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JUDICIAL REVIEW OF STATE LEGISLATION: AN IRONIC RETURN TO LOCHNERIAN IDEOLOGY WHEN PUBLIC SECTOR LABOR CONTRACTS ARE IMPAIRED

NILA M. MEROLA[†]

INTRODUCTION

Rochelle Johnson is a state worker in Sacramento, California. Ms. Johnson's \$38,000 annual salary has been cut by approximately fourteen percent due to the state's mandate that more than 200,000 workers take three unpaid days off per month.¹ While her modest salary never allowed her to live in luxury, Ms. Johnson now struggles just to keep the power on in her home and to provide basic necessities for her two children.² About her ability to make ends meet, Johnson professed, "I just feel like I'm less than a parent."³ Though the reduction in liquidity has threatened the sustainability of Ms. Johnson's already conservative lifestyle, the slow stripping away of her dignity is perhaps her greatest loss of all.

California's furloughs—or involuntary,⁴ unpaid days off from work⁵—are not a national outlier. In fact, twenty-five other states have resorted to some type of furlough program in an

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¹ Shane Goldmacher, *California; Workers Pay for Furloughs; Many Are Unable To Make Mortgage or Car Payments or Even Buy Enough Food. Some Face Bankruptcy. Biden and Feinstein Protest*, L.A. TIMES, Aug. 30, 2009, at A39.

² *Id.* (noting that Ms. Johnson's power had already been shut off once).

³ *Id.*

⁴ Not all furloughs are involuntary. Sometimes "furlough" is used to refer to a vacation. However, this Note will refer to furloughs exclusively as involuntary unpaid days off from work mandated by the state.

⁵ BLACK'S LAW DICTIONARY 745 (9th ed. 2009).

effort to reduce enormous budget gaps.⁶ As half of the states project a cumulative budget shortfall of \$145 billion for fiscal year 2010,⁷ the states' desires to expeditiously identify and implement measures to reduce these deficits are apparent. However, some of the means chosen to achieve this goal—laws that impose furloughs or wage freezes on unionized public sector employees—may be an abuse of states' police powers and an unconstitutional impairment of public sector labor contracts.

In response to these laws, labor unions across the country have sued, alleging that the furloughs and wage freezes violate the Contract Clause of the United States Constitution, which proscribes states from enacting laws that impair contractual obligations.⁸ Most recently, a United States district court in Maryland found that an employee furlough plan implemented by Prince George's County was unconstitutional under the Contract Clause.⁹ Many unions view the *Prince George's* decision as a collective victory not only because the court invalidated the furloughs but also, and perhaps more importantly, because the court was willing to strictly scrutinize the furlough legislation.¹⁰

Indeed, before ultimately concluding that the furloughs were unconstitutional, the court undertook a rather extensive analysis of the furlough legislation, throughout which the court examined whether the law was reasonable and necessary to serve an important public purpose.¹¹ The court showed great sympathy for the policymakers' plight of closing soaring budget gaps amidst this "global recession" and acknowledged that a certain degree of deference must be accorded to lawmakers' fiscal decisions. The court also noted, however, that it "cannot merely give lip service to the fundamental principles that undergird the Contract Clause of the United States Constitution" and that "[t]o do otherwise, even in these severe economic times, would sanction

⁶ NAT'L CONFERENCE OF STATE LEGISLATURES, ACTIONS & PROPOSALS TO BALANCE THE FY 2010 BUDGET: STATE EMPLOYEE ACTIONS, FURLOUGHS AND LAYOFFS (2009), <http://www.ncsl.org/default.aspx?tabid=17244>.

⁷ *Id.*

⁸ See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

⁹ See Fraternal Order of Police Lodge No. 89 v. Prince George's Cnty. (*Prince George's I*), 645 F. Supp. 2d 492, 518 (D. Md. 2009), *rev'd*, 608 F.3d 183 (4th Cir. 2010).

¹⁰ See *id.*

¹¹ See *id.* at 510–18.

the County running roughshod over the Unions, who in good faith negotiated a binding contract with the County.”¹² The *Prince George’s* Court’s refusal to allow state legislatures to run “roughshod”¹³ over public sector unions through an unchecked use of police power and under the guise of fiscal necessity is strikingly reminiscent of the now infamous, widely criticized, and allegedly abandoned judicial activism of the “*Lochner* era,” spawned by the 1905 Supreme Court decision, *Lochner v. New York*.¹⁴

The labor unions’ *Prince George’s* victory, however, was short-lived. On June 23, 2010, the United States Court of Appeals for the Fourth Circuit reversed the district court in a nine-page opinion.¹⁵ Nevertheless, the district court’s opinion is groundbreaking in its scrutiny of state legislation, instructive to other courts analyzing similar issues and, indeed, the focus of this Note.¹⁶ While the Fourth Circuit’s opinion will be discussed only briefly, it is further evidence of the rift among the courts in their willingness to strictly scrutinize state legislation under *Lochner*-like jurisprudence.

In addition to the *Prince George’s* courts, other state, district, and appellate courts around the country have elected to review state legislation that impairs public contracts with greater scrutiny.¹⁷ Because the laws in question are predominately economic or social, this jurisprudential approach is quite controversial, as, since the end of the *Lochner* era, greater deference is typically given to the legislatures in determining whether the laws are reasonable and necessary to achieve a compelling public purpose.¹⁸ In fact, even the courts seem to be split on whether second guessing legislative economic and social decisions is an appropriate judicial role. While those courts that are willing to give less deference to the legislature face criticism from some for returning to *Lochner*-like judicial activism, these courts should be applauded, rather than rebuked.

¹² *Id.* at 518.

¹³ *Id.*

¹⁴ 198 U.S. 45 (1905).

¹⁵ See Fraternal Order of Police Lodge No. 89 v. Prince George’s Cnty. (*Prince George’s II*), 608 F.3d 183, 185 (4th Cir. 2010).

¹⁶ Unless otherwise indicated, “*Prince George’s*” is in reference to the district court opinion.

¹⁷ See *infra* note 223 and accompanying text.

¹⁸ See *infra* note 50 and accompanying text.

These courts deserve praise because they demonstrate that the proper role of the courts is to say “no” only after a substantive review reveals that legislation is inconsistent with the Constitution, not because it is the judiciary’s job is to sit as a super-legislature or because they invalidate laws based on differing ideology or economic opinion.¹⁹ This type of jurisprudence is not paternalistic protectionism but is, in fact, the judicial function that *Lochner* stood for all along. Though the Court claimed to have discarded *Lochner* in the 1930s, the pendulum seems to be swinging back to a more scrutinizing judiciary. In fact, *Lochner* still lives in the fabric of contemporary jurisprudence but now in a positive, responsible, and more authentic capacity.

This Note argues that, despite its notorious reputation as the case that permitted and encouraged judicial usurpation of the states’ inherent police powers,²⁰ a return to a *Lochnerian* level of review of economic legislation is appropriate when state or local legislatures pass laws that substantially impair public sector labor contracts. Part I briefly recaps the *Lochner* era, beginning with an overview of *Lochner* itself and culminating in a brief discussion of the criticisms of *Lochner*. Part II introduces the Contract Clause and demonstrates that the contemporary test for determining whether there has been a Contract Clause violation is similar to the *Lochner* Court’s analysis for whether the Fourteenth Amendment’s substantive due process guarantee of liberty of contract had been violated.

Part III reveals that *Lochner*’s legacy may positively live on by protecting public sector employees from substantial contractual impairments, despite the nefarious connotation of the “*Lochner*” name. First, through an in-depth review of two cases, *Fraternal Order of Police v. Prince George’s County*²¹ and *Buffalo*

¹⁹ See Randy Barnett, *A Libertarian View: Judicial Activism Is Necessary*, LEGAL TIMES, Apr. 27, 1987, at 13.

²⁰ Federal Court of Appeals Judge Robert Bork denounced *Lochner* as “the symbol, indeed the quintessence, of judicial usurpation of power.” ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1991). Even now, Chief Justice John Roberts, during his Senate confirmation hearings, criticized *Lochner*: “You go to a case like the [*Lochner*] case, you can read that opinion today and it’s quite clear that they’re not interpreting the law, they’re making the law.” *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST, Sept. 13, 2005, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/09/13/AR2005091300876.html>.

²¹ 645 F. Supp. 2d 492 (D. Md. 2009), *rev’d*, 608 F.3d 183 (4th Cir. 2010).

Teachers Federation v. Tobe,²² Part III shows that courts struggle and vary with the amount of deference owed and given to state legislatures. Additionally, Part III illustrates that, without strict scrutiny, courts may be reluctant to find contract-impairing laws in violation of the Contract Clause, leaving public sector employees unprotected from unconstitutional state legislation. In light of the tumultuous economy and the states' increasing resort to furloughs and wage freezes to close budget gaps, Part III concludes with a call to the courts to responsibly use the power that they wield and place a limit on the states' "unbounded power . . . where legislation of this character is concerned, and where the protection of the Federal Constitution is sought."²³

I. LOCHNER REVISITED

A. *Lochner*: Its Jurisprudential Ramifications, Progeny, and Demise

In *Lochner v. New York*, the Supreme Court held that a New York law proscribing a bakery employer from requiring or permitting an employee to work more than ten hours in one day or sixty hours in one week was unconstitutional under the Fourteenth Amendment of the United States Constitution.²⁴ The Court stated that the Fourteenth Amendment protects an individual's liberty to enter into contracts in relation to his or her business and found that the New York law interfered with this right.²⁵ The Court did not hold, however, that the state can never enact laws that interfere with constitutional liberties or rights.

Instead, the Court noted that state sovereignty is preserved in the states' inherent "police powers" to pass laws that restrict individual liberties yet simultaneously serve the "safety, health, morals, and general welfare of the public."²⁶ The Court made clear, however, that there must be limits on the states' police power.²⁷ Otherwise, the Court opined, "the 14th Amendment would have no efficacy . . . and it would be enough to say that any piece of legislation was enacted to conserve the morals, the

²² 464 F.3d 362 (2d Cir. 2006).

²³ *Lochner v. New York*, 198 U.S. 45, 56 (1905).

²⁴ *See id.*

²⁵ *See id.* at 53.

²⁶ *Id.*

²⁷ *See id.* at 56.

health, or the safety of the people.”²⁸ The rule, therefore, that emerges from *Lochner* is that the states have the power to pass laws that promote the public welfare. The judiciary, however, has the power to determine whether those laws actually do achieve a common social good or whether they are merely an unnecessary and unreasonable restriction of individual liberties, crafted under the pretext of state sovereignty.

Ultimately, the *Lochner* Court found that the law at issue was an abuse of New York’s police powers.²⁹ The Court stated that there was no “reasonable” grounds for finding that the law was neither “necessary [n]or appropriate” to safeguard the public health, as the occupation of a baker is not an unusually hazardous one.³⁰ Moreover, the Court explained that bakers are not a class inferior in intelligence or competence than men of other trades or occupations so as to require the arm of the state to interfere with a baker’s right to sell and an employer’s right to buy labor on contractual terms that both parties see fit.³¹ Therefore, when the law’s end is not legitimate and the law itself is a palpable invasion of a constitutional right, the courts must find the state’s chosen means an unconstitutional interference with individual liberties.³²

The *Lochner* decision marked the beginning of an era in which the judiciary strictly scrutinized the reasonableness and necessity of state laws to ensure that the states did not overstep their police powers.³³ For the next thirty years, the Court freely substituted its own judgment for that of the legislature and invalidated nearly two hundred social welfare and regulatory measures.³⁴ To illustrate, in the 1908 decision, *Adair v. United States*,³⁵ the Supreme Court invalidated a federal law banning “yellow-dog” contracts—an adhesion contract imposed by the employer upon the employee in which the employee, as a

²⁸ *Id.*

²⁹ *See id.* at 58.

³⁰ *See id.* at 58–59.

³¹ *See id.* at 56–57.

³² *Id.* at 61–62.

³³ *See, e.g.,* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003).

³⁴ *See id.* at 373 (explaining that *Lochner* symbolizes an entire era in which the Supreme Court struck down various social legislation, including minimum wage laws and laws designed to enable employees to unionize).

³⁵ 208 U.S. 161 (1908).

condition of employment, agrees not to join a union.³⁶ In finding the act at issue “repugnant to the 5th Amendment,”³⁷ the Court returned to laissez faire economic theory and, in language similar to that in *Lochner*, deemed the “right of a person to sell his labor upon such terms as he [considers] proper [to be] the same as the right of the purchaser of labor to prescribe the conditions.”³⁸ The Court stated that an employer and his employees “have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract.”³⁹ As seen in *Adair*, the *Lochner* era cases recognized the existence of states’ police powers, but infrequently deferred to legislative decisionmaking.⁴⁰

Not until 1937 did the *Lochner* era come to an end.⁴¹ The United States was beginning to recover from the deepest and most prolonged economic depression in American history. It was a time that today feels more familiar than it does distant and is now more recognizable than it is obscure.⁴² As the tumultuous economy of the 1930s began to raise American consciousness to the improprieties occurring in the workplace, economic policy began to shift from classical to Keynesian theory, and *Lochnerian* ideology was abandoned.⁴³ Additionally, the composition and

³⁶ *Id.* at 180.

³⁷ *Id.*

³⁸ *Id.* at 174.

³⁹ *Id.* at 175.

⁴⁰ See generally *Morehead v. Tipaldo*, 298 U.S. 587 (1936) (declaring unconstitutional a New York state minimum wage law); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (declaring unconstitutional a federal statute establishing a pension fund for railway workers); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (declaring unconstitutional a federal statute providing for minimum wages for women and children in the District of Columbia); *Coppage v. Kansas*, 236 U.S. 1 (1915) (declaring unconstitutional a state law that forbade employers to require employees to agree not to join labor organizations).

⁴¹ See Strauss, *supra* note 33 (noting that *West Coast Hotel* marked the end of the *Lochner* era and that “[b]y the early 1940s, *Lochner’s* status as a pariah was secure”).

⁴² See Mitchell H. Rubenstein, *Obama’s Big Deal; The 2009 Federal Stimulus; Labor and Employment Law at the Crossroads*, 33 RUTGERS L. REC. 1, 2 (2009) (discussing the similarities between the economic situations faced by FDR and Obama when they stepped into office and explaining the need for social change and reform of labor and employment legislation).

⁴³ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1358 (3d ed. 2000).

No longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and to produce a social optimum. The legal ‘freedom’ of contract and property

philosophy of the Supreme Court had changed significantly since *Lochner*.⁴⁴ In *West Coast Hotel v. Parrish*,⁴⁵ the Court sustained a state minimum wage law for women and noted that, when it comes to the relationship between an employer and employee, “the Legislature has necessarily a wide field of discretion.”⁴⁶ The Court not only began to afford state legislatures greater discretion in the exercise of their police powers,⁴⁷ but also departed from the notion that freedom of contract is an untouchable constitutional right.⁴⁸

Just two years after *West Coast Hotel*, Justice Stone, in *United States v. Carolene Products*,⁴⁹ inserted one of the most talked about footnotes in constitutional law. Footnote four suggested that the Court would apply minimal scrutiny—or rational basis scrutiny—to economic regulation, but would apply strict scrutiny to legislation that prejudiced personal rights, such as freedom of expression or religion.⁵⁰ The Court intimated that a “more searching judicial inquiry” was necessary to protect “discrete and insular minorities” when the political process fails.⁵¹ Immediately following *West Coast Hotel* and *Carolene Products*, the Supreme Court upheld a host of New Deal

came increasingly to be seen as an illusion, subject as it was to impersonal economic forces.

....

Thus, the basic justification for judicial intervention under *Lochner*—that the courts were restoring the natural order which had been upset by the legislature—was increasingly perceived as fundamentally flawed. There was no . . . economic order to upset or restore, and legislative . . . decision in any direction could neither be restrained nor justified on any such basis.

Id.

⁴⁴ See *id.* at 1359.

⁴⁵ 300 U.S. 379 (1937).

⁴⁶ *Id.* at 393.

⁴⁷ See *id.* at 397–99.

⁴⁸ See *id.* at 391–400.

⁴⁹ 304 U.S. 144 (1938).

⁵⁰ See *id.* at 153 n.4; see also Geoffrey P. Miller, *The True Story of Carolene Products*, SUPREME CT. REV. 397, 399 (1988) (“By separating economic and personal liberties, Justice Stone suggested that the Court might really mean what it said about deference to the legislative will in economic cases.”); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 703 (1984) (“Today the general view is that constitutional protection is afforded to economic liberties only in the few cases of government action so egregious and outrageous as to transgress the narrow prohibitions of substantive due process.”).

⁵¹ *Caroline Prods.*, 304 U.S. at 153 n.4.

legislation, including the National Labor Relations Act,⁵² the Fair Labor Standards Act,⁵³ and the Agricultural Adjustment Act.⁵⁴

In the next three decades, the Court moved further away from the judicial activism of the *Lochner* era and sustained numerous state economic legislations.⁵⁵ In 1963, the Supreme Court demonstrated that *Lochner* was but a distant memory in *Ferguson v. Skrupa*.⁵⁶ Writing for the Court, Justice Black stated that “[i]t is up to the legislatures, not the courts, to decide on the wisdom and utility of legislation,”⁵⁷ and “[t]he doctrine that prevailed in *Lochner*, *Coppage*, *Adkins* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”⁵⁸ Thus, *Lochner* was a dead-letter to most, symbolizing a thirty-year hiccup in Supreme Court jurisprudence with activist ideology that was at last a relic, rather than a reality.

B. *Lochner’s Critics*

Lochner is arguably the most rebuked Supreme Court decision of all time.⁵⁹ To “*Lochnerize*” is widely understood to

⁵² See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

⁵³ See *United States v. Darby*, 312 U.S. 100, 125–26 (1941).

⁵⁴ See *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵⁵ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding a law regulating opticians and optometrists); *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (upholding a state “right-to-work” law that barred a preference for union membership in employment decisions); *Olsen v. Nebraska*, 313 U.S. 236, 246–47 (1941) (upholding a Nebraska statute fixing maximum fees for employment agencies).

⁵⁶ 372 U.S. 726 (1963).

⁵⁷ *Id.* at 729.

⁵⁸ *Id.* at 730.

⁵⁹ See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1st ed. 1980) (describing *Lochner* as “one of the most condemned cases in United States history . . . used to symbolize judicial dereliction and abuse” and noting “the animosity and contempt that erupted against” the *Lochner* line of substantive due process cases); Strauss, *supra* note 33 (stating that *Lochner* “would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years”); see also *United States v. Lopez*, 514 U.S. 549, 604–05 (1995) (Souter, J., dissenting) (warning against a return to *Lochner*-style judicial review characteristic of laissez-faire economics and reiterating that “[t]he practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint” (internal citations omitted)); *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (asserting that the Fourteenth Amendment does not preclude workplace regulation and criticizing the majority’s use of laissez-faire economic theory in its due process analysis).

refer to a fundamental judicial error.⁶⁰ The principal criticism is that *Lochner* was wrong because it involved “judicial activism,” a usurpation of the legislative branch’s traditionally and constitutionally reserved lawmaking power.⁶¹ The Supreme Court has perhaps been the biggest critic of Lochnerian philosophy. In *Lochner* itself, both Justice Holmes and Justice Harlan dissented. First, Justice Holmes rejected the premise of limited government and took the position that the courts have no right to “embody their opinions in law” and that “state laws may regulate life in many ways which [the Court] as legislators might think as injudicious.”⁶² Justice Harlan, joined by Justice White and Justice Day, maintained that it was possible to place limits on police power, yet still uphold the maximum hour legislation at issue in *Lochner*.⁶³

The *Lochner* dissenters urged the Court to exercise more restraint in its scrutiny of state legislation and to afford state legislatures a bit more deference in what policy truly did serve the health, safety, and welfare of the public.⁶⁴ In 1963, Justice Black wrote that “the original constitutional proposition [is] that courts do not substitute their social and economic beliefs for the judgment of legislative bodies.”⁶⁵ And most recently, in 2008, Justice Thomas stated in his concurring opinion in *MeadWestvaco Corp. v. Illinois Department of Revenue*⁶⁶ that

⁶⁰ See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988) (“*Lochnerizing*’ has become so much an epithet that the very use of the label may obscure attempts at understanding.”); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 556–57 (1996).

⁶¹ Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (explaining that the lesson learned from *Lochner* is that the Court should provide more deference to legislative enactments).

⁶² *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

⁶³ See *id.* at 68 (Harlan, J., concurring).

⁶⁴ See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 720–21 (2005) (referring to Justice Holmes as “[t]he true outlier” by not joining Justice Harlan’s dissent and instead offering a “parliamentary model of democracy: the legislature can do whatever it likes”). But see Gerald Leonard, *Holmes on the Lochner Court*, 85 B.U. L. REV. 1001, 1004–05 (2005) (stating that Holmes was “far from alone” in advocating substantial deference to the legislature, and that Harlan’s words were “pretty strong, but they only echoed the ‘reasonable doubt’ or ‘doubtful case’ rule”).

⁶⁵ *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

⁶⁶ 553 U.S. 16 (2008).

“divining from the Fourteenth Amendment a right” not enumerated in the Constitution “bears a striking resemblance to our long-rejected *Lochner*-era precedents.”⁶⁷

As indicated by Justice Thomas’s concurrence,⁶⁸ part of the judicial activism condemnation involves the argument that the *Lochner* Court devised and enforced a right—“the right of contract between the employer and employees”⁶⁹—that is neither explicitly stated in nor readily inferred from the text of the Constitution.⁷⁰ The Court stated that the Fourteenth Amendment guarantees that “no state can deprive any person of life, liberty, or property without due process of law,”⁷¹ and freedom of contract, while unenumerated, is nevertheless a fundamental right.⁷² That freedom of contract is protected by the Fourteenth Amendment and is, therefore, considered by many to be attenuated at best. Like the criticisms of *Roe v. Wade*,⁷³ in which the Court found that, within the penumbras of the Fourteenth and Ninth Amendments, there lies a fundamental “freedom of privacy”⁷⁴—another right conspicuously absent from the text of the Constitution—*Lochner* is admonished not only for the Court supplanting its own judgment for that of the states⁷⁵ but also for enforcing a right seemingly fabricated by the Court, rather than conceived by the Framers.⁷⁶ Despite these criticisms, however, *Lochner* is still a part of American jurisprudence. And when applied in the right circumstances, it operates as an imperative check on state legislative power and affords the public a safeguard from unconstitutional state legislation.

⁶⁷ *Id.* at 32–34 (Thomas, J., concurring).

⁶⁸ By stating that “divining from the Fourteenth Amendment a right” not found in the Constitution, Justice Thomas seems to agree with *Lochner*’s critics that it is not within the Court’s power to simply create constitutional rights that are not readily found in the Constitution itself. *Id.* (emphasis added).

⁶⁹ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

⁷⁰ See *W. Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (“What is this freedom? The Constitution does not speak of freedom of contract.”); Strauss, *supra* note 33, at 374, 378–81.

⁷¹ See *Lochner*, 198 U.S. at 53.

⁷² See *id.*

⁷³ 410 U.S. 113 (1973).

⁷⁴ *Id.* at 153 (“[The] right of privacy, whether it be founded in the Fourteenth Amendment[. . . or . . . the Ninth Amendment[. . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

⁷⁵ See Sunstein, *supra* note 61.

⁷⁶ See Strauss, *supra* note 33, at 374, 378–81.

II. THE CONTRACT CLAUSE AND THE COURT'S *LOCHNER*-LIKE LEVEL OF REVIEW

When examining claims under the Contract Clause, the Supreme Court uses an analysis that is remarkably similar to that of the *Lochner* Court. The Contract Clause of the United States Constitution provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”⁷⁷ Like the Fourteenth Amendment was in *Lochner*, the Contract Clause has been, and still is, a check on the states’ police powers.⁷⁸ While on its face the Contract Clause appears absolute, it is not a complete prohibition on the states’ rights to pass legislation to serve the public interest, even if those laws incidentally impair contracts.⁷⁹ Instead, the Court has devised a three-prong test to determine whether a state has, in fact, violated the Contract Clause.⁸⁰ The application of this test has emerged most recently in determining the constitutionality of furloughs imposed on unionized public sector employees.⁸¹ Part II.A briefly explores the origins, history, and contemporary revitalization of the Contract Clause. Part II.B demonstrates that Contract Clause jurisprudence is not at all different from *Lochnerian* Fourteenth Amendment substantive due process jurisprudence.

A. *Origin, History, and Contemporary Revitalization Origin of the Contract Clause: The Framers’ Intent*

The Framers’ intent in including the Contract Clause in the Constitution is murky and provides little help to courts in

⁷⁷ U.S. CONST. art. I, § 10, cl. 1.

⁷⁸ See, e.g., *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21–24 (1977) (“[P]rivate contracts are not subject to unlimited modification under the police power.”); Thomas H. Lee, Jr., *Baltimore Teachers Union v. Mayor of Baltimore: Does the Contract Clause Have Any Vitality in the Fourth Circuit?*, 72 N.C. L. REV. 1633, 1639–40 (1993) (“[T]he Court determined that the police power doctrine does not excuse states from binding [contractual] obligations . . .”).

⁷⁹ See *U.S. Trust*, 431 U.S. at 20 (“Although the Contract Clause appears literally to proscribe ‘any’ impairment, this Court observed in *Blaisdell* that ‘the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.’” (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 428 (1934))).

⁸⁰ See, e.g., *Prince George’s II*, 608 F.3d 183, 188–89 (4th Cir. 2010); *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

⁸¹ See *Prince George’s I*, 645 F. Supp. 2d 492, 508–10 (D. Md. 2009), *rev’d*, 608 F.3d 183 (4th Cir. 2010).

understanding exactly how to apply the Contract Clause today.⁸² Perhaps most importantly, the origin of the Contract Clause offers little guidance in how broadly or narrowly the clause is to be construed.⁸³ There is some indication that the clause was drafted exclusively to protect creditor's rights and to prevent the states from enacting debtor relief laws in the aftermath of Shays's Rebellion—a post-Revolutionary War revolt by struggling farmers aimed at stopping courts from carrying out foreclosures.⁸⁴ It is not conclusive, however, that this was the Framers' sole motivation in including the clause in the Constitution.⁸⁵ The principal question nevertheless remains: How expansive is the Contract Clause's scope?

Given its broad language, if read literally, the breadth of the Contract Clause could potentially eviscerate state sovereignty and greatly limit state police powers by not permitting the states to enact *any* legislation that impaired contractual obligations, no matter how incidental the impairment or how compelling the larger societal interest.⁸⁶ On the other hand, if interpreted too narrowly, courts would essentially be writing a blank check to the legislatures to enact whatever laws they choose, even if they unnecessarily and unreasonably impair contractual obligations. Despite these questions, not much is revealed from the political and social context of the clause,⁸⁷ and even less can be gleaned

⁸² See Epstein, *supra* note 50, at 707 ("There is very little reason to think that the framers had any theory about the contract clause, or pondered its implications for cases to which it would be applied.").

⁸³ See *id.* at 717.

⁸⁴ JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 326 (1999). There is some authority that indicates that the policy underlying the Contract Clause was chiefly to protect creditor's rights. In 1785 and 1786, a depression threatened the lives and businesses of small farmers. *Id.* at 461. The rise of foreclosures prompted many states to enact laws staying foreclosures or excusing debt. *Id.* Massachusetts, however, refused to adopt any of these measures, and the farmers besieged local courts to prevent foreclosures. *Id.* One farmer, Daniel Shays, organized a militia in an attempt to seize a military arsenal. *Id.* Though Shays's Rebellion failed, it convinced many state leaders that creditor's rights needed constitutional protection. *Id.* Three weeks after Shays's Rebellion collapsed, Congress passed a resolution calling for the Constitutional Convention of 1787. *Id.*

⁸⁵ Nevertheless, the Contract Clause was obscurely worded, and the history of the Court's application of the clause demonstrates a strong suggestion that it was not drafted exclusively for the protection of creditor's rights. *Id.* at 326.

⁸⁶ See Epstein, *supra* note 50, at 708.

⁸⁷ See *id.* at 706 (noting that one possible interpretation is that the clause was intended "to prevent the repudiation of foreign debts without interfering with the

from the debates at the drafting and ratifying conventions, as the Framers insisted that they be kept confidential.⁸⁸ There is, however, some agreement that the Contract Clause was included because of the Framers' strong beliefs that trade and commerce were social goods and were best fostered by stability in contractual obligations.⁸⁹

Attempting to remedy the interpretive problems of the Contract Clause through convention debates and its social-political context is inconclusive. Two other sources of information, however, inform the debate: the context in which the clause is written and the primary purpose of the Constitution as a whole.⁹⁰ First, the Contract Clause is situated in the same section as the prohibitions of bills of attainder and ex post facto laws.⁹¹ A bill of attainder is an act of the legislature declaring a person or group of persons guilty of some crime and punishing them without benefit of a trial,⁹² and an ex post facto law is one that unlawfully applies retroactively such as a law that renders an act punishable when it was not illegal when committed.⁹³ The Framers, therefore, placed the Contract Clause alongside other

traditional modes of economic regulation undertaken by the states," but that there are "obstacles to making any definite link"). *But see* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 257 (1978) (Brennan, J., dissenting) (arguing that the Framers intended that the Contract Clause be applied only to debtor-relief laws because the clause was included in the same section as other provisions regulating currency); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427–28 (1934) (contending that the Contract Clause was adopted because of the plight of debtors following the revolutionary period); Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 188 (1985) (stating that the Framers intended the Contract Clause "to serve the limited purpose of preventing the states from adopting debtor-relief laws").

⁸⁸ See Epstein, *supra* note 50, at 706.

⁸⁹ See *id.*; see also U.S. Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977) ("[T]he debates in the Constitutional Convention were of little aid in the construction of the Contract Clause, but . . . the general purpose of the Clause [is] clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations.").

⁹⁰ See Epstein, *supra* note 50, at 710–17.

⁹¹ See U.S. CONST. art. I, § 10, cl. 1. This Clause states in full:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Id. (emphasis added).

⁹² BLACK'S LAW DICTIONARY 188 (9th ed. 2009).

⁹³ *Id.* at 661.

seemingly absolute prohibitions on state legislatures, demonstrating that total judicial deference to state police powers while considering laws that impair contracts is antithetical to the Framers' intent.⁹⁴

Second, one of the primary purposes of the Constitution is to place limits on the government at both the state and federal levels.⁹⁵ The Framers saw a potential for legislative abuse and therefore, drafted clauses within the Constitution to curb legislative power yet also conserve legislative ability to enact laws that serve the health, safety, and welfare of the public.⁹⁶ The Contract Clause limits legislative power and thus substantiates the argument that complete judicial deference to legislative decisionmaking is inappropriate when laws impair contractual obligations.⁹⁷

1. The History of the Contract Clause: Case Law

The evolution of case law dealing with Contract Clause violations is helpful in ascertaining the extent to which courts are willing to invalidate state and federal legislation that impairs contractual obligations. In 1810, Chief Justice John Marshall expressed a desire to interpret the Contract Clause broadly.⁹⁸ In

⁹⁴ See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136–39 (1810).

⁹⁵ See *id.* at 136–38.

⁹⁶ See Epstein, *supra* note 50, at 715 (“The task of limited government, then, is to forge those institutions that will control the abuses of trust without depriving government of the powers needed to maintain the social order.”); see also *Fletcher*, 10 U.S. (6 Cranch) at 138 (noting that the Framers felt some apprehension in regard to state sovereignties because they recognized “the violent acts which might grow out of the feelings of the moment”). James Madison also commented on the need to place a check on legislative power in the *Federalist Papers*:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

THE FEDERALIST NO. 44, at 294 (James Madison) (John Harvard Library ed. 2009).

⁹⁷ See BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 15 (1938) (arguing that at least some of the Framers understood the Contract Clause to have a broader application); Epstein, *supra* note 50, at 715–17.

⁹⁸ See *Fletcher*, 10 U.S. (6 Cranch) at 87.

Fletcher v. Peck,⁹⁹ the Supreme Court found a Georgia law that rescinded a contract for the sale of land that was made by the previous legislature unconstitutional under the Contract Clause.¹⁰⁰ This decision made clear that the Contract Clause applies to public contracts—contracts to which the state is a party—and private contracts alike.¹⁰¹ Just nine years after *Fletcher*, in *Dartmouth College v. Woodward*,¹⁰² the Court specifically stated that salary contracts between the state and a public officer would be afforded the same constitutional protection as private employment contracts.¹⁰³

Despite the Marshall Court's expansive interpretation of the Contract Clause, in the years following Marshall's death, the Court began to limit the protection of the Contract Clause and afford state legislatures wider discretion.¹⁰⁴ In *Charles River Bridge v. Warren Bridge*,¹⁰⁵ the Court upheld Massachusetts legislation authorizing the construction of the Warren Bridge, despite a previous act that granted the Charles River Bridge Company an impliedly exclusive right to operate a toll bridge over the Charles River.¹⁰⁶ The Court held that all ambiguities in public contracts would be construed in favor of the state,¹⁰⁷ reasoning that a more draconian application of the Contract Clause would unduly restrict the state's police powers.¹⁰⁸ Even after *Charles River Bridge*, the Court continued to expand the states' police powers.¹⁰⁹

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 139. A 1795 Georgia Act divided a thirty-five million acre territory into four tracts and sold them to four different development companies. *Id.* at 89–90. Peck purchased land originally purchased under the 1795 Act. *Id.* at 127. Peck later sold his land to Fletcher. *Id.* A subsequent Georgia legislature repealed the original sale because it was discovered that the previous legislature sold the land because it was influenced by bribes. *Id.* at 89–90. Fletcher brought suit against Peck claiming that Peck sold the land without clear title. *Id.* at 127–28.

¹⁰¹ *See id.* at 137–38.

¹⁰² 17 U.S. (4 Wheat.) 518 (1819).

¹⁰³ *See id.* at 694.

¹⁰⁴ *See Lee, supra* note 78, at 1638.

¹⁰⁵ 36 U.S. (11 Pet.) 420 (1837).

¹⁰⁶ *Id.* at 536–37.

¹⁰⁷ *See id.* at 544.

¹⁰⁸ *See id.* at 547.

¹⁰⁹ *See Stone v. Mississippi*, 101 U.S. 814 (1879). Mississippi amended its constitution to prohibit lotteries after it had granted a charter to Stone to conduct a lottery. *Id.* at 814–15. The Court held that the Contract Clause could not be used to limit state police powers to protect the morals and health of the public. *See id.* at 819.

Not surprisingly, during the Great Depression, the Court was just as reluctant to invalidate legislation under the Contract Clause as it was under the Fourteenth Amendment.¹¹⁰ In *Home Building & Loan v. Blaisdell*,¹¹¹ the Court upheld a Minnesota law that superseded private mortgage agreements and allowed mortgagors in default to delay foreclosure.¹¹² In upholding the law, the Court found five factors significant, thus creating a new test for Contract Clause violations. The Court found that: (1) the state legislature declared in the Act itself that there was an emergency warranting homeowner protection;¹¹³ (2) the state law was enacted to protect a basic societal interest, not a favored group;¹¹⁴ (3) the relief was appropriately tailored to the emergency that it was designed to meet;¹¹⁵ (4) the imposed conditions were reasonable;¹¹⁶ and (5) the legislation was limited to the duration of the emergency.¹¹⁷ While this test placed some limitations on states' police powers, the Court was still adamant about deserting Lochnerian ideology and continued to defer to the states' discretion, especially in economic legislation.¹¹⁸

2. The Revitalization of the Contract Clause

The more expansive application of the Contract Clause, once envisioned by the Marshall Court, was finally reignited in the 1977 Supreme Court case, *U.S. Trust Co. v. New Jersey*.¹¹⁹ *U.S. Trust* arose in the wake of a national energy crisis and as a result of an attempt by New York and New Jersey to repeal a 1962

¹¹⁰ See Epstein, *supra* note 50, at 738 (noting that the police powers expansion in *Blaisdell* "paved the way for massive government intervention that undermines the security of private transactions" that has, today, "eviscerate[d] the [C]ontract[] [C]lause"); Lee, *supra* note 78, at 1639.

¹¹¹ 290 U.S. 398 (1934).

¹¹² *Id.* at 416–18, 448.

¹¹³ *Id.* at 444.

¹¹⁴ *Id.* at 445.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 447.

¹¹⁸ See *supra* note 50 and accompanying text. From the Depression and through the early 1970s, the Court upheld state legislation based on the police powers doctrine. While the five *Blaisdell* factors exposed the potential for a limit to state police powers, no clear doctrine existed. See Lee, *supra* note 78; see also *El Paso v. Simmons*, 379 U.S. 497, 515–16 (1965) (upholding a Texas law imposing a statute of limitations on a land redemption right because the law was necessary for the public welfare and was only a "technical" impairment).

¹¹⁹ 431 U.S. 1 (1977).

covenant in the charter of the Port Authority that limited the ability of the Port Authority to “subsidize rail passenger transportation from revenues and reserves.”¹²⁰ Port Authority bondholders sued, alleging that the modification was a violation of the Contract Clause.¹²¹ After the New Jersey Supreme Court upheld the repeal,¹²² the United States Supreme Court invalidated the repeal as a substantial, unreasonable, and unnecessary impairment of a public contract.¹²³

It is within *U.S. Trust* that the contemporary Contract Clause doctrine is found, which both encompasses the *Blaisdell* factors and elucidates some of the ambiguities that *Blaisdell* left behind. Under *U.S. Trust*, a court must undertake a three-part analysis to determine whether the Contract Clause has been violated. First, the court must assess whether the legislation at issue, in fact, impairs a contract.¹²⁴ Second, the court must determine whether the impairment is substantial.¹²⁵ Third, assuming that the impairment is substantial, the court must then determine whether the impairment is nevertheless reasonable¹²⁶ and necessary¹²⁷ to serve an important public purpose.¹²⁸ In determining whether the impairment is reasonable and necessary when the state itself is a party to the

¹²⁰ *Id.* at 3.

¹²¹ *Id.*

¹²² *Id.* at 3–4.

¹²³ *Id.* at 28–31.

¹²⁴ *See id.* at 17; *see also* Stephen J. McGarry, *Public Sector Collective Bargaining and the Contract Clause*, 31 LAB. L.J. 67, 70 (1980) (noting that whether an impairment has actually taken place is “based upon the subjective expectation of the parties rather than the objective results of the state’s action”).

¹²⁵ To determine whether an impairment is substantial, courts must look to “the extent to which reasonable expectations under the contract have been disrupted.” *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006) (quoting *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997)); *see U.S. Trust*, 431 U.S. at 28; *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1015 (4th Cir. 1993) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

¹²⁶ In determining reasonableness, courts look to “whether the parties at the time of contracting had foreseen possible changed circumstances.” McGarry, *supra* note 124; *see also U.S. Trust*, 431 U.S. at 31–32.

¹²⁷ Necessity is “to be measured by whether there [are] less drastic means or other alternatives available.” McGarry, *supra* note 124; *see also U.S. Trust*, 431 U.S. at 29–30.

¹²⁸ *See U.S. Trust*, 431 U.S. at 28–29; *see also id.* at 25 (“[A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.”).

contract, the *U.S. Trust* Court specifically stated that “complete deference to a legislative assessment . . . is not appropriate because the State’s self-interest is at stake.”¹²⁹ The Court, therefore, created a more scrutinizing standard of review for laws that impair public contracts, whereas almost complete deference is accorded to legislative judgment when only private contracts are impaired.¹³⁰

After an initial finding that the repeal did constitute a “serious impairment,”¹³¹ the *U.S. Trust* Court found that the impairment was unnecessary for two reasons.¹³² First, the states could have partially honored the covenant, rather than totally repeal it.¹³³ Second, the states could have accomplished their goals of decreasing automobile use and encouraging mass transit without modifying the covenant at all. For example, the Court noted, the state could have taxed gasoline and parking or increased bridge and tunnel tolls.¹³⁴ Next, using a foreseeability test, the Court found that the impairment was not reasonable.¹³⁵ The Court pointed out that, though increasingly urgent because of the energy crisis, the need for mass rail transit and the problems associated with automobiles in the New York metropolitan area was “not a new development” and that the state had full knowledge of the concerns when they entered into a covenant in 1962.¹³⁶ As illustrated, by discussing the foreseeability of a need for mass transit regulation at the time of contract and by noting other feasible alternatives to the repeal, the Court determined reasonableness and necessity through a rather discerning lens, affording the legislature virtually no discretion.

¹²⁹ *Id.* at 25–26. This lower level of deference is referred to as the “less deference standard.”

¹³⁰ *See* *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) (noting that the *U.S. Trust* reduced deference standard did not apply because the state did not alter its own contractual obligations); *Buffalo Teachers Fed’n*, 464 F.3d at 369 (explaining that when analyzing public contracts, courts use a different approach than that employed in analyzing private contracts).

¹³¹ *U.S. Trust*, 431 U.S. at 28.

¹³² *Id.* at 29–30.

¹³³ *Id.* at 29–30, 31 n.28.

¹³⁴ *Id.* at 30, 31 n.29.

¹³⁵ *Id.* at 31–32.

¹³⁶ *Id.*

B. Contract Clause Jurisprudence: Not a Far Cry from Lochner

The *U.S. Trust* doctrine, promulgated by the Supreme Court, one of *Lochner's* most steadfast critics, is tantamount to a return to *Lochnerian* ideology. Both the Fourteenth Amendment and the Contract Clause place restrictions on state police powers, and although the Fourteenth Amendment assumed a greater role in adjudicating states' rights,¹³⁷ the Contract Clause is not without purpose.¹³⁸ While Fourteenth Amendment substantive due process jurisprudence and the slow to mature Contract Clause doctrine grew up together, evolving side by side as America itself underwent a multitude of changes, only in the modern era do they meet in a significant way. Through both its explicit statements—that less deference should be given to the legislature¹³⁹—and its scrutinizing reasonable and necessary analysis,¹⁴⁰ the *U.S. Trust* Court, like the *Lochner* Court, made very clear that there are limits to state police powers and that sometimes the court, not the legislature, must determine whether laws are reasonable and necessary to serve an important public purpose.

First, *Lochner* did not hold that the Fourteenth Amendment placed unbounded limitations on state police powers.¹⁴¹ In fact, the Court cited five cases in which it previously upheld state legislation as a valid exercise of states' police powers,¹⁴² including *Knoxville Iron Co. v. Harbison*,¹⁴³ in which the Court upheld state legislation that intended to rectify the disadvantage that coal miners faced in obtaining wages from their employers by

¹³⁷ *Id.* at 15.

¹³⁸ *Id.* at 16.

¹³⁹ *Id.* at 25–26.

¹⁴⁰ *Id.* at 28–31.

¹⁴¹ *See* *Lochner v. New York*, 198 U.S. 45, 54–56 (1905).

¹⁴² *See id.*; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 38 (1905) (upholding state compulsory vaccination law); *Atkin v. Kansas*, 191 U.S. 207, 219, 222 (1903) (upholding state law prescribing the conditions upon which the state will permit work of a public character to be done for a municipality); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 16, 22 (1901) (upholding state law regulating the way in which miners could obtain their wages); *Petit v. Minnesota*, 177 U.S. 164, 168 (1900) (upholding state law declaring that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity); *Holden v. Hardy*, 169 U.S. 366, 380, 395 (1898) (upholding state law limiting the hours of employment in all underground mines or workings, smelting, and other institutions for the reduction or refining of ores or metals to eight hours per day, except in cases of emergency, where life or property is in imminent danger).

¹⁴³ 183 U.S. 13 (1901).

mandating that the employer cash coal orders when presented by the miner.¹⁴⁴ Instead, both the *Lochner* Court and the *U.S. Trust* Court simply stated that there should be limits on this police power.¹⁴⁵

Second, the *U.S. Trust* Court placed these limits on police power through a reasonable and necessary doctrine similar to that formulated in *Lochner*.¹⁴⁶ The *Lochner* Court explained that where legislation that may offend rights granted by the Constitution is concerned, the court must ask whether the law is “a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference?”¹⁴⁷ Without this analysis, the Court stated, “the [Fourteenth] Amendment would have no efficacy.”¹⁴⁸ Similarly, the *U.S. Trust* Court articulated that, without a court’s inquiry into whether a law impairing a contractual obligation is reasonable and necessary to achieve an important public purpose, “the Contract Clause would provide no protection at all” because a state could just “reduce its financial obligations . . . for what[ever] it regarded as an important public purpose.”¹⁴⁹

U.S. Trust, therefore, not only revitalized the Contract Clause, but also unearthed *Lochner*. Both the *Lochner* Court and the *U.S. Trust* Court recognized the need to reconcile the dueling constitutional goals to maintain state sovereignty and place a check on police powers. In pursuing these objectives, both Courts devised similar methodologies. For Contract Clause purposes, a *Lochner*-like level of review is appropriate when public contracts are impaired by state legislation. Since *U.S. Trust*, however, lower courts have struggled with the amount of deference owed to state legislatures, most notably when state laws impair public sector collective bargaining agreements.¹⁵⁰

¹⁴⁴ See *Lochner*, 198 U.S. at 55.

¹⁴⁵ *Id.* at 56; *U.S. Trust*, 431 U.S. 1 at 29.

¹⁴⁶ *Lochner*, 198 U.S. at 56–57.

¹⁴⁷ *Id.* at 56 (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ *U.S. Trust*, 431 U.S. at 26.

¹⁵⁰ See *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 370 (2d Cir. 2006) (“[W]hat does giving less deference to the legislature actually mean?”).

III. STATE IMPAIRMENT OF PUBLIC SECTOR LABOR CONTRACTS

While the *U.S. Trust* doctrine has proved to give significant guidance to the lower courts, it has created ambiguities as to the amount of deference owed to state legislatures, perhaps out of a fear of being too *Lochnerian*.¹⁵¹ Part III first compares two recent cases, *Buffalo Teachers Federation v. Tobe* and *Fraternal Order of Police v. Prince George's County*. Through these two cases, Part III demonstrates that lower courts struggle with the *U.S. Trust* "less deference" standard as applied to state legislation impairing public sector labor contracts and that there are not only inter-circuit splits, but also intra-circuit splits over the amount of deference given to legislatures. Second, Part III argues that a proper application of *U.S. Trust* and strong public policy considerations demand that courts apply strict scrutiny when public sector labor contracts are impaired by state legislation, even though these laws are predominately economic in nature.¹⁵²

A. *Lower Court Confusion: Divergent Levels of Deference Creates Different Levels of Protection for Public Employees—A Need for Uniformity*

1. The Second Circuit: *Buffalo Teachers Federation v. Tobe*

In 2003, the City of Buffalo, New York faced an enormous fiscal crisis, and experts projected that Buffalo's financial health would continue to deteriorate.¹⁵³ After an investigation by the state comptroller,¹⁵⁴ the state legislature enacted the Buffalo

¹⁵¹ See *id.* at 370–71; Lee, *supra* note 78, at 1642–43.

¹⁵² The fact that these laws are primarily economic is important because, traditionally, courts give greater deference to legislatures for economic and social legislation. This strict scrutiny of economic legislation, while appropriate and necessary, is a departure from modern jurisprudence. See, e.g., *U.S. Trust*, 431 U.S. at 22–23 ("As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis." (citation and footnote omitted)).

¹⁵³ See *Buffalo Teachers Fed'n*, 464 F.3d at 365. The comptroller projected the following budget deficits: "\$7.5 million for 2002–03, \$30–\$46 million for 2004–05, \$76–\$107 million for 2005–06, and \$93–\$127 million for 2006–07." *Id.*

¹⁵⁴ The state comptroller determined that Buffalo's budget deficits would increase exponentially over the next three years. As a result, the comptroller determined that Buffalo was not equipped to remedy its fiscal woes without

Fiscal Stability Authority Act (the “Act”), which adopted the recommendations of the comptroller, created the Buffalo Fiscal Authority (“BFSA”), and granted it the power to institute wage freezes. Approximately nine months after the passage of the Act, the BFSA realized that the budget deficit for fiscal year 2004–2005 would be \$20 million greater than previously anticipated.¹⁵⁵ The BFSA, therefore, instituted a wage freeze on all covered employees.¹⁵⁶ Soon thereafter, the Buffalo Teachers Union and several other unions (“Unions”) brought suit, seeking a judgment declaring that the wage freezes were, among other claims, unconstitutional under the Contract Clause as the wage freezes permanently cancelled certain wage increases to which the teachers were contractually entitled.¹⁵⁷

The Second Circuit held that wage freezes were a substantial impairment, as wage increases are both an inducement for employees to enter into a labor contract and a central provision on which employees reasonably rely.¹⁵⁸ But the court ultimately held that the wage freezes did not violate the Contract Clause because it was a reasonable and necessary measure to achieve an important public purpose.¹⁵⁹ The court’s application of the “less deference” standard in reaching its holding, however, was a misapplication of the *U.S. Trust* rule.

First, the court incorrectly questioned which standard of review was applicable, when *U.S. Trust* makes it clear that the “less deference” standard is the one to apply. The court grappled with the appropriate standard of review because the contracts were between the Unions and the City of Buffalo, rather than between the Unions and New York State.¹⁶⁰ The defendants argued that more deference should be afforded because the state was not a party to the contract, while the Unions argued that “less deference” should be afforded because the legislation was

legislative intervention and recommended the establishment of the BFSA to oversee Buffalo’s finances and to have the authority to institute wage freezes in the event that the BFSA declared a fiscal crisis. *Id.* at 365–66.

¹⁵⁵ *See id.* at 366.

¹⁵⁶ *See id.* at 366–67.

¹⁵⁷ *See id.* at 367; Brief for Plaintiffs-Appellants et al. at 9–10, *Buffalo Teachers Fed’n*, 464 F.3d 362 (No. 05-4744).

¹⁵⁸ *See Buffalo Teachers Fed’n*, 464 F.3d at 368.

¹⁵⁹ *See id.* at 371.

¹⁶⁰ *See id.* at 369–70.

nevertheless self-serving.¹⁶¹ The court noted that such legislation may be self-serving even though the state was not a party but that “this is [not] the sort of case in which the state legislature ‘welches’ on its obligations as a matter of ‘political expediency.’”¹⁶² Ultimately, however, the court concluded that they need not resolve the level of deference that is appropriate for such a case but that they would “assume that the lower level of deference applies” because “the wage freeze is reasonable and necessary even under the less deferential standard.”¹⁶³

From the beginning, the court’s explanation for applying a less deferential standard was convoluted. By stating that this did not *seem* like a case where the legislature was acting out of self-interest, the court already afforded the legislature too much discretion. Just because the court thought that, in this situation, the legislature *would not* act out of self-serving motives does not mean that the legislature *did not* act out of self-serving motives. In fact, the whole purpose of the “less deference” standard is to ensure that the legislature acted in the best interest of the public, not to assume that it did under the circumstances.¹⁶⁴

Second, once it concluded that the “less deference” standard did apply, the court then veered from *U.S. Trust* in its actual application of the standard. The court acknowledged that the true meaning of the “less deference” standard is difficult to ascertain.¹⁶⁵ Additionally, the court hastened to point out that “less deference does not imply no deference” and that less deference also does not mean “strict scrutiny” because, otherwise, “[s]uch a high level of judicial scrutiny . . . would harken a dangerous return to the days of *Lochner v. New York*.”¹⁶⁶ While the *U.S. Trust* “less deference” standard is an elusive one and should be clarified by the Court, the Second Circuit should have looked to the Court’s application of the “less deference” standard

¹⁶¹ *See id.*

¹⁶² *Id.* at 370.

¹⁶³ *Id.*

¹⁶⁴ *See Ass’n of Surrogates v. New York*, 940 F.2d 766, 773 (2d Cir. 1991) (holding that a state-imposed payroll lag violated the Contract Clause and noting that “if the federal judiciary’s proper role were as supine as defendants assert it to be, the contract clause would be a ‘dead letter’”).

¹⁶⁵ *See Buffalo Teachers Fed’n*, 464 F.3d at 370–71.

¹⁶⁶ *Id.*

in *U.S. Trust* rather than assume that it would automatically morph into a “superlegislature” if a strict scrutiny standard was applied.¹⁶⁷

Third, while analyzing whether the law was necessary, the court incorrectly stated that it need not explore whether another, better alternative existed to shrink the budget deficit.¹⁶⁸ The *U.S. Trust* Court, however, *did* determine that other solutions would have been better than impairing the existing contract and even pointed out what those solutions were.¹⁶⁹ Namely, when discussing whether the repeal was necessary, the *U.S. Trust* Court noted that the state could have raised taxes or increased tolls.¹⁷⁰ In contrast, in *Buffalo Teachers*, although the Unions pointed out that the City could have further raised taxes,¹⁷¹ the court rejected this proposition, in part, because it is always conceivable to raise taxes to meet a fiscal crisis and because there was “no need to second-guess the wisdom of picking the wage freeze over other policy alternatives.”¹⁷² While the Second Circuit purported to give less deference to legislative judgment, its adamant refusal to scrutinize whether feasible alternatives existed completely fell out of line with the *U.S. Trust* analysis.

Finally, *Buffalo Teachers* misapplied the reasonableness element of *U.S. Trust*. Rather than using the foreseeability test employed in *U.S. Trust*,¹⁷³ the Second Circuit focused only on the extent of the impairment caused by the wage freezes and concluded that the prospective and temporary nature of the wage freezes deemed them reasonable.¹⁷⁴ While the *U.S. Trust* Court stated that the extent of the impairment was a factor to consider in assessing the reasonableness of legislation,¹⁷⁵ the Court also stated that the extent of the impairment was not dispositive.¹⁷⁶

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 370.

¹⁶⁹ See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 29–30, 31 n.29.

¹⁷⁰ See *id.* at 31 n.29.

¹⁷¹ See Brief for Plaintiffs-Appellants et al. at 25–26, *Buffalo Teachers Fed'n*, 464 F.3d 362 (No. 05-4744).

¹⁷² See *Buffalo Teachers Fed'n*, 464 F.3d at 372.

¹⁷³ See *U.S. Trust*, 431 U.S. at 31–32.

¹⁷⁴ See *Buffalo Teachers Fed'n*, 464 F.3d at 371–72.

¹⁷⁵ See *U.S. Trust*, 431 U.S. at 27.

¹⁷⁶ See *id.* (noting that the repeal could not be sustained “simply because the bondholders’ rights were not totally destroyed”); see also McGarry, *supra* note 124, at 70 n.12 (noting that the *U.S. Trust* Court rejected the lower court’s “total destruction test”).

In fact, the Court hinged its conclusion that the repeal was unreasonable on given that the need to regulate automobile use and increase mass transit in the New York City area was known at the time the parties entered into the contract.¹⁷⁷ The Second Circuit, therefore, completely ignored that the City of Buffalo may have known, or at least was able to foresee, that it would be unable to meet its financial obligations when it entered into the contracts with the Unions. By failing to explore whether the City of Buffalo foresaw its looming budget deficits when it entered into the contracts, the court skipped an indispensable element of the *U.S. Trust* test.

The *Buffalo Teachers* decision departs not only from Supreme Court precedent but also from other Second Circuit precedent, further demonstrating the rift and confusion in the lower courts. In *Ass'n of Surrogates v. New York*,¹⁷⁸ the Second Circuit adopted a "less deference" standard¹⁷⁹ and invalidated a New York statute that would have financed the expansion of the court system by deferring the payment of court employee wages for two weeks.¹⁸⁰ Not unlike the energy crisis that the state claimed necessitated the repeal in *U.S. Trust* or the exponential growth of budget deficits that the state claimed justified the wage freezes in *Buffalo Teachers*, in *Surrogates*, the state asserted that a fiscal crisis demanded that the pay lags be implemented so as to provide courts with adequate services.¹⁸¹

First, *Buffalo Teachers* and *Surrogates* differed as to amount of consideration that is to be given to the government's alternatives to deal with the budgetary issue. Relying on *U.S. Trust* and its suspicion that the state was motivated by political expedience, *Surrogates* found that the pay lags were unnecessary and concluded that raising taxes or shifting the cost from another service were less draconian alternatives, though perhaps not the most politically preferred.¹⁸² The court also noted that, by raising taxes or cutting other governmental programs, the burden is spread out among all of the citizens, rather than placed entirely

¹⁷⁷ See *U.S. Trust*, 431 U.S. at 31–32.

¹⁷⁸ 940 F.2d 766 (2d Cir. 1991).

¹⁷⁹ See *id.* at 771–72.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 773.

¹⁸² See *id.* (noting that the lag-payroll scheme "smacks of the political expediency that *United States Trust Co.* warned of").

on the shoulders of the judiciary employees.¹⁸³ *Buffalo Teachers*, on the other hand, expressly dismissed these alternatives.¹⁸⁴

Second, *Buffalo Teachers* and *Surrogates* differed in the weight given to the existence of an “emergency.” *Buffalo Teachers* attempted to distinguish itself from *Surrogates* because, unlike *Surrogates*, Buffalo faced a real emergency.¹⁸⁵ In fact, the court stated that its holding could be summed up by the fact that, “[a]n emergency exists in Buffalo that furnishes a proper occasion for the state and BFSA to impose a wage freeze to ‘protect the vital interests of the community,’ and the existence of the emergency ‘cannot be regarded as a subterfuge or as lacking in adequate basis.’”¹⁸⁶ Through this attempt, however, rather than expose that a different holding was warranted, *Buffalo Teachers* further revealed its misapplication of *U.S. Trust*. *Buffalo Teachers*’ emphasis on the existence of an emergency is a departure from both *Surrogates*, which gave no weight to whether there was an emergency, and *U.S. Trust*, which does not require such an analysis. The existence of an emergency as a relevant factor in determining the legitimacy of state legislation was first incorporated in the 1934 *Blaisdell* decision, but was one of *five* considerations.¹⁸⁷ Never in Supreme Court Contract Clause jurisprudence was the existence of an emergency a dispositive factor in upholding state legislation.¹⁸⁸ Moreover, under the modern Contract Clause analysis articulated by the *U.S. Trust* Court, the existence of an emergency situation is no longer necessary.¹⁸⁹ If, to uphold state legislation, the existence of an emergency is no longer a necessary condition, then it is hardly likely that the existence of an emergency is sufficient, by

¹⁸³ *See id.*

¹⁸⁴ *See Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 372 (2d Cir. 2006).

¹⁸⁵ *See id.* at 372–73.

¹⁸⁶ *Id.* at 373 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934)).

¹⁸⁷ *See supra* notes 111–17 and accompanying text.

¹⁸⁸ *See Blaisdell*, 290 U.S. at 444; *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983).

¹⁸⁹ *See Energy Reserves*, 459 U.S. at 412; *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977); *Veix v. Sixth Ward Bldg & Loan Ass’n*, 310 U.S. 32, 38–40 (1940).

itself, to sustain state legislation.¹⁹⁰ In *Buffalo Teachers*, therefore, the Second Circuit departed from both its own and Supreme Court precedent.¹⁹¹

2. The Fourth Circuit: *Fraternal Order of Police v. Prince George's County*

The most recent case deciding the constitutionality of legislation impairing a public sector labor contract is *Fraternal Order of Police Lodge No. 89 v. Prince George's County*.¹⁹² Unlike the Second Circuit's holding in *Buffalo Teachers*¹⁹³ and a previous Fourth Circuit decision, *Baltimore Teachers Union v. Mayor*,¹⁹⁴ the *Prince George's* Court, a district court within the Fourth Circuit, held that furloughs implemented by the county violated the Contract Clause.¹⁹⁵ While all three cases arose under similar factual situations—public employees challenged a legislative effort to meet financial shortcomings by withholding promised wages—the *Prince George's* district court decision reached a different result.¹⁹⁶

As did *Buffalo Teachers* and *Surrogates*, the *Prince George's* case arose out of a legislative act to reduce budget deficits by cutting public employees' contractually promised wages. In September of 2008, Prince George's County attempted to close a \$57 million budget gap by \$20 million by implementing an Employee Furlough Plan ("EFP"), which temporarily furloughed approximately 5,900 County employees.¹⁹⁷ These public employees were members of various Unions, including the Fraternal Order of Police Lodge No. 89, the International Fire Fighters Association Prince George's County Local 1619, Inc.,

¹⁹⁰ See *U.S. Trust*, 431 U.S. at 23 n.19 ("Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case.").

¹⁹¹ Compare *Buffalo Teachers Fed'n*, 464 F.3d at 36–73, with *Ass'n of Surrogates v. New York*, 940 F.2d 766, 771–74 (2d Cir. 1991), and *U.S. Trust*, 431 U.S. at 20–32.

¹⁹² 645 F. Supp. 2d 492, 518 (D. Md. 2009), *rev'd*, 608 F.3d 183 (4th Cir. 2010).

¹⁹³ See *Buffalo Teachers Fed'n*, 464 F.3d at 373 (holding a wage freeze was a reasonable and necessary impairment under the Contract Clause).

¹⁹⁴ See *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1022 (4th Cir. 1993) (holding that furloughs were an impairment permitted under the Contract Clause).

¹⁹⁵ See 645 F. Supp. 2d at 518. Again, it is important to note that the district court was overruled by the Fourth Circuit. See *Prince George's II*, 608 F.3d at 193 (4th Cir. 2010).

¹⁹⁶ *Prince George's I*, 645 F. Supp. 2d at 518–19.

¹⁹⁷ See *id.* at 500–01.

and the American Federation of State and Municipal Employees (“AFSCME”), AFL-CIO.¹⁹⁸ By cutting the work hours of all covered employees by eighty-eight hours during fiscal year 2009, the EFP effectively reduced these employees’ annual salaries by 3.85%.¹⁹⁹ Consequently, the Unions brought suit against the County in federal court, alleging, in part, that the EFP violated the Contract Clause.²⁰⁰

The factual context in *Prince George’s* was remarkably similar to a 1993 Fourth Circuit case, *Baltimore Teachers*, in which Baltimore, in response to a budgetary shortfall, implemented a plan under which it ultimately reduced the annual salaries of public employees by approximately one percent through deductions from five of their semi-monthly paychecks.²⁰¹ Claiming to have followed *U.S. Trust*, *Baltimore Teachers* found the salary reductions to be permitted under the Contract Clause.²⁰² However, in doing so, it misapplied that standard by ignoring the distinction between public and private contracts and affording the legislature too much discretion. More than fifteen years later, *Prince George’s* purported to “follow the lead” of both the Fourth Circuit in *Baltimore Teachers* and the Supreme Court in *U.S. Trust*.²⁰³ *Prince George’s*, however, more appropriately adhered to the *U.S. Trust* standard than did *Baltimore Teachers*.²⁰⁴

Prince George’s and *Baltimore Teachers* both correctly identified the nature of the harm caused by the governmental action. Both courts properly began with finding that a contract existed between the unions and the government and the legislation enacted to reduce the budget deficits was a “substantial impairment” of the collective bargaining agreements²⁰⁵ because, under Supreme Court precedent, “the right abridged was one that induced the parties to contract in the

¹⁹⁸ See *id.* at 494.

¹⁹⁹ See *id.* at 501.

²⁰⁰ See *id.*

²⁰¹ See *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1014 (4th Cir. 1993).

²⁰² See *id.* at 1022.

²⁰³ See *Prince George’s I*, 645 F. Supp. 2d at 509–10.

²⁰⁴ See *Balt. Teachers*, 6 F.3d at 1019 (explaining that “less” deference still permits the court to give some deference to the legislature); Lee, *supra* note 78, at 1643–49.

²⁰⁵ See *Balt. Teachers*, 6 F.3d at 1015; *Prince George’s I*, 645 F. Supp. 2d at 509–10.

first place.”²⁰⁶ *Baltimore Teachers* noted that, in the employment context, there is perhaps no contractual component that induces parties to contract and on which parties rely on more than compensation.²⁰⁷ Following suit, the *Prince George's* Court noted that the EFP constituted a substantial impairment because, as implemented, it abridged the compensation for which the union employees bargained and subjected every employee to a loss of eighty hours of pay.²⁰⁸

Where *Baltimore Teachers* and *Prince George's* departed is in the examination of the reasonableness and necessity of the contract impairing legislation.²⁰⁹ *Baltimore Teachers*, unlike *Prince George's*, misapplied the reasonableness element. Where *U.S. Trust* focused on whether the impairing state action was a response to an unforeseen change of circumstances,²¹⁰ *Baltimore Teachers* acknowledged the *U.S. Trust* foreseeability test only in a footnote, but never inquired as to whether Baltimore faced an unforeseen change in circumstances, prompting the city to implement the furloughs.²¹¹ Instead, *Baltimore Teachers* found the impairment was reasonable based on factors that are traditionally considered when *private* contracts are impaired.²¹²

²⁰⁶ *Balt. Teachers*, 6 F.3d at 1017 (citing *El Paso v. Simmons*, 379 U.S. 497, 514 (1965) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 235, 243 n.14 (1978)).

²⁰⁷ *See id.* at 1018.

²⁰⁸ *See Prince George's I*, 645 F. Supp. 2d at 510. It was with the first prong of the Contract Clause analysis that the Fourth Circuit disagreed with the district court. *Prince George's II*, 608 F.3d at 189. The Fourth Circuit found that the district court erred in ruling that the collective bargaining agreements were impaired. *Id.* at 190. According to the Fourth Circuit, the Prince George's County Personnel Law included the authorization for furloughs. Because “[i]t is a cardinal principle of contract interpretation that the parties are presumed to contract against the backdrop of relevant law . . . all . . . relevant laws must be read into the agreement of the parties just as if expressly provided by them.” *Id.* at 191. Therefore, the Fourth Circuit concluded, because the Personnel Law authorized furloughs, the Unions' collective bargaining agreements included a provision permitting furloughs. *Id.* Thus, there was no impairment and the Unions' Contract Clause claims failed. It is important to note, however, that although the Fourth Circuit overruled the district court, the Fourth Circuit did not criticize, or even mention, the district court's level of review.

²⁰⁹ *See Balt. Teachers*, 6 F.3d at 1018; *Prince George's I*, 645 F. Supp. 2d at 510–11.

²¹⁰ *See U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 31–32 (1977).

²¹¹ *See Balt. Teachers*, 6 F.3d at 1021 n.13.

²¹² *See id.* at 1021 (“[T]he furlough plan possessed, not insignificantly, each of the attributes identified in *Spannaus* as present in various state laws that had impaired *private* contracts but survived Contract Clause challenge.” (emphasis added)). The court found that the salary reduction plan was reasonable because it

Prince George's, on the other hand, found that the furloughs were not reasonable because the plan was not narrowly tailored and the shortfalls were perhaps foreseeable.²¹³ *Prince George's*, therefore, applied the appropriate reasonableness test.

Moving on to the necessary analysis, *Prince George's* more accurately followed the *U.S. Trust* test, from which the *Baltimore Teachers* Court again departed.²¹⁴ Part of the Supreme Court's necessity inquiry hinged on the existence of feasible alternatives. One of the alternatives the Court took note of in *U.S. Trust* was the ability of the state to raise taxes. Ignoring the Supreme Court's indication that governments should virtually always be held to their financial obligations,²¹⁵ *Baltimore Teachers* refused to even consider the alternative of raising taxes because it believed that this alternative would always be available to overturn a state's impairment of its own financial obligations.²¹⁶

Prince George's and *Baltimore Teachers* also varied as to their analysis of the necessity of the government's actions. In contrast, *Prince George's* noted that the furloughs were not necessary because the county had \$97 million in untapped reserve funds when it implemented the furloughs. The court noted that, without an attempt to first use some of that money to close the budget gaps, the county did not adequately exhaust

was aimed to deal with a broad, generalized economic problem, it targeted all employees, rather than a specific class of employees, it "affected reliance interests not wholly unlike those of *private* entities in regulated industries, which contract subject to future, additional regulation," and it affected only a temporary alteration of the contractual relationship. *Id.* (emphasis added).

²¹³ *Prince George's I*, 645 F. Supp. 2d at 512 (emphasis added). Interestingly, *Prince George's* cited to page 1020 of *Baltimore Teachers* when it mentioned its reservations about whether the shortfalls were unforeseen. *Id.* Nowhere on page 1020, or anywhere in the *Baltimore Teachers* opinion, however, does the word "unforeseen" appear. See *Balt. Teachers*, 6 F.3d at 1020.

²¹⁴ See *Lee*, *supra* note 78, at 1646.

²¹⁵ See *U.S. Trust*, 431 U.S. at 25. The Court quoted the following passage:

The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties [T]he contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

Id. at 25 n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)); see also *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) ("In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.").

²¹⁶ See *Balt. Teachers*, 6 F.3d at 1019–20.

other feasible alternatives.²¹⁷ In concluding its analysis for whether the furloughs were necessary, *Prince George's* again mentioned that, under the Contract Clause, the county does not enjoy "wide discretionary latitude" in choosing among alternatives to remedy its fiscal problems.²¹⁸ And, the court made clear that while it would not instruct the county on its fiscal affairs, it believed that other, less draconian and more feasible alternatives existed.²¹⁹ Finally, the court articulated its suspicion that the furloughs were merely a politically expedient method to accomplish the county's goal to reduce its budget deficit and that such a motive is one that the Contract Clause exists, in part, to prevent.²²⁰

The dichotomous holdings and the varying level of deference afforded to the legislatures, both within and among the circuits, illustrate the inconsistencies amid the lower courts in applying the third prong of the *U.S. Trust* test.²²¹ As a more scrutinizing level of review has proven to result in finding furloughs, wage

²¹⁷ See *Prince George's I*, 645 F. Supp. 2d at 517.

²¹⁸ See *id.* at 516.

²¹⁹ *Id.* at 513.

²²⁰ *Id.* at 510–11.

²²¹ The Second and Fourth Circuits are not the only courts that have reviewed this issue. In 1999, the United States Court of Appeals for the Ninth Circuit upheld a preliminary injunction preventing the state from implementing delays in issuance of pay checks pursuant to a statute because the statutory scheme represented substantial impairment of the parties' collective bargaining agreement for Contracts Clause purposes, and the state failed to demonstrate that the statute delaying issuance of payroll checks was "reasonable and necessary to fulfill an important public purpose in light of Hawaii's budgetary crisis." *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1096 (9th Cir. 1999). Additionally, in 1997, the District of Columbia Circuit held that emergency rules establishing reduction-in-force ("RIF") procedures were expressly authorized by congressional legislation and, thus, were insulated from challenge under the Contract Clause when teachers who were laid off during a RIF sued the board of education. *Wash. Teachers' Union Local #6 v. Bd. of Educ.*, 109 F.3d 774 (D.C. Cir. 1997). In 1995, the Massachusetts Supreme Judicial Court ruled that furloughs imposed, in response to a fiscal crisis, on unionized state employees earning more than \$20,000 violated the Contract Clause because they were neither reasonable nor necessary. *Mass. Cmty. Coll. Counsel v. Commonwealth*, 649 N.E.2d 708, 716 (Mass. 1995). Moreover, in 1992, in response to a House of Representatives opinion request on the constitutionality of state-imposed furloughs, the New Hampshire Supreme Court held that the furloughs were, in fact, a violation of the Contract Clause as unreasonable and unnecessary impairments of state employees' collective bargaining agreements. *Opinion of the Justices (Furlough)*, 609 A.2d 1204, 1212 (N.H. 1992). Finally, in 1985, the Supreme Court of Washington held that a declared financial emergency did not justify the state's legislatively authorized refusal to implement bargained-for salary increases for certain state employees. *Carlstrom v. State*, 694 P.2d 1, 5–6 (Wash. 1985).

freezes, payroll lags, and other contract impairing legislation unconstitutional under the Contract Clause, varying levels of judicial deference directly correlates to the amount of protection extended to public employees. The divergent results throughout the country juxtaposed with the increasing frequency at which legislatures resort to these types of deficit-reducing means demonstrates the need for the Supreme Court to review this issue so that there may be a uniform level of review and a consistent level of protection afforded to public employees.

B. The Need for Strict Scrutiny in Legislation that Impairs Public Sector Collective Bargaining Agreements: Why Lochner Still Lives

As evidenced by the varied amount of scrutiny that lower courts apply to state laws that impair public contracts, the *U.S. Trust* “less deference” standard has proven to obscure rather than elucidate.²²² In modern constitutional jurisprudence, courts apply minimal scrutiny to economic and social legislation and strict scrutiny to legislation that offends personal liberties.²²³ The level of scrutiny for Contract Clause violations, therefore, should conform to one of these customary approaches. Even though Contract Clause claims arise predominately out of economic or social legislation, it seems as though the *U.S. Trust* Court intended to rule that strict scrutiny should be applied when public contracts are impaired because “a state’s self interest is at stake.”²²⁴ This standard would not only resolve the inconsistencies in the lower courts but also appeal to the enormous public interest that demands that strict scrutiny be applied to laws that impair public sector labor contracts.

As several lower courts that have been more willing to apply strict scrutiny have commented, public employees deserve the utmost protection.²²⁵ A common denominator of most of the public sector Contract Clause litigation is some sort of financial

²²² See *supra* Part III.A and cases cited within.

²²³ See note 50 and accompanying text.

²²⁴ *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25–26 (1977) (noting that “[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised”).

²²⁵ See *Cayetano*, 183 F.3d at 1105 (citing *Ass’n of Surrogates v. New York*, 940 F.2d 766, 772 (2d Cir. 1991)).

or economic crisis.²²⁶ The states or local governments enter into collective bargaining agreements with public sector labor unions, guaranteeing, among other things, certain hours and wages. But then, at the first sign of an economic downturn, these governments take drastic measures, such as furloughs or wage freezes, that substantially impair these contracts.²²⁷ As the Second and Ninth Circuits correctly noted, while soaring budget deficits may seem to justify such drastic legislative acts, in the government's attempt to lessen its own fiscal crisis, it creates and exacerbates public employees' financial hardships.²²⁸

This logic demonstrates that implementing furloughs or wage freezes solves one economic problem simply by causing countless others. Significantly decreasing the income of these already underpaid public sector employees will likely have an adverse ripple effect on other already devastated markets, such as the housing industry and the auto industry, due to their inability to meet their financial commitments.²²⁹ John and Carrie Anne Quintos of Chino California, state workers whose combined \$70,000 annual salary was cut by fourteen percent due to the furloughs, are an example of how the furloughs simply perpetuate a vicious circle.²³⁰ As a result of their pay cuts, the Quintos's could no longer afford their car payments or their home mortgage payments and, because they owed more than the property was worth, they were forced to sublet, rather than sell.²³¹ Their tenants, however, missed a few payments, causing the Quintos's themselves to miss mortgage payments and fall

²²⁶ See *U.S. Trust*, 431 U.S. at 13–14; *Prince George's I*, 645 F. Supp. 2d 492, 494–95 (D. Md. 2009), *rev'd*, 408 F.3d 183 (4th Cir. 2010); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 365 (2d Cir. 2006); *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1014 (4th Cir. 1993).

²²⁷ See *U.S. Trust*, 431 U.S. at 13–14; *Prince George's I*, 645 F. Supp. 2d at 494–95; *Buffalo Teachers*, 464 F.3d at 365; *Balt. Teachers*, 6 F.3d at 1014.

²²⁸ See *Cayetano*, 183 F.3d at 1105 (quoting *Ass'n of Surrogates v. New York*, 940 F.2d 766, 772 (2d Cir. 1991)).

²²⁹ See *id.*; Clarke, *supra* note 87, at 248–50 (endorsing the *U.S. Trust* rationale because it protects individual reliance interests and encourages states to contract efficiently); Lee, *supra* note 78, at 1649 (noting that the higher scrutiny mandated in *U.S. Trust* promotes economic stability).

²³⁰ Goldmacher, *supra* note 1.

²³¹ *Id.*

behind in rent they were paying to live in a townhouse.²³² Ultimately, their car was repossessed in a parking lot, and they were forced to relinquish the townhouse.²³³

In addition to meeting individual financial obligations, these public employees rely on the promised wages to afford other common necessities, such as food, clothing, and their children's education.²³⁴ While these life-sustaining items are not enumerated as fundamental rights in the text of the Constitution, most would concede that they are no less fundamental than the right to speak one's mind or choose one's own religion. If the courts must apply strict scrutiny to legislation that inhibits individuals' rights to practice a religion of their choosing, then it is not farfetched to require the courts to apply strict scrutiny to legislation that will deprive public employees of the means to purchase basic human needs.

Furthermore, a more scrutinizing review of contract-impairing legislation will accommodate other policy considerations. First, a relaxed Contract Clause will give state legislatures greater power to unilaterally modify the agreements they enter into, thus inflating the risk component of the contract price.²³⁵ Therefore, employees may demand a risk premium before agreeing to work due to a magnified fear that the state will breach.²³⁶ Consequently, the state will have to pay more for public contracts²³⁷ or reduce the quality of services offered.²³⁸ Increasing risk premiums, therefore, will reduce economic stability and diminish faith in contractual relations—results antithetical to both *U.S. Trust* and the larger purpose of the Contract Clause itself.

Another policy consideration is that public employees are, among other indispensable occupations, our police, our firefighters, our teachers, our sanitation and mass transit workers. Without them, gangs, not justice, would rule the

²³² *Id.*

²³³ *Id.* John moved in with his parents thirty miles away; Carrie Ann stayed in Chino with their four children. *Id.*

²³⁴ See *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1105 (9th Cir. 1999) (noting that food and clothing are necessities of life); Lee, *supra* note 78, at 1645.

²³⁵ See Clarke, *supra* note 87, at 242–43.

²³⁶ See Lee, *supra* note 78, at 1649–50.

²³⁷ See Clarke, *supra* note 87, at 242–43.

²³⁸ See Lee, *supra* note 78, at 1649–50.

streets, fires would blaze unabated, children would go untaught, garbage would linger, and the pace of our days would come to a halt. If laws that impair these public employees' contracts need only to stand the test of minimum scrutiny, then they would be sustained more often than invalidated.²³⁹ Accordingly, public employees who doubt the stability of their contracts would perform less efficiently on the job and be less dedicated to their work.²⁴⁰ The risk of reducing the efficiency, productivity, and commitment of public sector employees far outweighs the inconvenience of forcing policy makers to rethink their legislative schemes.

Despite these compelling policy considerations, however, some argue that the *U.S. Trust* "less deference" standard—and therefore, the strict scrutiny standard—provides too much protection for public contracts²⁴¹ and is an inexcusable return to *Lochner*-like judicial intrusion on legislative judgment.²⁴² *But* it is time to stop fearing judicial oversight into legislative action that impairs the state's own financial obligations. Such review will not revive an era defined by the judiciary sitting as a superlegislature—those days are gone.²⁴³ When public contracts, especially public sector labor contracts, are impaired by self-serving state legislation, it is the court's constitutional duty to question the reasonableness and necessity of that legislation in accordance with the Contract Clause.²⁴⁴

²³⁹ See, e.g., *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 372–73 (2d Cir. 2006); *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1022 (4th Cir. 1993).

²⁴⁰ See Lee, *supra* note 78, at 1650.

²⁴¹ See Clarke, *supra* note 87, at 251–52 (suggesting that the *U.S. Trust* test should be replaced with an approach that would invoke Contract Clause protection only upon legislative failure "to recognize the reliance interests of the contractors").

²⁴² *Buffalo Teachers*, 464 F.3d at 371 (noting that applying strict scrutiny to the government's wage freezes would be a dangerous return to the long discarded *Lochner*).

²⁴³ See Barnett, *supra* note 19 (asserting that "the real problem with the judiciary today is not that it has thwarted the majority's will, but that it has succumbed to it").

²⁴⁴ See Randy Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 276 (1987) ("Judges are therefore inescapably responsible for developing, justifying, and applying substantive rules and standards for normatively evaluating human conduct—including the conduct of legislatures acting collectively." (emphasis added)).

This level of review is not repugnant to the constitutional notion of separation of powers.²⁴⁵ To begin, requiring the courts to strictly scrutinize laws that impair public contracts does not correlate to a sanction for the courts to proclaim what, in their view, the laws *should be*—a role reserved for the legislature. Instead, permitting the courts to strictly scrutinize public-contract impairing legislation enables the courts to fulfill their duty to declare what the law, under the Constitution of the United States, *cannot be*.

At least in the application of Contract Clause doctrine to public sector labor contracts, the courts are—and those that are not, should be—moving toward a judicial approach that constitutional law scholar Randy Barnett refers to as “Footnote Four-Plus.”²⁴⁶ Under “Footnote Four-Plus” jurisprudence—a compromise of sort between judicial conservatives and progressives—courts enforce the express prohibitions of the Constitution plus “some judicially-selected ‘fundamental’ unenumerated rights that are ‘deeply rooted in this Nation’s history and tradition,’ or ‘implicit in the concept of ordered liberty.’”²⁴⁷ This approach strikes an appropriate balance between judicial passivity and activism by allowing the courts to defer to the legislature where no fundamental enumerated or unenumerated rights are violated yet also to make calculated, responsible decisions to protect certain unenumerated individual rights when necessary.²⁴⁸

Additionally, all federal judges, and many state judges, are not elected, but are *appointed* to decide between conflicting claims of right.²⁴⁹ Judges are appointed with the expectation and belief that they will decide cases in a “principled and morally justified manner”²⁵⁰ and that they will both adhere to the black letter law *and* develop a common law system comprised of

²⁴⁵ See *id.* (noting that federal judges have no authority to exercise executive functions or to spend state or federal tax moneys).

²⁴⁶ See Barnett, *supra* note 254, at 328 (noting that judicial conservatives strictly adhere to the rule espoused in footnote four of the *Caroline Products* decision—that state legislation should be strictly scrutinized only when enumerated constitutional rights are transgressed).

²⁴⁷ See *id.* (internal quotation marks omitted).

²⁴⁸ Professor Barnett also refers to this judicial role as “principled judicial activism.” See Barnett, *supra* note 244, at 276–77.

²⁴⁹ See *id.* at 277 (noting that even those judges that are elected are not elected to legislate).

²⁵⁰ *Id.* at 286.

“substantive standards that are as much a product of collective wisdom as the statutory output of Congress.”²⁵¹ The American legal system thus affords the judiciary significant power but also has great faith that that power will be used responsibly. Finally, the appellate process exists as an internal self-regulating mechanism,²⁵² and the Constitution provides two important external safeguards on the judiciary: The Senate may scrutinize the judicial philosophy of all judicial appointments, and the Senate may impeach federal judges.²⁵³ An abuse of judicial power, therefore, will not go unnoticed or unchecked.

CONCLUSION

While *Lochner* likely did reach the wrong result, it is time to doubt that both its holding and its use of substantive due process were wrong.²⁵⁴ As stated by the *Lochner* Court,

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.²⁵⁵

As illustrated, even the reviled *Lochner* Court knew and appreciated that there were limits to judicial review, but also saw that there was a need for the judiciary to ensure that the legislature was acting within its powers.

Though *Lochner* may still be regarded as a reprehensible usurpation of legislative power or an illegitimate intrusion of laissez faire economic policy into constitutional analysis, this interpretation is no longer entirely controlling. Where *Lochnerian* jurisprudence once deprived workers of state protection from unscrupulous employers, it now has the potential, if used appropriately and responsibly, to shield workers from politically expedient state legislation.²⁵⁶ Over one

²⁵¹ *Id.* at 287.

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See* Randy Barnett, *Foreword: What's So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325, 328–29 (2005) (noting that substantive due process is not inherently wrong).

²⁵⁵ *Lochner v. New York*, 198 U.S. 45, 56–57 (1905).

²⁵⁶ *See* Epstein, *supra* note 50, at 712.

hundred years after it was decided and over seventy years after it was abandoned, as ironic as it is, perhaps now we see that from *Lochner* comes enlightenment.

The great danger is that, once in office, legislators need no longer rely upon naked aggression to exact private gain, but can instead enlist the force of the state by passing laws that work to advance their own interests at the expense of the public or some part of it. Legislators, in other words, cannot be given the power of absolute owners because they hold power as trustees for the benefit of the public. The old maxim, "A public office is a public trust," is not simply metaphor. Those entrusted with public power act as fiduciaries and must avoid conflicts of interest every bit as much as private trustees who hold the reins of power for private beneficiaries.

Id.