

A Process-Oriented Approach to the Contract Clause

Until recent years, the contract clause¹ of the Constitution was thought to be a dead letter.² After vigorous application in the nineteenth century,³ the clause⁴—along with other judicial devices for protecting economic rights⁵—fell into disuse in the late 1930s.⁶ During the following four decades, the Supreme Court invoked the clause only twice.⁷ In 1977, however, the Court invalidated the repeal of a public bond covenant on grounds of contract impairment.⁸ The fol-

1. U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .”)

2. *See, e.g.*, B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART II. THE RIGHTS OF PROPERTY 306 (1965) (contract clause “has . . . been reduced to a minor organic provision in the constitutional law of the twentieth century”); Hale, *The Supreme Court and the Contract Clause* (pt. 3), 57 HARV. L. REV. 852, 890-91 (1944) (“results might be the same if the contract clause were dropped out of the Constitution” and supplanted by due process clause); *cf.* City of El Paso v. Simmons, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (Court has “balanc[ed] away the plain guarantee” of the contract clause).

3. In the nineteenth century, the Supreme Court used the contract clause more often than any other constitutional provision to invalidate state legislation. By the 1930s, the Court had turned primarily to the due process clause as the basis for judicial review of economic legislation. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 91-100 (1938).

4. The contract clause is one of the few provisions of the Constitution that provide specific protection for economic rights. The Fifth and Fourteenth Amendments prohibit the federal government and the states from depriving persons of property without due process and from taking property without just compensation. U.S. CONST. amends. V, XIV. Other provisions, such as the commerce clause, U.S. CONST. art. I, § 8, may protect individual economic rights indirectly. *See, e.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (out-of-state milk distributor protected by commerce clause invalidation of state milk regulations).

5. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 548-96 (9th ed. 1975) (tracing rise in late nineteenth century and decline in 1930s of judicial application of substantive due process to economic regulation); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (describing virtual abdication by Supreme Court of due process and equal protection review of economic legislation).

6. In upholding a state mortgage-foreclosure moratorium in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), the Supreme Court recognized “the necessity of finding ground for a rational compromise between individual rights and public welfare.” 290 U.S. at 442. This recognition of the legitimacy of direct economic regulation marked the turning point in the Court's application of the contract clause.

7. Wood v. Lovett, 313 U.S. 362 (1941); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938). Neither law was a typical case of impairment. The law invalidated in *Brand* implicated free speech rights. *See id.* at 107-09. The law invalidated in *Wood* involved the special case of title to state granted land, and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), required its invalidation. *See* 313 U.S. at 368-69.

8. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The Port Authority of New York and New Jersey since 1962 had issued bonds with a statutory covenant restricting its involvement in mass transit operations. In 1973 and 1974, with suddenly

lowing year, the Court overturned a state pension law as imposing unbargained-for obligations upon a party to a private contract.⁹ These decisions have signaled a new activism in the Supreme Court's use of the contract clause to protect economic rights.¹⁰

The Supreme Court has offered few clues indicating the extent of this new activism.¹¹ Its two recent opinions relied upon inconsistent approaches to contract clause jurisprudence,¹² and neither opinion

worsening energy problems and increasing concern over environmental and urban-transportation issues, the New York and New Jersey legislatures repealed the covenant, first prospectively and then retroactively, to permit use of Port Authority facilities for new mass transit projects. New Jersey state courts found that repeal of the covenant had affected the bonds' security only nominally and had not harmed their secondary market value. They upheld the repeal as a legitimate exercise of the states' police power. *United States Trust Co. v. State*, 134 N.J. Super. 124, 338 A.2d 833 (1975), *aff'd*, 69 N.J. 253, 353 A.2d 514 (1976). The Supreme Court found a substantial impairment of security and reversed: repeal was not reasonable, in that the problems at which it was directed were foreseen when the covenant was passed, 431 U.S. at 31-32, and the law was not necessary, in that less drastic means were available to pursue the states' ends, *id.* at 29-31.

9. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). A Minnesota law required any company of one hundred employees or more that maintained a pension plan and closed an office in the state, to fund pensions for employees of at least ten years, even if the pension rights under the plan did not vest at ten-years' service. Although the law was preempted by federal pension legislation less than a year after its passage, the state imposed a \$185,000 "pension-funding charge" on Allied Structural Steel Co. A three-judge federal district court found the law constitutional as applied to the company. *Fleck v. Spannaus*, 449 F. Supp. 644 (D. Minn. 1977). Without indicating precisely what test it was applying, the Supreme Court reversed. The Court found that the impairment was sudden, severe, retroactive, and permanent, 438 U.S. at 244-47, 250, and concluded that the statute operated in a previously unregulated field and was not directed at a public emergency or broad societal interest, *id.* at 247-50. Those factors rendered the law unconstitutional.

10. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 251, 259 (1978) (Brennan, J., dissenting) (decision "greatly expands the reach of the Clause" and "threatens to undermine the jurisprudence of property rights developed over the last 40 years"); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 33 (1977) (Brennan, J., dissenting) (decision creates "a constitutional safe haven for property rights embodied in a contract"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-3, at 49, 50 (Supp. 1979) (revival of contract clause "may become part of a significant new trend" and "could be seen as another sign of the Court's growing solicitude for the interests of corporate capitalism").

In 1979, the Supreme Court reaffirmed its renewed commitment to a strong contract clause by summarily affirming a lower court decision that invalidated the *Spannaus* law as applied in circumstances similar to those of *Spannaus*. *White Motor Corp. v. Malone*, 599 F.2d 283 (8th Cir.), *aff'd mem.*, 100 S. Ct. 223 (1979).

11. In *United States Trust Co.*, the Court restricted the tests employed to cases involving "purely financial" state contractual obligations. 431 U.S. at 25-26. The *Spannaus* Court did not suggest that the factors emphasized would be relevant in all contract clause cases, 438 U.S. at 249-51 & n.24, and seemed deliberately to avoid articulating any general standard.

12. The opinions in *United States Trust Co.* and *Spannaus* are inconsistent in two ways. First, in *United States Trust Co.*, the Court stated that judicial deference to legislative judgments is appropriate in private contract cases. 431 U.S. at 22-23. Yet in *Spannaus*, the Court strictly scrutinized the challenged legislation, dismissing available evidence of legislative purpose and making its own judgments as to reasonableness. 438 U.S. at 246 n.18, 248 n.19. Second, the Court in *United States Trust Co.* adopted a reasonableness-and-necessity standard and interpreted it to require application of the foreseeability and least drastic means tests. 431 U.S. at 29-32. In *Spannaus*, the Court used neither of the

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proposed an overall theory for construction or application of the clause. In addition, the Court has made no effort to justify departing from its customary deference to legislative regulation of economic rights.¹³

This Note advocates an approach to contract clause jurisprudence by which a court would scrutinize the manner in which the legislature has adopted the particular law, but would not intrude upon the legislature's substantive policy judgment. After a brief examination of the framers' intent, the Note identifies several competing principles that pervade contract clause doctrine and contends that the Supreme Court's various approaches to interpretation of the clause have failed to reconcile those principles. The Note then proposes a process-oriented approach to application of the contract clause. The objective of the scrutiny would be to ensure that political, not judicial, checks operate to promote compliance with the principles underlying the clause.

United States Trust Co. tests, but adopted instead an unstructured factor-based balancing approach. 438 U.S. at 250; see Note, *Revival of the Contract Clause: Allied Structural Steel Co. v. Spannaus and United States Trust Co. v. New Jersey*, 65 VA. L. REV. 377, 395-96 (1979) (comparing *United States Trust Co.* and *Spannaus*).

13. With respect to policy judgments, the Court adopted a deferential approach in contract clause cases in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-48 (1934) ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.") With respect to legislative judgments of necessity, the Court articulated a similar approach in *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945) ("[o]nce we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary'") (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)). Similarly, the leading post-1930s contract clause case, *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (upholding elimination of reinstatement rights for defaulting purchasers of certain state lands), deferred to legislative judgments of purpose and need.

The recent departure from this judicial deference in the realm of economic rights is particularly striking in light of the Burger Court's respect for federalism and its usual deference to legislative choices. See, e.g., *PruneYard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980) (deference to state constitutional free speech provision against takings clause); *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (only invidious discrimination, the wholly arbitrary act, cannot stand consistently with Fourteenth Amendment); *National League of Cities v. Usery*, 426 U.S. 833, 849, 852 (1976) (congressionally imposed displacement of traditional state governmental functions inconsistent with federalism).

The Burger Court has shown some willingness, however, to find constitutional protection against government action abridging economic rights under provisions other than the contract clause. See, e.g., *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979) (prohibition of refusal to permit public access to marina created from private pond is compensable taking); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (First Amendment protects pharmacists' "purely economic" interest in advertising). The Court's approach has not, however, been unswervingly protective of individual economic rights. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (designation of Grand Central Terminal as landmark not a taking); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (retroactive requirement that coal mining companies pay benefits to miners stricken with black lung disease held not violative of due process).

I. Rejection of Literalism

Neither the constitutional text nor the intent of the framers¹⁴ provides much guidance in interpreting the contract clause. The clause was directed narrowly at forms of debtor-relief legislation thought to have contributed to the economic troubles of the 1780s,¹⁵ and it generated little discussion at the Philadelphia Convention¹⁶ or during the state ratification process.¹⁷ The framers appear to have given almost no thought to the broad implications of the language.¹⁸

Although it has applied the contract clause to many laws other than debtor-relief laws, the Supreme Court has long rejected a literalist reading.¹⁹ The conclusive step in the repudiation of literalism was the Court's adoption in the late nineteenth century of two principles that drastically restricted the reach of the contract clause.²⁰ Those principles were that private contracts are made subject to the state's retained police power (the "reserved power" doctrine),²¹ and that public contracts are made subject to the state's constitutional inability to alienate its police powers (the "inalienability" doctrine).²² The introduction of those doctrines greatly softened the apparent command of the contract clause that

14. See Johnson, *The Contract Clause of the United States Constitution*, 16 Ky. L.J. 222, 222 (1928).

15. B. WRIGHT, *supra* note 3, at 10 (Convention records throw little light upon the meaning of text); see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427 (1934) (Convention debates "of little aid" in construing clause).

16. B. WRIGHT, *supra* note 3, at 12 (discussion of clause in state ratifying conventions and pamphlet literature was rare).

17. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934); see B. WRIGHT, *supra* note 3, at 1-16 (discussing debtor-relief laws common in 1780s and analyzing framers' intent).

18. B. WRIGHT, *supra* note 3, at 5 (contract clause not regarded with great concern either by framers or Anti-Federalists). "[T]he men of 1787-1788 were not so greatly concerned about the contract clause as would be expected, and . . . although some of them were definitely of the opinion that it applied primarily as against stay laws, or laws permitting debtors to pay their creditors in some kind of commodity other than money, most of them seem to confuse this clause with the monetary provisions of Section 10." *Id.* at 15.

19. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978) ("Clause is not . . . the Draconian provision that its words might seem to imply"); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977) (prohibition not to be read with literal exactness) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)).

20. See Hale, *The Supreme Court and the Contract Clause* (pts. 1-3), 57 HARV. L. REV. 512, 621, 852 (1944) (reviewing development of contract clause doctrine).

21. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) ("reservation of essential attributes of sovereign power is . . . read into contracts as a postulate of the legal order"); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (contract clause does not prevent state from exercise of police powers for public good).

22. *City of El Paso v. Simmons*, 379 U.S. 497, 508 (1965) (state may protect public welfare notwithstanding interference with public contracts); *Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 558 (1914) (state police power is "inalienable even by express grant").

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contract rights were to be protected in preference to other substantive values. Interpretation of the clause became virtually independent of intent and text.²³

II. Principles of Contract Clause Jurisprudence

Since the introduction of the reserved power and inalienability doctrines, interpretation of the contract clause has focused on competing principles of public power and private right.²⁴ In particular, contract clause cases pose the question of how to reconcile the notion that government should be held to its word, with the idea that retroactive legislation to pursue public goals is a necessary product of modern government.

In interpreting the clause, the Supreme Court has emphasized both competing substantive concerns and constraints upon institutional roles. Analysis of the Court's pronouncements suggests several general principles that can help resolve the conflict of substantive values and indicate the proper limits on judicial application of the clause.

A. *Private Expectations*

A central concern of the Supreme Court in contract clause cases has been to protect legitimate contract-based expectations from government interference.²⁵ That concern has rested on two principles: that a state is estopped from dishonoring its commitment that a contractual obligation recognized by it will remain secure;²⁶ and that

23. This type of interpretation is similar to that given to the more "indeterminate" provisions of the Constitution. Cf. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1088-94 (1979) ("due process" and "equal protection" too indeterminate for literalist adjudication); Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5 & n.3 (1978) (interpretation of certain provisions, including equal protection clause, privileges or immunities clause, and Ninth Amendment, requires sources beyond text and intention of drafters).

24. See B. WRIGHT, *supra* note 3, at 258.

25. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978) (Allied had reasonable and legitimate contractual expectation); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977) (repeal of bond covenant is serious disruption of bondholders' legitimate expectations).

26. In Professor Tribe's formulation of this estoppel principle, "the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-7, at 470 (1978). In a public-contract case, the state has expressly given its word. In a private-contract case, the state guarantee is implicit, based upon reading into the contract the "contemporaneous state law pertaining to interpretation and enforcement." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977); see *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827) (state law read into contracts).

there is a legitimate expectation that a private arrangement will not be disturbed without special justification.²⁷ The first principle protects justified reliance upon state assurances of security;²⁸ the second principle protects the individual autonomy and independence that the institution of contract is designed, in part, to foster.²⁹ A state's impairment of a contract can both disturb reliance upon a commitment of security and upset expectations of government noninterference.

Other aspects of contract clause jurisprudence limit these two strands of the expectations notion. The recognition that contract rights affect the public interest³⁰ substantially qualifies the idea that abridgment of contract rights unduly intrudes upon expectations of personal autonomy.³¹ The reserved power and inalienability doctrines, which authorize a state to break even an express commitment,³² and the justifications for retroactive legislation,³³ limit the principle that reliance upon state assurances may not be upset. With these qualifications, though, contract-based expectations constitute the private interest with which the contract clause has been, and should continue to be, centrally concerned.

27. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.") The legitimacy of expectations of government noninterference is also the Supreme Court's primary concern in deciding whether a challenged law enters a new field of regulation. See *id.* at 250 (challenged law not operating in area subject to state regulation at time of contract formation); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) (relevant to law's validity that complainant had "purchased into an enterprise already regulated in the particular to which he now objects").

28. Justified reliance has long been a notion fundamental to contract law. See, e.g., 1A A. CORBIN, *CONTRACTS* §§ 193-209 (1963 & Supp. 1980); *RESTATEMENT OF CONTRACTS* § 90 (1932).

29. See M. COHEN, *LAW AND THE SOCIAL ORDER* 74-79 (1933) (institution of contract serves values of personal autonomy and liberty); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 45 (1968) (institution of contract allows individuals to control and predict future).

30. This notion is implicit in the principle that prospective conditioning of contractual obligations is valid. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (contract clause applies only to laws affecting existing contracts, not to laws setting conditions on contracts made after the law's enactment).

31. Intrusions in the form of restrictions on the liberty of contract are not barred by the contract clause. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212 (1827). Interference with the liberty to form contracts, however, may be invalid under the due process clause, see *Lochner v. New York*, 198 U.S. 45, 53 (1905) (due process clause protects liberty of contract), though the justification required under the due process clause for such action has been minimal since 1937, see *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-400 (1937) (establishing deferential rationality standard for due process challenges to economic legislation).

32. See notes 21 & 22 *supra*. By permitting interference with private arrangements, those doctrines also limit the personal-autonomy strand of the expectations notion.

33. See note 54 *infra*.

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An approach to contract clause analysis that focused on legitimate expectations, however, would have to determine which expectations were legitimate, in the sense of being constitutionally protected. Yet, except in cases that involved laws closely resembling laws whose validity had already been adjudicated under the contract clause,³⁴ the Court could not assume that legitimate expectations were clearly defined. Actual expectations³⁵ could not be the measure of legitimacy without restricting the scope of public power preserved under the reserved power and inalienability doctrines; neither doctrine, however, has limited the areas in which public power may legitimately be exercised, even if that exercise effects a contractual impairment.³⁶ In most cases, therefore, the Court would necessarily focus, not on the contracting parties' expectations, but rather on the justification offered by the state for the impairment.³⁷ Though the protection of contractual expectations is an important concern, contract clause analysis should not adopt the protection of expectations as the guiding operational principle.

34. The Court might safely assume that any legislation closely resembling a law previously upheld against a contract clause challenge would violate no legitimate expectations. One example would be laws concerning health, safety, or morals powers, which were involved in the cases in which the reserved power and inalienability doctrines were formulated. *E.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (regulation of public water supply); *Stone v. Mississippi*, 101 U.S. 814 (1879) (lottery regulation); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1877) (liquor regulation). Another example would be legislation affecting the state's administration of its legal system. *E.g.*, *Gelfert v. National City Bank*, 313 U.S. 221 (1941) (modification of deficiency judgment procedures); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 553 (1866) (states may modify own procedure provided no substantial contract right impaired); *cf.* *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977) (modification of statutes governing remedies much less likely to upset expectations than law adjusting express terms of contract).

Similarly, the Court could assume that a law very similar to one already overturned as effecting an unconstitutional impairment would upset legitimate expectations. One example would be legislation repealing a state's grant of title to property. *E.g.*, *Wood v. Lovett*, 313 U.S. 362 (1941) (repeal of law establishing title to land sold by state); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (repeal of state land grant). Another example would be a state's refusal to repay borrowed money. *E.g.*, *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909) (state restriction of municipality's taxing power resulting in municipality's default on bonds); *Wolff v. New Orleans*, 103 U.S. 358 (1880) (same).

35. Actual expectations with respect to the particular impairment may be nonexistent. For example, the parties to the land-sale contracts in *City of El Paso v. Simmons*, 379 U.S. 497 (1965), probably did not contemplate the possibility of legal title confusion resulting from the existence of reinstatement rights, the possibility of oil and gas discoveries, or the possibility of rapidly increasing population; they therefore probably did not expect elimination of reinstatement rights.

36. The reserved power and inalienability doctrines have defined broad, not narrow, categories of legitimate state action. *See* *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1978) (impairment valid if reasonable and necessary to serve important public purpose); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934) (contract clause does not prohibit exercise of state powers for promotion of common weal).

37. *See* *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934).

B. *The Scope of Public Power*

The reserved power and inalienability doctrines establish that a necessary exercise of public power may impair private expectations of contractual security without violating the Constitution. A court must focus on whether the public purpose adopted by the state requires impairment of particular contracts. If impairment is not necessary to achieve that purpose, or if selection of the particular group of contract parties to bear the burden of fulfilling the public purpose is inappropriate, the court may overturn the legislation.

1. *Public Purpose*

By adopting the reserved power and inalienability doctrines, the Supreme Court acknowledged that existing contract rights must give way in a conflict with the public interest.³⁸ Though the Court initially limited state power by defining narrowly both the interests that a state could protect as public and the interests that a state could declare affected by exercise of otherwise-private contract rights,³⁹ both limits have gradually been eroded. The Court has subsequently recognized that a state may legitimately protect a virtually limitless range of interests that conflict with economic rights⁴⁰ and that all economic interests, particularly contractual relationships, can affect

38. See *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (police power paramount to private-contract rights); B. SCHWARTZ, *supra* note 2, at 285 (existing contractual rights must yield to police power). Theories of property rights have similarly recognized the justifiability of public regulation of property use. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (government may regulate to prevent harmful consequences of exercise of individual economic rights); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851) (“[E]very holder of property . . . holds it under the implied liability that his use of it . . . shall not be injurious to the equal enjoyment of others . . .”); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152, 162 (1971) (external effects of property use may constitutionally be restrained).

39. The range of nonproperty interests that could be protected in the public interest was initially restricted to public health, safety, morals, and a narrowly conceived general welfare. B. WRIGHT, *supra* note 3, at 195-213; Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1042 (1978).

40. The broad formulations that the Court gave the reserved power and inalienability doctrines permitted it to expand their scope. In *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (upholding rent-control law), and *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding mortgage-foreclosure moratorium), the Supreme Court recognized the legitimacy of direct state intervention into private economic relations in order to protect individuals from financial hardship. Later, the Court further expanded the scope of “public welfare”; given the paucity of contract clause cases after 1937, the expansion occurred primarily in cases involving other constitutional provisions. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) (legislation to preserve character and aesthetic features of city improves public welfare); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (public welfare includes spiritual and aesthetic, as well as physical and monetary values).

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the public interest.⁴¹ The Court's doctrine implicitly includes the general proposition that public power, properly exercised, is superior to contract rights.⁴²

The Court's focus has shifted, therefore, to two concerns: the state's definition of a public purpose, and the manner in which it is pursued in a particular case. Because there are few limits on the legitimacy of public purposes,⁴³ inquiry into whether the state has adopted truly public ends typically is perfunctory.⁴⁴ The public-purpose requirement, however, is the critical predicate for infringement of individual expectations;⁴⁵ the principal danger is that the legislation is serving only private interests.⁴⁶

41. See, e.g., *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945) (private contracts exist in public context); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934) (private contracts affect interests of state); M. COHEN, *supra* note 29, at 78 (private contract never devoid of all public interest).

A contract may affect the public interest in three ways. The rights of each party to a contractual arrangement affect at least other parties' interests; preventing damage to those interests may be a public goal. See, e.g., *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945) (public purpose to protect mortgagors from foreclosure); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (same). Enforcement of a contract may also harm third parties. See, e.g., *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) (public purpose to protect savings and loan association depositors from shareholders' exercise of withdrawal rights); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (public purpose to protect dwellings in vicinity of oil storage tanks). Finally, enforcement may merely stand in the way of promoting a public goal without being responsible for harm to individuals. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (bond covenant as obstacle to public purpose of improving mass transit); *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (public purpose to cure legal title confusion due to maintenance of reinstatement rights on public land sales).

42. See *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 375 (1919).

43. See *Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Cr. Rev. 95, 106-07 (class of impermissible objectives is small).

44. The public purpose requirement "prohibit[s] a State from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 (1977) (Brennan, J., dissenting) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934)). In all cases involving a state breach of contract, however, the state advances a public purpose. See, e.g., *id.* at 28-29 (state contends transportation, energy, and environmental goals require impairment); *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942) (financial emergency required reduction of municipal bondholders' rights).

45. See *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 108-09 (1938); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 196 (1936).

46. See *Bennett*, *supra* note 23, at 1083 ("unalloyed personal favor is beyond the present legislative pale"); cf. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248-49 (1978) (narrow focus of law generates suspicion of private interests being served); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197-98 (1936) (challenged law dealt only with private rights and not legitimate public end).

Protecting private interests could in some instances be adopted as a public purpose. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 227 (1962) (legislative decision to foster private interests as public goal legitimate); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1246-49 (1970) (rationality standard permits promotion of private interest as public goal). A legislature may, however, wish to serve

The second and more important element of public-purpose scrutiny looks to means. The Court's decisions indicate that if the state offers no policy justification for its selection of means and if a serious defeat of expectations seems unnecessary, a court may invalidate the legislation.⁴⁷ If policies subsidiary to the primary purpose make the selected means necessary, however, an impairment may be justified.⁴⁸ Means-scrutiny under the contract clause, therefore, should require that impairment be necessary, within the constraints set by subsidiary policy choices, for achievement of the state's primary purpose.⁴⁹

private interests without adopting their protection as a public end. In its unwillingness to expose its true purposes, the legislature may then disingenuously attach a general statement of public purpose. In such cases, the legislature will typically provide inadequate support for the purported connection between the general purpose and the action taken. Several commentators have suggested that the rationality test—which scrutinizes this connection—has been and should be used to invalidate legislation when suspicions of disingenuousness arise. *E.g.*, Bennett, *supra* note 23, at 1077-84; Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 45-46 (1972). A process-oriented approach can achieve the same ends. *See pp.* 1645-47 *infra*.

47. *See, e.g.*, W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935) (security of public bond may not be reduced without reason when public welfare may be served by less severe impairment); W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934) (debtor-relief law with no time, amount, circumstance, or need limits violates contract clause when less severe impairment would serve public goals).

48. *See, e.g.*, East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 234 (1945) (no violation when impairment is necessary in light of state judgments respecting complex economic and financial affairs); *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 515 (1942) (no violation when impairment was carefully designed to serve state policies). Objective criteria perhaps cannot be formulated to determine the level of generality at which policies must be articulated in order for means to be evaluated against them: overly general policies may justify no particular means, and overly specific policies may tautologically justify any given means. P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 565-66 (1975). Yet, courts regularly assume "that a particular level of generality . . . is appropriate." *Id.* at 566. *Cf.* H. LINDE, DUE PROCESS OF LAWMAKING 208-12 (1976) (in evaluating means, courts faced with choice of ends at high or low level of generality).

Impairment is never absolutely necessary to fulfillment of a public purpose, for the state can ultimately finance alternative programs itself; for example, a state can compensate parties to contracts the value of whose performance it has diminished. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 & n.16 (1977). The theoretical availability of that alternative, however, has never alone justified invalidation of impairments; otherwise, no impairment could be valid, except perhaps during an extraordinary public fiscal crisis. *See id.* at 59 (Brennan, J., dissenting). Rather, states have been afforded "wide discretion . . . in determining what is and what is not necessary." *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965) (quoting *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232-33 (1945)).

49. Two additional principles have informed the Court's means-scrutiny. First, if the state's commitment of contractual security was strong, the state must explain why its position with respect to the necessity of impairment has changed since the contract was made. *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31-32 (1977) (impairment invalid absent demonstrated change of policy or circumstances since contract made); *City of El Paso v. Simmons*, 379 U.S. 497, 514-16 (1965) (impairment valid if policy and circumstances changed since contracts made).

Second, when costs are imposed upon individuals for the state's pursuit of a public goal, the state must establish the appropriateness of the particular imposition. The appropriateness requirement is responsive to concerns about fairness that pervade discussion of government action respecting contract or property rights. *See* L. TRIBE, *supra* note

2. *Retroactivity*

Legislation is retroactive if it impairs the obligation of a contract entered into prior to the law's enactment. Two effects of retroactivity caution against needless impairment: a retroactive law violates implicit or explicit assurances of contractual security; and absent fair warning of the law's passage, it upsets expectations.⁵⁰ Nevertheless, under the reserved power and inalienability doctrines, those effects are sometimes justified. In particular, retroactive legislation is typically aimed at problems caused by existing contracts; prospective legislation in such cases would not serve the chosen public purpose.⁵¹

The legitimacy of an impairment depends upon whether it is necessary to fulfill a public purpose.⁵² When a state dishonors a commitment, the disruption of reliance interests has led the Court to concentrate on changes in the state's conception of public purpose or necessity that have occurred since the contract was made.⁵³ In a po-

26, § 9-6, at 469 (Constitution suggests general principle that "there exist limits on the degree to which government can sacrifice some individuals to serve the ends of others" (footnote omitted)); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1226 (1967) (takings clause is "the visible, formal [expression] . . . of society's commitment to fairness").

50. See Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

51. For example, in the circumstances that gave rise to *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), conditioning future mortgage contracts to permit delayed repayments in the event of widespread financial hardship would not have served the state's purpose of protecting already-insolvent mortgagors.

Though prospective legislation would only prevent a problem from arising anew, in the long run such legislation may suffice to serve public purposes for certain types of contract. For example, the early holding that the contract clause forbids modification of corporate charters, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), was eventually made ineffective as a constraint on public regulation of corporate affairs by state adoption of statutes or constitutional provisions reserving the right to alter or amend corporate charters. See B. WRIGHT, *supra* note 3, at 60, 86, 168-70 (adoption of reservation clauses possibly "principal factor" in decline of contract clause).

Because state law defines the obligation of a contract, *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 256-59, 326 (1827), states could constitutionally adopt general reservation clauses in their constitutions, formally conditioning all contracts—public and private—by the state's power to interfere for a public purpose. *Id.* at 339 (Marshall, C. J., dissenting). Given that states already have great flexibility under the reserved power and inalienability doctrines, a formal disclaimer would be necessary only if a state intended to impair contracts frequently. Because the economic insecurity that would result—both for the state and for private parties—would be intolerably costly, states would not adopt general reservations.

52. The selection of means to pursue a general end typically involves accommodation of subsidiary ends; the public purpose of legislation encompasses the complex of public policies. See H. LINDE, *supra* note 48, at 207-15; Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972). Whether impairment is necessary to fulfill a public purpose therefore depends upon whether enforcement of the contract conflicts with the means chosen, assuming those means are themselves justified by public policies.

53. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31-32 (1977) (impairment invalid because of insufficient change of circumstances); *City of El Paso v. Simmons*, 379 U.S. 497, 516 (1965) (impairment valid because of change of circumstances and policy).

litical system that vests authority to determine public policy in periodically elected legislatures, factual and policy judgments frequently change.⁵⁴ If the basis of the state's initial assurances was that contractual security was more important than, or had no effect upon, other policies, dishonoring those assurances on public-purpose grounds requires repudiation of the policy balance or alteration of the factual assessment. The Court's attention to these changes suggests that absent such repudiation, the impairment is unnecessary and should be blocked.

3. *Burdened Class*

In deciding that enforcement of a contract would be contrary to the public interest, a state must determine who should bear the cost of protecting that interest. Because alternatives always exist to imposing the costs on a class of contracting parties, the state can rarely claim that pursuit of general goals absolutely requires impairment of a particular contract. A state must therefore adopt some appropriate justification for imposing such costs on individuals in pursuing public goals.⁵⁵ The usual justification relies on the notion of

54. In many instances, especially when the contract is long-term or affects third parties, the determination that its enforcement is contrary to the public good requires knowledge of consequences of the contractual arrangement that could not be confidently predicted. *See, e.g.*, *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (reinstatement rights on land sales caused legal confusion over 50 year period); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) (shareholder withdrawal rights would cause bank failure). Changing conditions also may alter the public effect of the contractual arrangement. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgagor-defaults became widespread public problem during Depression); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (residences encroached on originally isolated oil tanks). The legislature may receive new information, perhaps because political forces gained sufficient strength to bring a problem to the state's attention or to motivate new scrutiny. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (employees drew legislature's attention to pension problem); *Stephenson v. Binford*, 287 U.S. 251 (1932) (railroad drew legislature's attention to highway maintenance). In addition, with time the state may exhaust alternative means of protecting the interest at stake. *See, e.g.*, *United States Trust Co., v. New Jersey*, 431 U.S. 1 (1977) (covenant repealed retroactively only after prospective repeal found to be inadequate); *City of El Paso v. Simmons*, 379 U.S. 498 (1965) (step-by-step removal of reinstatement rights on land sale). Finally, public policies change so that the state may adopt a particular public goal for the first time, or determine that some existing goal is more important than it had deemed it earlier. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (protection of mortgagors deemed more urgent than earlier, and interference with private mortgage market deemed acceptable); *Stone v. Mississippi*, 101 U.S. 814 (1879) (lotteries formerly authorized deemed unacceptable).

55. The Court has not addressed the question of how costs may appropriately be imposed separately from the question of whether impairment is necessary for pursuit of the public purpose. Yet, the first question is conceptually distinct from the second and has been of implicit importance in contract clause cases. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978) (impairment invalid when "severe" costs of legislation

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the intended cost-bearer's causal responsibility for harm:⁵⁶ unless the contract is impaired, the cost-bearer will take an affirmative step⁵⁷ harmful to other contracting parties, third parties, or the public at large.⁵⁸

Though states rarely attempt to justify imposition of the costs of impairment other than in terms of causal responsibility,⁵⁹ particular circumstances may generate alternative justifications.⁶⁰ In such situa-

with "narrow aim" imposed only on employers); *United States Trust Co. v. New Jersey*, 431 U.S. 30, 31 & nn.28 & 29 (1977) (impairment invalid when less drastic alternatives available that would burden beneficiaries of transportation program rather than bondholders); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-48 (1934) (imposition of costs "appropriate" where mortgagor-relief is temporary, individually tailored, and equitable). The appropriateness requirement is therefore a characterization of contract clause cases that differs from the language of the opinions.

56. Cf. H. HART & A. HONORE, *CAUSATION IN THE LAW* 61 (1959) ("causing harm constitutes not only the most usual but the primary type of ground for holding persons responsible"); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 479 (1979) (principle that "a person may act without having to account for his actions to another . . . [but] he cannot 'cause harm' to another" is fundamental to legal responsibility).

57. An act is required in order justifiably to attribute causal responsibility to the cost-bearer. Cf. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 53-54 (1979) (act requirement in nuisance law insures recognition of personal freedom and autonomy).

58. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgagees would foreclose on mortgagors); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (landlords would evict tenants).

59. There may be several reasons why the state advances no causal-responsibility justification. There may be no harm that the state wishes to prevent, but rather a more positive goal to be pursued. Alternatively, there may be a harm, but the cost-bearers may not be responsible. No single group may be identified as responsible, or a group other than the group of cost-bearers may be responsible. In the latter case, the state must advance an especially strong justification for why costs are not imposed on those responsible for the harm. If causal responsibility is the strongest justification for imposing costs, special explanation is required when it is not used.

In *United States Trust Co.*, for example, it was arguable that no distinguishable class was responsible for the complex of energy, environmental, and urban transportation problems at which impairment was directed. 431 U.S. at 28-30. Conversely, if automobile drivers could justifiably be distinguished as causing a substantial part of those problems, the legislative decision not to impose costs on them is suspect, especially given that such an imposition appeared to be feasible. *Id.* at 30 n.29. In response, it is arguable that the hardship that would be worked on drivers by such alternatives to bond-covenant repeal as raising bridge tolls were considered by the state sufficient reason to dismiss those alternatives, because drivers already faced high gasoline prices and their need to use bridges was relatively inflexible.

Similarly, it is difficult to characterize the mere holding of reinstatement rights by the defaulted land purchasers in *City of El Paso v. Simmons*, 379 U.S. 498 (1965), as causing harm, given that one of the state's purposes was to improve the property tax base. *Id.* at 512-13.

60. Cf. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (describing and analyzing alternative justifications for fairness of government actions affecting property rights); Michelman, *supra* note 49 (same). Because contract rights are property, theories applicable in the property rights context—for example, utilitarian and rights-based theories—should also apply in contract clause cases. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 88 (1977).

tions, the state must articulate a theory to justify the appropriateness of imposing costs.⁶¹ The cost-bearer may be singled out as the primary obstacle to achievement of the public purpose. The state may adopt a cost-benefit or other utilitarian justification,⁶² or may emphasize the spreading or avoidance of costs.⁶³ Alternatively, the state may impose costs on those who have profited from an activity that is subject to the regulation.⁶⁴ If the state cannot meet the burden of establishing the appropriateness of its means of imposing costs to pursue its public purpose, a court may invalidate the challenged legislation and require the state to adopt alternative means.

C. *Institutional Role: Judicial Deference and Political Checks*

The text of the contract clause appears to make it an appropriate candidate for judicial interpretation without great deference to legislative judgments.⁶⁵ Contract clause doctrine, however, has established that impairment is justified when necessary for achievement of a public purpose. Application of the clause thus requires only policy judgments⁶⁶ and factual assessments⁶⁷ that the Court has repeatedly deemed inappropriate for the judiciary to make.⁶⁸ The tentative and specula-

61. Alternative means must be evaluated in the context of the legal constraints and subsidiary policies constraining the state's action. *See, e.g.,* *United States Trust Co. v. New Jersey*, 431 U.S. 1, 39-40 (1977) (Brennan, J., dissenting) (reasonable for state to conclude no alternative to repeal of bond covenant).

62. *Cf. B. ACKERMAN, supra* note 62, at 41-70 (applying utilitarian analysis to takings problem). The size of the burden placed on the cost-bearer would figure significantly in any utilitarian justification. Thus, a utilitarian theory might have justified the nominal impairment in *United States Trust Co.* *But see* 431 U.S. at 29 (rejecting utilitarian approach).

63. *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976) (law requiring coal mine operators to compensate former employees for black lung disease upheld as rational measure to spread costs of disabilities).

64. *See, e.g., City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) (impairment upheld as preventing speculative gains from holding reinstatement rights); *Gelfert v. National City Bank*, 313 U.S. 221, 233-34 (1941) (same).

65. Indeed, Professor Ely reads the contract clause as one of the few constitutional provisions that single out a substantive value for special protection from the political process. J. ELY, *DEMOCRACY AND DISTRUST* 92 (1980).

66. These choices may include adopting the protection of private interests as a public purpose; deciding in other situations what constitutes harm or what is a public goal; weighing the importance of subsidiary policies that affect the acceptability of alternative means of pursuing a public goal; and assigning weights to competing claims in choosing an appropriate distribution of costs.

67. These may include judgments about social and economic conditions, about the likely effects of alternative means for achieving the public purpose within the constraints of subsidiary policies, about the identity of those responsible for harm, and about the impact of impairment on contracting parties.

68. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (for solely economic regulation, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations"); *Day-Brite Lighting, Inc. v. Missouri*,

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tive character of the required policy and factual judgments⁶⁹ raises substantial doubts about relative judicial competence⁷⁰ and renders them more appropriate for legislative decision.⁷¹ Moreover, insofar as the necessary policy choices require tradeoffs of competing public interests, the limitation on judicial intrusion rests on basic tenets of representative democracy.⁷² The Supreme Court has recognized these

342 U.S. 421, 423, 425 (1952) (state legislatures entitled to decide standards of public welfare in areas where policy issues are debatable); *cf.* Brest, *supra* note 43, at 106-07 (under traditional due process and equal protection standards, political branches have "virtually plenary authority to choose which objectives to promote at the expense of which others, and to determine what costs shall be incurred to promote the objectives and on whom those costs shall be placed").

69. The nature of the policy judgments makes it impossible to separate clearly the empirical from the normative; indeed, the idea of "policy determinations" typically encompasses judgments of both fact and value. In this respect, these judgments differ significantly from fundamental-value choices, which may be both amenable to and better made by judicial decision. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1-17 (1979) (courts well-suited to give meaning to constitutional values). Thus, the competence argument for a limited judicial role in contract clause cases does not imply that courts should also refrain from "discovering fundamental values."

70. *See* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60, 64 (1973) (not for Court to resolve empirical uncertainties underlying economic or social legislation); *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 234 (1945) (complex factual judgments, including necessity of impairment, are not for judiciary); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 47 (1977) ("[t]raditionally, the courts have been modest about their competence to ascertain social facts and . . . have shielded themselves by . . . deferring to the fact-finding abilities of legislatures").

71. Thus, the argument that courts should defer to legislative judgments in contract clause cases depends upon the conclusion that public purpose, appropriately declared and defined, is paramount to private contractual expectations. For other constitutional provisions, the extent to which deference is appropriate would depend on the governing substantive standard. If "necessary to pursue a public purpose" is not the standard and if fundamental interests are involved, or if the legislative judgments are within the competence of the courts, deference may be inappropriate. To decide this issue for any particular provision, therefore, requires analysis of the substantive meaning of that provision. Unlike Professor Ely's argument for limited judicial role, *see* J. ELY, *supra* note 65, at 73-104, the argument here is not generally applicable to the Constitution as a whole.

72. *See* A. BICKEL, *supra* note 46, at 19 ("[T]he policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system.")

In applying constitutional provisions other than the contract clause, other principles may counterbalance these tenets. Under such provisions as the First Amendment's protection of unpopular speech or the Bill of Rights' criminal procedure safeguards, a democratically determined public purpose may not justify infringement of an individual's constitutionally identified rights. In those cases, the Court's interpretation of the Constitution makes the definition and protection of fundamental interests against majoritarian interference a proper task for the judiciary. In addition, even under a provision such as the due process clause that does not identify substantive values for constitutional protection, an interpretation may be adopted—for example, the right to privacy identified in *Griswold v. Connecticut*, 381 U.S. 479 (1965)—that requires judicial identification of values. When, however, the Court interprets a provision, as it has interpreted the contract clause, to protect no fundamental interests against public power, the principles counterbalancing the majoritarian tenets do not apply.

institutional constraints in its contract clause jurisprudence⁷³ as in other areas of constitutional law.⁷⁴

Deference to legislatures rests on the assumption that policy determinations and factual judgments must be trusted when the process that generates them is functioning properly.⁷⁵ Such institutional constraints restrict judicial review to the process that produced the challenged legislation.⁷⁶ This suggests that in contract clause jurisprudence, a process-oriented approach is appropriate.⁷⁷

Process review is concerned with the predicate of judicial deference: that political processes effectively check the legislature's decisions. Thus, a court applying process review would inquire whether political processes provided all groups interested in challenged legis-

73. Prior to 1977, the Supreme Court's approach to contract clause cases rested upon assumptions of extreme judicial deference to legislative judgments, *see* Note, *supra* note 12, at 387, similar to those supporting the Court's due process and lower-tier equal protection jurisprudence. *See* G. GUNTHER, *supra* note 5, at 491 (equal protection and economic due process typically meant virtually no scrutiny). Recently, in reviving the clause, however, the Court has articulated its recognition of institutional role. *See* *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 247 (1978) (customary judicial deference to state laws directed to social and economic problems creates presumption favoring legislative judgment as to necessity and reasonableness of particular measure).

74. *See* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1179 (1977) (validity of legislation under broad constitutional provisions depends upon appraisal of complex factual issues and subsidiary value choices within province of legislature).

75. A decision generated by a "deliberate" and "broadly representative political process," *id.* at 1186-87, must be trusted as "the statement of a norm that can be said to reflect the values of the society," *id.* at 1187. This is why judicial review is problematic in a representative democracy. *See* A. BICKEL, *supra* note 46, at 16-23. When societal norms define the appropriate standard but the political branches are not functioning properly to represent societal judgments, a court may decline to defer to the political branches, *see e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting exacting judicial scrutiny when political processes deficient); Gunther, *supra* note 46, at 44 ("legislative value choices warrant judicial deference so long as the people can have their say in the public forum and at the ballot box").

76. Though it has not substituted process review for substantive review in contract clause cases, the Court has, in deferring to legislative judgments, focused on several aspects of the process that generated the challenged legislation. *See, e.g.*, *City of El Paso v. Simmons*, 379 U.S. 497, 511-13 (1965) (legislature's detailed factual reports demonstrated necessity of impairment); *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233-35 (1945) (extensive findings in legislative record supported necessity of impairment); Note, *supra* note 12, at 399 (contract clause cases since *Blaisdell* all considered legislative attention to interests of cost-bearers).

77. Some commentators have proposed process approaches for other constitutional provisions. *See, e.g.*, J. ELY, *supra* note 65, at 73-104 (recommending approach to constitutional adjudication that would search for malfunction of political process); H. LINDE, *supra* note 48, at 235-55 (recommending process approach to substantive due process). Professor Ely's proposal rests on general arguments of constitutional theory. Justice Linde's proposal rests on the unworkability of the rationality standard and on considerations regarding role. *See* H. LINDE, *id.* at 201-35. His argument, which proceeds by analyzing the substantive standards appropriate for a particular provision and considering both practical and theoretical arguments concerning the appropriate scope of judicial review under the provision, is thus similar in structure to the argument presented here.

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lation with an effective means of representing their interests.⁷⁸ In contract clause cases, process review would require the legislature to give full consideration to the interests of the cost-bearing group.⁷⁹ Such an approach could protect against irresponsible decisions; it also would provide legislatures with the substantive flexibility that contract clause principles require.

III. The Failure of Existing Standards

The existing approaches to contract clause jurisprudence use tests based on reasonableness, foreseeability, or balancing. None, however, conforms to the principles governing the scope of public power or institutional role. A fourth approach, involving a least drastic means standard, may be less intrusive than the other three, but it invites inappropriate judicial application.

A. Reasonableness

In *Home Building & Loan Association v. Blaisdell*,⁸⁰ the Court relied on a reasonableness standard to uphold legislation against a contract clause challenge.⁸¹ Although that standard has never been clearly defined, the Court has used it to substitute its own judgment for that of the legislature as to the propriety of an accommodation of contract rights and competing public interests.⁸² The reasonableness standard

78. Professor Ely's process approach focuses not on individual legislative actions, but rather on systematic disregard of groups' interests. See J. ELY, *supra* note 65, at 101, 103 (process malfunctions when minorities are "systematically disadvantaged"). In this respect, it differs from a process approach that requires consideration of all affected interests on each occasion of legislative action.

79. What constitutes full consideration would vary with the circumstances. If a group is an easy target for imposition of costs, for example, a court may insist upon especially careful legislative attention to the interests of that group. In part because of their independence from political processes, courts are well-suited to determine when that process has malfunctioned to the detriment of a poorly represented group. See J. ELY, *supra* note 65, at 103; Bennett, *supra* note 23, at 1069.

80. 290 U.S. 398 (1934).

81. *Id.* at 438 (question is "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end").

82. In applying the reasonableness standard in *Blaisdell*, the Court supplemented the legislative findings with judicial notice of the declared emergency and accepted the legitimacy of the state's end—"the protection of a basic interest of society." *Id.* at 445. The Court concluded that the legislation was reasonable and valid because the relief afforded mortgagors was temporary, limited to postponement of the mortgage obligation, and fashioned with regard to the mortgagees' interests. *Id.* at 446-47.

In *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935), by contrast, the Supreme Court invalidated a revision of the procedures that provided a remedy for default on municipal improvement benefit assessments. The state's purpose was evidently to protect owners of land who, because of the Depression, could not pay the benefit assessments. The Court decided that the protection given the mortgagors was unreasonable and oppressive

permits the Court to determine independently how urgent or widespread a social problem is and whether its importance justifies contractual impairment. The standard also permits courts independently to assess the efficacy of programs.⁸³ In addition, its failure to specify the principles relevant to constitutionality⁸⁴ may result in decisions that ignore whatever principles are implicitly used. Finally, although the reasonableness standard could be applied with deference to legislative judgments,⁸⁵ it still would give legislatures no guidance as to when, and with respect to which judgments, deference would be accorded.⁸⁶

B. *Foreseeability*

The foreseeability test of *United States Trust Co. v. New Jersey*⁸⁷ accords dispositive weight to contract-based expectations. The test

because of its "studied indifference to the interests of the mortgagee or to his appropriate protection." *Id.* at 60-62. Similarly, in *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), the Court decided that exemption of life insurance policies from garnishment was unreasonable—contrary to the state's judgment that protection of that source of personal security was best accomplished by blanket exemption.

83. In *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936), for example, the Court found that restrictions on savings and loan association withdrawal rights served no public purpose because the effect of the state's action was to adjust priorities among investors. The Court's subsequent validation of similar priority adjustments in *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940), however, suggests that the *Treigle* Court merely deemed the apparent public purpose—keeping savings and loan associations open despite members' demands for withdrawal—unimportant in comparison to modification of the members' contract rights.

84. A reasonableness standard might have various meanings. It could require a reasonable balancing of values, with the more important ones given due consideration. *Cf. W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (unreasonable to ignore value of mortgagee protection). It could require that the legislature's factual judgments be those that reasonable people with the same knowledge as the legislators would make. *Cf. Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (both declaration of emergency and means adopted reasonable). It could require simply that the judgments underlying the statute not be irrational. *See United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 (1938) (commercial regulatory legislation constitutional if it rests upon rational basis within knowledge and experience of legislators).

85. Though the Supreme Court afforded great deference to legislative judgments after 1937, *see* note 13 *supra*, nothing in the reasonableness standard requires deferential application. In contract clause cases, as in other contexts, such a standard has been used to invalidate legislation that a deferential court might have upheld. *See* note 82 *supra* (citing contract clause cases); *cf. Bennett, supra* note 23, at 1054-55 nn.34 & 35 (citing cases invalidating laws under rationality standard).

86. *B. Wright, supra* note 3, at 119 (reasonableness standard "cannot be much of a guide to legislators"); *cf. H. Linde, supra* note 48, at 222 (courts should not invalidate legislation unless government should have complied with constitutional rule or should know how to comply in future).

87. 431 U.S. 1 (1977). The Court contrasted the unreasonable covenant repeal with the impairment upheld in *City of El Paso v. Simmons*, 379 U.S. 497 (1965). In *El Paso*, the conditions necessitating repeal were "unforeseen and unintended" and were not "reasonably to be expected." By contrast, in *United States Trust Co.*, the need for mass transit was "not a new development" and "not unknown," and circumstances had not changed sufficiently to have a "substantially different impact." 431 U.S. at 31-32. Though this

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provides that an impairment is invalid if the conditions that necessitate it were foreseen and intended to be covered by the terms of the contract. The test thus fully enforces the expectations of the parties.⁸⁸

Although the foreseeability test focuses on an important interest in contract clause cases, it provides excessive protection for that interest. By granting absolute protection to expectations enforceable under ordinary contract law, the foreseeability test ignores the reserved power and inalienability doctrines. The test also violates the principle that expectations may be upset by retroactive legislation when a change of policy occurs, even if that policy change was easily foreseeable.⁸⁹

As applied in *United States Trust Co.*, the foreseeability test would also allow the Court to substitute its judgment for that of the legislature as to when circumstances had changed—precisely the sort of tentative, unverifiable assessment of social conditions that the Court should not make.⁹⁰ A foreseeability test would be inappropriate even for a legislature, for it elevates contractual expectations to a protected status that is inconsistent with important principles of contract clause doctrine.

C. Balancing

The defects of the balancing approach used in *Allied Structural Steel Co. v. Spannaus*⁹¹ are similar to, but even more extreme than,

language leaves it unclear whether the conditions necessitating impairment need actually to have been foreseen or whether foreseeability suffices, both the concurrence and the dissent characterize the test as one of foreseeability. *See id.* at 32 (Burger, C.J., concurring) (state must show that it “did not know and could not have known” impact of contract on state interest); *id.* at 59-60 (Brennan, J., dissenting) (criticizing Court’s “foreseeability” test).

88. Implicit in the Court’s reliance upon a finding of insufficient change of circumstances to justify impairment is the notion that a contract contains an implied condition that certain conditions would remain relatively constant. If those conditions change sufficiently, the implied condition is defeated and the contract is frustrated. *See* RESTATEMENT (SECOND) OF CONTRACTS § 285 (Tent. Draft No. 9, 1974).

89. *See, e.g., Veix v. Sixth Ward Bldg. & Loan Ass’n*, 310 U.S. 32 (1940) (upholding foreseeable policy change in bank regulation); *Stone v. Mississippi*, 101 U.S. 814 (1879) (upholding foreseeable policy change regarding lotteries one year after public chartering of lottery).

90. The Court’s finding in *United States Trust Co.* that environmental and energy problems had not changed enough to justify repeal of the bond covenant was supported only by the bold assertion that any changes in these problems “were of degree and not of kind.” 431 U.S. at 32. The Court might have meant that in light of the available alternatives to repeal, the legislature’s support for its claim of changed circumstances was inadequate. Though such a gloss would obviate the institutional role objection to the foreseeability test, the objection that it is the wrong standard, regardless of how applied, would remain.

91. 438 U.S. 234 (1978). The Court considered six factors gleaned from earlier contract clause cases. The Court found that the impact on *Allied* was severe, sudden, permanent,

those of the reasonableness standard. Although the reasonableness test might articulate standards that a legislature could employ, the balancing approach requires no standards at all for deciding how much weight to give to reliance interests, public harm, and the like. Judicial balancing displaces legislative judgments completely: in each case, it requires a de novo determination of the balance that should be struck between competing interests.

Courts, however, should not make such judgments.⁹² Nonprincipled jurisprudence is particularly harmful in contract clause cases, in which the Court is especially vulnerable to charges of undue solicitude for particular economic interests.⁹³ In addition, as *Spannaus* illustrates, a balancing approach provides no basis for evaluating future decisions for consistency and little guidance for legislators attempting to obey constitutional commands.

D. *Least Drastic Means*

A least drastic means test⁹⁴ is theoretically consistent with the principle that expectations should be protected when possible but may be defeated when they conflict with pursuit of a public purpose. When such a conflict exists, the test requires that the costs of pursuing the public purpose be imposed less drastically on parties to the contract than on anyone else. If the appropriateness of imposing costs is a factor in determining severity, the least drastic means test may be a proper test for a legislature to use in contemplating an impairment.

Problems arise when courts apply the test. The least drastic means test purports to avoid judicial ends-testing, in that it accepts the legislature's ends and inquires only whether the means adopted to pursue them are the least drastic. But in deciding which means are least drastic, a court may overturn the legislative accommodation of secondary policy judgments⁹⁵ in favor of its own evaluation of their

and unanticipated, and that the law's purpose and coverage were narrow. Without expressly labeling its method "balancing," the Court weighed those findings and invalidated the law.

92. See pp. 1636-38 *supra* (contract clause principles permit wide latitude for legislative policy judgments).

93. Cf. *L. TRIBE*, *supra* note 10, at 50 (*Spannaus* Court, "in its eagerness to protect even the slimmest of contract-related expectations of the corporation, was all too willing to leave the contract-related expectations of workers to the mercy of corporate power"). Because laws challenged in contract clause cases frequently protect one contracting party's interests at the expense of another's, the Court's preferences may be more starkly presented than in other constitutional economic rights cases.

94. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31 (1977) (impairment invalid when goals could be served by "less drastic modification" or by "alternative means" not modifying covenant).

95. See *H. LINDE*, *supra* note 48, at 212 (policy results from accommodation of com-

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relative importance.⁹⁶ In addition, a court will often rely upon its own assessment of the cost and efficacy of alternative means.⁹⁷ Nevertheless, if it were applied with consistent deference toward legislative balancing of primary and subsidiary policies, the least drastic means test might be consistent with the prevailing principles of contract clause jurisprudence.⁹⁸

In sum, all of the existing approaches to judicial interpretation of the contract clause inadequately respect important principles of contract clause jurisprudence. The foreseeability test emphasizes expectations to the exclusion of the need to pursue public purposes. The reasonableness and balancing approaches provide courts with no principles by which to decide cases and permit unconstrained judicial value choice. And the least drastic means standard, though a potentially useful standard for legislatures, typically results in inappropriate judicial policymaking.

IV. A Framework for Contract Clause Jurisprudence

The principles of contract clause jurisprudence outlined above⁹⁹ suggest that a process-oriented approach would be preferable to existing analyses. Under this approach, the justification required of a

peting and inconsistent values); Note, *supra* note 52, at 144 (“seemingly straightforward statutes can involve goals that reflect an accommodation of various purposes which are determined by subtle or blatant policy trade-offs”).

96. See Bennett, *supra* note 23, at 1065 (judicial value judgments unavoidable in evaluating costs, benefits, and alternatives). Given that “for any given regulation, there is almost always available an imperfect less restrictive alternative—provided that one is willing to tolerate increasing costs and inefficiencies,” P. BREST, *supra* note 48, at 993, a court can nearly always justify invalidating challenged legislation on these grounds. In doing so, however, the Court decides—often contrary to the legislative decision—that the resulting costs and inefficiencies are less “drastic” or “restrictive” than the impairment.

97. In determining that the least drastic alternative test had not been met in *United States Trust Co.*, 431 U.S. at 30-31 & n.29, for example, the Court hardly considered secondary policies and legal constraints on alternative means. See 431 U.S. at 38-40 (Brennan, J., dissenting). Rather, the Court found it sufficient to note that the state had failed to show why an “evident and more moderate course” was not practical. *Id.* at 31. If the Court meant that the state had not provided adequate support for its judgment, its use of the least drastic means test may comport with constraints on judicial value choice. Otherwise, the test would intrude on legislative decisions regarding subsidiary policies.

98. In *United States Trust Co.*, the Court hinted at a proper use of the least drastic means test: “a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.” *Id.* at 30-31. Once contractual security is given such priority, a burden might be placed on states to explain interference with this higher interest when alternative means that interfere with other interests seem to be available. Such an approach would give courts a starting point for evaluating the alternatives as more or less drastic, but it would not justify refusal to defer to a particular legislative determination that contractual security should be sacrificed.

99. See pp. 1627-39 *supra*.

legislature would vary with the relative weight of the substantive principles governing expectations and public power.

A. *Threshold Inquiry*

The preliminary stage of a court's analysis should be to determine whether the case involves a contract rather than some other form of legal interest.¹⁰⁰ If a contract is involved, the court must determine whether, in the ordinary contract-law sense—that is, ignoring constitutional considerations—it has been impaired. The court would inquire whether, but for the challenged state law, either the full obligation of all parties would have been met¹⁰¹ or a state remedy would have been available to compensate for non-performance of a contractual obligation.¹⁰² A negative answer would signify that the state has not interfered with the contract in violation of its tacit or express assurances of security.¹⁰³

100. In private-contract cases this issue rarely arises, though obligations deriving from marriage and some court judgments have been held not to be contracts for purposes of the contract clause. *See Hale, supra* note 20, at 621-28. In public-contract cases, the complaining party may have relied upon an action of the state and therefore claim that the state entered into a contract. The state might deny this, arguing that its action merely established a policy that persons could take advantage of only as long as the policy survived. *See, e.g., Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379 (1903) (distinguishing policy from contract). In such cases, a court should follow ordinary contract law principles and look to the circumstances of the state's action to decide whether a contract was made. *Compare Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (teacher tenure law created contract) with *Dodge v. Board of Educ.*, 302 U.S. 74 (1937) (teacher tenure law created no contract).

101. Under either a consideration or a reliance theory of contract, imposition of unbargained-for obligations also may constitute an impairment. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.16 (1978) (contract clause not restricted to reduction of obligations).

102. This characterization of the threshold inquiry would encompass a state's breach of its own contract when, because of the defense provided by the challenged state law, state courts could not grant relief. *E.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (breach of bond covenant); *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909) (breach of debt contract).

103. In determining what degree of interference rises to the level of impairment, a court would face a variety of problems. Alterations of remedy would raise the question of whether an equivalent substitute has been provided. *See, e.g., Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124 (1937) (upholding alteration in method of determining fair value on foreclosure sale). Nominal interference with contractual terms would raise the question of whether some real loss in value must occur to constitute an impairment. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (bond covenant repeal is impairment despite questionable severity of loss in value and existence of secondary market). In any case, the threshold inquiry need not be rigid; because the inquiry focuses on damage to reliance and expectation interests, minimal intrusion on these interests should permit further judicial investigation at the next stage. The magnitude of the infringement of reliance and expectation interests becomes relevant when the necessity and appropriateness justifications are examined.

B. *The Elements of Process Scrutiny*

Process scrutiny differs from the existing approaches to contract clause jurisprudence in that it recognizes the constraints on institutional role that caution against independent judicial determination of the public interest. If the legislature is functioning properly, selection of a public purpose and determinations of necessity and appropriateness should be left to it. Even if the legislative process is inadequate, the proposed approach would invalidate legislation only on process grounds, leaving open the possibility that the legislature could reenact the legislation after remedying the defects in process.¹⁰⁴

Judicial determination of the adequacy of process would focus on two related questions: whether the legislature made the judgments necessary to support the validity of the impairment,¹⁰⁵ and whether political processes functioned effectively to provide all interested parties with a fair opportunity to argue their cases or to challenge an adverse decision.¹⁰⁶ The requisite legislative judgments would depend upon whether a public or private contract is at issue.¹⁰⁷ The adequacy of process would depend upon the grounds for suspecting insufficient legislative consideration of the interests of a burdened group.

Requiring explicit judgments in order to justify an impairment could render political checks effective for several reasons. Explicitness would enhance legislative responsibility by opening the action

104. Cf. Brest, *supra* note 43, at 126 (noting possibility that motivation review may result in reenactment); Sandalow, *supra* note 74, at 1189 (recommending “[g]iving judicial decisions the effect of suspensive vetoes”). In many cases, the legislature might not reenact the law. That might occur because the need for it would have passed, *see, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 248 n.21 (1978) (noting preemption by federal legislation), or because the required judgments either could not be supported factually, *see, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (requiring judgment that covenant repeal be only available means to solve mass transit problem), or would be unconstitutional, *see, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) (requiring judgment that teachers could be dismissed for engaging in protected speech). In addition, reenactment may not occur because the legislators would find it politically impossible to make the required judgments explicit. *See, e.g.*, W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934) (requiring judgment that life insurance companies were major beneficiaries of law).

105. The required judgments are that there is a public purpose to which enforcement of the contract presents an obstacle and that it is appropriate to impose the costs of pursuing the public purpose on parties to impaired contracts. *See* pp. 1630-39 *supra*.

106. *See* J. SALOMA, CONGRESS AND THE NEW POLITICS 71 (1969) (political responsibility exists when legislature is accountable for actions and when all interests considered in making decision); Gunther, *supra* note 46, at 44 (political processes functioning properly when interests are heard and electorate checks decisions). Lack of access to the public and lack of access to its representatives tend to go hand-in-hand, for legislators generally have little interest in the views of a group that has no practical effect on their political survival. *See* W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 316 (4th ed. 1977).

107. *See* pp. 1647-49 *infra*.

and its supporting judgments to public criticism and electoral response.¹⁰⁸ Explicitness would also constrain legislators more directly by forcing them to predict their constituents' reaction and to analyze more fully the justification for their action.¹⁰⁹ By articulating the policy and factual judgments implicit in their decisions, legislators would invite more immediate and effective criticism from fellow legislators and other persons who monitor and influence legislation.¹¹⁰

A court applying process review in contract clause cases would have to decide when to doubt that the legislature had fully considered the interests of all concerned parties.¹¹¹ The legislative process might fail in two ways. First, the legislature could rely upon public willingness to accept the particular legislation even though it has not made the judgments necessary to support the impairment.¹¹² Second, the burdened group could be politically weak or an easy target for the imposition of costs and hence chosen to bear those costs without fair

108. See L. RIESELBACH, *CONGRESSIONAL REFORM IN THE SEVENTIES* 29 (1977) (fundamental to political accountability that public know about legislative judgments); cf. *THE FEDERALIST* No. 63, at 383 (J. Madison) (C. Rossiter ed. 1961) ("[r]esponsibility, . . . in order to be effectual, must relate to operations . . . , of which a ready and proper judgment can be formed by the constituents").

109. See M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 7-8 (3d ed. 1977) (deliberation ensures time and opportunity for variety of interests to be heard); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 *HARV. L. REV.* 1373, 1411-13 (1978) (legislative deliberation essential for making reasonable and fair judgments).

110. Unless legislation deals with one of the few controversial issues that generate single-issue constituencies, it is likely to remain relatively unimportant in the political process. See W. KEEFE & M. OGUL, *supra* note 106, at 263 ("[t]he more controversial the issue, the greater the possibility that the processes of legislative bargaining and adjustment will be exposed to public view and consideration"). But overall voting patterns of legislators are a focus of electoral concern, and any given issue can be pinpointed for public comment if those with a direct interest in its resolution are aware of it. See M. JEWELL & S. PATTERSON, *supra* note 109, at 289-90 (importance of lobbyists in communications between organized constituents and legislators).

111. Even with ideal process—all interests fully considered and competing values recognized, reasonable grounds for believing in the necessity and appropriateness of impairment, and decisions made sufficiently public to ensure that the public could challenge them—a group's interests could still be defeated. The mere fact of defeat, therefore, would not necessarily signal invalid process.

112. A legislature may make a politically popular decision without making the necessary policy and factual judgments to justify impairment. When, as in contract clause cases, the Constitution has made the legislature responsible for mediating majority sentiment with judgments of "reasonability and fairness," reliance on public ratification of the result does not respect the need for a deliberate process. See Sager, *supra* note 109, at 1411-13. When political processes cannot be expected to challenge the legislature's action, therefore, a court should demand stronger evidence of full legislative consideration of the required judgments.

In *United States Trust Co.*, 431 U.S. 1 (1977), for example, the Court could justifiably believe, absent conflicting evidence, that the fairest means of financing mass transit improvements would impose costs widely on drivers. Because that means would have been politically unpopular and because the covenant repeal was politically safe, the Court could reasonably require strong legislative support for the claim that covenant repeal was the most appropriate means of solving the mass transit problem. See p. 1650 *infra*.

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attention to its interests.¹¹³ Failure of the process in either respect would warrant suspicion that the legislative decision was not supported by public policies sufficient to justify an impairment.¹¹⁴

C. *Requisite Legislative Judgments*

Integration of the principles underlying the contract clause requires separate consideration of public-contract cases and private-contract cases in defining which judgments should suffice to justify an impairment. In public-contract cases, the proposed approach requires states to overcome the presumptive primacy of contractual security; in private-contract cases no such presumption should be established.

1. *Public Contracts*

In a public-contract case, a court should presume that impairment of the contract upset legitimate expectations. In entering into the contract, the state negotiated its terms and committed itself expressly to honoring the contract. As a consequence of this express commitment, other parties are strongly justified in relying upon enforcement of the contract. The stricture against the state's breaking its word therefore applies with great force. Impairment defeats a justified reliance interest, and courts should therefore require a legislature to address explicitly its failure to keep its word.

To justify the impairment, the state must find that enforcement of the contract conflicts with pursuit of a public goal and that imposition of the costs on the complaining party is appropriate. Courts should presume that the state continues to adhere to the policy and factual judgments implicit in the initial contractual undertaking.¹¹⁵ To overcome that presumption, the legislature must specify policies

113. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (extraordinary judicial scrutiny appropriate when group burdened and when political checks will not function effectively); Sandalow, *supra* note 74, at 1188 (legislative decision not representative of public policies if it is product of partial political pressures not broadly reflective of whole society). In *Spannaus*, for example, the challenged legislation appeared to have been passed quickly in response to the requests of one employee group. *Id.* at 247-48. This suggests that there was inadequate opportunity for employers to present their case.

114. Professor Ely's argument that requiring explicitness would not enhance accountability assumes that, to meet such a requirement, the most general purposes would be written into statutory preambles or committee reports, and that stricter standards would block much desirable legislation. See J. ELY, *supra* note 65, at 127-29. A process approach that focused on factual support for legislative conclusions and specified the interests that must be addressed would avoid this objection.

115. Because the state had an opportunity when entering the contract to bargain for conditions to meet future contingencies, there is an implicit understanding in the state's commitment that the contract conflicted with no public policy.

or conditions that have changed, or new information that has come forth, since the making of the contract.

In addition to identifying the conflict, the state should be required to justify the fairness of impairing particular contracts to pursue the public purpose.¹¹⁶ In situations in which the state cannot persuasively identify the burdened party as responsible for harm, it could attempt to justify the appropriateness of the impairment on some other theory.¹¹⁷

The adequacy of a legislature's support for its judgments would depend on the ability of interested parties to use political processes effectively to present their interests. The complaining party would be able to rebut the legislative judgments by establishing that the process was inadequate.¹¹⁸ If a court found reason to doubt that political processes ensure the genuineness of any of these legislative judgments,¹¹⁹ the impairment should be blocked.¹²⁰

116. If, as in most cases, the purpose is prevention of harm for which the complaining party would be causally responsible, then it is fair to restrict performance of the contract. In such cases, the judgments of harm and of responsibility typically involve direct action within the context of a common legal relationship and are therefore simple. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (employer termination of employee without pension); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgagee foreclosure on mortgagor).

117. In adopting and applying a fairness principle, the state would have to say why no alternative imposition of costs is appropriate. Case-by-case experience would inform the courts as to which justifications would be more likely to be advanced disingenuously and therefore should be subject to more stringent process requirements. In *United States Trust Co.*, for example, the Court found that the states paid insufficient attention to several obvious alternative cost-bearers, 431 U.S. at 30-31, perhaps because of the availability of bondholders as an easy "target" group. *See The Supreme Court, 1976 Term*, *supra* note 60, at 92 (bondholders constitute "target" group).

Factual judgments necessary to support a conclusion of fairness on a noncausal theory would tend to require surveying alternative cost-imposition schemes, estimating relative costs and benefits, and analyzing administrative costs. Such judgments would tend to be more complex than the judgments of harm and responsibility required by the more common fairness justification. *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31 (1977) (showing that no alternatives were available would require elaborate description of statutory constraints and of efficacy and costs of alternative means); *City of El Paso v. Simmons*, 379 U.S. 497, 509-17 (1965) (impairment justification given detailed factual support).

118. The cost-bearing class may point to its political weakness or isolation in attempting to show inadequate attention to the interests of the class, evidenced perhaps by failure to hold hearings or by unsupported conclusions in the legislation.

119. When the fairness justification attributes to the cost-bearer causal responsibility for some harm, the simplicity of the judgments involved makes legislative disingenuousness unlikely. In other cases, in which the judgments are more complex, there are many possible explanations for disingenuousness: politically weak or target groups may be available; the legislature may be covertly protecting or damaging private interests; and unsupported but unchallengeable factual judgments may plausibly be advanced.

120. In *United States Trust Co.*, the Court gave as its sole reason for less deference in public-contract cases the fact that "the State's self-interest is at stake." 431 U.S. at 26. As a general argument based on desire to preserve the public fisc, that reason cuts across

2. *Private Contracts*

In private-contract cases, courts should not presume the primacy of contractual expectations. Because the state cannot be expected to anticipate every private contract, tacit assurances that the contract will be enforced cannot be treated as firm commitments. Impairment of a private contract, therefore, does not violate strong strictures against the state's breaking its word.¹²¹ In addition, because private contracts are made about virtually every conceivable subject, almost no legislation can escape upsetting some private contractual expectations.¹²² Courts therefore should not require a legislature to specify intervening changes of condition, information, or policy that necessitate impairment.

The state should, however, articulate the purpose that it claims requires impairment and explain the selection of the particular means chosen to pursue that purpose. In finding that pursuit of the goal and enforcement of the contract are in conflict, and in determining the fairness of imposing the costs upon contracting parties, the state would make the same judgments in a private-contract case as in a public-contract case. Those judgments would be subject to the same constraints: adequate political process to ensure fair consideration for interested parties, and sufficient explicitness and factual support to allay suspicions of legislative disingenuity. The judgments would also vary with the type of fairness justification being offered.¹²³

D. *Rethinking United States Trust Co. and Spannaus*

Under the proposed process approach, *United States Trust Co.*, a public-contract case, was correctly decided. The threshold inquiry

the public-private contract line: in either case, if public funding is a likely alternative to impairment, the public purse is in jeopardy. See *The Supreme Court, 1976 Term, supra* note 60, at 89-90. Impairment of a public contract, however, always provides an opportunity to save state money; the state therefore may be tempted more readily to take action without careful consideration of the costs of alternatives. But because this is true for almost all state actions, public-contract impairments should not be distinguished on this ground.

121. A state's general contract law is some assurance of security, but because it—like any other law affecting the activity that a private contract concerns—is addressed to the public at large and not to a particular individual, it is in the nature of a policy, not a contract. See note 100 *supra*. It therefore gives rise to a much weaker estoppel argument. If a general law authorizes state officials to make certain contracts, those contracts are public contracts, to which a stronger estoppel claim applies.

122. See *Wood v. Lovett*, 313 U.S. 362, 382 (1941) (Black, J., dissenting) (difficult to conceive of laws not bearing directly or indirectly upon contractual obligations); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 258-59 (1827) (same).

123. See note 117 *supra*.

would find at most a technical impairment.¹²⁴ Furthermore, the state's claim that energy, environmental, and transportation policies had become significantly more important since 1962 was credible.¹²⁵ Nevertheless, the state's necessity and appropriateness justifications were weak. Because obvious alternative means would have been politically unpopular,¹²⁶ and because bondholders were a target group with little political strength,¹²⁷ the process approach would require explicit support in the legislative record for judgments of necessity and appropriateness.¹²⁸ Although the state might have shown necessity by articulating relevant legal constraints and subsidiary policies,¹²⁹ and might have advanced a cost-benefit justification for imposing the minimal burden on bondholders,¹³⁰ its failure to demonstrate adequate consideration of alternatives would justify invalidation.¹³¹

The *Spannaus* legislation, on the other hand, would be upheld under the process approach. Interference with the pension agreement would constitute an impairment,¹³² but because a private contract was involved, the state would not need to demonstrate changed circumstances or policies; it would merely have to show that the impairment was necessary and appropriate. Though some evidence suggested hurried passage,¹³³ the legislation was of a sufficiently common variety¹³⁴

124. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 18-21 (1977); *id.* at 41-44 (Brennan, J., dissenting) (relying on detailed findings of trial court).

125. The opinion does not make clear how much legislative attention was focused on these changes. The dissenting opinion, however, sets out some of the evidence to support the claim of changed circumstances and policies. 431 U.S. at 40-41 (Brennan, J., dissenting). The state could have introduced a wide variety of socioeconomic evidence to establish a heightened concern over environmental, energy, and mass transit problems.

126. *See id.* at 30 nn.28 & 29 (suggesting bridge and tunnel tolls and taxes on gasoline or parking).

127. *See The Supreme Court, 1976 Term, supra* note 60, at 92.

128. Because bondholders performed no act under the covenant that caused any of the energy or environmental harms that the repeal was aimed at undoing, the state could not plausibly argue that the bondholders were responsible for harm. The state therefore would have the more difficult burden of advancing a different appropriateness justification.

129. *See* 431 U.S. at 38-40 (Brennan, J., dissenting) (describing legal constraints and policies behind adoption of means).

130. The minimal burden imposed on bondholders might have been judged a smaller cost than the social cost of imposing extra burdens on drivers.

131. *Id.* at 29-31 & nn.28 & 29 (describing alternatives state should have addressed).

132. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-46 (1978); *see* note 101 *supra* (increasing obligations may constitute impairment).

133. Hurried passage might be inferred from the district court's finding that the need for a pension law was brought to the legislature's attention by one plant's employees and that the new law took effect immediately. 438 U.S. at 247-48. That the state evidently knew that its law would be preempted by federal legislation within one year, *id.* at 248 n.21, might also generate suspicion; but the state may legitimately meet a temporary problem with temporary legislation.

134. *See* 438 U.S. at 261 n.8 (Brennan, J., dissenting) (employee-protection legislation common).

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and was carefully enough drafted¹³⁵ that the political process could be found to be functioning properly. Finally, a court could easily find that the state was protecting employees' reliance interests from actions of their employers that would harm those interests.¹³⁶ The law therefore would be validated.

Conclusion

The process approach proposed in this Note would return to legislatures primary authority to resolve conflicts between public power and private expectations—authority that the recent revival of the contract clause has eroded. Although the new activism would thus be halted, the restoration of legislative authority would be accompanied by stringent requirements as to the process by which legislatures exercised that authority. The approach would foster responsible political processes and would direct courts to focus on the legislature's responsibility in making the public policy judgments upon which contract clause cases depend.

135. *See id.* ("narrow aim" explained by fact that large employers' pension plans create problem of employee reliance).

136. *See id.* at 252 (Brennan, J., dissenting) (both terms of Act and opinion of State Supreme Court disclose intent to remedy serious social problem arising from operation of private pension plans). The purpose of the pension law was evident and should not have been ignored by the Court. *Id.* at 246-48 & nn.18 & 19. It may even be argued that some element of fault was present in employers' actions concerning their pension plans. *Id.* at 252-53 (Brennan, J., dissenting) (employers mislead employees and inadequately fund pension plans).

