles River claimed that it had an exclusive charter and that the second charter to Warren Bridge had impaired the obligation of contract.⁹³ Hovenkamp agrees with Taney that, “in grants by the public, nothing passes by implication,” and thus takes Story to task for defending a monopoly that the Jacksonians so strongly resisted.⁹⁴

Yet the issue is surely more complicated than that. To be sure, there is always a presumption against creating naked monopolies, which are public giveaways for which there is no return benefit. But in this particular instance, the charter to build a bridge could well have been obtained at a lesser price with the promise of an exclusive, at least for some period of years. The

88. *Id.* at 22 (citing, inter alia, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Alexis C. Angell ed., 6th ed. 1890); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886)).

89. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 626.

90. *See generally* Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

91. *Id.* at 536.

92. *Id.* at 537.

93. *Id.* at 537–38.

94. Hovenkamp, *supra* note 1, at 21 (citing *Proprietors of the Charles River Bridge*, 36 U.S. (11 Pet.) at 546).

question in *Charles River Bridge* was solely one of charter construction. But in future cases the issue was so important that it had to be resolved by contract, as it indeed was with the Warren Bridge Company, which was given three years to recover its expenses.

The issue in this case involves the so-called “marginal cost controversy,”⁹⁵ where, from a public point of view, it is best that all bridges be open for public use, without tolls, at least on the simplified assumption that bridge upkeep is zero. Any positive toll will keep off the bridge someone who valued its use at greater than zero but below the toll level. Nonetheless, setting tolls at zero requires substantial public expenditures to build and maintain the bridge, and thus creates the serious problem that the legislature will (by analogy to Georgia in the Yazoo scandal) authorize large giveaways for large public works projects that were economically unjustified in the first place. A structured contract that allows for a decent rate of return after which tolls are reduced to cover marginal cost is not an indefensible intermediate solution. And it is one that shows that a blunderbuss attack on all monopolies may make for good populist politics but not necessarily for good economic development. Story was more than sensitive to that issue because he was the 19th century’s greatest practitioner of patent law, which involves exactly that kind of grant of a limited exclusive right over some new and original investment.⁹⁶

The difficulties associated with *Dartmouth College* and *Charles River Bridge* were real enough, and the question then arises how best to deal with the risk of state-created monopolies on the one hand, without stripping the state from the ability to create useful charters on the other. In this regard, Hovenkamp makes a serious omission when he does not refer to one of the great reforms of the mid-19th century, namely the passage of the general incorporation law of New York, which allowed for most corporate charters to be granted to a broad class of applicants as of right and thus ended the monopoly game associated with special charters.⁹⁷

But that development did not solve all problems, because special grants still had to be created in certain circumstances, which in turn raised the problem of how these should be handled, to which there were a number of sensible judicial responses in the 19th century. *West River Bridge Co. v. Dix* involved a charter in which the government promised explicitly never to

95. See generally R.H. Coase, *The Marginal Cost Controversy*, 13 *ECONOMICA* (n.s.) 169 (1946).

96. For the current provision see 35 U.S.C. § 101 (2012) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

97. For a discussion, see generally Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 *J. LEGAL STUD.* 129 (1985); John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 *J. ECON. HIST.* 211 (2005). The law is discussed in HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 51–52 (1991).

exercise its power of eminent domain.⁹⁸ The Court rightly held that this promise amounted to an alienation of a distinctive sovereign power, and thus held that the property transferred under this charter was no more immune from government takeover than was any property that passed under a charter issued by a private company.⁹⁹ The upshot was that the condemnation power could be exercised, but only on payment of just compensation for the property taken; the just compensation was thus read into the Contract Clause on good classical liberal principles.

In a similar vein, it is important to comment on at least two other decisions that Hovenkamp does not refer to in his critique. The first of these, *Stone v. Mississippi*, which held that the State had the right to abrogate, without compensation, a contract that allowed Stone to operate a lottery for 20 years.¹⁰⁰ The case did not overrule *Dartmouth College*, but distinguished it on the ground that colleges were not lotteries:

All agree that the legislature cannot bargain away the police power of a State. “Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.”¹⁰¹

At that point the Court refused to give a comprehensive definition of the police power, knowing it to be a limited notion, but it concluded by holding that it surely covered the ability to deal with “all matters affecting the public health or the public morals.”¹⁰²

The second of these key developments was the articulation of the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*,¹⁰³ which involved the application of the public trust doctrine to the conveyance of land by the State of Illinois to Illinois Central to build a railroad. Clearly this case presented the problem of a potential sweetheart deal similar to that in *Fletcher*, and the State responded to that problem by adopting a categorical rule that conveyance of public trust property is the appropriate antidote to that problem. But in this case, the cure is almost as bad as the disease because it means that the State cannot convey public trust property even when it works to its advantage. To deal with this problem, I proposed in 1987 that *Illinois Central* be taken as the inspiration for adding a “Givings Clause” to the Constitution, namely “nor

98. *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848).

99. *See id.* at 538–39.

100. *Stone v. Mississippi*, 101 U.S. 814, 820–21 (1879).

101. *Id.* at 817–18 (quoting *Boyd v. Alabama*, 94 U.S. 645, 649–50 (1876); *Metro. Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (1866)).

102. *Id.* at 818.

103. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

shall public property be given for private use, without just compensation.”¹⁰⁴ An exhaustive study of *Illinois Central* by Joseph D. Kearney and Thomas W. Merrill takes the position that the full deal between Illinois and the railroad was not nearly as one-sided as had commonly been claimed, most notably by the late Professor Joseph Sax.¹⁰⁵ But no matter which way the facts come out, in principle the use of the corporate tests for improper dealing look to be superior to the flat ban on alienation introduced by the *Illinois Central* version of the public trust doctrine.

Now, for the final piece of the puzzle. The concern with monopoly is not so overwhelming that it can prevent the state from entering into any long-term contract at all. In particular, governments at all levels have to borrow funds for the completion of long-term projects, and a rule that allows them to set aside or repudiate any such deal without compensation would pose serious difficulties to their creditworthiness, and thus these must be allowed in general, even if they can be challenged on narrow grounds in particular cases.

In my view, therefore, there is no huge migration in sentiment in the understanding of the Contract Clause cases over the course of the 19th century. I think that Hovenkamp misreads the history when he states: “In sum, the classical position on the government and economic development did not become embedded in American statecraft until the mid-19th century.”¹⁰⁶ As I read the cases, what changes is not the basic framework but the particular problems faced at any given time. In addition, I do not think that it is correct to treat Taney’s views in *Charles River Bridge* as being consistent with the classical liberal position, given that it trivializes the concerns with the formation of certain limited monopolies that could easily advance overall welfare, including those under patent law, which Story championed.

The key point is whether we can point to any systematic change in outlook between the classical liberal views of the 19th century and the more adventurous and plastic doctrines of the 20th century. Again, it is critical to note that Hovenkamp does not address any of the 20th-century cases. But properly understood, these cases represent a vast expansion in the level of discretion that progressive theorists give to government. Here are just a few high points. First, in *Home Building & Loan Assoc. v. Blaisdell*, the Supreme Court sustained a debtor’s relief law with retroactive effect,¹⁰⁷ which is in manifest tension with a general view that the Contract Clause, at the very least, was targeted at just these events. Ironically, the Court in *Blaisdell* paid lip service to *West River Bridge*, even as the case represented a sharp departure

104. See Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 417–22 (1987).

105. See generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (criticizing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)).

106. Hovenkamp, *supra* note 1, at 22.

107. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 446–48 (1934).

from it: *full* compensation was paid in *West River Bridge*, but *no* compensation was paid in *Blaisdell*, on the ground that the statute was intended to have only a short-term effect during the current emergency.¹⁰⁸ That is an odd qualification, given that debtor relief laws are passed only in emergency times. The change in sentiment across the two periods could not be more profound.

The same can be said for other aspects of modern contract law that often use the low rational-basis standard of judicial review to insulate the state from challenges to retroactive legislation. In this context, it seems all too clear that the content-based Contract Clause analysis has given way to a low-level rational-basis test that is applied both to federal and state legislation. The only reason for this bifurcation is that the Contract Clause does not apply to the national government, but the case law under it and the Due Process Clause of the Fifth Amendment are not distinguishable.¹⁰⁹

The basic issue was set out clearly in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*¹¹⁰ Congress's legislation included abrogating explicit exit rights from a government program in order to shore up a pension plan that had underestimated liabilities and overestimated assets. The proposed cure suggested by the Pension Benefit Guaranty Corporation was to create "new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation."¹¹¹ The legislation was retroactive, so R.A. Gray suggested that the Supreme Court "resuscitate the Court's 1935 decision in *Railroad Retirement Board v. Alton R. Co.*, . . . which invalidated provisions of the Railroad Retirement Act of 1934 that required employers to finance pensions for former railroad employees."¹¹² The contrast between the pre- and post-1937 rules could not be clearer: "retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose,"¹¹³ or again, the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.¹¹⁴

108. See generally *id.*; *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848).

109. See generally *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

110. *R.A. Gray & Co.*, 467 U.S. at 717.

111. *Id.* at 723.

112. *Id.* at 733 (citing *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935)).

113. *Id.* at 730.

114. *Id.* at 729.

The scope of the constitutional protection is further narrowed by the argument that any party that is subject to extensive regulation knows that it is likely to be subject to further regulation, so the abrogation of its contract rights in the name of consumer protection again passes constitutional muster.¹¹⁵ No one should claim that the picture is only one of judicial acquiescence to legislative schemes, for there are some cases in which the Contract Clause has protected states against general state regulation.¹¹⁶ Once again, there are ups and downs both before and after the 1937 watershed. But overall there is little doubt that the drop down to rational-basis review in the post-1937 period represents a sea change that separates the classical liberal from the progressive eras.

IV. PUBLIC USE AND PUBLIC PURPOSE

The next issue I shall address is the role of the public purpose doctrine in American law. The term “public use” is a direct connection to the Fifth Amendment of the Constitution, which says “nor shall private property be taken for a public use, without just compensation.”¹¹⁷ Some state constitutions have similar limitations, in which the words “public use” are largely left undefined.¹¹⁸ The obvious cases are public uses that are run by governments or are open to the public at large. From the earliest times, it was well understood that privately owned railroads and grist mills counted as public uses, given that the parties were subject to common carrier obligations to take all comers at reasonable and nondiscriminatory prices.¹¹⁹ But even in the

115. See generally *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983).

116. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down a narrow imposition of retroactive liabilities); *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1 (1977) (finding a Contract Clause violation by weakening creditor’s security of state debt).

117. U.S. CONST. amend. V.

118. See, e.g., OHIO CONST. art. 1, § 1.19. The Ohio Constitution states:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Id. For construction, see *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006) (“We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.”). See generally ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2015).

119. For discussions, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161–83 (1985); Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61 (1986).

classical period it was not confined to those cases, but was also invoked to allow the state to order takeovers of private property that, under certain limited circumstances, was needed to overcome serious holdout problems, which, as Hovenkamp notes, were of primary concern during the 19th century.¹²⁰ Thus, in *Clark v. Nash*, a taking by one private person for another was sustained when one miner was allowed to transport water through an enlarged ditch over his neighbor's land to use it in his own mining operations.¹²¹ Justice Rufus Peckham was clearly uneasy about allowing this private taking, but did so in light of the sustained use "for the irrigation of the lands, than can any one be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the state courts."¹²² The case thus has echoes of the traditional private necessity doctrine, which allows one person to enter the land of another, so long as he pays compensation for the harm caused to the property.¹²³ Here the necessity does not arise from an immediate emergency, but from a permanent blockade position that one landowner has relative to another. And just one year after *Clark v. Nash*, in *Strickley v. Highland Boy Gold Mining Co.*, Justice Oliver Wendell Holmes followed *Clark* and sustained against public-use challenge a Utah statute that allowed for the operation of a tramline over the plaintiff's land in order to carry ore "in suspended buckets, down to the railway station, two miles distant and twelve hundred feet below."¹²⁴ These cases are nice illustrations of the reach of classical liberal theory in so far as they limit the scope of the public use doctrine to durable blockade settings where market failures are likely to be large.

It takes little imagination to see that the modern cases go far beyond this limited rule. Hovenkamp gives a brief reference to two of the public use cases in the 20th century, *Berman v. Parker*,¹²⁵ decided in 1954, and *Kelo v. City of New London*,¹²⁶ to which of course should be added *Hawaiian Housing Authority v. Midkiff*.¹²⁷ *Midkiff* represents a far broader conception of public use, largely removing it as a constraint on public action.¹²⁸ These decisions all tie in with the general progressive preference for comprehensive planning, which all too easily can go astray.¹²⁹ *Berman* involved the condemnation of a viable

120. Hovenkamp, *supra* note 1, at 136–37.

121. *Clark v. Nash*, 198 U.S. 361 (1905).

122. *Id.* at 369.

123. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 460 (Minn. 1910).

124. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 529 (1906).

125. *Berman v. Parker*, 348 U.S. 26 (1954).

126. *Kelo v. City of New London*, 545 U.S. 469 (2005).

127. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

128. *Id.* at 243–45.

129. See generally Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

department store as part of a neighborhood revitalization plan.¹³⁰ *Midkiff* was undertaken pursuant to a plan to let tenants take ownership of their own units from the powerful Bishop's Estate in an effort to change the pattern of political control in Hawaii.¹³¹ *Kelo* was an overambitious scheme for the revitalization of New London, Connecticut that fell to pieces with its excessive ambition.¹³² In his dissent in *Kelo*, Justice Thomas lamely tried to establish some continuity with earlier cases like *Clark*, which he quoted out of context, by failing to give due weight to the exceptional circumstances that led to that decision.¹³³ But the two cases could not be more disparate. In the former, there was a huge holdout problem over property that had no subjective value for its owner. In the latter, there was no holdout problem with respect to property for which its owner attached huge subjective value. No longer was public use tied to use by the public or to the alleviation of holdout problems. Now it was a free-floating doctrine that remained more conducive to mischief than sound planning. The contrast between the classical liberal and progressive interpretations of the doctrine could scarcely be starker.

The second half of the public purpose doctrine deals with the question of taxation. In dealing with this issue, the classical liberal position favors taxation chiefly to provide public goods that the market cannot provide. The power of taxation in the Constitution was crafted with just those ends in mind when it limited taxation to three objectives: the debt, the common defense, and the general welfare of the United States.¹³⁴ As I argued in *The Classical Liberal Constitution*, that last phrase did not mean anything that did not allow the government to do what it would. It only allowed the government to act when the United States as a whole benefitted, which allows for the creation of public goods, but not of transfer payments. That position was adhered to by all branches of government until the advent of the New Deal, when the entire edifice collapsed in a series of opinions that added transfer payments to the top of the list, starting with *Steward Machine Co. v. Davis*,¹³⁵ and running through *National Federation of Independent Business v. Sebelius*, which sustained the entire ObamaCare edifice on the basis of a broad reading of the taxing power that all nine Justices of the Supreme Court accepted.¹³⁶

The situation in the 19th century was quite different. One illustration should suffice to point out the contrast. Hovenkamp thus goes through the history of *Loan Ass'n. v. Topeka*,¹³⁷ where the Supreme Court invalidated a state

130. *Berman*, 348 U.S. at 31.

131. *Midkiff*, 467 U.S. at 232–33.

132. *See, e.g.*, SOMIN, *supra* note 118.

133. *See Kelo v. City of New London*, 545 U.S. 469, 516 (2005) (Thomas, J., dissenting) (quoting *Clark v. Nash*, 198 U.S. 361 (1905), without its restrictive language).

134. *See* U.S. CONST. art. I, § 8.

135. *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

136. *See generally* Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566 (2012).

137. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874).

statute that held that local governments were entitled to levy taxes for the construction of railroads and bridges.¹³⁸ Today, those would be regarded as no-brainers in dealing with the public-use issue, even though the bridge was privately owned. But Justice Miller relied on John H. Dillon, another 19th-century stalwart, and Justice Cooley to strike down the statute. There is a stark contrast between the narrow views of taxation in the 19th-century cases and the hugely expansive view of the topic adopted by all the justices in discussing the Affordable Care Act.¹³⁹ The opposition between the pre- and post-1937 cases could not be starker.

V. INVERSE CONDEMNATION AND PHYSICAL TAKINGS

Yet another issue to which Hovenkamp refers is the scope of eminent domain law. He writes, “The Fifth Amendment Eminent Domain Clause and, historically, the equivalent clauses in state constitutions provided compensation only for a ‘taking,’ which was historically interpreted to refer to outright expropriation.”¹⁴⁰ After making this statement, he contends that the critical Supreme Court decision *Pumpelly v. Green Bay Co.*¹⁴¹ marks an important break from the past insofar as it allowed compensation for those damages that followed when the defendants, as authorized by statute, raised a dam to improve the navigation along the Fox River, without making any allowance for compensation for the ensuing losses. In this diversity case, the United States Supreme Court held that the claim for compensation was valid under the Wisconsin constitution (at a time when the Takings Clause of the Fifth Amendment only bound the federal government).¹⁴²

There are two issues raised by this case. The first looks backward: Just how far did *Pumpelly* depart from earlier case law? The second looks forward: How does the discussion in *Pumpelly* relate to modern takings cases?

On the historical point, Hovenkamp treats the decision as though it marks a break with the earlier cases. But the cases he cites to support that proposition do not carry the day. The first case, *Alexander v. City of Milwaukee*,¹⁴³ he describes as “denying action where the city’s excavation caused intermittent flooding.”¹⁴⁴ In dealing with this case, Justice Miller in *Pumpelly* is content to say that it is “difficult to reconcile” that case with the current one.¹⁴⁵ But even here the issue is complicated, because the flooding involved in that case was only intermittent, not permanent, so that in later cases the conduct might be described as a tort for which the doctrine of

138. See Hovenkamp, *supra* note 1, at 28.

139. See *Sebelius*, 132 S. Ct. at 2580–81, 2643.

140. Hovenkamp, *supra* note 1, at 37.

141. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

142. See *Barron v. Mayor & City Council of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

143. *Alexander v. City of Milwaukee*, 16 Wis. 247 (1862).

144. Hovenkamp, *supra* note 1, at 38 n.204.

145. *Pumpelly*, 80 U.S. (13 Wall.) at 180.

sovereign immunity applies, and not a taking to which it does not.¹⁴⁶ The case is even more difficult because the chain of causation was more complex than ordinary. Thus the complaint stated:

[E]ver since the opening of said canal or straight cut, whenever there has been or is a high wind blowing from the eastward, the waves and waters of said lake dash in upon and along said channel, and are driven in upon and along said river, and in upon and over the plaintiff's said lots with great body, force and effect, by means whereof the said joiner's shop, together with a great amount of ship timber, stores and materials of the plaintiff, of great value, have been swept away, destroyed and lost, and said other buildings erected upon said lots have been driven from their foundation, broken, damaged and rendered insecure and unfit for use¹⁴⁷

No sensible reading can treat this as an occupation of the property so that it is possible to draw some line between the two cases, even if one thinks, as I do, that the tort and takings claims should be treated in the same fashion, and that neither should be subject to a sovereign immunity defense.¹⁴⁸

The change in the structure of the canal exposed the plaintiff's property to winds and waves that were sufficient to damage it, but that did not in any sense occupy the water in question. At this point, it is back to the vexing problem of how best to draw the line between a tort, which is subject to the doctrine of sovereign immunity, and a taking, that is not.¹⁴⁹

Hovenkamp writes that the second of the cases he discusses, *Hanson v. City Council of Lafayette*,¹⁵⁰ is similar to *Alexander*: "destruction of private buildings for road construction."¹⁵¹ But in fact the two cases are quite dissimilar: it denied compensation when the government demolished a levy built along the Mississippi River for the simple reason that the private construction of the mill was illegal.¹⁵²

146. See, e.g., *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) ("[I]t is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."); *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 126 (1922) (accepting the distinction); see also *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520–21 (2012) (demonstrating the erosion of this distinction). For my commentary on this confused line of cases, see Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589, 601–10 (2013).

147. *Alexander*, 16 Wis. at 249.

148. See EPSTEIN, *supra* note 119, at 41–47.

149. See *Alexander*, 16 Wis. at 254–55.

150. *Hanson v. City Council*, 18 La. 295 (1841).

151. Hovenkamp, *supra* note 1, at 38 n.204.

152. *Hanson*, 18 La. at 305–07.

The third case, *Canal Appraisers of New York v. People ex rel. Tibbits*,¹⁵³ Hovenkamp describes this as a case in which the court denied “compensation where river improvements made the plaintiff’s mill worthless.”¹⁵⁴ In fact, the situation was much more complicated. This complex case was subject to a division of opinion when a neighboring landowner claimed damages for an increase in the height of a public waterway that resulted in harm to his land. The decision was obviously heatedly contested because the vote at the end of the opinion showed a 13–11 split, with the bare majority rejecting the claim for compensation in the particular case. That position was urged by Senator Tracy:

The injury complained of in this case, results from a dam in the *Hudson river* below tide water, erected by the state for the sole purpose of improving the public navigation. . . . If the relator has the same title and rights to the water flowing by his island, as he has to the island itself, he doubtless has the same claim to be indemnified against whatever injuriously affects the condition of the one or the other. But I cannot conceive the nature of his property in the two to be alike, or that the right of the public to elevate the water *within* its natural channel is not different from the right to elevate it *above* its natural channel, and thereby make it overflow and affect injuriously the property of individuals, to which the public has no pretension of claim for any purpose whatever. If the effect of the efforts now making by the general government, to remove the obstructions to navigation in the Hudson river, shall be to deepen the water at some places on the shore, and to lessen its present depth in others, I cannot believe that a claim of the riparian owners for damages would be tolerated, even though they should show, as in many instances doubtless they might, that this change of the condition of the water had affected injuriously their use of the river. . . . In the present case the right of the state to the use of the element at the place *where the dam was built*, was absolute and unqualified, and if the use of it there was rightful, I cannot think that the state is liable for damages which an individual having a subordinate right to the water at another place, may have sustained in consequence of its changed condition adjacent his land. I repeat that there appears to be a manifest distinction between the right of the public in such a case to affect within its natural channel, the water adjacent the lands of individuals and the right to overflow those lands by carrying the water out of its natural channel.¹⁵⁵

153. *Canal Appraisers of N.Y. v. People ex rel. Tibbits*, 17 Wend. 571 (N.Y. 1836).

154. Hovenkamp, *supra* note 1, at 38 n.204.

155. *Canal Appraisers of N.Y.*, 17 Wend. at 628–30.

The argument thus turned on narrow grounds that did not dispute the need for compensation if the water was raised above the limits of the channel. The opposite view, taken by the Chancellor (Kent), does not explicitly address this point but states the general proposition in the form that is perfectly congenial with *Pumpelly*, and with which the majority does not disagree:

In the case under consideration, the power of the state to improve any of its waters so as to render them navigable, or to improve the navigation of those which could before be navigated to a certain extent, is not denied by the relator [private plaintiff], and indeed could not be: as the right to take private property for any public use, which the legislature, in the exercise of a sound discretion may deem expedient or necessary for the general good, is expressly recognized in the constitution itself. What the counsel for the relator have contended for in this case is, that whenever it is necessary to take the property of an individual, or to destroy or materially injure him in regard to its present or future use, for the public good, he is entitled to compensation for the damages which he may really sustain thereby.¹⁵⁶

The fuller examination of this case (which deals with a wide range of other points) shows that Hovenkamp's simple description elides the critical fact that the increase in the level of the water remained within the lawful channel, and thus was clearly distinguishable from the situation in *Pumpelly* where the water was elevated to a greater height. The point here is that *Pumpelly* did not mark an obvious departure from earlier cases. Nor, to say the least, was it the last word on this question of consequential damages. Indeed, other decisions on this question veered in different directions, sometimes allowing these damages. The more telling point is that it is difficult in closely argued cases to find strong historical trends when both sides of an issue have support during all relevant periods.

At this point, the question is why *Pumpelly* has received such extensive approval. There is little disagreement here between Hovenkamp and myself on the merits of this case, which raised two questions. The first is whether a statutory authorization of given conduct immunized it from takings liability. The second is whether the distinction between occupation and consequential damages can bear the weight. On the first question, *Pumpelly* took the view that the statutory authorization established a public use, but did not dispense with the need for compensation, which was a debate that raged at the time not only in connection with canals, but also with railroads.¹⁵⁷ It is extensively

156. *Id.* at 603-04.

157. Compare *Transp. Co. v. Chicago*, 99 U.S. 635 (1878) (refusing to allow consequential damages), with *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914) (allowing special damages for disproportionate losses). For the tort debate in England, compare *Vaughn v. Taff Vale Ry. Co.* (1860) 157 Eng. Rep. 1351, 1354 (denying compensation), with *Powell v. Fall* [1880] 5 QB

cited because it concisely states the proposition that the government cannot use clever tricks to circumvent its obligation to provide compensation when property is taken for public use. In this regard, it is useful to quote the key passage from this diversity case that dealt with a state, rather than federal, constitution, whose content was distinguishable from the federal provision only on inconsequential matters of word order:

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.¹⁵⁸

This issue continues to be a topic of interest, but for these purposes, the key point is that modern takings cases take a very different cast. In the water cases, the decisive opinion against awarding compensation view is in *United States v. Willow River Power Co.*,¹⁵⁹ yet another situation in which modifications along a navigable river raised water levels, rendering a mill thereby unusable. The type of damage was different from those in *Alexander, Canal Appraisers*, or *Pumpelly*, but the relevant issues are the same, even if the modern outcome rejected all the received 19th-century learning. More specifically, *Willow River* demonstrates that progressive era cases rested explicitly on the proposition

597 at 601 (Eng.) (allowing compensation). It is worth noting that *Richards* was written by Justice Pitney and *Powell* was written by Lord Justice Bramwell, both jurists with staunch libertarian leanings. For discussion, see Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, SUP. CT. ECON. REV. (forthcoming 2016).

158. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871).

159. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

that however rights are defined between private landowners, the paramount position of the national government means that it takes free of those restraints. Thus Justice Jackson, who served in the Roosevelt Cabinet, wrote as follows:

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.¹⁶⁰

In writing this passage, Jackson took explicit issue with a decision of Justice Pitney (the consistent libertarian) whom, as Jackson wrote, had taken the opposite position:

The *Cress* case [*United States v. Cress*, 243 U.S. 316 (1917)] is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of *Cress*.¹⁶¹

The rub is that *Cress* is in fact the correct result precisely because it links public law to private law.¹⁶² The moment public law is untethered from private law, it becomes a wild card in the hands of the judges that wipes aside everything that stands in its path, which is how the Supreme Court behaved when it insisted that the “paramount” navigation servitude under the Commerce Clause swept everything aside.¹⁶³ It is quite clear that no state can derive a navigation servitude from the federal commerce power; a state can only appeal to its own police power. But it is equally clear that all the 19th-century courts, both state and federal, understood well that simply declaring the dominance of the state interest did not work. In this sense, the federal navigation servitude cases in the 20th century mark a sea change from the closely fought struggles of the 19th century, of which *Pumpelly* is the most prominent exemplar.

160. *Id.* at 510.

161. *Id.* at 506.

162. See Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in *PROPERTY IN LAND AND OTHER RESOURCES* 317, 345-47 (Daniel H. Cole & Elinor Ostrom eds., 2012).

163. See, e.g., *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

The difference in world views, moreover, was not confined to the navigation servitude, but extended far beyond it. When it comes to the definition of property, there is an eagerness to depart from the common-law definitions that stress the combination of the exclusive rights of possession, use and disposition, and instead stress the right of exclusion above all else.¹⁶⁴ “In this case, we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”¹⁶⁵ That sentiment is fine as far as it goes, but it does not go far enough. Side by side with cases like *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁶⁶ lie the countless cases that insist that regulatory takings, those which leave a party in possession of his property, are subject to the same weak rational-basis test from *Penn Central Transportation Co. v. New York City*¹⁶⁷ that dominates every other modern area of property rights. It is no accident that *Penn Central* relies explicitly on *Willow River* as one support for weakly protecting property rights.¹⁶⁸ Thus *Penn Central* fuses the navigation servitude cases with *Village of Euclid v. Ambler Realty Co.*,¹⁶⁹ which is now read to stand for the proposition that land-use regulations “which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking[.]’”¹⁷⁰

164. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

165. *Id.* at 179–80 (footnote omitted). For the most influential defense of this position, see Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

166. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a forced cable installation on a landlord’s property, done in accordance with a New York statute that authorized installations without the landowner’s permission, was a taking because it destroyed the owner’s exclusion rights over that portion of her property, even though the invasion was trivial).

167. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

168. *Id.* at 124–25. *Penn Central* stated:

[T]his Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values [These include] the decisions in which this Court has dismissed “taking” challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes. See, e.g., *United States v. Willow River Power Co.*, 324 [U.S.] 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 [U.S.] 53 (1913) (no property interest can exist in navigable waters)

Id.

169. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

170. *Penn Central*, 438 U.S. at 131.

In addition to a weak set of substantive rules for all cases of economic regulation, the recent cases have on procedural grounds made it exceedingly difficult to bring constitutional challenges against regulatory takings in both federal and state courts. The key decision of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*¹⁷¹ requires first that any applicant exhaust his administrative remedies before mounting any judicial challenge. And it further requires that no property owner can go into federal court unless he has exhausted state-court remedies, which may in the end subject him to a defense of res judicata if the state-court challenge is unsuccessful.¹⁷² The hostility to strategic government maneuvers that was so evident in *Pumpelly* has been replaced by a very different attitude on these key questions. Once again, Hovenkamp passes these developments by in relative silence given his preoccupation with the ebbs and flows of 19th-century jurisdiction, none of which come close to the transformation from the earlier classical liberal Constitution to the modern progressive ones.

VI. CONCLUSION

There is little need for me to belabor the points that I have tried to develop here. But it is important to note that Hovenkamp and I look at legal materials through a different lens. He starts as a historian and rejoices in the ebbs and flows of doctrine and cases and politics. I start as a legal theorist, determined to isolate the common features that organize how legal systems operate, and why they are capable of success. The only tradition that has both the flexibility and durability to structure society properly is one of classical liberal origins. Yet it is the only system that historians and modern jurists are anxious to reject in order to give greater scope to their own progressive vision of the legal order, even though it is a far cry from John Locke's social contract theory, which started with individual rights, and then, via the social contract, sought to develop a theory of government that would best preserve that system of rights from a system of centralized control that was strong enough to preserve order, but complex enough to avoid tyranny. Truth is, most of these systems tend to fail. But sometimes a rare generation, working under near ideal circumstances, uses political statecraft to get closer to the correct set of rights and institutional structures to make matters go. That was the case with our own Constitution, warts and all. What is so tragic is that the best life raft has been cast aside for a mess of porridge, which leaves us beset with problems at home and abroad. The only long-term solution is a systematic embrace of the principles of *The Classical Liberal Constitution* that have everywhere fallen into desuetude. We do not need to "Invent the Classical Constitution." We need to rediscover "The Classical Liberal Constitution."

171. *Williamson Cty. Reg'l Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

172. *See San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323 (2005).