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The Dual Standard of Review in Contracts Clause Jurisprudence

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NOTES

The Dual Standard of Review in Contracts Clause Jurisprudence

BRENNER M. FISSELL*

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INTRODUCTION

It seems obvious that there is something suspicious about a state entering into a contract only to later use its legislative power to escape from fulfilling that obligation. When the government enters into contracts, it binds itself according to the dictates of private law but, nevertheless, remains the sovereign. How can a space be preserved wherein a legislature can exercise its authority for the common good while simultaneously being bound to abide by agreements it made at an earlier time? This is the dilemma posed in a narrow band of Contracts Clause jurisprudence that culminates in *United States Trust Co. of New York v. New Jersey*.¹ In that case, the Supreme Court attempted to solve the dilemma by reviewing a legislature's repudiations of its own contracts with heightened scrutiny.² Legislative repudiations of private agreements, though, would be accorded substantially more deference.³ This "dual standard of review" was justified by a reference to the "State's self-interest" in altering or repudiating its own obligations.⁴ This all seems like good common sense, and since the promulgation of the doctrine, it has been continuously reaffirmed and supported by the Court.⁵ Despite this judicial consensus, the doctrine has been the subject of fierce criticism from the legal academy (with very few defenders). This Note will contribute to the debate about this doctrine and will conclude that it is entirely defensible. In the contemporary era, government contracting has become more prevalent than ever, and the government is again involved in alleviating the economy through various financial involvements. A sympathetic reassessment of the dual standard is appropriate and will hopefully inform the inevitable litigation following this recent recession.

Part I will discuss the historical and doctrinal background of the Contracts Clause and the dual standard of review. This will set the stage for a presentation

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

2. *Id.* at 25–26.

3. *Id.*

4. *Id.* at 25–26 & n.25.

5. *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987).

of the major academic critiques of the doctrine in Part II. These include critiques from the standpoints of trusteeship and public choice theory, as well as the criticism that the dual standard is underinclusive. Part III will assess the strength of these objections and reveal important weaknesses of those objections. Then, Part IV will present a substantive defense of the doctrine, suggesting that the proper interpretation of *United States Trust*, given both the text of the opinion and the doctrinal context in which the dual standard is expected to be applied, is that there is an implied limitation to the theory: it is meant to be employed only in cases of “purely financial” public contracts. Part V makes a case for why this implied limitation makes good sense, in that there are features peculiar to the financial context that make heightened scrutiny especially appropriate.

I. BACKGROUND: THE CONTRACTS CLAUSE AND THE DUAL STANDARD OF REVIEW

It is worth spending some time discussing the historical and doctrinal background from which the dual standard arises, framing it as somewhat of a revival of what had been a Contracts Clause long declining in importance. The Contracts Clause is a provision in the Constitution that states, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”⁶ It has had a tumultuous history. Most indications show that the purpose of the Clause was to prevent the kind of instability that prevailed through the Critical Period—the time in which the Articles of Confederation were in effect—when poor majorities would use the legislature to dissolve their own debts.⁷ As one of the only express prohibitions on state action in the early years of the United States, it produced a great deal of litigation.⁸ During this period, the Marshall Court held that the Clause applied to both public and private contracts.⁹

This heyday of activity eventually came to an end, as was the case with so many other restrictive doctrinal regimes, with the advent of the New Deal. In *Home Building & Loan Ass’n v. Blaisdell*, the Court upheld as a valid exercise of the police power—and thus immune from the Contracts Clause—a law that

6. U.S. CONST. art. I, § 10, cl. 1.

7. See Henry N. Butler & Larry E. Ribstein, *State Anti-takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 623–24 (1988); see also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354–55 (1827) (“The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.”).

8. See Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 525–26 (1987).

9. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 87 (1810) (“A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.”).

would have been struck down under earlier jurisprudence.¹⁰ In the wake of an economic foreclosure crisis, Minnesota altered existing mortgage contracts by providing for extensions.¹¹ A pro-debtor measure enacted in the face of an economic downturn seems to be precisely the type of law that the Framers had hoped to prohibit,¹² and because of this case the importance of the Contracts Clause shrank dramatically. The decision essentially created an exception for emergency circumstances,¹³ but for the next forty years, this exception swallowed the rule; only two state laws were struck down during the entire period.¹⁴ By the end of this process, even the pretense of an “emergency” was no longer necessary.¹⁵

In 1977, though, everything changed. In *United States Trust Co. of New York v. New Jersey*, a contract between the Port Authority of New York and New Jersey and the holders of its bonds had stipulated that the bond money typically would not be used to subsidize unprofitable passenger rail facilities.¹⁶ However, when circumstances changed and the nation faced a drastic fuel shortage in the early 1970s, New York and New Jersey both retroactively repealed the covenant containing this restriction, thereby freeing up the bond funds for that use.¹⁷ In a surprise move, the Court invalidated the repeal on the basis of the Contracts Clause, holding that it was not the least restrictive alternative available.¹⁸ In justifying this admittedly less-deferential standard of review in what would normally be a simple “reasonableness” analysis, the Court highlighted why it believed government contracts were special cases—and thus created the dual standard of review that is the subject of this Note:

As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.¹⁹

10. See 290 U.S. 398, 444–48 (1934).

11. *Id.* at 416.

12. See *id.* at 471–72 (Sutherland, J., dissenting).

13. See *id.* at 444–45 (majority opinion).

14. See Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1623 & n.7 (1980).

15. See *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 n.19 (1977).

16. *Id.* at 10 (explaining that under the terms, if a facility was not “self-supporting,” the money could not go to it unless other conditions were met).

17. *Id.* at 13–14.

18. *Id.* at 29–31.

19. *Id.* at 25–26.

A later case would describe the basis for this “stricter standard” as follows: “When a State itself enters into a contract, it cannot simply walk away from its financial obligations.”²⁰ Therefore, in cases of private contracts, only minimal review would ensue—and post-*Blaisdell* type deference would defeat most claims—but in public contracts, a heightened scrutiny would be used, permitting results such as those in *United States Trust*. Importantly, the Court quoted one of the *Gold Clause Cases*,²¹ *Perry v. United States*, as precedent for such a distinction:

There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.²²

After *United States Trust*, various other modifications were made to the basic Contracts Clause test,²³ but the dual standard of review has become rooted firmly and cited routinely.²⁴ Overall, this history shows that the dual standard of review can be seen as somewhat of a revitalization of a formerly moribund clause in the Constitution. Given the Contracts Clause’s evisceration during the Great Depression, one might wonder whether the dual standard—to the extent that it serves as a partial revitalization—will come under similar attack in the wake of our current recession. It is my hope that the sympathetic reassessment undertaken here can serve as an informative prophylactic.

II. RECEPTION & LITERATURE REVIEW

Given the unwavering and continuous reaffirmation of the dual standard of review in contemporary doctrine, one might think that commentary surrounding it would be singularly positive—that the dual standard has simply been incorporated into the fabric of the law without objection. Although this may be true on the judicial front (because lower courts are not free to countermand the precedent of the highest tribunal), commentators have not been so sanguine. Instead, legal thinkers outside of the judiciary have reacted in the opposite manner, lodging protestations nearly every time the topic is broached. Very few

20. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983).

21. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935) (decided together with *United States v. Bankers’ Trust Co.*).

22. *U.S. Trust Co.*, 431 U.S. at 26 n.25 (quoting *Perry*, 294 U.S. at 350–51 (internal quotation marks omitted)).

23. See *Butler & Ribstein*, *supra* note 7, at 629–30 (describing developments); see also Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAAMI L. REV. 183, 200–11 (1985) (same).

24. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 n.13 (1983); *Energy Reserves Grp.*, 459 U.S. at 411–13.

positive responses exist.²⁵ The next section will lay out the major critiques of the dual standard, including originalist responses, theories of representation such as trusteeship and public choice, and finally a hybrid criticism that charges the dual standard with the problem of underinclusion.²⁶

A. ORIGINAL UNDERSTANDING

The most obvious objection to the creation of the dual standard is also the least controversial: this doctrine is essentially unfounded in precedent and perverts the original purpose of the Contracts Clause. Regarding the latter, the seminal critique is made by Douglas Kmiec and John McGinnis.²⁷ In their article, they note that the history of the Framing indicates that a primary concern animating the inclusion of the Contracts Clause was legislative interference with debtor and creditor relations.²⁸ This was largely a response to the events of the Critical Period, when majoritarian factions of impoverished debtors could quickly take over a state legislature and compel it to dissolve or beneficially alter their contracts.²⁹ An oft-quoted contemporaneous statement by Madison is revealing:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the commu-

25. The only major defense that exists is in a recent article by Evan Zoldan. See Evan C. Zoldan, *The Permanent Seat of Government: An Unintended Consequence of Heightened Scrutiny Under the Contract Clause*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 163 (2011). Zoldan's defense centers around the need for "legislative generality" that inheres in all of the clauses in Article I, Section 10 of the Constitution. See *id.* at 207. In particular, he notes that 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." *Id.* at 209.

26. Another minor critique posits that the repudiation of public contracts is really a takings problem and has nothing to do with the Contracts Clause at all. See 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, 290 (1988) ("When the relationship in question is that between government and individual, the case is conceptually more like a takings case than the prototypical impairment of obligation of contract."); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 93 (1977). A final minor critique follows from Justice Brennan's dissent in *United States Trust*, where he noted that the private bond market "is apt to exact 'justice' that is quicker and surer than anything that this Court can hope to offer." *U.S. Trust Co.*, 431 U.S. at 62 n.18 (Brennan, J., dissenting). For an example of this critique, see Butler & Ribstein, *supra* note 7, at 639 ("Finally, even if a state's interests are relevant and are more implicated concerning its own contracts than private contracts, the Contract Clause is arguably less necessary to discipline impairment of the former than of the latter. . . . [because] the state's conduct in impairing its own bond contracts is disciplined by the bond market . . .").

27. See Kmiec & McGinnis, *supra* note 8.

28. *Id.* at 532–33.

29. *Id.*

nity. . . . They very rightly infer, therefore, that some thorough reform is wanting, which will . . . give a regular course to the business of society.³⁰

Given this original purpose, it is therefore uncertain even to this day whether or not the extension undertaken in *Fletcher v. Peck*³¹ was warranted. In any case, Kmiec and McGinnis argue that even granting that this extension is a proper one, the original purposes at the very least militate in favor of precisely the opposite of the *United States Trust* doctrine. In other words, public contracts should get less, not more, scrutiny than private contracts.³² Picking up on that theme, Thomas Merrill writes that the “modern Court has in effect turned the contract clause of both the framers and the post-*Charles River Bridge* era on its head. The prior understanding was that private contracts were protected from state interference with *more* rigor than public contracts.”³³ This “remarkable inversion,”³⁴ as Merrill coins it, is something that others have similarly found to be a cause for lament.³⁵

B. TRUSTEESHIP CRITIQUES

The next two lines of objection come from disparate and opposing theories of representation, both of which seek to undermine the premises upon which the heightened scrutiny rests. The first can be referred to as a trusteeship critique: it maintains that there can be no independent “interest” of legislators or representatives and that their interest is by definition the same as that of the public interest. A strong version of this theory assumes that what is now called “rent-seeking behavior”³⁶ is actually impossible, but a weaker version might propose merely that institutions and rules ought to be crafted either with the assumption that legislators do act in the public interest or with the goal of

30. See McConnell, *supra* note 26, at 288 (alteration in original) (quoting THE FEDERALIST No. 44, at 282–83 (James Madison) (Clinton Rossiter ed., 1961)).

31. See *supra* note 9 and accompanying text.

32. Kmiec & McGinnis, *supra* note 8, at 547 (“If anything, the Court’s earlier jurisprudence has been more, not less, deferential to public contracts insofar as the contracts were more likely to implicate the police power or reserved authority.”).

33. Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 604, 609 (1987) (“[A]fter *Charles River Bridge*, both public and private contracts were still protected by the contract clause, but there was now a dual standard of review, with public contracts enjoying *less* protection than private contracts.”) (emphasis added).

34. *Id.* at 609.

35. See, e.g., McConnell, *supra* note 26, at 293–94 (“[T]hese conclusions suggest that the modern thrust of contracts clause jurisprudence is precisely backwards. . . . [because] it is interference with private contracts that lies at the heart of the clause.”).

36. This term has been used to link Madisonian faction theory with modern political science and economic models of politics, and it will be used throughout this Note. See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713 (1984) (“This central problem of governance is very old, but in recent years it has been captured in the language of economics: any grant of legislative power will invite ‘rent-seeking’ behavior; each group will try to use that legislative power to appropriate the wealth of its rivals.”).

encouraging them to do so.³⁷ Overall, this view rests upon the idea that legislators are generally good people who take their oaths seriously.

The influences of this trusteeship approach are prevalent in some of the critiques of the *United States Trust* dual standard of review. Kmiec and McGinnis briefly make the following consequential point: “[W]hile the argument that the legislature’s self-interest in public contracts should lead to a stricter review has a certain, albeit delusive, plausibility, it is fundamentally incorrect because the self-interest of a state legislature passing economic or social legislation is, at bottom, no different from the public interest.”³⁸ Similarly, a commentator weighing in immediately after the decision wrote that “[i]n the absence of legislative venality or corruption . . . it makes no sense to speak of the state’s self-interest as a concept distinct from that of the ‘public interest’ which is normally deemed a proper basis for regulation.”³⁹ According to this trusteeship critique, there should be no heightened scrutiny for government contracts just as there should be none for private cases. In both areas, deference is due because the legislature acts, or should be presumed to act, for the public good.

C. DELEGATE, ADVOCATE, OR PUBLIC CHOICE CRITIQUES

The third response to the dual standard flows from the polar opposite of the trusteeship position: it comes from the notion that legislators are almost always acting in a rent-seeking manner and that the idea of a “state interest” divorced from the interests of private groups—if it exists at all—would never be titillating enough to warrant heightened scrutiny.⁴⁰ This argument is made most vividly by Merrill: “‘the legislature’ is . . . not . . . a hypostatized entity having its own distinct interests, but . . . a collection of flesh and blood individuals having disparate interests and representing persons having disparate interests,”⁴¹ and it has a propensity to “trade short-term gains for long-term losses.”⁴² This is essentially the teaching of public choice theory, which sees the representative as neither angelic trustee nor government-minded bureaucrat, but instead as rent-seeking factionalist.⁴³ Put another way, “public choice analysis typically

37. Hints of the theory can be seen in the Supreme Court case of *Spallone v. United States*, 493 U.S. 265 (1990). In that case, a lower court had imposed contempt sanctions on local government board members for failing to put into effect antidiscrimination policies that had been ordered. *Id.* at 268–73. The Supreme Court reversed, noting the perverse effect that such measures would have on the decision-making calculus of elected representatives. *Id.* at 279–80 (“[W]e have emphasized that any restriction on a legislator’s freedom undermines the ‘public good’ by interfering with the rights of the people to representation in the democratic process. . . . The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests.”).

38. Kmiec & McGinnis, *supra* note 8, at 547.

39. See *The Supreme Court, 1976 Term*, *supra* note 26, at 89.

40. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (describing public choice theory).

41. Merrill, *supra* note 33, at 616.

42. *Id.* at 619.

43. See FARBER & FRICKEY, *supra* note 40, at 1–6.

treats legislators as the representatives of private factional interests rather than of any governmental self-interest.”⁴⁴ Because of this:

It makes no sense to distinguish impairment of state and private agreements on the basis of ‘the State’s self-interest.’ The self-interest that matters in questioning the reasonableness of the statute is that of those who actually enact the statute—the legislators. The legislators, like other economic actors . . . are motivated by self-interest in terms of wanting to capture rents in the form of increased power, campaign funding and votes from competing lobbying groups.⁴⁵

Because all legislative interests are ultimately private in nature, there is no such thing as a “state” self-interest—no distinction exists, and heightened scrutiny is theoretically incoherent.⁴⁶

D. UNDERINCLUSIVENESS

By far the most important critique of the dual standard of review flows from the strict-scrutiny idea of underinclusion. It can be summarized as follows: all of the concerns that could be leveled against the alteration of government contracts are equally applicable to private ones. Therefore, heightened scrutiny solely for the former—the dual standard—does not do enough. Even the alteration of private contracts should be suspect.

Although other critics have invoked this idea at times,⁴⁷ Merrill gives it the most exhaustive treatment.⁴⁸ Under his reading of the *Gold Clause Cases* and *United States Trust*, the dual level of scrutiny has been defended using three distinct justificatory tools: a Kantian argument against the repudiation of one’s own contract, a process-based theory that the legislature does not act neutrally when judging its own case, and a utilitarian justification proceeding from a concern over public confidence in the government and the security of public

44. Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 658 n.126 (1996).

45. Butler & Ribstein, *supra* note 7, at 639.

46. It is unclear how public choice theory would deal with the case-of-a-lifetime bureaucrat with institutional interests, but presumably this is not at issue in contract repudiations, which require legislative action.

47. See, e.g., Butler & Ribstein, *supra* note 7, at 639 (“Moreover, even if the ‘state’s’ interests were relevant, the state would potentially have just as much interest in abrogating private agreements as public, because the state can ‘reduce its financial obligations’ by either method.”); *id.* (“Legislators’ self-interest obviously is potentially a factor in passage of all legislation, whether or not the legislation impairs contracts, and whether the impaired contracts are state or private in nature.”); Epstein, *supra* note 36, at 719 (“In addition, the problem of legislative abuse is as great in the one context as in the other.”); *The Supreme Court, 1976 Term*, *supra* note 26, at 89–90 (“Justice Blackmun’s apprehension that the natural tendency to preserve the public fisc might precipitate abuse of the police power in unfettered abrogation of government obligations simply proves too much: the same policy may equally predicate the modification of many private contracts and private property rights.”) (footnote omitted).

48. See generally Merrill, *supra* note 33.

debt.⁴⁹ According to him, the Kantian wrongfulness that attaches to breaking one's own promises is equally applicable in the case of the alteration of private contracts because "the government can participate in promise-breaking . . . indirectly, as the agent of some other (private) promisor," and because the Contracts Clause is itself a promise that the government has made—and it demands that *all* contracts be upheld.⁵⁰ The process-based justification similarly applies equally to both private and public agreements, Merrill argues, because of the public choice concerns noted earlier: there is no such thing as legislative "neutrality," as even in the case of private contracts legislators will be interested in the outcome and will be judging their own case, so to speak.⁵¹ Finally, even under the utilitarian argument there is no reason for the distinction because tinkering with private contracts will have an equally negative effect on utility through the increase of interest rates.⁵²

So far, the major criticisms of the dual standard of review have been categorized and presented. Overall, it should be noted that criticism is far more prevalent than support, and the tide of opinion has gone against the doctrine. However, no criticism should be uncritically accepted.

III. RESPONSE TO CRITICS

Before presenting an independent defense of the dual standard, it is worth specifically responding to some⁵³ of the points made above. As will be shown, each has internal problems that undermine their force even absent any outside considerations.

A. TRUSTEESHIP: A REBUTTAL

Although many would dismiss the trusteeship critique *ab initio* as overly naïve (think of the public choice theorists), it is also shaky on its own ground. Recall that there are both strong and weak versions of this theory. The strongest, and also the most implausible, holds that legislators always act for the common good. Even taking this view for granted, its application to the government Contracts Clause context is uncertain. That the legislators may have good *intentions* is not enough—the moments when it will be most tempting to alter or

49. *Id.* at 611–19.

50. *Id.* at 611–12.

51. *Id.* at 615–16.

52. *Id.* at 619.

53. I say "some" because there are certain points that are essentially unassailable—I make no attempt to counter the originalist or historical critiques, and as far as I know, no one else has. Similarly, the utilitarian points made by Merrill seem persuasive, but they have no place in constitutional analysis; these are more redolent of "law and economics" debates that currently take place in common law areas such as torts and property. After all, the Court in *United States Trust* strongly advised against such methods: "[New York and New Jersey] contend that [their] goals are so important that any harm to bondholders from repeal . . . is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 28–29 (1977).

repudiate public contracts will, as *Blaisdell* suggests, often be in cases of economic crisis or emergency.⁵⁴ Even when true trustees inhabit the halls of legislatures, emergency situations may provoke them to do things that are mistaken or emotionally driven, despite their best intentions. The facts of *United States Trust* are instructive. It could not be gainsaid that, in seeking to fund alternative methods of transportation in the face of a national economic fuel crisis, New York and New Jersey were acting in good faith. Their intentions, at least, were pure, and even Justice Blackmun admitted that “[m]ass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern.”⁵⁵ Still, the crisis was short lived, and the need for major automobile alternatives was overly hyped. The point must be this: although the Contracts Clause is indeed concerned with governmental purposes, it is also concerned with effects, and it is no surprise that a legislature—especially in an emergency setting—might make hasty decisions that impermissibly (although perhaps unintentionally) shift burdens to certain groups.⁵⁶

Now let us assume that the trusteeship critique flows from a model that makes a more plausible claim: not that all lawmakers are always good trustees, but that rules, courts, and institutions should both assume that they act in such a way and encourage them to do so. This assumption is likely what underpins commentary such as the following: “In the absence of legislative venality or corruption . . . it makes no sense to speak of the state’s self-interest as a concept distinct from that of the ‘public interest’”⁵⁷ The problem with this proposal is primarily an evidentiary one. It seems wrong to put the production burden for raising scrutiny upon the bondholders because they were the ones who fulfilled their obligations. The presumption should be in their favor, not the government’s. By setting the default position at a higher level of suspicion against the government, the Court has properly placed the burden upon the breaching party to demonstrate its bona fides.

B. PUBLIC CHOICE: A REBUTTAL

Turning to public choice, this view holds there can be no distinct “government interest” because all legislators act self-interestedly and are merely conveyor belts for constituent interests. Again, let us take for granted the underlying

54. See *supra* notes 10–13 and accompanying text.

55. *U.S. Trust Co.*, 431 U.S. at 28.

56. This is a prevalent concern of the Contracts Clause jurisprudence. As the Court itself has noted, “[Financial self-relief] is not necessarily inconsistent with a public purpose, of course, and when we speak of governmental ‘self-interest,’ we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties.” *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion).

57. See *The Supreme Court, 1976 Term*, *supra* note 26, at 89; see also *supra* note 39 and accompanying text.

premise.⁵⁸ Even if we deny that there is any qualitative difference between public and private contracts with respect to the specific interests of the legislators, is there not still a quantitative difference? A repudiation of a public contract always and necessarily “reallocates a burden that properly belongs [on] the entire body politic onto some subset of the whole,” whereas a private contract usually implicates only the reallocation of burdens between private parties.⁵⁹ Moreover, beyond the actual incidence of burden shifting being less likely, the burdens’ magnitudes are also different. In the case of public contracts, the entire polity dumps its heavy burden on the few—this is something that would otherwise be borne through tax dollars by everyone. Even if public choice theory is correct, the guaranteed incidence of majoritarian burden shifting, coupled with its far greater magnitude, warrants a more suspicious review of public contract repudiation.⁶⁰

C. UNDERINCLUSION: A KANTIAN REBUTTAL

The final response is to the underinclusion critique. This Note will deal only with Merrill’s attack on the Kantian justification for the dual level of scrutiny.⁶¹ His first point is that the government can participate in breaking private promises indirectly as an agent of a private promisor, and that this is just as immoral as breaking its own promise directly; therefore, the standard of review should be the same for both.⁶² Although it may be true that it is immoral to participate indirectly in the third party’s breach, this doesn’t violate the Kantian principle as Merrill himself has defined it: “it is morally wrong to repudiate *one’s own* promise.”⁶³ The Kantian justification is not about abstract immorality more generally, but about the specific type of immorality that is exhibited when

58. Zoldan takes a quasi-public choice position and still comes out in favor of the dual standard. *See* Zoldan, *supra* note 25, at 207–10. For him, the dual standard still makes sense because of the guarantee of legislative “generality” that inheres in the prohibitions in Article I, Section 10, of which the Contracts Clause is but one. *Id.* at 207–09. Zoldan speaks of the “sudden and strong passions to which men are exposed . . . impairing the rights of an individual who committed no prohibited act . . . [and allowing] the majority . . . [to] burden[] a politically defenseless or easy target group . . .” *Id.* at 209 (internal quotation marks and citation omitted). I say that he is only a quasi-public choice theorist because he believes that there can be cases “when the state is not an interested party in the particular contract at issue.” *Id.* at 210.

59. *Id.* at 209–10.

60. Beyond this, one could note that, under an extreme public choice theory, there is a colorable argument that the state itself—not private minorities—would be the biggest victim because when there is no concern for the “public fisc,” *see supra* note 47, the state’s own coffers would be the easiest target of all. Although much attention is paid to the problems attendant with government bonds, we ought to take a moment to consider government loans. Public choice theory, when applied in this area, actually militates in favor of a higher scrutiny for the review of government contract repudiation. This is needed to protect the state coffers from being victimized by powerful factions who might loan themselves money, only to repudiate in favor of themselves later on through legislative action.

61. This is because his arguments against the process justification, *see* Merrill, *supra* note 33, at 613–14, are essentially identical to the public choice arguments made above. The utilitarian theory will not be addressed either, for reasons already stated.

62. *See id.* at 611.

63. *Id.* at 609 (emphasis added).

one has explicitly violated a prior pledge that he himself has made. To circumvent this, Merrill evokes the idea of indirect participation in the breach of the private, third-party contract—the legislator is the “agent” of that party.⁶⁴ Even when participating intentionally, though, the legislators who repudiate a private contract for the good of some private party have not broken their own promise. That a third party might assist in enabling a breach does not transmute the original terms of an agreement and incorporate that party into it.

The second larger point made in his critique of the Kantian justification is that in repudiating private agreements, the government nevertheless perpetrates a breach of some suprapromise: the Contracts Clause.⁶⁵ This seems too general. The Contracts Clause, if it can be seen coherently as a “promise” at all, is only a promise insofar as its terms are interpreted by the Supreme Court. If the legislature has permissibly altered or repudiated a private contract according to one of the exceptions to the Clause recognized by the Court—the Reserved Powers exception, say⁶⁶—then no violation has occurred, and therefore no “breach” of the larger constitutional “promise” has taken place. If, however, the alteration or repudiation does not fall within an exception, then either the legislature will refrain from making it or it will be judged unconstitutional by the reviewing court. In either case, the outcome will be the same: the terms of the promise will be upheld, albeit by different actors in the governmental apparatus.

This concludes the response I hope to make to the major critiques. As we have seen, there are internal problems in all of them, and after taking these weaknesses into consideration, both the Kantian justification of the *Gold Clause Cases* and the process justification seem more fitting: the problem of violating one’s own agreement still stands, and there seems to be something particularly bad about public contract repudiations, even though private repudiations might also be bad. Any judicial reassessment of the dual standard should take note of these critiques’ own limitations, should it choose to rely upon them.

IV. RATIONALIZING HEIGHTENED SCRUTINY: A LIMITED READING OF *UNITED STATES TRUST*

Beyond calling attention to problems internal to the dual standard’s critiques, I also hope to advance a new way of interpreting what the Court said in *United States Trust*. The true labor for any defense of the dual standard of review is to justify not only why public contracts are unique, but also why they have a pernicious uniqueness. The Court highlighted the “self-interest” of the state as

64. *See id.* at 611.

65. *See id.* at 612 (“Second, if the government must keep its own promises, one of the promises it presumably must keep is the guarantee of article I, section 10 of the Constitution which provides that the government will not impair the obligation of contracts. Whatever else this provision means, it was originally intended to include private contracts.”).

66. *See Stone v. Mississippi*, 101 U.S. 814, 817 (1880); *see also infra* note 68.

party to the repudiated deal,⁶⁷ and the major criticisms of the doctrine have attacked the reality of this phenomenon, primarily through an appeal to various theories of representation. In what follows, I will discuss why I believe the immediate resort to theories of representation has been a distraction. I argue that the dual standard is justified when limited to the specific circumstances at issue in *United States Trust*—a purely financial public contract. While theories of representation may undermine the idea of a state’s self-interest in the larger context of legislation, with purely financial contracts, the legislators act not as representatives in the traditional sense, but more as corporate directors with narrow pecuniary motives.

A. THE PROPER INTERPRETATION OF *UNITED STATES TRUST* AS LIMITED TO FINANCIAL CONTRACTS

Read closely, *United States Trust* suggests that it is only speaking about purely financial contracts—agreements where only money, and only the state’s own money, is at issue. Indeed, the presumed context may be even narrower than this, perhaps limited solely to bond repudiations. These cases are the governmental analogues of a defaulting or bankrupt corporation. Why has this been missed? It seems that the commentators discussed above have looked to what follows the creation of the dual standard in the opinion (the *Gold Clause Cases* citation), ignoring what precedes it.

The Court begins by explicitly referencing *Stone v. Mississippi*, which held that the government cannot contract away its core sovereign power.⁶⁸ In *Stone*, the state granted a charter to operate a lottery for twenty-five years but later repudiated the agreement, and the Court held that this was not a Contracts Clause violation: “All agree that the legislature cannot bargain away the police power of a State.”⁶⁹ The Court notes that the bond agreement in *United States Trust* was unlike the arrangement in *Stone* but was instead a “purely financial” contract not implicating core governmental powers.⁷⁰ The opinion also discusses how taxing, spending, and other general financial powers are clearly amenable to contract, despite any correlative effect that such burdens or benefits might have on governmental operation.⁷¹ The Court’s early dismissal of the Reserved Powers defense in *United States Trust* notifies the reader of the types of contracts the opinion is not talking about and immediately flags the foil to this category that is amenable to Contracts Clause review: financial agreements.

As the opinion continues, the repeated emphasis is not merely on agree-

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

68. *See id.* at 23 (quoting *Stone*, 101 U.S. at 817). This is known as the Reserved Powers doctrine. For a history of the doctrine, see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

69. *Stone*, 101 U.S. at 817. The same is true of the eminent domain power. *See W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532–34 (1848).

70. *U.S. Trust Co.*, 431 U.S. at 25.

71. *See id.* at 24–25.

ments that touch on any financial subject matter, but more particularly on those that relate to the state's own internal finances. The passage creating the dual standard itself points us to such a presumed and implicit context:

A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce *its financial obligations* whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.⁷²

For support, the Court quotes from *Perry v. United States*, one of the *Gold Clause Cases*, which also supports such a limited reading: “There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties . . . and the power of the Congress to alter or repudiate the substance of its own engagements *when it has borrowed money . . .*”⁷³ The opinion also cites a revealing quote from the case *Murray v. Charleston*: “The truth is, States and cities, when they *borrow money* and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.”⁷⁴

Overall, in speaking of a state's self-interest, the Court seems to be thinking of the state as a corporation, and the legislators as directors, but only when borrowing and lending in purely financial settings where an obligation is undertaken or extended. This is a very narrow reading, and it is supported by the text when it is taken as a whole. In fact, the last time a majority opinion discussed the dual standard's rationale, it again seemed to limit the application to a bond repudiation scenario: “Thus, the Court has observed that in order to maintain the credit of public debtors, and because the ‘State's self-interest is at stake,’ the Government's impairment of its own obligations perhaps should be treated differently.”⁷⁵ However, the definition of “financial obligations” is not entirely unambiguous,⁷⁶ and it is certainly true that a government could be financially obliged to pay a certain sum without having to borrow to cover that cost (think of a simple contract to pay a company to build a public highway). An agreement to pay is indeed different from an agreement to pay back, and each probably implicates slightly different constitutional concerns, but such a fine demarcation would need to be made with more clarity in the opinion. What is clear, though, is the financial–nonfinancial distinction.

Read as a whole, the *United States Trust* opinion anticipates that the dual standard will only be applied in repudiations of purely financial contracts where

72. *Id.* at 26 (emphasis added).

73. *Id.* at 26 n.25 (emphasis added) (quoting *Perry v. United States*, 294 U.S. 330, 350–51 (1935)).

74. *Id.* at 25 n.23 (emphasis added) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

75. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 471 n.24 (1985) (citations omitted) (quoting *U.S. Trust Co.*, 431 U.S. at 26).

76. *See U.S. Trust Co.*, 431 U.S. at 25–26.

the terms relate to money, and (as will be shown) this is in fact the only doctrinally possible application.

B. *UNITED STATES V. WINSTAR CORP.*: DOCTRINAL CONTEXT NECESSITATES
A LIMITED READING

The most recent, relevant case, *United States v. Winstar Corp.*,⁷⁷ even more concretely affirms the textual conclusion from above: all government contracts amenable to Contracts Clause analysis will be of a financial type. While *Winstar* involved the Federal government (not a state) and therefore did not directly implicate the Contracts Clause, the Due Process challenge in the case proceeded along familiar Contracts Clause parameters, and the Court saw Contracts Clause jurisprudence as relevant by analogy.⁷⁸ In any event, *Winstar* is useful to us in that it highlights the importance of a doctrine that *is* implicated by the Contract Clause: Reserved Powers. It shows how the doctrinal context of *United States Trust* makes the limited reading described above a necessary one.

Winstar involved what many commentators call a “regulatory contract”⁷⁹: a government agency made an agreement with various financial institutions that should it alter its regulatory scheme, it would cover any losses created by their reliance upon the previous rules.⁸⁰ After repudiating but failing to pay, the government raised numerous defenses to the financial institutions’ Due Process claim, including an assertion that the contract was unenforceable because it restricted the exercise of Reserved Powers.⁸¹ While the *Winstar* decision is somewhat convoluted (it produced only a plurality opinion on most of the major issues in the case), a majority of the justices agreed that the Reserved Powers doctrine did not apply.⁸² Essentially, if a contract is enforced by money damages and not specific performance—as was this regulatory contract—it does not formally fetter the government’s power, and there can be no Reserved Powers defense.⁸³ Although the expenditure of money will always affect action in some

77. 518 U.S. 839 (1996).

78. *Id.* at 875–76 (“Although the Contract Clause has no application to acts of the United States, it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. The extent of that capacity, to be sure, remains somewhat obscure.”) (internal citations omitted). The Court then cites to *United States Trust*, among other cases. *Id.*

79. See David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 475 (1999) (“[T]he regulated entity contractually promises the government that the entity will provide or do something that is not otherwise clearly required by extant law. In return, the government contractually promises the regulated entity to maintain the regulatory regime set out in the contract. If the government breaches its promise of regulatory stability, it must pay contract damages.”).

80. See *Winstar*, 518 U.S. at 843 (plurality opinion).

81. See *id.* at 888–89.

82. *Id.* at 889; *id.* at 922–23 (Scalia, J., concurring).

83. *Id.* at 889 (plurality opinion) (“The answer to the Government’s contention that the State cannot barter away certain elements of its sovereign power is that a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty.”); see also *id.* at 923 (Scalia, J., concurring) (finding Reserved Powers doctrine inapposite when “the private party to the

sense, the Court refused to accept this argument.⁸⁴ After *Winstar*, then, the category of what the Court understands to be financial contracts is very broad indeed: so long as no specific government action is mandated and only monetary payments are required, the contract is purely financial.⁸⁵ No matter how closely the agreement seems to be related to sovereignty (*Winstar* involved regulation of private activity, after all), it is the enforcement mechanism that matters.

After *Winstar*, it is plausible that no contracts falling outside of this financial category are enforceable against the government, as where specific performance is involved, there will almost certainly be a Reserved Powers defense. The Reserved Powers doctrine only purportedly prevents the state from “barter[ing] away *certain* elements of its sovereign power,”⁸⁶ not all elements, but after taxing and spending, there seems to be little—if anything—left that falls outside the prohibited core area.⁸⁷ It is unclear whether there exists some small sphere of nonfinancial activity that is nevertheless enforceable—not implicating a Reserved Power, yet demanding that the government do or refrain from doing something that does not involve money. Even the Supreme Court was unable to think of such a power and rested content to at least demarcate its one exception (financial agreements): “Whatever the propriety of a State’s binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned.”⁸⁸ Given the lessons of *Winstar*, we can safely conclude that in all possible government contracts amenable to

contract does not seek to stay the exercise of sovereign authority, but merely requests damages for breach of contract”).

84. The problem was that it would allow for the Reserved Powers exception to swallow the rule, and no simple monetary threshold could be devised upon which the government could be said to be truly fettered. *Id.* at 917 (Breyer, J., concurring) (“[T]his rationale has no logical stopping point. . . . It is difficult to see how the Court could, in a principled fashion, apply the Government’s rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, [is] properly governed by ordinary principles of contract law. To draw the line—*i.e.*, to apply a more stringent rule of contract interpretation—based only on the amount of money at stake, and therefore (in the Government’s terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory.”). That such agreements “may indirectly deter needed governmental regulation by raising its costs” is not sufficient: “[A]ll regulations have their costs . . .” *Id.* at 883 (plurality opinion). This is similar to the rejected reasoning in *United States Trust*. See *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 24 (1977) (“Any financial obligation could be regarded in theory as a relinquishment of the State’s spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.”).

85. See *Dana & Koniak*, *supra* note 79, at 491 (“[A]s *Winstar* showed, a majority of the current Court believes that, as long as the remedy sought for breach of a regulatory contract is damages, as opposed to specific performance, the obligation is financial and thus the contract is enforceable against the State irrespective of its underlying subject matter.”).

86. *Winstar*, 518 U.S. at 889 (plurality opinion) (emphasis added).

87. The only governmental “actions” that seem enforceable are precisely those of a financial character that were discussed in *United States Trust*. See *U.S. Trust Co.*, 431 U.S. at 24 (noting that “the State could bind itself in the future exercise of the taxing and spending powers”).

88. *Id.*

Contracts Clause review (or at least nearly all), the subject matter of the agreement will be and must be financial. If not financial, the contract will be unenforceable as per the Reserved Powers doctrine. We earlier discussed how a close reading of the text of *United States Trust* hinted strongly towards a reading limiting the dual standard's application to financial agreements, and we now find that the doctrinal context further makes this limitation necessary.⁸⁹

V. RATIONALIZING HEIGHTENED SCRUTINY: THE LIMITED READING AS
SOUND JURISPRUDENCE

Although it is important to note, as above, that the text of *United States Trust* and the doctrinal context of the Contracts Clause presuppose that the dual standard of review will be applied only in cases of financial government contracts, it is not enough to stop there. Instead, it is equally important to inquire further and to ask whether, given this limitation, the dual standard of review continues to be defensible. I find that this limitation, far from detracting from the dual standard's soundness, further strengthens the conceptual foundations of the dual standard and helps to obviate the major criticisms lodged against it by commentators.

The commentators' mistake is essentially this: they have uncritically applied theories of representation so as to assail a legislative practice, but said theories have limited usefulness outside of the context of normal legislative deliberation. As the above discussion has made apparent, repudiations of government contracts that are themselves open to Contracts Clause review will always relate to the payment or collection of the government's own money. These types of legislative action differ in character, though, from the paradigmatic type of legislation, where sovereign power is directly exercised. Thus, the resort to traditional representation theory is merely a futile obfuscation—it would be appropriate when analyzing government contracts entailing core governmental powers, but these are precisely the types of agreements that are unenforceable given the Reserved Powers doctrine. Positing governmental self-interest in the exercise of sovereign power makes little sense indeed, but contractual arrangements directly affecting this exercise are outside of Contracts Clause review. When it implements its heightened scrutiny, the Supreme Court is not dealing with agreements that directly implicate sovereign power. Any sovereign power that *would* be implicated is itself mediated through taxing and spending—through financial power that affects the state's coffers.

There are numerous reasons why we ought to think that the repudiation of

89. It also bears noting that another doctrine was discussed in *Winstar* but failed to obtain a majority of votes and has never been adopted as law by the Supreme Court—the sovereign acts doctrine. This doctrine allows for the government to raise an impossibility defense (that would be prevented by traditional contract law) when the impossibility is due to the government's actions as sovereign. See *Winstar*, 518 U.S. at 891–98 (plurality opinion). Although the sovereign acts doctrine might have interesting implications for my theory, I pass over it here because of its current legal status.

government contracts that are purely financial—dealing the state’s own money—ought to be viewed in a different light from a situation where a legislature simply reverses its course of action on a matter of policy, pursuant to one of its core sovereign powers.⁹⁰ Note that the focus must be on public contract repudiations and their private analogues—the Contracts Clause deals not with the formation of contracts but with the “impair[ment]” of existing ones.⁹¹ What I find salient is that both the “input” and the “output” of public financial repudiations are more problematic than those of private agreements—input meaning the types of deliberations or the purposes and motivations that produce the legislation, and output meaning the effects or aftermath of that legislation.

A. THE PERNICIOUS UNIQUENESS OF GOVERNMENT FINANCIAL CONTRACTS

1. Legislative Inputs (Purposes)

With respect to the input of the legislative deliberation leading up to the repudiation of a purely financial contract, there are two important observations to be made. First, these repudiations are attenuated from the direct exercise of sovereign power because they are only about money. Therefore, the deliberation that precedes them will be afflicted by a certain tunnel vision that makes the idea of a state self-interest (abstracted from the good of the citizenry) cognizable. Second, the relatively painless option of performance through monetary payment, with no true fettering of the government’s powers to act, makes it such that these repudiations are *prima facie* subject to suspicion.

The first point is the most important, and it relates to the formal nature of the state action at issue in the creation and destruction of these agreements. The repudiation of a financial contract, unlike the normal exercise of a sovereign act, is attenuated by at least one step from the sovereign power. Such was the case in *United States Trust*. Although the government justified its repudiation in the case by relying on larger energy security concerns (the Port Authority needed to free up its funds so as to increase public transit in the wake of the severe oil shortages of the 1970s), the repudiation of these bonds was still ultimately about finances.⁹² The terms of the agreement were solely about the lending and the repayment of money, and the government was free to do whatever it wished so

90. We could place the repudiation of private contracts within this latter category (think of the *Blaisdell* emergency exception).

91. U.S. CONST. art. I, § 10, cl. 1.

92. The discussion in the opinion is revealing. See *U.S. Trust Co.*, 431 U.S. at 25 (“Not every security provision, however, is necessarily financial. For example, a revenue bond might be secured by the State’s promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons. The security provision at issue here, however, is different: The States promised that revenues and reserves securing the bonds would not be depleted by the Port Authority’s operation of deficit-producing passenger railroads beyond the level of ‘permitted deficits.’ Such a promise is purely financial and thus not necessarily a compromise of the State’s reserved powers.”).

long as it paid the money back as expectation damages.⁹³ The bond agreement was not about transportation but about money *for* transportation.

Attenuation is important because of its tendency to aggravate deliberative tunnel vision. When an agreement is formally about money alone and is at least one step removed from traditional governance (for instance, the provision of transit or the prosecution of war), legislators are more likely to act like private corporate directors than as representatives. The subject matter of governing is further from their minds, and the possibility is stronger that state self-interest will motivate them. A layer of remoteness is added between the legislative deliberation and the public good; decision makers can think and speak as if there were some separate interest that they must advance. Instead of remembering that their role is to advance the common good, it is acceptable to say, “We need to balance *our* books.” Money, for its own sake and not for some further end, tends to become the dominant subject of discussion. In these types of deliberations, and in these types of repudiations, it makes some sense to see the legislators in a somewhat different light—as the board of directors of a corporation seeking to “get into the black,” limited by a certain tunnel vision that is not present in more traditional deliberation. Of course, were these deliberators totally wise and forward-looking, they would understand that their ultimate vocation is to look out for the common good and that the state’s fiscal health is but a means to an end. However, heightened judicial standards of review are put in place precisely because of legislative shortcomings.

I would classify this deliberative tunnel vision, itself a product of the attenuation of the discussion’s subject from the exercise of sovereign power, as a problem of knowledge and not an indictment of the legislators’ good faith. It is not that they stand to personally gain from balancing the state’s books,⁹⁴ but rather that their zeal for the state’s financial solvency (or simply for more cash on hand) causes them to mistakenly undervalue or forget the rights of the contracting party. As Justice Blackmun wrote in *United States Trust*:

Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. . . . [But] a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.⁹⁵

Consider also this revealing explanation by the *Winstar* plurality: “[Financial self-relief] is not necessarily inconsistent with a public purpose, of course, and when we speak of governmental ‘self-interest,’ we simply mean to identify instances in which the Government seeks to shift the costs of meeting its

93. *Id.* This is what the Court meant by stating that the contract was “purely financial” and did not compromise the reserved powers. *Id.*

94. Although there might be some of this involved in that it bodes favorably for reelection.

95. *U.S. Trust Co.*, 431 U.S. at 28–29.

legitimate public responsibilities to private parties.”⁹⁶ We need not impugn the good faith of legislators to nevertheless view these repudiations with suspicion; heightened scrutiny pushes back against legislators’ perhaps well-intentioned actions where those actions have the effect of impairing minority rights and reliance.

All of this is categorically different from cases where a legislature deliberates directly about an exercise of sovereign power. Take, for example, the decriminalization of certain conduct. In this deliberation, the core power to proscribe or permit behavior is immediately before the legislature, and no tunnel vision, distraction, or forgetfulness is possible. When a legislature reverses its prior course in the area of nonfinancial sovereign powers, no mediating distraction or temptation (in the form of money) enters into the picture. Such is also the case with a legislative nullification of private contracts pursuant to the police power (think *Blaisdell*); in these cases, the public good is squarely presented. Some may think this distinction is hopelessly formalistic, but as Justice Blackmun noted, although “[s]uch formalistic distinctions perhaps cannot be dispositive . . . they contain an important element of truth.”⁹⁷ Hopefully, the above discussion has helped to show that there is a meaningful difference between the attenuated financial contract deliberation and the direct sovereign-power deliberation.

Having concluded this discussion of the hampered input of deliberative tunnel vision in financial contract repudiations, we find that the concept provides us with a substantive rebuttal to the trusteeship and public choice critiques from earlier. Legislators are not simply vehicles for constituent interest, nor are they infallible angels—instead, they are different things in different contexts, and it is sensible to see them as susceptible to certain temptations or epistemic limitations when the government’s own money is the subject of debate and lawmaking.

After deliberative tunnel vision, there is a second consideration regarding the legislative input that should lead a court to view financial contract repudiations as particularly suspicious: the options presented when a state feels the genuine need to change its course. Where there is a contract that relates to internal fiscal matters, it will never be true that the state must repudiate in order to exercise its power for the common good. It is free to proceed, to halt, or to modify its actions, and it need only pay the money to the private party.⁹⁸ There is always the option to simply take the financial hit in order to preserve its freedom of action; repudiation is never a real necessity, and even an internal fiscal emergency does not formally fetter the government’s powers. This is the lesson of *Winstar*.

96. *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion).

97. *U.S. Trust Co.*, 431 U.S. at 24.

98. For example, the Port Authority was entirely free to do as it pleased with the bond money; the only consequences of breaking the terms would have been financial. *Id.* at 25 (“Such a promise is purely financial and thus not necessarily a compromise of the State’s reserved powers.”).

The options that are available to legislators are relevant to our inquiry because they give rise to presumptions and inferences as to motivations. Because there is no case (or, at most, precious few)⁹⁹ where a government must repudiate a purely financial contract in order to exercise its sovereign power for the public benefit, there is a *prima facie* case that such repudiations will be motivated by the state self-interest highlighted in *United States Trust*. It is the existence of a relatively nonconstricting option—payment—that makes these repudiations seem like a knee-jerk resort to the easy way out, shifting the burden to the weakest parties. These repudiations seem less like those that involve the police power, where the necessities of a situation demand that some private party bear a loss.¹⁰⁰ Here, the government itself has expressly promised to bear any loss, and accordingly these repudiations are properly viewed with suspicion as evasions of responsibility. As the Court itself said, “[a] governmental entity can always find a use for extra money”¹⁰¹ Heightened scrutiny properly places a higher justificatory burden in these cases and prevents the state from crying “police power!” whenever it hopes to wiggle out of a financial commitment. Financial agreements, after all, do not fetter the police power.

In considering the relatively easy option available at the time of repudiation, and the inferences of purpose that can be drawn from it, we find a response to the “underinclusion” critique earlier leveled against the dual standard. There is something unique about a government’s repudiation of its own agreements—the only enforceable agreements will be financial, and financial agreements can be fulfilled without arresting government action. The same is not true, of course, when a government faces a landscape of private agreements and is forbidden from interfering with them because of a constitutional edict.

2. Legislative Outputs (Effects)

Having discussed the inputs or purposes influencing state repudiations of purely financial agreements, it is appropriate to turn to outputs, or effects. Here, both accountability and burden-shifting concerns militate in favor of heightened scrutiny.

A legislature never acts in a vacuum, and many believe that our constitutional scheme depends upon public accountability to check governmental excess or corruption.¹⁰² When a legislature seeks to repudiate its financial agreements, the

99. Such a case might arise where the payment of a sum is so debilitating that it cripples government action in other areas. Given the ability of a government to take on large sums of debt, though, I think that such a threshold would be extremely high—it is likely that such a large expenditure has never occurred in the history of the United States.

100. *See* *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) (“And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”).

101. *U.S. Trust Co.*, 431 U.S. at 26.

102. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (“The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the

problem is that the “necessity” justifying it can more easily be concocted than in normal reversals of legislative policy. Evidence of a need to change course on, for instance, foreign policy or drug criminalization is likely to be stark and apparent. A government’s own internal fiscal woes can far more easily be trumped up or presented misleadingly (“liars figure, and figures lie”). Here, heightened judicial scrutiny properly fills the gap where public pressure will not, due to confusion or incomplete knowledge, lead to the same check against abuse.¹⁰³

Second, a point made earlier must be repeated: the Contracts Clause and the dual standard of review are primarily concerned with the Madisonian problem of majorities shifting burdens to minorities, and there often will be a difference in allocation between public and private repudiations.¹⁰⁴ A repudiation of a public contract always and necessarily moves burdens from majorities to minorities, while a private contract usually implicates only the reallocation of burdens between two private parties. It is conceivable that with a private contract, either the minority or majority could benefit, depending on the situation, whereas when the government is a party, it will always be the victorious “majority” (representing, as it does, the entirety of the populace, or at least all those paying taxes). Beyond the actual incidence of burden shifting being less likely in the context of private repudiation, the burdens’ magnitudes are also different given the presence or absence of a governmental party. In the case of public contracts, the entire polity dumps its heavy burden on the few—this is something that would otherwise be borne through tax dollars by everyone (or at least all taxpayers). In purely financial public contracts, the presence of a governmental party leads to a guaranteed incidence of majoritarian burden shifting, coupled with what is frequently a far greater magnitude of shift; these observations warrant a more suspicious review of public contract repudiation.

The accountability and burden-shifting concerns give us an important rebuttal to the underinclusion critique of the dual standard. There is something uniquely problematic about the outputs of public contract repudiations that justifies subjecting them to higher scrutiny.

3. Summary

Both the purposes and motivations behind repudiations of financial government contracts (the inputs), as well as the effects that flow from their enactment

legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.”); *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (proposing the theory of “representation reinforcement,” whereby the central role of the judiciary is to correct the aberration from or structural stifling of democratic influence).

103. *See generally* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. REV. 437 (2006) (describing the theory of “legislative deception” and the judiciary’s role in counteracting it).

104. *See supra* note 30 and accompanying text.

(the outputs), demand that the judiciary review these actions with heightened scrutiny. Deliberative tunnel vision, relative ease of performance, higher risk of duping the public, and quantitatively greater burden shifting all militate in favor of viewing public financial contracts with greater suspicion than normal legislative action (and, most relevantly, the repudiation of private contracts under the police power) in the vast majority of cases. Although there may be exceptions to all of these general observations, we are not talking about mathematical prediction, but are instead crafting levels of scrutiny. This does not demand absolute precision; instead, a designated level of scrutiny is employed because *X* type of case *usually* involves *Y* type of activity.¹⁰⁵

All of these factors lead to the conclusion that the “private” character of a government’s repudiations of its own financial contracts, with legislative deliberators acting more as corporate directors than as political representatives, makes the idea of state self-interest cognizable and makes the dual standard seem justified. Both trusteeship and public-choice critiques paint with too broad a brush to account for this private aspect of governmental decision making that flows from deliberative tunnel vision, and the critique of underinclusion is rebutted when the legislative options and the repudiation’s effects are considered. There is something especially problematic when the state repudiates its own agreements using its powers of legislation—more so than when it alters or destroys private ones. Again, it is not that a state always steps upon the rights of minorities or suffers from myopia when it does so, but rather that this is so often the case that these actions ought to be viewed with suspicion by a reviewing court. Heightened scrutiny need not be seen as “strict in theory and fatal in fact”¹⁰⁶; it is merely that the very broad deference normally accorded to legislative action under the Contracts Clause is narrowed in this limited range of cases.

B. GOVERNMENT AS CORPORATION: NO INNOVATIVE PROPOSITION

The dual standard of *United States Trust* reflects the reality that although governments are sovereigns, they operate as quasi-private entities in various markets, and legislators—consciously or not—will tend to view the financial well-being of the entity they control in an increasingly selfish (or at least short-sighted) way. By way of conclusion, it will be helpful to assuage any fears that what has been said is unprecedented in the law. That certain government action is quasi-private is no radical innovation.

One could recall the First Amendment case of *Lehman v. City of Shaker Heights* (decided only three years before *United States Trust* and also written by

105. For example, although a content-based restriction on political speech is subject to strict scrutiny because it usually evinces impermissible government animus, there are cases where such a restriction is permissible. *See, e.g., Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

106. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

Justice Blackmun), where a city was held to be constitutionally empowered to ban all political advertising on the side of its buses.¹⁰⁷ Instead of viewing anything the city touched as somehow a sacrosanct “public forum,” the Court wrote:

[T]he city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture . . . [and] a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.¹⁰⁸

Beyond this, think of the many examples in federal cases touching on local government law. The Supreme Court has long held that municipalities can have a quasi-private aspect and that certain property owned by a local government will be legally treated as private despite its public owner.¹⁰⁹ Another area where local government has been appropriately understood to take on quasi-private characteristics is that of voting rights for special districts. In *Ball v. James*, weighted voting for the board of directors of a water district was permitted because, although districts like it are made a “nominal public entit[y]” for the purposes of bond financing, “the districts remain essentially business enterprises”¹¹⁰ A final consideration in this field is municipal tort liability. At common law, and in many jurisdictions today, municipalities are immunized from liability when performing a governmental function, but not when taking on a proprietary role.¹¹¹ State courts have recognized that municipalities do conduct quasi-private activities, and when doing so, they act “only for the benefit of the municipality and its residents,” and not for the “general public.”¹¹² The Supreme Court, it seems, has never been so naïve as to conceive of government entities as possessing one holistic nature and has instead recognized that they often act like private firms (and should be held to similar standards).

Finally, we can return to Contracts Clause jurisprudence to complete this survey. Think of the “sovereign acts” theory that, though not law, garnered a

107. 418 U.S. 298, 304 (1974).

108. *Id.* at 303.

109. *See, e.g.,* *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (“[Municipal] corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts, and it has been held that, as to the latter class of property, the legislature is not omnipotent.” (citations omitted)).

110. 451 U.S. 355, 368 (1981); *see also* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728–29 (1973) (allowing water district to weight votes in part because it provided “no other general public services” besides water).

111. *See* HARPER, JAMES & GRAY, 5 THE LAW OF TORTS § 29.6 (2d ed. 1986).

112. *Hillerby v. Town of Colchester*, 706 A.2d 446, 447 (Vt. 1997).

sizeable number of votes on the Supreme Court in *Winstar*.¹¹³ Though under normal contract law an impossibility defense cannot be raised by a party that created the conditions of impossibility, the sovereign acts theory makes an exception when the contract is a government contract and the actions creating the impossibility are “public and general,” flowing from the government as sovereign (and not as contractor).¹¹⁴ The distinction between the government’s regulatory and contractual “characters” can largely be determined, so the theory goes, by assessing how “substantial” the role of the governmental action is in creating the impossibility of performance—is impossibility merely incidental to a larger governmental project, or is it the main effect of government action?¹¹⁵ If the *main* effect of the action is the creation of an impossibility, then it would be more likely that the contractual character motivates, and not the regulatory (that is, it seems more likely that the entire point of the action was to evade a promissory obligation). This assessment will flush out “statutes tainted by a governmental object of self-relief.”¹¹⁶ All this should sound familiar by now, and it is telling that the plurality in *Winstar* cites to the *United States Trust* dual standard in appealing to the problem of “governmental self-interest.”¹¹⁷

Overall, it seems that the government can and should be viewed in a different light when it is doing different types of things, and that standards that are usually only appropriate when applied to private citizens can be extended by analogy to the government when it is acting in a mostly private manner, whether it be by participating in commerce, owning property, providing certain discrete services, or engaging in contracts. This is no innovation in the law. As mentioned before, the private analogue of the government’s fiscal contract repudiation is a bankruptcy. Heightened scrutiny in these cases ensures that legislators will not have the ever-present option of a bankruptcy, but without any of its traditional costs.

C. PROSPECTS FOR THE FUTURE

With the country now involved in numerous military ventures, and also involved in the attempted revival of a recessionary economy, government contracting has become far more prevalent, and the prospect of future Supreme Court litigation involving these measures is strong. Just as the Great Depression caused the Court to eviscerate the Contracts Clause so as to remove the obstacles to economic recovery, there is a danger that the same impulse may lead to a backlash against the one area where the constitutional provision has any bite: government contracts. Moreover, were the Court to take seriously the overwhelming current of academic commentary in the past thirty years, it might

113. *U.S. v. Winstar Corp.*, 518 U.S. 839, 892–97 (1996) (plurality opinion).

114. *See id.* at 895–96 (internal quotation marks omitted).

115. *See id.* at 897–98.

116. *Id.* at 896.

117. *Id.* at 897 n.41 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977)).

feel completely justified in doing so. I have endeavored to present a sympathetic reassessment of the doctrine so as to, in some small way, help create balance.

CONCLUSION

The *United States Trust* dual standard of review has been much maligned by commentators, but the major critiques I have highlighted are internally problematic. Beyond this, a close reading of the opinion suggests that there is an implied context for the dual standard's application: financial contracts that deal with the government's own money. Beyond the textual suggestions, a survey of the doctrinal framework reveals that this is indeed the only possible reading—if a governmental contract involves a promise to act or to refrain from acting, it is almost certainly invalid under the Reserved Powers doctrine. Because of this, only government contracts whose terms deal with financial matters are amenable to Contracts Clause review; other agreements are beyond it. With the dual standard so limited, the criticisms—themselves flowing from theories of representation—lose their salience. While state self-interest may seem to be a weak foundation for creating a distinction between public and private repudiations, it is sound when limited to the context of financial agreements.

This is true because of both the inputs and the outputs of this type of contract repudiation. The attenuated subject matter allows for legislators to be misled by deliberative tunnel vision, valuing the government's own fiscal well-being as if it had some value independent of the good of the public and seeing themselves as corporate directors instead of political representatives. Moreover, the government never truly needs to repudiate a financial contract because the agreement is financial and cannot affect its powers to act—thus, repudiations should be viewed as suspicious knee-jerk resorts to the easy way out. Accountability to the public (once the law is enacted) is also more easily subverted when the subject matter of the contract is financial, and the necessity for repudiation is more easily manipulated given the complexity of the subject. Finally, the presence of the government as a party to the repudiated agreement makes it such that the incidence and magnitude of burden shifting will usually be greater with public contracts.

Given these considerations, it is appropriate to posit that state self-interest is a reality in public financial contracts, even though it may seem nonsensical in the ordinary legislative context. This understanding of the government as having both a private and public capacity is not novel in the law, and it is appropriately extended here.