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Robert Jenkin

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## A Forgotten Clause of the Constitution: The Contract Clause In Light of *Sveen v. Melin*

*Robert Jenkin\**

### I. Introduction

Mark Sveen and Kaye Melin fell in love in the 1990's and in 1997 the couple married.<sup>1</sup> One year later, Mr. Sveen purchased a life insurance policy naming his wife as the primary beneficiary.<sup>2</sup> In 2002, Minnesota, where the Sveen's resided, enacted statute 524.2-804 requiring the default revocation of previous spouses named as beneficiaries after divorces except in certain circumstances.<sup>3</sup> Unfortunately, the Sveen's marriage did not last and in 2007 the couple divorced without any mention of the life insurance policy.<sup>4</sup> Mr. Sveen passed away just four years later having not altered his life insurance policy and creating a mystery of who he intended the Life insurance policy to benefit.<sup>5</sup>

A federal district court ruled that the statute required Mr. Sveen's life insurance policy payout be paid to the contingent beneficiaries, his two children.<sup>6</sup> The United States Court of Appeals for the Eighth Circuit, reversed and remanded the district court decision, holding that the statute was unconstitutional when applied retroactively because it violated the Contract Clause of the United States Constitution.<sup>7</sup> The Supreme Court issued a Writ of Certiorari in the case and reversed the decision of the Court of Appeals, holding that the statute's retroactive applicability does not violate

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\* J.D. Candidate, 2020, Seton Hall University School of Law; B.A., Rutgers University. I would like to extend a special thank you to my Clare for all of the love and support she gave me during this process and to Professor Healy for his essential guidance in this process.

<sup>1</sup> *Sveen v. Melin*, 138 S.Ct. 1815, 1821 (2018).

<sup>2</sup> *Melin*, 138 S.Ct. at 1821.

<sup>3</sup> *Id.* at 1820; Minn. Stat. Ann. § 524.2-804 (“[T]he dissolution or annulment of a marriage revokes any revocable . . . disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument.”).

<sup>4</sup> *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018).

<sup>5</sup> *Melin*, 138 S.Ct. at 1821.

<sup>6</sup> *Id.*

<sup>7</sup> *Metropolitan Life Insurance Company v. Melin*, 853 F.3d 410, 414 (8th Cir. 2017).

the Contract Clause of the Constitution because it did not substantially impair the insurance contract.<sup>8</sup> Justice Neil Gorsuch filed a lone dissent in the case.<sup>9</sup> The Court’s holding in *Sveen* was just the newest installment of a two century-long debate on the proper interpretation of the Contract Clause.

This Comment will examine the Supreme Court’s long history of interpreting and applying the Contract Clause of the Constitution in Part II; the interpretation of the Contract Clause used by the Court in *Sveen* to reach its holding in Part III; the alternative interpretation of the Contract Clause applied by Justice Gorsuch in his dissent in Part IV; the problems inherent in the Court’s interpretation of the Contract Clause in Part V; propose a new interpretation of the Contract Clause that is more aligned with its original purpose and intent in Part VI; examine the arguments against the proposed interpretation in Part VII; and, will hypothesize how *Sveen* would have turned out differently under the proposed interpretation in Part VIII.

## II. Contract Clause Jurisprudence, From the Framers to the Present

### A. The Early History of the Contract Clause

While the Contract Clause of the Constitution is only eleven words in total length, hundreds of thousands of words have been written interpreting it.<sup>10</sup> The Contract Clause is found in Article I, Section 10, Clause 1, which in its entirety states, “[n]o State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a legal 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.”<sup>11</sup> The

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<sup>8</sup> *Sveen v. Melin*, 138 S.Ct. 1815, 1826 (2018).

<sup>9</sup> *Melin*, 138 S.Ct. at 1827 (Gorsuch, J., dissenting).

<sup>10</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>11</sup> *Id.*

Contract Clause itself only refers to the prohibition against states passing laws that impair “the obligation of contracts.”<sup>12</sup>

The Contract Clause was introduced at the Constitutional Convention by Rufus King and was molded after an Ordinance in the Articles of Confederation.<sup>13</sup> When it was introduced, the clause was not loved by all.<sup>14</sup> Multiple objections over its inclusion were made during the ratifying process.<sup>15</sup> The history of the debate over the Contract Clause gives insight into what the original purpose of the Clause was.<sup>16</sup> The Contract Clause was intended to protect contracts from protectionist legislation passed by states.<sup>17</sup> Its purpose was also to protect minorities from majority’s laws, as well as to promote stability.<sup>18</sup> One objection made at the time of the ratification was that the Contract Clause prevented states from responding with necessary regulations in times of emergency.<sup>19</sup> Even James Madison, who supported the Contract Clause’s inclusion, admitted that it could act as an inconvenience for the states, but felt the clause was necessary.<sup>20</sup>

While there is some dispute over the exact purpose of the Contract Clause, many scholars reference Federalist Paper 44 for guidance.<sup>21</sup> Written by Madison, the paper argued that,

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

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<sup>12</sup> *Id.*

<sup>13</sup> See Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 529–30 (1987) [hereinafter *Original Understanding*] (citing to the Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789)).

<sup>14</sup> *Id.* at 530.

<sup>15</sup> *Id.* at 531.

<sup>16</sup> *Id.* at 532–33.

<sup>17</sup> *Id.*

<sup>18</sup> See *Original Understandings*, *supra* note 13, at 528–29.

<sup>19</sup> *Id.* at 533 (Martin Luther complained the Contract Clause would limit the abilities of states to pass legislation during emergencies.).

<sup>20</sup> *Id.* at 530.

<sup>21</sup> See J. Michael Veron, *The Contract Clause and the Court: A View of Precedent and Practice in Constitutional Adjudication*, 54 TUL. L. REV. 117, 122–23 (1979) [hereinafter, *Contract Clause and the Court*] (arguing that there is some doubt about the origin of the Contract Clause and referencing Federalist No. 44 as guidance on the purpose of the Contract Clause); see also Tommy Tobin, *Far From A “Dead Letter”*: *The Contract Clause and North Carolina Association of Educators v. State*, 96 N.C.L. REV. 1681, 1682 [hereinafter, *Far from a “Dead Letter”*] (arguing that the Contract Clause was passed directly in response to the needs of the time as described in The Federalist No. 44).

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.<sup>22</sup>

The paper demonstrated that contracts were understood to be important at the time the Constitution was ratified and supports the argument that the goal of the Contract Clause was to protect contracts from “sudden changes and legislative interferences” especially in cases “affecting personal rights”.<sup>23</sup> The early jurisprudence of the Contract Clause aligned with this understanding of the purpose of the Contract Clause.<sup>24</sup>

In 1810, the Supreme Court heard *Fletcher v. Peck*, a Contract Clause challenge to the repeal of a law selling land in the State of Georgia.<sup>25</sup> The crux of the case was that Georgia repealed a law under which land rights were sold to citizens.<sup>26</sup> One of the questions before the Court was could the State absolve itself of the contracts it had entered into to distribute the land under the law.<sup>27</sup> The Court held that the repealing of the law violated the Constitution.<sup>28</sup> The Court, without mention of the Contract Clause, held the law impaired the land-granting contracts.<sup>29</sup>

This all-inclusive and broad interpretation of the Contract Clause was reaffirmed in the 1819 matter of *Trustees of Dartmouth College v. Woodward*.<sup>30</sup> The case involved the corporate charter of Dartmouth College and a New Hampshire law that attempted to alter the charter to make the college a public university.<sup>31</sup> The Court held the New Hampshire law was an impairment to the

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<sup>22</sup> THE FEDERALIST NO. 44 (James Madison); *Home Bldg. & Loan Ass’n v. Blaidell*, 290 U.S. 398, 463 (Sutherland, J. dissenting) (1934).

<sup>23</sup> *Id.*

<sup>24</sup> *See Fletcher v. Peck*, 10 U.S. 87, 88 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 663 (1819); *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Green v. Biddle*, 21 U.S. 1 (1823).

<sup>25</sup> 10 U.S. 87, 127 (1810).

<sup>26</sup> *Id.* at 129.

<sup>27</sup> *Id.* at 130.

<sup>28</sup> *Id.* at 132.

<sup>29</sup> *Id.* at 132, 139 (the Court also compared to the impairment to a violation of ex-post-facto law, which is prohibited by the Constitution in the same clause as the Contract Clause); *See U.S. CONST.* art. I, § 10, cl. 1.

<sup>30</sup> 17 U.S. 518 (1819).

<sup>31</sup> *Id.* at 624–27.

charter and was therefore unconstitutional.<sup>32</sup> In the Court’s holding, Justice Marshall opined, “[a]nd can it be seriously contended, that a law, which changes so materially the terms of a contract, does not impair it? In short, does not every alteration of a contract, however, unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation?”<sup>33</sup>

The Supreme Court’s interpretation of the Contract Clause in *Woodward* was reaffirmed twice before it was amended by the Court.<sup>34</sup> In *Sturges v. Crowninshield*, a bankruptcy law was held unconstitutional when applied retroactively.<sup>35</sup> In *Green v. Biddle*, the Supreme Court held that “a State has no more power to impair an obligation into which she has entered” and struck down a Kentucky law that altered a contract between the states of Kentucky and Virginia.<sup>36</sup>

After *Green*, the next time the Supreme Court heard a Contract Clause dispute was in *Ogden v. Saunders*, which presented a challenge to New York’s bankruptcy law.<sup>37</sup> The Court held that the Contract Clause only prevented states from passing laws that *retroactively* impaired contracts.<sup>38</sup> The Court supported its holding by arguing that the Contract Clause must be interpreted in the same fashion as the other prohibitions found in Article 1, Section 10, Clause 1 of the Constitution.<sup>39</sup> In conclusion of its holding, the Court stated “the prohibition, in the tenth section, reaches to all *contracts*.”<sup>40</sup> The Court’s holding in *Saunders* marked the beginning of a

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<sup>32</sup> *Id.* at 650.

<sup>33</sup> *Id.* at 662.

<sup>34</sup> *Green v. Biddle*, 21 U.S. 1 (1823).

<sup>35</sup> *Sturges v. Crowninshield*, 17 U.S. 122, 123, 131 (1819).

<sup>36</sup> *Crowninshield*, 17 U.S. at 92–93.

<sup>37</sup> 25 U.S. 213, 254 (1827).

<sup>38</sup> *Saunders*, 25 U.S. at 252; *see Contract Clause and the Court*, *supra* note 21, at 126.

<sup>39</sup> *Id.*; U.S. CONST. art. I, § 10, cl. 1. (Prohibits states from paying their debts with anything other than silver or gold or coining their own money).

<sup>40</sup> *Ogden v. Saunders*, 25 U.S. 213, 254 (1827).

downhill spiral for the Contract Clause by limiting the Contract Clause to a ban against retroactive state legislation that impaired contracts.<sup>41</sup>

Considered together, the Court’s holdings in *Fletcher*, *Woodward*, *Sturges*, *Green* and *Saunders* laid out a clear and definitive interpretation of the Contract Clause—an interpretation that acted as a bar against any state law that sought to retroactively impair contracts between any parties, for any reason, and that did not distinguish between private and public contracts.<sup>42</sup> This complete bar has never been seen again in Contract Clause jurisprudence.<sup>43</sup>

#### B. The First Decline of the Contract Clause

Post *Saunders*, the Supreme Court began weakening the Contract Clause.<sup>44</sup> In 1870, in the case of *Jackson ex dem. Hart v. Lamphire*, the Supreme Court held that retroactive recording laws did not violate the Contract Clause.<sup>45</sup> Additionally, the Court held “Cases may occur where the provisions [of a law] . . . may be so unreasonable as to amount to a denial of a right” of the contract but that was not the case in the matter before it.<sup>46</sup> Compared to Court’s holding *Saunders*, the Court’s holding in *Lamphire* interpreted the Contract Clause to be less absolute.<sup>47</sup>

In the 1871 case of *Curtis v. Whitney*, the Supreme Court upheld a retroactive state law that required the holder of a certificate of tax-sale to notify anyone in possession of the land listed on the tax-sale certificate.<sup>48</sup> The Court relied on its previous holding in *Jackson* to support its holding

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<sup>41</sup> See *Contract Clause and the Court*, *supra* note 21, at 126; Leo Clarke, *The Contract Clause: A Basis For Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 190 (1985) [hereinafter, *Limited Judicial Review*].

<sup>42</sup> See *Contract Clause and the Court*, *supra* note 21, at 127; see also *Fletcher v. Peck*, 10 U.S. 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Green v. Biddle*, 21 U.S. 1 (1823); *Ogden v. Saunders*, 25 U.S. 213 (1827).

<sup>43</sup> See *Original Understanding*, *supra* note 13, at 527.

<sup>44</sup> See *Limited Judicial Review*, *supra* note 41, at 190 (describing how starting in 1842, the Contract Clause began being weakened by the Court).

<sup>45</sup> 28 U.S. 280, 290 (1830).

<sup>46</sup> *Lamphire*, 28 U.S. at 290.

<sup>47</sup> Compare *Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280 (1830) (where the Court upheld a state recording law) with *Ogden v. Saunders*, 25 U.S. 213 (1827) (where the Court struck down a state bankruptcy law).

<sup>48</sup> 80 U.S. 68, 70–72 (1871).

in *Curtis*.<sup>49</sup> Notably, the *Curtis* Court held that “[n]or does every statute which affects the value of a contract impair its obligation.”<sup>50</sup> The Court concluded that only state laws which impaired the “obligation of performance” were restrained by the Constitution.<sup>51</sup>

*Stone v. Mississippi* was the next major Contract Clause case that made its way to the Supreme Court.<sup>52</sup> The case was a challenge to a Mississippi law that repealed a contract, in which the state was a party, allowing a state lottery.<sup>53</sup> The Court’s holding in *Stone* stands out because it distinguished between public and private contracts.<sup>54</sup> The Court held that the Contract Clause only protected “property rights, not governmental” rights because the Court thought it was foreseeable by those who chartered lottery corporations with the state that the state retained the ability to legislate the lottery out of existence at any time.<sup>55</sup> The consideration of the Court about the foreseeability of government action in the field in which the contract exist is a theme that continues in Contract Clause jurisprudence.<sup>56</sup>

In *Vance v. Vance*, the Supreme Court examined a Louisiana mortgage recording statute to determine if it violated the Contract Clause.<sup>57</sup> The Court upheld the law and reaffirmed its previous holdings in *Curtis* and *Jackson*.<sup>58</sup> The Court held the recording statute acted similarly to statutes of limitations.<sup>59</sup> The Court also held that both recording statutes and statutes of limitations were necessary to manage land rights and that the laws did not impair the rights of contracts as they did

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<sup>49</sup> *Whitney*, 80 U.S. at 71.

<sup>50</sup> *Id.* at 70.

<sup>51</sup> *Id.* at 71.

<sup>52</sup> 101 U.S. 814 (1879).

<sup>53</sup> *Stone*, 101 U.S. at 816.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 820.

<sup>56</sup> *Id.*; see *Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018) (the Court considered the fact a Court could have altered the life insurance policy when the Sveen’s divorced as evidence the contract was not impaired).

<sup>57</sup> 108 U.S. 514, 516 (1883).

<sup>58</sup> *Vance*, 108 U.S. at 518, 520, 522.

<sup>59</sup> *Id.* at 520.



not “change, defeat, or impair the obligation” of contracts.<sup>60</sup> The comparison of recording statutes to statutes of limitations laws is an often repeated concept in Contract Clause jurisprudence.<sup>61</sup> It is similar to viewing state laws as default rules that act on, but do not impair contracts—a view analyzed in the Court’s holding in *Sveen*.<sup>62</sup>

Not long after the Court’s holding in *Vance*, the Court heard the matter of *Gilfillan v. Union Canal Co. of Pennsylvania*.<sup>63</sup> In *Gilfillan*, the Court upheld a retroactive state law because the impairment the law caused was held to be reasonable.<sup>64</sup> The Court cited to *Vance* for the proposition that the Court should examine the ease of compliance with the law as evidence of why the law should stand.<sup>65</sup> Balancing the reasonableness of the impairment to the contract and the ease of compliance with the law continue to be elements of Contract Clause jurisprudence today.<sup>66</sup>

*Seibert v. Lewis* was the next major Contract Clause case to reach the Supreme Court and demonstrated that the clause was not yet worthless.<sup>67</sup> The Court in *Seibert* held that the Missouri law impaired what it viewed as the most important portion of a contract—the ability to enforce it—and was therefore unconstitutional.<sup>68</sup> The holding in *Seibert* was important because it recognized that impairment of contracts was still a concern for the Court and that Contract Clause challenges were still worth bring.<sup>69</sup>

Similarly, in *McGahey v. Commonwealth of Virginia*, the Court demonstrated that the Contract Clause was not completely dead letter law.<sup>70</sup> The Court held in *McGahey* that a retroactive

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<sup>60</sup> *Id.* at 517.

<sup>61</sup> *Sveen v. Melin*, 138 S.Ct. 1815, 1823–24 (2018).

<sup>62</sup> *Id.*

<sup>63</sup> 109 U.S. 401 (1883).

<sup>64</sup> *Gilfillan*, 109 U.S. at 406–07.

<sup>65</sup> *Id.* at 407.

<sup>66</sup> *See Sveen v. Melin*, 138 S.Ct. 1815, 1817–18 (2018).

<sup>67</sup> 122 U.S. 284 (1887).

<sup>68</sup> *Lewis*, 122 U.S. at 297, 300.

<sup>69</sup> *Id.* at 300.

<sup>70</sup> 135 U.S. 662 (1890).

Virginia law that burdened the redemption of bonds was unconstitutional.<sup>71</sup> The Court stated that “[i]t is well settled by the adjudications of this court that the obligation of a contract is impaired, in the sense of the constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it”.<sup>72</sup>

### C. Rock Bottom for the Contract Clause

The entire application of the Contract Clause changed with the Court’s holding in *Home Building & Loan Association v. Blaisdell* in 1934.<sup>73</sup> A Minnesota mortgage moratorium law was challenged for violating the Contract Clause because the law allowed courts to prolong the time a borrower had to recover when behind on their mortgage.<sup>74</sup> It must be noted that this law was passed in the heart of the Great Depression.<sup>75</sup> The Court’s holding in *Blaisdell* set forth a test to determine what level of impairment a state law can constitutionally create.<sup>76</sup> The creation of the test itself demonstrated how weakened the Contract Clause had become. The Contract Clause that had once held that any impairment of a contract was unconstitutional, now had a test to determine the amount of impairment that was permissible.<sup>77</sup> The Court’s holding made clear it was no longer bound by the original understanding of the Contract Clause.<sup>78</sup>

The test set forth in the Court’s holding considered five factors: (1) was the law passed in pursuit of a reasonable end and written reasonably to accomplish that end, noting that a reasonable

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<sup>71</sup> *Id.* at 684.

<sup>72</sup> *Id.* at 693.

<sup>73</sup> 290 U.S. 398 (1934); see *Original Understanding*, *supra* note 13 at 541–42; see *Dead Letter*, *supra* note 21, at 1686–87.

<sup>74</sup> *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 415–16 (1934).

<sup>75</sup> *Blaisdell*, 290 U.S. at 419.

<sup>76</sup> *Id.* at 444–48.

<sup>77</sup> Compare *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934) (Where the Court utilized a five factor test to determine how much impairment was constitutional) with *Fletcher v. Peck*, 10 U.S. 87, 88 (1810) (Where the Court held any impairment was unconstitutional).

<sup>78</sup> *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 439 (1934) (“It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts”).

end cannot be to advantage certain individuals; (2) was the law passed in response to an emergency; (3) was the law an appropriate response to the emergency; (4) are the impairments created by the law reasonable in comparison to the emergency the law was drafted to address; and, (5) was the law temporary in nature or was the law meant to exist even after the emergency subsided.<sup>79</sup> While this five-factor test is no longer the standard applied to state laws challenged under the Contract Clause, it is still often cited and referenced as leading to the current standard.<sup>80</sup>

It should be noted that the Court's holding in *Blaisdell* had a dissent, written by Justice Sutherland, which took issue with the majority's ignoring of the original meaning of the Contract Clause.<sup>81</sup> In the dissent, the justice made clear that considering public and private contracts differently was a disturbing development and one that violated both the original intent of the Contract Clause and the Contract Clause jurisprudence of the Court.<sup>82</sup> These are complaints that are levied at the Court today for its modern jurisprudence involving the Contract Clause.<sup>83</sup>

In *City of El Paso v. Simmons*, a 1965 Supreme Court Contract Clause challenge, the Court referenced but did not wholly rely on the Court's earlier holding in *Blaisdell*.<sup>84</sup> In *Simmons*, the Court held that a Texas law that retroactively placed a five-year statute of limitation on challenges to land foreclosures by the state, on property sold by the state, was constitutional.<sup>85</sup> The Court held, in line with its earlier decisions, that not all modifications of contracts, nor alterations of possible remedies, constituted unconstitutional impairment.<sup>86</sup> The Court's holding in *Simmons*

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<sup>79</sup> *Blaisdell*, 290 U.S. at 444–48.

<sup>80</sup> See *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1 (1977); see also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

<sup>81</sup> *Home Bldg. & Loan Ass'n v. Blaidell*, 290 U.S. 398, 448–50 (Sutherland, J. dissenting) (1934).

<sup>82</sup> *Blaisdell*, 290 U.S. at 454 (Sutherland, J. dissenting).

<sup>83</sup> *Sveen v. Melin*, 138 S.Ct. 1815, 1827 (Gorsuch, J., dissenting) (2018).

<sup>84</sup> 379 U.S. 497, 508 (1965).

<sup>85</sup> *Simmons*, 379 U.S. at 497–500, 517.

<sup>86</sup> *Id.* at 508.

exemplified the weakening of the Contract Clause to its most powerless form.<sup>87</sup> The holding showed that a state could retroactively change the terms of a contract, to which it was a party, in a manner that led to the complete loss of property by the other party of the contract, without the law running afoul of the Contract Clause.<sup>88</sup>

Justice Black wrote a dissent in *Simmons* that is often quoted by advocates for a return to the original interpretation of the Contract Clause.<sup>89</sup> In the dissent, the justice criticized what he defined as the Court “balancing away the plain guarantee” of the Contract Clause.<sup>90</sup> Justice Black was critical of the rationale of the Majority, which he accused of setting the precedent that contracts can be impaired by the states whenever it is financially advisable.<sup>91</sup> He also took issue with the Court “balancing” its way into upholding a law that it openly admitted was an impairment of contracts.<sup>92</sup> Justice Black cited to The Federalist Number 44, the Court’s holding in both *Fletcher* and *Sturges*, and early Contract Clause jurisprudence as evidence that while remedies may be altered by a state, the obligations of a contract never can be.<sup>93</sup> Justice Black accused the majority of having made up new law without the support of precedent and of having overruled the Court’s Contract Clause precedent without acknowledging they did so.<sup>94</sup>

The dissent also disagreed with the Court’s interpretation of *Blaisdell*.<sup>95</sup> Justice Black argued that *Blaisdell* was limited to laws that retroactively impair contracts during times of urgent need.<sup>96</sup> Lastly, the dissent took issue with the idea of a “reasonableness formula” which the justice defined

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<sup>87</sup> Compare *City of El Paso v. Simmons*, 379 U.S. 497 (1965) with *Fletcher v. Peck*, 10 U.S. 87, 88 (1810).

<sup>88</sup> *Sveen v. Melin*, 138 S.Ct. 1815, 1828 (Gorsuch, J., dissenting) (2018).

<sup>89</sup> *City of El Paso v. Simmons*, 379 U.S. 497, 517 (Black, J. dissenting) (1965).

<sup>90</sup> *Simmons*, 379 U.S. at 517 (Black, J. dissenting).

<sup>91</sup> *Id.* at 518.

<sup>92</sup> *Id.* at 520.

<sup>93</sup> *Id.* at 522.

<sup>94</sup> *Id.* at 523, 531–32 (“I do not believe that any or all of the things set out above on which the Court relies are . . . required by the Contract Clause.”).

<sup>95</sup> *Simmons*, 379 U.S. 497, 523 (Black, J. dissenting) (“The cases the Court mentions do not supports its reasoning.”).

<sup>96</sup> *Id.* at 529.

as a test of “indefinable standards”.<sup>97</sup> Justice Black quibbled with the concept that the Court should attempt to define the “primary consideration” of why a buyer entered into a contract.<sup>98</sup> While Justice Black was alone in his dissent, his powerful argument fuels many critics of the modern jurisprudence of the Contract Clause.<sup>99</sup>

#### D. The Contract Clause Returns from the Grave

In 1977, the Supreme Court heard a challenge to the revocation of a bond agreement between the Port Authority of New York and New Jersey in the case of *United States Trust Company of New York v. New Jersey*.<sup>100</sup> The Court began by addressing the history of the Contract Clause, pointing out that the Contract Clause was originally a very strong check on state powers but had been weakened over time and become less frequently used after the passing of the Fourteenth Amendment.<sup>101</sup> The Court then addressed what it described as the two controlling cases of Contract Clause jurisprudence, *Blaisdell* and *Simmons*.<sup>102</sup> The Court pointed out that both holdings set a very high bar for invalidating a state law.<sup>103</sup> The Court held that while it may not “comport[] with current views of wise public policy, the Contract Clause remains a part of our written Constitution.”<sup>104</sup> The Court’s holding was filled with dicta that can best be described as a battle to balance the Contract Clause having some significant meaning and the Court’s jurisprudence on the clause which deprived the clause of almost all significance.<sup>105</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See Sveen v. Melin*, 138 S.Ct. 1821, 1828 (Gorsuch, J., dissenting) (2018).

<sup>100</sup> 431 U.S. 1, 1–14 (1977).

<sup>101</sup> *Id.* at 15.

<sup>102</sup> *Id.* at 15–16.

<sup>103</sup> *Id.* at 16.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 27 (The Court referenced its holdings in *Fletcher* and *Dartmouth College*, both early 19<sup>th</sup> century cases that held the Contract Clause was a complete bar on state laws involving contracts. The Court then immediately stated that the State must have the ability to pass and remove laws that could involve contracts. The contradiction of the original and modern jurisprudence presented a challenge for the Court).

The Court began its analysis by analyzing if there was impairment of contract when the Port Authority Bonds were revoked.<sup>106</sup> The Court heavily relied on the finding of the district court, that the bond values were negatively affected by the State’s action, and held that there was impairment of the contracts.<sup>107</sup> The Court then, in line with its jurisprudence of the Contract Clause, did not automatically strike down the law but evaluated the impairment to determine if it was permissible.<sup>108</sup>

The Court held that impairment is permissible if it is “reasonable and necessary to serve an important public purpose.”<sup>109</sup> The Court noted that this was the standard for both public and private contracts but that when evaluating impairment of private contracts the state legislative should be given complete deference over what is “reasonable and necessary”.<sup>110</sup> The justification for the disparity in treatment given by the Court was that a “governmental entity can always find a use for extra money”.<sup>111</sup>

The Court set out two prongs of consideration to determine what satisfied the “necessary” element.<sup>112</sup> The two considerations the Court put forward were: (1) considering if modification of the contract was essential; and, (2) was there a less intrusive way to modify the contract that could have accomplished the same goal.<sup>113</sup> When paired with the requirement that the purpose the law had to be an “important and legitimate public concern,” this standard amounted to a high bar, similar to strict scrutiny.<sup>114</sup> The Court’s holding represented a major change of course from the

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<sup>106</sup> *U.S. Tr. Co. of New York*, 431 U.S. at 17.

<sup>107</sup> *Id.* at 20.

<sup>108</sup> *Id.* (The Court reaffirmed the view put forward in *Blaisdell* that even though the Contract Clause plainly reads as a prohibition upon state laws impairing contracts, the clause is not absolute and should not be applied like a mathematical formula); see *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 428 (1934).

<sup>109</sup> *U.S. Tr. Co. of New York*, 431 U.S. at 25.

<sup>110</sup> *Id.* at 26.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 29–30.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 28.

Contract Clause jurisprudence applied by the Court in *Simmons*.<sup>115</sup> The holding reaffirmed the belief that the Contract Clause served as some form of a check upon the states, even if it was limited to only laws that impaired the obligations of public contracts.<sup>116</sup>

Less than a year later, the Court heard *Allied Structural Steel Company v. Spannaus*, a challenge to the constitutionality of a retroactive Minnesota law that changed certain terms of private pensions.<sup>117</sup> The Court began its holding by stating that the Contract Clause reads “unambiguously absolute” and as a complete bar to any retroactive contract impairment, but that the jurisprudence of the Contract Clause has not held the clause to be so broad since the early 19<sup>th</sup> century.<sup>118</sup> But, the Court also opined that the Contract Clause is “not a dead letter.”<sup>119</sup>

The Court’s holding first measured the degree of impairment the law created, stating that if the impairment was minimal, the inquiry ended there, but if it was substantial, the law required careful examination.<sup>120</sup> The Court opined that when measuring the impairment a state law created, it was important to factor in the “high value the Framers placed on the protection of private contracts.”<sup>121</sup>

The Court held the Minnesota law severely impaired the contracts.<sup>122</sup> The Court applied the test in *United States Trust Company of New York* which required the law to have been passed to “meet an important general social problem.”<sup>123</sup> The Court held the Minnesota law was not passed to address any general social problem and therefor was evaluated in same manner as if the law

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<sup>115</sup> Compare *U.S. Tr. Co. of New York*, 431 U.S. at 28 with *El Paso v. Simmons*, 379 U.S. 497 (1965).

<sup>116</sup> *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 16 (1977).

<sup>117</sup> 438 U.S. 234, 236 (1978).

<sup>118</sup> *Spannaus*, 438 U.S. at 240.

<sup>119</sup> *Id.* at 241.

<sup>120</sup> *Id.* at 244.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 247.

<sup>123</sup> *Id.*; see *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 16 (1977).

impaired a public contract with no deference was given to the legislature.<sup>124</sup> Without deference to the legislature, the law was struck down as unconstitutional.<sup>125</sup>

#### E. Somewhere in the Middle, Reversal of the Contract Clause Jurisprudence, Again

The Contract Clause came up in a number of cases before the Supreme Court near the end of the 20<sup>th</sup> century. In the 1982 case of *Texaco, Inc. v. Short*, the Court dismissed a challenge to a mining law in a single paragraph, holding that state laws passed before a contract was entered into were immune from Contract Clause challenges and, even if they were not, having to record a document in a county recording office was such a minimal burden that it was “not beyond the scope of permissible state action.”<sup>126</sup>

A year later, the Court heard a similar case that involved a Kansas law which regulated private contracts for the sale and purchase of natural gas in the matter of *Energy Reserves Group v. Kansas Power & Light Company*.<sup>127</sup> The Court acknowledged its holdings in *Blaisdell*, *US Trust* and *Allied Steel*, and laid out a test to determine the validity of Contract Clause challenges very similar to the test found in *Allied Steel*.<sup>128</sup> The first step required the Court to examine the state law to determine if it substantially impaired the contract in question.<sup>129</sup>

The Court undertook the first step and held that the Kansas law did not amount to a substantial impairment because it did not impair the reasonable expectations of the parties to the contract.<sup>130</sup> The Court held the natural gas market was highly regulated and that the contract in question recognized that explicitly.<sup>131</sup> Additionally, the Court held that “[t]here can be little doubt about

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<sup>124</sup> *Spannaus*, 438 U.S. at 244.

<sup>125</sup> *Id.*

<sup>126</sup> 454 U.S. 516, 531 (1982).

<sup>127</sup> 459 U.S. 400, 403 (1983).

<sup>128</sup> *Id.* at 410; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

<sup>129</sup> *Energy Reserves Group v. Kansas Power & Light Company*, 459 U.S. 400, 411 (1983).

<sup>130</sup> *Energy Reserves Group*, 459 U.S. at 416.

<sup>131</sup> *Id.*



the legitimate public purpose behind the Act.”<sup>132</sup> Lastly, the Court held that the law was reasonable in its pursuit of the legitimate public purpose.<sup>133</sup> The Court’s decision to uphold the law, utilizing a test similar to the tests found in *US Trust* and *Allied Steel*, showed that state laws could still survive Constitutional challenges even under the slightly revived Contract Clause.<sup>134</sup>

In 1983, the Court heard *Exxon Corporation v. Eagerton*, a Contract Clause challenge to an Alabama law that retroactively stopped pass-through agreements on taxes for oil and gas sold, even if they were explicitly agreed to as part of previously executed sales contracts.<sup>135</sup> The Court’s holding began with recited dicta from its holdings in both *Stone* and *Blaisdell* that laws “even barring altogether, the performance of duties created by contracts” could be constitutional.<sup>136</sup> The Court held that the purpose of the Alabama law was to lower the cost of oil and gas for all consumers and that the law was to be expected given previous rulings of the Court involving oil and gas laws.<sup>137</sup> The Court concluded the Alabama law did not violate the Constitution.<sup>138</sup> Notably, the Court did not present an argument that, or even conclusively state, the law was reasonable or necessary.<sup>139</sup>

In *Keystone Bituminous Coal Association v. DeBenedictis*, the Court held a state law that retroactively stripped liability waiver clauses from mining contracts was constitutional.<sup>140</sup> While the Court held that the law created a substantial impairment of contracts, that holding did not help the petitioners.<sup>141</sup> It did not help because the Court again held that when reviewing a state law that

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<sup>132</sup> *Id.* at 417.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 419; *see* *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978); *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 16 (1977).

<sup>135</sup> 462 U.S. 176, 178–80 (1983).

<sup>136</sup> *Id.* at 190–91.

<sup>137</sup> *Id.* at 196.

<sup>138</sup> *Eagerton*, 426 U.S. at 197.

<sup>139</sup> *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).

<sup>140</sup> 480 U.S. 470, 474–79, 502 (1987).

<sup>141</sup> *Id.* at 504 (“We agree that the statute operates as ‘a substantial impairment.’”).

impairs a private contract, the Court is to give the legislature great deference.<sup>142</sup> The Court gives the legislature deference by essentially applying a rational basis standard which means that private contracts can almost never win a challenge to state law under the Contract Clause.<sup>143</sup> Unsurprisingly, once the deference was given to the legislature, the Court held the state law was constitutional.<sup>144</sup>

The next important Contract Clause case the Court heard was *General Motors Corporation v. Romein*, a challenge by General Motors and Ford Motor Company to a Michigan statute passed in 1987 that repealed a 1981 statute.<sup>145</sup> In *Ford*, the Court held that there were three steps to determine if there was substantial impairment of a contract by state law: (1) was there a contractual relationship; (2) did the law impair the contractual relationship; and, (3) was the impairment substantial.<sup>146</sup>

Uniquely, the car companies in *Ford* argued that the 1981 statute had been integrated into the contract by default of the fact that the law was in effect when the contracts were executed.<sup>147</sup> They argued that since the 1987 statute repealed the 1981 statute, and the 1981 statute was integrated into the contracts, the 1987 statute impaired the contracts by eliminating the effects of the 1981 statute from the contracts.<sup>148</sup> The Court rejected the argument, holding that not all state regulations that existed at the time the contracts were executed were incorporated into the contracts.<sup>149</sup> The

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<sup>142</sup> *Id.* at 505 (“[U]nless the State is itself a contracting party, courts should properly defer to legislative judgement”); see *U.S. Tr. Co. of New York*, 431 U.S. at 26 (holding that when evaluating private contracts the legislature should be given great deference).

<sup>143</sup> *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 505 (1987); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319 (2018) [hereinafter *Rational Basis*] (describing rational basis as a useless test that is nearly impossible to successfully mount a challenge against).

<sup>144</sup> *DeBenedictis*, 480 U.S. at 505.

<sup>145</sup> 503 U.S. 181, 183 (1992).

<sup>146</sup> *Id.* at 186–87.

<sup>147</sup> *Id.* at 183.

<sup>148</sup> *Id.* at 186.

<sup>149</sup> *Id.* at 188.

Court held the only laws that were incorporated into the contracts were those that “affect[ed] the validity, construction and enforcement” of the contracts.<sup>150</sup> The Court held that the 1981 statute was never a part of the contracts meaning that the contracts were not impaired by the 1987 repeal.<sup>151</sup>

#### F. Insurance Contracts and the Contract Clause

A touchstone case of Contract Clause jurisprudence, *W. B. Worthen Company v. Thomas* is one of the only pure Contract Clause cases to appear before the Supreme Court dealing with insurance policies impaired by a state law.<sup>152</sup> Decided the same year as *Blaisdell*, the Court in *W. B. Worthen* heard a challenge to an Arkansas law that denied creditors of an individual the ability to claim a portion of the individual’s life insurance payout.<sup>153</sup> The Court referenced its holding in *Blaisdell* and struck down the law as unconstitutional, differentiating the law in *Blaisdell* and the law in question.<sup>154</sup> Specifically, the Court focused on the fact that the Arkansas law was unlimited in its time of applicability and was not passed to address an emergency.<sup>155</sup>

Outside of the Supreme Court of the United States, the Eighth and Tenth Circuits have also addressed Contract Clause challenges to laws that affected insurance policies brought under the Contract Clause.<sup>156</sup> In 1991, the Eighth Circuit heard *Whirlpool Corp. v. Ritter*, a case with facts nearly identical to that of *Sveen*.<sup>157</sup> The court held that the law’s retroactive change of the life

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<sup>150</sup> *Id.* at 189.

<sup>151</sup> *Romein*, 503 U.S. at 190 (Interestingly the Petitioners did not allege, or the Court did not accept, that the 1981 and 1987 statutes violated the Constitution by impairing the employment contracts on their own. This could be in part because the precedent of the Contract Clause at the time would have made doing so a fool’s errand).

<sup>152</sup> 292 U.S. 426, 429 (1934).

<sup>153</sup> *Id.* at 429.

<sup>154</sup> *Id.* at 432–33.

<sup>155</sup> *Id.*

<sup>156</sup> See *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991); *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311(10th Cir. 2003).

<sup>157</sup> 929 F.2d 1318, 1321 (8th Cir. 1991); *Sveen v. Melin*, 138 S.Ct. 1821, 1817 (2018).

insurance beneficiary after a divorce was “not insignificant.”<sup>158</sup> The court opined that “one of the primary purposes of a life insurance contract is to provide for the financial needs of a person (or persons) designated by the insured” and that the law “effected a fundamental and pejorative change in the very essence of these contracts.”<sup>159</sup>

Having found substantial impairment, the court in *Ritter* cited to both *US Trust* and *Allied Steel* and held that the law in question was “merely general, social legislation” and therefore must be examined to determine if it was reasonable.<sup>160</sup> The court held that the law was not reasonable because it was being implemented retroactively to pursue what may or may not have been the insured’s actual intention.<sup>161</sup> The court dismissed the argument that the ease of changing the beneficiary back should factor into the constitutionality of the law.<sup>162</sup>

The holding in *Ritter* did not play a large role *Sveen* because of the Tenth Circuit’s holding in *Stillman v. Teachers Ins. & Annuity Ass’n Coll. Ret. Equities Fundi* in 2003.<sup>163</sup> The facts in *Stillman* strongly resemble the facts of both *Sveen* and *Ritter* with the only major difference being that the matter involved annuities and not life insurance.<sup>164</sup> In *Stillman*, the court went out of its way to strike down the Contract Clause challenge and reject the holding in *Ritter*.<sup>165</sup> The *Stillman* court held that there was no substantial impairment of a contractual right.<sup>166</sup> Quoting extensively from the Joint Editorial Board of the Uniform Probate Code, the court held that contracts such as

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<sup>158</sup> *Ritter*, 929 F.2d. at 1322.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1323.

<sup>161</sup> *Id.* (Similar to Supreme Court’s holding in *Sveen*, the court pointed to no evidence provided by either side to establish the actual intent of the insured. Without such information, the court stated that it is “not a universal truth” that the insured would have wanted to change the beneficiary.); *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>162</sup> *Id.* at 1324 (“This fact does not cure the constitutional infirmity”).

<sup>163</sup> 343 F.3d 1311 (10th Cir. 2003).

<sup>164</sup> *Id.*; *see Sveen v. Melin*, 138 S.Ct. 1821, 1817 (2018); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1321 (8th Cir. 1991).

<sup>165</sup> *Stillman v. Teachers Ins. & Annuity Ass’n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1321–22 (10th Cir. 2003) (The appellants did not brief the constitutional challenge leading the court to point out it could easily rule against them just for failing to argue the point).

<sup>166</sup> *Id.* at 1322.

the one in question are a “mixture of contract and donative transfer.”<sup>167</sup> The court opined that the paying of the policy to a specified person was purely donative and therefore was not protected by the Contract Clause.<sup>168</sup>

Having concluded that the Contract Clause was not applicable, the court went no further in its analysis.<sup>169</sup> The court’s holding in *Stillman* never discussed if the law was reasonable or necessary.<sup>170</sup> The Court in *Sveen* also heard the argument that life insurance contracts should be viewed as having a donative component that is separate from the contractaul component of a life insurance policy.<sup>171</sup> The Court’s consideration of the argument suggests that it may have merit and may reappear in future Contract Clause cases.<sup>172</sup>

### III. The Supreme Court’s Holding in *Sveen v. Melin*

Few observers were surprised when the Supreme Court granted certiorari in the matter of *Sveen v. Melin* in 2018. While the case focused on Minnesota State Law § 524.2-804, subd. 1, at the time of certification, at least 26 other states had enacted similar laws.<sup>173</sup> Additionally, the interest the Joint Editorial Board of the Uniform Probate Code showed in *Stillman* may have caught the attention of the Court.<sup>174</sup> Regardless of the reason, the Court heard the case on March 19, 2018, and on June 11, 2018, the Supreme Court issued its holding in an opinion written by Justice Kagan.<sup>175</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1322.

<sup>171</sup> Brief for Petitioners at 13, *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>172</sup> *Sveen v. Melin*, 138 S.Ct. 1821, 1819 (2018).

<sup>173</sup> Brief for Petitioners at 8–9, *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>174</sup> Brief for Petitioners at 13, *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>175</sup> *Sveen v. Melin*, 138 S.Ct. 1818 (2018).

The majority set out by citing the Court’s holdings in *Keystone* and *Allied Steel* to reaffirm the Court’s long-standing precedent that the Contract Clause applies to all contracts.<sup>176</sup> The Court then cited its holding in *Simmons* to reaffirm that not all laws “affecting pre-existing contracts violate the [Contract] Clause.”<sup>177</sup> After which, the Court set out the factors that should be considered in determining if there was a substantial impairment of a contract.<sup>178</sup> The Court held that “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights” should be considered in the analysis.<sup>179</sup>

Having laid out the considerations, the Court held that Minnesota statute did not substantially impair the life insurance contract.<sup>180</sup> The Court reached this conclusion by holding that in many instances the law fulfills the intention of the insured, or at least the legislature thought so.<sup>181</sup> An example of how the Court in *Sveen* showed great deference to the Minnesota legislature.<sup>182</sup> The Court also stated that the insurance policy was essentially a will substitute and that the law has long allowed the revoking and altering of previously executed wills.<sup>183</sup> The Court went on to opine that the law “no doubt” changed the contracts but that it was not impairing the contracts because many policyholders likely welcomed the change.<sup>184</sup>

Shifting gears, the Court held that the law was unlikely to upset an insured’s expectations at the time they executed the policy.<sup>185</sup> The Court opined that because at the time of execution, a

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<sup>176</sup> *Sveen*, 138 S.Ct. at 1821.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1822.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Sveen*, 138 S.Ct. at 1822.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1823 (The Court acknowledge that wills and life insurance policies are not the same and considering them the same presents a “brand-new constitutional question.”).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

reasonable insured individual should have known that a divorce decree could affect the insurance policy, that the respondent should have expected the outcome the law demands or at least understood the possibility of it.<sup>186</sup> The majority acknowledged that the Contract Clause applies only to legislation, but dismissed the acknowledgment as irrelevant because it did not alter the insured's expectations.<sup>187</sup> The Court noted it was unlikely that any married person purchasing life insurance contemplates divorce anyway.<sup>188</sup>

The final reasoning presented by the majority for why there was no substantial impairment in *Sveen* was the ease at which an insured person could reverse the operations of the law.<sup>189</sup> The Court pointed out that mailing in a change of beneficiary form was all that was required to have the divorced individual renamed as the beneficiary under the law.<sup>190</sup> To support the holding, the Court cited to its holdings in *Jackson*, *Curtis*, *Gilfillan*, and *Vance* as examples of the Court upholding statutes in part because of the ease of compliance with the laws.<sup>191</sup> The Court also repeated the argument made by the petitioners that the result of non-compliance with the Minnesota law was minimal when compared to the result of non-compliance with the laws in those cases.<sup>192</sup>

The majority concluded its holding by dismissing the last point of the respondent's argument.<sup>193</sup> The Court rejected the argument that recording statutes do not act on the contract itself, while the Minnesota law acts on a contract by changing a term of the contract.<sup>194</sup> The Court

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<sup>186</sup> *Id.* at 1823.

<sup>187</sup> *Sveen*, 138 S.Ct at 1823.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1824.

<sup>192</sup> *Id.* at 1825; Brief for Petitioners at 48, *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>193</sup> *Sveen*, 138 S.Ct. at 1825.

<sup>194</sup> *Id.* at 1825.

summarized this as arguing for a separation between rights and remedies of contracts.<sup>195</sup> The Court rejected this argument in part because it found that the recording statutes also act on the contracts, inserting mandatory action not found in the contract, and in part because both require little effort to “safeguard those benefits by taking an action.”<sup>196</sup> To further bolster this conclusion, the Court also cited to its holding in *Texaco*.<sup>197</sup> The Court pointed out that in *Texaco*, the Court specifically held that there was no legal significance between eliminating a right and a remedy under the Contract Clause.<sup>198</sup>

Having reached the above conclusions, seven justices, along with Justice Kagan, held in favor of Mr. Sveen’s children, holding that the Minnesota law was constitutional because it did not substantially impair the insurance contract.<sup>199</sup>

#### IV. Justice Gorsuch, the Lone Dissenter

Justice Gorsuch wrote the lone dissent in *Sveen v. Melin*.<sup>200</sup> The dissent started out by conceding that there is no dispute that when applied prospectively the Minnesota law is Constitutional.<sup>201</sup> Then, the dissent continued its argument by examining the wording of the Contract Clause.<sup>202</sup> Justice Gorsuch argued first that the wording of the Contract Clause is unambiguous and that it demands a complete ban on all state laws that impair the obligations of contracts.<sup>203</sup> Noting, that the framers knew how to write the clause if they did not want it to result

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (the safeguard was mailing in a letter after the divorce to make clear who the insured wanted the beneficiary to be, while in the recording law cases it was submitting the contracts or deeds for recording).

<sup>197</sup> *Id.* at 1826.

<sup>198</sup> *Id.*

<sup>199</sup> *Sveen*, 138 S.Ct. at 1826.

<sup>200</sup> *Id.* at 1826 (Gorsuch, J., dissenting) (2018).

<sup>201</sup> *Id.* at 1826 (Gorsuch, J., dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



in a complete bar.<sup>204</sup> To buttress this view, the justice cited to the Court’s holding in *Sturges*.<sup>205</sup> Additionally, the justice, pointed to evidence from the ratification of the Constitution to support the contention that the Contract Clause was intended to be a complete bar and was known to be so at the time of ratification.<sup>206</sup>

The dissent then proceeded to highlight the early precedent of the Court that addressed the Contract Clause and how it aligned with the unambiguous text of the Contract Clause.<sup>207</sup> Justice Gorsuch identified the Court’s holdings in *Green*, *Saunders*, and more recently, the dissent of Justice Black in *Simmons* to support his view.<sup>208</sup> Each case held, in the opinion of the dissent, that the modern interpretation of the Contract Clause is “hard to square with the Constitution’s original public meaning.”<sup>209</sup>

The dissent also addressed the majority’s holding that the Minnesota law did not impair the life insurance contract.<sup>210</sup> Justice Gorsuch began by agreeing with the majority that the choice of beneficiary is the “whole point” of a life insurance contract.<sup>211</sup> The justice, however, argued that if the “whole point” of the contract was changed by state law, then there must be substantial impairment.<sup>212</sup> The dissent cited to the Court’s holding in *Woodward* as support for this premise.<sup>213</sup>

Attacking the legitimate purpose of the Minnesota law, Justice Gorsuch cited to an amicus brief filed in *Hillman v. Maretta*, on behalf of the United States Government, that argued that some

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<sup>204</sup> *Id.* at 1827 (Justice Gorsuch pointed out the Article 1, Section 10, Clauses 2 and 3 of the Constitution are both examples of phrasing by the framers of clauses that only act as bars when necessary or with the consent of the senate).

<sup>205</sup> *Sveen*, 138 S.Ct. at 1827 (Gorsuch, J., dissenting).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1827 (Gorsuch, J., dissenting).

<sup>210</sup> *Id.* at 1828.

<sup>211</sup> *Sveen*, 138 S.Ct. at 1828.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

divorced persons intentionally keep their former spouses as the beneficiary for a variety of reasons.<sup>214</sup> He also cited to other sources that suggest there are benefits to be gained by keeping a divorced spouse as the beneficiary when children are involved or when a person wishes matters to be handled more privately than a divorce proceeding.<sup>215</sup>

With regard to the reasonableness of the impairment, the dissent started out by citing to the Court's holdings in *Allied Steel* and *US Trust* to lay out the modern Contract Clause jurisprudence.<sup>216</sup> Interestingly, and without comment as to why, Justice Gorsuch defined reasonableness as requiring that there was no more moderate way to accomplish the legislative intent, a standard similar to strict scrutiny and only found in modern Contract Clause jurisprudence when the state was a party to the contract being impaired.<sup>217</sup> Perhaps Justice Gorsuch was accepting the argument put forth by the respondent that the Court should treat public and private contracts alike when applying the Contract Clause.<sup>218</sup>

The justice then applied his version of the *Allied Steel* test to the facts and argued there was a substantial impairment of the life insurance contract.<sup>219</sup> The justice found that not only were there theoretically less intrusive ways to accomplish the goal but that in some states the theoretical approaches had become reality.<sup>220</sup> Justice Gorsuch also cited to the Amici Curiae for the Women's Law Project et al. filed in *Sveen v. Melin* for support of this contention.<sup>221</sup>

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<sup>214</sup> *Id.* (citing Brief for the United States as Amicus Curiae Supporting Respondent, *Hillman v. Maretta*, No. 11-1221 (U.S. April 1, 2013)).

<sup>215</sup> *Id.* at 1829 (Gorsuch, J., dissenting).

<sup>216</sup> *Id.* (Gorsuch, J., dissenting).

<sup>217</sup> *Sveen*, 138 S.Ct. at 1829.

<sup>218</sup> *Id.* at 1829 (Gorsuch, J., dissenting) (This was likely a very intentional choice by Justice Gorsuch as it is very unlikely the Justice did not know he was applying the wrong standard under the modern Contract Clause jurisprudence. It is interesting to ponder why he would not point out or argue for his merging of the standards.); Brief for Respondent at 27, *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>219</sup> *Id.* (Gorsuch, J., dissenting).

<sup>220</sup> *Id.* (Gorsuch, J., dissenting).

<sup>221</sup> *Id.* (citing Brief for The Women's Law Project, et al as Amicus Curiae Supporting Respondent, *Sveen v. Melin*, No. 16-1432 (U.S. Feb. 28, 2018)).

The dissent then shifted gears to focus on the arguments made by the majority.<sup>222</sup> Justice Gorsuch alleged that the majority was guilty of putting the carriage before the horse by considering factors of the reasonableness of the impairment to argue that there was no substantial impairment.<sup>223</sup> The argument rests on the premise that the ease of reversing the effect of the law should not be considered as part of the standard for determining if there was substantial impairment created by the law.<sup>224</sup> Additionally, the justice argued that the majority glossed over the “sizable (and maybe growing)” number of people affected by the law and who are not in favor of its result.<sup>225</sup> Justice Gorsuch argued that part of the purpose of the Contract Clause was to protect all people who enter into contracts and that the majority betrayed that protection.<sup>226</sup>

Accusing the majority of circular reasoning, the justice also took issue with the majority’s reasoning for why the law was reasonable.<sup>227</sup> The dissent pointed out that the majority agreed with the Minnesota legislature that the law was necessary because the average insured person pays little attention to their beneficiary designation after getting divorced.<sup>228</sup> The dissent also pointed out that the majority agreed with the petitioner that the insured individuals can reverse the effects of the law by paying attention to their beneficiary designation after getting divorced.<sup>229</sup> Justice Gorsuch summarized this argument as “an apparent paradox.”<sup>230</sup>

Concerning the reasonable expectations argument made by the majority, the dissent took issue with what he defined as treating courts and legislatures the same.<sup>231</sup> The justice argued that a

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<sup>222</sup> *Id.* (Gorsuch, J., dissenting).

<sup>223</sup> *Sveen*, 138 S. Ct. at 1829–30 (Gorsuch, J., dissenting).

<sup>224</sup> *Id.* at 1829.

<sup>225</sup> *Id.* at 1830.

<sup>226</sup> *Id.* (Justice Gorsuch questioned the fairness of doing so by pointing out that ignoring minorities has continually been rejected in First Amendment religion cases).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (Gorsuch, J., dissenting).

<sup>229</sup> *Sveen*, 138 S. Ct. at 1830.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

major difference between courts and legislatures was that “[c]ourts may apply *pre-existing* laws” (emphasis his) while the legislatures passes new laws.<sup>232</sup> The justice pointed to criminal law to provide the example that a court can only punish a person for violating a law that existed at the time it was broken and that legislatures can only pass laws that make future conduct illegal<sup>233</sup> — a constitutional mandate found in the same article, section, and clause as the Contract Clause.<sup>234</sup>

Lastly, the dissent challenged the majority’s interpretation of the cases the majority relied on to establish that retroactive laws have long been found constitutional by the Court.<sup>235</sup> Justice Gorsuch charged that the Court’s holding in *Blaisdell* only supports retroactive legislation which alters “contractual *remedies*” (emphasis his).<sup>236</sup> Therefore, the dissent argued, the case was inapplicable because the Minnesota law changes the obligation of who gets paid – not a remedy of how to enforce the payment.<sup>237</sup> Justice Gorsuch again cited to the Court’s holding in *Fletcher* and Justice Black’s dissent *Simmons* to support his argument.<sup>238</sup>

Justice Gorsuch also cited *Lamphire*, arguing that the recording statute the Court upheld did not affect an obligation but a remedy.<sup>239</sup> The justice argued that while the law in *Lamphire* did prevent the first owner, who did not record his deed, from obtaining the rights to the land from the second owner, who did record his deed, nothing in the law prevented the first owner from bringing a claim against the person who sold the land twice to enforce the obligation.<sup>240</sup> Therefore the value of the contract was never impaired by the law, just how the contract was enforced.<sup>241</sup> The justice

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (Gorsuch, J., dissenting).

<sup>234</sup> (“No state shall . . . pass any . . . ex post facto law”) U.S. Const. art. I, § 10, cl. 1.

<sup>235</sup> *Sveen*, 138 S.Ct. at 1830 (Gorsuch, J., dissenting) (2018).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1830–31.

<sup>239</sup> *Id.* at 1831.

<sup>240</sup> *Id.* (Interestingly, this argument also strikes at the majorities’ argument that the potential downside of this law is minimal in comparison to the potential downside in the recording law cases).

<sup>241</sup> *Sveen*, 138 S. Ct. at 1831 (Gorsuch, J., dissenting).

concluded this line of reasoning by distinguishing *Gilfillan* because of its extraordinary circumstances.<sup>242</sup>

Justice Gorsuch concluded his dissent by acknowledging that declaring state laws unconstitutional is a strong power and should not be lightly invoked.<sup>243</sup> But even acknowledging that, he felt that the Minnesota law could not “survive an encounter even with the breeziest of Contract Clause tests.”<sup>244</sup>

## V. Words Have Meanings, Clauses Have Power, and Why the Holding in *Sveen v. Melin* Missed the Mark

The Court’s holding in *Sveen v. Melin* was wrong for a number of reasons, all of which stem from how the modern Contract Clause jurisprudence has been stripped of almost all power and meaning. The Contract Clause, which the Court has continually held to be unambiguous,<sup>245</sup> and which the Court originally enforced as such,<sup>246</sup> has now evolved into a moderate check on the states in some cases and dead letter law in others.<sup>247</sup> It is time to embrace the dissents of Justice Sutherland in *Blaisdell*, Justice Black in *Simmons* and Justice Gorsuch in *Sveen* and return the Contract Clause to at least some of its original purpose.<sup>248</sup>

### A. The Status of the Contract Clause post *Sveen v. Melin*

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See *Trs. of Dartmouth College v Woodward*, 17 U.S. 518 (1819); *Ogden v. Saunders*, 25 U.S. 213 (1827); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

<sup>246</sup> See *Fletcher v. Peck*, 10 U.S. 87 (1810); *Trs. of Dartmouth College v Woodward*, 17 U.S. 518 (1819); *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Green v. Biddle*, 21 U.S. 1 (1823).

<sup>247</sup> See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977).

<sup>248</sup> See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (Sutherland, J. dissenting) (1934); *El Paso v. Simmons*, 379 U.S. 497 (Black, J. dissenting) (1965); *Sveen v. Melin*, 138 S.Ct. 1821, (Gorsuch, J., dissenting) (2018).

The modern jurisprudence of the Contract Clause was reaffirmed by the Court's holding in *Sveen*, at least for private contracts.<sup>249</sup> The Court's application of the Contract Clause made clear that challenges brought under the Contract Clause face a steep uphill battle just to prove substantial impairment.<sup>250</sup> The Court held that the reasonable expectations of the parties to the contract, the purpose of the legislation that changed the contract, and the ease at which the change created by the law was reversible determined if the law substantially impaired the contract.<sup>251</sup> The Court did not clarify if all three of the elements, or just one or two of them, was required for a law to have created a substantial impairment.<sup>252</sup> The holding in *Sveen* also raised the bar satisfy any of the three elements, adding to the battles a challenger of the law faces.<sup>253</sup>

In *Sveen*, the Court held that when examining a law to determine if it upset the reasonable expectations of the parties to the contract, the Court is to examine all laws in existence at the time of execution of the contract,<sup>254</sup> the level of regulation in the field in which the contract existed at the time of execution,<sup>255</sup> the powers courts had with respect to the contract at the time of the contract's execution.<sup>256</sup> The addition of the consideration of courts powers over the contract, at the time the contract was executed, makes this element nearly impossible for a challenger to satisfy.<sup>257</sup>

The element that examines the purpose of the law that changed the contract is also unlikely to be satisfied by a challenger. The Court reaffirmed in *Sveen* that great deference is given to

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<sup>249</sup> *Sveen v. Melin*, 138 S.Ct. 1821 (2018).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1822.

<sup>252</sup> *Id.* at 1821.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1823.

<sup>255</sup> *Sveen*, 138 S.Ct. at 1830.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (Gorsuch, J., dissenting).

legislatures when evaluating a law that may impair private contracts.<sup>258</sup> The practical effect of deference being given to the legislature, is to remove this element from the reach of a challenger. For example, in *Sveen*, evidence that some portion of divorced spouses opposed the effect of the law was not enough to overcome the Court’s deference to the legislature.<sup>259</sup>

The third and final element that the Court used to determine if the law substantially impaired the insurance contract was how easily the effect of the law could be reversed by Mr. Sveen if he was disgruntled with its effect.<sup>260</sup> As Justice Gorsuch argued in his dissent, the Court held that a law passed after the execution of a contract, that was passed because people did not pay attention to their life insurance policies was easily reversible because a person can pay attention to their life insurance policy and reverse the effect of the law.<sup>261</sup> The Court essentially held as long as law’s effects are easily reversible on paper, the Court will uphold the law regardless of the reality of the situation.<sup>262</sup> And of course, even if a challenger satisfied this, or all three elements laid out by the Court in *Sveen*, if the law was passed at a time of emergency and is designed to be short term and to counter the emergency then the law may still stand.<sup>263</sup>

The modern jurisprudence of the Contract Clause for public contracts is very different than that for private contracts<sup>264</sup> despite the fact that the Contract Clause itself makes no distinction between the two.<sup>265</sup> Two significant differences between how public and private contracts are treated is: (1) that no deference is given to the state legislature when it impairs a public contract;

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<sup>258</sup> *Id.* at 1821.

<sup>259</sup> *Id.* at 1829 (Gorsuch, J., dissenting).

<sup>260</sup> *Id.* at 1821.

<sup>261</sup> *Id.* at 1830 (Gorsuch, J., dissenting).

<sup>262</sup> *Id.*

<sup>263</sup> *Home Loan & Building Association v. Blaisdell*, 290 U.S. 398 (1934).

<sup>264</sup> *Compare* *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, (1977) (The Court made no reference to giving deference to the legislature and in fact ruled against the state) *with* *Energy Reserves Group v. Kansas Power & Light Company*, 459 U.S. 400, 412–13 (1983) (The Court held that it would “defer to legislative judgement”).

<sup>265</sup> U.S. CONST. art. I, § 10, cl. 1 (The Contract Clause does not have a modifier before the word contracts nor suggest anywhere in its text that public and private contracts should be treated differently).

and, (2) state laws that create substantial impairment of public contracts must survive a test that strongly resembles strict scrutiny instead of rational basis.<sup>266</sup> So while the two tests may appear identical, in reality they are worlds apart with public contracts receiving substantially more protection than private contracts.

## B. The Problems with Modern Contract Clause Jurisprudence

When approaching a constitutional clause, and its jurisprudence, the first step is to determine the methodology that will be used to interpret the clause.<sup>267</sup> There is substantial disagreement in law and academia over the proper way to interpret the Constitution.<sup>268</sup> On one side, there are textualist and originalist who believe that the Constitution is a dead document and only consider the text of the Constitution and how it was understood at the time of its ratification.<sup>269</sup> On the other side there are those who believe the Constitution is a living document that other evidence should be considered besides the text and original meaning of the Constitution.<sup>270</sup> What makes the modern jurisprudence of the Contract Clause concerning is that regardless of which view is used, the modern jurisprudence falls short of what the clause demands.

### i. The Textualist and Originalist Approach to the Contract Clause

Textualists interpret the Constitution by examining only what is written in the Constitution and how the words in the Constitution were defined at the time it was written.<sup>271</sup> Somewhat

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<sup>266</sup> *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 27–30 (1977).

<sup>267</sup> See generally Sara Aronchick Solow; Barry Friedman, *How to Talk about the Constitution*, 25 YALE J.L. & HUMAN. 69, 100 (2013) [hereinafter, *How to Talk*].

<sup>268</sup> *Id.* at 70.

<sup>269</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 410 (2012) (“In practice, the Living Constitution would better be called the Dead Democracy.”).

<sup>270</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) [hereinafter, *Living Constitution*].

<sup>271</sup> Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749, 755 (2017) [hereinafter, *Originalism and Textualism*]; See also Thomas E. Baker, *Constitutional Theory in A Nutshell*, 13 WM. & MARY BILL RIGHTS J. 57, 70 (2004) [hereinafter, *Constitutional Theory*].



similarly, originalist require the constitution be interpreted to mean what it was believed to have meant by those who ratified it.<sup>272</sup> It is clear why these two theories often work hand in hand; the meaning of the words written, at the time they were written, likely molded what the people who voted to ratify the Constitution thought the clauses of the Constitution meant.<sup>273</sup>

The first problem this methodology of constitution interpretation has with modern Contract Clause jurisprudence is that it is far removed from the original meaning and purpose of the Contract Clause.<sup>274</sup> The Contract Clause, in its eleven short words, describes a bar on state laws which impair contracts.<sup>275</sup> The early history of the ratification of the Contract Clause supports this view of the clause.<sup>276</sup> Evidence from the constitutional debates about the Contract Clause, the similarity of the Contract Clause to that of an Ordinance in the Articles of Confederation, and the writings of Madison in *The Federalist* Number 44, make clear that the drafting committee was not intending to strongly limit the reach or scope of the clause.<sup>277</sup>

Likewise, the early jurisprudence of the Contract Clause supports this understanding of the original intention of the clause.<sup>278</sup> *Fletcher*, *Woodward*, *Sturges*, and *Green* are all early Supreme Court cases that held that the original understanding of the Contract Clause was to act as a complete ban on states impairing the obligations of contracts.<sup>279</sup> It is telling that in the first case to truly limit the Court's understanding of the application of the Contract Clause, *Saunders*, the Court held

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<sup>272</sup> See generally *Originalism and Textualism*, *supra* note 271, at 755.

<sup>273</sup> *Id.*

<sup>274</sup> See *Original Understandings*, *supra* note 13, at 533 (“Thus, the history of the [Contract] [c]ause suggests that it was aimed at all retrospective . . . scheme in violation of vested contractual rights”); *but see Sveen v. Melin*, 138 S.Ct. 1821 (2018) (The Court held a retroactive state law was constitutional).

<sup>275</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>276</sup> See *Original Understanding*, *supra* note 13, at 533.

<sup>277</sup> *Id.* at 530–33.

<sup>278</sup> See *Contract Clause and the Court*, *supra* note 21, at 124–26.

<sup>279</sup> *Id.*

that it was unsure of the ruling it was issuing and only restricted the clause to be applicable to laws that retroactively impair contracts.<sup>280</sup>

ii. The Non-Textualist and Non-Originalist approach to the Contract Clause

Even to those who dismiss, or who place less value on, the importance of interpreting the Constitution in a textualist or originalist fashion, there is little debate that the words of the Constitution must mean something.<sup>281</sup> The non-textualist and non-originalist approach to constitutional interpretation considers multiple factors including the text, original meaning, legislative intent, modern understanding of the constitution and the effect of the Courts holding on the matter to form the meaning of the Constitution.<sup>282</sup> Interpretation of the Constitution, when not done in originalist or textualist fashion, can require looking at the intent of words and applying it to modern times.<sup>283</sup>

The purpose of the Contract Clause was to stop states from passing laws that impair contracts, particularly in a manner that allows a government to disfavor the contracts of a private citizens, and to allow the economy to function with the security of valid contracts.<sup>284</sup> As explained in Part II, the purpose is known by the debates about the Contract Clause that lead to its insertion and eventual ratification as part of the United States Constitution.<sup>285</sup> The concerns that lead to the inclusion of the Contract Clause in the Constitution are still very applicable today.

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<sup>280</sup> *Ogden v. Saunders*, 25 U.S. 213, 307 (1827).

<sup>281</sup> See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) [hereinafter, *Textualists from Purposivists*]; see *Constitutional Theory*, *supra* note 271, at 70.

<sup>282</sup> Ofer Raban, *Is Textualism Required by Constitutional Separation of Powers*, 49 LOY. L. A. L. REV. 421, 429 (2016) [hereinafter, *Textualism Required*]; see *Textualists from Purposivists*, *supra* note 281, at 71.

<sup>283</sup> See *Textualists from Purposivists*, *supra* note 281, at 71, 76.

<sup>284</sup> See *Original Understanding*, *supra* note 13, at 526.

<sup>285</sup> See *supra* Part II.

Protecting citizens from state government agendas that may disfavor them is still a very sought after goal,<sup>286</sup> as is passing laws that allow the economy to function properly and for people to be able to trust in the validity and enforceability of their contracts in business.<sup>287</sup> It follows that even if the Contract Clause is not to be construed absolutely, it should be interpreted as a clause to protect disfavored individuals from having states pass laws impairing the contracts they entered into before the law was passed except in exceptional cases.<sup>288</sup>

It worth pausing to consider groups that contract within states and who benefit from the Constitution's protection from the states being able to impair their contracts. There is no dispute that some states pass laws with the intention of making it harder for unions to operate.<sup>289</sup> Unions are a prime example of a group who may be disfavored by the state government<sup>290</sup> and who may benefit from their contracts being protected against state laws. It does not take a vivid imagination to contemplate a scenarios where states that disfavor unions could take advantage of the ability to impair contracts unions enter into after the contracts are executed. Unions are just one example of a potentially disfavored group that benefits from the Contract Clause's purpose of protecting contracts from state impairment.

When applying this approach of constitutional interpretation to the Contract Clause, the modern jurisprudence of the Contract Clause comes up short. As the Court's holding in *Sveen* made clear, and Justice Gorsuch criticized in his dissent, the modern Contract Clause jurisprudence

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<sup>286</sup> *Sveen v. Melin*, 138 S. Ct. 1821, 1829–30 (Gorsuch, J., dissenting) (2018).

<sup>287</sup> Take for example, the fact that in 2016, 27.5 million life insurance contracts were purchased. These contracts are only entered into because they are believed to be binding and enforceable by the terms they contain. *Number of life insurance policy purchases in the United States from 1998 to 2017 (in millions)*, STATISTA, <https://www.statista.com/statistics/194363/us-life-insurance-policy-purchases-total-since-1999/>.

<sup>288</sup> *Sveen*, 138 S. Ct. at 1829–30 (Gorsuch, J., dissenting) (2018).

<sup>289</sup> See J. Albert Woll, *State Anti Union Security Laws - A Tragic Fraud*, 15 Fed. B.J. 68, 75 (1955) (discussing states that have passed “right to work” laws and how they are part of a national attempt to hurt unions).

<sup>290</sup> *Id.*

favors laws that are favored by the state.<sup>291</sup> Put a different way, the modern jurisprudence allows the majority in a state, through its legislature, to pass laws that impair the contracts of disfavored or less cared about individuals.<sup>292</sup> In the case of *Sveen*, to impair the contracts of those who divorce amicably, or at least in a fashion where one spouse still wishes to provide for the other in the case of their passing.<sup>293</sup>

Along with losing its purpose of protecting disfavored individual's contracts, the modern jurisprudence is ignoring the equally valid economic protection purpose of the Contract Clause.<sup>294</sup> It is undisputed that contracts are an important element of the modern economy.<sup>295</sup> But contracts are only useful when the terms written in them are believed to be enforceable and governing the exchange.<sup>296</sup> The value of a contract is greatly diminished if at any time and for any "good" reason a state can pass a law that changes the terms of the contract. While it is generally conceded that sometimes this practice of altering contracts by state law must be allowed, particularly when done to stop actions considered criminal or dangerous, at other times it is something that must be avoided to provide stability and faith to the market.<sup>297</sup> The modern jurisprudence of the Contract Clause invites states to interfere with private contracts at their own leisure.<sup>298</sup> As the Court pointed out in *United States Trust Company of New York v. New Jersey*, a "governmental entity can always

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<sup>291</sup> *Id.* at 1821; *Id.* at 1829–30 (Gorsuch, J., dissenting) (2018).

<sup>292</sup> *Id.* at 1829–30 (Gorsuch, J., dissenting).

<sup>293</sup> *Id.* at 1822–23.

<sup>294</sup> *See supra* Part II.

<sup>295</sup> William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 *BUS. LAW.* 653, 654 (2000) [hereinafter *Understanding Fiduciary Outs*].

<sup>296</sup> *Id.*

<sup>297</sup> *See Gilfillan v. Union Canal Co. of Pennsylvania*, 109 U.S. 401, 402 (1883); *Sveen v. Melin*, 138 S. Ct. 1821, 1829 (Gorsuch, J., dissenting) (2018).

<sup>298</sup> *El Paso v. Simmons*, 379 U.S. 497, 517 (Black, J. dissenting) (1965).

find a use for extra money”.<sup>299</sup> The risk of states impairing contracts with immunity concerned the framers of the Constitution and should equally concern the Court now.<sup>300</sup>

Lastly, the treatment of the Contract Clause by the Court sets the precedent that full clauses of the Constitution can be ignored by the Court, or at the least, chipped away until they mean next to nothing.<sup>301</sup> This is a precedent that should equally concern all citizens, regardless of their favored manner of interpreting the Constitution.<sup>302</sup> While ignoring the Contract Clause is unlikely to provoke outrage from the general public, or even from most in the legal community, it is a dangerous precedent no less.<sup>303</sup>

## VI. Be Part of the Solution, Not the Problem; Fixing the Contract Clause Jurisprudence

While it may seem tempting to return the Contract Clause to its original meaning, doing so would be equally unlikely and disastrous, even if proper. Consider the number of state laws currently in existence. Now consider how many of them impair some form of contract in one way or another. While no exact answer can be given, it is safe to assume the answer is a lot. If tomorrow, all of these laws’ constitutionality was questioned, the impact would be both large and negative. This is essentially the argument made for *stare decisis*, to avoid overnight reversals of laws that create drastic changes by the courts.<sup>304</sup> Instead, the Court should follow the suggestion of the respondent and the implication of Justice Gorsuch’s dissent, and change the standard of judging private contracts challenged under the Contract Clause to match the standard of judging public contracts challenged under the Contract Clause.<sup>305</sup>

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<sup>299</sup> *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

<sup>300</sup> THE FEDERALIST NO. 44 (James Madison).

<sup>301</sup> *Sveen v. Melin*, 138 S. Ct. 1821, 1829 (Gorsuch, J., dissenting) (2018).

<sup>302</sup> Harry Steinberg, *Stare Decisis Provides Stability to the Legal System, but Applying May Involve a Love-Hate Relationship*, 73 N.Y. ST. B.A. J. 39, 43 (2001) [hereinafter *Stare Decisis*].

<sup>303</sup> *Id.*

<sup>304</sup> See *supra* *Stare Decisis*, note 302 at 39, 43.

<sup>305</sup> *Sveen v. Melin*, 138 S. Ct. 1821, 1829 (Gorsuch, J., dissenting) (2018).

The modern jurisprudence of the Contract Clause for challenges to state laws that impair public contracts is measurably stricter than challenges to private contracts.<sup>306</sup> It eliminates the deference given to the state and requires the state to consider alternatives to impairing contracts when possible.<sup>307</sup> The change would help realign the modern jurisprudence of the Contracts Clause with its original purpose.<sup>308</sup> By losing the required deference standard, the courts would examine laws to see if they are passed by states to unfairly target certain private citizens, as originally intended.<sup>309</sup> Similarly, the Court would also be able to examine state laws to be sure that they are not impairing citizen's faith in their contracts as the Framers feared would occur.<sup>310</sup> And, perhaps most importantly, it would continue to give the Contract Clause actual meaning and not be essentially written out of the Constitution.

The change would bring the modern Contract Clause back towards its original intent. The Contract Clause was meant to favor the challengers of state laws, not to make state laws unquestionable.<sup>311</sup> The modern jurisprudence pushes the high burden onto the challenger except in cases involving public contracts.<sup>312</sup> If the Contract Clause is applied to private contracts as if they were public contracts, the Contract Clause would retain its use as a bar on the states except when laws are truly necessary for emergent reasons, limiting *Blaisdell* as Justice Black argued in his dissent in *Simmons*.<sup>313</sup>

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<sup>306</sup> Compare *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 27 (1977) (a public contract impairment matter) with *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (a private contract impairment matter).

<sup>307</sup> *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 27 (1977).

<sup>308</sup> See *supra* Part II.

<sup>309</sup> THE FEDERALIST NO. 44 (James Madison).

<sup>310</sup> *Id.*; *supra* *Far From a "Dead letter"*, note 21.

<sup>311</sup> See *supra* Part II.

<sup>312</sup> Compare *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 27 (1977) (a public contract impairment matter) with *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (a private contract impact matter).

<sup>313</sup> See *Home Loan & Building Association v. Blaisdell*, 290 U.S. 398 (1934); *El Paso v. Simmons*, 379 U.S. 497, 517 (Black, J. dissenting) (1965).

The same can be said of how the shift would align more with a textual analysis of the Contract Clause. The text of the Contract Clause is clear, states must not pass laws that impair contracts.<sup>314</sup> Any interpretation that makes it harder for the state to pass these law is a step towards alignment with the text.<sup>315</sup> It would also eliminate the distinction the Court created between private and public contracts, a distinction that has no support in the text.<sup>316</sup>

Non-originalist and non-textualist methodologies of interpreting the Constitution will also find this shift in the application of the Contract Clause desirable. By applying the modern public standard to private contracts, there would still be nothing preventing states from passing laws that impair contracts in times of emergency.<sup>317</sup> What would be prevented is states passing laws that retroactively change contracts for any reason other than serious need.<sup>318</sup> This interpretation protects contracts that may become disfavored by a state for any reason and the economy. What this interpretation does not do is stop states from passing laws that are necessary to protect a state or its citizens.<sup>319</sup>

Interpretations of the Constitution almost always disfavors absolutes.<sup>320</sup> In fact, the Court's precedents in freedom of speech cases make clear that no right is absolute, regardless of what a textualist, originalist, or any other interpretative methodology may find the right to demand.<sup>321</sup> Treating all laws challenged under the Contract Clause as if they are impairing public contract is a realistic approach because it protects disfavored groups within a state, protects the economies

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<sup>314</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>315</sup> *Id.*

<sup>316</sup> The Contract Clause does not use the word private or public, or directly add any qualifier to the type of contract it applies to. U.S. CONST. art. I, § 10, cl. 1.

<sup>317</sup> *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 27 (1977).

<sup>318</sup> *Id.*

<sup>319</sup> *Stone v. Mississippi*, 101 U.S. 814, 816 (1879).

<sup>320</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL Texts* 355 (2012).

<sup>321</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919) (The Court held that though the First Amendment protects freedom of speech, that right is not absolute. It should be noted that the First Amendment contains the word "abridge" which is very similar to the word "impair" contained in the Contract Clause).

faith in contracts, and protects the legitimacy of all clauses in the Constitution, without imposing an absolute bar that the court's avoid.<sup>322</sup>

While perhaps not ideal for any one methodology of constitutional interpretation, the proposed interpretation of the Contract Clause represents a modest approach to realigning the jurisprudence of the clause with its original purpose while remaining workable in modern times. It strikes a position in the middle of the extremes of the Court's holdings in *Fletcher* and *Simmons*.<sup>323</sup> By taking this modest approach at reforming the jurisprudence, the proposed interpretation presents a realistic opportunity to implement an interpretation of the Contract Clause that most can accept.

## VII. Stare Excusis<sup>324\*</sup> and the Argument Against Changing the Contract Clause

The strongest argument against the proposed interpretation of the Contract Clause is stare decisis. Stare decisis is a legal theory that the Supreme Court should abide by its earlier decisions.<sup>325</sup> The purpose of the theory is to "promote[] stability, protect[] reliance interests, constrain[] judicial discretion, and reduce[] the decision costs of resolving constitutional cases."<sup>326</sup> It is generally agreed upon that stare decisis is an important theory in all methodologies of constitutional interpretation.<sup>327</sup>

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<sup>322</sup> *Home Loan & Building Association v. Blaisdell*, 290 U.S. 398 (1934) (the Court made clear that the Great Depression was a major factor in why the state law was allowed to impair the mortgage contracts).

<sup>323</sup> *Fletcher v. Peck*, 10 U.S. 87, 88 (1810); *El Paso v. Simmons*, 379 U.S. 497 (1965).

<sup>324</sup> Interview with Seth Essendrop, Associate Editor, *Seton Hall Law Review*, in Newark, NJ. (Jan 9, 2019) (a term coined by Seth Essendrop to describe the phenomenon of courts using or disregarding stare decisis to support already held beliefs).

\* Interview with Clare Brogan, in Morristown, NJ. (Jan 10, 2019) (*stare excusatis* is the proper Latin translation for the phrase let the excuses stand).

<sup>325</sup> Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 68 (2011) [hereinafter, *Mitchell's Stare Decisis*].

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*



The theory of stare decisis argues that the Supreme Court should be extremely hesitant in changing its current jurisprudence of the Contract Clause.<sup>328</sup> It argues that the lower courts, and all citizens, are depending on the current interpretation of the clause being consistently applied in cases across the country.<sup>329</sup>

The argument for stare decisis is less persuasive, however, when viewed in the context of the history of the Contract Clause. As examined in Part II, the Court’s interpretation of the Contract Clause has changed multiple times during the last two centuries.<sup>330</sup> Every one of these changes represents an example of the Court straying from the theory of stare decisis.<sup>331</sup> Admittedly some of the changes have been minor, but others have also been large and strongly push against the legal theory.<sup>332</sup>

It is also relevant that the current jurisprudence of the Contract Clause is less than a year old.<sup>333</sup> The argument of stare decisis strengthens with time, which means it is currently at its weakest form.<sup>334</sup> Admittedly, this rebuttal is weakened because *Sveen* relied the jurisprudence on the clause

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *See supra* Part II.

<sup>331</sup> *See, e.g. Mitchell’s Stare Decisis, supra* note 325, at 70.

<sup>332</sup> The jurisprudence of the Contract Clause is filled examples of the Court issuing holdings that change or even contradict the earlier jurisprudence of the Contract Clause. *See* *Ogden v. Saunders*, 25 U.S. 213, 254 (1827) (holding for the first time that the Contract Clause only applied to laws that impair contracts retroactively); *Curtis v. Whitney*, 80 U.S. 67, 71 (1871) (holding that the Contract Clause only applied to laws which impair “obligation of performance”); *Gilfillan v. Union Canal Co. of Penn.*, 109 U.S. 401 (1883) (holding that reasonableness of the law impairing a contract was factor to be considered by the Court); *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 415 (1934) (creating an exception to the Contract Clause for when states are responding to an emergency); *El Paso v. Simmons*, 379 U.S. 497 (1965) (holding that the should Court gave deference to the legislature in challenge to a law that impaired a public contract); *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 27 (1977) (holding that when the Court is examining laws that impair public contracts, state legislatures should not be given deference).

<sup>333</sup> *Sveen* was decided on June 11, 2018.

<sup>334</sup> *See Mitchell’s Stare Decisis, supra* note 325, at 70.

from the 1970s.<sup>335</sup> Even so, the jurisprudence of the clause being relied on is relatively small when considering the lifespan of the Contract Clause.<sup>336</sup>

When all of these arguments against the theory of stare decisis are aggregated, they create a fair rebuttal. Stare Decisis is an important element of this country's legal framework,<sup>337</sup> but it can also be used as an excuse to avoid necessary change. Reformation of the Contract Clause should not be prevented because of stare decisis.

Another argument that could be made against the implementation of the proposed interpretation of the Contract Clause is that will be too restrictive on the states, an argument that has been made since its inclusion in the Constitution.<sup>338</sup> As discussed above, this argument is unpersuasive because even strict textualist disfavors absolute interpretations of the Constitution.<sup>339</sup> The proposed interpretation maintains flexibility because it is not calling for *Blaisdell* to be overruled and therefore maintaining the theory that states can impair contracts during emergencies if done in a reasonable manner.<sup>340</sup>

Strict Originalist are also likely to take issue with the proposed interpretation not over *Blaisdell*.<sup>341</sup> The argument is that Contract Clause was known during the ratification period to be an inconvenience on states, specifically in their ability to respond to emergencies.<sup>342</sup> For this reason they will oppose any interpretation that does not enforce the same strict liability upon the

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<sup>335</sup> See *Sveen v. Melin*, 138 S. Ct. 1821 (2018) (citing to *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978)).

<sup>336</sup> See *supra* Part II.

<sup>337</sup> See *Mitchell's Stare Decisis*, *supra* note 325, at 70.

<sup>338</sup> See *supra* *Contract Clause and the Court*, note 21, at 122.

<sup>339</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL 355* (2012).

<sup>340</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL 355* (2012); *Home Loan & Building Association v. Blaisdell*, 290 U.S. 398 (1934) (where the Court did not apply an interpretation anywhere near textualism or originalism and still allowed flexibility in its interpretation of the Contract Clause).

<sup>341</sup> *Home Loan & Building Association v. Blaisdell*, 290 U.S. 398 (1934).

<sup>342</sup> See *Original Understandings*, *supra* note 13, at 528–29.

states.<sup>343</sup> As argued above, while this view may please strict originalist, the Court disfavors absolutes and it is unlikely to believe they will accept any proposed interpretation that demands an absolute bar.<sup>344</sup> So while the proposed interpretation may not go far enough for a strict originalist, it is likely their best shot at a step towards their preferred interpretation of the Contract Clause.

The proposed interpretation of the Contract Clause may not be perfect. It may present stare decisis concerns<sup>345</sup> and is unlikely to please any one particular view of constitutional interpretation.<sup>346</sup> The Court should adopt the proposed interpretation of the Contract Clause anyway because the current status of Contract Clause jurisprudence is unacceptable<sup>347</sup>, the benefits of the proposed interpretation warrant the change<sup>348</sup>, and because stare decisis should not force bad law to be addressable.

#### VIII. How the Court Should Have Held in *Sveen v. Melin*

Had the Court relied on the proposed interpretation of the Contract Clause, its holding in *Sveen* would have looked a lot more like the argument of the Justice Gorsuch's dissent. There are two major differences that would have taken place in the analysis of the Minnesota law: (1) a shift in the likelihood of finding an impairment in favor of Ms. Melin; and, (2) the removal of deference to the Minnesota legislature.

Starting with the shift in finding an impairment, the proposed interpretation would have required the Court to examine the law under the standard it has applied to public contracts.<sup>349</sup> The Court's holding in *US Trust* made clear that the Court favored finding impairments in Contract

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<sup>343</sup> See generally *Originalism and Textualism*, *supra* note 271, at 755.

<sup>344</sup> See *supra* Part VIII

<sup>345</sup> See, e.g. *Mitchell's Stare Decisis*, *supra* note 325, at 70 (noting the value that precedent should receive from the Court).

<sup>346</sup> See *supra* Part i; see also *supra* Part ii.

<sup>347</sup> See *supra* Part B.

<sup>348</sup> See *supra* Part VI.

<sup>349</sup> *Sveen v. Melin*, 138 S. Ct. 1821, 1829 (Gorsuch, J., dissenting) (2018).

Clause challenges involving public contracts.<sup>350</sup> While it is impossible to accurately predict how the Court would have held, the Court's history of finding impairments of public contracts and the fact the Court in *Sveen* found a "change" of the contract makes it more likely than not that an impairment would have been found.<sup>351</sup>

If the Court had found an impairment, it is very likely that the law would have been held to be unconstitutional under the proposed interpretation. The proposed interpretation would have required the Court to give no deference to the Minnesota legislature regarding the necessity of the law.<sup>352</sup> More so, the interpretation would have applied a standard similar to strict scrutiny.<sup>353</sup> It would have required the Court to examine if there were less intrusive methods to accomplish its goal.<sup>354</sup> As the dissent by Justice Gorsuch pointed out, there are actually implemented laws that accomplish the goal of assisting divorced spouses to address their life insurance policies that do not impair insurance contracts in multiple states.<sup>355</sup> The existence of alternatives would have required the Court to hold that the Minnesota law violated the Contract Clause of the Constitution.

## IX. Conclusion

The Supreme Court must reverse the course of its precedent with regards to the Contract Clause of the United States Constitution. The current jurisprudence of the clause is unsatisfactory regardless of which method of constitutional interpretation is employed. The ideal solution is to enforce the Contract Clause against private contracts in the same manner in which the Court currently enforces it against public contracts. This realignment of the Contract Clause is supported

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<sup>350</sup> *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 14 (1977).

<sup>351</sup> *Sveen*, 138 S. Ct. at 1817.

<sup>352</sup> *United States Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 14 (1977).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Melin*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting).

by all interpretative methods of the Constitution and likely would have led to a reversal of the Court's holding in *Sveen v. Melin*.