SELECTING THE RIGHT VEHICLE: IS A CIVIL RIGHTS CLAIM UNDER 42 U.S.C. § 1983 THE RIGHT WAY TO REMEDY A CONTRACTS CLAUSE VIOLATION?

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* Articles Editor, *Michigan State Law Review*, J.D. 2020, Michigan State University College of Law; B.B.A. 2017, Saint Norbert College. I would like to thank the staff of the *Michigan State Law Review* for their insightful comments through the entire process of writing this Note. I would also like to extend my sincerest gratitude to Professor Elliot Spoon at Michigan State University College of Law for providing clarity and constructive comments throughout the Note writing process. I could not have made it through law school without the unconditional love and support from my fiancé, Nicole. Your belief in me made a not so easy three years not only possible but successful. I would be remiss if I did not recognize my two fuzzy stress relieving Golden Retrievers, Murphy and Sullivan. Lastly, I want to thank my mom, dad, and brother, Adam, for everything they have done to help make me who I am today. My accomplishments are just as much yours as they are mine.

INTRODUCTION

James Madison once declared that laws impairing the obligation of contracts were contrary to the central role of government—namely, appropriate legislative reach.[1] Such a view took hold in early America, particularly with the United States Supreme Court, because Court decisions upholding the Contracts Clause were responsible for nearly half of state laws deemed unconstitutional by 1890.[2] However, the Great Depression and President Franklin Delano Roosevelt's New Deal in the early twentieth century proved to be the end for the commonality of Contracts Clause claims.[3] Accordingly, the Court's decision to grant certiorari in *Sveen v. Melin* in 2018 shocked constitutional law pundits because it was the first case to implicate the Contracts Clause in over twenty-five years.[4]

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1. *See* THE FEDERALIST NO. 44 (James Madison) ("[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."); *see also* Robert B. Reich, *What Happened to the American Social Compact*, 50 ME. L. REV. 1, 4 (1998) (explaining every society and culture possesses a social compact that is usually both explicit and implicit and designed to define the obligations of each member in relation to each other). The Contracts Clause maintains "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." *See* U.S. CONST. art. I, § 10, cl. 1.

2. *See* Nick Sibilla, *The Supreme Court Abandons Another Constitutional Safeguard, Only Gorsuch Dissents*, FORBES (June 12, 2018, 4:00 PM), https://www.forbes.com/sites/instituteforjustice/2018/06/12/the-supreme-court-abandons-another-constitutional-safeguard-only-gorsuch-dissents/#1120ab5f1f80 [https://perma.cc/U7DS-UJ8T] (discussing the once prominent role of the Contracts Clause in ruling state legislation unconstitutional).

3. *See* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459–60 (2001) (discussing how the traditional conception of the New Deal's successes was attributed to striking down pre-1937 doctrines and the avoidance of a court packing plan proposed by the Roosevelt Administration); *see also* Sibilla, *supra* note 2 ("[L]ike far too many other constitutional provisions, the Contracts Clause was largely gutted during the New Deal and became moribund.").

4. *See* Sveen v. Melin, 138 S. Ct. 1815, 1820 (2018) (explaining that the statute at issue differed from its predecessor statute in that divorce now operates as a termination of a beneficiary designation, rather than assuming a divorce allows the beneficiary designation to continue); *see also* Wystan Ackerman, Sveen v. Melin*: Supreme Court Speaks on the Contracts Clause*, ROBINSON + COLE (June 13, 2018), https://www.classactionsinsider.com/2018/06/sveen-v-melin-supreme-court-speaks-on-the-contracts-clause/ [https://perma.cc/DHH5-G2MT] ("After a decades-long drought, the Supreme Court recently decided a case involving the Contracts Clause of the Constitution. You might not recall that provision because it is so rarely invoked in modern-day litigation . . . ."); Donald Scarinci, Sveen v Melin *Is First Contracts Clause Case in Decades*, CONST. L. REP., https://constitutionallawreporter.com/2018/09/05/sveen-v-melin-2018/ [https://perma.cc/4LZY-KUVN] (last visited Mar.

The source of the dispute in *Sveen* was a Minnesota revocation-on-divorce statute.[5] The statute maintains that divorce by operation of law will terminate any devise of property, including a beneficiary designation.[6] In *Sveen*, the relevant contract was a life insurance policy Sveen purchased naming his wife as beneficiary and his two children as contingent beneficiaries.[7] Sveen's failure to revise his life insurance policy to reflect his divorce prior to his death prompted the litigation.[8] The Sveen children argued that the revocation-on-divorce statute voided the ex-wife's interest in the insurance policy.[9] In opposition, Sveen's ex-wife maintained that the statute did not exist upon formation of the contract and would violate the Contracts Clause in the Constitution if applied.[10]

The significance of the Court granting certiorari in *Sveen* does not turn on its holding but its status as the first case to implicate the Contracts Clause in more than twenty-five years.[11] The Court's willingness to conduct its analysis using the Contracts Clause presents an opportunity to resolve additional circuit splits implicating the

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16, 2020) ("The Supreme Court addressed the Constitution's Contracts Clause for the first time in 25 years in *Sveen v Melin* . . . ."); *see also* Sibilla, *supra* note 2 (explaining *Sveen v. Melin* was the first case analyzed under the Contracts Clause in twenty-five years).

5. *See Sveen*, 138 S. Ct. at 1820 (discussing divorce courts' broad discretion in dividing marital property).

6. *See id.* (quoting MINN. STAT. § 524.2-804 (2016)) ("Enacted in 2002 to track the Code, the law provides that 'the 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.'").

7. *See id.* at 1821 (noting that Mark Sveen's children, who were named as contingent beneficiaries, were from a previous marriage).

8. *See id.* ("The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations.").

9. *See id.* (discussing the Sveen children's argument).

10. *See id.* ("Melin notes in reply that the Minnesota law did not yet exist when her former husband bought his insurance policy and named her as the primary beneficiary.").

11. *See* Scarinci, *supra* note 4 (explaining the Contracts Clause had not been plead in a Supreme Court case for twenty-five years). The Supreme Court held that retroactive application of the revocation-on-divorce statute did not violate the Contracts Clause. *See Sveen*, 138 S. Ct. at 1821 (discussing the reversal of the Court of Appeals decision in favor of the ex-wife). The last Supreme Court case prior to *Sveen* to implicate the Contracts Clause was *General Motors Corp. v. Romein*, which involved workers' compensation benefits withheld by General Motors Corporation and Ford Motor Company under a Michigan workers' compensation statute. *See* 503 U.S. 181, 183 (1992) (explaining petitioners challenged the workers' compensation statute based on its ex post facto application violating the Contracts Clause).

Contracts Clause.[12] A decades-long debate exists concerning whether a Contracts Clause claim is actionable under 42 U.S.C. § 1983, a statute providing a cause of action when an individual acting "under color of" state law or custom deprives federally protected rights.[13]

The Contracts Clause ensures that the several states do not impair a private citizen's right to contract.[14] Despite its presence in the Constitution, the prohibition applies only to the states, not the federal government.[15] The Court has set forth a two-part test to determine whether a law violates the Contracts Clause when state action retroactively modifies a contract.[16] The initial determination is whether the state action has "substantially impaired" a contractual relationship.[17] The degree of impairment has a direct relationship to

12. *See* Sheldon Nahmod, *Are Contract Clause Violations Actionable Under Section 1983? A Circuit Split*, NAHMOD L. (Apr. 4, 2018, 10:41 AM), https://nahmodlaw.com/2018/04/04/are-contract-clause-violations-actionable-under-section-1983-a-circuit-split/ [https://perma.cc/7VPP-PCUB] ("[T]here is no persuasive reason to exclude Contract Clause violations from the 'deprivation of any rights . . . secured by the Constitution' language of §1983 itself.").

13. *See* 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); *Sveen*, 138 S. Ct. at 1828 (Gorsuch, J., dissenting) (discussing how many critics have questioned the Court's departure from the plain text of the Contracts Clause and how their views deserve to be analyzed in a future case).

14. *See* U.S. CONST. art. I, § 10, cl. 1 (guaranteeing the individual's freedom of contract).

15. *See* Pension Benefit Guar. Corp. v. R.A. Gray, 467 U.S. 717, 733 (1984) ("We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts."); Charlotte Simon, *The (In)applicability of the Contracts Clause to the Federal Government*, LEARNING CONST. L. (Mar. 8, 2009, 8:35 PM), https://learningconlaw.wordpress.com/2009/03/08/the-inapplicability-of-the-contracts-clause-to-the-federal-government/ [https://perma.cc/2D8G-QZPB] (discussing the *Gray* case).

16. *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (describing the two-part test used to analyze Contracts Clause claims).

17. *See id.* (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978)) ("The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'"); Texaco, Inc. v. Short, 454 U.S. 516, 531 (1982) (explaining that a state statute requiring a party to preserve their contract rights and obligations is not a substantial impairment); U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 26–27 (1977) (explaining that substantial impairment does not require total destruction of the contract); City of El Paso v. Simmons, 379 U.S. 497, 515 (1965) (explaining that a state regulation limiting a contractual party's

the level of scrutiny applied to the state law or action.[18] If the Court determines a state law or action constitutes a substantial impairment, it then considers whether such law or action is a reasonable and appropriate means of furthering a significant and legitimate public purpose.[19]

Courts have also made clear that the two-part test differs when evaluating private and public contracts.[20] Namely, when the Contracts Clause violation involves a public contract, the Court augments the second part of the analysis to require the state to justify its approach.[21] Public contracts receive a heightened standard of review because the state is self-interested in the terms of the contract.[22] Despite the enhanced standard of review for public contracts, state law or action affecting private contracts historically comports with the Court's Contracts Clause jurisprudence.[23]

"reasonably . . . expected" financial gains is not per se a substantial impairment). Justice Gorsuch criticized the two-part test in *Sveen v. Melin* for substantially departing from the plain text of the Contracts Clause, which prohibits any law impairing the obligation of contracts. *See Sveen*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting) ("[T]he Constitution does not speak of 'substantial' impairments—it bars 'any' impairment.").

18. *See Energy Reserves Grp., Inc.*, 459 U.S. at 411 (citing *Allied Structural Steel Co.*, 438 U.S. at 245) ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.").

19. *See id.* at 411–12 (citing *U.S. Tr. Co.*, 431 U.S. at 22) ("If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem.").

20. *See U.S. Tr. Co.*, 431 U.S. at 25–26 ("In applying this standard . . . [involving a public contract], . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate . . . .").

21. *See id.* (explaining the Contracts Clause analysis is augmented due to the government's self-interest); Barbara A. Cherry & Steven S. Wildman, *Preventing Flawed Communication Policies by Addressing Constitutional Principles*, 2000 L. REV. MICH. ST. U. DET. C.L. 55, 82 ("Thus, with public contracts the court will also address questions such as: (1) was a more moderate approach available?; and (2) was the state action reasonable in light of surrounding circumstances?").

22. *See U.S. Tr. Co.*, 431 U.S. at 26; Stephen F. Belfort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 23–24 (2011) (explaining that after nearly a half-century of deferring to the constitutionality of state legislation, the Court placed a heightened standard of review on state impairment of public contracts).

23. *See, e.g.*, *Energy Reserves Grp., Inc.*, 459 U.S. at 416 (upholding a Kansas statute placing a limit on natural gas sales as consistent with the Contracts Clause); Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983) (upholding an Alabama severance tax on oil and gas as consistent with the Contracts Clause). *But see, e.g.*, *Allied Structural Steel Co.*, 438 U.S. at 250 (explaining a Minnesota statute imposing

Because of myriad procedural and substantive advantages, such as the availability of attorney's fees for prevailing plaintiffs and the potential for a longer statute of limitations,[24] plaintiffs seek to state a cause of action pursuant to 42 U.S.C. § 1983.[25] This Note provides reasons as to why the Supreme Court should settle the decades-long circuit split concerning Contracts Clause claims under § 1983.[26] Because the goal of the private party and the state is to protect individual health and welfare, the Court should make evident that the freedom of contract and state police power can coincide harmoniously.[27]

Part I of this Note discusses the historical evolution and purpose of the Contracts Clause. Part I also discusses the origins of § 1983, including the Court's jurisprudence concerning what constitutional provisions historically allow for a cause of action.[28] Part II considers the Court's decision under § 1983's predecessor statute and how appellate courts have extended or declined to extend a cause of action under § 1983 for a Contracts Clause claim.[29] Part II further analyzes

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a fee for termination of a pension impermissibly affected a private contract in violation of the Contracts Clause).

24. *See* Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 13–14 (2004) (discussing the reasons why plaintiffs use § 1983 to sue public officials).

25. *See* 42 U.S.C. § 1983 (2018) (providing a cause of action for state deprivation of rights, privileges, and immunities secured by the Constitution); *see e.g.*, Kaminski v. Coulter, 865 F.3d 339, 341 (6th Cir. 2017) (discussing retirees' decision to bring suit under § 1983); Crosby v. City of Gastonia, 635 F.3d 634, 637–38 (4th Cir. 2011) (describing plaintiffs' § 1983 claim); S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 886 (9th Cir. 2003) (discussing the availability of attorney's fees under § 1983). One important area of litigation that would be affected if the Court were to rule that § 1983 provides a cause of action for a violation of the Contracts Clause is state pension reform laws. *See* Alexander Volokh, *The Revival of the Contract Clause*, REASON FOUND. (Sept. 25, 2013), https://reason.org/commentary/pensions-contract-clause/ [https://perma.cc/7AG8-M9SH]. Many public employees make the argument that their pension plans were included as a part of their signed employment contracts and bring suit under the Contracts Clause of the Constitution. *See id.*

26. *See infra* Part III (discussing the need to establish a proper balance between state police power, a clear standard of review, and the scope of § 1983).

27. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 3.03 (4th ed. 2018) (arguing that the Contracts Clause is enforceable under § 1983).

28. *See infra* Part I (discussing the historical evolution of § 1983 and the Contracts Clause); *see also Kaminski*, 865 F.3d at 345–47 (describing the judicial history of § 1983 and the Contracts Clause).

29. *See infra* Part II (discussing the Court's interpretation of § 1983's predecessor statute and how federal appellate courts have interpreted the decision to provide or withhold a cause of action for a violation of the Contracts Clause); *see also*

what factors led to each court's respective decision.[30] Finally, Part III recommends a resolution of the various appeals court decisions and offers various policy justifications that demonstrate the need for a § 1983 cause of action for a Contracts Clause violation.[31]

I. HISTORY AND DEVELOPMENT OF THE CONTRACTS CLAUSE AND § 1983

To better understand the court of appeals' decisions, one must survey the history of both the Contracts Clause and § 1983.[32] The Contracts Clause was once the most litigated constitutional provision; today, however, the provision is unlikely to receive extensive treatment in the curriculum for a first-year law student enrolled in Constitutional Law.[33] The primary reason for the relative absence of contemporary Contracts Clause litigation is the Court's departure from enforcing broad and plenary individual contract rights to a consistent favoring of state police power and states' ability to respond to exigent circumstances.[34] Constitutional provisions are commonly enforced when parties bring an action against a state actor under § 1983.[35] The Court provided a two-part test for an individual to make

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Carter v. Greenhow, 114 U.S. 317, 323 (1885) (holding that § 1983's predecessor statute did not provide a cause of action for a violation of the Contracts Clause).

30. *See infra* Part II (explaining the reasons each court of appeals offered for deciding a cause of action existed under § 1983 for a Contracts Clause claim).

31. *See infra* Part III (discussing the policy concerns that could potentially be rectified if the Court finds a cause of action under § 1983 for a Contracts Clause violation); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (discussing the inconsistency in the application of municipal liability under state and federal law); Lochner v. New York, 198 U.S. 45, 56–57 (1905) (establishing a quasi-strict scrutiny standard of review).

32. *See infra* Section I.A (discussing the historical evolution of the Contracts Clause); Section I.B (discussing the historical background and development of § 1983); *see also* Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 152–53 (2005); James W. Ely Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371, 371–72 (2010) (discussing the once important nature of the Contracts Clause and its gradual decline throughout the twentieth century).

33. *See* Ely, *supra* note 32, at 371 (explaining that when the author was discussing his project with his potential research assistant the student did not recognize what the Contracts Clause was).

34. *See id.* at 387–90 (discussing the genesis of the Court's movement away from consistently enforcing the Contracts Clause in favor of private parties).

35. *See* Beermann, *supra* note 24, at 9 (explaining that claimants bring § 1983 actions against the government and not private entities).

out a cause of action under § 1983, and meeting it has several substantive and procedural advantages.[36]

A. The History and Evolution of the Contracts Clause

The Contracts Clause of the Constitution maintains that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts."[37] The policy behind the Contracts Clause is rooted in efficiency, promotion of commerce, and preventing interference on the part of the several states with regard to preexisting contractual agreements.[38] Elsewhere, the Court has afforded the right to contract protection as an individual liberty under the Fourteenth Amendment.[39] The Court has interpreted the right to contract as so entrenched in individualism that certain government actions infringing the individual right to contract entitle that individual to some form of a hearing.[40] Nevertheless, at its inception, the Contracts Clause did not serve as an all-powerful constitutional safeguard protecting the overall freedom of contract.[41] While constitutional provisions have afforded

36. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) ("Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.'"); *see also* Beermann, *supra* note 24, at 13–14 (surveying the procedural and substantive advantages of bringing suit under § 1983).

37. *See* U.S. CONST. art. I, § 10, cl. 1 (securing the freedom of contract).

38. *See* Cherry & Wildman, *supra* note 21, at 81 (citing Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 186 (1985)) ("Contract rights deserve special protection because they are perhaps the one property interest that is most closely related to allocative efficiency and the growth of commerce."); *see also* 16B AM. JUR. 2D *Constitutional Law* § 754 (2d ed. 2018) ("The larger purpose is to encourage trade and credit by promoting confidence in the stability of contractual obligations, generally.").

39. *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) ("While this [C]ourt has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . ."); *see also* Perry v. Sindermann, 408 U.S. 593, 602 (1972) (discussing how even those contracts that are formed on an implied basis can be afforded protection as a property interest recognized by state law).

40. *See Roth*, 408 U.S. at 569–70 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.").

41. *See* Ogden v. Saunders, 25 U.S. 213, 262 (1827) (explaining that the Contracts Clause prevents laws from retroactively affecting contracts, but not those

great protection to an individual's right to contract, since the early twentieth century, state interference with preexisting individual contract rights have often bowed to state police power.[42] The Contracts Clause historically has not provided absolute protection for the freedom of contract when countervailing concerns of health, safety, and morals are at stake.[43]

To say freedom of contract was a largely safeguarded and litigated provision of the Constitution prior to and into the early twentieth century would be an understatement.[44] The Court once opined that the Contracts Clause has done more than any other constitutional provision to protect the administration of justice.[45] Both conservative and progressive scholars agree that the most significant and controversial decision favoring an individual's right to contract over the state's police power came in *Lochner v. New York*.[46] In *Lochner*, the Court struck down a law intended to protect the safety of workers in favor of freedom of contract principles.[47] The *Lochner*

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that prospectively affect contracts); *see also* David E. Bernstein, *Freedom of Contract* 1 (Geo. Mason Univ. Law & Econ. Research Paper Series, Working Paper No. 08-51, 2008) [hereinafter Bernstein, *Freedom of Contract*].

42. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502–03 (1987) (discussing that the Contracts Clause is not read based on its plain text); Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983); *see also* Cherry & Wildman, *supra* note 21, at 81–82 (discussing the limits imposed on the Contracts Clause).

43. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–45 (1934) (explaining that a Minnesota statute imposing a mortgage foreclosure moratorium addressing an economic hardship that threatened homes and lands was a "legitimate end" of protecting "a basic interest of society").

44. *See* Barnitz v. Beverly, 163 U.S. 118, 121 (1896) ("No provision of the [C]onstitution of the United States has received more frequent consideration by this [C]ourt than that which provides that no [S]tate shall pass any law impairing the obligation of contracts.").

45. *See* Hepburn v. Griswold, 75 U.S. 603, 623 (1869) (explaining how the Contracts Clause works as "an efficient safeguard against injustice").

46. *See* Lochner v. New York, 198 U.S. 45, 54 (1905) ("Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract . . . it becomes of great importance to determine which shall prevail . . . ."); *see also* Bernstein, *Freedom of Contract*, *supra* note 41, at 3 (discussing how the *Lochner* decision perplexed labor activists and progressive legal scholars); David P. Weber, *Restricting the Freedom to Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 58 (2013) (discussing how few Supreme Court cases have evoked as much controversy as *Lochner v. New York*).

47. *See Lochner*, 198 U.S. at 58 (explaining that no condition in a bakery could rise to the level necessary to allow the State of New York to use its police power to infringe on a private employee's ability to labor and contract).

decision marked the beginning of a thirty-year period where the Court struck down protectionist measures states took via their police power in favor of economic liberty and private contract rights.[48] The *Lochner* era receives criticism for the unrestrained, collective economic mindset of the Justices that comprised the Court.[49] That is, a majority of the Court adhered to laissez-faire economics, which is the theory that individuals have the freedom to bargain on their own volition without government interference.[50] The tendency of the Court to allow for unrestrained contractual liberty appeared so engrained in its collective mindset that even the Justices opposed to free-market economic measures joined majorities on stare decisis grounds.[51]

A series of early twentieth-century Court cases signaled a slowdown for Contracts Clause litigation.[52] By 1978, the Court felt it was necessary to explain that the Contracts Clause still remained in full force and effect.[53] The Court attributed the decline in relevance to the Fourteenth Amendment because the Fourteenth Amendment provides for protection against state infringement of both existing and future contracts.[54] In practical terms, however, the Court's discussion

48. *See* Weber, *supra* note 46, at 58 ("During the *Lochner* era, lasting approximately thirty years, courts struck down laws if they were perceived as encroaching on economic liberty or private contract rights.").

49. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 2–3 (2003) [hereinafter Bernstein, Lochner *Era Revisionism*] ("The *Lochner* era Justices, infected with class bias, knew that their substantive due process decisions favored large corporations and harmed workers."); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (explaining that *Lochner* is generally agreed to be among the most infamous Supreme Court decisions).

50. *See* Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 930 ("Commercial growth and activism combined with laissez-faire economics, which dominated commerce in the nineteenth century. Individualism and objectivity in the formation and scrutiny of bargains became bedrock elements of contract law.").

51. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 49, at 3–4 ("Once liberty of contract was established as a constitutional right, even Justices not inclined to Social Darwinism or laissez-faire ideology felt obligated to formalistically follow precedent, ignoring social conditions and the need for ameliorative legislation.").

52. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) (using the emergency powers doctrine to justify retroactive impairment of a pre-existing contract); Manigault v. Springs, 199 U.S. 473, 480 (1905) (justifying state police power to impair a contractual obligation).

53. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) ("[T]he Contract Clause remains part of the Constitution. It is not a dead letter.").

54. *See id.* (discussing how modern due process case law has developed to all but eliminate the need for Contracts Clause litigation); *see also* Belfort, *supra* note

ensured the Contracts Clause would not be the primary vehicle under which private litigants would enforce their private contractual rights.[55] The Court's own actions in early to mid-twentieth-century litigation contributed significantly to the lack of contemporaneous Contracts Clause litigation.[56]

First, the Supreme Court recognized the several states' use of police power as a basis for infringing upon a private contractual relationship.[57] In *Manigualt v. Springs*, the Court allowed a contracting party to rely on subsequent legislation to breach a contractual agreement, thus placing the public welfare above any rights the private contract created among the parties.[58] The Court maintained that a state's police power allowed a change in policy to obstruct a preexisting contractual relationship.[59] For the first time, the Court put an emphasis on maintaining the health, safety, morals, and general welfare of the public over private individuals' right to contract.[60]

Second, the Court endorsed the states' use of the emergency powers doctrine.[61] Such doctrine allows states to forgo certain legal rights and processes in the face of exigent circumstances.[62] An application of the doctrine occurred during World War I in *Block v. Hirsh*, where the Court upheld rent control laws intended to combat the lack of available housing as a permissible intrusion on private

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22, at 22 (discussing how the Fourteenth Amendment overtook the Contracts Clause in the protection of private, individual contract rights).

55. *See* Ely, *supra* note 32, at 376 ("To explain that a constitutional provision is not dead is a sure sign that it is virtually comatose.").

56. *See id.* at 387 (explaining that the Supreme Court slowly refrained from adamantly enforcing private contractual relationships beginning in the early twentieth century).

57. *See* Nebbia v. New York, 291 U.S. 502, 523–25 (1934) (discussing in detail the Court's role in upholding state police power).

58. *See* Manigault v. Springs, 199 U.S. 473, 480 (1905) ("It is the settled law of this [C]ourt that . . . statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for . . . the general good of the public . . . .").

59. *See id.* ("[P]arties . . . entering into contracts, may not estop the legislature from enacting laws intended for the public good.").

60. *See* Ely, *supra* note 32, at 387 (explaining that private contracts were subordinate to legislative measures that considered the public welfare).

61. *See id.* at 387–88 (explaining the emergency powers doctrine was not explicitly set forth in the Constitution).

62. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 210 (2004) ("In cases of an urgent threat to the state or regime, constitutions sometimes permit the delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights.").

contract and property rights.[63] The Court, without addressing the competing rights under the Contracts Clause, held that a housing shortage was an exigent circumstance of higher import than individual contract and property rights.[64]

The Court's ruling in *Home Building & Loan Ass'n v. Blaisdell* was its first attempt at balancing the Contracts Clause and the emergency powers doctrine.[65] The decision relied chiefly on the *Block* decision upholding World War I rent control laws.[66] *Blaisdell* involved a Minnesota statute that allowed for a two-year moratorium on mortgage foreclosures.[67] In upholding the state statute, the Court balanced the competing interests of responding to the effects of the Great Depression and ensured that the Contracts Clause remained a check on state infringement of private contractual relationships.[68]

Minnesota lawmakers sought to rely on the emergency powers doctrine when drafting the mortgage moratorium at issue in *Blaisdell*.[69] Moreover, a private mortgage holder challenged the law as

63. *See* Block v. Hirsh, 256 U.S. 135, 158 (1921) ("A part of exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent."); *see also* Michael R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 82–83 (1983) ("Congress . . . had enacted these laws to cure housing shortages . . . caused by the World War I mobilization and the accompanying curtailment of civilian home construction.").

64. *See* Ely, *supra* note 32, at 388 ("A sharply divided Supreme Court upheld municipal rent control laws as a temporary limit on property and contractual rights made necessary by shortages in the rental housing market, resulting in part from a cessation of building activity during the war.").

65. *See* 290 U.S. 398, 415–16 (1934) (discussing how plaintiff was challenging a Minnesota mortgage moratorium law as "repugnant" to the Contracts Clause).

66. *See id.* at 444 (explaining that the legislature and courts of Minnesota acted consistent with precedent in recognizing the existence of an emergency); Belknap, *supra* note 63, at 93 (explaining the chief consequence of the *Blaisdell* decision was the ability of states to invoke the emergency powers doctrine in non-wartime conditions).

67. *See Blaisdell*, 290 U.S. at 416 ("The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended.").

68. *See* Ely, *supra* note 32, at 389 ("Most likely, Chief Justice Hughes hoped to permit the states room to deal with the unusual circumstances of the Great Depression, while at the same time keeping the Contract Clause as a meaningful restraint on the states.").

69. *See Blaisdell*, 290 U.S. at 416 (discussing the text of the mortgage moratorium law).

a retroactive impairment of his constitutionally protected contractual rights.[70] The Court agreed with lawmakers, maintaining that the Contracts Clause was a fluid provision that could give way to emergency circumstances intended to protect the economic and financial security of the public.[71] However, the dissent maintained that neither the Contracts Clause nor any other constitutional provision could be adapted to support modern notions of financial or economic exigency.[72] Three years following the *Blaisdell* decision, in *West Coast Hotel Co. v. Parrish*, the Court effectively thwarted the effectiveness of the Contracts Clause when it posited freedom of contract principles yield to the public interest.[73]

In the decades of post-*Lochner* era decisions, not all constitutional provisions have remained stifled by state police power.[74] Specifically, the First Amendment received "preferred position" when the Court decided *Murdock v. Pennsylvania*, an economic regulations case.[75] In *Murdock*, several Jehovah's Witnesses appealed their conviction under a municipal ordinance requiring licensure to sell goods within the city limits.[76] In overturning the members' conviction, the Court maintained that the First Amendment is facially absolute and

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70. *See id.* at 415–16 ("Appellant contests the validity of . . . [the law] . . . as being repugnant to the [C]ontract [C]lause . . . .").

71. *See id.* at 443 ("When we consider the [C]ontract [C]lause and the decisions which have expounded it in harmony with the essential reserved power of the states to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped . . . .").

72. *See id.* at 448–49 (Sutherland, J., dissenting) (explaining a provision in the Constitution is not susceptible to competing interpretations depending on the time and circumstances).

73. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.").

74. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."); *see also* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918–19 (2016) (discussing the "preferred position" the First Amendment has occupied since the Court's decision in *Murdock*).

75. *Murdock*, 319 U.S. at 106, 115 (discussing the Jeannette, Pennsylvania, business license ordinance that was invalidated as an impermissible commercial free speech regulation).

76. *See id.* at 106 ("[A]ll persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business . . . .").

denied the respondent's position that the ordinance's nondiscriminatory nature protected it from strict scrutiny review.[77] The *Murdock* decision received praise for its defense of the First Amendment, but not all of the Justices praised the opinion as correct on all fronts.[78] Justices Roberts, Reed, Frankfurter, and Jackson cautioned their fellow Justices that the Court's actions in *Murdock* were the very judicial economic decision-making for which the *Lochner* era Court received criticism.[79] In its post-*Murdock* jurisprudence, the Court has taken care to reign in its *Lochner*-esque economic lawmaking in *Murdock* by tempering the reach of the First Amendment.[80] Specifically, the Court has endorsed the use of time, place, and manner restrictions as a permissible freedom of speech curtailment, where countervailing concerns of the public welfare are involved.[81]

Some scholars argue that the time is right to return to the *Lochner* era in one key regard: protecting the fundamental ability of parties to contract without substantial state interference.[82] The strategy

77. *See id.* at 115 ("The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted.").

78. *See* Kessler, *supra* note 74, at 1919 (discussing the *Murdock* Court's dissenting Justices' viewpoints).

79. *See id.* at 1967–68 (discussing the reservations held by Justices Roberts, Reed, Frankfurter, and Jackson concerning the majority's economic regulation in the name of protecting civil liberties).

80. *See* 16B C.J.S. *Constitutional Law* § 957 (2020) (discussing how protected speech may be reasonably restricted). The first case to curtail individual First Amendment speech rights was *Cox v. New Hampshire*, a case that precedes *Murdock* chronologically, which upheld the government's ability to regulate the time, place, and manner of speech. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (discussing the ability of a municipality to regulate free speech as matter of public welfare). Interestingly, the *Cox* case also involved Jehovah's Witnesses as petitioners, who were found in violation of a municipal statute "prohibiting a 'parade or procession' upon a public street without a special license." *Id.* at 570–71.

81. *See Cox*, 312 U.S. at 574 ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.").

82. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 49, at 31 (arguing that *Lochner* should be considered in light of what the Court was attempting to accomplish: protection of fundamental rights against government intrusion); Weber, *supra* note 46, at 56–57 ("To be sure, this article is not arguing for a return to *Lochnerian* jurisprudence based on a laissez faire approach to the market in which wage and hour laws, child labor laws, and the like were invalidated as impositions on

for returning to the fundamental ability to contract likely lies in broadening the appropriate constitutional standard of review.[83] As most first-year law students learn, there are three primary levels of judicial scrutiny used by federal courts when evaluating government actions or laws: rational basis scrutiny, intermediate scrutiny, and strict scrutiny.[84] The impetus behind such review is a judicial determination as to whether the government law or action comports with the Constitution.[85] A reviewing court focuses on: (1) the government interest; (2) the relationship between the government interest and the government methodology for accomplishing its objective; and (3) the burdens imposed by the chosen methodology.[86] Moreover, the Court defines the appropriate standard of review in any given case by evaluating a wealth of factors, including whether its decision to apply a heighted standard of review to a particular law or action will encourage a panoply of claims from similarly situated parties.[87]

Generally, reviewing courts employ rational basis scrutiny, the least exacting standard, when evaluating the constitutionality of a government entity's action with regard to economic regulations, which are most often the underlying interest involved in freedom of contract disputes.[88] However, in limited instances, post-*Lochner* era courts reviewing government interference with private contracts

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the 'freedom of contract.' Rather, the freedom to contract argued for is the basic right of an individual to enter into agreements that gain or dispose of possessions, services or otherwise alter legal relationships.").

83. *See* Weber, *supra* note 46, at 89 (explaining plaintiffs asserting infringement of contract rights aim to avoid the strict-scrutiny standard of review).

84. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227–28 (2002) (arguing that practically the Supreme Court uses six standards of review).

85. *See id.* at 227 (discussing the three constituent parts of any constitutionality review).

86. *See id.* at 227–28 (explaining the relationship between constituent parts and the primary standards of review).

87. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445–46 (discussing the difficulty in justifying disparate treatment among the elderly, disabled, and the mentally ill).

88. *See* Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight Over Health Care*, 27 J.L. & POL. 177, 197 (2011) (explaining economic regulations are most often upheld as valid under rational basis standard of review); Weber, *supra* note 46, at 62 ("The general framework then for evaluating economic regulations, being an issue of freedom of liberty, is to apply a rational basis standard.").

applied the intermediate scrutiny standard of review.[89] The Court applied the intermediate standard of review because most decisions during this era centered upon contracts that disproportionately affected minorities and women in employment and wage negotiations with employers.[90] Interestingly, even twenty years after the New Deal, the Court still was willing to lower the states' evidentiary hurdle under the rational basis test.[91] In the Court's most recent Contracts Clause case, *Sveen v. Melin*, the Court did not have the opportunity to adopt a standard of review.[92] In reality, the revocation-on-divorce statute did not fully implicate the Contracts Clause because the Court ruled the ex-wife lacked a contractual relationship with her decedent ex-husband's insurance company.[93] Thus, scholars will likely continue to postulate whether the Roberts Court will adopt post-*Lochner* era Court decisions using a rational basis standard of review when evaluating freedom of contract claims.[94]

In the 1965, the Court identified certain fundamental rights that are present in the penumbras of the Constitution, such as the right to

89. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938) (discussing how the underlying effects of the contract are what determines the applicable standard of review).

90. *See* Weber, *supra* note 46, at 62 ("For cases involving economic regulations that disproportionately affect vulnerable parties or are arbitrary or discriminatory restraints on their liberty, including their freedom of contract, the Court recognized the need for enhanced scrutiny.").

91. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see also* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 203–04 (2d prtg. 2001) (explaining that the Court Justices of the 1930s and 1940s were free to shape their doctrine).

92. *See* Sveen v. Melin, 138 S. Ct. 1815, 1821–22 (2018) (discussing the two-step review for Contracts Clause claims).

93. *See id.* at 1822 (explaining that the Court's Contracts Clause analysis could stop after the first step because the revocation-on-divorce statute did not substantially impair a pre-existing contract).

94. *See* David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 299, 331 (Michael C. Dorf ed., 2009) [hereinafter Bernstein, *The Story of* Lochner] (arguing the logic of the *Lochner* decision should apply to protect economic rights); Steven C. Begakis, *Rediscovering Liberty of Contract: The Unnoticed Economic Right Contained in the Freedom of Speech*, 50 LOY. L.A. L. REV. 57, 59–60 (2017) (discussing the unusual lack of protection afforded to freedom of contract rights).

privacy, in *Griswold v. Connecticut*.[95] The Court finds these penumbras implicit in the Bill of Rights.[96] The fundamental rights that fall within these so-called penumbras, as with explicit fundamental rights, are deeply rooted rights and liberties in America's history and are traditions deemed fundamental.[97] In his concurrence in *Griswold*, Justice Byron White advocated for a strict scrutiny standard of review that would protect both enumerated and unenumerated fundamental liberties when subject to state regulation.[98]

Most legal minds agree that the *Lochner* era Court's disposition with regard to the freedom of contract was perversely in favor of individual autonomy in a free-market economy.[99] However, the disfavored status of *Lochner* also has meant that courts have completely abandoned the exacting scrutiny it once applied to freedom of contract principles.[100] Consequently, scholars argue that reviewing courts should consider freedom of contract a fundamental right that deserves stronger protection against arbitrary and capricious actions by state governments.[101] Recognizing a more deferential standard of

95. *See* Griswold v. Connecticut, 381 U.S. 479, 481–84 (1965) (holding that the right to privacy is present in the margins of those guarantees provided by the federal Bill of Rights).

96. *See id.* at 484 (citing Poe v. Ullman, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

97. *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997) ("[T]he Court has regularly observed that the [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."); *see also* Weber, *supra* note 46, at 62 (discussing the locutions employed by the Court when defining fundamental rights).

98. *See Griswold*, 381 U.S. at 503–04 (White, J., concurring) (maintaining that marriage as a fundamental liberty, not a notion of privacy, controls whether strict scrutiny is applied).

99. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 49, at 4–5 (explaining that conventional legal theory suggests *Lochner* is permanently disfavored law); Weber, *supra* note 46, at 58 ("In the United States, few Supreme Court decisions have engendered as much controversy as the 1905 decision *Lochner v. New York*.").

100. *See* Weber, *supra* note 46, at 62–63 ("While it is true that the *Lochner* era demonstrated a need for legislative intervention in some aspects of contracting, it would be inappropriate to analogize discrete restrictions for a specific type of contract with the broader prescription that would prevent an individual from contractually obligating himself in nearly any type of contract.").

101. *See* Begakis, *supra* note 94, at 60 ("But the U.S. Constitution, the supreme charter of English freedom, currently provides zero protection against arbitrary abridgements of this freedom."); Weber, *supra* note 46, at 62 (explaining

review is likely to result in increased Contracts Clause litigation, and a cause of action under § 1983 would allow such litigation to make its way into federal courts.[102]

B. Historical Background and Development of § 1983

Congress enacted §1983 as a part of the Civil Rights Act of 1871, which was also known as the Ku Klux Klan Act.[103] The statute was, in effect, a method of creating federal jurisdiction for the violation of Fourteenth Amendment rights.[104] The Court has ruled that a claim under § 1983 has two elements: (1) the plaintiff must assert a violation of a right secured by the Constitution or laws of the United States, and (2) the plaintiff must demonstrate that the asserted violation was committed by a person acting under the authority of state law or custom.[105] The first litigation to test the effects of § 1983 were the post-

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that in instances of arbitrary or capricious laws a strict-scrutiny standard of review applies).

102. *See* Beermann, *supra* note 24, at 9 (explaining that federalism concerns caution courts in extending § 1983 into areas more adequately addressed by state law).

103. *See* Clarke, *supra* note 32, at 155 ("Congress intended the Civil Rights Act of 1871, a part of which has come down to us as 42 U.S.C. § 1983, to . . . provide[] federal court jurisdiction for any citizen whose rights were abridged by any person acting under the color of state law."); Brad Reid, *A Legal Overview of Section 1983 Civil Rights Litigation*, HUFFINGTON POST (Apr. 14, 2017, 11:12 AM), https://www.huffingtonpost.com/entry/a-legal-overview-of-section-1983-civil-rights-litigation_us_58f0e17ee4b048372700d793 [https://perma.cc/6VM6-NFVS] (explaining how Congress promulgated the Civil Rights Act of 1871 as part of legal developments emanating out of the Thirteenth, Fourteenth, and Fifteenth Amendments). The Civil Rights Act of 1871, known in the alternative as the Third Force Act, is a part of a series of three acts passed by Congress from May 1870 to April 1871. *See Landmark Legislation: The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm [https://perma.cc/V952-D2FV] (last visited Mar. 16, 2020). The tripartite legislation gives force to the Thirteenth, Fourteenth, and Fifteenth Amendments, by deterring the actions of white supremacist groups, primarily the Ku Klux Klan, aimed at disfranchising black Americans. *See id.*

104. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 543, 551 (1972) (discussing how § 1983 does not distinguish between personal and property rights, although the distinguishing hallmarks of each are often difficult to make out); *see also* SCHWARTZ, *supra* note 27, § 3.03 (discussing the Court's debunking of the division of personal and property rights).

105. *See* West v. Atkins, 487 U.S. 42, 48 (1988) ("To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (discussing the Court's two-step approach).

Reconstruction civil rights cases in South Carolina in 1871 and 1872.[106] However, such litigation provided scant interpretation of the scope of § 1983 because the Court declined to recognize that the statute provided a cause of action for all federally protected rights.[107] The scope of § 1983 remained in question throughout the Jim Crow era until the beginning of the Civil Rights movement of the 1950s and 1960s.[108]

The full force and effect of § 1983 was not realized until around ninety years after its enactment when the Court decided *Monroe v. Pape* in 1961.[109] In *Monroe*, Chicago police officers conducted a search on a residence without a valid search warrant.[110] The Court undertook the task of interpreting the phrase "under color of" law or custom as used in § 1983.[111] The Court concluded, after discussing the judicial and legislative history of § 1983, that "under color of" included actions taken pursuant to state law or state authority.[112] The Court ruled further in *Monell v. Department of Social Services of New York* that its interpretation of the legislative history of the Civil Rights Act of 1871 made clear that municipalities should also be included in the definition of a state actor.[113] However, much confusion surrounds the scope of municipal liability because appellate courts have declined to reconcile § 1983 with state deprivation of constitutional rights

106. *See* Clarke, *supra* note 32, at 156 ("The first major test of Reconstruction civil rights legislation came in the South Carolina Ku Klux Klan trials of 1871 to 1872.").

107. *See id.* at 156–57 (maintaining that the Court declined to expand the scope of the Civil Rights Act of 1871 in an effort to signal the end of Reconstruction).

108. *See* Beermann, *supra* note 24, at 11–12 (explaining the substance of the Civil Rights Act of 1871 was also the basis of the Civil Rights Act of 1964).

109. *See* Clarke, *supra* note 32, at 158 (discussing the changed scope of federal liability, enforceability in federal court, and accountability of government officials); *see also* Reid, *supra* note 103 ("This decision allowed individual governmental employees to be sued for acts that violate the Constitution or statutes.").

110. *See* Monroe v. Pape, 365 U.S. 167, 168–69 (1961) (explaining how petitioners alleged the officers failed to procure a valid search or arrest warrant and did so while holding themselves out as acting on behalf of the government).

111. *See id.* at 182–87 (discussing how the Court's previous interpretations of "under color of" law were not challenged by subsequent legislative amendments).

112. *See id.* at 187 ("We conclude that the meaning given 'under color of' law in the [*Classic*] case in the [*Screws*] and [*Williams*] cases was the correct one; and we adhere to it.").

113. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.") (emphasis omitted).

statutes.[114] Such confusion creates a perverse incentive for entities in contract with municipalities to perform below a reasonable standard of care because § 1983 does not impose liability on common tortfeasors.[115]

Several procedural advantages exist for plaintiffs bringing suit under § 1983 as opposed to another federal statute.[116] Primarily, plaintiffs bring suit under § 1983 to bring a claim in federal court, rather than state court.[117] Additional procedural advantages include the potential for a longer statute of limitations and a larger award of damages, including the possibility for the award of punitive damages.[118] A prevailing party is also entitled to the payment of attorney fees and costs under 42 U.S.C. § 1988.[119]

Procedural advantages are also available to a defendant asserting a § 1983 claim—primarily, qualified immunity.[120] The qualified immunity defense applies to defendants when their conduct does not encroach upon those rights vested in the Constitution.[121] The qualified

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114. *See, e.g.*, Robinson v. Solano Cty., 218 F.3d 1030, 1037–38 (9th Cir. 2000) (holding local government units in California liable under a theory of respondeat superior); Washington v. Robertson Cty., 29 S.W.3d 466, 475 (Tenn. 2000) (declining to following the Court's interpretation of § 1983). Three years prior to the proceeding decisions, the Supreme Court affirmed its reasoning in *Monell*. *See* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 400 (1997) (affirming its reasoning in *Monell*).

115. *See* Crump v. Corr. Med. Servs., 647 F. Supp. 2d 375, 379 (D. Del. 2009) (declining to impose § 1983 liability on contractors in contract with a municipality).

116. *See* Beermann, *supra* note 24, at 14 (explaining that courts need to analyze why plaintiffs bring suit under § 1983 against the backdrop of the procedural and substantive advantages).

117. *See id.* (explaining that the ability to bring suit in federal court eliminates state procedural requirements, such as the notice of claim procedure and mandatory pre-screenings in medical malpractice actions).

118. *See id.* (discussing the award of damages may be larger due to the potential for punitive damages).

119. *See* 42 U.S.C. § 1988(b) (2018) ("In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."); *see also* Glen N. Lenhoff, *A View of the Present and Future of 42 USC 1983*, 94 MICH. B.J. 28, 30–31 (2015) (explaining that the award of attorney's fees are typically larger in personal injury cases than in civil rights cases that most often involve police officers, with whom the jury often sympathizes).

120. *See* Lenhoff, *supra* note 119, at 29 (citing Owen v. City of Indep., 445 U.S. 622, 638 (1980)) ("An individual defendant in a 42 USC [§] 1983 case has the right to assert the defense of qualified immunity. This defense is not available for municipal defendants, however.").

121. *See* Plumhoff v. Rickard, 572 U.S. 765, 778 (2014) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)) ("An official sued under § 1983 is entitled to

immunity defense does not exculpate a § 1983 defendant from liability; federal courts will afford special attention to ensuring that the facts are applied in a manner most favorable to the plaintiff.[122]

Nevertheless, the substantive advantages are more likely to be the impetus behind a claimant's choice to pursue a § 1983 claim.[123] Often, no state claim is available to provide redress for an aggrieved party for much of the conduct that is deemed illegal under § 1983.[124] Alternatively, plaintiffs tend to bring suit under § 1983 for even those suits that can be brought both in federal and state courts because many state causes of action place caps on compensatory and punitive damages.[125]

The Contracts Clause was once a bastion for defending individual liberties; however, its commonality in litigation has been largely nonexistent since the early twentieth century.[126] Conversely, claims asserting deprivations of rights under 42 U.S.C. § 1983 largely increased in the years after the Court defined the scope of the statute

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qualified immunity unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct. . . . And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.").

122. *See* Lenhoff, *supra* note 119, at 29 (explaining the critical nature for federal courts to view the facts in a manner that is deferential to the plaintiff).

123. *See* Beermann, *supra* note 24, at 14, 18 (explaining that while procedural factors are an important reason for plaintiffs to bring claims under § 1983, the substantive factors are just as important).

124. *See id.* at 14 ("The most fundamental substantive reason for seeking remedies under section 1983 is that there may be no liability under state law for much of the conduct that gives rise to § 1983 claims.").

125. *See id.* at 19 (discussing how many states eliminated immunity for government and charitable entities in favor of placing caps or complete bars on the amount of compensatory and punitive damages that could be awarded against municipalities).

126. *See* Bernstein, *Freedom of Contract*, *supra* note 41, at 6–8 (explaining that New Deal era measures have largely confined the scope of Contracts Claims asserted against the states); *see also* George Leef, *The Supreme Court Will Soon Decide: Uphold the Contract Clause or Let It Die?*, FORBES (Mar. 13, 2018, 12:00 PM), https://www.forbes.com/sites/georgeleef/2018/03/13/the-supreme-court-will-soon-decide-uphold-the-contract-clause-or-let-it-die/#4cf8453435a1 [https://perma.cc/HT7N-GS32] ("In the first century or so of our national existence, one of the Constitution's provisions that was most often at issue was the Contract Clause. But following New Deal era decisions that eviscerated it, hardly any cases have since centered on it.").

in *Monroe v. Pape*.[127] Section 1983's attractive procedural and substantive features expanded the amount of Contracts Clause claims in the late twentieth and early twenty-first centuries.[128] Moreover, a difference of opinion as to the proper interpretation of the Supreme Court case discussing § 1983's predecessor statute and its relationship to the Contracts Clause has provided the perfect environment for an active circuit split among the federal appellate courts.[129]

II. A LOOK INTO THE CIRCUIT SPLIT

Federal appellate courts disagree on whether § 1983 is the most appropriate method to bring a civil action against a state government for retroactively infringing a contract.[130] The Court has only ruled on the issue pursuant to § 1983 once before, in the late nineteenth-century case *Carter v. Greenhow*.[131] The *Carter* decision has stood for the proposition that any individual rights afforded under the Contracts Clause are secondary in the sense that the rights secured are not cognizable under § 1983.[132] *Carter* was the word of the Court until it granted certiorari to determine whether a Dormant Commerce Clause claim warranted a cause of action under § 1983 in *Dennis v. Higgins*.[133]

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127. *See* Symposium, *Limiting the Section 1983 Action in Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1486–87 (1969) (discussing how *Monroe v. Pape* expanded the scope of claims brought under § 1983).

128. *See, e.g.*, Kaminski v. Coulter, 865 F.3d 339, 341 (6th Cir. 2017) (discussing that plaintiff city employees alleged state impairment of retirement benefits); Crosby v. City of Gastonia, 635 F.3d 634, 637–38 (4th Cir. 2011) (describing retired police officers' suit for contractual impairment); S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 886 (9th Cir. 2003) (discussing company's suit against city government for passing an ordinance that retroactively impaired their pre-existing contract).

129. *See* Nahmod, *supra* note 12 (explaining the federal circuits' rulings on whether actions under § 1983 are allowed for Contracts Clause violations).

130. *See, e.g.*, SCHWARTZ, *supra* note 27, § 3.03 (explaining that lower courts are in disagreement as to whether the Contracts Clause is actionable under § 1983); Nahmod, *supra* note 12 (providing a brief overview of the federal circuit split).

131. *See* Carter v. Greenhow, 114 U.S. 317, 322 (1885) (discussing how the petitioner's contractual right to pay his State of Virginia taxes in bonds was protected by the Contracts Clause).

132. *See id.* ("That constitutional provision [the Contracts Clause], so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally.").

133. *See* Dennis v. Higgins, 498 U.S. 439, 440 (1991) (7-2 decision) (resolving a circuit split as to whether a Dormant Commerce Clause violation can be enforced as a cause of action under § 1983); *see also* SCHWARTZ, *supra* note 27,

The *Dennis* decision was also important in discrediting the proposition that only Fourteenth Amendment rights could be asserted under § 1983.[134] By expanding the scope of § 1983 and the Dormant Commerce Clause, the Court invited lower federal courts, by way of a footnote, to offer their differing opinions as to whether the Contracts Clause was a constitutional right deserving of enforceability under § 1983.[135]

A. The *Carter* Case

The Court first ruled on the relationship between § 1983 and the Contracts Clause in *Carter v. Greenhow*.[136] The plaintiff in *Carter* brought suit to challenge the City of Richmond's decision to disallow payment of taxes using state issued bond coupons.[137] The plaintiff's main contention was that an amended Virginia statute barred his contractual right to pay tax using bond coupons, thus forbidding tax collectors from accepting such coupons as payment.[138] The plaintiff interpreted such an action as the government providing the defendant tax collector with the authority to act "under color of" law to deprive the plaintiff of his constitutionally protected interest.[139]

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§ 3.03 (explaining how split authority existed concerning a Dormant Commerce Clause cause of action under § 1983 given the original legislative intent of § 1983).

134. *See* SCHWARTZ, *supra* note 27, § 3.03 (discussing how *Dennis v. Higgins* was the first Court decision to maintain a § 1983 cause of action for a non-Fourteenth Amendment right).

135. *See Dennis*, 498 U.S. at 451 n.9 (explaining how the dissent used the *Carter* decision to argue the Dormant Commerce Clause was similar to the Contracts Clause in that they do not "secure any rights, privileges, or immunities within the meaning of § 1983").

136. *See Carter*, 114 U.S. at 321–22 (discussing § 1983's predecessor statute); *see also* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 402 (1982) (explaining that § 1983's predecessor, R.S. § 1979, is substantially similar to § 1983 and the result of a congressional reorganizing of statutes and regulations into a centralized location).

137. *See Carter*, 114 U.S. at 318–19 (discussing how the plaintiff's cause of action was based on his inability to pay his taxes in the manner he saw fit).

138. *See id.* at 319–20 (discussing how an amendment to Virginia tax law by the Virginia General Assembly caused defendant tax collector to act "under color of [law]").

139. *Id.* at 320 ("That in refusing to receive the said coupons and money in payment of said taxes, and in levying on and seizing the plaintiff's property for said taxes, after the plaintiff had tendered the same in payment thereof, the defendant deprived the plaintiff of a right secured to him by the constitution of the United States, under color of statutes . . . .").

The Court implicated the Contracts Clause, explaining the proviso was the only constitutional provision that provided for and secured the rights for which the plaintiff claimed infringement.[140] The Court further explained that the plaintiff's right to pay property taxes with bond coupons was a right provided by Virginia law and not constitutionally by the Contracts Clause.[141] Moreover, the Court found that the only right guaranteed by the Contracts Clause in this case was the right to a judicial hearing and the prospect for invalidation of the state action at a hearing.[142] The current circuit split arose because the Court has never granted certiorari to a case where the plaintiff asserted that a Contracts Clause claim was actionable under § 1983.[143]

Additionally, the *Carter* decision suggests that the only remedy afforded by § 1983 is the invalidation of a state law that conflicts with an individual's ability to freely contract.[144] The plaintiff in *Carter* only sought a determination that the Virginia statute barring him from paying his taxes using state issued bonds was in contravention of his constitutional right to pay his taxes in any method that satisfied the debt obligation.[145] In its analysis, the Court saw fit to categorize exactly what plaintiff's claim was by striking a contract between the

140. *Id.* at 322 ("How and in what sense are these rights secured to him by the constitution of the United States? The answer is, by that provision, article 1, § 10, which forbids any state to pass laws impairing the obligations of contracts.").

141. *Id.* ("The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the constitution, and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia.").

142. *Id.* ("In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation.").

143. *See* Kaminski v. Coulter, 865 F.3d 339, 346 (6th Cir. 2017) (explaining that even though § 1983 was expanded "post-*Monroe*," the Court has yet to confirm that a Contracts Clause violation is a recognized claim under § 1983).

144. *See* Carter v. Greenhow, 114 U.S. 317, 320–21 (1885) (discussing the Court's interpretation of the sole remedy provided under the Contracts Clause); *see also* Gregory A. Kalscheur, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right to Be Free of Protectionist State Action*, 86 MICH. L. REV. 157, 178 (1987) (discussing the Court's failure to distinguish how the remedy available for any other Contracts Clause differed from any other constitutional provision).

145. *See Carter*, 114 U.S. at 319 ("That plaintiff was always ready and willing to deliver to the defendant in payment of said taxes, up to the moment when the defendant so levied upon his said property, the said coupons and money, and he many times offered to do so, but the defendant always refused to receive the same. That the plaintiff has the right under the constitution of the United States to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by the constitution of the United States.").

two parties.[146] As a result, the *Carter* decision has long stood for the proposition that Contracts Clause violations are not actionable under 42 U.S.C. § 1983.[147] The flawed nature of the *Carter* decision has cast some doubt on its significance in barring a Contracts Clause claim action under § 1983.[148]

B. The *Dennis v. Higgins* Decision

The Court has criticized the *Carter* decision for its precedential value as the basis on which courts and parties rely to find that a Contracts Clause violation is not actionable under § 1983.[149] In *Dennis v. Higgins*, the Court granted certiorari to establish whether Nebraskan state officials could be held liable for a violation of the Dormant Commerce Clause under § 1983.[150] The Court held in the affirmative and adopted the plaintiff's argument that the Dormant Commerce Clause provided the rights referred to in the meaning of § 1983.[151] In ruling for the plaintiff, the Court held that § 1983 deserved broad construction.[152]

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146. *Id.* at 322 ("The rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the state, contained in the act of March 28, 1879, and the bonds and coupons issued under its authority.").

147. *See Kaminski*, 865 F.3d at 346 (quoting *Carter*, 114 U.S. at 322) ("The remedy is not a private cause of action against the state official responsible for the contractual impairment, but rather 'a right to have a judicial determination declaring the nullity of the attempt to impair its obligation' in a suit 'to vindicate his rights under a contract.'").

148. *See* Dennis v. Higgins, 498 U.S. 439, 451–52 n.9 (1991) ("This Court . . . has already given [*Carter*] a narrow reading, stating that the case held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the contract clause], to which he had chosen not to resort.") (internal quotations omitted).

149. *See id.* (explaining that the *Carter* Court held that a contract was created as a matter of pleading and was not intended to operate as an action to "redress deprivation" under § 1983).

150. *See id.* at 441 (explaining petitioner sought a declaration the motor taxes constituted an "unlawful burden" on interstate commerce in violation of the Dormant Commerce Clause).

151. *See id.* at 446 ("Petitioner contends that the [Dormant] Commerce Clause confers 'rights, privileges, or immunities' within the meaning of § 1983. We agree.").

152. *See id.* at 443 (citing Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989)) ("A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution and laws.'").

The *Dennis* case demonstrated that the limitations of *Carter* were not foreseen when the case was decided in the late nineteenth century.[153] Specifically, the *Dennis* Court explained that Supreme Court precedent evolved to provide a cause of action for a deprivation of any federally protected right, not just those recognized under the Fourteenth Amendment.[154] Nevertheless, some federal appellate courts contend that the Court has yet to explicitly overturn the proposition set forth in the *Carter* case.[155] In other words, several of the federal appellate courts declining to provide a cause of action for Contracts Clause claims under § 1983 await a Court decision similar to *Dennis v. Higgins*.[156] Another federal appellate court maintains the implications of the Court's ruling in *Dennis v. Higgins* were not as far-reaching as proponents of cognizable Contracts Clause claims pursuant to § 1983 would make legal scholars and the public at large believe.[157]

C. Contracts Clause and 42 U.S.C. § 1983 Circuit Split

Only one federal appellate court has affirmatively concluded that § 1983 provides a cause of action for a violation of the Contracts

153. *See id.* at 444–45 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979)) ("[T]he 'prime focus' of § 1983 and related provisions was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto[.]' . . . [T]he Court has never restricted the section's scope to the effectuation of that goal.").

154. *See id.* at 445 (citing Maine v. Thiboutot, 448 U.S. 1, 4, 6–8 (1980)) (explaining the phrase "and laws" under § 1983 is not limited to civil rights or equal protection legislation).

155. *See* Crosby v. City of Gastonia, 635 F.3d 634, 640–41 (4th Cir. 2011) (arguing that the Court in *Dennis* only ruled on whether a violation of the Dormant Commerce Clause provided a cause of action under § 1983 and that Justice White's footnote discussing *Carter* was only to illustrate that non-Fourteenth Amendment rights may provide for a cause of action under § 1983).

156. *See, e.g.*, Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch., 876 F.3d 926, 932 (7th Cir. 2017) (declining to weigh in on a Contracts Clause claim providing a cause of action under § 1983); Kaminski v. Coulter, 865 F.3d 339, 347 (6th Cir. 2017) (arguing that the plaintiff's cause of action could not stand because the *Carter* decision had never been explicitly overturned).

157. *See Crosby*, 635 F.3d at 641 ("Justice Matthews's decision is of limited utility in determining whether § 1983 might afford a remedy for infringements of federal rights not previously considered in that context. There is little doubt, however, that *Carter* stands even today for the proposition that an attempted § 1983 action alleging state impairment of a private contract will not lie.").

Clause.[158] In 2003, the Ninth Circuit was the first federal appellate court to maintain clearly and unequivocally that a private cause of action exists when an individual brings a Contracts Clause claim under § 1983 in *Southern California Gas Co. v. City of Santa Ana*.[159] A 1938 city ordinance formed the underlying contract between the City of Santa Ana (Santa Ana) and Southern California Gas Company (Southern Gas).[160] The ordinance provided Southern Gas with the right to construct and maintain the piping underneath the streets of Santa Ana.[161]

The contractual relationship deteriorated when Southern Gas brought suit against Santa Ana citing a 2001 ordinance.[162] The ordinance required any party wishing to make trench cuts within Santa Ana to first provide advance payment.[163] Southern Gas's issue with the ordinance was, *inter alia*, that its contract with Santa Ana had been "substantially impair[ed]" in violation of the Contracts Clause.[164] The Ninth Circuit ruled in favor of Southern Gas by maintaining that the right to contract without impairment was guaranteed by the Constitution and could give rise to a claim under § 1983.[165] Specifically, the court maintained that § 1983 clearly stood for the proposition that a party was constitutionally protected against the actions of a state, or one of its political subdivisions, which "under color of" law deprive a party of its rights, privileges, or immunities.[166]

In this case, the court agreed with Southern Gas that double payment was a "substantial impairment," given it had already entered

158. *See* S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 887 (9th Cir. 2003) ("The City's argument that section 1983 provides no relief for a party deprived of its rights under the Contracts Clause is without merit.").

159. *See id.* (explaining how the *Dennis* Court narrowly construed the *Carter* decision).

160. *See id.* (discussing the 1938 ordinance that formed the contract at issue).

161. *See id*. at 887–88 (describing Santa Ana's desired scope of work for Southern Gas).

162. *See id.* at 888 (discussing the 2001 trench cut ordinance).

163. *See id.* ("With certain exceptions, the trench cut ordinance requires advance payment by anyone wishing to perform excavations or trench cuts.").

164. *See id.* ("The Gas Company contends the trench cut ordinance: (1) substantially impairs its rights under the 1938 Franchise in violation of the Contract Clause, (2) constitutes an uncompensated taking in violation of the Fifth and Fourteenth Amendments, and (3) is arbitrary and capricious in contravention of the Fourteenth Amendment's substantive due process clause.").

165. *See id.* at 887 (citing Dennis v. Higgins, 498 U.S. 439, 443 (1991)) ("The rights guaranteed by section 1983 are 'liberally and beneficently construed.'").

166. *See id.* (explaining that the Contracts Clause plainly secures the right against retroactive contractual impairment).

into a contract with Santa Ana to perform pipe work under its streets.[167] The Ninth Circuit also addressed the application of Court precedent from *Carter v. Greenhow*.[168] The court maintained that the *Carter* Court addressed the Contracts Clause only as a matter of poor pleading on the part of the plaintiff.[169] Also notable was the Ninth Circuit's dismissal of the 2001 ordinance as a permissible use of state police power.[170]

Alternatively, two federal appellate courts have maintained that § 1983 is an inappropriate vehicle for asserting a Contracts Clause violation pursuant to the Constitution.[171] In 2011, the Fourth Circuit weighed in on the issue in *Crosby v. City of Gastonia*.[172] It asserted that the Court in *Carter* clearly maintained that the only right afforded by the Contracts Clause is a determination as to whether the state improperly denied the aggrieved access to a judicial proceeding.[173] Such a judicial proceeding serves only to make a determination as to whether a contractual right had been impaired.[174] The Fourth Circuit declined to follow the Ninth Circuit and narrowly construed the precedential value of the Justice Byron White's footnote in *Dennis v. Higgins*.[175] The substance of the Fourth Circuit's argument was that

167. *See id.* at 890 (clarifying that substantial impairment does not require complete destruction of the contract).

168. *See id.* at 887 (arguing that the decision to recognize a cause of action under § 1983 was not contrary to the Court's holding in *Carter*).

169. *See id.* (quoting *Dennis*, 498 U.S. at 451 n.9) ("*Carter* can only be read to have 'held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by [the Contracts Clause] . . . .'") (emphasis omitted).

170. *See id.* at 893 (citing U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 29 (1977)) (explaining the police power could not be used to alter a contract's material terms).

171. *See generally* Kaminski v. Coulter, 865 F.3d 339 (6th Cir. 2017) (adopting the Fourth Circuit's line of reasoning); Crosby v. City of Gastonia, 635 F.3d 634 (4th Cir. 2011) (declining to extend the Ninth Circuit's holding in *Southern Gas*).

172. *See Crosby*, 635 F.3d at 639–40 (discussing the facts and holding of the *Carter* decision).

173. *See id.* (discussing the *Carter* court's explanation of the sole Contracts Clause claim remedy).

174. *See id.* at 640 ("As a result of the Supreme Court's holding in *Carter*, then, recourse to § 1983 for the deprivation of rights secured by the Contracts Clause is 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, or has foreclosed the imposition of an adequate remedy for an established impairment. Section 1983 provides no basis to complain of an alleged impairment in the first instance.").

175. *See id.* at 640–41 (explaining Justice White's footnote in *Dennis v. Higgins*).

Carter was clear and binding precedent that the Court never directly overturned.[176]

The Sixth Circuit joined the Fourth Circuit in 2017, when it also declined to provide a cause of action for a Contracts Clause claim pursuant to § 1983.[177] The Sixth Circuit recognized that the Court in *Carter* took to deciding whether the Contracts Clause was a cognizable cause of action under § 1983's predecessor statute.[178] However, it quickly dismissed any argument suggesting that the two versions would cause the outcome to change.[179] The Sixth Circuit concluded that the conjecture extended by the federal appellate courts was unnecessary.[180] Instead, the Sixth Circuit opined that it was up to the Supreme Court to make a judicial determination as to whether *Carter* was still good law.[181]

Elsewhere, two federal appellate courts mentioned the interpretive issues regarding the *Carter* decision, but they either declined to weigh in or were not given the opportunity.[182] The First Circuit in *Parella v. Retirement Board of Rhode Island Retirement System* found that a New Jersey State retirement board's withholding of benefits did not violate the Contracts Clause.[183] The court in *Parella* was not provided the opportunity to analyze the plaintiff's Contracts Clause claim under § 1983 because the parties lacked a contractual relationship.[184] Specifically, the court declined to recognize a contract

176. *See id.* at 640 (discussing that the Contracts Clause was never directly implicated by the Court in *Dennis*).

177. *See* Kaminski v. Coulter, 865 F.3d 339, 347 (6th Cir. 2017) ("We join the Fourth Circuit and hold that an alleged Contracts Clause violation cannot give rise to a cause of action under § 1983.").

178. *See id.* at 346 (discussing the statute at issue in *Carter v. Greenhow*).

179. *See id.* (explaining that the two statutes contain "'substantially identical' language").

180. *See id.* at 347 (positing that the role of appellate courts is not to overturn Supreme Court precedent).

181. *See id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)) ("[The Fourth Circuit's view] comports with the time-honored principle that 'it is [the Supreme Court's] prerogative alone to overrule one of its precedents.'").

182. *See* Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch., 876 F.3d 926, 932 (7th Cir. 2017) (explaining that it was not weighing in on the issue); *see also* Parella v. Ret. Bd. of R.I. Emps. Ret. Sys., 173 F.3d 46, 62 (1st Cir. 1999) (explaining that plaintiff failed to establish a contractual relationship, making a § 1983 analysis for the Contracts Clause claim futile).

183. *See Parella*, 173 F.3d at 62 ("We hold that the plaintiffs' claim fails to pass the first component of the first part of the Contract Clause test—proving the existence of a contractual relationship.").

184. *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (discussing the first step in evaluating a Contracts Clause claim);

between the parties because there was no indication from the applicable statute that the government intended to bind itself contractually.[185]

The Seventh Circuit in *Elliott v. Board of School Trustees of Madison Consolidated Schools* recognized the active circuit split concerning § 1983 and the Contracts Clause; however, it chose to conduct its analysis without weighing in.[186] The court asserted that weighing in on the issue was not necessary for multiple reasons.[187] Namely, the issue did not affect the court's subject matter jurisdiction over the issue and the defendant failed to raise the *Carter* case as a defense at the district court level.[188]

The Court's holding in *Carter v. Greenhow* concerning the constitutional role of the Contracts Clause remains intact, despite the Court's anecdotal mention of the issue in *Dennis v. Higgins*.[189] Moreover, subsequent § 1983 and Contracts Clause jurisprudence has created room for debate regarding what the *Carter* decision offers in terms of precedent.[190] The inaction of the Seventh Circuit in *Elliott* suggests federal appellate courts are finished providing speculation

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Parella, 173 F.3d. at 57 n.9 ("Thus, we do not reach the question whether a claim for attorneys' fees or for a discretionary award of prejudgment interest under § 1983 are themselves enough to avoid mootness after the main claim has become moot.").

185. *See Parella*, 173 F.3d at 60 (quoting Nat'l R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985)) ("Indeed, 'absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights.'") (internal quotation omitted).

186. *See Elliott*, 876 F.3d at 931–32 (explaining that it recognized the interpretive chasm among the other federal appellate courts but was declining to offer its opinion).

187. *See id.* at 932 (discussing the reasons why the court was not offering an opinion on the § 1983 and Contracts Clause circuit split).

188. *See id.* ("We need not take sides on this question. It does not affect our subject matter jurisdiction, and the defendants have waived this potential defense. They did not raise it in the district court, and the State told us at argument that the defendants do not rely on *Carter*.").

189. *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1518 (1983) (discussing how the Court arrived at its "odd conclusion" in *Carter*).

190. *See* Dennis v. Higgins, 498 U.S. 439, 451 n.9 (1991) (discussing how the Contracts Clause, a non-Fourteenth Amendment right, is actionable under § 1983); Sunstein, *supra* note 136, at 409–11 (discussing § 1983 developments in the twentieth century).

concerning the relationship between § 1983 and the Contracts Clause.[191]

III. WHY THE SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT

The Court's recent jurisprudence regarding the Contracts Clause makes settling the decades-long circuit split a real possibility.[192] The time is now for the Court to issue a modern opinion regarding the Contracts Clause and whether its once sacrosanct nature should be afforded protection under 42 U.S.C. § 1983.[193] The Great Depression decidedly called for significant measures through New Deal era reform.[194] However, the measures permitted under the guise of state police power and the emergency powers doctrine cannot erode the relevance of the Contracts Clause any longer.[195] The permanent effect such measures had on the validity of the Contracts Clause would not have stood if taken in contravention of inviolable constitutional provisions, like the First Amendment.[196]

By agreeing to weigh in on the circuit split, the Court would have the opportunity to set forth an appropriate, modern approach to protecting individual contract rights while also respecting the ability

191. *See Elliott*, 876 F.3d at 932 (providing reasons as to why the Seventh Circuit did not have to address the circuit split).

192. *See* Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018) ("We granted certiorari . . . to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a pre-existing agreement's beneficiary designation.") (internal citation omitted); *see also* Sibilla, *supra* note 2 (explaining how the Court's decision to hear Contracts Clause case was shocking).

193. *See* Leef, *supra* note 126 (discussing how the Marshall Court held the Contracts Clause in a high regard).

194. *See* Belknap, *supra* note 63, at 108 (discussing the diverging path the legal community took under the New Deal).

195. *See id.* at 67 ("Fifty years after Franklin D. Roosevelt launched the New Deal, politicians are still debating programs that he initiated during the Great Depression of the 1930s."); Lash, *supra* note 3, at 459–60 ("Finally, in 1937, a single justice changed his vote and a new majority of the Supreme Court initiated the modern tradition of judicial deference to economic and social welfare legislation. Some aspects of the story are still debated, including whether the New Deal was a 'constitutional moment' and whether the Court's shift in doctrine was triggered by external political events or an internal evolution of doctrine.").

196. *See* Leef, *supra* note 126 ("Just imagine if the First Amendment had been treated that way, giving the government wide latitude to censor or punish free speech . . . .").

of the states to regulate via their police power.[197] The time is ripe to limit the scope of the states' all-important police power by returning to one key aspect of *Lochner* era judicial and economic thought concerning individual contract rights.[198] Namely, the return would mean allowing individuals the contractual freedom to make them arbiters of their adequate protection.[199]

Relatedly, striking a proper balance requires determining what interests deserve protection under principles of freedom of contract and what constitutional standard of review those interests should receive.[200] In doing so, the Court also has the opportunity to expand the broad role of § 1983.[201] The Court can resolve the circuit split by demonstrating that individual freedom of contract is a fundamental liberty interest protected under the Fourteenth Amendment, thus firmly supporting a cause of action under § 1983.[202]

A. Balancing Individual and State Interests with a Clear Standard of Review

The Contracts Clause shields against retroactive application of state law that affects the validity of pre-existing contractual

197. *See* Weber, *supra* note 46, at 57–58 (explaining the tension at issue in resolving the scope of the individual right to contract and determining how broad the contours are of government restriction of contract).

198. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 49, at 7–10 (discussing how revisionist academics have debunked the view that *Lochner* era Justices were proponents of Social Darwinism).

199. *See* Lochner v. New York, 198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state . . . ."); Bernstein, Lochner *Era Revisionism*, *supra* note 49, at 8–9 (discussing how Justice Holmes, one of the biggest anti-*Lochner* Justices, was actually the biggest supporter of free market economics).

200. *See* Leitch, *supra* note 88, at 188–89 (discussing the subtle difference in meaning between freedom to contract, freedom from contract, and liberty to contract).

201. *See* SCHWARTZ, *supra* note 27, § 3.03 ("[Section] 1983 has been utilized to litigate a broad spectrum of constitutional claims, including First Amendment rights, Fourth Amendment rights, due process and equal protection rights, and the rights of privacy, travel, and the right to vote.").

202. *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (discussing how the concept of liberty should be broadly defined); *see also* Dennis v. Higgins, 498 U.S. 439, 444–45 (1991) (explaining the legislative purpose of § 1983 was to ensure a cause of action for violations of the Fourteenth Amendment).

agreements.[203] To properly insulate against state actors acting under the guise of police power to deny freedom of contract rights, the Court must provide a clear standard of review.[204] As outlandish as it may sound to constitutional law scholars around the country, the proper standard lies within the text of the *Lochner* decision itself.[205]

The Constitution does not guarantee an absolute right to contract.[206] This proclamation has endured since the Great Depression and provides a hard outer limit on the freedom of contract via the state's police power.[207] Settling the circuit split would give the Court the opportunity to achieve the proper balance between the Contracts Clause and state police power by way of a clear standard of review.[208] To be sure, the standard of review needed to elucidate the proper balance is the constitutional standard of review and not the standard used to determine whether a state has retroactively impaired a contractual right.[209]

In assessing freedom of contract claims, the Court most often applies a rational basis review.[210] Application of a rational basis standard often means the regulation interfering with the contract is

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203. *See* Ogden v. Saunders, 25 U.S. 213, 262 (1827) ("It is thus most apparent, that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them, the law is pronounced to be void in the first class of cases, and not so in the second.").

204. *See* Begakis, *supra* note 94, at 60–61 (discussing how the Constitution provides no protection against arbitrary violations of the freedom of contact).

205. *See* Lochner v. New York, 198 U.S. 45, 56–57 (1905) (setting forth a quasi-strict-scrutiny standard of review); *see also* Strauss, *supra* note 49, at 373 (discussing the general unlikelihood of citing *Lochner* for support in a court brief).

206. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) (upholding a minimum wage law for women in the public interest); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–45 (1934) (upholding a Minnesota mortgage moratorium under the emergency powers doctrine).

207. *See* Bernstein, *Freedom of Contract*, *supra* note 41, at 7 (discussing how the Court's previous libertarian approach to interpreting constitutional liberties was unsustainable during the pressures of the Great Depression).

208. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (describing a relaxed rational basis standard of review).

209. *See, e.g.*, *Blaisdell*, 290 U.S. at 434–35 (explaining the rational basis for imposing a mortgage moratorium is the ability of the states to protect the interests of their constituency). *Cf.* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (describing the standard applicable to claim deprivation of a contractual right).

210. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (discussing the rational basis test applied in economic rights cases).

presumptively valid.[211] In limited instances where one of the contracting parties is a protected class deprived arbitrarily and capriciously of their personal liberty, the Court has elevated its analysis to an intermediate standard of review.[212] However, the Court has seemingly declined to evaluate freedom of contract claims using the same constitutional scrutiny it would for other fundamentally protected rights.[213] The Court's approval of state police power measures taken in the aftermath of the Great Depression somehow admonished *Lochner*-era Court decisions for adherence to laissez-faire economics, as well as for many of the era's tenable opinions, including its reverence for freedom of contract.[214]

Undoubtedly, progressive academics still have doubts regarding whether *Lochner* era decisions contain any precedential value.[215] However, the Court has substantially reversed course on its admonishment of the *Lochner* era in the past.[216] The *Griswold v. Connecticut* decision recognizing fundamental rights implicit in the Bill of Rights, specifically privacy, relied primarily on *Lochner* and its progeny for support.[217] The *Griswold* Court was reluctant to strike down state anti-contraception laws directly, following the logic of the *Lochner* decision.[218] Nevertheless, the Court was implicating *Lochner* because it recognized that even fundamental unenumerated rights

211. *See Williamson*, 348 U.S. at 487–88 (explaining the requirements under a rational basis standard of review); *see also* Leitch, *supra* note 88, at 197–98 (explaining that the government nearly always "wins" under a rational basis review).

212. *See Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (discussing the instances where the constitutional standard of review may be elevated).

213. *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (recognizing a liberty interest for the freedom of contract under the Fourteenth Amendment).

214. *See* Bernstein, *The Story of* Lochner, *supra* note 94, at 331 (discussing how liberal scholars have recognized *Lochner* as simply a misstep); WHITE, *supra* note 91, at 201–02 (suggesting the shift in constitutional scrutiny was not a result of the FDR's Court-packing plan or a response to the political conditions).

215. *See* Ely, *supra* note 32, at 393–94 (explaining the political trend toward government regulation of economic measures).

216. *See* Bernstein, *The Story of* Lochner, *supra* note 94, at 329–30 (explaining the Court relied on the civil liberties decisions of the *Lochner* era in announcing privacy as a fundamental unenumerated right).

217. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discussing the source of unenumerated fundamental rights).

218. *See id.* at 482 (explaining that the Court declined to use the *Lochner v. New York* decision as the basis to strike down a Connecticut law preventing the use of contraception).

require protection under the Due Process Clause of the Fourteenth Amendment.[219]

The key for claimants asserting a retroactive infringement of their contractual freedom is to demonstrate to the Court what the change in judicial thought between the *Lochner v. New York* and *West Coast Hotel Co. v. Parrish* decisions stood for on a practical level.[220] Namely, the claimant must demonstrate that the *Parrish* decision was not disapproving of laissez-faire economics, or a condemnation of freedom of contract principles, but rather a reactionary change based on the current economic, political, and legal landscape.[221] A petitioner who is able to successfully illustrate this claim will have opened the door to restoring freedom of contract principles under either an intermediate or quasi-strict scrutiny standard of review.[222]

Moreover, a plaintiff asserting that freedom to contract is a fundamental right can potentially offer a simpler explanation concerning why the Court provided deferential treatment to the police power and the emergency powers doctrine.[223] The majority in *Home Building & Loan v. Blaisdell* interpreted the Contracts Clause as having the ability to change under the unique economic conditions of the Great Depression.[224] A plaintiff asserting a state regulation violated his or her existing contractual rights under the Contracts Clause should

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219. *See* Bernstein, *The Story of* Lochner, *supra* note 94, at 329–30 ("By resurrecting the Lochnerian notion that due process protects fundamental unenumerated rights, the *Griswold* Court ensured that many of the great constitutional issues of the last forty years would be decided as Due Process cases, rather than being decided based on notions of equality under the Equal Protection Clause or even left to the political branches to sort out.").

220. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (acknowledging that freedom of contract must be balanced against the rightful exercise of state police power); Lochner v. New York, 198 U.S. 45, 53–54 (1905) (recognizing that the freedom of contract must be balanced against the exercise of police power).

221. *See Parrish*, 300 U.S. at 390 (discussing that one of the reasons that it agreed to grant certiorari was to consider changed circumstances in light of contemporary economic conditions); *see also* WHITE, *supra* note 91, at 202–03 (rejecting the hypothesis that the Court changed its jurisprudence based on Roosevelt's Court-packing plan).

222. *See* Bernstein, *The Story of Lochner*, *supra* note 94, at 301 (explaining that *Lochner* era court decisions focused on carefully scrutinizing both economic rights and other unenumerated fundamental rights).

223. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934) (describing the tension between the Contracts Clause and the public welfare).

224. *See* WHITE, *supra* note 91, at 213 (explaining that Justice Hughes was attempting to reconcile textualism and originalism with the notion that the Constitution is a living document).

demonstrate that the *Blaisdell* Court was at pains to square the states' police power with adherence to the text of a constitutional provision.[225] The vast majority of the constitutional provisions disavowed by the Court out of concern for the public welfare were the most litigated provisions prior to the New Deal.[226] Notably, the First Amendment was not the revered constitutional provision as it is today during the New Deal era.[227] Nevertheless, the First Amendment now enjoys a position of constitutional significance such that even laws with noteworthy public support consistently violate the civil liberties recognized in the First Amendment.[228] Put another way, Justices of all political persuasions have adhered to championing the First Amendment in a "preferred position" and have analyzed legislation, economic or otherwise, under a strict scrutiny standard.[229]

The Court's task of balancing the First Amendment and the public welfare during the New Deal era produced a different result than balancing the Contracts Clause and the public welfare.[230] That is, the First Amendment enjoys strong constitutional protection; however, even this sacrosanct individual liberty has limits.[231] For example, the Court has consistently supported time, place, and manner restrictions as a permissible restraint on the preferred constitutional

225. *See id.* at 214 ("[A] recognition that judges, in interpreting the Constitution, might discover that the practical meaning of a constitutional provision had changed did not in itself provide a justification for concluding that the provision could be ignored.").

226. *See* Strauss, *supra* note 49, at 376 ("During the *Lochner* era, the only constitutional principles that the Supreme Court enforced regularly and systematically were those that the New Deal discredited: freedom of contract . . . .").

227. *See id.* at 376 (discussing the undeveloped nature of First Amendment jurisprudence during the New Deal era).

228. *See id.* at 377 ("The First Amendment is a particularly clear example. The Supreme Court, and the lower courts, regularly invalidate legislation and other official action, including quite important and popular legislation, on First Amendment grounds.").

229. *See* Kessler, *supra* note 74, at 1918–19 (quoting Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)) (discussing the "preferred position" occupied by the First Amendment).

230. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) (explaining the balance between individual rights in the Contracts Clause and public emergency).

231. *See* C.J.S., *supra* note 80, § 957 ("While the content of communication enjoys virtually absolute First Amendment protection, the manner of communication does not.").

status of freedom of speech.[232] The state legislature can regulate the manner in which individuals convey their messages, and such regulation does not offend the First Amendment.[233] Nonetheless, limits exist regarding Congress's legislative abilities when regulating protected speech.[234]

If a regulation crosses the threshold into policing the content of the speech, the regulation no longer serves the public welfare.[235] Similarly, as with all cases concerning constitutional rights, when the several states exercise police power they must treat each individual uniformly with respect to the aspect of the public welfare they are trying to regulate.[236] Simply put, this illustration is in an effort to demonstrate the Court's ability to successfully balance freedom of speech claims with police power—namely, through its time, place, and manner restrictions.[237]

Moreover, the Court would be remiss if it did not recognize the irrational nature of citing *Blaisdell*, a case decided on the basis of exigent circumstances, when deciding future Contracts Clause cases.[238] Perhaps the current Court recognizes the unique nature of the *Blaisdell* decision.[239] However, the Court's view remains unclear because it did not conduct a complete Contracts Clause analysis in

232. *See id.* (maintaining time, place, and manner restrictions must be narrowly tailored but not necessarily the least restrictive means of accomplishing an end).

233. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.").

234. *See* C.J.S., *supra* note 80, § 957 (explaining that time, place, and manner restrictions are applicable to the manner and not the content of protected speech).

235. *See Cox*, 312 U.S. at 575–76 (explaining that regulations affecting the time, place, and manner of speech must be grounded in some aspect of protecting the public welfare).

236. *See id.* (discussing the need for a systematic approach when adjudicating freedom of speech claims).

237. *See id.* (demonstrating competing concerns of public welfare and free speech).

238. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) (explaining that the Minnesota statute placing a moratorium on mortgage contracts did not violate the Contracts Clause).

239. *See, e.g.*, Sveen v. Melin, 138 S. Ct. 1815, 1830–31 (2018) (Gorsuch, J., dissenting) (suggesting his belief that the Court does not fully appreciate the implications of *Blaisdell*).

Sveen.[240] If the Court is to resolve the circuit split, it must recognize the irrational disconnect post-*Lochner* era courts have created.[241] Specifically, the Court must question why it reviews First Amendment claims under strict scrutiny but does not evaluate Contracts Clause claims in the same manner simply because of the government's interest in overseeing economic measures.[242]

An elevated standard of review does not mean the states' police power is not deserving of respect.[243] Instead, it would be prudent for the Court to analyze the *Lochner* decision for what it contributed in terms of a workable constitutional standard of review.[244] The majority in *Lochner* argued that state police power should not be able to stand simply on a blank assertion of protecting the health, morals, safety, and welfare of the general public.[245] The Court posited that government regulation that interferes with pre-existing contractual rights requires the government to justify its specific interests related to the public health, safety, morals, and welfare.[246] If the intent of the state police power is public protection, should the standard not carefully scrutinize which measure best accomplishes that end?[247]

At its very best, the Court's decision in *Lochner* offers a quasi-strict scrutiny standard that can be adapted to balance the practical

240. *See id.* at 1822 (majority opinion) (explaining that a contractual relationship was not present between respondent and decedent's insurance company).

241. *See Blaisdell*, 290 U.S. at 448–49 (Sutherland, J., dissenting) (discussing his belief that the Court's reasoning was flawed).

242. *See, e.g.*, *Cox*, 312 U.S. at 574 (stating the balance between the "public convenience" and otherwise facially absolute constitutional provisions); *Blaisdell*, 290 U.S. at 442 (discussing the rational compromise struck between individual rights and the public welfare).

243. *See* Weber, *supra* note 46, at 56–58 (discussing how fundamental freedom of contract should ideally be in step with state police power).

244. *See* Lochner v. New York, 198 U.S. 45, 56 (1905) (discussing the balance the Court deemed appropriate between freedom of contract and state police power).

245. *See id.* at 57–58 ("The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract . . . .").

246. *See id.* at 57 (arguing that regulating the ability of bakers to choose their own hours has not been proven as a compelling government interest in furtherance of health, safety, morals, and welfare).

247. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (arguing that liberty is limited by the police power and should be reviewed using a lax rational basis standard).

implications of the public's well-being.[248] If the Court determined that a government measure infringing on the freedom of contract was a fair, appropriate, and reasonable exercise of police power after careful scrutiny, arguments asserting the police power had not furthered the public interest would be to no avail.[249] Nevertheless, an individual cannot properly safeguard his or her freedom of contract liberty without the Court sustaining a cause of action for the contractual damages he or she may have suffered.[250] Deprivation of contractual liberty is a constitutional rights deprivation action under 42 U.S.C. § 1983.[251]

B. Identifying the Scope of § 1983

The Court's decision in *Monroe v. Pape* undoubtedly increased the amount of civil rights litigation protecting liberty interests under the Fourteenth Amendment.[252] Similarly, the decisions that followed *Monroe* have largely worked to define the scope of just how broad those claims should be.[253] Nevertheless, much confusion still exists concerning the scope of § 1983 because state provisions protecting deprivation of constitutional rights have not been interpreted in line with *Monell*.[254]

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248. *See Lochner*, 198 U.S. at 56–57 (arguing that a quasi-strict scrutiny standard is not the judicial branch substituting its wisdom for the legislative branch).

249. *See id.* at 58 (arguing that after application of the quasi-strict scrutiny standard, the limit of state police power had been exceeded).

250. *See* Beermann, *supra* note 24, at 33 ("In the categories of cases in which section 1983 provides the only realistic substantive claim on the merits, it is of course more likely to be successful than any alternatives.").

251. *See* 42 U.S.C. § 1983 (2018) (promulgating a civil action for deprivation of rights).

252. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting) ("The decision in *Monroe v. Pape* was the fountainhead of the torrent of civil rights litigation . . . ."); Monroe v. Pape, 365 U.S. 167, 174 (1961) ("But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.") (emphasis omitted); *see also* Sunstein, *supra* note 136, at 396 ("Whether a private right of action is available for statutory violations under section 1983 is a question of enormous practical significance.").

253. *See* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 400 (1997) ("We conclude that the Court of Appeals' decision cannot be squared with our recognition that, in enacting § 1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiffs deprivation of federal rights.").

254. *See, e.g.*, Robinson v. Solano Cty., 218 F.3d 1030, 1038 (9th Cir. 2000) ("However, California has rejected the *Monell* rule, under which a county may be held

The Court has a strong incentive to resolve the circuit split in order to define the scope of § 1983 when the government body infringing freedom of contract is a municipal or other local government actor.[255] Because courts interpreting state law have not interpreted municipal liability in the same manner the Court did in *Monell*, those asserting a deprivation of a constitutional right in state court have no grounds to assert an enforceable action under § 1983.[256] While it is true that in limited instances courts interpreting state laws have held municipalities liable under a common law theory of respondeat superior,[257] the respondeat superior method of liability does nothing for those claimants asserting deprivation of constitutionally protected rights, such as the freedom of contract in state court.[258]

While the award of attorney's fees and uncapped compensatory damages are beneficial to a private litigant, they certainly do not provide an incentive for the Court to clarify the scope of § 1983.[259] Rather, the Court should hear a Contracts Clause claim under § 1983 because strong inconsistencies exist between state constitutional provisions protecting rights through vicarious liability and federal law imposing liability on municipal offenders only when acting under well-established policy.[260] However, such disconnect will continue

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liable in a § 1983 suit only if it has adopted an illegal or unconstitutional policy or custom. California holds counties liable for acts of their employees under the doctrine of *respondeat superior* . . . ."); Washington v. Robertson Cty., 29 S.W.3d 466, 475 (Tenn. 2000) ("However, unlike the specific language and history of the federal statute, 42 U.S.C. § 1983, Tennessee's statute . . . does not contain language that could be construed to limit a government liability to acts in furtherance of a policy or custom.").

255. *See Monell*, 436 U.S. at 691 (maintaining a municipal body is not liable simply for employing a tortfeasor under a theory of respondeat superior).

256. *See id.* (rejecting the compatibility of vicarious liability principles of respondeat superior with holding a governing body liable for a deprivation of federal rights).

257. *See, e.g.*, *Robinson*, 218 F.3d at 1038 (holding a municipality liable for the actions of its employees).

258. *See* Crump v. Corr. Med. Servs., 647 F. Supp. 2d 375, 379 (D. Del. 2009) ("Because liability in a § 1983 claim cannot be based on respondeat superior or vicarious liability, a corporation under contract with the state . . . cannot be held liable for the acts of its employees and agents under those theories.").

259. *See* 42 U.S.C. § 1988(b) (2018) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

260. *See Monell*, 436 U.S. at 694 (explaining municipalities should only be held liable to the extent individuals are conducting themselves in accordance with a formally approved policy). *Cf. Robinson*, 218 F.3d at 1037–38 (holding local government units in California liable under theory of respondeat superior).

until the Court rationalizes that a Contracts Clause claim deprives a plaintiff of a constitutionally fundamental right.[261] When a state actor deprives an individual of a First Amendment right, such as freedom of religion, that individual possesses a liberty interest that warrants a due process hearing.[262] The most common remedy sought by freedom of religion claimants is a judicial determination as to whether state action abridging their freedom meets strict constitutional muster.[263] Yet, somehow the *Carter* Court rationalized classifying the protections of the Contracts Clause as insubstantial based on the very same remedy sought: a judicial determination of rights.[264]

The Court could resolve the circuit split if it were to mesh the protections against retroactive state inference with contracts—which allegedly remain the only rights conferred by the Contracts Clause—with the general right of an individual to contract, which was explicitly incorporated into the Fourteenth Amendment.[265] By thoroughly explaining the anomaly and rectifying it by incorporating the Contracts Clause into the Fourteenth Amendment, the Court will have the opportunity to resolve additional constitutional issues involving the Contract Clause.[266] Namely, the Court can define an appropriate standard of review and hone in on a suitable scope of § 1983 as it relates to local government liability when individuals implicate it in freedom-of-contract disputes.[267]

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261. *See* Kalscheur, *supra* note 144, at 178 (discussing the incongruity of the *Carter* decision).

262. *See* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (explaining that freedom of religion is fundamental liberty interest).

263. *See* Kalscheur, *supra* note 144, at 178 ("A person claiming a violation of the [F]irst or [F]ourteenth [A]mendment seeks to have the offending statute declared invalid as well.").

264. *See* Carter v. Greenhow, 114 U.S. 317, 322 (1885) (arguing that the Contracts Clause provides only indirect and incidental rights).

265. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing the right of the individual to contract as a recognized Fourteenth Amendment liberty interest); Ogden v. Saunders, 25 U.S. 213, 262 (1827) (explaining that the Contracts Clause affords rights to only those state laws that retroactively affect contracts).

266. *See Carter*, 114 U.S. at 322 (discussing how the Contracts Clause lacks security in the Constitution); *see also* Collins, *supra* note 189, at 1503 (discussing the odd nature of Contracts Clause jurisprudence).

267. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (explaining that municipalities are liable to the extent individuals are conducting themselves in accordance with a formally approved policy).

CONCLUSION

The United States Supreme Court should adopt the view that 42 U.S.C. § 1983 provides a civil cause of action for a state violation of the Contracts Clause of Constitution.[268] The Court's decision in *Carter v. Greenhow* makes clear that its limitation of Contracts Clause protections were based strictly on omissions in the plaintiff's pleading.[269] In actuality, the Court in *Carter* never explicitly stood for the proposition that a Contracts Clause deprivation claimant could not seek redress in § 1983.[270] Thus, the circuits have erroneously perpetuated an anomaly—for at least the past twenty years—in a manner that has affected the ability of private individuals to be secure in their full gamut of the constitutional liberties.[271] By ruling that § 1983 provides a cause of action for a violation of the Contracts Clause, the Court can establish that the public welfare can be furthered by recognizing the clear meaning of the Contracts Clause.[272] Allowing Contracts Clause claims under § 1983 will provide individuals with the right vehicle for asserting deprivations of what was previously a sacrosanct fundamental individual right: the freedom of contract.[273]

268. *See generally* S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (suggesting the Supreme Court implied Contracts Clause claims are actionable under § 1983 in *Dennis v. Higgins*); *see also* SCHWARTZ, *supra* note 27, § 3.03 ("The author believes the better view is that the contract clause is enforceable under § 1983. The *Carter* language that the contract clause secures rights 'only indirectly and incidentally' is simply not accurate.").

269. *See* Dennis v. Higgins, 498 U.S. 439, 450–51 n.9 (1991) (discussing the precedential significance of *Carter*).

270. *See* SCHWARTZ, *supra* note 27, § 3.03 (noting that the significance of the *Dennis* decision is that the Court suggested, in dicta, that it would have found a Contracts Clause claim cognizable under § 1983).

271. *See* Meyer v. Nebraska, 262 U.S. 390, 399, 403 (1923) (discussing the right of the individual to contract as one of the select few Fourteenth Amendment liberty interests).

272. *See* WHITE, *supra* note 91, at 214 (explaining that a constitutional provision requires balancing with the public welfare).

273. *See* Barnitz v. Beverly, 163 U.S. 118, 121 (1896) (discussing the Contracts Clause's once prominent role in protecting the freedom of contract).