COMMENT

REEVALUATING THE SEVENTH CIRCUIT'S APPROACH TO CONTRACT CLAUSE CLAIMS IN AN AGE OF PENSION REFORM

THOMAS MCDONELL*

In the current era of fiscal crises, states consistently breach their own contracts with public employees to save money. Lawmakers argue that they have no choice but to enforce large pension cuts and modify collective bargaining agreements, while employees feel that the state has unfairly targeted them (especially when the state has other options, like raising taxes). Courts, faced with the difficult task of balancing these competing and compelling interests, must now consider the legality of such action by the state.

Constitutional challenges to state impairment of contract may provide the only substantive remedy for affected employees. Therefore, plaintiffs around the country have sensibly argued that particular state action (like severe pension cuts) violates their rights under the Contract Clause of the U.S. Constitution. In evaluating Contract Clause claims, the Supreme Court requires courts to consider (1) whether state action impaired a contractual obligation; (2) whether the impairment is substantial in nature; and (3) whether the impairment nonetheless is reasonable and necessary to serve an important public purpose.

While most circuits look at all these factors and engage in a true balancing test, the Seventh Circuit effectively bars all Contract Clause claims at their outset because of its narrow definition of the term "impairment." This Comment specifically challenges the Seventh Circuit's narrow interpretation of state "impairment" of contract and argues that 42 U.S.C. § 1983 is the most appropriate vehicle for making Contract Clause claims. The Seventh Circuit should adopt a three-pronged balancing test that would evaluate the reasonableness and necessity of a state's chosen course of action. Courts should examine whether a state's unilateral breach of a contract was reasonable and necessary to serve an important public purpose.

---

* J.D. Candidate, University of Wisconsin Law School, 2014; B.A. History, Boston College, 2011. Thank you to my editors and the entire *Wisconsin Law Review* staff for their time, effort, feedback, and advice. I would also like to thank my parents, Michael and Kristen McDonell, and my brothers, Andrew and Kevin, for their love and support.

INTRODUCTION

States across the country are in the midst of a suffocating fiscal crisis, one that will likely persist even as the economy rebounds.[1] Yet, rather than raising taxes to combat the debt, which is a politically unpalatable option, many lawmakers have chosen to unilaterally cut pension benefits for public employees or transform collective bargaining agreements.[2] The public servants affected by these changes realize that states and municipalities are reworking the terms of public contracts to save money, but they are also wondering whether the U.S. Constitution offers any legal protections to such drastic action by the government. That is, as states push to enact pension reforms and other measures, to what extent can they interfere with public contracts without violating citizens' constitutional rights?

1. Mary Williams Walsh & Michael Cooper, *Gloomy Forecast for States, Even if Economy Rebounds*, N.Y. TIMES, July 17, 2012, http://www.nytimes.com/2012/07/18/us/in-report-on-states-finances-a-grim-long-term-forecast.html?_r=0.

2. Eric M. Madiar, *Public Pension Benefits under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants?*, 27 A.B.A. J. LAB. & EMP. L. 179, 194 (2012).

In an increasing number of cases, states pass laws and city councils pass ordinances that terminate contracts or delay benefits in an effort to push expenses back to the next year.[3] From 2007 to 2011, for example, state and local governments deprived their pension plans of more than $50 billion.[4] As a result, state and local impairment of contracts has recently become a fiercely debated issue and has created substantial disagreement among the courts.[5] Legislatures want to reduce the debt, and they feel that invoking their police power[6]—which often results in a delay of pension benefits or termination of collective bargaining agreements—is the best way to provide for the welfare of their citizens.[7] Individuals, however, feel that the state often violates their contractual *and* constitutional rights through this process.[8]

The availability of constitutional claims for affected employees and retirees boils down to one question: Does unilateral state impairment of contract give rise to a constitutional claim, or is it merely a breach of contract? Importantly, the Contract Clause of the United States Constitution provides that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts."[9] However, the United States Court of

3. *See, e.g.*, Rick Lyman, *Illinois Legislature Approves Retiree Benefit Cuts in Troubled Pension System*, N.Y. TIMES, Dec. 3, 2013, http://www.nytimes.com/2013/12/04/us/politics/illinois-legislature-approves-benefit-cuts-in-troubled-pension-system.html; Rick Lyman & Mary Williams Walsh, *Struggling, San Jose Tests a Way to Cut Benefits*, N.Y. TIMES, Sept. 23, 2013, http://www.nytimes.com/2013/09/24/us/struggling-san-jose-tests-a-way-to-cut-benefits.html; Chris Isidore & Melanie Hicken, *Detroit Bankruptcy Plan Proposes Slashing Pension Benefits up to 34%*, CNN MONEY (Feb. 21, 2014), http://money.cnn.com/2014/02/21/news/economy/detroit-bankruptcy-pension-cuts/.

4. Walsh & Cooper, *supra* note 1.

5. STUART BUCK, LAURA & JOHN ARNOLD FOUND., PENSION LITIGATION 3–4 (2013), *available at* http://arnoldfoundation.org/sites/default/files/pdf/Pension%20Litigation%20Summary%204.9.13.pdf (providing a summary of public pension litigation in all fifty states) ("The most significant claim raised against pension reform legislation is that it violates the Contract Clause of the U.S. Constitution . . . . Courts have expressed a wide range of views . . . at times arriving at diametrically opposite conclusions. . . . To date, there is little to no definitive guidance or uniformity of interpretation on these matters, either at a state or federal level.").

6. "Police power" refers to the lawmaking authority of state and local governments, especially when the state acts in furtherance of broad social interests such as health, safety, schooling, and many others. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

7. Rachel Moroski, Comment, *Desperate Times Don't Always Call for Desperate Measures:* Professional Engineers v. Schwarzenegger *through the Lens of the Contract Clause*, 46 U.S.F. L. REV. 183, 183–85 (2011).

8. *See, e.g.*, Amended Complaint at 7–8, 13, *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875 (7th Cir. 2012) (alleging both constitutional impairment of contract through the Contract Clause (Count I) and breach of contract for violation of collective bargaining agreements (Count V)).

9. U.S. CONST. art. I, § 10.

Appeals for the Seventh Circuit has said that when a state repudiates a contract to which it is a party, it is committing a breach of contract—and only a breach of contract.[10] Judge Richard Posner, writing on behalf of the Seventh Circuit, stated that "when a state repudiates a contract . . . it is doing nothing different from what a private party does when it repudiates a contract," and "[i]t would be absurd to turn every breach of contract by a state or a municipality into a violation of the Federal Constitution."[11] The Seventh Circuit has consistently viewed state or local impairment of contracts as a mere breach of contract and not a constitutional violation.[12]

The Seventh Circuit's view on the Contract Clause stems from its narrow interpretation of the term "impairment." In the Seventh Circuit's estimation, every contract—even a contract to which the state is a party—is simply an agreement (or an obligation) to pay damages for nonperformance.[13] Therefore, as long as some remedy exists in the case of breach, the state cannot actually "impair" the contract—no matter how severe the interference.[14] Thus, rather than considering the *level* of impairment that a state's interference with a contract causes (that is, examining the severity of pension cuts) and balancing that against the public purpose that is served,[15] the Seventh Circuit uses an overly technical definition of "impairment." Through this interpretation, the Seventh Circuit has effectively barred all Contract Clause claims against the state at their very outset. In nearly every instance, the court will not equate a breach of contract by the state to a constitutional impairment of contract.

The most obvious vehicle to bring Contract Clause claims is 42 U.S.C. § 1983, as it deals with deprivations of constitutional rights. Section 1983 provides, in part, that "[e]very person who, under color of any statute . . . subject[s] any citizen . . . to the deprivation of any rights . . . secured by the [United States] Constitution . . . shall be liable to the party injured in an action at law."[16] Thus, Section 1983 provides a

10. *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996).

11. *Id*.

12. *Council 31*, 689 F.3d at 885 ("[W]e have rejected the notion that a breach of contract alone is enough to constitute a constitutional impairment of a contractual obligation.").

13. *Horwitz–Matthews, Inc.*, 78 F.3d at 1251.

14. *See id*. at 1250–51.

15. *See infra* Part I.B. The three-pronged test that courts should consider when evaluating Contract Clause claims is: (1) whether the state's actions impaired the contract, (2) whether the impairment is substantial in nature, and (3) whether the impairment was reasonable and necessary to serve an important public purpose. *See Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–13 (1983).

16. 42 U.S.C. § 1983 (2006).

procedural vehicle for claims such as excessive force, deliberate indifference, and freedom of speech—which are all issues that, like Contract Clause violations, the Constitution directly addresses.[17] Yet, despite the clear protection that Section 1983 would seem to provide citizens for Contract Clause violations (through Article I, Section 10), the Seventh Circuit has held that breaches of contract by the state are *not* constitutional deprivations—and therefore do not give rise to Section 1983 claims.[18]

Circuits around the United States disagree with one another on this issue.[19] The Fourth Circuit has recently said that a "§ 1983 action alleging state impairment of a private contract will not lie."[20] While the First Circuit has also endorsed this view,[21] the Ninth Circuit has instead argued that "[t]he right of a party not to have a State . . . impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under [S]ection 1983."[22] The District of Nebraska agreed with this reasoning from the Ninth Circuit, and described the Fourth Circuit's holding as "not persuasive."[23] In the midst of the current fiscal crisis, many more district courts around the country will have to decide whether to allow Section 1983 claims in cases involving state impairment of contract.

This Comment specifically challenges the Seventh Circuit's narrow interpretation of state "impairment" of contract and argues that Section 1983 is the most appropriate vehicle for making Contract Clause claims. Part I of this Comment provides a brief history of the Contract Clause, lays out the balancing test that courts are required to use when considering Contract Clause claims, and finally, puts this debate in context by offering a few recent examples of Section 1983 claims alleging state impairment of contract. Part II explains why other circuit courts of appeal have taken a more legally sound and practical approach to this issue than the Seventh Circuit and why there are particular

17. *See infra* Part II.D.2.

18. *See Horwitz–Matthews, Inc.*, 78 F.3d at 1250–51.

19. *See infra* Part II.B.

20. *Crosby v. City of Gastonia*, 635 F.3d 634, 640–41 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 112 (2011) (Section 1983 actions are "limited to the discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred . . . .").

21. *See Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011).

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

23. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, No. 8:10CV198, 2011 WL 2293155, at *3 (D. Neb. June 7, 2011). The Eastern District of Michigan has likewise found that the Fourth Circuit's reasoning in *Crosby* is unpersuasive. *See Welch v. Brown*, 935 F. Supp. 2d 875, 885–86 (E.D. Mich. 2013).

concerns with Seventh Circuit's view. Specifically, this Comment advocates for the Seventh Circuit's application of a true three-pronged balancing test and discusses the policy arguments for allowing Contracts Clause claims under Section 1983. Finally, this Comment concludes that the Seventh Circuit would be in error to continue denying these claims.

I. EVOLUTION OF THE CONTRACT CLAUSE

Feeling the pressure of fiscal crises, states continue to cut pension benefits and unilaterally breach their own contracts. Public employees, in search of some relief for this type of state action, now look to the United States Constitution and specifically the Contract Clause. Examining the evolution of the Contract Clause ultimately demonstrates the appropriateness of constitutional challenges to these recent impairments of contract by the state.

This Part explores three main topics. First, it lays out a general overview of the Contract Clause through historical examples, which provides insight into why citizens have made these constitutional claims in the past and how courts have reacted to them. Second, it describes the balancing test that courts are required to use when considering Contract Clause claims and examines why courts have chosen this test. Finally, it offers a few recent examples of Section 1983 claims alleging state impairment of contract—which puts this debate into context by demonstrating the conflicting holdings of modern courts.

A. Brief History of the Contract Clause

The Contract Clause has a checkered history in the United States. As stated above, the U.S. Constitution itself in Article I, Section 10 sets forth that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[24] In 1810, several years after the Constitution had been ratified, the U.S. Supreme Court staunchly defended the rights vested in individuals through the Contract Clause.[25] Chief Justice John Marshall wrote in *Fletcher v. Peck*[26] that, through the protections of this Clause, "the power of the legislature over the lives and fortunes of individuals is expressly restrained."[27]

As the nineteenth and twentieth centuries progressed, however, the power of the Contract Clause began to wane. Indeed, courts realized that absolute deference to the Clause was impossible for one reason: if the

24. U.S. CONST. art. I, § 10.
25. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).
26. 10 U.S. (6 Cranch) 87 (1810).
27. *Id.*

state can never impair private contracts, the regulatory power of the state is severely undermined. In 1934, while the United States was struggling through the Great Depression, the U.S. Supreme Court issued a landmark defense of the state's police power in *Home Building & Loan Association v. Blaisdell*.[28] The Court held that "the State also continues to possess authority to safeguard the vital interests of its people . . . . It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'"[29]

While the Contract Clause seemed dormant for many years after *Blaisdell*, the Supreme Court again breathed life into the Clause in 1977. In *United States Trust Co. of New York v. New Jersey*,[30] the Supreme Court struck down a New Jersey statute that attempted to terminate an agreement between the state and certain bondholders.[31] The Supreme Court emphasized that this was a contract to which the state was a party, and its own self-interest was at stake[32]—as opposed to *Blaisdell*, where the state impaired obligations of mortgages between private parties and the state itself was not a party to the contract.[33] In situations like this, "[a] government entity can always find a use for extra money, especially when taxes do not have to be raised."[34] Thus, the Court pointed out an important flaw in deferring to the state's police power too often: "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."[35]

Since *U.S. Trust Co.*, the U.S. Supreme Court has not directly ruled on any Contract Clause cases that involve state impairment of its own contracts. However, the Court has occasionally dealt with state modifications of *private* contracts since *U.S. Trust Co.*, and has struck down laws that do not seek to remedy a broad and desperate economic situation.[36] The Court in *Allied Structural Steel Co. v. Spannaus*,[37] for

---

28. 290 U.S. 398 (1934). The Minnesota statute in question temporarily restricted the ability of mortgage holders to foreclose. *Id.* at 415–16. The U.S. Supreme Court deemed this to be a valid exercise of the state's police power (and not a violation of the Contract Clause), especially in light of the economic emergency at hand and the temporary nature of the action. *Id.* at 426, 439, 441–42.

29. *Id.* at 434–35.

30. 431 U.S. 1 (1977).

31. *Id.* at 9–14.

32. *Id.* at 25–26.

33. *Blaisdell*, 290 U.S. at 416.

34. *U.S. Trust Co. of N.Y.*, 431 U.S. at 26.

35. *Id.*

36. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 236–38, 249 (1978). Minnesota enacted a statute, under which private employers of 100 or more employees providing pension benefits were subject to a "pension funding charge." *Id.* at 238. In upholding the employer's Contract Clause claim, the Court noted that this statute

example, upheld a Contract Clause claim and pointed out that the severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.[38] Moreover, "[t]he requirement of a legitimate public purpose [behind the legislation] guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[39]

B. Balancing Test and Framework for Contract Clause Claims

There are several factors that courts are required to consider when determining the validity of Contract Clause claims. Since the *U.S. Trust Co.* decision, courts have generally applied a three-pronged test[40]: (1) whether state action in fact impaired a contractual obligation, (2) whether the impairment is substantial in nature, and (3) whether the impairment nonetheless is reasonable and necessary to serve an important public purpose.[41]

The U.S. Supreme Court has said that analysis of the first prong of this test (whether state action impaired a contractual obligation) is normally "unproblematic."[42] Thus, courts usually need only address the second and third prongs. When considering the third prong of the test, or the "reasonableness" prong, courts have also considered whether "the regulation was foreseeable . . . if the law was created for public safety reasons, and . . . if the law was enacted pursuant to an emergency or if the law is temporary."[43]

Courts also "distinguish between government interference with private contracts and government interference with its own contractual

---

had an extremely narrow focus (targeted a select group of employers) and did not serve a broad societal interest. *Id.* at 248–49.

37. 438 U.S. 234 (1978).

38. *Id.* at 245.

39. *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983).

40. The U.S. Supreme Court itself has endorsed the use of a similar three-pronged test in evaluating Contract Clause claims. *See id.* at 411–13.

41. Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 30 (2011) (citing *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1015 (4th Cir. 1993); *Mass. Cmty. Coll. Council v. Commonwealth*, 649 N.E.2d 708, 712–13 (Mass. 1995)).

42. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). By "unproblematic," the Court means that the "impairment" analysis itself (the first prong of the test) is usually quite simple because it is obvious whether or not the state has interfered with the contractual obligation. *See id.* Thus, the more significant questions are whether that impairment was indeed substantial and whether it was reasonable and necessary to serve a legitimate public purpose.

43. Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 294 (2010).

obligations . . . ."[44] Importantly, a stricter standard of review applies to government interference with its own contracts because of the state's power to modify contracts to which it is a party.[45] Again, the Seventh Circuit almost never reaches the third prong of the balancing test because it does not view state breaches of contract as actual "impairment" of contract. Thus, Contract Clause claims in the Seventh Circuit regularly fail to meet the first prong of the test.

C. Putting This Debate into Its Current Context

This Part explores two recent cases that illustrate courts' opposing viewpoints on Contract Clause claims in the context of state impairment of contract. The first case, *Donohue v. Mangano*,[46] arises out of Nassau County, New York.[47] Nassau County passed a local law that allowed the County Executive (Edward Mangano) to unilaterally modify the terms of negotiated written collective bargaining agreements.[48] In its explanation for passing the law, the county cited that it was in desperate need of funds and was "embroiled in a fiscal crisis."[49]

Collective bargaining representatives for civil service employees, retirees, and police officers all brought suit against the county, and in the ensuing litigation, the district court provided a strong defense of the Contract Clause.[50] The court held that the law was "far from a mere 'technical' impairment" and that it operated as a "substantial, if not a total impairment, of the relevant contractual relationships."[51] Moreover, the court found that the local law was not reasonable or necessary, even though it was enacted for a legitimate public purpose.[52] Here, the court clearly considered all parts of the three-pronged balancing test.[53] This district court also recognized that Section 1983 was the proper vehicle by which to allege Contract Clause violations.[54]

---

44. *See* Moroski, *supra* note 7; *see also Mass. Cmty. Coll. Council*, 649 N.E.2d at 711.

45. *See* Moroski, *supra* note 7, at 196–97.

46. 886 F. Supp. 2d 126 (E.D.N.Y. 2012).

47. *Id.* at 132.

48. *Id.* at 134.

49. *Id.*

50. *Id.* at 155–62.

51. *Id.* at 156–57.

52. *Id.* at 162.

53. *See supra* Part I.B for analysis of the three-pronged balancing test.

54. *Donohue*, 886 F. Supp. 2d at 155. For a similar case providing a strong defense of the Contract Clause, see *Welch v. Brown*, 935 F. Supp. 2d 875 (E.D. Mich. 2013). In *Welch*, the City of Flint passed a local law that gave an Emergency Manager (Michael Brown) the authority to unilaterally modify the terms of negotiated, existing collective bargaining agreements. *Id.* at 878. Flint's Emergency Manager cited "financial

In contrast, a recent Illinois case, *Council 31 of the American Federation of State, County, and Municipal Employees v. Quinn*,[55] provides an opposing viewpoint.[56] The State of Illinois, facing a "significant and unprecedented fiscal deficit," instituted a pay freeze for 40,000 state employees, which repudiated the agreements that the parties had previously reached.[57] Council 31, the employees' exclusive bargaining representative, brought suit on behalf of the affected employees, alleging that the state's actions violated the Contract Clause.[58]

The case eventually made it through to the Seventh Circuit. In its opinion, the Seventh Circuit acknowledged that a three-pronged test should be used to decide Contract Clause claims but, unsurprisingly, did "not wade into all of [those] disputes . . . because [they] believe[d] that the issue of impairment settle[d] the matter."[59] The court described the plaintiffs' arguments as merely a "classic breach of contract action," and not an issue of constitutional impairment.[60] The court's inquiry did not focus on the level of impairment by the state, but only on whether the state "'set up a defense [to] prevent[] [Council 31] from obtaining damages . . . for the breach [of contract.]'"[61] To put it simply, the Seventh Circuit did not recognize the state's pay freezes for 40,000 state employees as an impairment of a contractual relationship.[62] Therefore, no Section 1983 claim could survive.

II. REEVALUATING THE SEVENTH CIRCUIT'S APPROACH TO CONTRACT CLAUSE CLAIMS

When states interfere with public contracts, the Contract Clause should serve as an essential tool for aggrieved plaintiffs seeking a remedy. The Framers of the Constitution intended the Contract Clause to have a significant influence,[63] and it serves as protection for individual

distress" as the reason behind altering lifetime health insurance benefits for retirees. *Id.* at 879. The court held that the modifications imposed were a substantial impairment and were made for a legitimate public purpose, but that those particular modifications were *not* reasonable and necessary to achieve their stated purpose. *Id.* at 882–84.

55. 680 F.3d 875 (7th Cir. 2012).

56. *See id.* at 884–85.

57. *Id.* at 878.

58. *Id.*

59. *Id.* at 885.

60. *Id.*

61. *Id.* (citing *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996)).

62. *Id.* at 885–86.

63. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810).

citizens from rash government decision making.[64] The Seventh Circuit, however, effectively bars all Contract Clause claims at their outset because of its narrow interpretation of state "impairment."[65] The Seventh Circuit should instead adopt a three-pronged balancing test that evaluates the reasonableness and necessity of a state's chosen course of action. Section 1983 provides the best vehicle for bringing Contract Clause claims because of its focus on deprivation of constitutional rights.

A. Why the Contract Clause Matters

The Founders added the Contract Clause to the United States Constitution because they wanted it to have real effect.[66] The Clause has a prominent place in the Constitution (placed in Article I, Section 10), and the Founders stated its principle in clear and plain language ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").[67] Moreover, courts understood from an early stage that, in adopting the Constitution and its clauses, the people "manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[68] Thus, the Framers themselves recognized that states might often act rashly or in the heat of the moment to pass laws—frequently at the unfair expense of individual citizens.[69] To combat these types of impulsive actions by the states, the Framers placed many protections for individuals in the Constitution, one of them being the Contract Clause.[70]

Courts today still hold the Framers' intent in high regard with respect to the Contract Clause. The U.S. Supreme Court, for example, has held that the Contract Clause still has significant meaning in modern constitutional jurisprudence and the Framers' intended limitation on state power is not merely illusory.[71] Justice Harry Blackmun expressed this belief when writing for the majority in *U.S. Trust Co. v. New Jersey*; Justices Warren Burger, William Rehnquist, and John Paul Stevens joined in his opinion.[72] Whatever the public policy of the day, the Contract Clause "remains a part of our Constitution."[73] In fact, the U.S. Supreme Court has specifically instructed courts to approach the

64. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).
65. *See Horwitz–Matthews, Inc.*, 78 F.3d at 1250–51 (7th Cir. 1996).
66. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).
67. U.S. CONST. art. I, § 10.
68. *Fletcher*, 10 U.S. at 138.
69. *See id.* at 137–38.
70. *Id.*
71. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16 (1977).
72. *Id.* at 2.
73. *Id.* at 16.

Contract Clause query by measuring "factors that reflect the high value the Framers placed on the protection of private contracts."[74]

Even beyond the Founders' intent, though, the Contract Clause is important because it has practical effects for individual, aggrieved plaintiffs. The ability of plaintiffs to bring constitutional claims rather than mere breach of contract actions affects a range of important issues. Three issues and their practical effects, in particular, stand out.

First, one cannot discount the deterrence factor. That is, the purpose of these constitutional claims—in particular Section 1983 claims—is to "deter violations through suits . . . [to] stop government illegality and to obtain damages for injuries already suffered."[75] State and local governments will be less likely to impair contracts in the future if they know that constitutional violations are a factor and the remedies for potential plaintiffs extend further than breach of contract damages.

Second, the parties to a contract also have expectations, and public employees have a strong reliance interest in seeing the state fulfill its contractual obligations. Just because budget crises exist does not mean that courts can set aside their constitutional obligations; "to find otherwise would mean that a contract with our state government has no meaning, and that the citizens of our state can place no trust in the work of our [l]egislature."[76] Therefore, Contract Clause claims can actually enhance the meaning of a contract between the state and its citizens; the terms of a contract take on more significance when the state cannot unilaterally alter the agreement—and do so with immunity from constitutional violation.

Finally, whether the government action amounts to a constitutional impairment of contract or an ordinary breach of contract affects plaintiffs' potential remedies.[77] The remedy for an unjustified contractual impairment is often an injunction prohibiting the municipality from enforcing the ordinance (or prohibiting the state from enforcing the law)—expectation or restitution damages simply do not provide the same

74. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

75. *See* Secunda, *supra* note 43, at 285 n.144 (citing Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 944 (2001)).

76. *Williams v. Scott*, No. 2011 CA 1584, 2012 WL 1379453, at *1–2, 4 (Fla. Cir. Ct. Mar. 6, 2012) (unpublished trial court order) (rejecting Florida's attempt to cut state and local government salaries by 3 percent to close a gaping budget hole; held to be more than a mere breach of contract).

77. Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 737 (2001) ("If the government action is merely a breach of contract, remedies such as damages, restitution, and specific performance are available to the private party. When the government action constitutes a contractual impairment, however, the focus turns to whether the government is justified in breaking its contractual obligations.").

effect.[78] With regard to pension reform, for example, plaintiffs may use a Contract Clause claim to obtain injunctive relief which bars enforcement of specific pension reform measures, such as an increase in the retirement age or an elimination of cost-of-living adjustments.[79] In contrast, courts in ordinary breach of contract suits (non-constitutional claims) are hesitant to mandate specific performance, and breach of contract damages themselves are subject to certain defenses.[80] In *Council 31*, the case from Illinois discussed above, the state simply argued that it had no alternative to breaching the contract: "the State cannot be held liable for a breach of contract when . . . insufficient funds exist to fulfill a contractual obligation."[81]

B. Contrasting Theories on "Impairment" of Contract

This Subpart explores two contrasting theories of state impairment of contract. While the Seventh Circuit employs a narrow and technical definition of "impairment," other circuits have applied a more legally sound and practical interpretation. Because the Seventh Circuit uses such a narrow definition of "impairment," it prevents valid Contract Clause claims at their outset and fails to engage in the proper balancing test when evaluating state interference with contract.

1. SEVENTH CIRCUIT'S APPROACH

The Seventh Circuit's interpretation of "impairment" has roots in the way it views a contract. In its opinions, this Circuit often relies on Oliver Wendell Holmes's discussion of obligations of contract.[82] Under Holmes's formulation, the obligation of contract is simply an agreement to pay damages for nonperformance.[83] While Holmes was referring to contracts between private parties,[84] the Seventh Circuit has taken

78. *See id.* at 738.

79. *See* Secunda, *supra* note 43, at 271.

80. *See Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996) (discussing specific performance); *see also Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 886 (7th Cir. 2012) (discussing the State's counterarguments to Council 31's breach of contract claims).

81. *Council 31*, 680 F.3d at 886.

82. *Horwitz–Matthews, Inc.*, 78 F.3d at 1251.

83. *Id.*

84. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Holmes does not refer to contracts to which the state is a party anywhere in this article. Instead, he laments that moral ideas receive too much consideration in *private* contracts, especially when dealing with remedies. In a case where a British court granted specific performance of a lease, Holmes clearly disagreed, and argued that it should be "at [the party's] election to either lose the damages or make the lease." *Id.* "But," Holmes

Holmes's formulation to mean that *all* contracts—even contracts to which the state is a party—are subject only to the "obligation to pay damages for nonperformance" principle.[85]

Under the Seventh Circuit's philosophy then, as long as a duty to pay *some* breach of contract damages exists, the obligation of contract cannot be said to have been impaired.[86] A problem arises, though, because this type of thinking does not distinguish between ordinary breach of contract damages and remedies for constitutional violations—nor does it separate private party contracts from contracts in which the state is involved. In *Horwitz–Matthews, Inc. v. Chicago*,[87] Judge Richard Posner explained how the Seventh Circuit does not treat contracts any differently if the state is involved: "[f]or when a state repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contract."[88] Thus, the only inquiry courts make under this analysis is whether the state set up a defense that prevented plaintiffs from obtaining any damages for the breach.[89] It turns out that this burden is practically impossible for plaintiffs to meet, and therefore constitutional "impairment" of contract is unheard of in the Seventh Circuit.[90]

Interestingly, the U.S. Supreme Court, even when defending the states' police power against Contract Clause claims, has not defined "impairment" as narrowly as the Seventh Circuit. Chief Justice Charles Hughes, writing for the majority in *Blaisdell* (a case that *struck down* a Contract Clause claim), stated that impairment "has been predicated of laws which without destroying contracts derogate from substantial contractual rights."[91] Therefore, the *Blaisdell* Court did not reject the Contract Clause claim because there was no impairment; rather, the state's police power overruled the impairment because "the State . . . continues to possess authority to safeguard the vital interests of its people."[92] Moreover, a more recent Supreme Court decision has held that

---

continued, "such a . . . matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." *Id.*

85. *See, e.g.*, *Council 31*, 680 F.3d at 885.

86. *Id.*

87. 78 F.3d 1248 (7th Cir. 2012).

88. *Id.* at 1250.

89. *Council 31*, 680 F.3d at 885.

90. *See infra* Part II.C for further discussion of the Seventh's Circuit reasoning behind its definition of "impairment." For an example of the Seventh Circuit rejecting plaintiffs' Contract Clause claim at the "impairment" stage, see *supra* Part I.C.

91. *Home Blg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934).

92. *Id.* at 434. The Supreme Court's reasoning here (in a 1934 case) appears similar to the current third prong of the Contract Clause claim test. The third prong is whether the impairment was reasonable and necessary to serve an important public purpose. *AFSCME, Local 2957 v. City of Benton*, 513 F.3d 874, 879 (8th Cir. 2008).

the question of whether a particular state action impaired a contractual obligation is normally "unproblematic."[93]

2. HOW OTHER CIRCUITS DEFINE "IMPAIRMENT"

Whereas the Seventh Circuit prevents Contract Clause claims at their outset, other circuits have applied balancing tests to determine if there has been a constitutional impairment. These balancing tests vary in their exact language, but almost all use a three-part test to determine whether state action violates the Contract Clause.[94] Under the balancing tests, courts generally look first to the level of state impairment, then to the law's purpose, and finally to the reasonableness and necessity of the law.[95] Importantly, the Seventh Circuit never engages in a true three-pronged balancing test for analyzing Contract Clause claims; it does not consider whether the impairment was substantial in nature or whether it was reasonable and necessary to serve a legitimate public purpose.[96]

Other circuits commonly recognize that the state has substantially interfered with a contractual relationship but then go on to weigh the other factors in the balancing test. The Eighth Circuit, for example, factors in (1) whether substantial impairment existed, (2) whether there was a significant and legitimate public purpose behind the regulation, and (3) (if the state identifies a public purpose) whether the adjustments of rights and responsibilities of contracting parties is based upon reasonable conditions and is appropriate to the legislation's adoption.[97]

The Second Circuit, in determining if a law impermissibly encroaches on contract rights, uses a similar test.[98] Courts ask themselves three questions, which are to be answered in succession[99]: first, whether the contractual impairment is substantial;[100] second, if the impairment is substantial, whether "the law serve[s] a legitimate public purpose such as

---

93. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992); *see supra* note 36 (giving an explanation of "unproblematic").

94. *See, e.g.*, *AFSCME, Local 2957*, 513 F.3d at 879; *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1015 (4th Cir. 1993); *Welch v. Brown*, 935 F. Supp. 2d 875, 881–82 (E.D. Mich. 2013); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 155–56 (E.D.N.Y. 2012).

95. *Donohue*, 886 F. Supp. 2d at 155–56.

96. *See*, *e.g.*, *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 885–86 (7th Cir. 2012) (dismissing the Contract Clause claim by holding that no impairment of contract could have occurred).

97. *AFSCME, Local 2957*, 513 F.3d at 879.

98. *Donohue*, 886 F. Supp. 2d at 155–56.

99. *Id.* at 156.

100. *Id.*

remedying a general social or economic problem;"[101] and finally, if such purpose is demonstrated, whether the "means chosen to accomplish this purpose [are] reasonable and necessary."[102] Contract Clause claims that are struck down in these circuits (and others) are often dismissed because the court finds the state complied with the second and third prongs of the test—not because of the substantial impairment issue.

C. Why the Seventh Circuit's Approach Is Too Narrow

In applying its limited approach to Contract Clause claims, the Seventh Circuit fails to account for several important factors. Courts should not ignore the uniqueness of unilateral action by the state and, in so doing, should seek to apply a true three-pronged balancing test to evaluate drastic state action. Ultimately, the Seventh Circuit should hold states to a higher standard and examine the reasonableness and necessity of their impairments with contract.

1. UNILATERAL ACTION TAKEN BY THE STATE

The Seventh Circuit fails to recognize any distinction whatsoever between a breach of contract by a private party and a breach of contract by the state.[103] While other circuits frequently recognize the unique nature of unilateral action taken by the state, the Seventh Circuit makes no reference to the fact that the state's own self-interest is at stake in public contracts. Instead, under the Seventh Circuit's reasoning, when states or municipalities pass laws that terminate existing agreements, it is the equivalent of a private contracting party saying: "I promised to sell you my land, but I've thought better of the promise and have decided to withdraw it."[104]

Therefore, the Seventh Circuit stresses that, just as the private contracting party in the above situation may be subject to a breach of contract suit, so too may the state when it terminates public contracts.[105] While this theory might seem plausible on its face—the theory that when a state terminates a contract, even wrongfully, there is no right to demand performance but only a right to seek damages[106]—it neglects to point out the defenses available to states and the constitutional remedies that are

101. *Id.*

102. *Id.*

103. *See, e.g.*, *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996).

104. *Id.* at 1251.

105. *Id.*

106. *Id.*

foregone.[107] For example, in its attempt to defeat a breach of contract claim, one state simply argued that it had insufficient funds to fulfill the contractual obligation.[108]

Unilateral action is defined as "the alteration of existing terms, policies, or practices by only one party privy to [the agreement] . . . ."[109] Courts have recognized that there is an important difference between unilateral action taken by private parties and unilateral action taken by the state.[110] Crucially, unilateral modification of public sector bargaining agreements by a state legislature generally implicates constitutional issues, as opposed to merely contractual or statutory issues.[111]

Courts usually look to the Supreme Court's holding in *U.S. Trust Co.* when describing why unilateral action by the state should be viewed in a unique light.[112] As mentioned above, in *U.S. Trust Co.*, the Supreme Court struck down a New Jersey statute that attempted to terminate an agreement between the state and certain bondholders.[113] While many expected the Court to dismiss the bondholders' Contract Clause claim, the Court instead provided a firm defense of a constitutional cause of action under those circumstances. Although the Court recognized the state's need to occasionally modify its financial obligations, it also held that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[114] States cannot reduce their financial obligations whenever they want because the Contract Clause would then provide no protection at all against a state acting unilaterally and in its own self-interest.[115]

---

107. Schwartz, *supra* note 77, at 736–38 ("[W]hen distinguishing between breach of contract and impairment of contract, the court's central inquiry focuses on remedies: when an adequate remedy in damages exists, government action is characterized as a breach of contract that does not rise to the level of contractual impairment. When the government action consists of *passing a law*, an adequate remedy in damages generally does not exist because the law will be a sufficient defense, making it illegal or impossible for the defaulting party to fulfill its contractual obligation. . . . [I]f the government impairment is not justified, the court will issue an injunction prohibiting the municipality from enforcing the ordinance.").

108. *See Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 886 (7th Cir. 2012).

109. *See* Befort, *supra* note 41, at 13.

110. *Id.*

111. *See id.* at 25.

112. *See id.* at 24–25.

113. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 9–14, 32 (1977).

114. *Id.* at 25–26.

115. *Id.* at 26.

2. REASONABLE AND NECESSARY TO SERVE AN IMPORTANT PUBLIC PURPOSE

The third prong of many circuits' balancing test—whether the action is reasonable and necessary to serve an important public purpose—creates the most debate, but the majority of Contract Clause cases *should* depend on this factor. States and municipalities across the country are passing laws and ordinances in an attempt to combat their fiscal crises. However, at least one court has stated that a state's budgetary problems alone are not sufficient to constitute a finding of reasonableness and necessity under the Contract Clause.[116] Moreover, an interference with contract "will likely not be considered reasonable and necessary if the state imposed a drastic impairment when an 'evident and more moderate course was available.'"[117]

While courts in general often include the extent of impairment, the importance of the public purpose to be served, and foreseeability into their analysis of the "reasonableness" prong, different circuits weigh certain factors more heavily than others. In Massachusetts, for example, whether state interference with a contract is "reasonable" usually depends on foreseeability.[118] There, an impairment is not reasonable if the problem sought to be solved by the legislature's action existed at the time the contractual obligation was incurred; if the foreseen problem has changed "only in degree and not in kind," the impairment is not a reasonable one.[119]

The Fourth Circuit, on the other hand, has taken a broader approach to the "reasonableness" prong.[120] In finding that certain state actions *were* reasonable, this court emphasized the fact that states were dealing with "'broad, generalized economic or social problem[s].'"[121] Additionally, the Fourth Circuit held that the ability to raise taxes or shift funds among programs does not automatically preclude a finding of necessity[122]—thus the court de-emphasized the importance of reasonable alternatives. In any event, these circuits are properly judging Contract Clause claims because they are analyzing the reasonableness and

116. *Donohue v. Paterson*, 715 F. Supp. 2d 306, 321–22 (N.D.N.Y. 2010).

117. *See* Moroski, *supra* note 7, at 208 (quoting *Donohue*, 715 F. Supp. 2d at 322).

118. *See* Befort, *supra* note 41, at 33 (citing *Mass. Cmty. Coll. Council v. Commonwealth*, 649 N.E.2d 708, 713 (Mass. 1995)).

119. *Mass. Cmty. Coll. Council*, 649 N.E.2d at 713.

120. *See* Befort, *supra* note 41, at 34.

121. *Balt. Teachers Union v. Mayor of Balt.*, 6 F.3d 1012, 1021 (4th Cir. 1993) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978)).

122. *Id.* at 1019–20.

necessity of state action; the Seventh Circuit never reaches this analysis because it dismisses nearly all claims at the "impairment" stage.

3. POLICY REASONS FOR PUTTING GREATER EMPHASIS ON A THREE-PRONGED BALANCING TEST

Many courts outside the Seventh Circuit use a three-pronged test for Contract Clause claims to "balance the severity of the contractual impairment with the state's need to take such action in the broader public interest."[123] As described above, the Seventh Circuit, unfortunately, does not engage in this type of balancing with Contract Clause claims because of its overly technical definition of "impairment." Yet, as a matter of policy, the Seventh Circuit should move towards a true three-pronged test for several reasons. The Contract Clause still has real meaning in today's world, and it should continue to provide protection to aggrieved citizens.[124] By not engaging in a three-pronged test, courts also diminish the meaning of contracts with state governments and the trust citizens have in their legislature.[125]

Furthermore, as recently as 1996, the U.S. Supreme Court recognized that a stricter level of scrutiny under the Contract Clause applies when a state alters its own contractual obligations.[126] The Seventh Circuit's narrow interpretation of "impairment" is legally unsound because it ignores this required heightened level of scrutiny. As demonstrated above, the Seventh Circuit views contractual impairments by the state (such as an increase in the retirement age or an elimination of cost-of-living adjustments in pension reform measures) as identical to ordinary breaches of contract between private parties.[127]

The Seventh Circuit is clearly concerned with the states' fiscal crises and therefore appears to want to be deferential to a state's chosen course of action;[128] however, in doing so, the court misapplies an important standard. As a result, aggrieved plaintiffs are unfairly denied courts' analysis of the "reasonableness and necessity" of state action.[129]

---

123. *See* Befort, *supra* note 41, at 30.

124. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16, 26 (1977).

125. *Williams v. Scott*, No. 2011 CA 1584, 2012 WL 1379453, at *1–2, 4 (Fla. Cir. Ct. Mar. 6, 2012) (unpublished trial court order) (rejecting Florida's attempt to cut state and local government salaries by 3 percent to close a gaping budget hole; held to be more than a mere breach of contract).

126. *United States v. Winstar Corp.*, 518 U.S. 839, 897 n.41 (1996).

127. *See supra* notes 103–06 and accompanying text.

128. *See, e.g.*, *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps. v. Quinn*, 680 F.3d 875, 878, 885–86 (7th Cir. 2012).

129. *See, e.g.*, *Donohue v. Paterson*, 715 F. Supp. 2d 306, 321–22 (N.D.N.Y 2010).

Moreover, the courts deny plaintiffs federal constitutional claims, which can lead to constitutional remedies—breach of contract damages alone will not suffice.[130] Finally, because this is unilateral action by the states when their own self-interest is at stake,[131] the Seventh Circuit must adopt a standard that truly examines the reasonableness and necessity of the interference with contract.

D. Section 1983 Is the Most Appropriate Vehicle for Contract Clause Claims

If Contract Clause claims provide a valid constitutional challenge to state interference with contract, affected employees (and attorneys bringing their claims) want to know what is the most appropriate legal vehicle for these kinds of suits. Although there is disagreement among circuits on this issue, 42 U.S.C. § 1983 ultimately provides the most legally sound vehicle for Contract Clause claims.

1. DISAGREEMENT BETWEEN CIRCUITS

The disagreement among circuits on Section 1983 as a vehicle for Contract Clause claims stems from differing views on what is considered a "deprivation of rights."[132] By its very language, one would imagine that Section 1983 provides a cause of action to a Contract Clause plaintiff; the statute states that an injured party may bring suit for "deprivation of any rights . . . secured by the Constitution,"[133] and the Contract Clause resides in Article I, Section 10 of the Constitution. However, several circuits, including the Seventh, have held that Section 1983 claims for Contract Clause violations are reserved only for those "discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts."[134] In contrast, several other courts believe that this narrow reading of Section 1983 is without merit.[135] Under their analysis, the rights guaranteed by Section 1983 should be "liberally and beneficently construed," and therefore a deprivation of citizens' rights under the Contract Clause gives rise to a Section 1983 cause of action.[136]

---

130. *See* Schwartz, *supra* note 77, at 736–37.

131. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977).

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

133. 42 U.S.C. § 1983 (2006).

134. *Crosby*, 635 F.3d at 640.

135. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, No. 8:10CV198, 2011 WL 2293155, at *2–3 (D. Neb. June 7, 2011).

136. *Id.*

2. EQUATING IMPAIRMENT OF CONTRACT TO A CONSTITUTIONAL DEPRIVATION (THROUGH SECTION 1983)

The purpose of Section 1983 claims is to vindicate constitutional rights and deter future government violations of these rights.[137] If Section 1983 provides a procedural vehicle for claims like excessive force, deliberate indifference, and freedom of speech[138]—all issues that, like Contract Clause violations, the Constitution directly addresses—there is no reason to deny plaintiffs the ability to bring Contract Clause claims through Section 1983. The U.S. Supreme Court has said that Section 1983 is to be "broadly" and "liberally" construed.[139] In sum, the Seventh Circuit and others have improperly refused to equate impairment of contract with a deprivation of a constitutional right—even when there is substantial evidence that state impairment of contract is more than simply a breach of contract issue.

Courts which have held that state interference with contract is not an issue subject to Section 1983 have misapplied Supreme Court jurisprudence in their analysis.[140] In *Crosby v. City of Gastonia*,[141] the Fourth Circuit relied on its own broad reading of *Carter v. Greenhow*,[142] an obscure 1885 Supreme Court case, to hold that Contract Clause cases are not subject to Section 1983.[143] However, the Supreme Court has since given the *Carter* decision a narrow reading.[144] Moreover, the Supreme Court and others have held that a broad construction of Section 1983 is required when constitutional rights are alleged[145]—there is no reason why Contract Clause rights should not also receive the benefit of this broad construction.

CONCLUSION

The Seventh Circuit needs to broaden its interpretation of "impairment" and use a true three-pronged balancing test when evaluating Contract Clause claims. Rather than effectively giving states and municipalities immunity for any action they take to interfere with contracts, the Seventh Circuit should instead focus on the reasonableness

137. *See* Secunda, *supra* note 43, at 285 n.144 (citing Wells, *supra* note 75, at 944).

138. *See* Wells, *supra* note 75, at 944.

139. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991).

140. *See, e.g.*, *Welch v. Brown*, 935 F. Supp. 2d 875, 886 (E.D. Mich. 2013).

141. *Crosby v. City of Gastonia*, 635 F.3d 634 (4th Cir. 2011).

142. 114 U.S. 317 (1885).

143. *Crosby*, 635 F.3d at 640–41.

144. *Higgins*, 498 U.S. at 451 n.9.

145. *Id.* at 443–45.

and necessity of the government action. Section 1983 claims provide the best vehicle for Contract Clause violations because deprivations of constitutional rights are at stake. Allowing Section 1983 claims will help deter future impairments of contract by state and local governments, and also strengthen the public's trust and confidence in their legislatures.

Importantly, with states continuing to come up with creative ways to battle their fiscal crises, courts cannot shy away from the state impairment of contract issue at this crucial moment. States consistently breach their own contracts with public employees to save money. Lawmakers argue that they have no choice but to enforce large pension cuts and modify collective bargaining agreements, while employees feel that the state has unfairly targeted them (especially when the state has other options, like raising taxes). Courts, faced with the difficult task of balancing these competing and compelling interests, must now consider the legality of such action by the state.

If lawmakers in a particular state make a drastic change to certain contracts with public employees, the courts should judge the reasonableness and necessity of that action. Citizens expect this much from their courts. If a court deems a substantial impairment of contract to be reasonable and necessary to serve an important public purpose, then the court has provided a reasoned analysis and helped to legitimize the state action in the eyes of the public. However, dismissing Contract Clause challenges to public pension reform at the "impairment" stage prevents courts from ever reaching this analysis. The Seventh Circuit should reconsider its narrow definition of impairment of contract and examine these cases on the merits rather than dismissing them on a perceived technicality.