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# The Contract Clause: A Constitutional History by James W. Ely (review)

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liberty inspired us with unanimity, that system would never have carried us through” (2, 228).

Governmental units that are closer and more directly accountable to the people that they serve may well have certain advantages. State legislatures and city councils are often in a much better position to address issues that are “purely local” than are remote central authorities (89). The question that Watkins neither asks nor answers, however, is whether the “vexing modern problems” confronted by Congress and the Supreme Court during and after the New Deal were actually *local* in either nature or effect. In the 1780s, the United States had scant infrastructure. Movement of goods and people between the several states was a time-consuming and tedious process. But by the 1930s, most of the impediments to quick and efficient interstate commerce had disappeared. The doctrine of “substantial economic effect,” embraced in *Wickard v. Filburn* (1942), may have been neither necessary nor economically sensible in the Confederation area. But its value—and constitutional propriety—became entirely different matters later, when local and state boundaries had become irrelevant in an integrated national economy.

Such is the practical problem, albeit one of considerable significance, that Watkins and his fellow proponents of states’ rights tend to relegate to the background or, more often, simply ignore. More tellingly, *Wickard* indicates, as Watkins claims (90), “a substantial departure from the original understanding of the Commerce Clause” only if one ignores (or does not credit) what Marshall said in *Gibbons v. Ogden* (1824) about the ability of the federal government to reach “those internal concerns which affect the States generally” (22 U.S. [9 Wall.] at 195).

None of this commentary is new—neither Watkins’ advocacy for a different organizational vision nor the opposing impatience with critiques that gloss over the practical realities and compromises required in an effective *national* government. The opposing perspective is aptly represented by Justice Benjamin Cardozo’s rejection—articulated in *Baldwin v. G.A.F. Seelig, Inc.* (1935)—of the Anti-Federalists’ “parochial” philosophy in favor of a Constitution “framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division” (294 U.S. at 523).

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*The Contract Clause: A Constitutional History.* By James W. Ely, Jr. (Lawrence, University Press of Kansas, 2016) 384 pp. \$39.95

If the Constitution were a zoo, what resident animal would the Contract Clause be? The clause, which is found in Article I, section 10 of our founding document, reads: “No state shall . . . pass any . . . Law impairing

the Obligation of Contracts.” It certainly would not be one of the zoo’s star attractions; the Contract Clause is no First Amendment lion or Fourth Amendment tiger. But it is no bat-eared fox (the Letters of Marque Clause?) or Eurasian water shrew (the Third Amendment?) either. Based on reading Ely’s comprehensive history of the Contract Clause, perhaps it would be an animal that used to be a big draw but is now one that visitors might check out at the zoo if they had the time but not necessarily a priority. A tapir or some kind of rare goat?

Ely’s volume is without a doubt the most exhaustive and authoritative modern treatment of the Contract Clause ever presented, a book that constitutional scholars and historians will want to consult whenever they find themselves needing to know nearly anything about the provision. In seven thorough substantive chapters, Ely traces the history of the clause chronologically from its origins in the late eighteenth century through the modern day. He stops along the way to look in detail at how the clause fared when Chief Justices John Marshall and Roger Taney led the Supreme Court, when the nation was recovering from the Civil War, and when President Franklin D. Roosevelt expanded the scope and reach of the federal government during the New Deal. In each of these eras, Ely maps the approach of courts—mostly the U.S. Supreme Court but state and lower federal courts as well—alongside historical events and the shifting tide of public opinion toward such central concerns as the sanctity of contracts, the importance of a private market economy, and the rights and obligations of states to provide for the public welfare of their citizens.

The book is weakest when cataloging, in dry and overly intricate detail, case after case decided by the courts regarding whatever the issue happens to be, and it is strongest when linking the evolution in judicial interpretation of the clause to broader historical currents. Ely persuasively establishes that the Marshall Court’s original strong reading of the clause—including its holding in *Dartmouth College v. Woodward* (1819) that corporate charters counted as contracts—was linked closely to the widespread belief in the era that “the reliability of agreements were essential . . . in a growing market economy” (14). Similarly, Ely explains how the Court’s weakening of the clause during and after the New Deal era—as exemplified by its 1934 decision in *Home Building and Loan Association v. Blaisdell*, upholding a Minnesota law providing certain kinds of debt relief to mortgagors—was reflective of the widespread belief of the time that the state should have the authority to address emergency conditions and other social and economic problems. “The principle of governmental noninterference with contracts, a norm expressed in the contract clause,” Ely writes, “was sharply at odds with New Deal constitutionalism” (232).

Will the Contract Clause ever rise to prominence again? Ely hints that it might, suggesting that “[t]alk of its demise is exaggerated” (2). It surely would not be the first long-dormant constitutional clause to make a comeback; consider the recent revival of the Interstate Commerce

Clause or the Second Amendment. One never knows, in other words, when today's Third Amendment will become tomorrow's, well, Fourth Amendment. But what Ely has shown in his impressive book is that regardless of the Contract Clause's future, its past will always be well worth considering. After all, there is nothing wrong with taking a break from the zoo's eco-celebrities to watch an interesting tapir for a little while, right?

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*Feeding Gotham: The Political Economy and Geography of Food in New York City, 1790–1860.* By Gergely Baics (Princeton, Princeton University Press, 2016) 368 pp. \$39.95

In the early nineteenth century, residents of New York City relied primarily on public markets to obtain beef and other food supplies. However, in 1843, the city ended the public markets' monopoly on beef sales, leading to a rapid privatization of food provisioning in the city. In *Feeding Gotham*, Baics explores the rise and fall of these markets, concluding that their demise led to deteriorating food access for lower income New Yorkers.

Baics draws from a wide variety of sources and techniques to tell this story. In one chapter, he relies on the diaries of Evert Bancker, Jr., a state politician, and banker John Pintard to analyze the consumption patterns of New Yorkers during the 1820s and 1830s. Historians have long mined Pintard's diary for his insights about notable political and social developments, but few of them have utilized it to capture the rhythms of daily life. Pintard and, by extension, other New Yorkers patronized public markets three to four times a week. Baics combines Pintard's observations with public data to trace the seasonal variations in food consumption. Beef was the primary protein source for most New Yorkers, though they also ate poultry, veal, and other meats when they were in abundance. Baics makes a strong argument that city residents enjoyed better access to fresh red meat than did their rural counterparts, who generally relied on preserved supplies. He attributes this urban advantage to numbers: The density of residents in New York ensured a steady supply of livestock into the city, and thus regular access to beef.

Baics's most valuable contribution consists of the maps that he created to illustrate the role of the public markets in urban life. These detailed maps illuminate many aspects of the city's geographical and economic structure, including the location of slaughterhouses and the relationship between population and food purveyors. The maps help readers to understand the lived geography of the city and clarify the differential access to food based on income and residential location.