THE CONTRACT CLAUSE: REAWAKENED IN THE AGE OF COVID-19

Article I, section 10, clause 1 of the Constitution introduces a litany of limitations on state power. States cannot, inter alia, "grant Letters of Marque and Reprisal," "pass any Bill of Attainder," or "grant any Title of Nobility."[1] On first read, the clause seems little more than a constitutional relic, chronicling a forgone past of state-sanctioned princes[2] and pirates.[3] But another provision — the Contract Clause — is as historically significant as it is linguistically broad: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[4] The Supreme Court's early history featured Contract Clause litigation in nearly forty percent of all cases challenging state legislation and nearly fifty percent of successful challenges (amounting to seventy-five decisions) before 1889.[5] Despite its broad scope and historical preeminence, the clause has fallen into desuetude. Due to the development of a contextual "reasonableness" test,[6] successful Contract Clause challenges are few and far between. The Supreme Court has not invoked the clause to invalidate a state law for over forty years.[7] Scholars have thus concluded that the Contract Clause "is no longer with us,"[8] "a dead letter,"[9] and "a shadow of its former self."[10]

Even so, the Contract Clause and its broad language remain a topic of litigation today, especially in the context of the COVID-19 pandemic. Litigants protesting against eviction moratoria and other rent

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[1] U.S. CONST. art. I, § 10, cl. 1.

[2] *See* FUNDAMENTAL CONSTS. OF CAROLINA OF 1669, arts. I, V, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2772, 2772 (Francis Newton Thorpe ed., 1909) (establishing a feudal government with noble titles of "palatines," "landgraves," and "caziques").

[3] *See* CARL E. SWANSON, PREDATORS AND PRIZES: AMERICAN PRIVATEERING AND IMPERIAL WARFARE, 1739–1748, at 29–30 (1991) (outlining the colonial recognition and practice of privateering).

[4] U.S. CONST. art. I, § 10, cl. 1.

[5] BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 95 (1938).

[6] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 430 (1934) (quoting Antoni v. Greenhow, 107 U.S. 769, 775 (1883)).

[7] James W. Ely, Jr., *Still in Exile? The Current Status of the Contract Clause*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 93, 101 (2019).

[8] MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 143 (2012).

[9] Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 890 (1987).

[10] John O. McGinnis, *Gorsuch Tries (Unsuccessfully) to Restore the Contract Clause*, LAW & LIBERTY (June 12, 2018), https://lawliberty.org/gorsuch-tries-unsucessfully-to-restore-the-contract-clause [https://perma.cc/Y7H2-PB62].

assistance,[11] recall ordinances,[12] and even vaccine mandates[13] have looked to the Contract Clause for relief. Few have succeeded, but those recent triumphs may augur a reevaluation of the Contract Clause. If even COVID-19 failed to justify state governments' exercise of police power,[14] the clause may furnish even more successful challenges in a postpandemic world.

Such a reevaluation may invite the imposition of laissez-faire ideas of economic liberty under the guise of constitutional interpretation. Indeed, this has happened before. In the early twentieth century, the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to "routinely invalidate[] state social and economic legislation"[15] based on "notions of liberty and property characteristic of laissez-faire economics."[16] Reviving a literalist interpretation of the Contract Clause would permit the irony of a textually grounded Lochnerism — broad judicial control of "economic liberty," but without the anticanonical,[17] extraconstitutional[18] reasoning of the Supreme Court in *Lochner v. New York*.[19]

This Note examines two live issues surrounding the Contract Clause. First, the extraordinary measures state governments undertook to combat the COVID-19 pandemic provided an opportunity to relitigate the balancing test traditionally used to evaluate Contract Clause claims. To

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[11] *See, e.g.*, Heights Apartments, LLC v. Walz, 30 F.4th 720, 724 (8th Cir.), *reh'g & reh'g en banc denied*, 39 F.4th 479 (8th Cir. 2022); Melendez v. City of New York, 16 F.4th 992, 996 (2d Cir. 2021); Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles, 10 F.4th 905, 908 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1699 (2022); Gallo v. District of Columbia, 610 F. Supp. 3d 73, 78–80 (D.D.C. 2022), *reconsideration granted*, No. 21-cv-03298, 2023 WL 2301961 (D.D.C. Mar. 1, 2023); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1089 (E.D. Wash. 2021); Johnson v. Murphy, 527 F. Supp. 3d 703, 707 (D.N.J. 2021), *vacated as moot sub nom.* Johnson v. Governor of N.J., No. 21-1795, 2022 WL 767035 (3d Cir. Mar. 14, 2022); *cf.* Kravitz v. Murphy, 260 A.3d 880, 899 (N.J. Super. Ct. App. Div. 2021) (regarding state constitutional contract clause claim), *cert. denied*, 272 A.3d 405 (N.J. 2022) (unpublished table decision).

[12] *See, e.g.*, RHC Operating LLC v. City of New York, No. 21-CV-9322, 2022 WL 951168, at *8–13 (S.D.N.Y. Mar. 30, 2022); San Diego Cnty. Lodging Ass'n v. City of San Diego, 561 F. Supp. 3d 960, 967 (S.D. Cal. 2021). Such laws require or incentivize employers to "offer open positions to qualified, laid-off employees before hiring new applicants." *San Diego Cnty. Lodging Ass'n*, 561 F. Supp. 3d at 963.

[13] *See, e.g.*, Wise v. Inslee, No. 21-CV-0288, 2021 WL 4951571, at *1, *4 (E.D. Wash. Oct. 25, 2021), *appeal dismissed*, No. 22-35426, 2022 WL 17254335 (9th Cir. Oct. 7, 2022); Mass. Corr. Officers Federated Union v. Baker, 567 F. Supp. 3d 315, 319 (D. Mass. 2021); Valdez v. Grisham, 559 F. Supp. 3d 1161, 1179 (D.N.M. 2021), *aff'd*, No. 21-2105, 2022 WL 2129071 (10th Cir. June 14, 2022).

[14] *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam) ("Stemming the spread of COVID–19 is unquestionably a compelling interest . . . .").

[15] United States v. Lopez, 514 U.S. 549, 605 (1995) (Souter, J., dissenting).

[16] *Id.* at 606.

[17] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011) ("*Lochner* remains firmly within the anticanon, and its defenders must always remain self-conscious about their iconoclasm.").

[18] *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

[19] 198 U.S. 45.

curb the spread of COVID-19, state laws and executive orders necessarily altered contractual obligations, thus introducing a new chapter to the clause's history book. Second, this Note explores the circuit split regarding whether Contract Clause claims may be actionable under 42 U.S.C. § 1983 in the first place. While § 1983 is not the sole cause of action through which Contract Clause claims are asserted, its presumed availability for Contract Clause claims (often because litigants do not raise the issue) has allowed for resurgent doctrinal development.

Part I charts the history of Contract Clause jurisprudence at its height in the early nineteenth century, with attention to how the Framers and early American courts distilled a natural right to contract from the broad framing of the clause. It then fast-forwards to the twentieth century, identifying how the *Lochner*-era doctrine of economic due process developed and departed alongside the Contract Clause's protections of economic liberty. Part II identifies cases within the past two years raising Contract Clause challenges to various governmental responses to the COVID-19 pandemic, taking stock of the natural law legacy remaining after the clause's storied history. Part III tracks the current circuit split regarding whether 42 U.S.C. § 1983 furnishes a private cause of action for Contract Clause claims. This Note thus concludes that the Contract Clause, though dormant, is far from dead.

I. The Contract Clause's Origins and Expansion

"What's past is prologue"[20] — and the Contract Clause is no exception. An understanding of the varied interpretations of such a broad constitutional clause requires an examination of its history. Yet not much recorded history exists for the Contract Clause. Discarded at the Constitutional Convention but salvaged by a style committee, the clause boasts an early history rife with references to a natural right to contract, one that early state courts and the Marshall Court embraced. That natural right presaged a more aggressive invocation of a "right to contract" made famous in *Lochner* — indeed, the Contract Clause and Lochnerism both fell victim to increasing deference to states' police power.

A. Authorship and Ratification

Only one recorded discussion from the Constitutional Convention pertained to the clause. On August 28, 1787, Rufus King proposed including "a prohibition on the States to interfere in private contracts."[21]

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[20] William Shakespeare, The Tempest act 2, sc. 1, l. 251 (Stephen Orgel ed., Oxford Univ. Press 1987) (1610).

[21] 2 The Records of the Federal Convention of 1787, at 439 (Max Farrand ed., 1911) [hereinafter Records]. Professor Benjamin Wright argues that the language of the first

James Madison responded that the proposed prohibition on ex post facto laws would already forbid such interferences.[22] The convention thus voted 7–3 to insert only "bills of attainder" and "ex post facto laws" into the text.[23] But a month later, the five-member Committee of Style and Arrangement refurbished and reinserted the clause, which now barred states from "altering or impairing the obligation of contracts."[24] Without further recorded discussion, the phrase "altering or" was dropped, and the Contract Clause as we know it today was enshrined in Article I.[25]

Absent any cues from its drafting, the clause became a vehicle for natural economic rights as the Framers championed the principle of the right to contract. Amid a depressed economy, many viewed the clause as a cure to retrospective debtor-relief state laws of the time.[26] Roger Sherman and future Chief Justice Oliver Ellsworth expressed that the clause was "thought necessary as a security to commerce, in which the interests of foreigners, as well as of the citizens of different states, may be affected."[27] Despite his initial misgivings, Madison declared in the *Federalist Papers* that "laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation."[28] Likewise, Alexander Hamilton viewed "[l]aws in violation of private contracts" as a potential source of interstate conflict that a strong federal government would remedy, "as they amount to aggressions on the rights of those States whose citizens are injured by them."[29] And Charles Pinckney celebrated the rights of citizens to "trade with each other without fear of tender-laws or laws impairing the nature of contracts."[30] Already the language of rights, counterbalanced against states' legislative power, was prevalent in

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Contract Clause stemmed from the parallel phrasing of the Northwest Ordinance, which required "that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements *bona fide*, and without fraud previously formed." WRIGHT, *supra* note 5, at 6–7 (quoting An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52 n.a (1789)).

[22] 2 RECORDS, *supra* note 21, at 440.

[23] *Id.*

[24] *Id.* at 597. The five members included King and Madison, as well as Alexander Hamilton, William S. Johnson, and Gouverneur Morris. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 13 (2016).

[25] 2 RECORDS, *supra* note 21, at 619. Elbridge Gerry even went so far as to propose a similar limitation on the federal government, but no member seconded his motion. *Id.*

[26] *See* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 280–81 (1988).

[27] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) [hereinafter DEBATES].

[28] THE FEDERALIST NO. 44, at 278–79 (James Madison) (Clinton Rossiter ed., 1961).

[29] THE FEDERALIST NO. 7, *supra* note 28, at 59 (Alexander Hamilton).

[30] 4 DEBATES, *supra* note 27, at 335.

discourse surrounding the Contract Clause, presaging its intersection with the "freedom of contract" championed in *Lochner*.[31]

A few Antifederalists fired back. Luther Martin argued against adopting the clause, contending to the Maryland state legislature that "there might be times of such *great public calamities* and *distress*, and of such *extreme scarcity of specie*, as should render it the *duty* of a government . . . in some measure to interfere in their favor."[32] Patrick Henry likewise noted that the Contract Clause would leave states powerless to intervene against speculators and debt collectors.[33] Yet most Antifederalists focused their attention on other limitations on state power in Article I, conceding that "the states had often acted irresponsibly regarding contracts."[34]

Already, however, the Contract Clause's early history envisioned some limitation to the clause's reach. The context of state debt-relief laws suggests that the primary intent of the clause was to prevent debt forgiveness, rather than to bar any regulation touching on contracts, as the Marshall Court would later recognize.[35] And the text, though capacious, comports with this understanding. Founding-era dictionaries defined "impair" as "to lessen, diminish, injure, [or] hurt."[36] Yet the word "alter," rejected from the Contract Clause's text,[37] would have broadened this understanding to any change: "[T]o make otherwise than it is."[38] While some scholars have elided this distinction by reference to the Northwest Ordinance's broad language, from which the Contract Clause was likely patterned,[39] the clause's text explicitly departed from the ordinance's more expansive reach. Though sweeping on its face, the Contract Clause features built-in textual and contextual limits to its scope. The indeterminacy of these limitations, however, set the stage for early American courts to exercise judicial review in full force.

B. Judicial Expansion

The entrenchment of a natural right to contract began with early judicial interpretations of the Contract Clause, creating a legacy of natural economic freedom that many courts cite today to justify expanding the Contract Clause's modern reach.[40] The federal Contract Clause was

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[31] Lochner v. New York, 198 U.S. 45, 57 (1905).

[32] 3 RECORDS, *supra* note 21, at 214–15.

[33] 3 DEBATES, *supra* note 27, at 475–76.

[34] ELY, *supra* note 24, at 16–17.

[35] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–29 (1819).

[36] NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 151 (New Haven, Sidney's Press 1806); *accord* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 529 (London, J & P Knapton 1783).

[37] *See supra* note 25 and accompanying text.

[38] JOHNSON, *supra* note 36, at 71.

[39] *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 538 & n.62 (1987).

[40] *See infra* Part II, pp. 2142–46.

the weapon of choice for state and federal courts alike to strike down laws as unconstitutional in the nineteenth century.[41] From land grants to corporate charters to insolvency laws, the Supreme Court construed a limitation on state power as a wellspring of the natural right to contract.[42] And the Court was not first in this regard.[43]

Leveraging the vocabulary of natural law, state high courts and federal circuit courts struck down legislation deemed inimical to the freedom of contract. These courts faulted state laws not for contravening the text, as it were, but rather for violating the principle of contractual freedom that the clause enshrined. Riding circuit, Justice Paterson declared in 1795 that "the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable" when he found a Pennsylvania statute unconstitutional for quieting title to settlers' land claims.[44] State high courts soon followed suit, including those of Massachusetts[45] and Virginia.[46] And even the Supreme Court, albeit in seriatim opinions, engaged in such natural lawmaking in conversation with the Contract Clause.[47] This natural law tradition first articulated the freedom of contract that gained momentum in early Supreme Court jurisprudence and that would reappear in the infamous *Lochner* era.

Such principles informed the Supreme Court's first examination of the Contract Clause's text. In 1795, Georgia sold public lands in present-day Alabama and Mississippi, but allegations of bribery led the

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[41] That the original Constitution made states "subject only to the limitations of Article I, Section 10," MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 630 (2016), perhaps induced creativity in interpreting the provision.

[42] *See* Stephen A. Simon, *Inherent Sovereign Powers: The Influential yet Curiously Uncontroversial Flip Side of Natural Rights*, 4 ALA. C.R. & C.L. L. REV. 133, 136–51 (2013) (charting Contract Clause jurisprudence as moving from "natural law reasoning about rights" to "natural law reasoning about powers," *id.* at 136).

[43] *See* ELY, *supra* note 24, at 22–29 (collecting federal and state court cases considering the scope of the Contract Clause).

[44] Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311, 28 F. Cas. 1012, 1016 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857).

[45] *See Law Intelligence: Georgia Lands*, COLUMBIAN CENTINEL (Boston), Oct. 9, 1799, at 1, *reprinted in* 226 MASSACHUSETTS REPORTS 618, 624 (1917) (case report of *Derby v. Blake*, decided by the Supreme Judicial Court of Massachusetts in 1799) (labeling a Georgia statute "as a flagrant, outrageous violation of the first and fundamental principles of social compacts").

[46] *See* Elliott's Ex'r v. Lyell, 7 Va. (3 Call) 268, 285 (1802) ("And it must be acknowledged that retrospective laws . . . which either impair or give a new and important force to existing obligations or contracts . . . are against the principles of natural justice."). For a thorough investigation of the natural law heritage of state courts, see generally Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992).

[47] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) ("The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation . . . . [that] violate the right of an antecedent lawful private contract . . . ." (emphases omitted)); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1810) (opinion of Johnson, J.) ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.").

state legislature to later rescind the grants.[48] In *Fletcher v. Peck*,[49] the Court determined that the Contract Clause rendered the law rescinding these land grants void, allowing the sale to remain binding.[50] Like the Federalist Framers, Chief Justice Marshall employed the language of rights to describe the Contract Clause's function, concluding that "when absolute rights have vested under that contract, a repeal of the law cannot devest those rights."[51] Considering whether a public grant qualified as a contract, Chief Justice Marshall again relied on how rights inured similarly between grants and contracts: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."[52] Declaring that the clause was "applicable to contracts of every description,"[53] public and private, the Chief Justice filled the gap the Framers had left in drafting the Contract Clause. In doing so, he deferred to "a power applicable to the case of every individual in the community" to enforce such rights in defense of the freedom to contract.[54] *Fletcher* thus employed a natural rights–based perspective to distill from the Contract Clause an economic right to contract, free from retrospective impairment.

In addition to state grants, the Supreme Court included corporate charters and bankruptcy laws within its interpretive scope, again relying on a natural rights–based perspective of the Contract Clause's reach. In *Trustees of Dartmouth College v. Woodward*,[55] the New Hampshire act at issue would have made the college a public institution, even though it was originally chartered to private trustees by King George III.[56] While *Fletcher* featured wholesale voidance of land grants, *Dartmouth College* involved a (perhaps drastic) change to a corporate charter. But because the case featured retrospective contractual impairment, the Chief Justice concluded that the act violated the Contract Clause.[57] He seemed to "interpret[] the word 'impair' in the Contract Clause as equivalent to 'alter'"[58] by rejecting the argument that the state legislature's alteration of the charter did not impair it, despite the clause's drafting history.[59] In doing so, Chief Justice Marshall again relied on a natural rights–based framework, this time distinguishing a corporation as an artificial instrument from its trustees enjoying contracting rights as

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48 *See* ELY, *supra* note 24, at 25.

49 10 U.S. (6 Cranch) 87.

50 *Id.* at 139.

51 *Id.* at 135.

52 *Id.* at 137.

53 *Id.*

54 *Id.* at 135.

55 17 U.S. (4 Wheat.) 518 (1819).

56 *See id.* at 626, 640–41.

57 *Id.* at 644, 654.

58 Kmiec & McGinnis, *supra* note 39, at 537.

59 Recall that the clause originally barred states from "altering or impairing" contracts before taking its final form. *See supra* notes 24–25 and accompanying text.

"natural person[s]."[60] By invoking this natural law tradition in tandem with a broad textual interpretation, the Marshall Court further entrenched an individualized freedom to contract within a structural state limitation.

Yet Chief Justice Marshall did not always succeed in his efforts to expand the clause's meaning. When he did not, debate on the limits of the natural right to contract erupted. In *Ogden v. Saunders*,[61] a debtor used an 1801 New York bankruptcy law as a defense against an action in assumpsit for a contract drawn up in 1806.[62] The majority concluded that a law prospectively affecting contracts — that is, a statute impacting those contracts formed after it goes into effect — did not violate the Constitution.[63] Justice Johnson curbed what had been the trend of granting vast constitutional protections to contracts, concluding that "to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution."[64] He even discussed how slavery once fit into the rights-based perspective Chief Justice Marshall had employed in previous Contract Clause cases, stating: "There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor, and his family."[65]

Dissenting, Chief Justice Marshall[66] asserted that the clause, "taken in [its] natural and obvious sense, admit[s] of a prospective, as well as of a retrospective operation."[67] He thus resisted the idea that states could enact such legislation by simply specifying prospective application, which in time, he believed, would "make this provision of the [C]onstitution so far useless."[68] And as in previous cases, the Chief Justice emphasized the right to contract, which "do[es] not derive from government" but rather "is intrinsic, and is conferred by the act of the parties."[69]

These cases showcase the entrenchment of the right to contract within the Marshall Court's interpretation of the Contract Clause. Courts converted a structural limitation on state power into a source of a natural and individual right to contract. This fusion presaged what the *Lochner* Court would term "freedom of contract"[70]: "The doctrine that people have the right to enter into binding private agreements with others; a judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by undue external

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60 *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636–37.
61 25 U.S. (12 Wheat.) 213 (1827).
62 *Id.* at 292.
63 *Id.* at 313.
64 *Id.* at 286.
65 *Id.* at 284.
66 Chief Justice Marshall was joined by Justices Duvall and Story.
67 Ogden, 25 U.S. (12 Wheat.) at 354 (Marshall, C.J., dissenting).
68 *Id.* at 355.
69 *Id.* at 346.
70 Lochner v. New York, 198 U.S. 45, 57 (1905).

control such as governmental interference."[71] And the tension between the Contract Clause as a source of individual rights and as an allocation of authority between federal and state sovereignties typifies the current circuit split on federal private rights of action under the clause.[72] Though the Contract Clause's bright-line language provided textualist support for the Marshall Court's interpretation, the Court's natural law reasoning connects the clause to the lessons of the *Lochner* era and to its potential revitalization today.

C. The Decline of the Contract Clause and the Ascendancy of Economic Due Process

Despite its ambitious beginnings, Contract Clause jurisprudence would eventually decline from its once-lofty status. While employing the same rights-based language that the Marshall Court used in describing the value of the Contract Clause,[73] the Taney Court began limiting the reach of the clause,[74] which nevertheless remained broad until the Gilded Age.[75] The Court soon recognized that "the legislature cannot bargain away the police power of a State."[76] But the emergence of economic due process carried on the principle of the freedom to contract, which — like the Contract Clause — fell to a renewed understanding of state police power.

The *Lochner*-era Court's articulation of the freedom to contract under the Fourteenth Amendment's Due Process Clause mirrored that of the Marshall Court under the Contract Clause. In 1897, the Supreme Court first articulated that the due process guarantee to "liberty" included "enter[ing] into all contracts which may be proper, necessary, and essential" to enjoy "all [a citizen's] faculties."[77] In 1905, the Court issued its infamous *Lochner* decision, striking down a New York law establishing a maximum sixty-hour workweek for bakers.[78] Despite the Contract Clause's prominence over the past century, it never came up once in the

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[71] *Freedom of Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019); *cf.* Robert L. Hale, *The Supreme Court and the Contract Clause* (pt. 3), 57 HARV. L. REV. 852, 890 (1944) (commenting on "the tendency for the contract clause and the due process clause to coalesce").

[72] *See infra* Part III, pp. 2146–50.

[73] *See* Bronson v. Kinzie, 42 U.S. (1 How.) 311, 318 (1843) (remarking that obtaining an order to recover a mortgagor's debt is the mortgagee's right "by the law of the contract; and it is the duty of the court to maintain and enforce it, without any reasonable delay").

[74] *See, e.g.*, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 548, 553 (1837) (refusing to recognize an implied right of exclusivity in a bridge charter); W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 524–25 (1848) (holding that the exercise of eminent domain does not run afoul of the Contract Clause).

[75] *See* ELY, *supra* note 24, at 190–91.

[76] Stone v. Mississippi, 101 U.S. 814, 817 (1879); *see also id.* at 819 ("No legislature can bargain away the public health or the public morals. . . . The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require.").

[77] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

[78] Lochner v. New York, 198 U.S. 45, 64–65 (1905).

Lochner decision, due to *Ogden*'s restriction to only retrospective claims. Rather, the natural rights of contracting articulated in *Lochner* depended on a *prospective* view of the freedom to contract.[79]

Like the *Ogden* majority, Justices Holmes's and Harlan's dissents in *Lochner* rebelled against a natural rights–driven conception of a limitless freedom to contract. With special significance in today's context, Justice Holmes referred to the Court's earlier decision upholding Massachusetts's compulsory vaccine law as proof that states are able to implement certain restrictions to liberty for the common good without violating the Constitution.[80] And Justice Harlan catalogued a variety of previous Supreme Court cases standing for the proposition that "the right of contract was not 'absolute . . . but may be subjected to the restraints demanded by the safety and welfare of the State.'"[81] The *Lochner* Court's language of economic rights in majority and dissent mirrored that of early Contract Clause jurisprudence, confirming the common basis behind the jurisprudence of the two clauses.

Just as the Contract Clause and the *Lochner* era shared a nexus of laissez-faire economic rights, they also experienced a shared decline based on the notion of the states' police power. The Supreme Court decided *Home Building & Loan Association v. Blaisdell*[82] and *West Coast Hotel Co. v. Parrish*[83] within three years of each other, dismantling in two fell swoops the expansive interpretation of the Contract Clause and economic due process, respectively. As states sought to alleviate the immense economic distress incurred during the Great Depression, the pedestal upon which the Contract Clause rested soon toppled.

First in 1934, the Supreme Court implemented a balancing test in *Blaisdell* that defanged the Contract Clause, in a now-complete reversal of its nineteenth-century sharpness. In *Blaisdell*, the Court rejected a Contract Clause challenge to a Great Depression–era Minnesota law suspending foreclosures.[84] Writing for the majority, Chief Justice Hughes recognized "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."[85] While acknowledging that existing laws were read into contracts to define obligations between parties, so too were "the preëxisting and higher authority of the laws of nature, of nations or of the community to which the parties belong."[86] Such a

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[79] *See* ELY, *supra* note 24, at 190 ("[T]he liberty of contract doctrine was concerned with the right to make *future* contracts without state oversight." (emphasis added)).

[80] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

[81] *Id.* at 67 (Harlan, J., dissenting) (quoting St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul, 173 U.S. 404, 409 (1899)).

[82] 290 U.S. 398 (1934).

[83] 300 U.S. 379 (1937).

[84] *Blaisdell*, 290 U.S. at 416, 447.

[85] *Id.* at 442.

[86] *Id.* at 436.

move was equal yet opposite to the Marshallian tradition. Whereas Chief Justice Marshall relied upon the natural rights of individuals to contract to broaden the Contract Clause's reach, Chief Justice Hughes deferred to the natural powers of the state to regulate health, safety, and welfare to narrow it. He established five criteria that demonstrated the validity of the state's mortgage moratorium to impair contracts, including adequate basis, legitimate end, appropriate relation to the emergency, reasonability, and temporariness.[87]

The Court would repeat this process to undo *Lochner* in *West Coast Hotel*, further demonstrating the doctrines' shared paths. In distinguishing the "qualified" rather than "absolute" freedom of contract, the *West Coast Hotel* Court underscored how "[t]he guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards."[88] Both *Blaisdell* and *West Coast Hotel* thus relied on an understanding of the importance of state police power to alleviate economic distress, regardless of precedent advocating for nonimpairment of contracts or economic due process. As Professor Cass Sunstein notes, "the [*Blaisdell*] Court read the police power very broadly — thus replicating the outcome in *West Coast Hotel* and rendering the contracts clause functionally identical to the due process clause."[89]

The last Supreme Court case striking down a state law under the Contract Clause was *Allied Structural Steel Co. v. Spannaus*,[90] a 1978 case in which the Court declared that the Contract Clause "is not a dead letter"[91] and struck down a Minnesota pension law.[92] But the *Spannaus* Court's reformulation of the *Blaisdell* factors only "assigned different weights to the factors to be balanced,"[93] and did little to rejuvenate the Contract Clause. And the Court's most recent consideration in *Sveen v. Melin*[94] straightforwardly applied *Spannaus* to reject a Contract Clause challenge,[95] with Justice Gorsuch's lone dissent advocating for "a thoughtful reply" to critics of the provision's decline.[96]

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87 *Id.* at 444–47. The "Four Horsemen" — Justices Sutherland, Van Devanter, McReynolds, and Butler — dissented. *See id.* at 448–49 (Sutherland, J., dissenting) ("A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.").

88 *W. Coast Hotel*, 300 U.S. at 392 (quoting Chi., Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 567 (1911)).

89 Sunstein, *supra* note 9, at 891.

90 438 U.S. 234 (1978).

91 *Id.* at 241.

92 *See id.* at 250–51.

93 Kmiec & McGinnis, *supra* note 39, at 548.

94 138 S. Ct. 1815 (2018).

95 *See id.* at 1821–22.

96 *Id.* at 1828 (Gorsuch, J., dissenting).

These doctrines are, of course, different. Scholars have made a sharp distinction between Contract Clause and economic due process jurisprudence, rightly distinguishing the Contract Clause's retrospectivity from economic due process's prospectivity. While the Contract Clause "was concerned with the stability of existing agreements and barred retroactive abridgment of contracts[,] . . . the liberty of contract doctrine was concerned with the right to make future contracts without state oversight."[97] But the doctrines are two sides of the same coin. If Chief Justice Marshall had his way in *Ogden*, the Contract Clause and the economic due process of the *Lochner* era would achieve precisely the same outcome.[98] The prospective-retrospective distinction between the Contract Clause and the Due Process Clause is no doubt important, but the upshot of the clauses' twin histories is that judges could (and with the former, perhaps still can) secure a laissez-faire vision of contractual rights by striking down state legislation they deem inimical to it.

To sequester the Contract Clause's historical development from the brief but groundbreaking *Lochner* era thus artificially hides one judicial expression of economic liberty from the other. What was foreclosed from the Contract Clause in *Ogden* — proactivity — was rediscovered in the Due Process Clause in *Lochner*, and both doctrines met similar ends in *Blaisdell* and *West Coast Hotel*. The fundamental idea of freedom of contract underlies both doctrines, which matters a great deal when one epitomizes anticanonical judicial interventionism and the other survives, albeit sidelined, in the text of the Constitution.

And although *Lochner* has been relegated to the anticanon, the Contract Clause remains waiting in the rafters. Though it applies only retrospectively,[99] the Contract Clause "offers a plausible textual basis for judicial intervention that apparently reconciles economic rights with principles of judicial restraint."[100] Despite the provision's spotty drafting history, the Contract Clause "had been construed almost from the beginning as a potent limitation on state economic regulation."[101] As Professor Richard E. Levy notes, the Supreme Court has followed a "pattern of reinvigoration and retreat"[102] with regard to championing economic rights in its Contract Clause jurisprudence.[103] With the clause

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[97] ELY, *supra* note 24, at 190.

[98] *See* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 729–30 (1984) (suggesting that the dormant commerce clause filled the gap left by the decision in *Ogden* that allowed only retrospective application of the Contract Clause).

[99] *See* ELY, *supra* note 24, at 190 ("[The Contract Clause] had no prospective effect and was therefore inapplicable to the making of contracts after a statute was in force.").

[100] Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 356 (1995).

[101] Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RSRV. L. REV. 597, 622 (1987).

[102] Levy, *supra* note 100, at 333.

[103] *See id.* at 333–35.

remaining "absolute in its field" as sanctified constitutional text,[104] reinvigoration may be near.

II. A Substantive Redux: The Contract Clause and the Pandemic

Indeed, reinvigoration of the Contract Clause may already be here. The severity of the COVID-19 pandemic, one of the deadliest in history,[105] resulted in widespread state government intervention to stem the spread of the virus. Contract Clause challenges ensued, and many failed. Yet the ones that succeeded defy expectations: the imperative of the pandemic plus the low *Blaisdell* standard should equal dismissal. That the Contract Clause has operated against state governments attempting to secure public health disputes its supposed dormancy.

A. Unsuccessful Pandemic Suits

Though the Contract Clause has undergone no jurisprudential shift, the COVID-19 pandemic pushed the reasonableness tests of *Blaisdell* and *Spannaus* quite far, perhaps to their limits. Yet many Contract Clause cases regarding the pandemic are not difficult to resolve under the Supreme Court's modern two-step test: first, whether state law has substantially impaired a contractual relationship; and second, whether it did so for a legitimate public purpose.[106] Analyzed through this framework, many case outcomes seem obvious. Stemming the spread of a virus that has claimed over one million American lives[107] would outweigh most impairments of the obligation of contracts.

But these recent cases demonstrate a context in which a constitutional clause is rendered almost wholly inoperative. As Justice Harlan, a *Lochner* dissenter, once espoused, "[t]he Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued."[108] For advocates of a more muscular Contract Clause, the pandemic could demonstrate that reinvigoration is in order.

The Ninth Circuit demonstrated flexibility in interpreting the Contract Clause when it upheld California's eviction moratorium in August 2021. As the first federal court of appeals to address a Contract Clause challenge to a COVID-19-related eviction moratorium, the Ninth

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104 Sveen v. Melin, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting).

105 *See* Berkeley Lovelace Jr., *COVID Is Officially America's Deadliest Pandemic as U.S. Fatalities Surpass 1918 Flu Estimates*, CNBC (Sept. 20, 2021, 7:26 PM), https://www.cnbc.com/2021/09/20/covid-is-americas-deadliest-pandemic-as-us-fatalities-near-1918-flu-estimates.html [https://perma.cc/23GG-HGFN].

106 *See Sveen*, 138 S. Ct. at 1821–22 (majority opinion).

107 *See Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths [https://perma.cc/RHD3-JE9Q].

108 Downes v. Bidwell, 182 U.S. 244, 384 (1901) (Harlan, J., dissenting).

Circuit first indicated that "the eviction moratorium curtail[ed] the rights of residential landlords in various ways."[109] These rights included evicting tenants for nonpayment of rent due to the pandemic or for a "no-fault reason," such as when an owner intends to occupy the property; withdraws, demolishes, or remodels the property; complies with laws requiring vacating the property; or seeks to evict on the basis of unauthorized occupants or pets.[110] However, the Ninth Circuit considered "the challenges that COVID-19 presents" to almost automatically compel the conclusion that "the moratorium's provisions constitute an 'appropriate and reasonable way to advance a significant and legitimate public purpose.'"[111] By its own admission, the court did not even *need* to decide the substantiality of the contract impairment because of the sheer enormity of the pandemic.[112]

Worthy of emphasis is the correctness of the Ninth Circuit's decision under *Blaisdell* — the public purpose of preventing more coronavirus infections and deaths by reducing evictions substantially outweighs any impairment of apartment leases. But also worth emphasizing are the implications of such decisions: When would the impairment of a mere contract outweigh the public purpose in combatting a pandemic? Could it ever? Beyond eviction moratoria, the U.S. District Court for the Southern District of California adopted the Ninth Circuit's reasoning wholesale in rejecting state and federal Contract Clause challenges to mandatory rehiring ordinances.[113]

District courts have followed suit in relying on the crisis of the pandemic to overwhelmingly satisfy the public-purpose factor. In *Jevons v. Inslee*,[114] the U.S. District Court for the Eastern District of Washington rejected a Contract Clause challenge to Washington's eviction moratorium at summary judgment.[115] The court remarked that "[i]t cannot seriously be argued" that the objectives of curtailing viral transmission and its economic consequences "do not serve the public and that they do not constitute significant and legitimate purposes of the state."[116] And the court expressly "decline[d] to second-guess the expertise of the state in formulating an appropriate response to the present public health

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109 Apartment Ass'n of L.A. Cnty. v. City of Los Angeles, 10 F.4th 905, 909 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1699 (2022).

110 *Id.* at 909–10 (citing L.A., CAL., MUN. CODE ch. IV, art. 14.6, §§ 49.99.1–.2 (2020)).

111 *Id.* at 913 (quoting *Sveen*, 138 S. Ct. at 1822).

112 *Id.*

113 *See* San Diego Cnty. Lodging Ass'n v. City of San Diego, 561 F. Supp. 3d 960, 967–70 (S.D. Cal. 2021).

114 561 F. Supp. 3d 1082 (E.D. Wash. 2021).

115 *Id.* at 1112.

116 *Id.* at 1100. The district court employed similar reasoning in another Contract Clause challenge against Washington's vaccine mandate for certain employees, positing that "[e]ven applying a heightened scrutiny, the Proclamation serves the State's compelling interest in reducing COVID-19 infections." Wise v. Inslee, No. 21-CV-0288, 2021 WL 4951571, at *5 (E.D. Wash. Oct. 25, 2021), *appeal dismissed*, No. 22-35426, 2022 WL 17254335 (9th Cir. Oct. 7, 2022).

emergency, which is fraught with medical and scientific uncertainties."[117] As a result of the pandemic, the permissiveness of the *Blaisdell* test defers to the states in such public-health matters, despite the Contract Clause's framing as a *limitation* on state power.

Other lower courts have taken an alternate approach to the Ninth Circuit in deciding substantial impairment before public purpose, yet the result remains the same. In *Johnson v. Murphy*,[118] New Jersey Governor Phil Murphy's executive order allowing security deposits to apply to past-due rents resisted a Contract Clause challenge in the U.S. District Court for the District of New Jersey, which concluded that the residential landlord challengers failed to state a claim.[119] Citing Third Circuit precedent, the district court emphasized that the extent to which an industry is regulated is "[a]n important factor in determining the substantiality of any contractual impairment."[120] Because the executive order modifying a statutory scheme "should have come as . . . no surprise" to the already heavily regulated plaintiffs,[121] resulting in no substantial impairment, the court did not address the public-purpose prong of the test.[122] Challengers had no luck in state court either — the New Jersey Superior Court adopted much of the same reasoning as in *Johnson* to reject a challenge to the same executive order under the state constitution's contract clause.[123] In these cases, the pandemic seems peripheral; heavily regulated industries seem incapable of making even a prima facie showing of a Contract Clause claim.

B. Successful Pandemic Suits

Yet not all Contract Clause litigation in the pandemic has failed. In *Melendez v. City of New York*,[124] the Second Circuit reversed the dismissal of landlords' Contract Clause challenge to the state's "Guaranty Law."[125] The law "render[ed] permanently unenforceable personal liability guaranties on certain commercial leases for any rent obligations

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117 *Jevons*, 561 F. Supp. 3d at 1101.

118 527 F. Supp. 3d 703 (D.N.J. 2021), *vacated as moot sub nom.* Johnson v. Governor of N.J., No. 21-1795, 2022 WL 767035 (3d Cir. Mar. 14, 2022).

119 *Id.* at 718.

120 *Id.* at 716 (quoting Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 369 (3d Cir. 2012)).

121 *Id.* at 717 (quoting Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 170 (S.D.N.Y. 2020), *appeal dismissed sub nom.* 36 Apartment Assocs., LLC v. Cuomo, 860 F. App'x 215 (2d Cir. 2021)).

122 *See id.* at 718.

123 *See* Kravitz v. Murphy, 260 A.3d 880, 899–903 (N.J. Super. Ct. App. Div. 2021), *cert. denied*, 272 A.3d 405 (N.J. 2022) (unpublished table decision). New Jersey's contract clause bars any state law "impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made," N.J. CONST. art. IV, § 7, ¶ 3, and "is interpreted similarly to its federal counterpart," *Kravitz*, 260 A.3d at 899.

124 16 F.4th 992 (2d Cir. 2021).

125 *Id.* at 996.

arising during a specified pandemic period."[126] Judge Raggi extensively surveyed the history of the Contract Clause and first concluded that, under the "initial strict textual understanding" of the clause, the Guaranty Law would be unconstitutional.[127] But even under the more deferential modern standard, Judge Raggi came to a similar conclusion, as the law substantially impaired landlords' guaranty rights and was not "reasonable and appropriate."[128] Judge Raggi listed five reasons for her latter conclusion: that the law was not temporary,[129] was not appropriately crafted to achieve its purpose,[130] allocated economic burden solely to commercial landlords,[131] was not conditioned on need,[132] and did not compensate landlords' losses.[133]

In another demonstration of the laissez-faire link between the Contract Clause and economic due process, Judge Carney, dissenting in part, warned of the Lochnerian overtone of the majority's heightened standard of review. She stated that the majority failed to accord the "substantial deference" legislatures traditionally receive under the modern interpretation of the Contract Clause.[134] Judge Carney suggested that "'heightened scrutiny under the Contracts Clause [is a] backdoor to *Lochner*-type jurisprudence' that 'has long since been discarded.'"[135] The majority's approach was all the more concerning, according to Judge Carney, because the legislature's police power "is at its apex" during a pandemic.[136] She thus asserted that the majority essentially adopted a strict scrutiny standard for the Contract Clause.[137]

The Eighth Circuit's approach in *Heights Apartments, LLC v. Walz*[138] mirrored *Melendez* in reversing a dismissal of a Contract Clause challenge to Minnesota's eviction moratorium. When Governor Tim Walz issued various executive orders that permitted evictions only for safety concerns or illicit activity, apartment associations challenged the orders as repugnant to the Contract Clause among other federal and

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126 *Id.* at 1004.

127 *Id.* at 1020.

128 *Id.* at 1038.

129 The court interpreted the Guaranty Law as permanent given that landlords would never be compensated for the loss of their guaranty rights. *Id.* at 1038–39. Yet the law did have an expiration date of June 30, 2021. *Id.* at 1039.

130 *Id.* at 1040–41.

131 *Id.* at 1042.

132 *Id.* at 1043–45.

133 *Id.* at 1045–47.

134 *Id.* at 1057 (Carney, J., concurring in the result in part and dissenting in part).

135 *Id.* (quoting Buffalo Tchrs. Fed'n v. Tobe, 464 F.3d 362, 371 (2d Cir. 2006)).

136 *Id.* at 1063.

137 *Id.* at 1069–70. Another plaintiff in the Second Circuit cited *Melendez* for the proposition that it established a strict scrutiny standard for Contract Clause claims. *See* Conn. State Police Union v. Rovella, 36 F.4th 54, 65 n.3 (2d Cir. 2022) (rejecting such an interpretation), *cert. denied*, 143 S. Ct. 215 (2022).

138 30 F.4th 720 (8th Cir.), *reh'g and reh'g en banc denied*, 39 F.4th 479 (8th Cir. 2022).

state constitutional provisions.[139] In reversing the lower court's dismissal, the Eighth Circuit found that the moratorium's indefinite end date and non-pandemic-related block on evictions strained reasonability.[140] The court explicitly parted from the Ninth Circuit, citing intervening Supreme Court precedent[141] and differing procedural posture.[142]

The *Melendez* and *Heights* decisions thus provide a glimmer of what the pandemic could imply for the police-power balancing test outlined in *Blaisdell*. While most federal and state courts have found the public purpose of legislative interferences with contracts more than sufficient, the Second Circuit emphasized "centuries-old case law" to rebalance the scales of the *Blaisdell* test.[143] The Eighth Circuit came to the same result, even though it cited modern Contract Clause jurisprudence. The thrust of the Marshall Court's natural law understanding of the Contract Clause, even in the face of the most pressing government concerns in the twenty-first century, persists today.

III. A PROCEDURAL STOPGAP: THE CONTRACT CLAUSE AND § 1983

Even outside of the substance of such claims, procedural issues in litigating the Contract Clause remain unresolved. One that directly implicates the economic rights rooted in the Contract Clause's history is whether 42 U.S.C. § 1983 furnishes a cause of action for Contract Clause violations. Resolving this question would alter the incentives of litigating Contract Clause claims, as § 1983 allows for the collection of attorneys' fees, the availability of federal court jurisdiction, and the avoidance of state law obstacles.[144] Federal courts of appeals are split on this issue, and the Supreme Court's potential resolution of it may shed further light on the enforceability of a constitutional right to contract.

A. The Legislative History of § 1983

Like the Contract Clause, § 1983 has a murky yet pertinent history. It originated from the Civil Rights Act of 1866,[145] which criminalized

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[139] *Id.* at 723–24.

[140] *Id.* at 729–32.

[141] *Id.* at 729 n.8 (citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021)).

[142] *Id.* (distinguishing the Ninth Circuit's consideration of a motion for a preliminary injunction from the 12(b)(6) motion at issue). Dissenting from the denial of rehearing en banc, Judge Colloton noted that the Supreme Court's decision in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, was silent on the Contract Clause and that the procedural distinction was immaterial. *See Heights*, 39 F.4th at 481–82 (Colloton, J., dissenting from denial of rehearing en banc).

[143] Melendez v. City of New York, 16 F.4th 992, 1057 (2d Cir. 2021) (Carney, J., concurring in the result in part and dissenting in part).

[144] *See* Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 14 (2004).

[145] Ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

the deprivation of various rights secured by the Act.[146] Among them (indeed, the first listed) is the right "to make and enforce contracts."[147] The Civil Rights Act of 1871[148] expanded this legislation to provide a private cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution."[149] Upon Congress's reorganization of provisions of federal law in 1874, the Act expanded to include rights "secured by the Constitution *and* laws,"[150] becoming substantially identical to the § 1983 of today.[151]

First "languish[ing] in relative obscurity until 1961,"[152] § 1983 has expanded to include a compendium of constitutional claims. Initially, the Supreme Court construed the Act to exclude conduct that transgressed officials' authority.[153] But nearly a century later, the Court reversed course. After reexamining the Act's legislative history, the Court concluded that § 1983 "afford[ed] a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced."[154] Time and again, the Court has emphasized that § 1983 is to be construed liberally due to its broad language and remedial purpose.[155]

Now, claims of constitutional and statutory violations are subject to a two-part test to qualify under § 1983's private right of action. First, "the plaintiff must assert the violation of a federal right," one in which the provision at issue creates binding obligations upon the government rather than express a congressional preference.[156] And second, "the defendant may show that Congress 'specifically foreclosed a remedy under § 1983' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.'"[157]

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146 *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 398–99 (1982).

147 1866 Act § 1, 14 Stat. at 27 (codified at 42 U.S.C. § 1981(a)).

148 Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

149 *Id.* § 1, 17 Stat. at 13 (codified at 42 U.S.C. § 1983).

150 24 Rev. Stat. § 1979 (1874) (emphasis added).

151 *See* Sunstein, *supra* note 146, at 402.

152 Kaminski v. Coulter, 865 F.3d 339, 345 (6th Cir. 2017).

153 *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1160–61 (1977) ("[T]hat very lawlessness of government agents the prevention of which had been the primary object of the Act of 1871 was immunized from federal sanction.").

154 Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

155 *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989); Maine v. Thiboutot, 448 U.S. 1, 6–8 (1980); *Monell*, 436 U.S. at 700–01.

156 *Golden State*, 493 U.S. at 106.

157 *Id.* (citation omitted) (quoting Smith v. Robinson, 468 U.S. 992, 1003, 1005 n.9 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, *as recognized in* Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743 (2017)).

B. Section 1983 Claims of Contract Clause Violations: Resolving the Tension Between Carter *and* Dennis

Yet even before the Court reinvigorated the Civil Rights Act, a Reconstruction-era case seemed to foreclose Contract Clause claims under § 1983. The trouble began with taxes. In *Carter v. Greenhow*,[158] a Virginia property owner attempted to pay his real estate taxes with "coupons cut from bonds issued by the state of Virginia."[159] But Virginia forbade payment via coupon,[160] levying the owner's property to collect his tax debts.[161] When the property owner invoked the Civil Rights Act of 1871 (the predecessor statute of § 1983) to challenge the Virginia law, the Court denied his challenge.[162] Suggesting that the lone potential source of federal law to support the challenge was the Contract Clause, the *Carter* Court explained that the clause, "so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally."[163] Rather than secure a private cause of action, the Contract Clause functions only to nullify state laws that would impair contractual enforcement in judicial proceedings.[164]

A similarly situated Commerce Clause case would cast doubt on *Carter* a century later. *Dennis v. Higgins*[165] featured a successful § 1983 challenge to "retaliatory" taxes on motor vehicles operated in Nebraska but registered in other states.[166] The Court recognized its common practice of describing the right to participate in interstate commerce throughout its Commerce Clause jurisprudence, finding such a claim captured under § 1983.[167] In dissent, Justice Kennedy emphasized *Carter* to suggest that the limitations placed on states in Article I grant no individual rights cognizable under § 1983.[168] In a footnote, the majority responded that *Carter* had been interpreted to be a deficiency in pleading rather than an assessment of whether § 1983 could provide redress for Contract Clause violations.[169]

From this footnote followed an as-of-yet unresolved circuit split. Whereas the Ninth Circuit pointed to the *Dennis* Court's narrow

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158 114 U.S. 317 (1885).

159 *Id.* at 318.

160 *Id.* at 319 (noting that Virginia accepted only "gold, silver, United States treasury notes, and national bank currency").

161 *Id.* at 321.

162 *Id.* at 320–22.

163 *Id.* at 322.

164 *See id.* The Court observed that insofar as the property owner could seek declaratory or injunctive relief through the judicial process, "[h]e ha[d] simply chosen not to resort to it." *Id.*

165 498 U.S. 439 (1991).

166 *Id.* at 441.

167 *See id.* at 448 (collecting cases).

168 *Id.* at 457 (Kennedy, J., dissenting).

169 *Id.* at 451 n.9 (majority opinion) (quoting Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 613 n.29 (1979)).

reading of *Carter* to recognize Contract Clause claims under § 1983,[170] other circuits have parted company. The Fourth Circuit understood *Dennis* to only distinguish *Carter* from the Commerce Clause framework, not to overrule it in its precise context.[171] More recently, the Sixth Circuit has agreed, adding that only the Supreme Court could overrule its precedent to resolve such tension.[172] Other circuits have punted on the question, but often due to litigants failing to raise the issue.[173]

The rights-based jurisprudence of the Contract Clause in its heyday might suggest a similar result as in *Dennis* should the Supreme Court reconsider *Carter*. Just as the Court "often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation,"[174] it has also frequently invoked the right to contract in its Contract Clause jurisprudence. As discussed above, Chief Justice Marshall spared little ink in championing the individual rights that the Contract Clause secured.[175] And even after the clause declined in force, the Court has continued to enshrine the individual right to contract within its tempered Contract Clause jurisprudence.[176]

Yet given the limited remedial landscape of constitutional contract law, *Carter* may retain vitality. Despite Elbridge Gerry's best efforts,[177] the Contract Clause limits only *state* power, exempting the federal government from its strictures.[178] And so far as state government contracts are concerned, the remedies available are slim to (likely) none. Courts have refused to equate a state government's breach of contract with a Contract Clause violation.[179] Specific performance and payments from

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170 *See* S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 887 (9th Cir. 2003) (per curiam).

171 *See* Crosby v. City of Gastonia, 635 F.3d 634, 640–41 (4th Cir. 2011).

172 *See* Kaminski v. Coulter, 865 F.3d 339, 347 (6th Cir. 2017) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

173 *See, e.g.*, Heights Apartments, LLC v. Walz, 30 F.4th 720, 728 (8th Cir.), *reh'g & reh'g en banc denied*, 39 F.4th 479 (8th Cir. 2022); Watters v. Bd. of Sch. Dirs., 975 F.3d 406, 413 (3d Cir. 2020) (acknowledging argument on the question but finding independent grounds to dismiss); Elliot v. Bd. of Sch. Trs. of Madison Consol. Schs., 876 F.3d 926, 931–32 (7th Cir. 2017); Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 279 n.14 (5th Cir. 2012); Haley v. Pataki, 106 F.3d 478, 482 n.2 (2d Cir. 1997).

174 *Dennis*, 498 U.S. at 448.

175 *See supra* section I.B, pp. 2134–38.

176 *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 190 (1992) (labeling the "anchoring purpose" of the Contract Clause as "enabl[ing] individuals to order their personal and business affairs according to their particular needs and interests" (alteration in original) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978))).

177 *See supra* note 25.

178 *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 n.9 (1984). Plaintiffs alleging that the federal government has impaired a contract have only the protections of the Fifth Amendment. *See id.* at 733 ("We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts.").

179 *See* Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1996) (Posner, C.J.) ("It would be absurd to turn every breach of contract by a state or municipality into a violation

state treasuries are forbidden remedies as well.[180] Even for private contract impairments, a § 1983 cause of action may be unnecessary — plaintiffs in breach of contract suits may always invoke the Contract Clause to rebut statutory defenses.[181] The lack of constitutional remedies for breaches of public contracts, coupled with the availability of constitutional replies against breaches of private contracts, leaves little room for Contract Clause claims under § 1983. On this understanding, *Carter* remains correct.

The right of action that § 1983 secures is far from the only mechanism in which Contract Clause claims may arise. For instance, breach of contract suits between private parties may feature Contract Clause claims as a reply to defenses that state laws have altered contractual obligations. Yet the successful pandemic suits discussed above have arisen uniformly through § 1983.[182] Determining whether § 1983 furnishes a private right of action for Contract Clause claims thus directly impacts the future doctrinal development of the Contract Clause.

CONCLUSION

Though probably the most textually linked to economic liberty, the Contract Clause is certainly not the only constitutional provision capable of resurrecting Lochnerism. Litigants have employed other provisions of the Constitution to attempt to thwart government responses to the pandemic, such as the Commerce Clause,[183] the Free Exercise Clause,[184] and the Due Process Clause.[185] Similarly, the Supreme Court and lower federal courts are not the only judicial institutions capable of

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of the federal Constitution."); *cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1790 n.317 (1991) ("As to contractual breaches by the states, it is possible to read the eleventh amendment, in overruling Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), as intended to free the states from liability for breach of contract.").

180 *See* Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 256–57 (2011) (citing Edelman v. Jordan, 415 U.S. 651, 666 (1974); *In re* Ayers, 123 U.S. 443 (1887)).

181 *See* Ann Woolhandler & Michael G. Collins, *Was* Bivens *Necessary?*, 96 NOTRE DAME L. REV. 1893, 1913–14 (2021) ("To say that a damages remedy is constitutionally necessary does not require that remedy must take the form of a federal action . . . .").

182 *See* Heights Apartments, LLC v. Walz, 30 F.4th 720, 724 (8th Cir.), *reh'g & reh'g en banc denied*, 39 F.4th 479 (8th Cir. 2022); Melendez v. City of New York, 16 F.4th 992, 996 (2d Cir. 2021).

183 *See* BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 617 (5th Cir. 2021) (concluding that the vaccine mandate "likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power"), *stay dissolved sub nom.* Mass. Bldg. Trades Council v. U.S. Dep't of Lab. (*In re* MCP No. 165), 21 F.4th 357 (6th Cir. 2021), *rev'd sub nom.* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (per curiam).

184 *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam).

185 *See Melendez*, 16 F.4th at 1015–16.

executing the Contract Clause. State courts may take more expansive interpretations of parallel state constitutional contract clauses.[186]

But if state governments, in the course of navigating a debilitating pandemic, cannot sideline other provisions of the Constitution,[187] *Blaisdell*'s justification for state impairments of contractual obligations suggests the opposite for the Contract Clause. Such a "boundless" police power could substantiate claims that the Contract Clause really is a dead letter that ought to return to its former laissez-faire glory.

As state government mandates wane with the pandemic's severity, mootness doctrine may prevent these issues from metamorphosing into full-blown challenges to the *Blaisdell* test, as in *Johnson*.[188] But the exigency of the pandemic resulted in an already permissive grant of police power to the states expanding even further beyond the ambit of the Contract Clause, exacerbating the criticism that the clause's modern jurisprudence has faced. Additionally, the recent emergence of coronavirus variants,[189] insofar as they inspire a revival of state government mandates and moratoria, could encourage a new wave of lawsuits. Though Justice Gorsuch is the only current Supreme Court Justice on record to advocate for a more expansionist interpretation of the Contract Clause, federal courts of appeals and state supreme courts wield the power to return, albeit incrementally, to the Marshallian view of the provision.

For the past fifty years, as it pertains to the Contract Clause, "the law hath not been dead, but it hath slept."[190] Yet so long as the provision's broad language remains enshrined within Article I, along with a patchy (and thus malleable) drafting history and an ambitious (if abandoned) jurisprudence, it remains capable of awakening. Understanding the clause's text, history, and development — especially in its relation to the *Lochner* era — is thus vital to comprehending a potential reinvigoration in the midst of unprecedented emergencies.

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186 *See* Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 94–95 (2013) (finding that at least thirty-nine state constitutions have contract clauses and that the majority of such clauses provide greater protection than their federal counterpart).

187 *See Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

188 *Compare* Johnson v. Governor of N.J., No. 21-1795, 2022 WL 767035, at *1 (3d Cir. Mar. 14, 2022) (holding that a challenge to an executive order regarding rent payments was moot due to the order's expiration), *with* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."), *and* Snell v. Walz, 985 N.W.2d 277, 280–81 (Minn. 2023) (finding most challenges to a state mask mandate moot but remanding on a state statutory question).

189 *See SARS-CoV-2 Variant Classifications and Definitions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 20, 2023), https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html [https://perma.cc/7W9D-BBNQ] (describing development of mutational variants of the coronavirus).

190 WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act II, sc. 2, l. 91 (N.W. Bawcutt ed., Oxford Univ. Press 1991) (1604).