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FLETCHER v. PECK: THE NATURE OF THE CONTRACT CLAUSE*

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While one controversy, *United States v. Peters*,[1] was dragging to its wretched conclusion in the adoption of futile resolutions, rising to the Court was the well-known case of *Fletcher v. Peck*,[2] in which for the first time a state statute would expressly be held invalid as conflicting with the Federal Constitution. It was the circumstances surrounding the decision in *Peters*, however, that afforded the Court the opportunity to make *Fletcher* a landmark case.

Initially a brief recapitulation of the facts and circumstances of *Peters* is helpful to an understanding of the foundation upon which the *Fletcher* decision was built. In 1778, Gideon Olmstead, a Revolutionary War sea captain, had sued in a federal court in Pennsylvania seeking enforcement of a judgment of the former federal court of appeals established by the Continental Congress awarding him prize proceeds for the seizure of the British sloop Active.[3] Pennsylvania had

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The following article is an adaptation of one chapter of a book in preparation by Professor Lynch. The book is an examination of the United States Constitution and the growing power of the Supreme Court. More specifically, the book examines those factors which the Supreme Court takes into consideration in construing the Constitution. In many cases, these factors which are unwritten are more important than the written text itself. As the article demonstrates, the landmark case of Fletcher v. Peck *represents one instance in which the Court relied on unwritten principles of natural law to support its construction. In so doing, the Constitution was broadened and the power of the Supreme Court expanded.*

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[1] 9 U.S. (5 Cranch) 115 (1809).

[2] 10 U.S. (6 Cranch) 87 (1810).

[3] 9 U.S. (5 Cranch) at 115. Olmstead and three other Americans impressed into service on the Active had seized control of the sloop off the coast of New Jersey in 1778 and sailed for the shore. Within sight of Little Egg Harbor they were overtaken by the sloop Convention, fitted out by the Commonwealth of Pennsylvania. The master of the Convention, an assisting privateer, and Olmstead along with his group filed rival claims in the Pennsylvania Court of Admiralty.

resisted the earlier judgment and the prize proceeds had been paid over not to Olmstead but to the state treasurer.[4] More than a decade passed before Olmstead sought redress in the federal courts created under the new Constitution.[5] Early in 1803, Judge Peters, who had presided over the trial of the case, entered judgment for Olmstead.[6] The state reaction was intense,[7] and 1803 being high season for the impeachment of judges, particularly in Pennsylvania,[8] the judgment was not executed.[9] Olmstead then applied to the Supreme Court for mandamus directing Judge Peters to issue the writ of execution. His

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On November 4, 1778, a jury returned a verdict, awarding one-quarter of the prize to the Olmstead group, and three-quarters to the others. Olmstead thereafter took an appeal from the judgment on the verdict to the federal court of appeals, which decided that the entire award should be paid to his group. *Id.* at 121.

[4] *Id.* at 123. The Pennsylvania Court of Admiralty, while admitting the jurisdiction of the federal court of appeals to set aside the decree of a judge of its court, challenged its jurisdiction to set aside a jury verdict. Since in its judgment the verdict of November 4, 1778 still stood, it ordered the sloop sold and the proceeds paid into court. Eventually, pursuant to a resolution of the state legislature, the court paid over the proceeds to the then treasurer of the state, David Rittenhouse, in exchange for an indemnity bond. *Id.* at 120-24.

[5] Part of this time was expended in fruitless litigation in the common-law courts of Pennsylvania in an action to compel the payment of the proceeds. Eventually, the Supreme Court of Pennsylvania held that a common-law court did not have jurisdiction over a dispute in admiralty. Ross v. Rittenhouse, 1 Yeates 443 (Pa. 1795).

[6] Olmstead v. The Active, 18 F. Cas. 680 (C.C.D. Pa. 1803) (No. 10,503a).

[7] The Governor sent a prompt message of protest to the general assembly denouncing the judgment as void and requesting its advice and direction. The general assembly in turn denounced the judgment as void and by statute required the governor to protect the state's interest against the issuance of process from the federal court. This was in April 1803, just one month after the Supreme Court's decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See* G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER 324-26 (1981).

[8] In January 1803, Alexander Addison, a Federalist state judge sitting in the western part of the state, had been convicted by the Pennsylvania Senate in an impeachment proceeding and removed from office. A few days later a Philadelphia merchant sentenced to 30 days in jail for contempt of the state supreme court submitted a memorial to the state legislature. Protesting against what he charged to be the arbitrary conduct of the chief justice and two of his associates as alarming to the liberties of the people, he sought an investigation leading to impeachment. Aurora, the leading Republican paper, took up the cause. *See generally* R. ELLIS, THE JEFFERSONIAN CRISIS 164-67 (1971).

[9] *Peters*, 9 U.S. (5 Cranch) at 116-17. In his official response to Olmstead's petition for mandamus in 1809, Judge Peters placed his failure to issue a compulsory process on "prudential" grounds, in the desire "to avoid embroiling" the United States and Pennsylvania, and in the hope that a subsequent state legislature would repeal the legislation of 1803 requiring the governor to protect state property. *Id.*

Significantly, this was not the only case involving a confrontation between the State of Pennsylvania and the federal judiciary. There already had been one other federal case, Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805), entering a judgment concerning land titles adverse to state claims. A later case involving conflicting governmental liens festered for years before its final dismissal by the United States Supreme Court in 1819. *See* Miller v. Nicholls, 17 U.S. (4 Wheat.) 311 (1819). For a full discussion of the various circumstances leading to these confrontations, sometimes known as the "Pennsylvania Rebellion," see G. HASKINS & H. JOHNSON, *supra* note 7, at 317, 335.

application was granted and the writ issued.[10] When the federal marshal prepared to execute, however, the Governor of Pennsylvania raised the state militia and ordered them to intercept the marshal. The state legislature voted its approval.[11]

The underlying political circumstances under which *Peters* was resolved serves as further background to the decision in *Fletcher*. The National Administration in Washington was Republican-Democrat as was the state administration in Pennsylvania. For this reason, the Federalist newspapers derided the Republicans in Pennsylvania for setting aside an order of a federal judge, while at the same time criticizing Federalists in New England for their lack of support of the federal embargo laws.[12] To save political embarrassment and to prevent the erosion of power in its own government, the National Administration proceeded to enforce the writ.[13] A federal grand jury indicted the general of the state militia for interfering with federal powers.[14] Alarmed at this turn of events, the Governor of Pennsylvania wrote Madison, who had just entered his Presidency, asking him to suppress the execution of Judge Peter's writ.[15] Madison tersely replied: "[T]he Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it."[16]

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[10] *Peters*, 9 U.S. (5 Cranch) at 115. Earlier in Penhallow v. Doane's Adm'rs., 3 U.S. (3 Dallas) 54 (1795), the Court had in a similar case affirmed the judgment of a federal district court, entered on a prior judgment of the old court of appeals established by the Congress under the Articles of Confederation, in a prize dispute in disregard of a state court judgment. The prevailing party in the state proceeding had challenged the jurisdiction of both the old court of appeals and the new federal district court. The United States Supreme Court rejected these arguments and affirmed the judgment below. Unlike the case of *Peters*, New Hampshire was not involved in a proprietary capacity. Nevertheless, it considered its sovereignty sufficiently impugned so as to send a formal remonstrance to the Congress. 1 AMERICAN STATE PAPERS MISCELLANEOUS 124 (1834). The remonstrance was referred to a committee, headed by James Madison. Eventually the committee reported that the matter was wholly judicial in nature and therefore inappropriate for Congress. *Id.* at 123.

[11] G. HASKINS & H. JOHNSON, *supra* note 7, at 327-29.

[12] 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 377-78 (1937). In turn, Federalist support of the "Pennsylvania Rebellion" moved Aurora to come out in support of the federal courts. *Id.* at 379.

[13] The Judiciary Act of 1789 authorized the federal marshal to command all necessary assistance in the execution of his duty to enforce judgments of the federal district courts. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87. In 1795, Congress further provided that whenever the execution of the laws of the United States shall be obstructed by a combination too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers invested in the marshals, the President was authorized to call forth the state militia to cause the laws to be executed. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424.

[14] G. HASKINS & H. JOHNSON, *supra* note 7, at 329-30.

[15] 2 ANNALS OF CONGRESS 2267 (J. Gales ed. 1809).

[16] *Id.* at 2269.

Pennsylvania capitulated and removed its troops. Its legislature appropriated the money to satisfy the federal judgment. The general was tried, convicted, and sentenced for obstruction of federal justice. (Eventually he was pardoned.) And Olmstead, at age 84, was finally paid.[17] Subsequently, the Pennsylvania Legislature passed and circulated among the other states a series of resolutions proposing an amendment to the Constitution, which would establish a special tribunal to resolve disputes between the federal and state governments.[18] Federalist New England lent its support but all other states disapproved. Among them was Virginia, loyal to Jefferson and Madison, and unaware that shortly it would, in the wake of *Martin v. Hunter's Lessee*,[19] be the next state to raise a serious challenge to the authority of the Court and of the United States.

Thus by 1809, years before the decision in *Martin v. Hunter's Lessee*, the resolution of the controversy in *Peters* had completed the network of national power. The national courts had in the eight years of Jefferson's Administration supported the powers of the national political branches.[20] In turn, the national political branches had supported the courts in the exercise of their powers over the states despite determined state opposition. Moreover, Madison, the most prominent surviving participant in the Constitutional Convention, was then President. At the Convention he had proposed and strenuously advocated the principle of a federal power to negative state laws in conflict with the Constitution, and had unsuccessfully supported the adoption of a proposal to place this power expressly in the hands of Congress.[21]

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[17] G. HASKINS & H. JOHNSON, *supra* note 7, at 331.

[18] 1 C. WARREN, *supra* note 12, at 388-89.

[19] 14 U.S. (1 Wheat.) 304 (1816).

[20] In United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805), the Court, responding to an argument advanced by the Jefferson Administration, upheld the constitutionality of a federal statute conferring a preference upon the United States in cases of bankruptcy. Counsel had argued to sustain the provision under the "necessary and proper" clause. The Court followed this argument setting forth in brief the doctrine of implied powers it was to develop at length in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). The constitutionality of the Embargo Act of 1808 which severely restricted international trade and coastal shipping was also upheld by a Federalist federal judge sitting in Massachusetts in the noted case of United States v. The William, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700). For a full discussion of this and related cases, see G. HASKINS & H. JOHNSON, *supra* note 7, at 292-311; 1 C. WARREN, *supra* note 12, at 316-65. It is true that some of the Court's decisions adversely affected the administration of the Embargo Laws, notably Justice Johnson's decision in Gilchrist v. Collector of Charleston, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5,420), in which he ordered the Collector, in administering the law, to ignore the orders of President Jefferson as contrary to the statutory provision conferring upon him a discretionary power. But these decisions, while an irritant to the Administration, left intact its legislative policies.

[21] Two months before the Convention began, Madison, in a letter to Jefferson dated March 19, 1787, referred to the power of the Federal Government to invalidate state laws as one of the foundations of the new system:

When the proposal had failed, he wrote to Jefferson, following the Convention, arguing at length its necessity, mourning its loss, and comforting himself with the existence of the power in the federal

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> Over and above the positive power of regulating trade and sundry other matters in which uniformity is proper, to arm the federal head with a negative *in all cases whatsoever* on the local Legislatures. Without this defensive power, experience and reflection have satisfied me that, however ample the federal powers may be made, or however clearly their boundaries may be delineated on paper, they will be easily and continually baffled by the Legislative sovereignties of the States. The effects of this provision would be not only to guard the national rights and interests against invasion, but also to restrain the States from thwarting and molesting each other; and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority. In order to render the exercise of such a negative prerogative convenient, an emanation of it must be vested in some set of men within the several States, so far as to enable them to give a temporary sanction to laws of immediate necessity.

Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 326-27 (G. Hunt ed. 1901). See also 2 THE WRITINGS OF JAMES MADISON 338-39, 346-47 (G. Hunt ed. 1901), for correspondence to similar effect.

On May 29, 1787, Governor Randolph, as a delegate to the Convention, opened the discussions concerning the substance of a new Constitution by proposing the Virginia plan. The sixth resolution of the plan provided that the new Congress be empowered "to negative all laws passed by the several States, contravening in the opinion of National Legislature, the Articles of Union." 2 THE PAPERS OF JAMES MADISON 728-32 (H. Gilpin ed. 1842) [hereinafter cited as PAPERS]; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 21 (M. Farrand ed. 1911) [hereinafter cited as FEDERAL CONVENTION]. On May 31st, the Convention initially approved this resolution. 1 FEDERAL CONVENTION, *supra*, at 47; 2 PAPERS, *supra*, at 761. When on June 8th this clause was reconsidered, Madison supported a motion authorizing the National Legislature to negative all laws which they judged to be improper. He regarded "an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system." 1 FEDERAL CONVENTION, *supra*, at 164; 2 PAPERS, *supra*, at 821. He concluded his remarks: "This prerogative of the General Government is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system." 1 FEDERAL CONVENTION, *supra*, at 164-65; 2 PAPERS, *supra*, at 822-23. The motion to confer upon the Congress such an indefinite power was defeated that day. 1 FEDERAL CONVENTION, *supra*, at 162-63, 68; 2 PAPERS, *supra*, at 827-28.

When on July 17, the original proposal was again reconsidered, Madison renewed his support. 1 FEDERAL CONVENTION, *supra*, at 21-22, 27-28; 2 PAPERS, *supra*, at 979. Again it was defeated. 2 FEDERAL CONVENTION, *supra*, at 27-28; 2 PAPERS, *supra*, at 1116-19. But when on August 23, Pinckney again moved to vest in Congress a power to negative state laws, Madison sided with a motion to commit. 2 FEDERAL CONVENTION, *supra*, at 390; 3 PAPERS, *supra*, at 1409. Roger Sherman of Connecticut "thought it unnecessary; the laws of the General Government being Supreme and paramount to the State laws according to the plan, as it now stands." 2 FEDERAL CONVENTION, *supra*, at 390; 3 PAPERS, *supra*, at 1410. Madison agreed. "He had been from the beginning a friend to the principle; but thought the modification might be made better." 2 FEDERAL CONVENTION, *supra*, at 390; 3 PAPERS, *supra*, at 1410. Although the motion to recommit was defeated by a narrow margin, Pinckney withdrew his motion as unpassable. 2 FEDERAL CONVENTION, *supra*, at 391-92; 3 PAPERS, *supra*, at 1409-12. What had changed Madison's mind was the adoption of the supremacy clause, article VI, and the practical sense that this was the best that could be had.

On September 12th, in response to an inquiry concerning the redress for a state law imposing duties beyond those permitted by the Constitution, Madison responded:

> There will be the same security as in other cases. The jurisdiction of the supreme Court must be the source of redress. So far only had provision been made by the plan

judiciary.[22] Was it a coincidence that it was during his Administration the Court assumed in *Fletcher v. Peck* the power for which he so strenuously contended?

There were other circumstances implicating Madison as a moving force behind the Court's easy assumption of a judicial power to negative a state law. *Fletcher* involved the celebrated Yazoo controversy. Early in 1795, a Georgia Legislature, bribe-induced, had deeded thirty-five million acres of land in its western territories, from which were later formed the present day states of Mississippi and Alabama, to groups of land speculators for a low consideration.[23] Almost immediately, the sale had become a political issue. A group of enterprising politicians, campaigning for rescission of the deed of sale, had swept into power in the ensuing election.[24] As the new legislature proceeded to adopt a rescinding statute, one of the bribing land companies had proceeded to peddle its title in a third of the lands to purchasers in New England.[25] These New Englanders subsequently claimed title as bona fide purchasers; Georgia claimed title by virtue of rescission.[26] The consequent cloud on title discouraged settlement, tied up investment money, infuriated everyone, and satisfied no one.

Thereafter, pursuant to its policy of acquiring western lands, the United States took from Georgia a deed to its interest in the entire territory. Negotiations to this end, begun in Washington's Administra-

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> agst. injurious acts of the States. His own opinion was, that this was insufficient—A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.

2 FEDERAL CONVENTION, *supra*, at 589; 3 PAPERS, *supra*, at 1567. No one objected to this statement.

[22] *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 26-27 (G. Hunt ed. 1901). Jefferson did not agree. In an earlier letter to Madison dated June 20, 1787, Jefferson rejected the idea of a power in Congress to negative state laws inconsistent with the Federal Constitution as a remedy incommensurate with the need. Instead, he suggested a recourse to the federal judiciary:

> Would not an appeal from the state judicatures to a federal court, in all cases where the act of Confederation controuled the question, be as effectual a remedy, exactly commensurate to the defect. A British creditor, e.g., sues for his debt in Virginia; the defendant pleads an act of the state excluding him from their courts; the plaintiff urges the Constitution and the treaty made under that, as controlling the state law; the judges are weak enough to decide according to the views of their legislature. An appeal to a federal court sets all to rights.

Letter from Thomas Jefferson to James Madison (June 20, 1787), *reprinted in* THE PAPERS OF THOMAS JEFFERSON 480-81 (J. Boyd ed. 1955). Jefferson, it will be noted, anticipated the very situation and result in Martin v. Hunter's Lessee thirty years before the event. By that time of course he had changed his position.

[23] *See* C. P. MAGRATH, YAZOO 1-7 (1966). For details of the Yazoo controversy, see generally C. H. Haskins, *The Yazoo Land Companies*, in 5 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 395 (1891).

[24] C.P. MAGRATH, *supra* note 23, at 7-12.

[25] *Id.* at 15.

[26] *Id.* at 16-17.

tion, were completed under Jefferson in 1802. Under the terms of the purchase, one-tenth of the lands were reserved for the purpose of satisfying other claimants.[27] After he had taken office in 1801, Jefferson appointed three of his cabinet officers as commissioners to investigate these claims, asserted mostly by New Englanders. Numbered among the claimants was his own Postmaster General, Gideon Granger.[28] Numbered among the commissioners was his Secretary of State, James Madison.[29] The satisfactory settlement of these claims became a matter of top priority on the Administration's political agenda.[30] A favorable resolution would erode Federalist support in New England and win that section for Jefferson in 1804. It would secure northern support for Madison in 1808 and thereafter.[31] Georgia

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[27] *Id.* at 351.

[28] *Id.* at 38. Granger was reported to have owned 160,000 acres. *Id.*

[29] *Id.* The other two commissioners were Albert Gallatin, Secretary of the Treasury, and Levi Lincoln, Attorney General.

[30] *Id.* at 35.

[31] The strategy was cogently explained in a letter of March 27, 1804 from Postmaster General Granger to New York's DeWitt Clinton. (Then and until very recently, the position of Postmaster General with its vast command of federal patronage was reserved to one endowed with special political instincts of organization.)

> The political balance of your state is to be decided by western counties who are principally Yankees, and who if I mistake not will go with New England whenever her citizens are agreed among themselves. And if measures less violent & more congenial with the principles of the government than some which have been proposed in Congress are not pursued I do not hesitate to say three years will not pass away before the six eastern states will be united and they will take with them New Jersey. When this is done they will want but *four* in the Senate & fourteen in the House to form a majority. Indeed there is no doubt all things considered that the strength of the nation this day is East of the Delaware. In addition to this we are to take into consideration the new relations of things west of the Mountains. Before the late Treaty [here he refers to the Louisiana Purchase] the great weight of the western people was safety, now it is prosperity.—When they look abroad to the various states in the Union, they must perceive that they cannot derive any aid from the Atlantic States South of the Susquehannah. This sentiment will grow and rest assured the period is not remote when a strong political union will be formed between the states east of the Delaware and west of the mountains. It is founded in nature. It cannot be successfully resisted.—It is owing to these considerations that I have such extreme anxiety on the subject of a junction.—between the Eastern people.—Nor do I hesitate to say, tho I may be in error when that Junction takes place the foundation is laid to produce a new state of politics.

Letter from Gideon Granger to DeWitt Clinton (Mar. 27, 1804), *reprinted in* R. ELLIS, *supra* note 8, at 89-90.

On the settlement of Yazoo, Granger presumably received his financial reward. His political career, however, was adversely affected because of his connection to the Yazoo incident. For upon seeking appointment to a seat on the Court, vacated on the death of Justice Cushing in 1810, as reward for his political exertions on behalf of the Administration, Granger was rebuffed. This induced Jefferson to write to Madison on his behalf.

> Madison, at first gently turning this aside, replied to Jefferson on October 19, 1810:
> Granger is working hard for it. His talents are as you state, a strong recommendation; but it is unfortunate that the only legal evidence of them known to the public,

and the South, however, under the leadership of Congressman Randolph of Virginia, killed this arrangement when it was first proposed in 1804 and many times thereafter. Upon Madison's accession in 1809, it was still hanging fire.[32]

Failing victory in Congress, the New England pressure group, like later pressure groups, decided to try for victory in the federal courts based on constitutional grounds. An action was laid in the federal court in Massachusetts based on the parties' diversity of citizenship. Fletcher, under contract to purchase certain Yazoo lands, sought rescission of the contract on the ground that Peck could not convey good title because the lands were part of the original grant subsequently voided by the Georgia legislation of 1796. Peck's defense was that he had bought the property for a valuable consideration without notice of the bribe. Therefore, under the doctrine of bona fide purchaser, his title was good and unaffected by the rescinding Georgia statute. The sufficiency of this plea was challenged and, not unexpectedly, in a court sitting in Massachusetts and sensitive to the strong Massachusetts interest in the result, upheld.[33] Fletcher then took his case to the Supreme Court. In support of the judgment below, Peck argued the constitutional invalidity of the 1796 statute as: (1) inherently beyond the power of the legislature, rescission being a judicial function not legislative, and (2) impairing the obligation of contract.[34] "A grant," Peck's counsel argued, "is a contract executed and it creates an implied executory contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant."[35]

In passing on the statute's invalidity, the Court had none of the difficulties it would later experience in *Martin v. Hunter's Lessee.* First, since *Fletcher* involved an appeal from a federal rather than a state court, there was no problem concerning the lower court's effectuating its mandate. Second, *Fletcher* involved the invalidity of a statute of a state other than that in which the trial was laid. Consequently, there would be no problem of home court disapproval. In-

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displays his Yazooism; and on this as well as some other accounts, the more particularly offensive to the Southern half of the Nation.

8 THE WRITINGS OF JAMES MADISON, *supra* note 21, at 111.

Then on December 7, 1810, Madison more firmly wrote to Jefferson as follows: "Granger has stirred up recommendations through the Eastern States. The means by which this has been done are easily conjectured, and outweigh the recommendations themselves. The soundest Republicans of [New] England are working hard against him as infected with Yazooism, and intrigue . . . ." *Id.* at 110 n.1.

[32] C.P. MAGRATH, *supra* note 23, at 39-49.

[33] *Fletcher*, 10 U.S. (6 Cranch) at 87-114.

[34] *Id.* at 123.

[35] *Id.*

deed, as has already been suggested, the home state would highly approve. Third, unlike the later situation in *Cohens v. Virginia*,[36] the state whose statute was at issue was not a party and since it had already conveyed its rights to the lands in question to the United States, its interest and authority were only abstractly implicated. Finally, the controversy appears to have been feigned. Justice Johnson so concluded in his concurring opinion.[37] The Court itself was so convinced of it that it initially was reluctant even to decide the case.[38] Inevitably, the friendly nature of the case would account for the lack of forceful argument. Luther Martin, counsel for Fletcher, who should have defended the Georgia Legislature's repeal, didn't. He neither addressed the contract question nor the competency of the legislature to rescind[39] and so careless was he in his argument, that showing up drunk, he forced the Court into an early adjournment.[40]

All of these factors made it easier for the Court to act. Moreover, Madison, who philosophically believed in the federal power to negative state statutes conflicting with the Federal Constitution, and had already provided strong governmental support to a judgment of the federal judiciary over the determined opposition of a state government, and had politically worked for New England interests in Yazoo in the past and would do so in the future, was now President of the United States. Given these facts, *Fletcher v. Peck* was a real opportunity for the Court to mark the constitutional landscape.

The Court was careful, however, in placing its markers. *Fletcher* is often cited as the first case in which the Court, exercising its power of judicial review, held a statute invalid for conflicting with a provision of the Federal Constitution.[41] There was, however, no specific provision in the Constitution conferring such power upon the Court. Yet, unlike the case of *Marbury v. Madison*,[42] where again in the absence of a specific provision the Court had faced the question, whether it had the power to invalidate a federal statute, had argued and decided that it had, here the Court assumed the power without

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[36] 19 U.S. (6 Wheat.) 264 (1821).

[37] *Fletcher*, 10 U.S. (6 Cranch) at 147-48 (Johnson, J., concurring).

[38] John Quincy Adams reported in his diary on March 7, 1809 that "[i]n the case of Fletcher and Peck . . . [the Chief Justice] mentioned to Mr. Cranch [the Court Reporter], and Judge Livingston had done the same to me on Saturday night at the [Madison inaugural] ball, the reluctance of the Court to decide the case at all, as it appeared manifestly made up for the purpose of getting the Court's judgment upon all the points." 1 MEMOIRS OF JOHN QUINCY ADAMS 546 (C. Adams ed. 1874).

[39] For the Reporter's summary of Martin's argument, see *Fletcher*, 10 U.S. (6 Cranch) at 124-25.

[40] C.P. MAGRATH, *supra* note 23, at 68-69.

[41] *See* 1 C. WARREN, *supra* note 12, at 392.

[42] 5 U.S. (1 Cranch) 137 (1806).

question and proceeded at once to a discussion of the relevant considerations:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability with each other.[43]

The ground had been covered. What the framers had not specifically provided—a power in the federal judiciary to invalidate state laws—had been stated as a matter of course, as though in passing. Of course it was easily stated here, because, unlike the situation to come in *Martin v. Hunter's Lessee*, this case did not involve a judgment of a court of the state whose law was being invalidated. Furthermore, since the case was probably collusive and brought for just that purpose, the parties would not object.

There were additional considerations which contributed to the Court's analysis of the issue. The elaboration of a constitutional arrangement in the absence of a specific provision is always difficult. It requires a recourse to unwritten principle, purpose, or policy and a skillful development of an argument so that the unwritten must necessarily shape and control the meaning of the text.[44] In *Marbury* this was undertaken so that the Court could extricate itself from a consti-

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[43] *Fletcher*, 10 U.S. (6 Cranch) at 128.

[44] Hamilton in the Federalist Papers 80 had already developed the argument:

> [T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union and others with the principles of good government. The imposition of duties on imported articles and the emission of paper money are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former and I presume will be most agreeable to the States.

THE FEDERALIST No. 80, at 475-76 (A. Hamilton) (C. Rossiter ed. 1961).

tutional confrontation with the Senate and President Jefferson, avoid deciding the merits, and at the same time save face with a flourish of constitutional power.[45] In *Fletcher*, such an exercise was unnecessary. President Madison had advocated the Court's power and the parties desired its exercise. Moreover, in *Marbury*, the exercise of judicial review after the elaborate justification of its existence was simple. The conflict between statute and written Constitution appeared manifest. A federal statute had seemingly conferred upon the Court a power of original jurisdiction for which the Constitution had not provided.[46] Conversely, the conflict in *Fletcher* between statute and Constitution was not so manifest. To establish this conflict, the Court would have to develop a second elaborate argument involving unwritten principles of natural law, policy, and the constitutional text of the contract clause. Elaboration upon elaboration would have inevitably weakened the case. This last consideration may have led the Court to doubt whether it should decide at all this unfriendly controversy and once decided, led Marshall, with the art that conceals art, to assume and assert in passing that it had the power to decide.

In what respect had the Georgia legislation conflicted with the Constitution? Had the statute, as argued, impaired the obligation of contract and thereby violated the contract clause? Justice Johnson did not think so. That a grant was a contract, as Blackstone had said, he considered unobjectionable. "But," he continued, "the difficulty arises with the word 'obligation' which certainly imports an existing moral or physical necessity. Now, a grant of conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract . . . ."[47]

The Constitution, therefore, in protecting the "obligation" intended only to protect executory, not executed, contracts. Nevertheless, Johnson held the statute invalid on an alternate ground. "[A] state does not possess the power of revoking its own grants . . . on a

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[45] *Marbury* presented the Court with a dilemma. If it should decide the case on the merits in favor of the Marbury group, it would be unable to enforce the remedy they sought. Madison, as Secretary of State, would ignore the Court's order directing him to deliver their certificates of office. Jefferson and the Senate would support Madison. Thus, the order would be unenforced and the Court would lose face. On the other hand, if it should decide the case on the merits against the Marbury group, it would be seen by friend and foe alike as yielding to Republican pressures. Again the Court would lose face. Only escape via the jurisdictional route saved face. And even then it would not be sufficient merely to construe the statute as not conferring upon the Court the jurisdiction Marbury had invoked. Properly to save face, the Court would have to invoke and justify the power of invalidation. If in defeat, it could flourish its most awesome power, the Court would appear a threatening institution.

[46] *See Marbury*, 5 U.S. (1 Cranch) at 173-75.

[47] *Fletcher*, 10 U.S. (6 Cranch) at 144-45 (Johnson, J., concurring).

general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."[48] In short, he would void the grant, based on principles of natural law. The general principle in question was that once a government, like any individual, conveyed its interest in property, it lost control of it. The property became vested in the other. The statute of rescission had disturbed vested property rights.

Naturally, if that word may be used in this context, such reasoning would have involved a more inclusive and therefore, more serious restraint on the power of a state legislature than would a broader construction of the contract clause to include executed as well as executory contracts. But where in the Federal Constitution was this provision to be found? And if not written, how would the provision be binding? Wasn't this the message of *Marbury*?

Marshall in delivering the opinion for the Court was too shrewd to follow Johnson all the way down his road; at the same time he was also too shrewd not to follow him part of the way. The Chief Justice first considered the statute's unnaturality. The lands which the state had conveyed, he wrote, had vested absolutely in the original grantees who in turn had conveyed title for a valuable consideration to innocent purchasers. Yet a later Georgia Legislature would involve the innocent in the fate of the original parties. He continued: "[F]or a party [Georgia] to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."[49]

If the Georgia Legislature as agents to the Georgia people were unfaithful as charged, nevertheless the principals, Chief Justice Marshall reasoned, could only act through their agents. Consequently, the acts of the first Georgia Legislature must be considered the acts of the Georgia people. If under state law, the Georgia Legislature was empowered to judge the legitimacy of these property rights, "yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded."[50]

It seemed "equitable", therefore, that the decision of the legislature should have been "regulated by those rules which would have regulated the decision of a judicial tribunal."[51] Since the question was one of title, it should have been guided by the doctrine of the bona

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[48] *Id.* at 143 (Johnson, J., concurring).
[49] *Id.* at 132.
[50] *Id.* at 133.
[51] *Id.*

fide purchaser. Else "[a]ll titles would be insecure, and the intercourse between man and man would be very seriously obstructed."[52] The conclusion was clear then that if "the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone."[53] If the legislature had the power to do this, it had the power to divest any individual of his land. The power was then not only unjust and unnatural, it was dangerous.[54]

Thus far Chief Justice Marshall followed the road Justice Johnson had traveled. But Marshall, remembering, as he would later say, that it was a Constitution he was propounding, now turned and walked down a different road. Finding it necessary to connect the argument based on equity and property with the one based on the constitutional text of the contract clause, he abruptly switched to the contract theme—a conveyance was a contract, and repeating, conveyances once made cannot be unmade. Then, introducing the new argument, he said:

> When, then, a law is in its nature a contract, when absolute rights are vested under that contract, a repeal of the laws cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.[55]

Before proceeding directly to a constitutional argument, however, Marshall further prepared his ground. Once again, stirring the anxieties of his readers, he appealed to their need for protection by invoking a principle of natural law: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation."[56]

In other words, to use the familiar American expression, there ought to be a law against the government's taking an honest man's property without just compensation. It isn't right. Having thus stirred his readers to the desire for a law limiting the Georgia legislative power, Marshall quickly proceeded to find it.

First, he briefly considered the argument advanced by Peck's counsel based on the separation of governmental powers, that the Act

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[52] *Id.* at 133-34.
[53] *Id.* at 134.
[54] *Id.*
[55] *Id.* at 135.
[56] *Id.*

in question, transferring the property of an individual to the people, was not within the province of the legislature inasmuch as it did not constitute the prescription of a general governmental rule. The argument, Marshall stated, was "well worthy of serious reflection."[57] The validity of the statute "might well be doubted, were Georgia a simple sovereign power."[58] This argument, however, ultimately suffered from the same defect as Johnson's argument. It had no constitutional textual connection. Had the Georgia Legislature assumed a function essentially judicial in nature, a viable argument would exist under the Georgia Constitution, not the Federal. Marshall adroitly blended this argument into the next, indicating that the statute offended the Federal Constitution's contract clause. Covering them both with emotional references to "empire," the "American Union" and "supremacy," Marshal wrote:

> The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none can claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.[59]

Then only after having thoroughly saturated the ground first with his argument from natural justice and the equitable principle securing the rights of a bona fide purchaser, second with his appeals to his readers' anxieties over the security of vested property and contract rights in general, and third with the argument based on the natural limitations of legislative power, did Marshall at last fasten upon the argument having the constitutional connection—the contract clause.

A contract could be either executed or executory. A grant was an executed contract. Contrary to Johnson's argument, an executed contract as well as an executory contract contained obligations binding on the parties. One such obligation was not to reassert the right of ownership. A grantor to a deed was therefore estopped by his own grant. Grants were fairly to be comprehended under the protection of the contract clause, and grants from a state were no exception. Just as

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[57] *Id.* at 136.
[58] *Id.*
[59] *Id.*

the contract clause inhibited a state from impairing the obligation of a contract between two individuals, it inhibited a state from impairing the obligation of its own contract. Then, Marshall applied the final touch:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.[60]

Marshall concluded, borrowing from Johnson's ground of natural law and the constitutional text of the contract clause:

> It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[61]

Thus, in this landmark case in which for the first time the Court invalidated a state statute as conflicting with the Federal Constitution, the Court invoked principles of natural justice to support its conclusion. Was this to satisfy Justice Johnson and, by including his rationale, to present a uniform front? Or was it to support the contract clause itself? To push the second question further, let us concede that the grant made pursuant to the first Georgia statute had implied a contract containing an obligation not to reassert the state's right of ownership. Nevertheless, it was a case of a conveyance made by faithless fiduciaries, much like the case of corporate property deeded by a conniving board of directors and complicit corporate officers for a paltry sum for the sake of personal advantage. In such a case, the law, on a general principle of agency, would not support the corporate grantor's promise to refrain from reasserting its right. On the contrary, the law would impose an obligation on the fiduciaries to

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[60] *Id.* at 137-38.

[61] *Id.* at 139.

reassert their principal's rights.[62] Failing this, the law, on another agency principle, would permit the stockholders, the owners of the corporation, to reassert the right thus defrauded against the grantees in a derivative suit seeking rescission of the grant[63] and restitution of the property.[64] Insofar as the parties to the contract were concerned, there would, under the circumstances of such a case, be no binding obligation, contractual or otherwise, upon the corporate stockholders not to reassert this right. Therefore, with respect to the defrauding grantees, there should have been no binding obligation in contract or in law upon the defrauded people of Georgia to refrain from reasserting their right of rescission. Under contract law or any other law, they were free through their legislative representatives to disown or rescind by a second act of the legislature the grant deeded by the first legislature. Any court would be bound under principles of natural justice to sustain them.[65]

This resolution, however, does not protect the bona fide purchasers whose rights do not accrue by virtue of contractual obligation. Since they were not parties to the original deed, no contractual obligation to them was made or incurred and none can be implied. Their rights accrue by virtue of a general principle of equity, a principle designed to secure property rights and ensure that vested rights are not divested.[66] But these rights do not arise out of contract, are not a

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[62] *See* RESTATEMENT (SECOND) OF AGENCY § 366 (1957). Section 366, entitled "Rescission or Reformation of Contracts," provides: "The other party to a contract of which the agent is a party promisee is subject to liability in an action brought by the agent in his own name on behalf of the principal for its rescission or reformation, or in other actions based upon its rescission."

[63] *See generally id.* § 312 comment d which provides in pertinent part: "A person who intentionally causes a servant or other agent to violate a duty to the principal is subject to liability in tort for the harm he has caused or in a restitutional action for any profit he derived from the transaction."

[64] *See generally* RESTATEMENT OF RESTITUTION § 138 (1936). Section 138, entitled "Violation of Fiduciary Duty," provides in pertinent part: "(2) A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary."

[65] *See supra* notes 62-64 and accompanying text.

[66] *See generally* 3 J. POMEROY, EQUITY JURISPRUDENCE §§ 735-785d (5th ed. 1941). In particular, Pomeroy observed:

> The protection given to the *bona fide* purchaser had its origin exclusively in equity, and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the *conscience* of litigant parties, by compelling the defendant to do what . . . *in foro conscientiae* he is bound to do.

Id. § 738.

Pomeroy further wrote:

> In applying the doctrine of *bona fide* purchase—and this is the very essence of the doctrine—equity does not . . . decide that the title of the defendant is valid, and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of the defense theoretically assumes *that the title*

matter of contractual obligation, and if impaired, are impaired without relevance to the contract clause of the Constitution. Therefore, the act of the Georgia Legislature repealing the original grant did not constitute an impairment of a contractual obligation. Therefore, since no other provision of the Constitution was at issue, the Georgia legislation did not conflict with the Constitution at all.

Stripped then of the unsatisfactory rationale based on the contract clause, *Fletcher* really stands for the naked proposition, based on Justice Johnson's view of the "reason and nature of things," that the Georgia Legislature could not by operation of statute divest the vested rights of bona fide purchasers. The equitable principle controlling even "the Deity" controlled Georgia.[67]

One suspects that Marshall knew exactly what he was doing when he prepared the ground for his construction of the contract clause with his saturating discussion of the principles of justice and equity. Having first been convinced that the Georgia cause was unjust in result, we would readily consent to his rendition of the Constitution. We had made up our minds. The case had already lost its interest and in our distraction he had construed the Constitution in such a way as to accomplish the desired result. And we let him. As long as we feel the Court is doing equity, we very pragmatic Americans do not inquire too closely how it is done.

Marshall and the Court understood the rules of the game. The Constitution cannot be populated with shades of "reason and nature," like so many ghosts. It is the visible world of text which must exist, not some vague and obscure invisible construct. In the case of constitutional litigation, it is and must be the words of the written Constitution which alone are pertinent and controlling. While invoking "reason and nature," Marshall purported to construe the text. It was after all a Constitution he was expounding. Yet the invisible casts its shadow over the visible. To protect innocent parties, "contract" would include "grant," which would include "an obligation," whose limits were held to be "impaired."

Yet, after all this, *Fletcher* is a landmark case in constitutional law. For while *Marbury v. Madison* established as the basis for judicial review the constitutional purpose that power be kept within its

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of the purchaser is really defective as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations. . . . It is thus seen that the doctrine of *bona fide* purchaser as administered by equity *is not in any sense a rule of property.*

Id. § 739.

[67] *See supra* note 48 and accompanying text.

written limits, *Fletcher* disclosed how the constitutional writing comes to be construed and how the limits come to be defined. In every landmark case, as in *Fletcher*, there is a hesitation that reveals the gap to be leaped, the Kierkegaardian leap which once accomplished lands you in another world, one of the opinion's making. The case is a landmark precisely because the outposts of the past did not lead to its placement. They lead to a place infinitely short of it. The rules and rationale of precedent cannot get you there. What is needed is a new creation, a numinous principle that breaks the bonds of past precedent and present provision, elevates the law and moving it by transcendental force places it on the other side. Once accomplished, there is no return. The past is effaced. The future will start from that point. That is what a landmark is. The law has been renewed. Thus, in *Fletcher* the contract clause was construed, broadened in construction, and state power was substantially limited.

Marshall may have leaped beyond the bounds of the Constitution but Hamilton, had he lived, certainly would have approved. He had written a formal opinion in support of the New England land speculators, an opinion which counsel for Peck had used as basis for their arguments.[68] Men of property and commerce would and did approve.[69] Federalists generally would approve.[70] And, Madison, the Republican-Democrat President, the most eminent surviving theorist of the Constitution, coauthor of the Yazoo compromise, solicitous of New England support in contemplation of his need for reelection in 1812, would surely not disapprove.

Whether the framers would have approved is doubtful. The contract clause originated late in the Convention in a motion to add to the restrictions on state action already proposed, the prohibition against state interference with private contracts, as provided in the Northwest Ordinance. In pertinent part that Ordinance had prohibited any law interfering with or affecting "private contracts or any agreements, bona fide and without fraud, previously formed."[71] The

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[68] In 1796, Hamilton had given a legal opinion to the Yazoo land companies in which he contended the unconstitutionality of the Georgia law of 1796 repealing the original grant on the grounds eventually accepted by the Court. First, on principles of natural justice as affecting the interests of innocent third-party purchasers; and second, as in conflict with the general spirit of the contract clause. 5 AMERICAN LAW JOURNAL 454-56 (1814), *reprinted in* C.P. MAGRATH, *supra* note 23, at 149-50 app. D.

[69] *See id.* at 22-23.

[70] *See id.*

[71] The Committee of Detail, charged with the task of presenting specific proposals for discussion, reported to the Convention August 28 on proposals for the prohibition against state action set forth in article XII. According to Madison, Rufus King, "moved to add in the words used in the Ordinance of Congress establishing new States, a prohibition on the States to interfere with private contracts," 2 FEDERAL CONVENTION, *supra* note 20, at 439. He was referring to the

proposal was opposed as "going too far,"[72] and was eventually superseded in favor of the more general language found in the Constitution.[73] Even in the broadest terms of the original proposal, however, the prohibition would not have extended to the situation in *Fletcher*. For if *Fletcher* involved a contract at all, it involved a public contract, not a private one. Moreover, the contract, if there were one, had been entered into mala fide and with fraud, not bona fide and without fraud. From what we know then, the framers had not the intent to proscribe the kind of legislation Georgia had enacted. Nor is it at all clear that had they considered it, they would have prohibited it.

Nevertheless, the confluence of need and interest usually called "circumstances," had suggested the desired result. Result had required a theory. Peck in recognition of this requirement had argued alternate theories and the Court had accepted them. These were the normal processes of litigation, constitutional or otherwise. The Court had responded as a court.

To get the result then, the Court, acting like a court of equity, had broadened the scope of the contract clause. In so doing it broadened its own power of review over state legislative action and em-

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Northwest Ordinance. The Ordinance provided: "And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the territory that shall in any manner interfere with or affect private contracts or any agreements, bona fide and without fraud, previously framed." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50-51 (adopting Northwest Ordinance).

It should be noted that the Journal of the Convention did not refer to this motion. It is not clear whether King's motion was made in these very words or whether Madison paraphrased them in the general prohibition "to interfere in private contracts."

[72] This was the reaction of Gouverneur Morris and Colonel Mason. *See* 2 FEDERAL CONVENTION, *supra* note 20, at 439-40. They considered that it might inhibit the adoption of statutes of limitations.

[73] A substitute motion was made and adopted to prohibit states from adopting "bills of attainder . . . [or] retrospective laws," according to Madison, *id.* at 440, or "bills of attainder or ex post facto laws" according to the Journal. *Id.* at 435. The next day Dickenson informed the Convention that on examining Blackstone's Commentaries, he found that "ex post facto" related to criminal cases only and that some further provision to restrict states from the passage of retrospective, i.e. retroactive, laws in civil cases would be required, *Id.* at 448-49. From this it would appear that the substitute motion had been made in terms of ex post facto prohibition rather than in contract. Initially, the Committee of Style reported its prohibition as against only "any bill of attainder or ex post facto laws," in article XII of the proposed Constitution. *Id.* at 577. But on September 12, it returned with a new version of both the provision and the entire Constitution, setting forth the prohibitions in article I, sec. 10: "No state shall . . . pass any bill of attainder, nor ex post facto law, nor laws altering or impairing the obligation of contracts. . . ." *Id.* at 597. Eventually on September 14, the Committee of Style made its final report, deleting the words "altering or" preceding "impairing the obligation." *Id.* at 657. The framers had thus reverted to the language effecting a prohibition against laws "interfering" with contracts.

barked upon its long career of broad judicial invalidation of state action. *Fletcher v. Peck*, though wrong, is a landmark case.

Not only is it the first case in which the Court invalidated state legislation as in conflict with the contract clause, it is the first case in which in the name of the constitutional text the Court exercised its prerogative to recognize and thereby create a fundamental constitutional right.