

# THE PERMANENT SEAT OF GOVERNMENT: AN UNINTENDED CONSEQUENCE OF HEIGHTENED SCRUTINY UNDER THE CONTRACT CLAUSE

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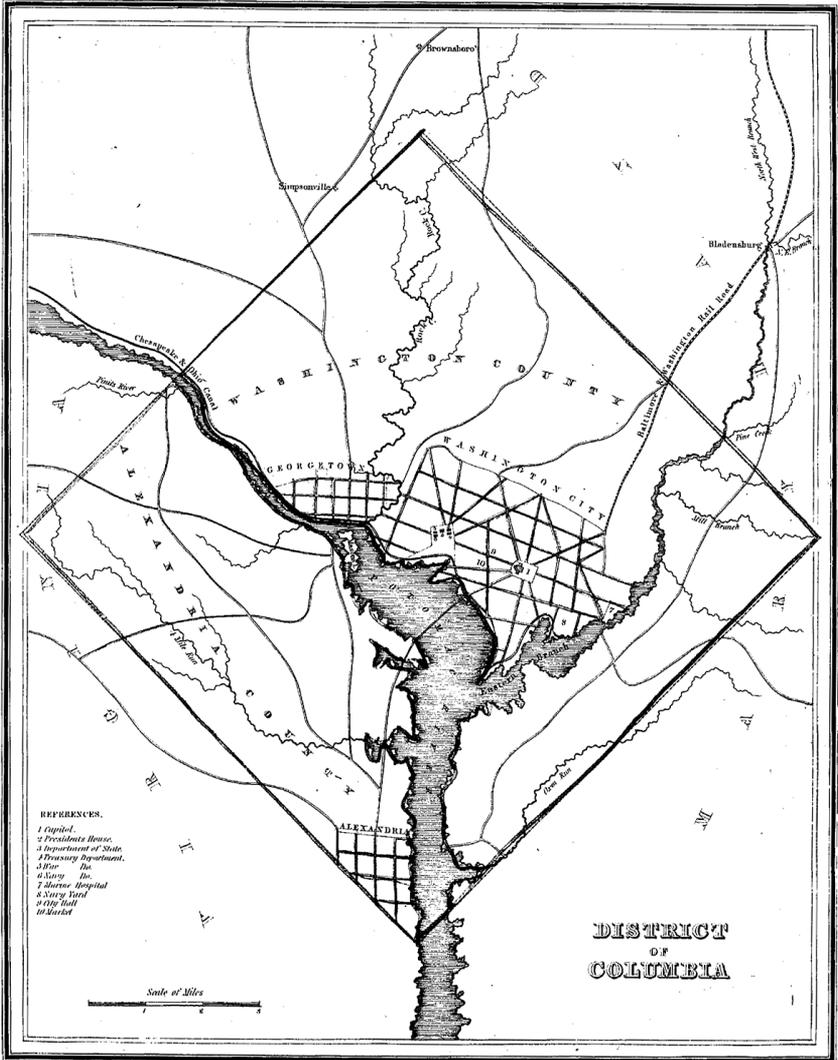
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## INTRODUCTION

The glow of the success of the American Revolution had barely subsided when the people of the United States turned to the arduous work of defining the contours of the new nation that they had created. During the revolution, the colonies were bound by their common desire to be independent of British rule; after this common goal was achieved, the economic, cultural, and social differences that divided the new states came sharply into focus. Some of the fiercest debate was reserved for the location of the capital of the new government. This debate, so contentious that it held up the ratification of the Constitution, was put aside by the Framers for the first Congress to resolve. After years of coalition-building, threats, side deals, and personal appeals, the first Congress finally resolved the question by creating the District of Columbia, which spanned the border of Virginia and Maryland in an attempt to bridge the more provocative divisions that separated the new states.

From 1791 until 1846, the District of Columbia occupied “ten miles square,”<sup>1</sup> the maximum size permitted by the Constitution for the seat of government of the United States. Two-thirds of the land composing the District of Columbia was granted to Congress by Maryland; the remainder, Alexandria County and the City of Alexandria, was granted by Virginia.<sup>2</sup> The orientation and location of the District were chosen by President George Washington, ratified by the United States Congress, and effected by parallel legislation enacted by Maryland and Virginia.<sup>3</sup> For fifty-five years the District retained its dia-

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1. U.S. CONST. art. I, § 8, cl. 17. For reference, a map from 1835 showing the original boundaries of the District of Columbia appears at the beginning of this article. T.G. BRADFORD, *COMPREHENSIVE ATLAS GEOGRAPHICAL, HISTORICAL AND COMMERCIAL* 37 (Boston, Ticknor 1835).

2. Paul A. Groves, *The Northeast and Regional Integration, 1800–1860*, in *NORTH AMERICA: THE HISTORICAL GEOGRAPHY OF A CHANGING CONTINENT* 189, 203 (Thomas F. McIlwraith & Edward K. Muller eds., 2001); see Mark David Richards, *The Debates over the Retrocession of the District of Columbia, 1801–2004*, *WASH. HIST.*, Spring/Summer 2004, at 55. Except when this article refers to the City of Alexandria or the rural Alexandria County specifically, both portions of the retroceded land will be referred to collectively as “Alexandria.”

3. An Act for the Cession of Ten Miles Square, or any Less Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. CODE ANN. at 33 (LexisNexis 2001) [hereinafter *Virginia Cession*]; An Act Concerning the Territory of Columbia and the City of Washington, Md. Act, 1791, ch. 45, *reprinted in* 1 D.C. CODE ANN. at 34 (LexisNexis 2001) [hereinafter *Maryland Ratifying Cession*]; Act of July 16, 1790, ch. 28, 1 Stat. 130 (1790), *reprinted in* 1 D.C. CODE ANN. at 42 (LexisNexis 2001) [hereinafter *Congress’ Acceptance of Ceded Territory*].

mond shape and status as the permanent seat of government, as promised by the United States and required by conditions attached to Maryland and Virginia's land grants. In 1846, as sectional differences threatened to tear the nation in two, the United States and Virginia agreed to retrocede, that is, return, Alexandria to Virginia.<sup>4</sup>

The circumstances surrounding the creation of the District of Columbia and the subsequent retrocession of Alexandria to Virginia can, and perhaps must, be viewed in light of the United States Constitution's Contract Clause. The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>5</sup> Because Virginia's 1846 Act of Retrocession breached its previous promise to forever cede and relinquish Alexandria, the question arises whether Virginia's Act of Retrocession, which annexed Alexandria in derogation of this promise, violated the Contract Clause. The legality of the retrocession has been considered but never finally resolved;<sup>6</sup> as with many difficult issues that have affected the federal city over the last two centuries, the pressures of political expediency have forestalled a satisfying legal analysis.

In light of the history of the formation and subsequent division of the District of Columbia, this article seeks to answer the question of whether the retrocession, which deprived the District of Columbia of one-third of its land area, did so in derogation of rights protected by the Constitution's Contract Clause. Answering this question requires a close inquiry into both the historical circumstances surrounding the formation of the District of Columbia as well as the development of the Supreme Court's Contract Clause jurisprudence. Part I describes the history of the four-way bargain made among the United States, Virginia, Maryland, and private landowners that resulted in the creation of the District of Columbia. Among the promises exchanged by the parties, both Virginia and Maryland agreed to forever cede and relinquish the land they promised for the permanent seat of government to the United States. Part II examines Virginia's apparent breach of its original bargain in light of the Supreme Court's newly revitalized Contract Clause jurisprudence. Part III addresses whether, despite the Contract Clause, Virginia's *de facto* control of Alexandria over-

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4. See Richards, *supra* note 2, at 55.

5. U.S. CONST. art. I, § 10, cl. 1.

6. After Attorney General Judson Harmon stated, in 1897, that the constitutionality of the retrocession "had not been judicially determined," Congress introduced a resolution calling on the Attorney General to bring suit to determine its constitutionality. The Judiciary Committee recommended that the resolution be indefinitely postponed, cautioning that the propriety of retrocession "is a political and not a judicial question." Richards, *supra* note 2, at 76.

rides its promise to relinquish its claim over its contribution to the “ten miles square.” Part IV considers the broader implications of the Court’s recent Contract Clause jurisprudence, examining whether the Contract Clause’s newly strengthened protection of contractual rights, which has been nearly universally criticized, can be justified in light of the Constitution’s other protections from legislation that singles out individuals for special treatment.

## I.

### HISTORICAL BACKGROUND OF THE RETROCESSION

The legal ramifications of the retrocession cannot be understood without some insight into the history of the formation of the District of Columbia and the circumstances surrounding the retrocession of Alexandria to Virginia. While it may not be true that the District was, as it is often claimed, a swamp before the arrival of the federal government,<sup>7</sup> the negotiations surrounding the site for the new federal city were indeed mired in bickering and parochial rivalries that threatened to tear apart the new Union.<sup>8</sup> The Constitution’s District Clause contemplates that the district housing the seat of government of the United States would be formed “by Cession of particular States, and the acceptance of Congress” of no more than ten miles square.<sup>9</sup> Pursuant to this authority, Congress authorized none other than President Washington to negotiate the boundaries of the city that would eventually bear his name.<sup>10</sup> Choosing the location of the capital of the United States was not merely the cause of contention among competing factions; rather, the choice became emblematic of the many divisions plaguing the states during the Confederation period.<sup>11</sup> Given the tensions that divided the states after the revolution, it is unlikely that anyone other than the widely respected Washington would have had the ability to create consensus among the factions vying for the loca-

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7. See KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 237 (1991) (“Early Washington, D.C., is popularly believed to have been a swamp. Dozens of observers of the young town, European as well as Americans from all sections of the country, indicate otherwise.”).

8. See *id.* at 88–93.

9. U.S. CONST. art. I, § 8, cl. 17.

10. See BOWLING, *supra* note 7, at 190.

11. See *id.* at 203, 208, 212; see also Amos B. Casselman, *The Virginia Portion of the District of Columbia*, in 12 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY OF WASHINGTON, D.C. 115, 123 (1909) (“The choice and location of the seat of government were thus determined after much difficulty, contention, and a bitter rivalry of sections, of states, and of cities to secure it.”).

tion of the capital.<sup>12</sup> It was in light of these competing interests—commercial versus agricultural, northern versus southern, free versus slave, and centralist versus decentralist—that Washington was able to negotiate the four-part contract that created the District of Columbia.<sup>13</sup>

#### A. *Challenges to Choosing a Location for the New Capital City*

As the states' most important commercial center, centrally located Philadelphia seemed to be a natural choice for the meeting place of the Continental Congress even before the American Revolution.<sup>14</sup> But, as the Confederation consolidated, and the defeat of the British permitted parochial differences to rise to the surface, other cities began to compete for the right to host the capital of the new nation.<sup>15</sup>

Proponents of locating the federal capital in Philadelphia reminded Congress that the city's urbane charms, like fine dining, the arts, and entertainment, were all appropriate for the seat of a new empire.<sup>16</sup> It was for these very reasons that its detractors, both northern and southern, bitterly opposed Philadelphia, which, with its "commerce, local politics, luxury and mobs,"<sup>17</sup> made it more akin to an imperial capital than the republican agrarian ideal.<sup>18</sup> As a consequence, while delegates to the Constitutional Convention representing commercial interests insisted that the new capital be located in a city, delegates representing agricultural interests proposed prohibiting "the

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12. Washington's personal influence in the choice of the location of the District cannot be overstated. Not only did he choose the location on his own, without the aid of commissioners as Congress intended, but he also ignored Congress' parameters for where the city should be located. See Samuel C. Busey, *The Centennial of the Permanent Seat of the Government of the United States*, in 3 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY OF WASHINGTON, D.C. 324, 328–32 (1900). Although Congress gave President Washington wide discretion to choose the borders of the new federal city within certain bounds, when Washington chose boundaries outside of Congress' mandate, Congress quietly ratified his *ultra vires* act to grant him authority, after the fact, to set the boundaries at their final location. See *id.* at 332.

13. See BOWLING, *supra* note 7, at 206.

14. See *id.* at 15–16.

15. Casselman, *supra* note 11, at 123.

16. Some New Englanders, for example, advocated locating the capital in a large city because the ample "social amenities of a city would also serve to heighten the dignity, glory and importance of the capital in the eyes of both citizens and foreigners." BOWLING, *supra* note 7, at 11; see also Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527, 534–35 (1995) (noting that agrarians "idealized America as a garden and farmers as the foundation of the Republic" and "feared that urban mobs would exert pressure on Congress and subvert representative democracy.").

17. BOWLING, *supra* note 7, at 10.

18. See *id.* at 10–11; Cobb, *supra* note 16, at 534–35.

seat of the national government [from] being in the same city or town with the seat of the government of any state.”<sup>19</sup>

The fight over the location of the new capital reflected not only the rural-urban divide that separated the more agricultural New England and southern states from the more commercial middle states, but also reflected the deep rift that separated the northern states from the southern states.<sup>20</sup> Southerners, seeing the economic center of gravity of the continent drift northward during the Revolutionary War, vehemently opposed a northern capital, anticipating that this would only cement northern primacy by locating the political center of gravity there as well.<sup>21</sup>

Of course, in the antebellum period, no rivalry was wholly divorced from the issue of slavery. Delegates from many slaveholding states were more concerned with keeping Congress away from anti-slavery interests than retaining the capital closer to the South. For this reason, many slaveholding interests supported a New York City location over Philadelphia out of fear that anti-slavery Quakers would exert great influence over a Congress located in Philadelphia.<sup>22</sup> Some southerners, concluding that a northern capital was the first step towards emancipation, threatened to bow out of the nascent Union if a northern city was chosen as the permanent seat of government.<sup>23</sup>

Despite fierce opposition by southern, slaveholding delegates and agricultural interests, Philadelphia might well have become the permanent seat of the new government had it not been for the events of 1783. In June of that year, a band of Revolutionary War soldiers, who had not been paid for their military service, marched on Philadelphia to demand redress from Congress.<sup>24</sup> The soldiers surrounded the building where Congress met, drinking and growing restless while Congress negotiated with the city of Philadelphia and the state of Pennsylvania for protection from the mob.<sup>25</sup> Finally, after two days

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19. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 220 (Jonathan Elliot ed., 2d ed. 1968); *see also* Casselman, *supra* note 11, at 116 (“it was suggested that the capitol ought not to be located in the same city with the capitol of any state, or in any large commercial city”); BOWLING, *supra* note 7, at 75, 83 (noting that opponents of an urban location for the capital feared that “the federal district would become a commercial as well as political center”).

20. *See* Casselman, *supra* note 11, at 116.

21. *See* BOWLING, *supra* note 7, at 92.

22. *See id.* at 89, 191, 242.

23. *See id.* at 171.

24. *See* Adams v. Clinton, 90 F. Supp. 2d 35, 50 n.25 (D.D.C. 2000); BOWLING, *supra* note 7, at 30–32.

25. *See* BOWLING, *supra* note 7, at 32–34.

spent in fruitless discussions with local and state authorities, it became evident that no protection would be coming.<sup>26</sup> Congress promptly adjourned—some would say fled—to New Jersey in order to forestall any violence from the disgruntled soldiers. This incident loomed large during the Constitutional Convention.<sup>27</sup> Congress learned from this experience that it would need territorial independence from all of the states in order to retain its political independence.<sup>28</sup>

### B. *Competition for the Location of the Capital*

Ultimately, the Constitution was ratified without a location designated as the seat of government. The District Clause, which provides that Congress has the power to “exercise exclusive Legislation” over the district chosen as the seat of government, left the responsibility of choosing a suitable location to the first Congress.<sup>29</sup> The challenges to congressional consensus over the location of the seat of government might never have been overcome but for the intervention of President Washington. Through a series of negotiations conducted through Thomas Jefferson and James Madison, Washington arranged a compromise that would locate the seat of government along the Potomac River, an area to which Washington had strong personal and financial ties.<sup>30</sup> The Compromise of 1790, as it is known, provided that in exchange for locating the capital in the South along the Potomac, the delegates of the southern states would agree to a federal assumption of the states’ Revolutionary War debt, a benefit enjoyed primarily by the northern states.<sup>31</sup> As a concession to the middle states, which mostly favored nearby and commercially oriented Philadelphia, the Compromise of 1790 provided that the temporary seat of government would move from New York City back to Philadelphia for ten years while provisions for the permanent seat of government were made in the new federal district on the Potomac.<sup>32</sup>

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26. *See id.* at 33–34.

27. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 120 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833).

28. *See* BOWLING, *supra* note 7, at 34; *see also* STORY, *supra* note 27, at 119–20 (noting that if the lesson of the incident at Philadelphia “could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor”).

29. U.S. CONST. art. 1, § 8, cl. 17; *see also* Adams, 90 F. Supp. 2d at 50 n.25.

30. *See* BOWLING, *supra* note 7, at 182–88. There was no shortage of proposed sites for the new capital. Other proposed locations included cities in Delaware, Maryland, New York, New Jersey, Pennsylvania, and Virginia. *See* Cobb, *supra* note 16, at 536.

31. *See* BOWLING, *supra* note 7, at 168, 184–85.

32. *See id.* at 183–84.

However, an act of Congress alone was not sufficient to set the location of the capital. The District Clause provides that the district could be formed only “by Cession of Particular States, and the Acceptance of Congress” of ten miles square of land.<sup>33</sup> In other words, the United States had no *right* to take land that it wanted for its seat of government; rather, it was obligated to convince the states, through bargain or otherwise, to voluntarily cede this land.<sup>34</sup> The text of the District Clause is consistent with the contemporaneous understanding of the Founders that the land appropriated under the clause would be ceded only “with the *consent* of the State ceding it.”<sup>35</sup>

During the negotiations leading up to Congress’ decision to locate the federal city on the Potomac, “all parts of the Union were anxious to have the seat of Government.”<sup>36</sup> Maryland and Virginia both succumbed to capital fever and expressed willingness “to make any sacrifice to obtain the capital.”<sup>37</sup> The contention and “bitter rivalry of sections, of states, and of cities to secure”<sup>38</sup> the right to host the seat of government was rooted not merely in patriotic zeal, but also in the hope that Congress would “every day increase in consequence,” bringing wealth and influence to the inhabitants of the city and state that hosted the government.<sup>39</sup> The Founders presumed that the residents of the states closest to the new seat of government would benefit most.<sup>40</sup> James Madison predicted that the new government would be such a source of future revenue that he even lamented that the people “most

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33. U.S. CONST. art. I, § 8, cl. 17.

34. See STORY, *supra* note 27, at 123 (emphasizing that “it rests in the option of the state” to cede land under the District Clause); see also JOSEPH B. VARNUM, THE SEAT OF GOVERNMENT OF THE UNITED STATES 16 (New York, Press of Hunt’s Merchant’s Magazine 1848) (noting that the States of Maryland and Virginia granted Congress land pursuant to the District Clause in consideration for the United States’ promise to make the land the permanent seat of government).

35. THE FEDERALIST NO. 43, at 209 (James Madison) (Terence Ball ed., 2003) (emphasis added); see also VARNUM, *supra* note 34, at 16 (noting that the States of Maryland and Virginia “would never had made the necessary grants” had permanency not been guaranteed by Congress).

36. Richards, *supra* note 2, at 57.

37. Casselman, *supra* note 11, at 126.

38. *Id.* at 123.

39. BOWLING, *supra* note 7, at 67.

40. See 1 ANNALS OF CONG. 896 (Joseph Gales & William Seaton eds., 1789). As Justice Story later wrote in his *Commentaries on the Constitution of the United States*, “There can be little doubt, that the inhabitants composing it would receive with thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union.” STORY, *supra* note 27, at 123.

convenient to the centre” would “enjoy this advantage in a higher degree than others.”<sup>41</sup>

In their anxiousness to acquire the benefits of a nearby location for the capital, the states contending for the honor to host the federal city showed little concern that the residents of the new city would be subject to plenary rule by Congress without representation in that body. Despite their disagreement about the propriety of plenary control by Congress, both Federalists and Anti-Federalists understood that residents of the new district would not be guaranteed the right to representation under the Constitution.<sup>42</sup>

Most striking is the language by which the Framers of the Constitution subjected the district to the plenary control of Congress. The District Clause provides that Congress shall have the power “to exercise *exclusive Legislation in all Cases whatsoever*” over the federal district.<sup>43</sup> This is the same language that the Declaration of Independence used to describe King George and the British Parliament’s power over the rebellious colonies. The Declaration of Independence decries as “absolute Tyranny” the fact that Parliament invested itself with the “power to *legislate*” for the American colonies “*in all cases whatsoever*.”<sup>44</sup> By using the same language in the Constitution to de-

41. ANNALS OF CONG., *supra* note 40, at 896. Madison further predicted that the “expenditures which will take place, where the government will be established, by them who are immediately concerned in its administration, and by others who may resort to it, will not be less than a half a million of dollars a year.” *Id.*

42. See THE FEDERALIST NO. 43, *supra* note 35, at 209–10 (James Madison) (arguing that although the residents of the seat of government would be subject to the plenary control of Congress, the states ceding the land would “provide in the compact [ceding territory to the United States] for the rights and consent of the citizens inhabiting it”); BOWLING, *supra* note 7, at 82 (explaining the Anti-Federalist objection that the residents of the new federal district would be “subject to a government with absolute authority over them but in which they were unrepresented”); STORY, *supra* note 27, at 122; Cobb, *supra* note 16, at 532–33. Proponents of the District Clause did not refute the conclusion that District residents would be subjected to congressional rule without representation, but argued that any harm would be mitigated because the residents of the new federal city would only be transferred to federal authority after a statewide vote. BOWLING, *supra* note 7, at 84 (noting that others “assumed that Congress would provide for a popularly elected legislature” although it was not required to do so); see Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311 (1990). With the exception of three years after the Civil War, the District did not have an elected city council until 1973. *Id.* at 312–13. Even now, the District of Columbia Council’s legislative power is limited by Congress’ power to overturn any council decision. *Id.* at 313. Moreover, Congress frequently legislates the minutiae of District life using “riders” attached to appropriations bills. *Id.* at 313–15.

43. U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

44. THE DECLARATION OF INDEPENDENCE paras. 2, 24 (U.S. 1776) (emphasis added).

scribe the power of Congress over the district, the Framers left no doubt that they were subjecting the people of the federal district to Congress' legislative power without representation.<sup>45</sup>

### C. *The Contract Creating the District of Columbia*

After the ratification of the Constitution, the states vying to host the seat of government were concerned that the intense political wrangling would not end with Congress' choice of location.<sup>46</sup> The District Clause provides only that the location chosen by Congress would be the "seat of government"; it does not provide that this location would be *permanent*.<sup>47</sup> Because the states were concerned that a future Congress would "move the permanent seat elsewhere,"<sup>48</sup> the United States offered more than the Constitution required in order to induce Maryland, Virginia, and the private landowners to grant Congress the land it desired for the District.<sup>49</sup> Accordingly, all of the final documents transferring land from Maryland, Virginia, and the private landowners to Congress for the new federal district reflect that these transfers were conditioned on the United States' promise that the land would be used for the *permanent* seat of government.<sup>50</sup>

First, on December 3, 1789, Virginia passed "An act for the cession of ten miles square, or any lesser quantity of territory within this State, to the United States in Congress assembled, for the permanent

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45. Much has been written of the "counterrevolution" that took place between the Declaration of Independence and the framing of the Constitution. *E.g.*, Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 385 (1986) (noting that the Constitution was a "means of social control in the interests of the moneyed and propertied"); William Michael Treanor, *Taking the Framers Seriously*, 55 U. CHI. L. REV. 1016, 1034 (1988) (reviewing WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987)) ("the Declaration's spirit is primarily concerned with the rights of man while the Constitution's spirit is more practically concerned with the rights of property"). Without a doubt, the change in characterization of government without representation from "absolute Tyranny," THE DECLARATION OF INDEPENDENCE para. 2, to an "indispensible necessity," STORY, *supra* note 27, at 119–20, is indicative of the sea change in American political philosophy during the nation's formative years. *See also* THE FEDERALIST No. 43, *supra* note 35, at 339 (James Madison). The purpose of the broad jurisdiction over the District, similar to the power permitted to Congress over federal land to be used for military installations, was to secure the independence of the fledgling government by making it exempt from state authority and preventing the security of the federal government from being dependent on any individual state. STORY, *supra* note 27, at 123.

46. VARNUM, *supra* note 34, at 15–16.

47. U.S. CONST. art. I, § 8, cl. 17.

48. BOWLING, *supra* note 7, at 66; VARNUM, *supra* note 34, at 15–16.

49. VARNUM, *supra* note 34, at 15–16.

50. *See* Virginia Cession, *supra* note 3; Maryland Ratifying Cession, *supra* note 3; Congress' Acceptance of Ceded Territory, *supra* note 3; 45 CONG. REC. 674 (1910).

seat of the General Government.”<sup>51</sup> Through this act, Virginia promised that any portion of its territory that Congress would select would be “forever ceded and relinquished to the Congress and Government of the United States, in full and absolute right and exclusive jurisdiction.”<sup>52</sup>

In light of Virginia’s promise to cede the required land for use as the permanent seat of government, and Maryland’s stated intention to pass similar legislation at a later time,<sup>53</sup> on July 16, 1790, Congress passed the “Act for establishing the temporary and permanent seat of the Government of the United States.”<sup>54</sup> Members of Congress explained that the “introduction of the word ‘permanent’ in contradistinction to ‘temporary’ in the title of the act” was intended “to make the metropolis of the Union durable and unchangeable” and that a “change of the seat of government would be a violation of the implied contract between the Federal government and the States of Maryland and Virginia, which would never have made the necessary grants, had not *permanency* been guaranteed by the solemn act of Congress.”<sup>55</sup>

Because of the tensions associated with the Compromise of 1790, however, Congress did not designate a specific spot for the new capital in its 1790 legislation.<sup>56</sup> Rather, Congress provided that the boundaries of the new federal territory would be chosen by President Washington. Congress established only a general location, consistent with the Compromise of 1790, that the new capital would be located on the Potomac River between the mouth of the Eastern Branch and

51. Virginia Cession, *supra* note 3; see Busey, *supra* note 12, at 329.

52. Virginia Cession, *supra* note 3; see Busey, *supra* note 12, at 329.

53. Maryland first expressed its intention to cede land to the Congress of the United States on December 23, 1788. An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, Md. Act, Dec. 23, 1788, ch. 46, reprinted in 1 D.C. CODE ANN. at 33 (LexisNexis 2001) [hereinafter Maryland Cession]. By statute, the State of Maryland “authorized and required” representatives to “cede to the Congress of the United States” any area, “not exceeding ten miles square,” that Congress would accept for the seat of government of the United States. *Id.* However, because the “Congress of the United States” did not exist until March 4, 1789, Maryland’s 1788 intention to cede its portion of the District was not finally enacted until December of 1791. Busey, *supra* note 12, at 328–29; see 45 CONG. REC. 672, 678 (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

54. Congress’ Acceptance of Ceded Territory, *supra* note 3; Busey, *supra* note 12, at 328–29.

55. VARNUM, *supra* note 34, at 16.

56. BOWLING, *supra* note 7, at 187–88; see Louis Dow Scisco, *A Site for the “Federal City”: The Original Proprietors and their Negotiations with Washington*, in 1957–1959 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY OF WASHINGTON, D.C. 123, 127–28 (Francis Coleman Rosenberger ed., 1961).

the Connogochegue.<sup>57</sup> Perhaps relying on the respect that Washington commanded, Congress gave the President complete discretion to set the boundaries of the district within broad limits that it described by statute.<sup>58</sup>

Pursuant to this authority, Washington issued a proclamation on January 24, 1791 that laid out the specific boundaries of the new city.<sup>59</sup> The area chosen by Washington was the midpoint between Maine and Georgia, the North-South axis of the new country; this central location was seen as an attempt to cement the Union.<sup>60</sup> Washington's proclamation, however, set the boundaries to include Alexandria, Virginia, which was not within the area permitted by Congress' 1790 Act.<sup>61</sup> Although Washington's proclamation was facially *ultra vires*, Congress avoided an outright confrontation with the beloved President by quietly ratifying his actions through an amendment to the 1790 Act. On March 3, 1791, Congress provided that "it shall be lawful for the President" to include "the town of Alexandria; and the territory so included shall form a part of the district, not exceeding ten miles square, for the permanent seat of the Government of the United States."<sup>62</sup>

The land chosen by Washington and ratified by Congress included some property owned by private landowners. Washington visited the prospective site for the new city in order to persuade the landowners to contribute their land to the federal city.<sup>63</sup> In a June 1791 meeting with the President, the private landowners granted their land on the condition that it would be conveyed to the government "by virtue of the act of Congress entitled 'An act for establishing the temporary and permanent seat of the Government of the United States'" "for the use of the United States forever."<sup>64</sup> This condition referred to

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57. Congress' Acceptance of Ceded Territory, *supra* note 3; Busey, *supra* note 12, at 330. The Connogochegue was later known as the Conococheague.

58. BOWLING, *supra* note 7, at 190.

59. Busey, *supra* note 12, at 328; 45 Cong. Rec. 676.

60. BOWLING, *supra* note 7, at 214–15.

61. *Id.* at 212–13.

62. Act of March 3, 1791, ch. 17, 1 STAT. 214–15 (1791); Busey, *supra* note 12, at 332–33. Pursuant to this amendment, Washington reissued his proclamation three weeks later that set the specific boundaries of the District. *Id.* at 334–35.

63. Scisco, *supra* note 56, at 138–39, 144–45.

64. 45 CONG. REC. 672, 674 (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846). Although the private landowners donated their land, it was not a mere gratuity. As the Supreme Court characterized these grants, the private landowners "understood themselves then to receive payment from the public . . . . It was still contemplated by them as a compensation; as a valuable consideration, fully adequate to the value of all their grants. It can, therefore, be treated in no other manner than as a bargain between themselves and the government, for what each

the fact that Congress had previously provided that Washington was permitted to set the boundaries of a district that would be “deemed the district accepted by this act, for the permanent seat of the Government of the United States.”<sup>65</sup> As the landowners well knew, Washington had already “definitely defined and accepted the territory of 10 miles square, including therein the grant from Virginia”<sup>66</sup> at the time they conditioned their grant of land on Washington’s choice of the new city’s boundaries. In other words, the private landowners’ grant was conditioned on the inclusion of Virginia’s contribution to the District.

Finally, after Virginia, the United States, and the private landowners all agreed on the boundaries of the new city, Maryland made the final grant of land on December 19, 1791.<sup>67</sup> Like the private landowners, Maryland conditioned its grant on the prior promises made by the other parties to the bargain. First, in the preamble to its 1791 act, Maryland recited at length the description of the boundaries of the District, specifically describing the land granted by Virginia.<sup>68</sup> Next, the Maryland act described the land granted by the local landowners.<sup>69</sup> Maryland then declared: “Whereas it appears to this general assembly highly just and expedient that all the lands within the said city should contribute, in due proportion, in the means which have already greatly enhanced the value of the whole,” the Maryland portion of the District would be “forever ceded and relinquished to the Congress and Government of the United States.”<sup>70</sup>

Contemporaneous statements attest to the fact that the four-way bargain made among the United States, Virginia, the private landowners, and Maryland was intended to be a permanent obligation.<sup>71</sup> In addition to the express language of the documents attesting to the permanence of the grants, President Washington issued a presidential proclamation in January 1791 making the District of Columbia the permanent seat of government after 1800. In 1799, President Adams referred to the transfer of the seat of government “to the district chosen for its permanent seat.”<sup>72</sup> In that same year, the House of Repre-

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deemed an adequate consideration.” *Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 232, 280–81 (1830).

65. Congress’ Acceptance of Ceded Territory, *supra* note 3; 45 CONG. REC. at 674.

66. 45 CONG. REC. at 674.

67. See Maryland Ratifying Cession, *supra* note 3 at 34.

68. Maryland Ratifying Cession, *supra* note 3; 45 CONG. REC. at 678.

69. Maryland Ratifying Cession, *supra* note 3; 45 CONG. REC. at 678.

70. Maryland Ratifying Cession, *supra* note 3; 45 CONG. REC. at 678.

71. See Cobb, *supra* note 16, at 545 (noting that immediately after the cession of land, opponents of removal referred to the agreement locating the District as a contract).

72. Busey, *supra* note 12, at 339.

sentatives referred to the District as the permanent seat of government. In 1800, President Adams again addressed the joint houses of Congress, congratulating “the people of the United States on the assembling of Congress at the permanent Seat of their Government.”<sup>73</sup> When debate in Congress arose over removing the seat of government to Philadelphia in 1808, opponents of removal quelled the debate by reminding Congress that the decision to locate the seat of government in Washington had been the result of a bargained-for agreement.<sup>74</sup> The “ten miles square” allocated for the seat of government, permitted by the Constitution, and effected by a four-way contract among the United States, Virginia, Maryland, and the private landowners, remained intact for fifty-five years.

#### D. *The Retrocession of Alexandria to Virginia*

In 1846, the Virginia General Assembly enacted a law providing that the land it had “forever ceded and relinquished to the congress and government of the United States”<sup>75</sup> would be “reannexed to this Commonwealth and constitute a portion thereof.”<sup>76</sup> Virginia’s stated reason for its decision to annex Alexandria in violation of its previous promise does not provide much insight into its intentions. In its 1846 Act of Retrocession, Virginia merely recorded that it was annexing Alexandria because “a petition has been presented to the general assembly by the citizens residing in said county of Alexandria . . . praying the consent of the general assembly to such re-cession.”<sup>77</sup> While the Virginia Assembly hinted that it was annexing Alexandria as a result of a petition presented by Alexandria’s citizens, contemporaneous evidence reveals that it was responding to pressure exerted by a small but powerful group of Alexandria’s merchants.<sup>78</sup>

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73. *Id.*

74. Cobb, *supra* note 16, at 544–45.

75. Virginia Cession, *supra* note 3.

76. An Act Accepting by the State of Virginia the County of Alexandria, in the District of Columbia, When the Same Shall be Re-ceded by the Congress of the United States, 1846 Va. Acts, ch. 64 [hereinafter Act of Retrocession].

77. *Id.*

78. See 2 WILHELMUS BOGART BRYAN, A HISTORY OF THE NATIONAL CAPITAL: FROM ITS FOUNDATION THROUGH THE PERIOD OF THE ADOPTION OF THE ORGANIC ACT 262–63 (Macmillan Company 1916); Mark David Richards, Address before the Arlington Historical Society: Fragmented before a Great Storm (May 9, 2002), available at <http://www.dcwatch.com/richards/020509.htm> (noting that Alexandria’s merchants, concerned with the economic stability of Alexandria, advocated retrocession as a result of the economic woes associated with the C&O Canal project and the District’s banking crisis). Among the merchants who played a significant role in effecting the annexation of Alexandria were Alexandria’s slave dealers, who advocated for retrocession as a way to protect Alexandria’s slave trade in the event that slavery

Early advocates of retroceding Alexandria to Virginia focused on issues of broad concern, particularly the fact that District residents were denied the basic right of self-governance.<sup>79</sup> However, by the time the modern retrocession movement developed in the 1840s, Virginia's advocates for retrocession were merchants with distinctly more parochial interests.<sup>80</sup> For these new retrocessionists, "economic conditions" rather than "the loss of political rights" accounted for the "unrest and dissatisfaction" of governance by Congress.<sup>81</sup> In 1840, Congress failed to recharter national banks in the District.<sup>82</sup> The sudden lack of funds brought about by the bank closures directly precipitated the creation of the Committee of Thirteen, a group of Alexandria merchants that would spend the next six years lobbying the Virginia Assembly to annex Alexandria.<sup>83</sup> This lack of funds exacerbated the difficult economic situation caused by the failure of the C&O Canal project and reenergized Alexandria's retrocession movement.<sup>84</sup>

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was abolished in the District. See HAROLD HURST, *ALEXANDRIA ON THE POTOMAC: THE PORTRAIT OF AN ANTEBELLUM COMMUNITY* 4 (1991); ELI ZIGAS, *LEFT WITH FEW RIGHTS: UNEQUAL DEMOCRACY AND THE DISTRICT OF COLUMBIA* 18 (2008). As they predicted, Alexandria continued the slave trade long after it was abolished in the District, becoming the major slave depot of the South during the 1850s. Richards, *supra* note 2, at 74. In addition to directly securing their own financial interests by preserving slavery in Alexandria, Alexandria's slave merchants further entrenched slavery in the State of Virginia, and nationally through retrocession. By annexing Alexandria, Virginia added two more pro-slavery members to the U.S. House of Representatives. *Id.* at 71. The State of Virginia General Assembly, moreover, further bolstered its pro-slavery contingent by adding members from Alexandria to the Assembly. Before the Civil War, Virginia's Assembly was torn between its anti-slavery "piedmont and mountain county farmers" and pro-slavery "tidewater planters." Richards, *supra* note 78. Adding Alexandria was a "victory" for the pro-slavery faction in the "intensifying political struggle" between these two groups. *Id.* While Richards argues that slavery was not evidently a major force driving retrocession, a closer examination of the congressional vote on retrocession does reveal that representatives from slave states were far more likely to vote for retrocession than representatives from free states. See Richards, *supra* note 2, at 70–71. While 51% of voting representatives from free states voted in favor of retrocession, 74% of representatives from slave states voted in favor of retrocession. See *id.*

79. Cobb, *supra* note 16, at 544–47 (noting that early discussions about the propriety of removal of the seat of government focused on issues of its constitutionality and on restoring the franchise); Richards, *supra* note 2, at 57.

80. BRYAN, *supra* note 78, at 266–67; Richards, *supra* note 78.

81. BRYAN, *supra* note 78, at 266–67.

82. *Id.* at 258–59.

83. See Richards, *supra* note 2, at 66–67; see also ZIGAS, *supra* note 78, at 17–18 (noting that economic conditions precipitated the retrocession movement in the 1830s and 1840s).

84. See BRYAN, *supra* note 78, at 262 (retrocession was "inspired" by Alexandria's economic woes); ZIGAS, *supra* note 78, at 18; Richards, *supra* note 78.

The C&O Canal project was designed to connect Alexandria to inland trade routes, making it supreme over its rival Georgetown. The project failed to bring in the revenue that the merchants expected; cut off from access to lending institutions, the merchants found themselves unable to borrow money to finish the project.<sup>85</sup> These merchants approached the Virginia legislature and pressed two related proposals; they would support retrocession of Alexandria to Virginia if the Virginia Assembly would assume the debt of the Canal project.<sup>86</sup> In response to the Committee of Thirteen's proposal, the Virginia Assembly passed a bill offering to accept the retrocession of Alexandria. True to the compromise proposed by the Committee of Thirteen, the first session of the Virginia Assembly after retrocession repaid the merchants' support by bailing out the Canal project, relieving Alexandria's merchants of a significant economic burden.<sup>87</sup>

Because the retrocession was driven by a small group of merchants heavily invested in a single insolvent project, it appears to have been enacted "as a favor" to local interests "and not to subserve any public interest."<sup>88</sup> In order to conceal the fact that all of Alexandria was not united in the decision to join Virginia, the referendum taken of the people of Alexandria, ostensibly to probe support for retrocession, was gerrymandered by pro-retrocessionists to secure a favorable vote for retrocession.<sup>89</sup> First, the referendum was held in relative secrecy in order to prevent Alexandria County's rural farmers, who were largely anti-retrocession, from voicing their opposition.<sup>90</sup> When they were informed of the referendum, after the fact, the residents of rural Alexandria County filed a formal complaint with the Virginia Assembly, protesting that they "were not consulted upon the matter of retrocession, or advised of the intention to seek a change of our allegiance, the whole proceeding having been concocted and de-

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85. See BRYAN, *supra* note 78, at 261–62.

86. *Id.* at 262–63.

87. *Id.* at 263. Immediately following the retrocession, Virginia "purchased at par the valueless bonds of the Alexandria Canal Company and assumed three-fifths of the corporation's debts, thus relieving the city of a burdensome debt." HURST, *supra* note 78, at 4. As compared with the outdated commercial laws of the District, which were frozen at time of the creation of the capital, Virginia had "liberal incorporation laws" that benefitted Alexandria merchants after retrocession. *Id.*

88. Casselman, *supra* note 11, at 115, 126.

89. *Id.* at 129.

90. See Memorial of the Citizens of the Country Part of Alexandria to the Virginia House of Assembly (December 2, 1846), in RECORDS OF THE COLUMBIA HISTORICAL SOCIETY OF WASHINGTON, *supra* note 11, at 127 [hereinafter Memorial of the Citizens of the Country Part of Alexandria]; Richards, *supra* note 2, at 67–68.

terminated upon in secret meeting” of the City of Alexandria.<sup>91</sup> The protest of the people of Alexandria County was ignored.<sup>92</sup>

Second, the referendum polled only the people of Alexandria, not the people of the entire District of Columbia. This selective referendum stood in sharp contrast with the initial cession of the land for the District, which was made by the state legislatures of Virginia and Maryland, representing the entirety of these states.<sup>93</sup> The residents of Georgetown, who were overwhelmingly opposed to retrocession, were not permitted to vote on the 1846 retrocession.<sup>94</sup>

Perhaps the most egregious indication that the wishes of the residents of Alexandria were only nominally taken into account is the fact that Alexandria County, whose residents were largely opposed to the retrocession, were retroceded along with the City of Alexandria.<sup>95</sup> Only a careful gerrymandering of the referendum permitted the people’s interests to be distorted to justify the retrocession of both Alexandria City and Alexandria County without taking into consideration the opinions of the rest of the District’s residents.<sup>96</sup>

The retrocession, provoked by a small group of merchants invested in the C&O Canal project, and effected by thinly veiled political maneuvering, was “the result of purely local influences” and “unjustified by any public interest.”<sup>97</sup> While it often has been pointed out that the retrocession was “unwise” and even “dangerous,”<sup>98</sup> the legality of retrocession has never been resolved.<sup>99</sup> However, this review of the history of the formation of the District of Columbia and its

91. Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127.

92. Casselman, *supra* note 11, at 127.

93. BOWLING, *supra* note 7, at 166; *see also* THE FEDERALIST NO. 43, *supra* note 35, at 210 (James Madison) (noting that the cession of land for use as the seat of government was only permitted with “the authority of the legislature of the State, and of the inhabitants of the ceded part of it.”). Indeed, the legitimacy of the original cession was predicated, in part, on the fact that Maryland and Virginia would be able to vote on the rights and fate of their citizens. *Id.*

94. ZIGAS, *supra* note 78, at 18.

95. Casselman, *supra* note 11, at 126–27; Richards, *supra* note 2, at 71.

96. Casselman, *supra* note 11, at 129.

97. *Id.* at 115, 126.

98. President Abraham Lincoln, State of the Union Address (Dec. 3, 1861).

99. H. PAUL CAEMMERER, A MANUAL ON THE ORIGIN AND DEVELOPMENT OF WASHINGTON 51 (Negley Press 2008). While early critics of the retrocession did raise the possibility that it was unconstitutional, the retrocession issue has been dormant since the early twentieth century. Richards, *supra* note 2, at 55. When the Supreme Court was faced with the opportunity to rule on the question, it sidestepped the issue, holding that the retrocession was not subject to judicial challenge. *Phillips v. Payne*, 92 U.S. 130, 133 (1875). This issue, and other arguments raised by *Phillips*, are addressed *infra* Part IV.

subsequent division raises a serious basis for questioning the retrocession's legality. Because Virginia's Act of Retrocession of 1846 breached its 1790 promise to forever cede and relinquish Alexandria to Congress, the nature of Virginia's contractual relationship and the consequences of its subsequent repudiation of these obligations must be viewed in light of the Contract Clause's restriction on state laws that impair obligations of contract. The legality of retrocession in light of the Contract Clause is addressed below.

## II.

### THE SCOPE OF THE CONTRACT CLAUSE AND ITS APPLICATION TO THE RETROCESSION

#### A. *The Dormancy of the Contract Clause*

The Contract Clause of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligations of Contract."<sup>100</sup> By its terms, this broad prohibition appears to foreclose Virginia from reneging on its contractual obligations to Maryland, the United States, and the private landowners to forever cede and relinquish Alexandria for use as part of the permanent seat of government. However, as with much legal interpretation, the life of the Contract Clause "has not been logic, it has been experience."<sup>101</sup> As experience goes, the Contract Clause has had one of the most unusual, evolving from the "principle vehicle by which the Supreme Court asserted federal constitutional control over state governments"<sup>102</sup> into nearly a dead-letter in the post-New Deal era.<sup>103</sup> Indeed, prior to the enactment of the Fourteenth Amendment's Due Process Clause, the Contract Clause was regarded as an "absolute bar to any impairment."<sup>104</sup> After suffering a decline during the latter half of the nineteenth century, the Contract Clause's previous vitality came to an abrupt end during the New Deal. Beginning with *Home Building & Loan Association v.*

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100. U.S. CONST. art. I, § 10, cl. 1.

101. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

102. Thomas W. Merrill, *Public Contracts, Private Contract, and the Transformation of the Constitutional Order*, 37 *CASE W. RES. L. REV.* 597, 598 (1986).

103. *See id.* at 598; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

104. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977); *see also* *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 241 (1978) (noting that the Contract Clause was the "strongest single constitutional check on state legislation" prior to the enactment of the Fourteenth Amendment); Merrill, *supra* note 102, at 597-98 ("in the days before the enactment of the fourteenth amendment, the contract clause . . . was the principal vehicle by which the Supreme Court asserted federal constitutional control over the state governments").

*Blaisdell*,<sup>105</sup> and continuing for much of the twentieth century, the Court declined to strike down a single state law based on the Contract Clause.<sup>106</sup> This new deference to state legislatures paralleled the deference that the Court showed to Congress in the post-New Deal era.<sup>107</sup> Indeed, after *Blaisdell*, the Court applied a deferential standard to state legislation under the Contract Clause akin to the rational basis review accorded to Congress under the Equal Protection Clause.<sup>108</sup>

B. United States Trust and a New Direction in  
*Contract Clause Jurisprudence*

In 1977, the Supreme Court ended its decades-long abstention from enforcing the Contract Clause by striking down parallel statutes of New York and New Jersey in *United States Trust*.<sup>109</sup> In *United States Trust*, however, the Court did more than merely resurrect its pre-New Deal jurisprudence. Rather, the Court distinguished, for the first time, between private contracts and public contracts, that is, contracts to which a state is itself a party. This distinction is critical for analyzing the constitutionality of the retrocession of Alexandria.<sup>110</sup>

In *United States Trust*, the States of New York and New Jersey rescinded earlier covenants to refrain from subsidizing the operations of a commuter rail system with general funds from the Port Authority of New York and New Jersey. The Port Authority was established by New York and New Jersey to own and manage the means of transportation in and around New York City.<sup>111</sup> It was authorized to issue

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105. 290 U.S. 398.

106. Merrill, *supra* note 102, at 598.

107. *Id.*

108. *See id.*, at 598. The Court has emphasized that it is proper to defer to state legislative enactments that burden purely private contracts because they are merely “economic and social legislation.” *United States Trust*, 431 U.S. at 22–23. However, the Court went on to distinguish purely private contracts from public contracts, which are not entitled to the same level of deference. *Id.* at 25–26; *see Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract*, 125 U. PA. L. REV. 167, 179–80 (1976) (recounting that just before the Court’s 1977 opinion in *United States Trust*, the then-current analysis under the Clause was subsumed under a “rational relation” test).

109. 431 U.S. at 3, 32.

110. *Id.* at 25–26. As an initial matter, *United States Trust* resolves the predicate question of whether a contract can be established by state statute for the purposes of the Contract Clause. It restated the long-settled rule that a contractual “obligation” can “be created by statute.” *Id.* at 17–18. Like the agreement creating the District of Columbia, in *United States Trust*, the covenant was between two states in favor of one another and in favor of private parties.

111. *Id.* at 4.

bonds to private investors in order to raise revenue<sup>112</sup> and, in 1962, to acquire the Hudson & Manhattan Railroad.<sup>113</sup>

In parallel legislation authorizing the acquisition of the Hudson & Manhattan, New York and New Jersey covenanted that revenues derived from the sale of bonds to investors would not be used to pay for new expenses associated with the operation of the Hudson & Manhattan Railroad.<sup>114</sup> In 1974, in light of the costs associated with managing the joint railroad system, New York and New Jersey enacted parallel statutes repealing their respective covenants to refrain from subsidizing these expenses from general funds.<sup>115</sup> The bondholders sued to invalidate the 1972 laws, arguing that the Contract Clause prohibited New York and New Jersey from enacting this legislation because it impaired the states' contractual obligations to the bondholders.<sup>116</sup>

Finding that the laws repealing the 1962 covenants were neither necessary nor reasonable, the Court held that the state laws violated the Contract Clause of the United States Constitution.<sup>117</sup> Despite the fact that this was the first time in nearly half a century that the Court struck down a state law on Contract Clause grounds, the Court did not describe its decision as novel.<sup>118</sup> Rather, the Court limited the deference it previously accorded state legislation under the Contract Clause to laws that burden contracts between private parties alone. By contrast, the Court held that this deference does not apply to public contracts.<sup>119</sup>

The Court rested its distinction between purely private contracts and public contracts on the fact that the state is an interested party that stands to benefit from the decision to impair its own contractual obligations.<sup>120</sup> The Court held that the deference traditionally accorded to a state's financial legislation simply is not appropriate when a state is a party to a contract that the legislature has breached because the "State's self-interest is at stake."<sup>121</sup> The Court reasoned that if the Contract Clause did not protect beneficiaries of public contracts from

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112. *Id.* at 4–5.

113. *Id.* at 11.

114. *Id.* The Hudson & Manhattan Railroad was subsequently renamed the Port Authority Trans-Hudson Corporation (PATH). *Id.*

115. *Id.* at 13–14.

116. *Id.* at 3.

117. *Id.* at 29–31.

118. *Id.* at 23–24.

119. *Id.* at 25–26.

120. *Id.*

121. *Id.* at 26.

self-interested legislation, then it would “provide no protection at all.”<sup>122</sup>

Starting with the premise that a state deserves little deference when enacting legislation that burdens a public contract, the Court in *United States Trust* proceeded to ask whether the legislative repeal of the 1962 covenant was “reasonable and necessary” to serve an “important public purpose.”<sup>123</sup> The Court assumed without deciding that encouraging mass transportation by subsidizing commuter railroad service was an important public purpose. Turning to the issues of what constitutes “reasonable and necessary” in the context of public contracts, the Court held that the state’s burden was high.<sup>124</sup> Because the Court could conceive of hypothetical alternative measures to achieve the same ends, the repeal of the 1962 covenant was not necessary.<sup>125</sup> In addition, the Court held that the repeal of the 1962 covenant was not “reasonable” because the need for mass public transportation was known at the time of the covenant.<sup>126</sup> Because the states knew that they could incur a deficit by owning commuter railways, it was not reasonable for them to impair their contracts with the bondholders to subsidize this deficit.<sup>127</sup>

The Supreme Court has reiterated the distinction between purely private contracts and public contracts in numerous decisions since *United States Trust*, deeply establishing the principle that state laws that impair a state’s own contractual obligations are reviewed with a great deal of scrutiny.<sup>128</sup> In the years following *United States Trust*, the Supreme Court and lower courts have elaborated on the types of state interests that are enacted for an “important public purpose,” and

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122. *Id.* The Court’s concern that a state will not be impartial when considering legislation that would affect its economic well-being is not a new one. James Madison reasoned that: “No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?” THE FEDERALIST NO. 10, *supra* note 35, at 42 (James Madison); Merrill, *supra* note 102, at 613.

123. *United States Trust*, 431 U.S. at 25.

124. *Id.* at 29–32.

125. *Id.* at 30, 31 n.28–29.

126. *Id.* at 31–32.

127. *Id.*

128. *E.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996) (comparing Contract Clause analysis to the Due Process Clause’s restrictions on federal impairments of contract); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987); *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412–13 n.14 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 n.13 (1983); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244 n.15 (1978).

whether these statutes are “reasonable” and “necessary” to meet such a purpose.<sup>129</sup>

### 1. *Important Public Purpose*

In order to overcome a Contract Clause challenge, a state must first identify an “important public purpose” that its impairment of its own contractual obligation seeks to remedy.<sup>130</sup> Whether the purpose proposed by the state is important depends, in turn, on whether the law impairing the contractual obligation is “enacted to protect a broad societal interest”<sup>131</sup> rather than having the intent or result of affecting specific contracts.<sup>132</sup>

Even in the context of purely private contracts, in which deference to the state legislature is at its apex, the Court holds that a state’s purpose is not legitimate<sup>133</sup> if it provides a benefit to “special interests”<sup>134</sup> or a “narrow class”<sup>135</sup> or has the “sole effect” of “repeal[ing] a covenant” or “alter[ing] contractual duties.”<sup>136</sup> By contrast, only a state law that provides a “generally applicable rule of conduct” and only burdens contractual obligations “incidental to [the] main effect” of addressing a “broad societal interest” will survive Contract Clause scrutiny.<sup>137</sup>

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129. *E.g.*, *Winstar*, 518 U.S. 839; *Energy Reserves*, 459 U.S. 400; *Eagerton*, 462 U.S. 176; *Spannaus*, 438 U.S. 234; *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 897 (9th Cir. 2003); *Mascio v. Pub. Employees Ret. Sys.*, 160 F.3d 310 (6th Cir. 1998).

130. *United States Trust*, 431 U.S. at 25.

131. *Spannaus*, 438 U.S. at 249–50.

132. *E.g.*, *Eagerton*, 462 U.S. at 191–92; *Energy Reserves*, 459 U.S. at 412 n.13; *Mascio*, 160 F.3d at 314 n.2.

133. “Legitimate” is an even lower standard than “important,” which is reserved for review of state law that burdens its own contractual obligations. *Energy Reserves*, 459 U.S. at 413 n.14. If a state law is not “legitimate” neither would it be “important.”

134. *Energy Reserves*, 459 U.S. at 412; *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (noting that the Contract Clause prohibits legislation intended to benefit “some favored group”).

135. *Spannaus*, 438 U.S. at 249.

136. *Eagerton*, 462 U.S. at 192.

137. *Id.* at 191–92. When the sovereign, be it a state legislature or Congress, exercises its legislative judgment, there is a presumption that it is doing so pursuant to its “police power” in order to promote the welfare of the people at large. *Energy Reserves*, 459 U.S. at 412. However, when a law is enacted to “protect a narrow class,” this presumption disappears. *Spannaus*, 438 U.S. at 249–50. The sovereign may be shielded from liability for a statute it enacts as a sovereign only if it is not the result of “self-relief.” *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996). The Court has stated unequivocally that financial burdens that should be borne by the government, as a representative of the public as a whole, may not be shifted to private parties. *Id.* at 896–97. By invalidating state laws that are narrowly drawn to repeal specific covenants, the Court seeks to ensure that the state is “properly exercising its

In *Allied Structural Steel v. Spannaus*,<sup>138</sup> a number of Minnesota employers and their employees entered into contracts in which the employers agreed to provide the employees with pension rights only after working for a specified number of years. The challenged state law required Minnesota employers that terminate pension plans to make a lump sum payment to individuals whose pensions had not yet vested. The Court found that the law applied only to a small set of contracts rather than to every Minnesota employer.<sup>139</sup> Because the Court found that the Minnesota law “was aimed at specific employers” and may have been “directed at one particular employer,”<sup>140</sup> the law did not deal with a “broad, generalized economic or social problem.”<sup>141</sup> As a result, the Court held it was in violation of the Contract Clause.<sup>142</sup> A similar issue arose in *Mascio v. Public Employees Retirement Systems*,<sup>143</sup> in which an Ohio law suspended already vested retirement benefits for state employees who took other state jobs. The Sixth Circuit found that the state law was directed at a single type of public contract; and therefore, the state’s impairment was “even more clearly unconstitutional” than the state law at issue in *Spannaus*.<sup>144</sup>

## 2. *Necessity*

Even if the state’s interest in impairing its contractual obligation is “important,” the method the state chooses to meet this goal must be “necessary” in order to survive a Contract Clause challenge.<sup>145</sup> The Court will only find that a state law is “necessary” if it is “essential” to the state’s purpose; that is, it is necessary only if there are no hypothetical alternative means for the state to achieve its purpose.<sup>146</sup> A state must demonstrate that it considered other possible ways to achieve its goal in addition to breaching its contractual obligation.<sup>147</sup>

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police power, rather than “providing a benefit to special interests.” *Energy Reserves*, 459 U.S. at 412.

138. 438 U.S. 234.

139. *Id.* at 250.

140. *Energy Reserves*, 459 U.S. at 412 n.13 (citing *Spannaus*, 438 U.S. at 247–48 & n.20).

141. *Spannaus*, 438 U.S. at 250.

142. *Id.* at 250–51.

143. 160 F.3d 310 (6th Cir. 1998).

144. *Id.* at 314 n.2.

145. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

146. *Id.* at 29–31 & nn.28–29.

147. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 897 (9th Cir. 2003); *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999).

In *Southern California Gas Co. v. Santa Ana*,<sup>148</sup> a city ordinance granted a gas utility the right to excavate under city streets without paying a fee unless the utility caused damage to the street above.<sup>149</sup> A later ordinance required the utility to pay for the right to excavate, irrespective of damage, in advance of the excavation.<sup>150</sup> The utility challenged the law as violative of the Contract Clause. Holding that the “ordinance is not necessary if more moderate alternatives” would serve the city’s purposes of raising revenue and encouraging coordination between the city and utilities, the court proceeded to speculate as to possible alternative measures that the city could have undertaken.<sup>151</sup> The court speculated that the city could simply raise revenue through taxes and encourage coordination by requiring the utility to give notice to the city, requiring periodic meetings between city and utility representatives, and entering into individual agreements with utilities.<sup>152</sup> Because the court could imagine possible alternatives that would preserve the utility’s contract right, the city’s breach was not “necessary” within the meaning of the Contract Clause.<sup>153</sup> Similarly, in *University of Hawaii Professional Assembly v. Cayetano*,<sup>154</sup> the court noted that the state had to consider alternatives to breaching its contract, even if these alternatives were “politically more difficult.”<sup>155</sup> The court held that it was the state’s burden to demonstrate that it could not have undertaken the hypothetical alternative measures posited by the court; because it could not so demonstrate, the court held that the state’s decision to impair its contractual obligations was not necessary.<sup>156</sup>

### 3. Reasonableness

If a court finds that the stated purpose of a state’s legislation is “important” and that the method chosen by the state to address this purpose is “necessary,” the court finally must determine whether the state’s attempt to achieve its goal is “reasonable.”<sup>157</sup> As with neces-

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148. 336 F.3d 885.

149. *Id.* at 878–88.

150. *Id.* at 888, 890.

151. *Id.* at 897.

152. *Id.*

153. *Id.*

154. 183 F.3d 1096, 1107 (9th Cir. 1999).

155. *Id.*

156. *Id.*; see also *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1010 (4th Cir. 1980) (holding that because the state’s purpose was addressed by other provisions in the legislation breaching the contractual obligation, the provision breaching the contractual obligation was not necessary).

157. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

sity, the scope of what is reasonable is narrow.<sup>158</sup> A state law will only be “reasonable” if the harm that the state seeks to remedy by breaching its contractual obligation was unforeseen at the time the contractual obligation was made.<sup>159</sup> In *United States Trust*, New York and New Jersey breached a contractual obligation to private bondholders providing that the states would not use revenues from general bonds to subsidize mass transportation.<sup>160</sup> The states argued that the contracts entered into with private bondholders inhibited the states’ ability to provide mass transportation in and around New York City. The Court held that because the need for mass transportation in the New York metropolitan area was “not a new development,” and because the likelihood that the mass transportation system would produce deficits was well known, the states’ breach of contract was not reasonable.<sup>161</sup> Because reasonableness is related to the expectations of the parties to the contract, the Court normally has found a state’s impairment of contract rights to be reasonable only when the party whose rights are being impaired is a member of a heavily regulated industry.<sup>162</sup>

In addition, and as a corollary to the Court’s principle that impairments of contract are unlawful if they *benefit* only “special interests”<sup>163</sup> or a “narrow class,”<sup>164</sup> a state’s method of addressing an important purpose may not be reasonable if it is used to “burden a politically defenseless or easy target group” without “fair attention to its interests.”<sup>165</sup>

158. *Id.* at 31–32.

159. *E.g., id.* at 31–32; *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 895 (9th Cir. 2003).

160. *United States Trust*, 431 U.S. at 25–26.

161. *Id.* at 31–32.

162. Because a member of a heavily regulated industry is always on notice that its rights might be altered by changes in regulations, the Court holds that subsequent changes to contract rights are foreseeable and thus reasonable. *See Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 413–14 (1983).

163. *Energy Reserves*, 459 U.S. at 412.

164. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 249 (1978).

165. *Bd. of Comm’rs of the Orleans Levee Dist. v. Dep’t of Natural Res.*, 496 So. 2d 281, 293 (La. 1986) (emphasis added) (citing Note, *A Process-Oriented Approach to the Contract Clause*, 89 *YALE L.J.* 1623, 1646–47 (1980)); *see also Energy Reserves*, 459 U.S. at 410 n.11 (explaining that the state statute must “protect a basic societal interest, rather than particular individuals” to survive Contract Clause scrutiny (citing *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444–47 (1934)); *cf. RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1171–72 (9th Cir. 2004) (Bybee, J., dissenting) (noting that when “[a] relatively small number of persons [are] concerned [by the legislation], a danger exists that the legislature acted less out of concern for the general good than for special interest or even its own interest” and such a breakdown of the political process is exactly what the Contract Clause was meant to prevent) (internal citation and quotation marks omitted); James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 *ALA. L. REV.* 1095, 1113–14 (2000) (arguing

Finally, a state law that impairs an obligation of contract is reasonable only if it effects a temporary delay in, rather than a total elimination of, its contractual obligation.<sup>166</sup> As the Court held in *Spannaus*, state legislation impairing a contractual obligation is invalid under the Contract Clause when not tailored in scope and in duration to a particular emergency situation.<sup>167</sup> With *United States Trust* and its progeny in mind, the retrocession of Alexandria to Virginia can be examined for validity under the Contract Clause.

### C. Virginia's Violation of the Contract Clause

Through an exchange of promises, the United States, Virginia, Maryland, and private landowners entered into a four-part bargain that resulted in the creation of the District of Columbia. First, Virginia promised to forever cede and relinquish Alexandria “to the Congress and Government of the United States, in full and absolute right” to be used as the “permanent seat” of government.<sup>168</sup> Next, the private landowners granted their land to the United States, specifically conditioning their gift on the boundaries of Virginia’s grant.<sup>169</sup> Maryland, likewise, conditioned its grant of land on the prior promises made by the other parties to the bargain, reciting at length the description of the boundaries of the District and specifically describing the land granted by Virginia and the private landowners.<sup>170</sup> Maryland added that its land would be contributed only “in due proportion” to the other contributors to the new city.<sup>171</sup> In exchange for these promises of land, the United States promised each of the parties that the land granted would be used as the “permanent seat of the Government.”<sup>172</sup> For fifty-five years, each of the parties to the contract creating the District of Co-

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that retroactive legislation can be navigated by the principle of reciprocity of advantage and the concern for all minorities); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that legislation directed at “discrete and insular minorities” merits stricter scrutiny).

166. *Spannaus*, 438 U.S. at 250; *Blaisdell*, 290 U.S. at 439–40 (upholding mortgage moratorium, in part, because it was “limited and temporary”); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1008–09 (4th Cir. 1980).

167. *Spannaus*, 438 U.S. at 242–43; *Blaisdell*, 290 U.S. at 439–40; *Garris*, 630 F.2d at 1008.

168. *Virginia Cession*, *supra* note 3, at 33; *see also* *Busey*, *supra* note 12, at 338.

169. *See* *Scisco*, *supra* note 56, at 140, 144–45; 45 CONG. REC. 672, 677–78 (1910); *see supra* Part II.C.

170. *Maryland Ratifying Cession*, *supra* note 3, at 34–35; 45 CONG. REC. 672, 678 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

171. *Maryland Ratifying Cession*, *supra* note 3, at 35; 45 CONG. REC. at 678.

172. *Congress’ Acceptance of Ceded Territory*, *supra* note 3; *Busey*, *supra* note 12, at 340–41.

lumbia observed its contractual obligations to the other parties. The District of Columbia was built on the “ten miles square” that was ceded by Virginia, the private landowners, and Maryland; the United States exercised “exclusive legislation” over the federal city, as authorized by the Constitution.<sup>173</sup>

During the first half of the nineteenth century, the sectional tensions that had been temporarily assuaged by the compromises attending the drafting of the Constitution became increasingly uncontainable.<sup>174</sup> As the nation headed towards fracture, the District of Columbia, the ultimate symbol of compromise of the parochial interests of the early period of the republic, became the first casualty of the coming war.

The Virginia Assembly’s 1846 Act of Retrocession provided that Alexandria “shall be and remain reannexed to this Commonwealth and constitute a portion thereof”<sup>175</sup> in derogation of Virginia’s previous promise to “forever cede and relinquish” this land to Congress to be the “permanent seat” of the United States government.<sup>176</sup> The Act of Retrocession falls squarely within the scope of conduct that *United States Trust* and its progeny aim to prohibit. First, and perhaps dispositively, the contract breached by Virginia’s Act of Retrocession was not a purely private contract, but rather a public contract with obligations running from the state of Virginia itself. Second, Virginia’s Act of Retrocession was not enacted to meet an important public purpose. Third, the Act of Retrocession was not necessary to meet

173. U.S. CONST. art. I, § 8.

174. In particular, the issue of slavery was repeatedly addressed, resulting in a series of compromises that proved unsatisfying, both to pro- and anti-slavery interests. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 *HAMLIN L. REV.* 1, 9–10 (1996). The Northwest Ordinance prohibited slavery in territories north and west of the Ohio River; this was modified by the Missouri Compromise, which permitted Missouri to enter the Union as a slave state, Maine to enter as a free state, and prohibited slavery above the 36° 30’ line, excepting Missouri. *Id.* The Compromise of 1850 modified the Missouri Compromise by abolishing slavery in the District of Columbia, strengthening fugitive slave laws, and permitting California to enter the Union as a free state and the new territories acquired by Mexico to enter the Union as slave states, irrespective of their latitude. *Id.* Finally, in 1854, the Kansas-Nebraska Act repealed the remainder of the Missouri Compromise by permitting the issue of slavery to be decided by the popular vote in Kansas, Nebraska, the Dakotas, Wyoming, Montana, and Colorado, resulting in bloody border wars on the Kansas-Nebraska frontier and the formation of the anti-slavery Republican Party in the North. *Id.* at 10. The 1846 retrocession can be viewed as another compromise in this timeline, which, like the other accommodations to slaveholding interests, temporarily but ultimately ineffectively forestalled the Civil War.

175. Act of Retrocession, *supra* note 76.

176. Virginia Cession, *supra* note 3, at 32–33; *see* Busey, *supra* note 12, at 339.

Virginia's goal. Last, the Act of Retrocession was not reasonable, as contemplated by Contract Clause jurisprudence.<sup>177</sup>

### *1. Virginia's Act of Retrocession Burdened Its Own Contractual Obligation*

As the Supreme Court has held invariably since *United States Trust*, while it is proper to “defer to legislative judgment” when a state burdens purely private contracts, by contrast, when a state passes legislation alleviating its own contractual obligations, this kind of deference simply is not appropriate.<sup>178</sup> Rather, the Court recognized that when a state is a party to a contract, the “State’s self-interest is at stake.”<sup>179</sup> In *United States Trust*, the Court concluded that if the Contract Clause has any force at all, it must be able to prohibit a state from impairing its *own* contractual obligations. The “heightened Contract Clause scrutiny” applied when “States abrogate their own contractual obligations”<sup>180</sup> is akin to the “‘strict’ in theory and fatal in fact”<sup>181</sup> level of judicial review reserved for laws burdening suspect classes and fundamental rights.<sup>182</sup> It is, indeed, even harder to overcome in

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177. Although outside the scope of this article, it is possible that the District Clause itself invalidates the retrocession. The District Clause contemplates that the district be composed of land that Congress accepts from “Cession of particular States.” U.S. CONST. art. I, § 8, cl. 17 (emphasis added). A plain reading of this provision requires the federal district to be composed of land from at least two states rather than from land from a single state. Had the Framers intended to give Congress a choice about whether to create the district out of territory ceded either from a single state or from multiple states, they could have done so expressly. Indeed, the Constitution contains evidence that the Framers’ deliberately chose either the words “any State” or “States,” depending on what they intended to convey. In the District Clause itself, the Constitution distinguishes between the “particular States” that may cede land for the federal district and the purchase of land for “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings” from the “State in which the Same shall be.” *Id.* Finally, it is consistent with the fierce debate over the location of the federal district to conclude that the Framers, in order to quell inter-state jealousy, intended the federal city to be made up of territory from more than one state.

178. *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987); *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 413 n.14 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 n.13 (1983); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244 n.15 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25–26 (1977).

179. *United States Trust*, 431 U.S. at 25–26.

180. *Winstar*, 518 U.S. at 876.

181. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

182. Compare Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793, 795 (2006), with *Energy Reserves*, 459 U.S. at 412 n.14. As Professor Winkler notes, an empirical analysis of strict scrutiny cases shows that “strict scrutiny is far from the inevitably deadly test imagined by the Gunther myth,” Winkler at 795; by contrast, when the

the realm of Contract Clause jurisprudence than in the equal protection context;<sup>183</sup> the Supreme Court has not permitted a state's breach of its own contractual obligation to stand in the face of a Contract Clause challenge since *United States Trust*.<sup>184</sup>

The exchange of promises by Virginia and Maryland, effected by parallel statutes, are contractual promises that implicate the protections of the Contract Clause.<sup>185</sup> As in *United States Trust*, the parallel state legislation, including the agreement with the private landowners, created a contractual obligation to grant land to Congress.<sup>186</sup> The terms of the agreement, as embodied in the parties' covenants, are clear. Virginia promised to forever cede its land in exchange for the United States' promise to make the land ceded the permanent seat of government.<sup>187</sup> Maryland ceded its land in exchange for Virginia's promise to grant its "due proportion" of land to be used for the permanent seat of government.<sup>188</sup> Historical analysis suggests that Maryland and Virginia "never would have made the necessary grants, had not *permanency* been guaranteed by the solemn act of Congress;" subsequently, the "reasonable expectations of the original proprietors . . . and inhabitants" of the District and the private landowners were "trifled with and destroyed by"<sup>189</sup> Virginia's renunciation of its obligation.

Because Virginia's Act of Retrocession had the effect of breaching its own contractual obligation, heightened scrutiny must be cast on Virginia's Act of Retrocession, which had the effect of impairing its own obligation to the State of Maryland, the United States, and the

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Court is reviewing Contract Clause challenges, since *United States Trust* the Court has invariably held the government to its contractual obligations. *Energy Reserves*, 459 U.S. at 412 n.14; *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 897 (9th Cir. 2003) (since 1965, the Court has never "found a statute or ordinance necessary when the law in question altered a financial term of an agreement to which a state was a party").

183. Winkler at 795; *Energy Reserves*, 459 U.S. at 412 n.14; see *Santa Ana*, 336 F.3d at 897.

184. *E.g.*, *Energy Reserves*, 459 U.S. at 412 n.14.

185. *United States Trust*, 431 U.S. at 17 n.14 (holding that "a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State").

186. See *id.*; see also *Winstar*, 518 U.S. at 874 (holding that a state legislature may bind itself to a contractual obligation through legislation); *Fletcher v. Peck*, 6 Cranch 87, 136-37 (1810) (land grants from a state create contractual obligations within the meaning of the Contract Clause); *Santa Ana*, 336 F.3d at 887, 889 (holding that city ordinance creates contractual obligations within the meaning of the Contract Clause).

187. See *Virginia Cession*, *supra* note 3; *supra* Part II.C.

188. See *Maryland Ratifying Cession*, *supra* note 3; *supra* Part II.C.

189. VARNUM, *supra* note 34, at 16.

private landowners.<sup>190</sup> In light of the Court's unwaivering invalidation of state laws that breach their own obligations, if reviewed under the Court's current Contract Clause jurisprudence, it is likely that Virginia's Act of Retrocession would be found to violate the Constitution's Contract Clause. Moreover, even if the heightened scrutiny applicable to the Act of Retrocession under the Contract Clause is not immediately fatal to Virginia's Act of Retrocession, an analysis of the facts surrounding retrocession reveals that, in addition, it ran afoul of the Contract Clause because it was not "reasonable" or "necessary" to achieve an "important public purpose."<sup>191</sup>

## 2. *Virginia Did Not Have an Important Public Purpose in Annexing Alexandria*

A state's goal serves an "important public purpose" only if the state is capable of articulating a "broad societal interest" that its law intends to protect<sup>192</sup> and if any burden to its contractual obligations is "incidental to [the] main effect" of addressing those broad interests.<sup>193</sup> By contrast, if a state law has the intent of repealing a covenant or altering contractual duties, or results in the impairment of specific contractual obligations, it is not an important public purpose.<sup>194</sup> If a state's purpose is to provide a benefit to "special interests,"<sup>195</sup> or to "protect . . . a narrow class,"<sup>196</sup> its purpose is not legitimate, let alone important.<sup>197</sup>

Virginia would likely not be able to articulate a "broad societal interest" that the retrocession was intended to protect. The Virginia Assembly was all but silent as to its purpose for the Act of Retroces-

190. *United States Trust*, 431 U.S. at 25–26. While the United States arguably relieved the state of Virginia of its obligation to the United States under Virginia's 1789 promise, neither the State of Maryland, the heirs or assigns of the local landowners, nor the beneficiaries of the contract, the inhabitants of the District, ever agreed to permit a modification of the original contract.

191. *Id.*

192. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 249 (1978). *E.g.*, *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 894 (9th Cir. 2003); *Mascio v. Pub. Employees Ret. Sys.*, 160 F.3d 310, 314 n.2 (6th Cir. 1998).

193. *Eagerton*, 462 U.S. at 191–92.

194. *Energy Reserves*, 459 U.S. at 412 n.13; *Eagerton*, 462 U.S. at 191–92; *Spannaus*, 438 U.S. at 249; *Mascio*, 160 F.3d at 314 n.2.

195. *Energy Reserves*, 459 U.S. at 412; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (Contract Clause prohibits legislation intended to benefit "some favored group.")

196. *Spannaus*, 438 U.S. at 249.

197. *Energy Reserves*, 459 U.S. at 413 n.13.

sion. In the legislation itself, Virginia merely noted that it was responding to a petition submitted to the Virginia General Assembly “praying the consent of the general assembly to such retrocession.”<sup>198</sup> Because there are no notes from any debates within the General Assembly that accompanied the Act of Retrocession,<sup>199</sup> it is impossible to speculate whether the Assembly had any purpose at all aside from a desire to fulfill the request of some out-of-state residents. In the absence of any articulated purpose, Virginia would likely not meet its burden to show that the retrocession, which extinguished its own contractual obligations, was intended to serve an important public purpose.<sup>200</sup>

Contemporaneous evidence reveals that if Virginia did have a more deliberate purpose than what is indicated in the language of the Act of Retrocession, it was likely to benefit special interests rather than to address a broad societal problem. Dissatisfied with the economic treatment they were receiving compared with their Georgetown neighbors, the Committee of Thirteen, a small group of Alexandria merchants who were heavily invested in the C&O Canal project and unable to seek access to credit because of the failure of Congress to recharter its banks, sought retrocession as a swift answer to their economic troubles.<sup>201</sup> In answer to their petition, the Virginia Assembly not only passed the Act of Retrocession but also, immediately after retrocession, assumed the Canal debt.<sup>202</sup> These dual pieces of legislation were enacted “as a favor”<sup>203</sup> to Alexandria’s merchants to the exclusion of the dissenting—or unaware—rural farmers from Alexandria County.<sup>204</sup> That the Committee of Thirteen expressed concern primarily with their own economic well-being and petitioned the Assembly for retrocession and assistance with the C&O Canal project just days before Virginia passed the Act of Retrocession, and that Virginia bailed out the C&O Canal project in its first session after retrocession, lead to the conclusion that Virginia’s intent in annexing Alexandria was driven in large part by its goal to benefit and protect

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198. Act of Retrocession, *supra* note 76.

199. Richards, *supra* note 2, at 67.

200. *United States Trust*, 431 U.S. at 25; *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 894 (9th Cir. 2003).

201. BRYAN, *supra* note 78, at 258–59, 262–63; ZIGAS, *supra* note 78, at 17–18. *See supra* Part II.D.

202. BRYAN, *supra* note 78, at 262–63.

203. Casselman, *supra* note 11, at 116, 126.

204. *Id.* at 127; Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127.

Alexandria merchants,<sup>205</sup> a “narrow class,”<sup>206</sup> rather than from a desire “to subserve any public interest”<sup>207</sup> or broad societal interest.<sup>208</sup>

Finally, the Act of Retrocession was directed explicitly at a single contractual relationship, namely, the contract among Virginia, the United States, Maryland, and the private landowners that resulted in the creation of the District of Columbia.<sup>209</sup> The “sole effect”<sup>210</sup> of the legislation was to alter Virginia’s obligation under its Act of Cession; impairing its contractual obligation was not incidental to providing a “generally applicable rule of conduct.”<sup>211</sup> Because retrocession intended to abrogate, and did in fact abrogate, a single contractual obligation, and because it benefited special interests rather than addressing a broad societal problem, Virginia’s goal was not an important public purpose sufficient to withstand Contract Clause scrutiny.<sup>212</sup>

### 3. *Retrocession Was Not Necessary to Fulfill Virginia’s Purpose*

Even assuming that Virginia’s goal was “important,” retrocession was not “necessary” to meet this goal.<sup>213</sup> A state law is “necessary” only if “essential” to the state’s purpose; that is, a law is necessary only if there are no hypothetical alternative means for the state to achieve its purpose.<sup>214</sup> A state must demonstrate that it considered whether it was possible to achieve its purpose without breaching its contractual obligation,<sup>215</sup> even if its alternatives were “politically

205. See BRYAN, *supra* note 78, at 262–63; Richards, *supra* note 78.

206. Allied Structural Steel v. Spannaus, 438 U.S. 234, 249 (1978).

207. Casselman, *supra* note 11, at 115, 126.

208. Spannaus, 438 U.S. at 249.

209. Virginia Act of Retrocession; see Part II.D. Exxon Corp. v. Eagerton, 462 U.S. 176, 191–92 (1983); see also Mascio v. Pub. Employees Ret. Sys., 160 F.3d 310, 314 n.2 (6th Cir. 1998) (noting that the Ohio statute may have been directed at Judge Mascio alone, which is unconstitutional because it clearly does not address a “broad and general” problem).

210. Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 412 n.13 (1983) (explaining that requiring state regulation to remedy a general social or economic problem guarantees that the state is exercising its police power rather than providing a benefit to special interests); Spannaus, 438 U.S. at 247–48 (1978) (finding that the state had not acted to solve an important general social problem but rather had focused on specific employers).

211. Eagerton, 462 U.S. at 192.

212. *Id.*; Energy Reserves, 459 U.S. at 412 n.13; Spannaus, 438 U.S. at 247–49; Mascio, 160 F.3d at 314 n.2.

213. United States Trust Co. v. New Jersey, 431 U.S. 1, 30–31 (1977).

214. See *id.* at 30 & n.29; S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 897 (9th Cir. 2003).

215. Santa Ana, 336 F.3d at 894, 896–97; Univ. of Haw. Prof’l Assembly v. Cayetano, 183 F.3d 1096, 1107 (9th Cir. 1999); see Garris v. Hanover Ins. Co., 630 F.2d 1001, 1010 n.5 (4th Cir. 1980) (noting that, in the context of public contracts, a

more difficult.”<sup>216</sup> Retrocession was not “necessary” to bail out the C&O Canal project, fix the credit crunch that Alexandria’s merchants were experiencing, or otherwise benefit Alexandria’s merchants, because hypothetical alternative means to address these problems existed. For example, Virginia could have extended credit to Alexandria’s merchants to ease the tight credit market they faced after the closure of District banks.<sup>217</sup> In addition, Virginia could have purchased shares of the C&O Canal project,<sup>218</sup> guaranteed the company’s bonds,<sup>219</sup> granted funds to the project or its proprietors, or even offered to become a steady customer of the canal in order to keep the project afloat. Instead, Virginia took advantage of the dire situation in which Alexandria found itself to acquire the entirety of the land previously ceded to the United States. Because there were other ways that Virginia could have assisted Alexandria’s merchants, short of violating its part of the bargain, Virginia’s Act of Retrocession was not “necessary.”<sup>220</sup>

#### 4. *The Act of Retrocession Was Not Reasonable*

Virginia’s Act of Retrocession was not reasonable because it worked a total elimination of contract rights rather than merely a limited or temporary delay in their enforcement.<sup>221</sup> Unlike state laws with a narrowly tailored scope designed to remedy a temporary emergency situation,<sup>222</sup> the Act of Retrocession provided that Alexandria “shall be and remain reannexed”<sup>223</sup> to Virginia in derogation of its previous obligation to “forever cede and relinquish” this property to be the “permanent seat” of the United States government.<sup>224</sup> The Act of Ret-

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state law is “necessary” only if “no less intrusive alternative was available to serve the asserted public purpose”).

216. *Cayetano*, 183 F.3d at 1107.

217. When Alexandria turned to the legislature of Virginia for funds to complete the C&O Canal, it was met with a “warm welcome.” BRYAN, *supra* note 78, at 262.

218. Virginia ultimately did purchase shares of the C&O Canal Company, but only after retrocession. *Id.* at 263.

219. As with the decision to purchase shares in the Canal project, Virginia withheld this form of aid until after the retrocession had been consummated. *Id.* at 263.

220. See *United States Trust*, 431 U.S. 1, 30–31 (1977); *Cayetano*, 183 F.3d at 1107; *Santa Ana*, 336 F.3d at 894, 896–97; *Garris*, 630 F.2d at 1010.

221. See *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250 (1978); *Garris*, 630 F.2d at 1008–09 (citing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444–47 (1934)).

222. See *Spannaus*, 438 U.S. at 242; *Garris*, 630 F.2d at 1008–09 (citing *Blaisdell*, 290 U.S. 444–47).

223. Act of Retrocession, *supra* note 76.

224. Virginia Cession, *supra* note 3; see Busey, *supra* note 12, at 340–41.

rocession, by its terms, was permanent, not temporary.<sup>225</sup> The act abrogated completely, rather than partially, Virginia's contractual obligations.<sup>226</sup> Rather than retroceding Alexandria in response to any emergent crisis, Virginia enacted the retrocession as a result of a multi-year lobbying effort by the Committee of Thirteen.<sup>227</sup>

In addition, the retrocession was not "reasonable" because the act "burden[ed] a politically defenseless or easy target group" without "fair attention to its interests."<sup>228</sup> The interests of the rural portion of Alexandria were ignored in the decision to retrocede Alexandria County along with the City of Alexandria to Virginia. When a referendum was taken of the people of Alexandria to probe public support for retrocession, the vote was gerrymandered by pro-retrocessionists to secure a favorable vote for retrocession.<sup>229</sup> The referendum was held in relative secrecy in order to prevent anti-retrocessionist rural Alexandrians from voting against the measure.<sup>230</sup> Some residents of Alexandria County were not informed of the vote until after it was held.<sup>231</sup> When they were informed and subsequently filed a formal complaint with the Virginia Assembly, protesting that they "were not consulted upon the matter of retrocession,"<sup>232</sup> their protest was ignored.<sup>233</sup> By excluding them from the referendum, the Committee of Thirteen took advantage of rural Alexandria County, an easy target group.<sup>234</sup> By

225. Act of Retrocession, *supra* note 76.

226. *Id.*

227. *See* Richards, *supra* note 2, at 66–67.

228. Bd. of Comm'rs of the Orleans Levee Dist. v. Dep't of Natural Res., 496 So. 2d 281, 293 (La. 1986) (citing *A Process-Oriented Approach to the Contract Clause*, *supra* note 165); *see also* Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 417 n.25 (1983) (noting that Contract Clause violation may be found when state enacts special interest legislation, when the political process has broken down, or when a small number of individuals were "singled out from the larger group").

229. Casselman, *supra* note 11, at 126–27; Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127.

230. Casselman, *supra* note 11, at 127; Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127; Richards, *supra* note 2, at 67–68.

231. Casselman, *supra* note 11, at 127; Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127.

232. Casselman, *supra* note 11, at 127; Memorial of the Citizens of the Country Part of Alexandria, *supra* note 90, at 127.

233. Casselman, *supra* note 11, at 127.

234. *See* Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 417 n.25 (1983) (holding that Contract Clause scrutiny requires an inquiry into whether "a small number . . . were singled out from [a] larger group"); Bd. of Comm'rs of the Orleans Levee Dist. v. Dep't of Natural Res., 496 So. 2d 281, 293 (La. 1986); *see also* *A Process-Oriented Approach to the Contract Clause*, *supra* note 165 (arguing that a breach of a public contract fails a political minority when "the burdened group" is "politically weak or an easy target for the imposition of costs and hence chosen to bear those costs without fair attention to its interests"); *cf.* RUI One Corp. v. City of

transferring its people “like so much swine in the market”<sup>235</sup> without their consent, Virginia annexed the people of Alexandria County without fair attention to their interests.<sup>236</sup>

Similarly, the retrocession was achieved without “fair attention” to the interests of the rest of the District of Columbia.<sup>237</sup> The referendum polled only the people of Alexandria and not the people of the entire District of Columbia, although the residents of Georgetown overwhelmingly opposed retrocession.<sup>238</sup> By contrast, the initial cession of land by Virginia and Maryland a half-century earlier came only after a vote of representatives of the entirety of these states.<sup>239</sup> Only a careful gerrymandering of the referendum permitted the people’s interests to be distorted to appear as if all concerned groups favored retrocession when in fact many were not even consulted.<sup>240</sup>

Finally, any harm that Virginia sought to remedy by annexing Alexandria was not “unforeseen” at the time that it originally ceded this land in 1789. As the Court has held, financial downturns are “unforeseen” only when they rise to the level of a massive, widespread economic crisis, akin to the Great Depression.<sup>241</sup> This requirement,

Berkeley, 371 F.3d 1137, 1171–72 (9th Cir. 2004) (Bybee, J. dissenting) (opining that a central function of the Contract Clause is to prevent the majority from shifting costs onto an underrepresented minority).

235. Richards, *supra* note 2, at 67 (quoting George Washington Parke Custis).

236. See *Energy Reserves*, 459 U.S. at 417; *Orleans Levee Dist.*, 496 So. 2d at 293; see also *A Process-Oriented Approach to the Contract Clause*, *supra* note 165, at 1646–47; cf. *RUI One Corp.* 371 F.3d at 1171–72 (Bybee, J. dissenting), 371 F.3d 1137, 1171–72 (9th Cir. 2004) (Bybee, J. dissenting) (opining that a central function of the Contract Clause is to prevent the majority from shifting costs onto an underrepresented minority).

237. The District of Columbia, without voting rights in Congress, is the archetypical “easy target group,” subject to the plenary authority of Congress without any representation in that body.

238. ZIGAS, *supra* note 78, at 18.

239. BOWLING, *supra* note 7, at 166, 204–05; see also THE FEDERALIST NO. 43, *supra* note 35, at 210 (James Madison) (noting that the cession of land for use as the seat of government was only permitted with “the authority of the legislature of the State, and of the inhabitants of the ceded part of it”).

240. Casselman, *supra* note 11, at 129.

241. *Compare Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934) (holding that the Court’s deference to the state mortgage moratorium statute was predicated on the “economic emergency” brought about by the Depression) with *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (distinguishing *Blaisdell* as having been enacted “during the depth of the Depression and when [Minnesota] was under severe economic stress, and appeared to have no effective alternative”). Tellingly, the *Blaisdell* Court, in upholding the mortgage moratorium at issue in that case, analogized the economic crisis precipitated by the Great Depression to emergencies like “fire, flood, or earthquake.” *Blaisdell*, 290 U.S. at 439. As the Court held in *Spannaus*, economic difficulties may be unforeseen, but they must satisfy the “broad, generalized” problem requirement of the Contract Clause. *Allied Structural Steel v. Spannaus*, 438 U.S. 234,

that an economic crisis be widespread before it is considered unforeseen, further ensures that an impairment of contractual obligations is not enacted “as a favor”<sup>242</sup> to “special interests,”<sup>243</sup> or in order to shift costs of a breach to a particular industry<sup>244</sup> or a particular employer.<sup>245</sup> In the absence of a generalized economic crisis, the expectations of parties to a contract generally determine whether elimination of contract rights is reasonable within the meaning of the Contract Clause.<sup>246</sup> The care that the United States, Maryland, Virginia, and the private landowners took in negotiating the original agreement belies any argument that they anticipated that their bargain would be subject to annulment by some of the other parties. The United States induced Maryland, Virginia, and the private landowners to cede their land by promising that their land, together, would hold the permanent seat of government.<sup>247</sup> President Washington made a special trip to visit Alexandria to convince the landowners to grant their land to the United States.<sup>248</sup> Maryland attempted to avoid being the sole grantee of the land that Congress would use for the new capital by specifically reciting the boundaries of the land granted by Virginia, including Alexandria, as a condition precedent to its grant and promising to cede its land only in “due proportion” to these other contributions.<sup>249</sup>

It is possible, although not evident from contemporaneous documents, that by annexing Alexandria, Virginia intended to do more than merely acquire land for itself and benefit Alexandria’s merchants. For example, suppose that Virginia sought retrocession because it regretted subjecting the residents of Alexandria to the plenary rule of Congress without representation.<sup>250</sup> Even assuming that the Virginia

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250 (1978). Given the current economic situation, it would not be surprising if there were another shift in Contract Clause jurisprudence, in which the Court accords greater deference to state laws enacted to protect citizens from their burdensome contractual relationships.

242. Casselman, *supra* note 11, at 126.

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

244. *Spannaus*, 438 U.S. at 250.

245. *Id.*

246. A heavily regulated industry is always on notice that its rights might be altered by statutory changes. See *Energy Reserves*, 459 U.S. at 413–14.

247. See *supra* Part II.C.

248. See *supra* Part II.C.

249. Maryland Ratifying Cession, *supra* note 3; see *supra* Part II.C.

250. This does not appear to have been Virginia’s intention; concern about voting rights for residents of the District seems to have ceased to be a widespread concern by the 1840s. Richards, *supra* note 2, at 57; Richards, *supra* note 78. To the extent that Virginia intended to extend the franchise, an issue arises about a state’s ability to contract away rights, like eminent domain, that are normally powers reserved to the state and that may not be contracted away. *Stone v. Mississippi*, 101 U.S. 814, 817 (1880); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532–33 (1848). How-

Assembly did possess this loftier goal, a goal that arguably could not be effected by Virginia without breaching its contract, this breach would not be reasonable because the harm that the breach sought to remedy was known at the time of contracting.<sup>251</sup> The problem of disenfranchisement was known at the time Virginia promised to cede its land and people to federal control.<sup>252</sup> Both Federalists and Anti-Federalists agreed that district residents would not be guaranteed the right to representation under the Constitution.<sup>253</sup> The language providing for Congress' plenary power over District residents in the District Clause, mirroring the language used to describe the tyranny of the British Parliament over the colonies prior to the Revolution, is a testament to the Framers' awareness that they were subjecting future residents of the District to governance without representation.<sup>254</sup> Because the fact of disenfranchisement was known to Virginia when it ceded Alexandria, and because the harms associated with disenfranchisement were surely known to the Revolutionary War generation, breach of its contract to remedy this harm would not have been reasonable.<sup>255</sup>

In sum, the scope of the Contract Clause's protections have undergone a great shift. Having begun as a strong check on state power in the nation's early years, and then having withered to nearly a dead letter in the New Deal era, recent Contract Clause jurisprudence has emerged bifurcated, providing significantly more protection for public contracts than for purely private contracts. Viewed in light of this new Contract Clause jurisprudence, Virginia's Act of Retrocession is likely unconstitutional. Virginia's Act of Retrocession breached its obligation to forever cede Alexandria to the United States. It is perhaps dispositive that Virginia impaired its own contract, which has proved to be "fatal in fact" in the years since *United States Trust*. Virginia's purpose, which was likely to benefit a small group by abrogating a

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ever, any argument that Virginia retained any right to exercise its police powers, including the right of eminent domain, over Alexandria is belied by the language of the District Clause, which permits a state to cede land to the federal government. As a result, no matter what reserved powers Virginia might have had to exercise its police power over its territory, the express language of the Constitution permitted Virginia to give these powers up by grant or contract. Any other conclusion would nullify the language and intention of the District Clause.

251. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31–32 (1977); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 895 (9th Cir. 2003).

252. Richards, *supra* note 2, at 57–58.

253. See BOWLING, *supra* note 7, at 82; THE FEDERALIST NO. 43, *supra* note 35, at 193 (James Madison); STORY, *supra* note 27, at 122–23.

254. Compare The Declaration of Independence para. 2, 24 with U.S. Const. art. I, § 8; see *supra* Part II.B.

255. See *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 235 (1978); *supra* Part II.

specific contract, is not important within the meaning of the Contract Clause. The Act of Retrocession was not necessary because there were alternate hypothetical means for Virginia to assist Alexandria's merchants. Whether Virginia's purpose was merely financial, or whether Virginia is assumed to have had the nobler purpose of protecting its former citizens from the injustice of disenfranchisement, the harms caused by the cession of its land to the United States was well-known at the time of contracting; it was therefore not reasonable for Virginia to breach its contract to correct these harms. As a result, by enacting its 1846 Act of Retrocession, Virginia impaired an obligation of contract in violation of the Contract Clause of the Constitution.

### III.

#### A *FAIT ACCOMPLI*?

In light of the fact that a Contract Clause-based challenge to the retrocession seems plausible, even likely, the question arises: why have the parties potentially aggrieved by the retrocession left this action unchallenged? One might expect that the United States and the District of Columbia would have a strong interest in reclaiming one-third of the District's original territory. One might well ask why the residents of Washington, D.C. are not protesting on the shores of the Potomac. Far from being fanciful questions, there have been, since the retrocession, a series of serious inquiries into whether the District can, and should, be made whole again. Nevertheless, despite early indignation on the part of both the residents of Alexandria County and officials of the federal government, over time the consensus has developed that Alexandria should not be reunited with the District of Columbia without Virginia's consent. However, while the policy of the retrocession appears to be a *fait accompli*, the legality of retrocession has never been resolved by the courts.

#### A. *From Indignation to Resignation*

At the outbreak of the Civil War, it became clear that retrocession left the Capitol dangerously close to the rebellious South. In his first State of the Union address, President Lincoln responded by calling for the reannexation of Alexandria by the United States.<sup>256</sup> At the same time, the Senate considered, but ultimately rejected, a bill that would undo the retrocession.<sup>257</sup> Interest in the legality of the retroces-

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256. Richards, *supra* note 2, at 75; Abraham Lincoln, State of the Union Address (Dec. 2, 1861).

257. Richards, *supra* note 2, at 75 (citing CONG. GLOBE, 37TH CONG., 1ST SESS. 391, 420 (1861)).

sion lasted until long after the Civil War ended; half a century after the retrocession, the Senate adopted a resolution calling on the Attorney General to consider its constitutionality.<sup>258</sup> The Attorney General concluded that this issue had not been resolved by the courts.<sup>259</sup> Early in the twentieth century, the Senate again considered the issue of the constitutionality of retrocession, concluding, ultimately, that it would be inexpedient to declare the retrocession unconstitutional without Virginia's consent.<sup>260</sup> By 1910, advocates of "reuniting the triangles" were few; the retrocession was considered a *fait accompli* and the question of its constitutionality was no longer debated.<sup>261</sup>

### B. Phillips v. Payne and De Facto Recognition

When the issue of the legality of the retrocession was raised before the Supreme Court, the Court avoided deciding the issue directly. In the 1875 case of *Phillips v. Payne*, a resident of recently retroceded Alexandria sued to recover taxes paid to Virginia, arguing that the retrocession of Alexandria was unlawful and, as a consequence, so were the taxes that Virginia levied on him.<sup>262</sup> In holding that the taxpayer could not challenge the legality of the retrocession, the Court rested on the ground that a "government *de facto*, in firm possession of any country, is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government *de jure*."<sup>263</sup> The Court relied on the premise that in "all cases where the United States have been called upon to recognize the existence of the government or the independence of any other country, they have looked only to the fact, and not to the right."<sup>264</sup> The Court concluded

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258. Casselman, *supra* note 11, at 132.

259. Richards, *supra* note 2, at 76 (citing Casselman, *supra* note 11, at 133–35); CAEMMERER, *supra* note 99, at 51. As discussed below, although the Court in *Phillips v. Payne* addressed the retrocession, it did not reach the question of its legality.

260. Richards, *supra* note 2, at 76.

261. *Id.* (citing Casselman, *supra* note 11, at 138).

262. 92 U.S. 130, 133 (1875).

263. *Id.* at 133.

264. *Id.* at 134. The Court's other major unstated assumption is that foreign countries can be fairly analogized to sister states for the purposes of recognition by the United States and its courts. It is doubtful that such an analogy can be sustained. The authority of the Executive to recognize foreign governments is implicit in the president's Article II power to appoint and receive ambassadors. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 959 (2004). As a result, the Supreme Court has consistently held that the Executive Branch alone has the authority to recognize, and to withdraw recognition from, foreign regimes. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *United States v. Pink*, 315 U.S. 203, 223 (1942) ("[R]ecognition of a foreign sovereign conclusively binds the courts."); *Jones v. United States*, 137

that it was “constrained to regard the *de facto* condition of things which exists with reference to the county of Alexandria as conclusive as to the rights of the parties before us.”<sup>265</sup> In short, the Court held that because Virginia was in *de facto* control of Alexandria, and because the United States had “in all cases . . . looked only to the fact, and not to the right” when deciding whether to recognize a foreign state, the Court was constrained to hold that the taxpayer could not challenge the validity of the retrocession.<sup>266</sup>

The Court’s premise that the United States bases recognition of a government only on *de facto* control, while perhaps a fair description of the law of recognition at the time,<sup>267</sup> has been long abandoned by courts in the United States. In 1913, President Wilson stated the classic case for the shift from automatic recognition of governments in *de*

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U.S. 202, 212 (1890) (“Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive branch of any government conclusively binds the judges.”). By contrast, in domestic affairs, “[i]t is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). Indeed, *Marbury v. Madison* made this distinction clearly and succinctly, distinguishing between violations of rights that are remediable and rights based on the executive’s prerogative over foreign affairs, which may “never be examinable by the courts.” *See id.* at 166.

265. *Phillips*, 92 U.S. at 134. In *Phillips*’s strong pronouncements about the recognition of *de facto* government, the Court had, perhaps, something more at stake. In the wake of the Civil War, with wounds still unhealed, the Court’s pronouncement in *Phillips* that the *de facto* government was the only recognized government is a somber approval of the legitimacy of the governments of the defeated southern states after the demise of the Confederacy. Indeed, 1875 found the South still in the midst of Reconstruction. *Phillips* was one of a series of post-Civil War Supreme Court cases that held that whatever legality the Confederacy potentially may have had while the rebellion endured was eviscerated retroactive to the time of the rebellion on its defeat. *See Williams v. Bruffy*, 96 U.S. 176, 186 (1877) (remarking that the validity of the acts of a *de facto* state “depends entirely upon its ultimate success. If it fail[s] to establish itself permanently, all such acts perish with it. If it succeed[s], and become[s] recognized, its acts from the commencement of its existence are upheld as those of an independent nation”); *Stevens v. Griffith*, 111 U.S. 48, 52–53 (1884) (holding that compliance with the laws of the Confederacy can not serve as a defense to an action for a payment of a debt because the Confederacy ultimately failed).

266. Technically, the Court did not resolve the question of the legality of the retrocession; rather, its holding was limited to whether the plaintiff in that case could make the challenge. *Phillips*, 92 U.S. at 134. Its careful choice of language reveals that the Court was mindful that both Maryland and the United States would have different rights vis-à-vis Virginia than would a private party. *See also* CAEMMERER, *supra* note 99, at 51 (noting that while *Phillips* did not directly rule on the issue of the constitutionality of the retrocession, it did hold that an individual may not bring the challenge).

267. Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 STAN. J. INT’L L. 435, 443 (1990).

*facto* control of territory to recognition of foreign states only when recognition comported with the executive branch's foreign policy interests. Under Wilson's approach, "recognition depended heavily on whether a government had come to power in accordance with its state's constitutional processes."<sup>268</sup> In conformity with this principle, for much of the twentieth century, courts of the United States recognized governments with no effective control over a territory when recognition comported with the interests of the executive branch; similarly, courts refused recognition to governments in *de facto* control when the interests of the executive branch demanded.<sup>269</sup> As a result, it is appropriate to call into question the Court's conclusion in *Phillips* that the *de facto* control of Alexandria by Virginia forecloses judicial review.<sup>270</sup> Rather, if the issue were decided today, it would be more appropriate for a court to decide the issue of the constitutionality

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268. *Id.* at 444; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 n.1 (1987) (discussing the shift in the United States' practice of recognizing foreign governments); Note, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473, 479–80 (1989).

269. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 292–93 (7th Cir. 1990) (declining to recognize the decrees of the government of Turkish-controlled northern Cyprus although it had been in *de facto* control of northern Cyprus for fifteen years); *Republic of Vietnam v. Pfizer*, 556 F.2d 892, 894 n.4 (8th Cir. 1977) (declining to recognize communist *de facto* control of South Vietnam although acknowledging that the South Vietnamese government had ceased to exist); *Bank of China v. Wells Fargo Bank*, 209 F.2d 467, 474 (9th Cir. 1953) (recognizing the Nationalist government of China although the People's Republic of China was in *de facto* control of mainland China); *Lehigh Valley R. Co. v. Russia*, 21 F.2d 396, 400 (2d Cir. 1927) (recognizing Russia's provisional government although the Soviet Union was long since in *de facto* control of Russia); *Lafontant v. Aristide*, 844 F. Supp. 128, 134–35 (E.D.N.Y. 1994) (holding that head-of-state immunity will be granted to the person recognized by the Executive Branch, irrespective of whether that person has *de facto* control of any government); *United States v. Noriega*, 746 F. Supp. 1506, 1519–20 (S.D. Fla. 1990) (refusing to accord head-of-state immunity to Noriega although he was the *de facto* leader of Panama); *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd* *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973) (declining to entertain suit brought by German Democratic Republic although it was in *de facto* control of East Germany); *The Penza*, 277 F. 91 (E.D.N.Y. 1921) (recognizing Russia's provisional government although the Soviet Union was in *de facto* control of Russia); see *West & Murphy*, *supra* note 267, at 445–48.

270. *Marbury v. Madison*'s oft-repeated exhortation that "every right, when withheld, must have a remedy, and every injury its proper redress" is, perhaps more honored in the breach than in the observance. 5 U.S. (1 Cranch) 137, 163 (1803). Indeed, *Marbury* itself made a distinction between rights, the violation of which have a remedy, and rights whose violation may "never be examinable by the courts." See *id.* at 166.

of retrocession rather than avoid the issue on the ground that Virginia's *de facto* control of Alexandria ends the analysis.<sup>271</sup>

#### IV.

#### RECONCILING THE TEXT AND CONTEXT OF THE CONTRACT CLAUSE

Aside from its application to the debate over the legality of the retrocession, the Court's new Contract Clause jurisprudence raises serious doctrinal questions that extend far beyond this narrow issue. The Court's distinction between public contracts and purely private contracts does not appear to find support in either the text of the Contract Clause or the intent of the Framers, and it appears to have sprung from *United States Trust* without precedent. For these reasons, scholars have harshly criticized *United States Trust* and its progeny, arguing persuasively that the distinction between public contracts and purely private contracts appears to be made from whole cloth.<sup>272</sup>

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271. Although the parties addressed whether Virginia had acquired Alexandria from the District of Columbia by prescription and whether the United States acquiesced in this acquisition, the Court did not rely on these grounds. *Phillips*, 92 U.S. at 132–33. A defense by Virginia that, irrespective of its original title, it acquired Alexandria by prescription, would fail as a matter of law because a state may not acquire land from the United States by prescription. See *New Jersey v. New York*, 523 U.S. 767, 803 n.25 (1998); *Texas v. Louisiana*, 410 U.S. 702, 714 (1973). However, even if it were potentially possible for Virginia to acquire Alexandria, which was part of the District of Columbia, and thus part of the United States, by prescription, it is unlikely, as a factual matter, that the Court would find that prescription had occurred. In recent cases, the Court has placed a very high burden before states arguing acquisition by prescription, finding that a state had not acquired by prescription the land of another state even though it had included residents of the disputed land on its voting rolls, *New Jersey*, 523 U.S. at 797; taxed structures on the disputed land, *Virginia v. Maryland*, 540 U.S. 56, 76 (2003); issued licenses for liquor and other activities on the disputed land, *id.*; exercised criminal jurisdiction over any crimes committed on the disputed land, *id.*; and issued birth, death, and marriage certificates for these events taking place on the disputed land. *New Jersey*, 523 U.S. at 795. The Court has also found that a state has not acquired territory by prescription even though its residents consider themselves part of the state seeking acquisition by prescription, *id.* at 798 and the United States itself acquiesced in the possession of the land by the state seeking acquisition by prescription, *id.* at 799, 801.

272. See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 718–19 (1984) (arguing that the express language of the Contract Clause makes no distinction between purely private and public contracts); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 546–47 (1987) (criticizing the Court's *United States Trust* analysis as contrary to the plain language and the history of the Contract Clause); Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 333–35 (1995) (criticizing the Supreme Court for "cursorily reject[ing] Contract Clause arguments" in the private contract context after introducing heightened scrutiny for public contracts);

First, it has been argued that the text of the Contract Clause makes no distinction between private and public contracts. Indeed, the plain reading of the Contract Clause, which provides that “No State shall . . . pass any . . . Law impairing the Obligations of Contract,” makes no such distinction.<sup>273</sup> Second, a historical inquiry into the intent of the Framers seems to suggest that, if anything, the Framers were more concerned with protecting purely private contracts than public contracts.<sup>274</sup> As a result, resort to the intent of the Framers does not provide support for *United States Trust*’s greater deference to state impairments of private contractual obligations than to state breaches of public contracts. Third, the doctrinal development of the Contract Clause, since its inception, had not included any indication that impairment of public contracts would be viewed with greater scrutiny than private contracts.<sup>275</sup> Neither in the early days of the republic, when the Contract Clause’s strength was at its zenith, nor at its nadir in the period between *Blaisdell* and *United States Trust*, did the Court hint at the distinction that *United States Trust* would later create.

These are formidable criticisms. However, if it is possible to make doctrinal sense out of the Court’s heightened scrutiny for public contracts, perhaps it can be done by viewing the Contract Clause in the context of the Constitution’s other Article I, Section 10 protections. The first paragraph of Article I, Section 10 of the Constitution, which contains powers that are prohibited to the states, provides that “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” Leaving aside the Contract Clause for a moment, it becomes easier to see the connection among the other Article I, Section 10 clauses. Notably, each of these other prohibitions also applies to the federal government through Article I, Section 9.<sup>276</sup> And, unlike the

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Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 293–94 (1988) (arguing that *United States Trust*’s increased scrutiny for public contracts is “precisely backwards”); Merrill, *supra* note 102, at 598–99 (characterizing the Contract Clause jurisprudence announced in *United States Trust* as “puzzling,” “an about face,” and a “curious transformation in the constitutional order”).

273. See Epstein, *supra* note 272, at 718–19; Kmiec & McGinnis, *supra* note 272, at 547.

274. See McConnell, *supra* note 272, at 293–94; Kmiec & McGinnis, *supra* note 272, at 533–34.

275. See Kmiec & McGinnis, *supra* note 272, at 535–47; Merrill, *supra* note 102, at 598–99.

276. U.S. CONST. art. I, § 9, cl. 3, 8.

rest of Article I, Section 10,<sup>277</sup> the Bill of Attainder, Ex Post Facto, and Anti-Nobility Clauses focus not on the division of authority between the state and federal governments, but rather on the right of the individual to be free from a particular type of oppressive legislation, irrespective of its source. As the Supreme Court has held, ex post facto laws and bills of attainder, which single out individuals—and not conduct—for punishment, are “oppressive, unjust, and tyrannical.”<sup>278</sup> Part of the great bulwark that the Constitution sets up against the “sudden and strong passions to which men are exposed,”<sup>279</sup> these clauses prevent the legislature from impinging on the life or property of an individual who committed no unlawful act.<sup>280</sup> Addressing the same principle from the obverse perspective, the Anti-Nobility Clause prevents injustice by prohibiting the government from singling out individuals or groups for special, advantageous treatment at the expense of the rest of the population.<sup>281</sup> Read together, these Article I, Section 10 clauses describe a constitutional value of legislative generality in the context of public law.

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277. The conclusion that the Bill of Attainder, Ex Post Facto, Contract, and Anti-Nobility Clauses are most meaningfully understood in light of one another is supported by a comparison of these clauses, as a group, with the other clauses found in the first paragraph of Article I, § 10. The full text of this paragraph reads:

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

U.S. Const. art. I, § 10, cl. 1. Although a thorough examination of these clauses is beyond the scope of this article, even a cursory look at this paragraph reveals that it falls naturally into two readily distinguishable categories. The first delineates the powers that are prohibited to the states as part of the Constitution’s function of defining the division of authority between the states and the federal government. *See* *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 305–06 (1827); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 217–20 (1833). The second set, including the Bill of Attainder, Ex Post Facto, and Anti-Nobility Clauses address laws that implicate not federalism issues, but fundamental individual rights. *See* *Ogden*, 25 U.S. (12 Wheat.) at 305–06. The location of the Contract Clause among them, as opposed to the federalism-oriented clauses, supports the conclusion that the Contract Clause is concerned with government overreaching rather than the state–federal division of authority.

278. *See* *Ogden*, 25 U.S. (12 Wheat.) at 266.

279. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

280. *See* Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227, 229–30, 246–47 (1998).

281. Richard Delgado, *Inequality “From the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 U.C.L.A. L. REV. 100, 111–14 (1984).

The Contract Clause has long been read together with the Bill of Attainder and Ex Post Facto Clauses to find meaning in the terms of each of these clauses. In *The Federalist No. 44*, Madison addresses the common purpose of these clauses, explaining that: “Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>282</sup> Similarly, the Supreme Court held that the collocation of these clauses indicates that the meaning of the Contract Clause can be gleaned in part from the purposes of the other clauses.<sup>283</sup> Considering the purpose of these clauses, together, the Court held that all were “introduced into the instrument in the very same spirit, and for the very same purpose, namely, for the protection of personal security and private rights.”<sup>284</sup>

Comparing the text and context of the Contract Clause, then, presents somewhat of an apparent anomaly. It is unsettling, to say the least, that impairments of contract, which are not expressly prohibited to the federal government, are considered to be “contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>285</sup> Conversely, it would seem to give too little regard to the text and history of the Constitution to hold that the Contract Clause was on par with the Ex Post Facto, Bill of Attainder, and Anti-Nobility Clauses despite its egregious absence from Article I, Section 9, in which the federal government is expressly prohibited from enacting these types of offensive legislation.

Into this apparent conundrum steps *United States Trust*. I suggest that the Court’s distinction in *United States Trust* between public contracts and purely private contracts makes sense of both the text and context of the Contract Clause. The post-*United States Trust* Contract Clause prohibits laws that impair obligations of contracts to which a state itself is a party, but continues to defer to state legislation that burdens contracts between private parties. If such a rule can be justified, it is because it appears to protect the same interest, and only the same interest, as the Ex Post Facto, Bill of Attainder, and Anti-Nobility Clauses: the protection of the individual from the unchecked will of the majority by favoring legislative generality over laws that single out individuals or identifiable groups.

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282. THE FEDERALIST NO. 44, *supra* note 35, at 218 (James Madison).

283. *Ogden*, 25 U.S. (12 Wheat.) at 330–31.

284. *Id.*; see also *Fletcher*, 10 U.S. (6 Cranch) at 138 (noting that the purpose of the Ex Post Facto, the Bill of Attainder, and the Contract Clauses are all to restrain the legislature’s power over the “lives and fortunes of individuals”).

285. THE FEDERALIST NO. 44, *supra* note 35, at 218 (James Madison).

When a state breaches a contract to which it itself is a party, it reallocates a burden that properly belongs by the entire body politic onto some subset of the whole.<sup>286</sup> This sort of special legislation, which singles out an individual or group to bear costs of which the majority wishes to divest itself, is not a proper exercise of a state's police power<sup>287</sup> because it necessarily excuses the majority of an obligation at the expense of some minority group.<sup>288</sup> The new Contract Clause jurisprudence protects groups that may run afoul of the majority will and find themselves at the mercy of a vindictive, opportunistic, or merely thoughtless state legislature. Like the Ex Post Facto Clause, the new Contract Clause jurisprudence prevents the "sudden and strong passions to which men are exposed"<sup>289</sup> from impairing the rights of an individual who committed no prohibited act. Like the Bill of Attainder Clause, the new Contract Clause jurisprudence prevents the majority from "burden[ing] a politically defenseless or easy target group" without "fair attention to its interests."<sup>290</sup> Like the Anti-Nobility Clause, it prevents the legislature from providing a benefit to "special interests"<sup>291</sup> or a "narrow class"<sup>292</sup> at the expense of the less politically powerful portion of the population.<sup>293</sup>

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286. See *United States v. Winstar Corp.*, 518 U.S. 839, 896–97 (1996). In *Winstar*, the Court drew on Contract Clause jurisprudence in holding that the federal government is prohibited from breaching its contractual obligations without providing compensation. The Court reasoned that the federal government improperly shifts public burdens onto individual parties when it breaches a contract to which it is a party. Read together with *United States Trust*, *Winstar* can be seen as further evidence that the Court views the right protected by the Contract Clause as a fundamental right, consistent with the other Article I, Section 10 protections.

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

288. See Epstein, *supra* note 272, at 719 ("To allow a state to repudiate its contracts unilaterally, however, is to invite the very abuses of factional coalition that the contract clause was designed to prevent, for we can be sure that almost every repudiation will provide benefits to some groups at the expense of others.").

289. *Fletcher*, 10 U.S. (6 Cranch) at 138–39; see also Strasser, *supra* note 280, at 230–31 (noting that the Ex Post Facto Clause reduces the possibility of arbitrary and vindictive action).

290. *Bd. of Comm'rs of the Orleans Levee Dist. v. Dep't of Natural Res.*, 496 So. 2d 281, 293 (La. 1986); see also *Energy Reserves*, 459 U.S. at 410 n.11 (explaining that the state must enact a statute to "protect a basic societal interest, rather than particular individuals" to pass muster under the Contract Clause); Huffman, *supra* note 165, at 1114 ("[T]he principle of reciprocity of advantage and the concern for discrete and insular minorities can help to define a coherent basis for assessing the validity of retroactive legislation.").

291. *Energy Reserves*, 459 U.S. at 412; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (Contract Clause prohibits legislation intended to benefit "some favored group").

292. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 249 (1978).

293. See Delgado, *supra* note 281, at 111–14.

By contrast, the new Contract Clause jurisprudence continues to accord great leeway to state regulation of contracts when the state is not an interested party in the particular contract at issue. Like the other Article I, Sections 9 and 10 protections, the new Contract Clause jurisprudence is not concerned with regulating private behavior. Rather, the requirement of generally applicable laws prevents the majority from burdening politically disfavored individuals or groups; the Contract Clause, in turn, does not prohibit the state from providing a “generally applicable rule of conduct” that only burdens contractual obligations “incidental to [the] main effect” of addressing a “‘broad societal interest.’”<sup>294</sup>

Viewed in this light, the new Contract Clause jurisprudence can be explained as a reassertion of federal protection of disfavored minority groups from the whim of the majority by requiring legislative generality in the context of public law.<sup>295</sup> In so doing, *United States Trust* has placed the Contract Clause in line with the purpose and effect of the Constitution’s other Article I, Sections 9 and 10 protections against legislation that singles out individuals or identifiable groups for special treatment. But, because it is only concerned with government overreaching to the detriment of disfavored minority groups, it does not go so far as to limit the states’ power to legislate disinterestedly for all its citizens.

Taken together with the Bill of Attainder, Ex Post Facto, and Anti-Nobility Clauses, the Court’s new Contract Clause jurisprudence not only folds it coherently back within the scope of these other Article I, Section 10 protections, but it also makes a powerful statement about the role of the Contract Clause in the American system. The Contract Clause is not simply designed to protect property rights; rather, it is one of a few constitutional provisions that protect the minority from the unchecked political will of the majority by disfavoring special legislation that targets individuals or identifiable groups rather than conduct.

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294. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191–92 (1983) (quoting *Spannus*, 438 U.S. at 249).

295. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 137 (1998) (noting that the basic concern with retroactive legislation is that it can be used against politically unpopular groups); see also Charles Tiefer, *Did Eastern Enterprises Send Enterprise Responsibility South?*, 51 ALA. L. REV. 1305, 1316 (2000) (arguing that “the ability of threatened groups to make their voices heard” is crucial when scrutinizing Congress’ ability to legislate retroactively). See generally Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 530 (2001) (noting that the Supreme Court’s decisions regarding retroactivity look to principles of fairness: “equity, justice, and reliance”).

In our system, committed to democracy and often critical of counter-majoritarianism, politically disfavored groups of all kinds rely on the judiciary to create a space for them that is safe from democracy. A robust reading of the constitutional provisions that protect political minorities is especially important in times, like our own, of economic crisis; it is, after all, during these times when the democratic will, on which we normally rely for our well-being, can give way to majoritarian passions that can run roughshod over the rights of disfavored minority groups. It is the establishment of these protections for the political minority from the will of the majority—from ourselves—that is the hallmark of the American ethic.

#### CONCLUSION

By bringing together the unusual development of the Contract Clause with the unusual history of the District of Columbia, this article addressed whether, if reviewed today, the retrocession of Alexandria could survive judicial scrutiny under the Constitution's newly heightened Contract Clause jurisprudence. I conclude that if the retrocession were examined anew, it would be found to be in violation of the Contract Clause. Since *United States Trust*, the Court has breathed new life to the Clause, holding that breaches of public contracts are presumptively invalid and that legislation that breaches these contracts is unreasonable when it is directed at a single enterprise or single contract. In light of this recent jurisprudence, the fact that Virginia promised to forever cede and relinquish its right to Alexandria and then subsequently breached this promise leads to the conclusion that Virginia's breach impaired an obligation of contract in violation of the Contract Clause.

The only Supreme Court case to have dealt with the legality of the retrocession, *Phillips*, did not explicitly address the Contract Clause and does not seem to have even considered the issue. Rather, the Court appears to have been focused on the right of a conquering power over territory that it has subdued.<sup>296</sup> Along with other Civil War era cases, *Phillips* appears to have been preoccupied with justifying the Union's right of control over the conquered southern states, which were still in the midst of Reconstruction.<sup>297</sup> Irrespective of whether *Phillips* was correctly decided in its day, *Phillips* can no longer serve as a basis for avoiding the question of the constitutional-

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296. See *Phillips v. Payne*, 92 U.S. 130, 133–34 (1875).

297. See, e.g., *Stevens v. Griffith*, 111 U.S. 48, 52–53 (1884); *Williams v. Bruffy*, 96 U.S. 176, 185 (1877).

ity of the retrocession on its merits; the Court's premise, the unquestioned recognition of a *de facto* government, has been wholly abandoned since *Phillips* was decided.

When its broader implications are considered, the Court's heightened scrutiny for breaches of public contracts presents both a doctrinal difficulty and an opportunity. The text and history of the Contract Clause, along with pre-*United States Trust* precedent, make the Court's reading of the Contract Clause in *United States Trust* difficult to justify. However, the Court's new Contract Clause jurisprudence fits in well with the Constitution's other Article I, Sections 9 and 10 protections that describe a constitutional value of legislative generality. By reading the Contract Clause in light of these other clauses, it becomes possible once again to meaningfully reconcile the text of the Contract Clause with its context.