STILL IN EXILE? THE CURRENT STATUS OF THE CONTRACT CLAUSE

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The Contract Clause is no longer the subject of much judicial solicitude or academic interest.[1] Since the 1930s the once potent Contract Clause has been largely relegated to the outer reaches of constitutional law.[2] This, of course, was not always the case. On the contrary, throughout the nineteenth century the Contract Clause was one of the most litigated provisions of the Constitution. In 1896, Justice George Shiras astutely commented: "No provision of the constitution of the United States has received more frequent consideration by this court than that which provides that no state shall pass any law impairing the obligation of contracts."[3] A brief survey of the evolution of contract clause jurisprudence helps to put into perspective the current desuetude of the Clause.

I. HISTORICAL BACKGROUND

The first provision protective of contractual rights was contained in the Northwest Ordinance of July 1787.[4] Its adoption anticipated

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1. Article I, Section 10 of the Constitution provides, in part: "No State . . . shall pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

2. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 237 (2016) ("By the 1940s the political triumph of the New Deal and the accompanying growth of the regulatory state relegated the contract clause to the periphery of constitutional law.").

3. Barnitz v. Beverly, 163 U.S. 118, 121 (1896).

4. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. 2 (July 13, 1787) *in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 340 ("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 said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed."); *see* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 960 (1995); Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 448–52 (2013).

the move at the Constitutional Convention to fashion a constitutional guarantee of agreements from state abridgements. Although the Contract Clause was added to the Constitution late in the deliberations of the Convention and without much debate, prominent members of that body stressed the importance of a prohibition on state interference with contracts as a means of protecting contractual stability and promoting commerce.[5] The measure was undoubtedly a response to the unhappy experiences with state debt-relief laws passed during the post–Revolutionary Era.[6] It bears emphasis that the framers thought a specific ban on state abridgement of agreements was so essential as to warrant adoption in the Constitution at the same time they were arguing that a bill of rights was unnecessary.[7] There were harbingers of robust contract clause jurisprudence even before the advent of John Marshall as Chief Justice in 1801.[8]

At the same time, there were limitations on the reach of the provision. By its express language, the Contract Clause applied only to the states and not to Congress. Thus, Congress was free to abridge contracts should circumstances dictate and was expressly authorized to enact bankruptcy laws.[9] Moreover, as James Wilson pointed out at the Constitutional Convention,[10] the Clause only safeguarded antecedent agreements against retroactive legislation and did not limit state laws pertaining to subsequent agreements made after the

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5. ELY, *supra* note 2, at 12–17.

6. ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789 404–05, 537, 571 (1924); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1137–40; James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 698–700 [hereinafter Ely, *Economic Liberties*].

7. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 537 (1989) ("This was the Federalist effort to link the eighteenth century's affirmation of individual liberty with the rhetoric of contract and private property. Thus, the Federalists valued market 'freedom' so highly that they forbade the states from 'impairing the obligation of Contract' in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.").

8. ELY, *supra* note 2, at 22–29.

9. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (Fuller, C.J.) ("The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do.").

10. Remarks in the Federal Convention (August 28, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON 158 (Kermit L. Hall & Mark David Hall eds., 2007) ("Mr. Wilson. The answer to these objections is that retrospective interferences only are to be prohibited.").

effective date of the law.[11] The Clause had no prospective application to future contracts.

The Contract Clause influenced the drafting of subsequent state constitutions. Most states, as they revised existing or adopted new constitutions, incorporated language to safeguard the security of agreements. This development strengthened the high standing of contracts in the constitutional order.[12] State courts regularly enforced the contract clauses in both federal and state constitutions throughout the nineteenth century.[13]

Both John Marshall and his successor Roger B. Taney developed the Contract Clause into a muscular restraint on state authority. Marshall notably construed the provision to cover public as well as private contracts.[14] In a line of famous cases he ruled that the Contract Clause reached state land grants,[15] grants of tax exemption,[16] and corporate charters.[17] Marshall also applied the provision to protect private contracts in the face of state debt-relief laws.[18] Taney moderated the protection afforded corporations under the Contract Clause by strict construction of the privileges contained in corporate charters,[19] but for the most part he built upon Marshall's jurisprudence. For example, the Court under Taney's leadership repeatedly upheld grants of tax exemption against state-legislative attempts to levy taxes.[20] In addition, Taney vigorously wielded the Contract Clause to vindicate private contracts and sustain the contractual rights of

11. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 262 (1827); *see also id.* at 327 (Trimble, J.) (commenting that the Contract Clause left the states "full liberty to legislate upon the subject of all future contracts"); Edwards v. Kearzey, 96 U.S. 595, 603 (1877) ("The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect.").

12. Ely, *Economic Liberties*, *supra* note 6, at 702.

13. *E.g.*, Jones v. Crittenden, 4 N.C. 55 (1814); People *ex rel.* Thorne v. Hayes, 4 Cal. 127 (1854), *overruled in part by* Hooker v. Burr, 70 P. 778 (Cal. 1902); Oatman v, Bond, 15 Wis. 20 (1862); The Homestead Cases, 63 Va. 266 (1872); Swinburne v. Mills, 50 P.489 (Wash. 1897).

14. ELY, *supra* note 2, at 32–43.

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

16. New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812).

17. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

18. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

19. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); *see* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, 112 (1991) ("The real effect of the *Charles River Bridge* case was to give entrepreneurs what they bargained for.").

20. ELY, *supra* note 2, at 81–86.

creditors. He explained that the Clause "was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States."[21]

The Civil War and Reconstruction generated a number of novel contract clause claims as well as a number of issues similar to those addressed in the antebellum years.[22] The Supreme Court upheld the validity of contracts, calling for payments in Confederate currency and contracts for the purchase of slave property. It invalidated the retroactive application of enlarged homestead exemptions that were enacted in postbellum Southern states as impairments of antecedent agreements.[23] In the same vein, the Court sustained legislative tax-exemption grants as within the shelter of the Contract Clause.[24] It looked skeptically on a variety of legislative schemes to repudiate municipal debt.[25]

Adoption of the Fourteenth Amendment in 1868 indirectly impacted the role of the Contract Clause in the late nineteenth century.[26] The Contract Clause had been the primary vehicle for federal judicial review of state legislation until this point. That would gradually change. The Due Process Clause of the Fourteenth Amendment opened the door for an additional avenue of federal court review and in time would partially eclipse the Contract Clause.[27]

In the late nineteenth century, courts and commentators lavished praise on the pivotal role of contracts in the market economy and the vital role of the Contract Clause. Justice William Strong insisted

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21. Bronson v. Kinzie, 42 U.S. (1 How.) 311, 318 (1843).

22. James W. Ely, Jr., *The Contract Clause During the Civil War and Reconstruction*, 41 J. SUP. CT. HIST. 257 (2016).

23. James W. Ely, Jr., *Homestead Exemptions in Southern Legal Culture*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 289–314 (Sally E. Hadden & Patricia Hagler Minter eds., 2013).

24. *See, e.g.*, Wilmington R.R. v. Reid, 80 U.S. (13 Wall.) 264 (1872); Wash. Univ. v. Rouse, 75 U.S. (8 Wall.) 439 (1869); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869).

25. *See, e.g.*, Bd. of Liquidation v. McComb, 92 U.S. 531 (1871); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867).

26. The Fourteenth Amendment provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

27. ELY, *supra* note 2, at 155–57 (pointing out that in the late nineteenth century railroads increasingly relied on the Due Process Clause rather than the Contract Clause in challenges to state-imposed rate regulations).

in 1878: "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away."[28] State courts often expressed similar sentiments. The Supreme Court of Alabama, for instance, declared in 1881 that the purpose of the contract clauses in federal and state constitutions "was to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion."[29]

To be sure, courts continued to vindicate private contracts; for example, striking down statutes that substantially impaired the rights of mortgagees in mortgage contracts.[30] At the same time, however, the Contract Clause began to gradually fade in significance. This was apparent in litigation involving public contracts. Although paying lip service to *Dartmouth College*,[31] the Supreme Court adhered to the strict construction principle and moved away from the notion of inviolate corporate charters.[32] Moreover, the Court gradually embraced the concept of an alienable police power to safeguard public health, safety, and morals. Accordingly, a state could not relinquish such power by entering a contract.[33] State regulatory authority increasingly prevailed notwithstanding language in public contracts or corporate charters. As the Contract Clause waned in significance, those challenging state legislation came more and more to argue that the challenged law constituted a deprivation of liberty or property, without due process of law, in violation of the Fourteenth Amendment.

The Contract Clause continued to decline in the early decades of the twentieth century.[34] The number of such cases before the Supreme

28. Murray v. City of Charleston, 96 U.S. 432, 448 (1878).

29. Edwards v. Williamson, 70 Ala. 145, 151 (1881).

30. *E.g.*, Barnitz v. Beverly, 163 U.S. 118, 129–32 (1896); Savings Bank of San Diego v. Barrett, 126 Cal. 413 (Cal. 1899).

31. Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

32. ELY, *supra* note 2, at 152–55; HOVENKAMP, *supra* note 19, at 33 (observing that in the late nineteenth century "the notion that a corporate charter was a contract according vested privileges to the corporation substantially fell apart").

33. *See, e.g.*, Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Stone v. Mississippi, 101 U.S. 814 (1880); New York & New England R.R. Co. v. Bristol, 151 U.S. 556 (1894).

34. ELY, *supra* note 2, at 192–93.

Court dwindled. Even the protection afforded private agreements began to erode. In 1905, the Supreme Court determined that private as well as public contracts were subordinated to the alienable police power. In other words, police power was paramount to any rights established in agreements between private parties.[35] It now appeared that state lawmakers could abridge private arrangements whenever they deemed it necessary. This point was underscored by litigation emanating out of unprecedented rent-control laws enacted in several cities following World War I. The laws were predicated upon the alleged existence of a public emergency in housing conditions.[36] Landlords maintained that the rent-control laws abridged existing leases in violation of the Contract Clause. In a cursory opinion, Justice Oliver Wendell Holmes brushed aside this argument and upheld the New York measure as a temporary response to address an emergency.[37] Writing for four dissenters, Justice Joseph McKenna found a contract clause violation. He asked, if states could invoke the police power to override contracts, what other provisions of the Constitution might similarly be subordinated to that power.[38]

The Great Depression of the 1930s and the political programs of President Franklin D. Roosevelt's New Deal had a profound impact on constitutional law. New Dealers called for expanded governmental intervention in the economy and sought to redistribute economic power. This approach was in sharp contrast to the commitment to limited government and the respect for private property that characterized traditional constitutionalism.[39] The Contract Clause was a prominent casualty of this change in outlook.

The weakened state of the Contract Clause was vividly demonstrated in the controversy over state laws imposing a moratorium on mortgage foreclosures. As the system of mortgage financing largely collapsed in the wake of the Depression, lawmakers in a number of

35. Manigualt v. Springs, 199 U.S. 473, 480 (1905) (Brown J.); *see also* David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 334–35 (1985) (declaring that *Manigualt* "was perilously close to saying that states could impair contractual obligations whenever they had a good reason").

36. For the background of this controversy, see ROBERT M. FOGELSON, THE GREAT RENT WARS: NEW YORK CITY, 1917–1929 (2013).

37. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

38. *Id.* at 199–201.

39. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 125–41 (3d ed. 2008).

states sought to protect homes and farms from foreclosure of delinquent mortgages. These laws harkened back to nineteenth-century relief laws. Indeed, laws altering the terms of mortgages were routinely struck down during the nineteenth century as violations of the Contract Clause. Nonetheless, a divided Supreme Court, in the seminal and controversial case of *Home Building and Loan Association v. Blaisdell* (1934), upheld a Minnesota moratorium law, rejecting a contract clause challenge.[40] Speaking for the Court, Chief Justice Charles Evans Hughes stressed the existence of emergency conditions and argued that the State's overriding protective power could justify interference with agreements.[41] In time, his broad language opened the door to virtually reading the Contract Clause out of the Constitution. To be sure, Hughes attempted to cabin the reach of his opinion by setting forth some limitations. Among other criteria, he pointed out that the Minnesota law was temporary in operation and protected the security interest of the mortgagee.[42] In a forceful dissent, Justice George Sutherland noted that the Contract Clause was adopted during a period of economic distress and strenuously denied that an emergency furnished a reason for avoiding the restrictions of that provision. He presciently warned that the majority opinion paved the way for further encroachments on both private and public contracts.[43]

To be sure, the Contract Clause did not disappear overnight. In the late 1930s and early 1940s, the Supreme Court relied on the Clause several times to invalidate state laws, suggesting that the scope of *Blaisdell* might be confined.[44] But it turned out, however, that *Blaisdell*, in fact, delivered a near-fatal blow to the efficacy of the Contract Clause. As the Roosevelt appointees gained control of the Court, they treated *Blaisdell* as the governing authority and ignored both the limitations expressed by Hughes and the subsequent decisions that confined its application. The emphasis on emergency situations as a justification for contractual impairment, for example, was

40. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

41. *Id.* at 437–41.

42. *Id.* at 444–47.

43. *Id.* at 448.

44. *E.g.*, Wood v. Lovett, 313 U.S. 362 (1941); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); W.B. Worthen v. Kavanaugh, 295 U.S. 56 (1935); W.B. Worthen v. Thomas, 292 U.S. 426 (1934); *see* David F. Forte, *Forgotten Cases:* Worthen v. Thomas, 66 CLEV. ST. L. REV. 705, 711–16 (2018) [hereinafter Forte, *Forgotten Cases*] (arguing that in these cases the Supreme Court sought to narrow the emergency exception articulated in *Blaisdell*).

specifically rejected.[45] Instead, the New Deal Court stressed the legislature's wide discretion to set economic policy and override contracts via the police power without regard to emergency conditions. It repeatedly demonstrated a dismissive attitude toward the Contract Clause. In effect, the Court adopted a balancing test, heavily weighted in favor of state authority, in assessing violations of the provision. Largely ignored and serving no meaningful purpose, the Contract Clause was not invoked again by the Supreme Court for more than thirty years. Despite this period of neglect at the federal level, the Contract Clause retained some modest efficacy at the state level, where courts sometimes relied on contract clauses in state constitutions.

II. THE CONTRACT CLAUSE'S DOUBTFUL REVIVAL

In the late 1970s, the Supreme Court expressed a fleeting interest in the provision[46] but in so doing promulgated a convoluted multifactor test that did more to obfuscate than to clarify contract clause jurisprudence.[47] In practice, the analytical framework established by the Supreme Court did more to uphold state regulatory authority than protect the rights of contracting parties from state interference.[48] As an aside, this multipart formula is reminiscent of the equally fuzzy balancing test articulated in *Penn Central* to determine the existence of a regulatory taking of property.[49]

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45. Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32, 38–40 (1940).

46. *See, e.g.*, U. S. Tr. Co. v. New Jersey, 431 U.S. 1 (1977) (invalidating repeal of covenant in bond agreement); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (striking down law retroactively imposing change in company's pension plan).

47. The current test asks three questions: (1) Has a change in state law operated as a substantial impairment of a contract? (2) If the impairment is substantial, does the law serve a legitimate public purpose, such as remedying a broad social or economic problem? (3) Are the means chosen to accomplish this purpose reasonable and appropriate to the public purpose? Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 411–13 (1983). For a discussion of the standard of review, see ELY, *supra* note 2, at 241–48.

48. Forte, *Forgotten Cases*, *supra* note 44, at 722 (cogently concluding that "all that remains of the Contract Clause's protective sweep is an asymmetric middle-tier test that has little analytic benefit and virtually no legal effect").

49. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1987); *see* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 604 (2014) (finding *Penn Central* test to be incoherent); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005); *see also* Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. LAND USE & ENVTL. L. 87, 138 (2017) ("In practice, the *Penn Central* ad hoc, multifactor balancing test has not proved auspicious for property owners.").

To compound the muddle, the Supreme Court imposed a higher standard of review when a state abridges its own contracts. It maintained that "complete deference" to a legislative determination of reasonableness and necessity was inappropriate when the state's self-interest was involved.[50] This dual standard is problematic on several grounds. There is no textual or historical basis to differentiate between the scrutiny given to private and public contracts.[51] Moreover, the Court has never made clear what level of scrutiny is appropriate for public contracts, and lower courts have wrestled with this without guidance. Cases dealing with public-employee contracts often raise the issue of the standard of review.

To be sure, some state courts have shown a willingness to more vigorously enforce the constitutional ban on legislative impairment of existing agreements.[52] But the fact remains that the Supreme Court has not invoked the Contract Clause to invalidate a state law in over forty years. Little wonder, then, that in 1995 Judge Douglas Ginsburg pictured the provision—along with other neglected parts of the Constitution—as part of the "Constitution-in-exile," provisions "banished for standing in opposition to unlimited government."[53]

III. THE CONTEMPORARY MUDDLE

The Supreme Court's most recent foray into contract clause jurisprudence, *Sveen v. Melin*, decided in June of 2018, did little to alter this bleak scene.[54] At issue in *Sveen* was a Minnesota statute that

50. *U.S. Tr. Co. of New York*, 431 U.S. at 22–23.

51. ELY, *supra* note 2, at 242; *see also* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 293–94 (1988) ("[T]he modern thrust of contracts clause jurisprudence is precisely backwards. . . . [I]t is interference with private contracts that lies at the heart of the clause."); Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 609 (1987) ("[T]he modern Court has in effect turned the contract clause of both the framers and the post–*Charles River Bridge* era on its head. The prior understanding was that private contracts were protected from state interference with *more* rigor than public contracts.").

52. Brian A. Schar, Note, *Contract Clause Law Under State Constitutions: A Model for Heightened Scrutiny*, 1 TEX. REV. L. & POL. 123 (1997).

53. Douglas H. Ginsburg, *Delegation Running Riot*, 1995 REG. 79, 80 (1995) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

54. Sveen v. Melin, 138 S. Ct. 1815 (2018). I submitted an amicus brief in *Sveen* supporting the respondent.

automatically revoked the designation of a former spouse in a life insurance policy upon the dissolution of a marriage.[55] The law was enacted after Sveen purchased a life insurance policy and named his wife, at the time, as beneficiary. Following their subsequent divorce, Sveen took no action to alter his beneficiary designation. The Eighth Circuit Court of Appeals found that the retroactive application of the law to Sveen's policy violated the Contract Clause.[56] Admittedly, this was not a topic likely to arouse deep public interest.

The Supreme Court disagreed and rejected the contract clause claim. The Court majority, in an opinion by Justice Elena Kagan, applied the prevailing multipart test. Although conceding that "the law ma[de] a significant change," she nonetheless concluded that the revocation statute did not "substantially impair" the pre-existing contract.[57] One could ponder whether there is a meaningful or merely a semantic distinction between such wording. In any event, Kagan offered several arguments to buttress her conclusion that the law did not substantially impair the insurance contract. She reasoned that the statute was designed to reflect the presumed intention of the policyholder not to benefit a former spouse. Perhaps even more telling, Kagan also emphasized that the policyholder could easily avoid application of the law by redesignating the former spouse as beneficiary.[58] In short, the Court majority pictured the Minnesota statute as simply a default rule that did not place an onerous burden on the policyholder.[59] By deciding the *Sveen* case on narrow grounds, the majority had no occasion to consider the broader argument that the multipart test was inconsistent with the original understanding of the Contract Clause as well as its historical construction by the courts, and therefore should be jettisoned.

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55. State courts were divided as to whether retroactive application of revocation-upon-divorce statutes ran afoul of the Contract Clause. *Compare* Aetna Life Ins. Co. v. Schilling, 616 N.E.2d 893 (Ohio 1993), *and* Parsonese v. Midland Nat'l Ins. Co., 706 A.2d 814 (Pa. 1998), *with In re* Estate of DeWitt, 54 P.3d 849 (Colo. 2002), *and* Mearns v. Scharbach, 12 P.3d 1048 (Wash. Ct. App. 2000).

56. Metropolitan Life Insurance Company v. Melin, 853 F.3d 410 (8th Cir. 2017).

57. *Id.* at 1822.

58. *Id.* at 1823–24.

59. On remand from the Supreme Court, the Eighth Circuit Court of Appeals awarded the proceeds of the insurance policy to the Sveen children. Metropolitan Life Ins. Co. v. Melin, 899 F.3d 953, 953 (8th Cir. 2018). Thereafter the Supreme Court of Alabama followed the analytical framework of *Sveen* and dismissed a contract clause attack on a revocation-on-divorce statute. Blalock v. Sutphin, 2018 WL 5306884 (Ala. Oct. 26, 2018).

Dissenting alone, Justice Neil Gorsuch maintained that the retroactive application of the statute to an insurance policy purchased before its enactment ran afoul of the Contract Clause.[60] More importantly, he was receptive to a far-reaching re-examination of current contract clause jurisprudence. He pointed out that historically the Supreme Court had interpreted the provision to bar any legislative interference with contracts.[61] Further, Gorsuch declared that the current multifactor test "seems hard to square with the Constitution's original public meaning."[62] Echoing Justice Hugo Black,[63] Gorsuch expressed concern that the Court had reduced the protection afforded agreements by the Contract Clause to an uncertain balancing test. "Should we worry," he asked, "that a balancing test risks investing judges with discretion to choose which contracts to enforce—a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand?"[64]

Even applying the current test, however, Gorsuch found a contract clause violation. He insisted that the choice of a beneficiary was at the heart of a life insurance contract and that a law undoing this designation was a substantial impairment. Gorsuch added that this impairment was not reasonable because the state could have achieved its goal by more moderate and less intrusive means.[65]

Perhaps the Gorsuch-dissenting opinion will spark a fundamental reconsideration of the Contract Clause by the Supreme Court. But such an attitudinal sea change does not seem imminent. It is more likely that the Justices will adhere to the pattern of generally ignoring the provision and employing tests that make successful contract clause claims very difficult. Even before *Sveen*, commentators proclaimed that the Contract Clause was virtually dead.[66]

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60. *Sveen*, 138 S. Ct. at 1826 (Gorsuch, J., dissenting).

61. *Id.* at 1827–28.

62. *Id.*

63. City of El Paso v. Simmons, 379 U.S. 497, 533 (1965) (Black, J., dissenting) ("[C]onstitutional adjudication under the balancing method becomes simply a matter of this Court's deciding for itself which result in a particular case seems in the circumstances the more acceptable governmental policy and then stating the facts in such a way that the considerations in the balance lead to the result.").

64. *Sveen*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting).

65. *Id.* at 1828–29.

66. *See, e.g.*, Richard Funston, *Requiescat in Pace: A Memorial to the Contract Clause*, 3 TEX. S. U. L. REV. 12, 24 (1973) ("Swallowed up by due process, the contract clause is no longer

Yet a eulogy for the Contract Clause, however diminished, seems premature. The provision continues to figure in a surprisingly large amount of litigation. Although the lower federal courts, following the lead of the Supreme Court, have demonstrated little interest in enforcing the Contract Clause, there are infrequent decisions which rely on the provision to strike down state laws. Recently, for example, the Seventh Circuit Court of Appeals invalidated changes to an Indiana teacher-tenure law with respect to layoffs as applied to already-tenured teachers.[67] Private contracts have also received occasional protection. Some federal courts have looked skeptically at laws altering the rights of parties under existing franchise agreements.[68] In 2017, for example, the district court in North Dakota found that an overhaul of the state-farm-equipment-dealership statute substantially impaired a pre-existing contract and amounted to a special-interest law that did not serve a legitimate public purpose.[69]

It is important to remember that much of this contract clause litigation has taken place at the state level. This has given state courts the opportunity to consider the degree of protection afforded to contracts under state constitutions.[70] Virtually all states have their own contract clauses, modeled after the federal provision. A threshold question is whether state contract clauses are equivalent to the federal provision or whether they confer enhanced protection. The answer is not easy and generalization is difficult. State court opinions do not always clarify whether they are relying on the Federal Constitution, the state constitution, or both. At least twenty states have taken the position that their state contract clause is interchangeable with the federal language and have expressly adopted the multipart federal test.[71] In contrast, a number of state courts

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a source of litigation."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890 (1987) (commenting that "the clause is now for the most part a dead letter"); *see* ELY, *supra* note 2, at 238.

67. Elliott v. Bd. of Sch. Trustees of Madison Consolidated Schs., 876 F.3d 926 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2624 (2018).

68. *See, e.g.*, Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842 (8th Cir. 2002).

69. Ass'n of Equip. Mfrs. v. Burgum, No. 1:17-cv-151, 2017 WL 8791104 (D.N.D. Dec. 14, 2017), *stay-pending appeal denied*, 2018 WL 1773145 (D.N.D. Mar. 5, 2018).

70. For a classic argument calling for increased reliance on state constitutional law, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

71. ELY, *supra* note 2, at 251; *see, e.g.*, CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 299 P.3d 186 (2013) (rejecting argument that Idaho contract clause provides

have indicated that their state constitutions should be read to provide a more robust safeguard for agreements. Courts in Arizona, Florida, Indiana, Texas, and Virginia, for example, have articulated such a position.[72] These differing approaches, of course, speak to the larger issue of determining the extent state courts should construe state-rights guarantees more broadly than federal doctrines.[73]

Although the majority of contract clause challenges in recent years have been rejected, state courts have invoked the provision to strike down legislation in a variety of situations. In 2016, the Supreme Court of North Carolina ruled that a state law retroactively revoking the tenured status of public school teachers violated the Federal Contract Clause.[74] It found that the elimination of tenure in favor of terms-of-years contracts was a substantial impairment of contractual benefits pertaining to job security. The state justified the repeal as a means of eliminating underperforming teachers. The court, however, concluded that this was not a reasonable means of achieving a legitimate public purpose, in view of less drastic alternatives. Consistent with the principle that the Contract Clause does not have prospective application, the court confined its ruling to the repeal of tenured status earned prior to the effective date of the statute and did not bar application of the repeal law to probationary teachers.[75]

In sync with *U.S. Trust*,[76] state courts have looked skeptically at state efforts to evade their financial obligations. At issue in *Maze v. Board of Directors for Commonwealth Postsecondary Education*

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greater protection of agreements than the United State Constitution and adopting three-step federal framework); Mearns v. Scharbach, 103 Wash. App. 498, 512, 12 P.3d 1048, 1055 (Wash. Ct. App. 2000), *petition for rev. den.* 143 Wash.2d 1101, 21 P.3d 291 (Apr. 10, 2001) ("The two clauses are substantially similar and are given the same effect.").

72. ELY, *supra* note 2, at 252–53; *see, e.g.*, Sears, Roebuck & Co. v. Forbes/Cohen Florida Props., 223 So. 3d 292, 299 (Fla. Dist. Ct. App. 2017) ("The Florida Constitution offers greater protection for the rights derived from the Contract Clause than the United States Constitution."); *see also* Maze v. Bd. of Dirs. for Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund, 559 S.W.3d 354, 369 (Ky. 2018) (declaring that "Kentucky jurisprudence takes a more restrictive view on the legislature's power to impose changes to existing contractual benefits and obligations than the pronouncements of the federal courts," but applying three-part federal test derived from *U.S. Trust*).

73. *See* Clint Bolick, *State Constitutions: Freedom's Frontier*, 2016–2017 CATO SUP. CT. REV. 15, 21–23 (2017) (noting that state constitutional law may provide enhanced protection for private-property rights and economic liberty, among other individual rights).

74. North Carolina Ass'n of Educators v. State, 786 S.E.2d 255 (N.C. 2016).

75. *Id.* For an analysis of this case, see Tommy Tobin, *Far from a "Dead Letter": The Contract Clause and* North Carolina Association of Educators v. State, 96 N.C. L. REV. 1681 (2018).

76. U.S. Tr. Co. of New York v. New Jersey, 431 U.S. 1 (1977).

Prepaid Tuition Trust Fund, for example, were legislative changes imposed retroactively on contracts made pursuant to the Kentucky Affordable Prepaid Tuition Fund ("KAPT").[77] The program "allowed families . . . to 'lock in' the current tuition rates for future attendance" at Kentucky public universities.[78] Financial miscalculations in administering the program, coupled with significant tuition increases, resulted in a "substantial unfunded liability."[79] In response, the legislature adopted a series of amendments that placed time limitations on KAPT contracts and curtailed the coverage for future tuition increases.[80] The effect was to devalue the economic benefits promised in the KAPT contracts. The State sought to justify its actions as dictated by "economic necessity."[81]

The Supreme Court of Kentucky struck down the retroactive application of the amendments because they extinguished the contractual rights of KAPT-contract purchasers to promised benefits. Invoking a stricter standard because the State was a party to the agreement, it found that the retroactive amendments amounted to an impairment of contract in violation of both the United States and Kentucky Constitutions. Concluding that the legislature could not demonstrate a legitimate public purpose behind the law, the court stressed that lawmakers could not "self-servingly renounce" debts.[82]

Other retroactive changes in prevailing law have also triggered contract clause scrutiny. For example, a Florida District Court of Appeals invalidated a municipal resolution that prevented a commercial-mall tenant from subleasing part of its leased space without the approval of both the mall owner and the city. It concluded that the resolution diminished the value of the contract and failed to serve a public purpose.[83] Moreover, the Supreme Court of Idaho struck down a state law retroactively changing the formula governing the distribution of workers compensation-fund dividends as a violation of the state contract clause.[84]

77. Maze v. Bd. of Dirs. Commonwealth Postsecondary Educ. Prepaid Tuition Tr. Fund, 559 S.W.3d 354 (Ky. 2018).

78. *Id.* at 360.

79. *Id.* at 362.

80. *Id.* at 361–62.

81. *Id.* at 371.

82. *Id.* at 373.

83. Sears, Roebuck & Co. v. Forbes/Cohen Florida Props., 223 So. 3d 292, 300 (Fla. Dist. Ct. App. 2017).

84. CDA Dairy Queen, Inc v. State Ins. Fund, 299 P.3d 186 (Idaho 2013).

This brief survey of recent contract clause decisions in the lower federal and state courts demonstrates that the Clause retains a modest degree of vitality. But qualifications are in order. Few of these cases present the kind of far-reaching contractual issues addressed by courts in the nineteenth and early twentieth centuries. None called into question the pervasive regulation of the economy. Indeed, both federal and state courts seemed, on the whole, more concerned with upholding state police power than vindicating contractual arrangements.[85]

The most frequently litigated contract clause claims today arise from the ongoing financial crises experienced by many states and localities.[86] Most commentators agree that the large and growing shortfall in funding for public-employee pensions and health benefits is a primary source of financial distress. There are estimates that in the aggregate such pension plans are underfunded by five trillion dollars.[87] Faced with such staggering deficits, many state and local governments have taken steps to trim benefits from both current and retired public-sector employees.[88] These moves have triggered a torrent of litigation, alleging violations of the contract clauses in both the state and federal constitutions. Given the malleable character of the prevailing multifactor test, the uncertainty over the standard of review for alleged impairments of public contracts, and the wording of different benefit schemes, it is hardly surprising that courts have reached conflicting results. In these brief comments I cannot assess the full range of these decisions.

As with any contract clause dispute, the initial inquiry is whether the claimed employee benefits are contractual in nature. A number of such claims in recent years have failed because courts have not found an impairment of a contractual right to the particular benefit at issue. In reaching this conclusion, courts have stressed that the principal function of legislature is to establish policy, not make contracts.[89] It

85. ELY, *supra* note 2, at 258–60.

86. For the background of this controversy, see James W. Ely, Jr., *Public Employees and the Curious Mini-Revival of Contract Clause Jurisprudence*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 37 (2013) [hereinafter Ely, *Public Employees*].

87. Sarah Krouse, *State and Local Pension Woes Are Starting to Bite*, WALL ST. J., July 31, 2018.

88. *Id.*

89. Dodge v. Bd. of Educ. of Chicago, 302 U.S. 74, 79 (1937) ("The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares

follows that only when state lawmakers express an unequivocal intent to create contractual rights in a statute would such a law amount to a binding contractual commitment.[90]

In 2019, the Supreme Court of California applied these principles in a case arising out of a California law revising public-employee pensions and eliminating the opportunity for public employees to purchase additional retirement service credits. Plaintiffs challenged the law as a violation of the contract clause in the California Constitution. Citing both federal and state authority, the court stressed that the primary function of legislatures was to determine policy, inherently subject to revision, and not to make contracts. It found no basis on which to conclude that the legislature intended to establish a contractual right to purchase any additional retirement credit. Since there was no contract, the court had no occasion to consider whether the elimination of the purchase option amounted to an unconstitutional impairment of contract.[91]

When a contract governing employee benefits is involved, courts have split as to whether state alteration of such agreements have run afoul of the Contract Clause. One line of cases has sustained

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a policy to be pursued until the Legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.") Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985) (declaring that the principal function of a legislature is not to make contracts but to enact laws that establish policy, which are subject to revision).

90. *See, e.g.*, Cranston Firefighters v. Raimondo, 880 F.3d 44 (1st Cir. 2018) (holding that legislative modification of state pension plans for government employees did not run afoul of contract clause because state had made no binding commitment); Dodd v. City of Chattanooga, 846 F.3d 180, 186 (6th Cir. 2017) (stressing "the fundamental assumption in Contract Clause analysis that legislation merely expresses current government policy—and future legislatures are free to change that policy—rather than creating contractual obligations," and ruling that municipal employee had no contractual right to default death benefit); Schwein v. Bd. of Ed. of Riverview Cmty. Dist., 335 F. Supp. 3d 964 (E.D. Mich. 2018) (concluding that Michigan Teacher Tenure Act did not grant teacher a contract and rejecting contract clause claim); Lake v. State Health Plan for Teachers & State Emps., 825 S.E. 2d 645, 650–56 (N.C. Ct. App. 2019) (finding no contractual right to unalterable health insurance benefits); Terry v. State, 2017 WL 491930 at *5 (N.C. Ct. App. 2017) (noting "the existence of a presumption under North Carolina law that no contractual rights are created by statute" and finding no contractual right to future salary increases), *review denied*, 369 N.C. 751 (June 2017); State *ex rel.* Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644 (Ohio 1998) (employees had no contractual rights to prospective benefits until benefits vested by the operation of law).

91. Cal Fire Local 2881 v. Cal. Pub. Emps. Ret. Sys., 6 Cal. 5th 965, 435 P.3d 433 (2019). The court differentiated between the opportunity to purchase additional retirement credit and the implied contractual right for public employees to receive statutory pension benefits, because the later constitute a form of deferred compensation.

legislative efforts to revamp employment contracts, granting deference to legislative policy and stressing the severity of budgetary problems.[92] Yet other decisions have concluded that such actions violated the Contract Clause, reasoning that the reduction of employee benefits was neither reasonable nor necessary and determining that less weight should be given to state and municipal financial crises. This line of cases highlights an ironic twist: having lectured for decades that courts should not second guess social and economic policies, some courts now take the position that they have the duty to probe the reasonableness of legislative policy regarding public-employee contacts.[93] This approach clearly entangles courts in policy matters and raises the troublesome question of whether public-employee contracts are being singled out for more favorable treatment than is accorded other agreements.[94] It recalls Justice Gorsuch's warning that a pliable balancing test, in effect, confers on judges the discretion to decide which agreements should be enforced.

IV. IMPAIRMENT DISTINGUISHED FROM BREACH OF CONTRACT

Although states are held to a higher standard of scrutiny when abridging their own contracts,[95] not every dispute over the meaning of a public contract gives rise to a contract clause violation. It has long been held that cases involving the construction of state agreements with individuals do not, standing alone, implicate the Contract Clause even if the state denies liability under the contract.[96] Thus, a breach of contract by the state, as distinguished from an impairment, leaves the parties free to seek a remedy in the state courts.[97]

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92. ELY, *supra* note 2, at 262.

93. *Id.*

94. *See* Nila M. Merola, *Judicial Review of State Legislation: An Ironic Return to Lochnerian Ideology When Public Sector Labor Contracts Are Impaired*, 84 ST. JOHN'S L. REV. 1179, 1211 (2010) (asserting that "enormous public interest . . . demands that strict scrutiny be applied to laws that impair public sector labor contracts" and insisting that "public employees deserve the utmost protection").

95. *See supra* notes 50–51 and accompanying text.

96. *See, e.g.*, St. Paul Gaslight Co. v. City of St. Paul, 181 U.S. 142, 149, 151 (1901) (finding there was no impairment of contract with the municipality, and stating that "it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court").

97. *See* Hays v. Port of Seattle, 251 U.S. 233, 237 (1920) (distinguishing between a law violating a contract and one impairing its obligation, and asserting that if the contract at issue

The absence of an effective remedy to enforce the contract, on the other hand, might trigger contract clause review.

This rule found application in a 2018 decision by the Ninth Circuit Court of Appeals.[98] At issue was a Montana statute that altered the price schedule for liquor sold to retailers by a state agency, pursuant to franchise agreements. The plaintiff liquor store had a ten-year contract with the agency to purchase liquor at a fixed rate, and was disadvantaged by the unilateral change. It brought suit alleging both a breach of the contract and a contractual impairment in violation of the Contract Clause. Plaintiff contended that the state agency had contractually promised not to alter the rates without the plaintiff's consent. In its defense, the State maintained that the agreement expressly provided that the established rate was subject to modification by state law and therefore the price adjustment was consistent with the terms of the agreement. Thus, there was a dispute over the interpretation of the agreement. The court insisted that "an interpretative disagreement over a contract" did not run afoul of the Contract Clause.[99] "At bottom," the court observed, "the parties' arguments amount to dueling interpretations between the parties over the proper meaning of their agreement."[100] It declared that such a public-contract dispute did not impair the agreement so long as the plaintiff could pursue a breach-of-contract claim against the State for any injury suffered.[101]

Of particular interest, however, was the Ninth Circuit's emphatic rejection of Montana's argument that a state could unilaterally modify contractual terms as an exercise of its sovereign power. "An assertion," the court maintained, "that the state always has the unilateral authority to modify the provisions of a contract is inconsistent

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was still in force "its obligation remained as before, and formed the measure of [the] right to recover from the state for the damages sustained"); E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage Cty., 613 F.2d 675, 679 (7th Cir. 1980) ("The Supreme Court in the context of the contract clause has drawn a distinction between a breach of contract and impairment of the obligation of the contract. The distinction depends on the availability of a remedy in damages in response to the state's (or its subdivision's) action. If the action of the state does not preclude a damage remedy the contract has been breached and the non-breaching party can be made whole. If this happens there has been no law impairing the obligation of the contract.").

98. LL Liquor, Inc. v. Montana, 912 F.3d 533 (9th Cir. 2018).

99. *Id.* at 537.

100. *Id.* at 539.

101. *Id.* at 538–39.

with the requirements of the Contracts Clause . . . ."[102] Although recognizing that a state does not relinquish its sovereign power to regulate by entering contracts, the court nonetheless stressed that a state cannot avoid financial liability if a change in the law results in financial harm to a contracting party.[103] It added: "Again, if state law did allow Montana unilaterally to modify contracts between itself and others without providing a damages remedy, then the federal Contracts Clause would be squarely implicated."[104]

V. PROSPECTS FOR REVITALIZATION

So we are left with a diminished Contract Clause that, although frequently ignored, is occasionally trotted out in unpredictable and unprincipled ways to oversee state laws.[105] This is a curious result for a provision that, as Lawrence M. Friedman has reminded us, was framed to guarantee the stability of agreements.[106]

Yet the chances for a meaningful revival of the Contract Clause, at least at the federal level, seem remote at the time of this writing. As discussed above, the Supreme Court has endorsed tests that virtually eliminate the Clause from the Constitution. The road to reform will not be easy. Nonetheless, I propose some steps that would make the judicial reconstruction of the Contract Clause more consistent with its text, history, and purpose.

Any move to restore the provision as a significant restraint on states' interference with agreements should start with the abandonment of the murky multiprong formula. This test, with its near-supine deference to legislative decisions regarding agreements, falls woefully short of achieving vigorous enforcement of the Clause. The Constitution does not provide that states may abridge contracts whenever they can devise a reason.

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102. *Id.* at 541.

103. *Id.* at 541–42.

104. *Id.* at 541 n.7.

105. *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 559 (1987) (observing that under the current test "the Supreme Court has interpreted a constitutional provision that was designed to provide certainty to contracting parties in a manner that maximizes the unpredictability of its application").

106. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 203 (3d ed. 2005).

The second step is to employ the same standard of review for both private and public contracts. Consistent with the text and historical understanding of the Clause, all agreements should be on a level playing field.

The third move would be to look skeptically at economic distress as an excuse for laws interfering with contracts—whether mortgages, debts, bonds, or benefits promised to public employees. This was the position that generally prevailed before *Blaisdell*.[107] It follows that the *Blaisdell* decision should be overruled as out of step with the constitutional ban on contractual impairment.

These brief proposals hardly resolve all the interpretative issues pertaining to the Contract Clause, but they would put us on a path to restore the Clause as a vital part of the Constitution.[108]

107. *See, e.g.*, State *ex rel.* Cleveringa v. Klein, 249 N.W. 118, 124–28, 128 (N.D. 1933) (brushing aside an argument that an economic emergency justified legislation enlarging the period of redemption from mortgage foreclosure, and declaring that "[i]t must not be forgotten that the right of private contracts is no small part of the liberty of the citizen").

108. For a more complete analysis of my proposals, see Ely, *Public Employees*, *supra* note 86, at 56–60.