THE CONTRACT CLAUSE OF THE CONSTITUTION AND THE NEED FOR “PASS ANY . . . LAW” REHABILITATION IN THE AGE OF DELEGATION

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INTRODUCTION

Imagine you are a retired firefighter in Anytown, State, living reasonably well on a public pension. Unfortunately, due to a string of shortsighted Anytown leaders and poor economic conditions, years of mismanagement have finally reached a financial breaking point. The governor of State just appointed an Emergency Financial Manager (“EM”) with broad powers over Anytown affairs pursuant to State law. You are a little nervous, but the attorneys representing the Retired Firefighters Association advise that at least some of the EM’s powers will be subject to judicial review.

Within days of her arrival in Anytown, the EM informs city officials that she is assuming the authority and powers of the local government and that they will act in an advisory capacity only. The State Supreme Court eventually supports this bold pronouncement. Although your pension derives from a collective bargaining agreement, the EM slashes your pension using State law’s delegated, discretionary authority. The Association files a lawsuit in Federal District Court to enjoin the cuts to your vested pension rights, and among the causes of action is a claim based on the Contract Clause of the United States Constitution.
Certain that the EM’s unilateral action is fundamentally wrong, you await the ruling with some optimism. Your optimism is misplaced. The result is disappointing, but more than that, it is confusing. The court denies all federal claims and explains that the Contract Clause, which plainly states “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .”, only allows parties to challenge laws passed by the state legislature. The EM is not the legislature. She merely exercised a delegated option to use broad authority at her sole discretion. The State legislature’s grant of that option did not, by itself, impair any contract obligation; therefore, the Contract Clause does not apply. What good is this interpretation of the Constitution, you muse, if the State legislature can simply delegate its way around constitutional language designed to protect individual rights? It hardly seems fair.

This hypothetical storyline combines facts from two actual financial emergencies, one of which is the crisis in Pontiac, Michigan. The Sixth Circuit Court of Appeals vacated and remanded the district court’s decision in City of Pontiac Retired Employees v. City of Pontiac, rejecting the district court’s reasoning that the EM did not actually pass any laws. In a subsequent case arising out of the financial crisis in Flint, Michigan, the Sixth Circuit held that parties other than a state legislature could “pass” laws for Contract Clause purposes. However, in Taylor v. City of Gadsden, the Eleventh Circuit Court of Appeals recently suggested just the opposite. In that case, the court ruled that the city’s execution of a “legislative option” to enact a state law impairing pension obligations was not analogous to pass-

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5 Id.
6 In Central Falls, Rhode Island, the state-appointed receiver attempted to negotiate with public pensioners before eventually declaring bankruptcy on August 1, 2011. The State Role in Local Government Financial Distress, THE PEW CHARITABLE TRUSTS 40 (July 2013), http://www.pewtrusts.org/en/research-and-analysis/reports/2013/07/23/the-state-role-in-local-government-financial-distress. Outside of bankruptcy, the relevant R.I. law specifically does not allow the receiver to “reject or alter any existing collective bargaining agreement, unless by agreement, during the term of such collective bargaining agreement.” R.I. GEN. LAWS § 45-9-9 (2014). However, Michigan law (Public Act 4) did grant emergency managers sole authority to modify or terminate collective bargaining agreements as a “legitimate exercise of the state’s sovereign powers.” MICH. COMP. LAWS § 141.1519(k) (repealed 2012). The current law (Public Act 436) provides the same power, albeit subject to a board review. It also does not require additional state legislative action. MICH. COMP. LAWS §§ 141.1552(k), 141.1559(1)-(2) (2012).
8 City of Pontiac Retired Emps. Ass’n v. Schimmel, 751 F.3d 427, 431 (6th Cir. 2014) (en banc) (per curiam) (regarding unfavorably the district court’s failure to cite any legal authority or conduct any analysis).
9 Welch v. Brown, 551 F. App’x 804, 809-10 (6th Cir. 2014).
10 767 F.3d 1124 (11th Cir. 2014).
11 Id. at 1133 (finding city’s exercise of discretionary state legislative option to not equate to the passing of a law for Contract Clause purposes).
ing a law. This holding stood despite the Alabama state legislature’s grant of absolute discretion to the city of Gadsden to determine the conditions for the option’s exercise, similar to the EM’s delegated power in the Sixth Circuit cases. Although not directly addressing this issue, the Tenth Circuit has implied that it would align with the Eleventh Circuit, while the Seventh Circuit leans more toward the Sixth Circuit. Adding to the jurisdictional inconsistency, the Ninth Circuit and its district courts appear to ignore the issue entirely by accepting without discussion that city ordinances fall under the federal Contract Clause.

This Comment argues that the proper interpretation of Supreme Court precedent regarding the constitutional phrase “pass any . . . Law” requires a broad reading, that a coherent and simple framework to accomplish this is possible, and that the method this Comment proposes is such a framework. The proposed two-part framework interprets New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.,15 and Ross v. Oregon,16 the most recent Supreme Court cases to adequately address whether a state has passed a law for Contract Clause purposes.17 The first part of the framework uses New Orleans Waterworks to ask the threshold question of whether the state legislature’s delegation of power provides a clear criterion for taking action such that an executing body (like an EM or city council) need only apply the existing state law. If so, the inquiry is over since the executing body’s action does not amount to passing law. If not, the second part of the framework uses Ross to divine whether the executing body has created a new rule.

12 See Grand River Dam Auth. v. Nat’l Gypsum Co., 352 F.2d 130, 138 (10th Cir. 1965) (“[I]mpairment of contract means impairment by legislative action. No such action has occurred.”).
13 See Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996) (implying that a body other than the state legislature might be capable of impairing a contract obligation if that body had “been delegated authority by the state to modify the law of contracts”).
15 125 U.S. 18 (1888).
16 227 U.S. 150 (1913).
17 The Supreme Court has ruled on this issue since 1913, but the relevant cases include issues clouding the analysis of the “pass any . . . Law” element. See, e.g., John P. King Mfg. Co., v. City Council of Augusta, 277 U.S. 100, 114 (1928) (stating much about the Court’s jurisdictional authority under the Judiciary Act of 1789 and the wording “statute of the state” but little about why the ordinance in question is a “law” under the Contract Clause); Atl. Coast Line R.R. Co., v. City of Goldsboro, 232 U.S. 548, 555 (1914) (ruling a city ordinance could be “within the powers conferred by the legislature of North Carolina” specifically because the state supreme court had already ruled the city’s ordinance did stem from state legislative power, fully settling the matter of state law).
analogous to passing legislation. Adopting this Comment’s proposed framework allows proper Contract Clause application to cases involving legislative options and other delegations of legislative power. Particularly appropriate to the legislative option cases but not limited to only those types of cases, the proposed framework will help prevent the further erosion of the Clause.

Part I of this Comment traces the evolution of the Contract Clause and its interpretation from the Constitutional Convention to the present. Part II describes three categories of delegation and how an improperly narrow reading of “pass any . . . Law” affects those types of delegation. Part III describes the Framers’ opinions on the intended strength of the Clause, analyzes the relevant Supreme Court cases interpreting “pass any . . . Law,” and proposes the simple two-part framework. Part IV analyzes cases involving the three different delegation schemes and applies the two-part framework to specific cases involving each of those schemes. Case law, the history of the Contract Clause, the modern legislative environment, and a lack of uniformity all support the proposed update to the Contract Clause paradigm.

I. BACKGROUND—EVOLUTION OF THE CONTRACT CLAUSE

Part I traces a brief jurisprudential history of the Contract Clause from its origin to the modern era. It outlines the Clause’s expansion to public contracts and subsequent limitation to only antecedent contracts. This Part also shows that the state police power can overcome the Clause but confirms that there are limits to that power. Finally, it touches on the importance of the central question of this Comment: what does it mean to pass a state law for purposes of the Contract Clause?

A. The Early Years of the Contract Clause—Before the Twentieth Century

At the Constitutional Convention, Rufus King introduced the language that would eventually become the final version of the Contract Clause on August 28, 1787.¹⁸ That original language proposed to ban state interference

¹⁸ James Madison, Notes on the Constitutional Convention (Aug. 28, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 437, 439 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (“Mr. King moved to add, in the words used in the Ordinance of Congs [sic] establishing new States, a prohibition on the States to interfere in private contracts.”). Specifically, Mr. King referred to the ordinance passed on July 13, 1787, by the Continental Congress, which related to the Northwest Territory. See Ogden v. Saunders, 25 U.S. 213, 304 (1827) (opinion of Thomson, J.) (interpreting the Contract Clause by referencing the original language, passed by Congress under the Articles of Confederation on July 13, 1787, “in an ordinance for the government of the territory of the United States north-
with private contracts, but the Committee on Style eventually omitted the word “private,” making the meaning somewhat ambiguous. And despite the later-held belief that the Contract Clause should be read as a specific response to debt crises of the time, the Clause is written generally enough to suggest it was meant to apply to many future unknown situations. Broadly speaking, “[t]he contract clause is an explicit limitation upon the power of the state to trench upon individual rights . . .”

The Contract Clause became a part of the Constitution, and the Supreme Court soon offered its own interpretation. In *Fletcher v. Peck*, the Court dispelled the notion that the Clause pertains only to contracts between individuals, unambiguously including public contracts within its purview. During this period, “the Court viewed the Clause’s prohibition as virtually absolute.” An important limitation arose, however, in *Ogden v. Saunders*. The Justices in the majority determined that the Contract Clause properly applies only to the passage of laws affecting antecedent contracts. Subsequent cases further constrained the power of the Clause.

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19 Madison, supra note 18, at 439.

20 Kmiec & McGinnis, supra note 18, at 531-32.

21 At least some Members of the Convention took home the conviction that the Clause still only applied to private contracts. See William Davie, Member of the Constitutional Convention, Response to James Galloway at the North Carolina Ratifying Convention (July 29, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 191 (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (“The clause refers merely to contracts between individuals.”).

22 See *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 256-57 (1978) (Brennan, J., dissenting) (“[T]he debates in the Constitutional Convention and the subsequent public discussion of the Constitution are not particularly enlightening in determining the scope of the Clause, [but] they support the view that the sole evil at which the Contract Clause was directed was the [economic depression induced] rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract.”).

23 See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

24 See id. at 137 (“Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction.”.


26 See generally *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

27 10 U.S. (6 Cranch) 87 (1810).

28 See id. at 137 (“Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction.”).

29 Kmiec & McGinnis, supra note 18, at 535.


31 Id. at 303 (opinion of Thompson, J.) (finding that the reach of the Clause should be “confined to laws affecting contracts made antecedent to the passage of such laws”).
Stone v. Mississippi, a case regarding an impaired contract for a lottery charter and coming fifty-two years after Ogden, makes clear that the Clause’s power of prohibition is not absolute, as the Supreme Court stated, “[a]ll agree that the legislature cannot bargain away the police power of a State.” Thus, the inherent sovereign power relating to certain welfare functions, like keeping the public free from the vice of lotteries, allows states to abrogate contracts notwithstanding the Contract Clause.

B. Weakening of the Clause During the Great Depression—Then a Resurgence

The Court expanded the class of state interests allowing the police power to impair contracts in Home Building & Loan Ass’n v. Blaisdell. In Blaisdell, the Court allowed the type of activity that influenced the Framers to adopt the Contract Clause in the first place—debt forgiveness. The Court also suggested that the state’s power to protect people from financial difficulty is part of the health, safety, and welfare function of the police power of the state. The broad implications and specific details of this case are fascinating but also beyond the scope of this Comment. Suffice it to say that many commentators view this decision as important, but not always in a positive way.

A modern era of sorts began for the Contract Clause with United States Trust Co. of New York v. New Jersey, when the Supreme Court confirmed that a state’s power to impair a contract obligation decreases with a

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32 101 U.S. 814 (1879).
33 Id. at 817.
34 See id. at 821.
35 See Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 437 (1934) (“The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.”); id. at 448 (Sutherland, J., dissenting) (“[This decision implies there will be] future gradual but ever-advancing encroachments upon the sanctity of private and public contracts...[F]ar more serious and dangerous inroads upon the limitations of the Constitution...are almost certain to ensue [because of this opinion].”).
36 Kmiec & McGinnis, supra note 18, at 542.
37 Blaisdell, 290 U.S. at 434-35.
38 See e.g., Epstein, supra note 23, at 735 (remarking on Chief Justice Hughes’ opinion as “contain[ing] some of the most misguided thinking on constitutional interpretation imaginable”); Kmiec & McGinnis, supra note 18, at 541-42 (“[The Blaisdell] Court turned the meaning of the Contract Clause on its head.”); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1720 (1984) (describing Blaisdell in context as key to a shift “from the strong to the weak version of the prohibition of naked preferences”). For a concise, superb history of the Contract Clause, see James W. Ely, Jr., Whatever Happened to the Contract Clause?, 4 Charleston L. Rev. 371 (2010), wherein Professor Ely characterizes Blaisdell as having given the Clause a “near-fatal punch.” Id. at 388.
correspondingly less important public purpose.\textsuperscript{40} Thus, a state's contractual financial obligations “may not be said automatically to fall within the reserved powers that cannot be contracted away.”\textsuperscript{41} Importantly, the Court stated that the state action is due less deference if the state impairs its own obligation in a contract “because the State’s self-interest is at stake.”\textsuperscript{42} The Contract Clause has made somewhat of a comeback in the second half of the last century, as evidenced by this and one other “modern era” case.\textsuperscript{43} And lower federal courts and state courts have responded positively to Contract Clause claims as recently as 2014.\textsuperscript{44} Although this may portend a general reinvigoration, narrow interpretations of what qualifies as state law passed for purposes of the Contract Clause may offset some of this modern strengthening.

None of the Contract Clause’s protections are helpful to a party whose case is arrested on the threshold issue of whether a state legislature has actually passed a law. In examining that critical threshold, two Supreme Court cases from over a hundred years ago, the aforementioned \textit{New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.} and \textit{Ross v. Oregon}, continue to define what constitutes state law for purposes of the Contract Clause.\textsuperscript{45} These two cases are discussed at length in Part III.B. As mentioned above, some courts have narrowly interpreted these cases such that delegation acts as an avoidance mechanism, a way to simply legislate around the Contract Clause.\textsuperscript{46}

\begin{thebibliography}{99}
\bibitem{40} Id. at 22.
\bibitem{41} Id. at 24-25.
\bibitem{42} Id. at 26.
\bibitem{43} \textit{See Allied Structural Steel v. Spannaus}, 438 U.S. 234, 244-47 (1978) (ruling that adding obligations to a contract will also violate the Contract Clause and interpreting “obligation of Contracts” to mean “impairment of a contractual relationship”).
\bibitem{45} City of Pontiac Retired Emps. Ass’n v. Schimmel, 751 F.3d 427, 431 (6th Cir. 2014) (en banc) (per curiam) (admonishing the district court to consider \textit{New Orleans Waterworks} and \textit{Ross}); Mabeys Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 874-75 (3d Cir. 2012) (“Although \textit{Ross} was decided [nearly one hundred years ago,] and the line between legislative and non-legislative acts has arguably blurred since that time, the guidance provided by that case remains helpful . . . .”).
\bibitem{46} \textit{See, e.g.}, Taylor v. City of Gadsden, 767 F.3d 1124, 1136 (11th Cir. 2014) (finding a delegated “option,” which the city exercised, was not an act of legislation); City of Pontiac Retired Emps. v. City of Pontiac, No. 12-12830, 2012 WL 2917311, at *5 (E.D. Mich. July 17, 2012) (finding that delegated authority allowing EM’s orders did not qualify as an act of the legislature), \textit{vacated en banc per curiam sub nom. City of Pontiac Retired Emps. Ass’n v. Schimmel}, 751 F.3d 427 (6th Cir. 2014).
\end{thebibliography}
II. **Types of Delegation of Legislative Authority, How They Relate to the Contract Clause, and Implications of a Narrow Interpretation**

Part II describes three types of state legislative delegation and their Contract Clause implications. The first type involves the communication of guidelines that grant an executing authority only the limited discretion of interpreting and applying the existing law. The second type involves a broader delegation of authority, as with administrative agencies capable of formal rulemaking. The third type is the legislative option, which allows an executive body or person sole discretion to implement or not implement a law and may even leave the specific scope of the authority up to that executive body. Importantly, this Comment remains neutral on the question of whether any type of delegation is generally legitimate, entirely avoiding any discussion of the nondelegation doctrine. This Comment’s only interest is how each presumptively legitimate delegation tool should affect a plaintiff’s access to substantive Contract Clause judicial review.

A. *When a Legislature Provides Executory Guidelines*

Assuming that a particular statute exists prior to the formation of the contract in question, when a state legislature provides specific guidance in that statute for administrative authorities to follow, the execution of that guidance subsequent to the formation of the contract will not be an act of legislation for purposes of the Contract Clause.\(^{47}\) The long-held rationale is that an action that does not sufficiently “change[] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [the enacting body’s] power” is not legislative in nature.\(^{48}\) A body simply applying legislation by following clear rules is obviously not making a “new rule.” The Contract Clause does not apply to the executive actions of administrators.\(^{49}\) The Framers most likely anticipated this type of delegation, making a literal reading of “pass any . . . Law” more likely to produce a result intended by the Framers.\(^{50}\)

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47 See New Orleans Waterworks Co. v. La. Sugar Ref. Co., 125 U.S. 18, 32 (1888) (“The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city.”).


49 See New Orleans Waterworks, 125 U.S. at 32 (“The prohibition is aimed at the legislative power of the state, and not . . . the acts of administrative or executive boards . . .”).

50 See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 44 (2012) (“Early Congresses also microman-
Even seemingly unfair and inconsistent interpretations of state law will not implicate the Contract Clause, which is only “aimed at the legislative power of the state.”51 A useful recent example of this type of delegation occurred in *Mabey Bridge & Shore, Inc. v. Schoch,*52 which this Comment discusses in greater detail in Part IV.A. In that case, the plaintiff bridge manufacturer sued the Commonwealth of Pennsylvania over the Pennsylvania Department of Transportation’s (“PennDOT’s”) post-contractual interpretation of the state’s Steel Products Procurement Act of 1978 (“SPPA”).53 The SPPA required “public works” to be completed with steel from the United States and defined “public works” to include temporary bridges.54 The manufacturer produced temporary bridges for construction projects using British steel.55 For more than twenty years, PennDOT had interpreted the SPPA to exempt temporary bridges used in construction projects.56 As “construction tools,” the manufacturer’s temporary bridges had been exempt from the domestic steel requirement, but PennDOT abruptly reversed that interpretation and banned the manufacturer’s bridges.57 The Third Circuit Court of Appeals expressed concern that the long course of dealing provided certain expectations to the manufacturer regarding its existing contracts but also ruled that PennDOT’s mere interpretation of “public works” and “construction tools” was not legislation under the Contract Clause.58 It may be obvious that an administrative agency interpreting “public works” is not passing law, but when state legislatures delegate greater power, the analysis becomes more complicated.

B. Complex Functions and Broad Delegation

When a legislature delegates complex functions to expert administrators, boards, commissions, or municipal officers, subsequent action by these bodies may well be law for the purposes of the Contract Clause.59 The important distinction, which is sometimes lost in a literal interpretation of “pass any . . . Law,” is that the question of whether an act is legislative “depends not upon the character of the body, but upon the character of the pro-

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51 *New Orleans Waterworks,* 125 U.S. at 32.
52 666 F.3d 862 (3d Cir. 2012).
53 Id. at 866.
54 Id. (quoting 73 PA. STAT. ANN. § 1886 (West 1984)).
55 Id. at 866-67.
56 Id. at 866 (citing PA. DEP’T OF TRANSP., PUB. 408/2007-6, SPECIFICATIONS § 106.01 (2010)).
57 Id. at 867.
58 *Mabey Bridge,* 666 F.3d at 875.
59 *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) ("[W]e think it equally plain that the proceedings [of the Virginia State Corporation Commission] here are legislative in their nature . . . .").
Due to the advent of the administrative state, this distinction has gained importance even as the judiciary continues to refer to cases on legislative character from over one hundred years ago.\footnote{Id. (deciding the applicability of res judicata on a proceeding of the Virginia State Corporation Commission and finding it not applicable due to the legislative nature of the proceeding).} \cite{Prentis} \footnote{Prentis, 211 U.S. at 225.} a Supreme Court case from the dawn of the twentieth century, indicates that state administrative agencies can exercise legislative authority.\footnote{Id. at 216.} Although \textit{Prentis} was unrelated to the Contract Clause, it became relevant after the Supreme Court cited it in \textit{Ross v. Oregon},\footnote{Id. at 223.} which would then be cited in subsequent Contract Clause cases.\footnote{Id. at 226.}

In \textit{Prentis}, The Virginia State Corporation Commission (“VSCC”) published a mandatory reduced rate for passenger travel, enforceable against the Atlantic Coast Line and other railroads.\footnote{Mabey Bridge, 666 F.3d at 874-75 (“Although \textit{Ross} was decided [nearly one hundred years ago,] and the line between legislative and non-legislative acts has arguably blurred since that time, the guidance provided by that case remains helpful . . . .”).} Before the VSCC could conduct the required hearing to allow Atlantic Coast the potential for redress, the railroad brought suit in federal court to enjoin the rate cut.\footnote{211 U.S. 210 (1908).} The VSCC demurred that the Commission’s action was judicial, could not be enjoined by a federal court under current law, and qualified as res judicata.\footnote{Id. at 223.} The Supreme Court held that the VSCC, having been delegated some of the power of all three branches of state government, had exercised legislative power by setting rates since “[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative . . . .”\footnote{Id. at 226.} Since neither federal law nor res judicata would bar a federal suit seeking an injunction for a state \textit{legislative} act, the suit would normally be allowed.\footnote{This case was actually a bit more complicated. As part of the VSCC process, Virginia law allowed the railroads to ask for a review by the state’s “supreme court of appeals.” That court could either decide to set a more appropriate rate or let the rate stand. The Supreme Court determined that this entire process, including the supreme court of appeals’ review, was actually legislative in nature. Since the railroads opted not to take their objections to the supreme court of appeals, the legislative process was not yet complete. Thus, the Supreme Court answered the critical question of whether the VSCC action was legislative, but overturned the injunction because the railroads had brought their case to federal court too soon. Id. at 224, 227-28.}

In the modern era, at least one Circuit Court in a Contract Clause case has ruled that an agency’s failing to engage in a formal rulemaking process
is a helpful indicator to determine that an agency did not exercise legislative power.\textsuperscript{71} This is an implicit admission that “pass any . . . Law” may apply to an administrative body that does engage in rulemaking. However, this is not particularly helpful when the inquiry regards an agency or party that does not engage in administrative rulemaking.

C. A Contemporary Problem: The Legislative Option Grant

Some courts have determined that legislative option granting may avoid the Contract Clause.\textsuperscript{72} Common reasoning is that the plaintiff cannot point to a formal act of the legislature to challenge.\textsuperscript{73} In a typical scenario, the state legislature passes a law granting to a surrogate the option to impair contracts.\textsuperscript{74} The law allows the surrogate the discretion to take action based on that party’s informed judgment.\textsuperscript{75} The legislature’s act does not necessarily provide specific guidelines for action and does not literally impair the contract by itself.\textsuperscript{76} Eventually, the surrogate who holds the option impairs the contract by executing the option.\textsuperscript{77} Under a narrow and literal reading of “pass any . . . Law,” a state legislature could presumably grant any specific option-style power to a non-legislator, and the exercise of that power would be unreachable in a Contract Clause action. Like the “Anytown” example in the introduction, this type of delegation offers no apparent limiting principle.

This is not a nationally trivial matter because nineteen states currently have programs allowing empowered individuals or groups to intervene in local government affairs during times of financial crisis.\textsuperscript{78} Some of those

\textsuperscript{71} See Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 875 (3d Cir. 2012) (finding that, among other factors, “[PennDOT] did not engage in formal, notice-and-comment rule making”).

\textsuperscript{72} See, e.g., Taylor v. City of Gadsden, 767 F.3d 1124, 1132-33 (11th Cir. 2014) (finding an exercised option of City to take action was not act of state legislature); City of Pontiac Retired Emps. v. City of Pontiac, No. 12-12830, 2012 WL 2917311, at *5 (E.D. Mich. July 17, 2012) (finding that EM’s orders were not qualifying acts of the legislature), vacated en banc per curiam sub nom. City of Pontiac Retired Emps. Ass’n v. Schimmel, 751 F.3d 427 (6th Cir. 2014).

\textsuperscript{73} See, e.g., Taylor, 767 F.3d at 1132 (“Plaintiffs do not challenge an act of legislation, however.”). This court further signals its understanding of what legislation is for Contract Clause purposes by quoting Black’s Law Dictionary: “Legislation is ‘[t]he process of making or enacting positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process.’” Id. (emphasis added) (quoting BLACK’S LAW DICTIONARY 982 (9th ed. 2009)).

\textsuperscript{74} E.g., Mich. Comp. Laws § 141.1519(k)(i)-(iv) (repealed 2012).

\textsuperscript{75} E.g., id.

\textsuperscript{76} See, e.g., id.

\textsuperscript{77} See, e.g., Welch v. Brown, 551 F. App’x 804, 808 (6th Cir. 2014).

\textsuperscript{78} As of July 2013, the nineteen states included Connecticut, Florida, Illinois, Indiana, Maine, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Texas. See PEW TRUSTS, supra note 6, at 9-10.
states allow or have allowed an intervening authority to renegotiate or reject terms of collective bargaining agreements and other contracts, effecting varying degrees of impairment. These are not the only states to watch since states without robust intervention laws can fairly quickly adopt such measures as the need arises. And to again mention the obvious, states can and do routinely delegate broad legislative powers to boards, localities, and commissions in times when there is no emergency.

Any time legislatures delegate broad powers to an executing body, whether emergency or not, subsequent action by that body impairing a contract might avoid review through a court’s narrow interpretation of what actually qualifies as a law “passed” by a state. In order to understand whether such a narrow interpretation is appropriate under the Constitution, it is useful to first examine the history of the Contract Clause in greater detail.

III. A BROAD INTERPRETATION IS CORRECT: UNDERSTANDING THE FRAMERS, REEXAMINING NEW ORLEANS WATERWORKS AND ROSS, AND A PROPER FRAMEWORK FOR FUTURE CASES

To begin, Part III argues that given the Framers’ opinions of the importance of the Contract Clause, “pass any . . . Law” should be read broadly to have its intended effect. This Part’s primary argument, however, is that under a proper interpretation of New Orleans Waterworks and Ross, the jurisprudence requires such a broad reading. Finally, this Part introduces this Comment’s two-part framework, which proposes a uniform approach to achieve the proper interpretation.

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79 See, e.g., Act of Mar. 31, 1993, No. 93-4, § 7(10), 1993 Conn. Acts 1854, 1858 (Spec. Sess.) (allowing a single Governor-appointed “receiver” the power to “review and approve or disapprove any contract not covered by collective bargaining” in Jewett City, Connecticut); 65 ILL. COMP. STAT. 5 / 8-12-13 (1990) (allowing the “Authority” the power to approve or reject contracts without “impair[ing] any existing contract or obligation of the city . . . ”); MICH. COMP. LAWS § 141.1552(k) (allowing Emergency Managers to alter or eliminate terms of existing collective bargaining agreements); New York State Financial Emergency Act of 1984 for the City of Yonkers, ch. 103, § 11, 1984 N.Y. Laws 1632, 1640 (granting seven-member board the power to freeze vested pay increases). See also PEW TRUSTS, supra note 6, at 50.

80 See Philo, supra note 2, at 89.

81 See, e.g., Prentis v. Atl. Coast Line Co., 211 U.S. 210, 224 (1908) (noting that the Virginia State Corporation Commission had “been clothed with legislative, judicial, and executive powers”); Taylor v. City of Gadsden, 767 F.3d 1124, 1132-33 (11th Cir. 2014) (addressing a City Council with a legislative option); Heffner v. Murphy, 745 F.3d 56, 62 (3d Cir.) (addressing a Funeral Director Board with rulemaking authority), cert. denied, 135 S. Ct. 220 (2014).
A. The Framers Believed They Had Crafted a Powerful Tool, One Forcefully Restrictive of State Legislative Authority That Could Not Be Easily Side-Stepped

The inclusion of the Contract Clause in the main body of the Constitution was significant enough to the Framers that they must have expected it to have a substantial impact. Examination of the Constitution reveals the Clause’s rarity as “one of the few prohibitions the Framers of the Constitution imposed on the states, and one of a handful of prohibitions that relate to the rights of private individuals . . . .” Indeed, even revered fundamental rights, like the Freedom of Speech and Freedom of Religion, failed to earn a place in the original body of the document, a fact implying the “centrality” of the core provisions that did merit inclusion.

The diversity and intensity of the Framers’ opinions regarding the Clause’s inclusion also indicate its importance. Innocuous statutory language on which every represented party agrees seldom offends the vested interests of those parties. But as a significant restriction on state sovereignty, the Framers did not see the Contract Clause as innocuous. Comments range from James Wilson’s statement at the Pennsylvania Ratifying Convention:

> If only the following lines were inserted in this Constitution, I think it would be worth our adoption: “No state shall hereafter emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bills of attainder, ex post facto law, or law impairing the obligation of contracts.”

...to Colonel George Mason’s cautionary admonition at the time Rufus King introduced the original strict language: “This is carrying the restraint too

82 Kmiec & McGinnis, supra note 18, at 525.
83 U.S. CONST. amend. I.
84 See Boumediene v. Bush, 553 U.S. 723, 739 (2008) (“[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause.”).
86 See Madison, supra note 18, at 439-40.
87 See id. at 440 (quoting Colonel George Mason as having asked, “whether it was proper to tie the hands of the States from making provision in [unforeseen cases]?”).
88 James Wilson, Member of the Constitutional Convention, Remarks at the Pennsylvania Ratifying Convention (December 4, 1787), in 2 ELLIOT’S DEBATES, supra note 21, at 486.
89 See Kmiec & McGinnis, supra note 18, at 530-32 & n.30 (showing the evolution of the Contract Clause language from “no law . . . shall in any manner whatever interfere with, or affect private
far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential." 90 In fact, a range of opinion during and shortly after the Convention suggests delegates recognized that the Contract Clause would have either significant hoped-for or feared consequences. 91

To achieve what James Madison viewed as a net benefit, he thought only strong language consisting of a “negative” on state legislatures would be adequate, or else “[e]vasions might and would be devised by the ingenuity of the Legislatures . . . .” 92 This suggests that Madison felt the strong language of the Clause would check errant state legislatures. It does not appear to reflect any foresight that legislatures might be able to lawfully delegate their way around the Contract Clause, obviating this “bulwark” for contractual rights. Based on the commentary of many of the Framers, it is doubtful that any of them believed it would be possible to successfully delegate legislative authority in order to lawfully impair a contractual obligation that the Contract Clause otherwise sought to protect. 93

B. Although the Supreme Court Has Not Altered the Understanding of “pass any . . . Law” Since Ross, Interpretations Have Varied but the Original Message Remains the Same

Notwithstanding the strong protections the Framers believed they had provided with the Contract Clause and century-old Supreme Court decisions regarding “pass any . . . Law” that remain faithful to that design, some

contracts . . . “ to the milder “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”).

90 Madison, supra note 18, at 439.

91 Compare William Davie, Member of the Constitutional Convention, Response to James Gallo-
way at the North Carolina Ratifying Convention (July 29, 1788), in 4 Elliot’s Debates, supra note 21, at 191 (“[Section 10 and the Contract Clause] is the best in the Constitution. It is founded on the strongest principles of justice. It is a section, in short, which I thought would have endeared the Constitution to [North Carolina].”), and Charles Pinckney, Member of the Constitutional Convention, Speech at the South Carolina Ratifying Convention (May 20, 1788), in 4 Elliot’s Debates, supra note 21, at 333-34 (“This section I consider as the soul of the Constitution . . . . [It is] extremely improper [the States] should ever be intrusted [sic] with the power of emitting money, or interfering in private contracts; or, by means of tender-laws, impairing the obligation of contracts.”), with Luther Martin, Member of the Constitutional Convention, Address to the Legislature of the State of Maryland (Nov. 29, 1787), in 3 Farrand’s Records, supra note 18, at 172, 214-15 (“[T]here might be times of such great public calamities and distress . . . . as should render it the duty of a [state] government . . . . [to authorize] the debtor to pay by instalments [sic], or by delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind necessary in most or all of the States . . . . I therefore voted against [the Contract Clause].”), and Madison, supra note 18, at 439 (reporting the remarks of Gouverneur Morris: “This would be going to far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts . . . .”).

92 Kmiec & McGinnis, supra note 18, at 530 & n.25 (quoting Madison, supra note 18, at 440).

93 See supra notes 85-92 and accompanying text.
lower court narrow interpretations of “pass any . . . Law” have loosened the moorings on this once powerful clause. The Supreme Court’s long silence on this particular issue has not served to rectify these improper interpretations.

In Blaisdell, the Court stated that “the prohibition [on impairing contracts] is not . . . to be read with literal exactness like a mathematical formula,” and one might expect a corresponding move away from narrow literalness on the “pass any . . . Law” part of the Clause. However, the Supreme Court has not substantively revisited the issue since Ross v. Oregon, and the lower courts have not uniformly ruled this way. This lack of uniformity may stem from improper readings of New Orleans Waterworks Co. v. Louisiana Sugar Refining Co. and Ross v. Oregon, the latter case decided in 1913. These two cases are still cited and provide the foundation for our understanding of what is state law for purposes of the Contract Clause.

Thus, analysis of these cases is central to understanding the “pass any . . . Law” problem.


In New Orleans Waterworks, the Court states,

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94 See, e.g., Taylor v. City of Gadsden, 767 F.3d 1124, 1132 (11th Cir. 2014) (“Plaintiff’s do not challenge an act of legislation . . . .”).

95 In fairness, this issue has not come up in any of the recent Contract Clause cases to reach the Supreme Court. See, e.g., U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 5 (1977) (requiring no interpretation on “pass any . . . Law” since the contract-impairing state actions were actual New York and New Jersey statues); Allied Structural Steel v. Spannaus, 438 U.S. 234, 238 (1978) (“On April 9, 1974, Minnesota enacted the law here in question . . . .”); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 407 (1983) (“[T]he Kansas Legislature promptly imposed price controls on the intrastate gas market. In May 1979, the Kansas Natural Gas Price Protection Act . . . was enacted.”).


97 See, e.g., Taylor, 767 F.3d at 1132 (“Plaintiffs do not challenge an act of legislation . . . [since] the contribution rate increase stems from a resolution by the City of Gadsden . . . that the City was permitted—but not required—to adopt pursuant to state law . . . .”) (emphasis added); Heffner v. Murphy, 745 F.3d 56, 93-94 (3d Cir.) (rejecting appellees’ claim that Board of Funeral Directors’ rule could be considered law because, although it was initially proposed and even allegedly enforced, it was not formally enacted and was, therefore, not an exercise of legislative power), cert. denied, 135 S. Ct. 220 (2014).


99 See, e.g., Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 874-75 (3d Cir. 2012) (“Although Ross was decided [nearly one-hundred years ago] and the line between legislative and non-legislative acts has arguably blurred since that time, the guidance provided by that case remains helpful . . . .”).
It is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation . . . . [Furthermore,] “[a]ny enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the [Contract Clause] . . . .”

The Court quotes *Williams v. Bruffy*, which held that any laws originating with the Confederacy but validated by the state of Virginia qualify as legislative acts for constitutional purposes even though the Confederacy was itself illegitimate. Despite this seemingly sweeping language, the issue in *New Orleans Waterworks* was a simple one: whether the city had the authority to grant the Louisiana Sugar Refining Company a right to lay water and sewage pipes to the Mississippi River.

A Louisiana statute granted exclusive rights to the New Orleans Waterworks Company to lay all pipes to the Mississippi, except that the city council was explicitly authorized to grant any person “contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use.” When the city council granted the Louisiana Sugar Refining Company a right to run pipe to the Mississippi, Waterworks sued in state court alleging that the grant constituted a Contract Clause violation.

The Supreme Court, pursuant to a writ of error to the Louisiana Supreme Court, held that since the antecedent statute adequately defined the category of persons who could receive such permission, all that was left for the city council to do was determine if a particular party qualified. Was the Sugar Refining Company contiguous to the river or not? This administrative function was not an exercise of legislative power, so no state law impaired any contract obligation; and since that was the only federal question, the Supreme Court dismissed the case for want of jurisdiction.

Importantly, to reach the relevant question, the Court made clear that a municipal corporation under direction of a city council could enact by-laws or ordinances that could be considered law under the Contract Clause. However, the only clear rule from this case is that if a state legislature defines clearly enough in original legislation the criterion for taking a given action, then a non-legislator simply taking action based on that clearly defined criterion is not taking legislative action. The inverse of this, derived

100 *New Orleans Waterworks Co.*, 125 U.S. at 30-31 (quoting *Williams v. Bruffy*, 96 U.S. 176, 183 (1877)).
101 96 U.S. 176 (1877).
102 Id. at 183.
103 *New Orleans Waterworks*, 125 U.S. at 26-27.
104 Id. at 19-20 (quoting Act of Mar. 31 1877, No. 33, § 18, 1877 La. Acts 51, 55).
105 Id. at 27.
106 Id. at 32.
107 Id.
108 Id. at 30.
from that rule and also true, is that if a court determines a non-legislator’s action to be legislative for purposes of the Contract Clause, then the original statutory guidance must not have been sufficiently clear in defining the criterion for taking action.\footnote{If A \(\rightarrow\) –B, then B \(\rightarrow\) –A, but nothing else can be known.} Unfortunately, nothing else can be logically derived from this rule,\footnote{\textit{New Orleans Waterworks} provides no information about B (whether non-legislator’s action is legislative) if the given is –A (a statute does not clearly define criterion for taking action) since the Court only held that if A \(\rightarrow\) –B.} but this is a good place to start. This leads to \textit{Ross v. Oregon}.

2. How to Read \textit{Ross v. Oregon}

In \textit{Ross}, the Court interprets “pass any . . . Law” by importing an understanding of “legislation” from \textit{Prentis}, the previously discussed case involving alleged-confiscatory, railroad-passenger rate cuts.\footnote{\textit{Ross v. Oregon}, 227 U.S. 150, 163 (1913) (citing \textit{Prentis v. Atl. Coast Line Co.}, 211 U.S. 210, 226 (1908)).} In referring to \textit{Prentis}, the \textit{Ross} Court distinguishes between judicial and legislative function in a case regarding an alleged ex post facto law.\footnote{\textit{Id.}} The original defendant in this criminal case (the “plaintiff-in-error” by the time the case reached the Supreme Court) asserted that an Oregon judicial decision violated the constitutional prohibition on state passage of ex post facto laws because “[n]o State . . . shall pass any bill of attainder, \textit{ex post facto} law, or law impairing the obligation of contracts.”\footnote{Id. at 161 (quoting U.S. \textit{CONST.}, art. I, § 10, cl. 1).}

The defendant banker in \textit{Ross} received funds designated as state education funds for deposit in his bank.\footnote{\textit{Id.} at 156.} A preexisting law stated that a person converting state funds for personal use would be guilty of larceny.\footnote{\textit{Id.}} Although not literally converting the funds for his personal use, the banker allowed those state funds to satisfy unrelated bank liabilities.\footnote{\textit{Id.}} Shortly thereafter, the bank failed with nearly all of the state education funds being lost.\footnote{\textit{Id.}} The Oregon Supreme Court confirmed a lower court’s decision that the banker’s use of the funds to benefit the bank constituted an unlawful personal appropriation.\footnote{\textit{Ross}, 227 U.S. at 156.} The Supreme Court held that, although the “pass any . . . Law” prohibition could reach every “instrumentality of the State exercising delegated legislative authority[,]” it could not reach judicial
acts. In describing legislative authority, the Court stated that “[l]egislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.” Since the Oregon law preexisted the banker’s “larceny” and his appeal only regarded the effect of a judicial decision, which did not make a “new rule,” the Court dismissed the case for want of jurisdiction.

A difficulty arises because the Ross Court ruled that a judicial decision cannot form the basis of a federal cause of action under the “pass any . . . Law” provision of Article I, Section 10 of the Constitution, but Ross provides little detail as to the scope of legislative or administrative actions that can do so. What Ross does provide is part of a framework for understanding the nature of delegated legislative authority that can be adapted to contemporary use. Since no recent Contract Clause cases have reached the Supreme Court on this specific controversy, both of these centenarian decisions—Ross and New Orleans Waterworks—still control.

C. A Framework for “pass any . . . Law” Today

This Comment proposes a simple two-part framework, which comprises the relevant rulings of Ross and New Orleans Waterworks. The framework allows for a consistent and accurate application of “pass any . . . Law” based on Supreme Court precedent. Under this paradigm, assuming that some delegation has actually occurred, courts should first ask,

(1) Whether the state legislature has defined clearly enough the criterion for taking action such that the non-legislator need simply make a judgment based on that criterion.

If so, the inquiry is over since the act is not legislative based on New Orleans Waterworks. If not, then courts must further inquire,

\[120\] Id. at 163 (citing New Orleans Waterworks Co. v. La. Sugar Ref. Co., 125 U.S. 18, 30-31 (1888)).
\[121\] Id. (quoting Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908)).
\[122\] Id. at 164.
\[123\] Id. at 163-64.
\[124\] See Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 874-75 (3d Cir. 2012) (“Although . . . the line between legislative and non-legislative acts has arguably blurred since [Ross], the guidance provided by that case remains helpful . . . .”).
Whether the impairing act of the non-legislator pursuant to the delegated legislative power "changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." 126

Focusing on the “new rule” requirement supports the Court’s statement that the Contract Clause can reach any “instrumentality of the state” impairing an existing contract. 127 Using only the language cited above restricts the use of dicta and minimizes the possibility that some confusing language from the earlier New Orleans Waterworks opinion might corrupt the more developed analysis of “pass any . . . Law” in the later Ross opinion. 128 This might seem intuitively obvious, but courts have misunderstood these constructs in modern opinions. 129 Properly applied, this framework would allow courts to hear more cases under the Contract Clause, giving more force to this part of the Constitution that the Framers believed so significant.

IV. CONTRACT CLAUSE INTERPRETATIONS FOR THE THREE VARIETIES OF CASES, HOW THE TWO-PART FRAMEWORK WOULD APPLY, AND WHY THE SUPREME COURT WILL AGREE

Part IV argues for the validity of the two-part framework by applying it to a number of cases representing the three types of delegation and in the order that Part II describes them. Restricting its analysis to the narrow issue of what it means to “pass any . . . Law,” this Part withholds comment on other requisite components of the Contract Clause unless clarity requires their mention. This Part also argues that given the “pass any . . . Law” jurisprudence and a recent case where the Supreme Court mentioned the im-

126 Ross, 227 U.S. at 163 (quoting Prentis, 211 U.S. at 226).
127 Id. at 162-63 (citing New Orleans Waterworks, 125 U.S. at 30-31).
128 Early in New Orleans Waterworks, the Court makes a seemingly clear statement excluding administrative bodies from Contract Clause consideration. 125 U.S. at 30 ("The prohibition is aimed at the legislative power of the State, and not . . . administrative or executive boards or officers . . . ."). However, only a few paragraphs later, in support of its assertion that a city council could pass laws for Contract Clause purposes, the Court amends its view. Id. at 31 ("Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State . . . .") (quoting Williams v. Bruffy, 96 U.S. 176, 183 (1877))). And Ross makes unmistakably clear that “pass any . . . Law” should be interpreted to encompass all state legislative power. 227 U.S. at 162-63 (stating that the Clause reaches “every form in which the legislative power of a State is exerted . . . .”).
129 See, e.g., Taylor v. City of Gadsden, 767 F.3d 1124, 1132-33 (11th Cir. 2014) (finding an exercise of delegated legislative power was not legislative because it was executed by the city and ignoring the extent to which state provided or did not provide guidance in its execution); Grand River Dam Auth. v. Nat’l Gypsum Co., 352 F.2d 130, 138 (10th Cir. 1965) ("[I]mpairment of contract means impairment by legislative action. No such action has occurred.").
portance of the intent of the Framers, the Court would likely rule in subsequent Contract Clause cases consistent with the two-part framework.

A. Delegation with Executory Guidelines

As briefly described in Part I.A, a quintessential example of this class of case is *Mabey Bridge & Shore, Inc. v. Schoch.* The plaintiff bridge manufacturer sued the Commonwealth of Pennsylvania on several theories, including a Contract Clause action, over PennDOT’s interpretation of Pennsylvania’s SPPA. The SPPA required “public works” to be completed with steel from the U.S. and defined “public works” to include “[a]ny structure, . . . [or] bridge . . . whether of a permanent or temporary nature . . . .” The manufacturer produced temporary steel bridges for construction projects using steel from the United Kingdom. For more than twenty years, the manufacturer had been operating under a published exemption from PennDOT, which allowed foreign steel to be “used as a construction tool [if it did not] serve a permanent functional use in the project.” PennDOT reversed the interpretation of its own published exemption and determined that the temporary bridges could not be considered “construction tools,” particularly in light of the clear language in the SPPA. Without remarking on whether a contract even existed or was impaired, the Third Circuit Court of Appeals ruled that PennDOT’s reversal was not a “new rule” under *Ross;* therefore, PennDOT changed no law as would be required to fall under the Contract Clause.

This is a clear example of simple statutory application. The legislative language provided guidance, and PennDOT merely interpreted that guidance. Under the proposed two-part framework, this determination is simple. The statutory language requiring PennDOT to determine whether a temporary bridge qualified as a “public work” was perhaps even less demanding than asking the city council of New Orleans to determine whether a particular person was “contiguous to the river.” In both cases the statutory guidance left no room for independent lawmaking, only administrative judgment in the application of a previously existing law. This case would not proceed beyond the first step of the two-part framework. Thus, use of

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130 666 F.3d 862 (3d Cir. 2012).
131 Id. at 866.
132 Id. (quoting 73 PA. STAT. ANN. § 1886 (West 1984)).
133 Id. at 866-67.
134 Id. at 866 (quoting PA. DEP’T OF TRANSP., PUB. 408/2007-6, SPECIFICATIONS § 106.01 (2010)).
135 See id. at 867.
136 Mabey Bridge, 666 F.3d at 875.
137 See supra Part III.C.
138 See supra Part III.C.
the framework in this case simplifies analysis to a single comparison, obviating the need to characterize PennDOT’s actions further.

B. Complex Functions and Broad Delegation—Administrative Agencies and Local Governing Bodies Using State Authority When Guidance Is Incomplete

State legislatures commonly delegate broad authority to administrative agencies and local governing bodies, providing varying levels of guidance on the exercise of that authority.\footnote{See Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1191-1200, 1201 tbl.1 (1999).} Adequately specific guidance will reduce an agency’s action to merely administrative interpretation,\footnote{See e.g., Mabey Bridge, 666 F.3d at 875.} but such guidance is obviously not always issued. And the Supreme Court has clarified that both administrative agencies and local governments can exercise a state’s legislative power.\footnote{See Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) (ruling Virginia State Corporation Commission had legislative authority); New Orleans Waterworks Co. v. La. Sugar Ref. Co., 125 U.S. 18, 19-20 (1888) (noting ordinances passed by municipal corporations could be state law).} The following two cases provide examples for how the two-part framework can determine whether an action essentially amounts to legislation for purposes of the Contract Clause when the guidance is incomplete.

1. A Borderline Interpretation Case

In a case decided only two years after Mabey Bridge, the Third Circuit Court of Appeals ruled on a different Contract Clause claim, reversing the district court’s summary judgment for the plaintiff funeral directors.\footnote{Heffner v. Murphy, 745 F.3d 56, 61-62 (3d Cir. 2014).} In 1952, Pennsylvania enacted the Funeral Director Law (“FDL”), which created a Funeral Director Board (“Board”) with rulemaking authority.\footnote{Id. at 62 (quoting 63 Pa. Stat. Ann. § 479.16(a) (West 1984)).} The FDL required any funeral director selling pre-need “funeral services”\footnote{These would be things like embalming and other “services” that are impossible to receive in advance. Id. at 87 (citing 63 Pa. Stat. Ann. § 479.13(c) (West 1984)).} to hold 100% of any advance in trust.\footnote{Id. (citing § 479.13(c)).} However, under a later law not specifically aimed at funeral directors, the Pennsylvania Future Interment Act (“FIA”), only 70% of the proceeds for funeral related goods, like caskets and urns, needed to be trusted.\footnote{Id. (citing 63 Pa. Stat. Ann. § 480.1 (West 1984)).} After several years of confusion, a state court declared that the FDL’s intent was to force funeral directors to com-
ply with the 100% trust requirement for both pre-need services and merchandising. Instead of vigorously enforcing the newly interpreted FDL against the funeral directors, the Board responded with an accommodation, arguably a new rule. Published in a 1991 memorandum, this new rule allowed funeral directors to own separately run, unlicensed merchandising companies subject to the lower 70% trust requirement. In 2007, the Board issued a proposed rule change, which would prevent funeral directors from contracting with their own merchandising businesses, essentially restoring the 100% trust requirement and reversing the 1991 memorandum. Although the Board withdrew this proposal in 2009, the funeral directors claimed the Board enacted this reversing rule in practice anyway through investigations and prosecutions. This caused impairment of the directors’ third-party contracts, which they had entered into solely because of the 1991 memorandum.

The Third Circuit rejected the Contract Clause claim on two grounds. First, since the proposal was not formally enacted, it was not a change in law. Second, citing Mabey Bridge, the court ruled that any rule with the force of law would simply be an interpretation of the FDL, the “antecedent state statute.” The main difficulty with this comparison is that, unlike Mabey Bridge’s definition of “public works,” there is no relevant statutory language to interpret with respect to the Board’s specific authorization of the independent merchandising companies. The FDL’s language concerns the trust requirements, but no language in the FDL concerns the business relationships contemplated by the Board. If the Board did reverse the 1991 memorandum allowing funeral directors to contract with unlicensed merchandising companies, it enacted an additional new rule.

Using the first part of the proposed test, the legislature did not provide a clear criterion for the Board to act. The regulatory regime was complex enough to require the existence of an organization with rulemaking authority pursuant to the FDL, and the conflicting trust requirements generated the need for interpretation.

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148 The court calls it the Board’s “view,” but doing so obscures the fact that it was a rule pursuant to the Board’s FDL-granted rule-making authority. See Heffner, 745 F.3d at 87.
149 Id. at 87-88.
150 See id. at 93-94.
151 Id. at 94.
152 Brief of Appellees at 53, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).
153 Heffner, 745 F.3d at 93-94.
154 Id. at 94.
155 Id. (citing Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 875 (3d Cir. 2012)).
156 See id. at 87.
157 See id.
complicated Board-produced regulation. The second inquiry is whether the Board actually “changed existing conditions” by enforcing a new rule without a formal enactment. The funeral directors provided little information on how the Board enforced its new rule except to say “the Board issued investigative subpoenas” and “prosecuted other funeral directors operating separate merchandise companies.” But without more detail indicating how widely and effectively the Board applied this new rule through its investigations and prosecutions, a court using this proposed framework would likely not characterize the Board’s action as having reversed the 1991 memorandum. Nonetheless, using the language from Ross in the second part of the proposed test, a rulemaking body throwing its weight behind a policy, intending it to have the force of law, and reversing a prior rule, may have possibly passed a law for purposes of the Contract Clause—even without a formal enactment.

2. A State Supreme Court Interprets the Contract Clause

The Supreme Court of North Carolina properly affirmed the proposition that “pass any . . . Law” for Contracts Clause purposes can involve a downstream delegation of state authority in Wiggs v. Edgecombe County. A local deputy sheriff retired from the Edgecombe County Sheriff’s Department and started to receive pay from the Local Government Employee’s Retirement System (“LGERS”). After the deputy sheriff’s retirement and upon his seeking new employment with another LGERS employer, County Commissioners passed a retrospective resolution preventing any retired local officers from receiving retired pay upon reemployment with another LGERS agency. The deputy sheriff brought suit in state court.

North Carolina state law had originally established a retirement system only for state law-enforcement officers and had included a reemployment prohibition for those state officers, but the legislature later extended benefits to cover local law-enforcement officers. The law extending these local benefits stated, “the provisions of [state retirement law] shall apply to all eligible [local officers,] except as may be provided by this section. As to the applicability of [state law] to locally employed officers, the [County Commissioners] shall be responsible for making determinations of eligibil-

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159 The Board prosecutor’s 1991 memorandum lists a number of factors designed to ensure that a funeral director and a merchandizing business are appropriately separated. These include separate operations, separate bookkeeping, separate advertising, etc. See Heffner, 745 F.3d at 88 & n.26.
160 Brief of Appellees, supra note 152, at 53.
161 643 S.E.2d 904 (N.C. 2007).
162 Id. at 905.
163 Id.
164 Id. at 905.
165 Id. at 906 (citing N.C. GEN. STAT. § 143-166.42 (2005)).
ity for their local officers . . . .” The County contended that the extending law’s mere reference to the state retirement law’s provisions (which included the reemployment prohibition for state officers) was enough to reach the local officer, implying their resolution was simply a clarification. The court disagreed. The court held that the law extending local benefits had conferred on the County Commissioners “incidental powers to implement the [extending law’s] mandate. . . .” Thus, the resolution prohibiting reemployment for local officers was a legislative action. The Commissioners unquestionably had the power to enact a prospective restriction for officers whose retirements had not yet vested, but the Contract Clause prohibited them from impairing the rights of current retirees.

This opinion aligns with the two-part framework. First, although the state law did direct that all eligible local officers would be covered, it offered the Commissioners no criteria for determining eligibility, delegating entirely the responsibility and the discretion “for making determinations of eligibility” to local officials. The Commissioners could have selected from a broad range of determining factors pursuant to their authority and the needs of the local community—a notable difference from the binary decision required of the New Orleans city council in resolving “contiguous to the river.” Under the second element of the framework, the resolution clearly changed the rules for all future retirees by aligning local rules with state rules. Henceforth, all local law enforcement officers under the authority of the Edgecombe County Commissioners would be unable to “double-dip.” That the state legislature did not actually “pass” additional law becomes immaterial since sufficient sovereign state power had been delegated to the local authority and exercised there. This type of case and the following option grant cases are precisely the cohort for which the Contract Clause must apply when courts interpret “pass any . . . Law” properly.

C. Legislative Option Granting

The following cases involve a specific kind of delegated authority whereby a state legislature grants to an executing body a broad power to either perform or not perform a particular action. Distinguishing this type of

166 Id. (emphasis added) (quoting § 143-166.42).
167 See Wiggs, 643 S.E.2d at 907.
168 See id.
169 See id. at 908.
170 See id.
171 Id. at 908-09.
172 See supra Part III.C.
173 Id. at 906 (quoting N.C. GEN STAT. § 143-166.42 (2005)).
174 See supra Part III.B.1.
175 See Wiggs, 643 S.E.2d at 905; supra Part III.C.
delegation from the others, the legislature issues no command to take any action at all. The option grant affords the executing body the discretion to act or not act. The legislature figuratively hands a loaded andcocked pistol to the chosen executor. State legislators should not then be able to distance themselves from the constitutional consequences of allowing the executor to pull the trigger—at least insofar as the Contract Clause is concerned.

1. A Case Where the Court Produces the Correct Result but Uses a Peculiar and Subsequently Criticized Rationale

In *Arriaga v. Board of Regents*, the Massachusetts Board of Regents of Higher Education (“Regents”) became aware of pending state legislation to address a budget shortfall. The legislation specifically addressed the need for, but did not explicitly require, retrospective and prospective non-resident student tuition increases. It would require the Regents to “develop a plan,” make a “recommendation,” and file it with the legislature. The Regents understood this pending law to mandate a retrospective tuition increase at public universities statewide for all non-resident students. The Regents passed a conditional motion increasing tuition retroactively in the event the expected state legislation became law, telegraphing their intent to the legislature and the Governor. The act did become law and the non-resident students received supplemental bills in the middle of their spring semesters. The students brought suit. The court held that “but for” the state legislation, the increases would not have occurred; therefore, an exertion of legislative power impaired the students’ contracts.

Although another court later criticized this “but for” formulation, properly understood, the Regents exercised an option. The legislation did not require the Regents to order retrospective tuition increases since they could have presumably recommended only prospective increases as a matter of fairness. Using the pistol metaphor, the Regents expressed intent to

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177 Id. at 3.
178 See id.
179 Id.
180 Id.
181 Id. at 3-4.
183 Id. at 2.
184 Id. at 5.
185 See Mo. Corrs. Officers Ass’n v. Mo. Dep’t of Corrs., No. 10-4168-CV-NKL, 2011 WL 1990475, at *3-6 (W.D. Mo. May 23, 2011) (calling into question the *Arriaga* court’s interpretation of precedent and the “but for” analysis but not finding fault with the result).
186 See *Arriaga*, 825 F. Supp. at 3 (“The board of regents shall develop a plan regarding tuition for students at Massachusetts public colleges and universities who are not Massachusetts residents. . . . [The
fire the pistol should it be given to them, the legislature delivered the pistol instead of using it themselves, and the Regents made good on their promise. The Regents’ motion effectively exercised the option at the moment the legislature conveyed the option.

For the first inquiry under the two-part framework, the legislature implied what action was to be authorized but provided no criteria to decide whether to execute—that was left to Regents. They were to “develop a plan,” which considered their assessment of the cost of the non-resident students to the state, and then recommend a course of action. Thus, because the legislature failed to offer criteria, the first step is not dispositive. Proper analysis requires the second step.

The Regents completed the legislative loop. Exercising the granted option by changing student tuition retrospectively, they changed “existing conditions by making a new rule” for all non-resident students under their authority, a large class of individuals. The second step is satisfied, and the legislature’s grant of the option, coupled with its execution, qualifies as a change in legislation for purposes of the Contract Clause.

2. Two Option Grant Cases Improperly Reasoned

In each of the following cases, the court held that the state actor allegedly impairing the plaintiffs’ contract did not pass legislation, but the power exercised is unmistakably of legislative character. A careful reading of New Orleans Waterworks and Ross and the application of the two-part framework make clear that both courts erred on the “pass any . . . Law” inquiry.

In Gadsden, Alabama, a city resolution subjected active firefighters with vested retirement interests to increases in their pension-fund contribution rates. The city’s resolution arose from a state law specifically granting localities the option of increasing those firefighters’ contribution rates. In Taylor v. City of Gadsden, instead of anchoring its opinion on the much more sound basis that the firefighters failed to show that fixed contribution rates were actually part of their contract, the Eleventh Circuit

Regents] shall make recommendations for non-resident tuition adjustments effective January first . . . ”.

187 Id.
188 See supra Part III.C.
190 See supra Part III.C.
191 Taylor v. City of Gadsden, 767 F.3d 1124, 1132-33 (11th Cir. 2014).
192 Id. at 1130 (citing ALA. CODE § 36-27-59(b)(2) (2012)).
193 Id.
194 After disposing of the “pass any . . . Law” issue, the court stated that pension benefits are rights of unilateral contract under Alabama law and that the payout cannot be adjusted after vesting. However,
Court of Appeals ruled the firefighters failed to challenge any act “bearing the imprimatur of the State’s legislative authority” because they challenged only the city’s resolution.\textsuperscript{195} Although the court characterized the city’s resolution as an option, it compared the city to a private party simply deciding not to honor a contract and implied that the proper action here may have been a state claim for breach of contract and not a Contract Clause claim.\textsuperscript{196}

The city cannot be merely breaching a contract if it exercises the delegated legislative power of the state because such an act by the city, in effect, changes state law and removes the city’s obligation entirely.\textsuperscript{197} Assuming the city’s resolution is a state law for purposes of the Contract Clause, the city has a complete defense against any breach of contract claim.\textsuperscript{198} Thus, the two-part framework can answer more than just the question of whether the city’s resolution qualifies under the Contract Clause but also whether a state breach of contract claim would actually be more appropriate.

In an analysis similar to step one of the proposed framework, the court improperly analyzes \textit{New Orleans Waterworks}. The court quoted \textit{New Orleans Waterworks} to imply that the option established by the Alabama legislature was analogous to the Louisiana statutory language passed by that state’s legislature.\textsuperscript{199} And Gadsden’s execution of that option, the court said, was similar to the New Orleans city council’s interpretation and application of the phrase “contiguous to the river.”\textsuperscript{200} The analogy was poorly chosen because the city council in \textit{New Orleans Waterworks} actually had statutory guidance to interpret in attempting to execute the state legislators’ intent. The city of Gadsden had no guidance prescribing action because the state had delegated its authority wholesale. The city had to decide whether to execute and under what conditions. Lacking any criteria, the job of legislating moved from the state to the city for as long as it took the city to exercise

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\textsuperscript{195} \textit{Id.} at 1132 (holding that the plaintiff’s failure to challenge an act of actual legislation, that the State of Alabama was not a defendant, and that Gadsden did not pass an actual law barred the Contract Clause claim).

\textsuperscript{196} \textit{Id.} at 1132, 1136.

\textsuperscript{197} \textit{Id.} at 1132, 1136.

\textsuperscript{198} \textit{See} E & E Hauling, Inc. v. Forest Pres. Dist., 613 F.2d 675, 679 (7th Cir. 1980) (“Use of law normally will preclude a recovery of damages because the law will be a complete defense to a suit seeking damages unless it is clear the law is not to have that effect.”).

\textsuperscript{199} \textit{Taylor}, 767 F.3d at 1133 (quoting \textit{New Orleans Waterworks} Co. v. La. Sugar Ref. Co., 125 U.S. 18, 31-32 (1888)).

\textsuperscript{200} \textit{Id.} (quoting \textit{New Orleans Waterworks} Co. v. La. Sugar Ref. Co., 125 U.S. 18, 31-32 (1888)).

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pension obligations for those who are vested but continue to work and contribute to their pensions are not unilateral rights. Thus, employee contribution rates (obligations) may or may not have been fixed as part of the pension contract depending on the evidence presented. No facts were presented to suggest anything but that these rates were to be set according to variable state law. Therefore, these terms were not part of the contract, and no contractual obligation actually existed. See \textit{id.} at 1134-35.
its option. Since the city performed more than mere interpretation, proper analysis requires the second step of the two-part framework.\(^\text{201}\)

The city’s resolution affected the entire class of active firefighters whose pensions had vested.\(^\text{202}\) Assuming for this discussion that the firefighters actually had a contractual right to fixed contribution rates, the resolution constituted a sweeping new rule impairing the firefighters’ present pension agreement going forward. Thus, the fully exercised option, delegated to the city through the authority of state legislature, is state law for Contract Clause purposes. In this case, a state breach of contract claim is not appropriate because of the effective enactment of state law through the city’s exercise of the state-crafted option. If state legislatures can deliver options to cities or even individuals in this manner and avoid Contract Clause scrutiny, more anomalous cases like the one that follows may result.

Although properly vacated by the Sixth Circuit Court of Appeals, the previously mentioned *City of Pontiac Retired Employees v. City of Pontiac* provides an excellent test case for the two-part framework. As a proxy for how other courts might erroneously view emergency managers or receivers, the district court’s ruling offers pedagogic value.

The Michigan state legislature passed Public Act 4 (“PA4”) on March 16, 2011.\(^\text{203}\) An Emergency Manager (“EM”), appointed pursuant to PA4 to manage the city’s financial crisis, issued a series of orders using the sweeping authority vested in him by PA4.\(^\text{204}\) These orders significantly affected the health plans of about one thousand retired former public employees and included, but were not limited to: (1) forcing all pre-Medicare retirees to accept a deduction of up to $500 to pay for premiums, (2) eliminating “all life insurance, disability, vision and hearing coverage for all retirees,” (3) increasing co-payments for prescription drugs, and (4) increasing the annual deductible by $750 per person.\(^\text{205}\) At the time of this action, the retirees sought preliminary injunctive relief on several theories, including a Contract Clause violation.\(^\text{206}\) Without reaching any of the other Contract Clause issues, the court held the retirees were not likely to succeed on the merits of their claim because “the EM did not enact any laws . . . .”\(^\text{207}\)

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\(^{201}\) See supra Part III.C.

\(^{202}\) See Taylor, 767 F.3d at 1131.


\(^{205}\) City of Pontiac Retired Emps., 2012 WL 2917311, at *1-3.

\(^{206}\) Id. at *3-4.

\(^{207}\) Id. at *5.
On rehearing the retirees’ claims en banc, the Sixth Circuit Court of Appeals vacated and remanded for consideration of a multitude of issues, including the Contract Clause claim.\(^{208}\) The Sixth Circuit instructed the district court to apply *New Orleans Waterworks* and *Ross*.\(^{209}\) The court also hinted at a more expansive interpretation of what may constitute an exercise of legislative power by quoting *INS v. Chadha*.\(^{210}\) Through the *Chadha* lens, “[w]hether actions ‘are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect.”\(^{211}\)

Using the framework, do clearly defined criteria exist within the legislation to assist the EM in making judgments? In this case, PA4 (and later PA436) grants authority to alter collective bargaining agreements with a directive to use the EM’s “sole discretion and judgment.”\(^{212}\) The EM’s actions must also be “reasonable and necessary,”\(^{213}\) “directly related to and designed to address the financial emergency,”\(^{214}\) and “temporary.”\(^{215}\) These words do not remove discretion and do not easily compare to “contiguous to the river.” A more apt analogy would be to assume that the old Louisiana law had allowed the city council the option of granting exemptions at their discretion so long as they were “reasonable and necessary,” leaving the New Orleans Waterworks Company to wonder if it really had exclusive rights at all. This case fails step one.

Second, under the proposed framework, do the EM’s actions change conditions by making new rules under the delegated authority of the state? At the EM’s option or “sole discretion,” the EM may enact specific, far-reaching rules to apply to those subject to his or her power. The EM increased medical insurance premiums, eliminated life insurance, and increased co-payments for prescription drugs for all retirees.\(^{216}\) Even if temporary, these unilateral changes to the retirees’ collective bargaining agreements represent loss that will not be recovered in the future. The EM took actions, which, by “character and effect,” directly implicate the sovereign

\(^{208}\) *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 751 F.3d at 431 (en banc) (per curiam) (regarding unfavorably the district court’s failure to cite any legal authority or conduct any analysis).

\(^{209}\) *Id.*

\(^{210}\) *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)).

\(^{211}\) *INS v. Chadha*, 462 U.S. 919, 952 (1983) (quoting S. REP. NO. 54-1335, at 8 (1897) (internal quotation marks omitted)).


power of the state. Using the framework, there can be little doubt that the EM is acting as a legislator enacting state law for purposes of the Contract Clause. Any similarly empowered individual or group acting in this way will also be legislating under the Contract Clause.

D. Prediction on Future Supreme Court Action

Doctrinally, state legislatures should not be able to delegate their power to avoid the Contract Clause. The unavoidable problem with such a regime is that there is no limiting principle. When this occurs, private constitutional rights suffer. As a matter of law, there are at least two reasons supporting the proposition that the Supreme Court will not countenance any such broad delegation to allow maneuver around the Contract Clause in future cases.

First, properly interpreted, the “current” Supreme Court jurisprudence on the “pass any . . . Law” issue strongly suggests that courts should not read the Contract Clause literally. Although it is true that some language in New Orleans Waterworks may be read to tightly restrict what might be considered legislation, later language in the opinion clearly refines this position to be surprisingly, perhaps presciently, appropriate to the legislative environment of today. Further refined in Ross, the Court’s definition of “legislation” instructs that the relevant question to ask is what the state action looks like and not where it comes from.

Second, the Supreme Court has spoken recently on an analogous matter that may shed light on how it might divine the Framers’ views on the “pass any . . . Law” question. It came in an answer to another constitutional question regarding the nature of a judicial proceeding in Federal Maritime Commission v. South Carolina Ports Authority. A private company brought a complaint against the state-run port with the Federal Maritime Commission (“FMC”). The FMC ultimately decided to review the dispute in an administrative proceeding, avoiding South Carolina’s immunity from

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217 Welch v. Brown, 551 F. App’x 804, 809-10 (6th Cir. 2014) (“[T]he character and effect of the challenged orders are properly understood as legislative because Public Act 4 explicitly contemplates that the Emergency Manager’s orders will carry the force of the state’s sovereign powers.”).
218 See supra Part III.B-C.
219 See New Orleans Waterworks Co. v. La. Sugar Ref. Co., 125 U.S. 18, 30 (1888) (“The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.”).
220 See id. (finding that whatever the source of the enactment, the judiciary should look to find whether an enactment embodies any exercise of legislative authority).
221 See Ross v. Oregon, 227 U.S. 150, 162-63 (1913) (instructing that the Contract Clause reaches every legislative form and that legislative action may be recognized by what it does).
223 Id. at 747.
private-party lawsuits under the Eleventh Amendment. In an opinion for the Majority, Justice Thomas stated that subjecting South Carolina to an administrative proceeding would efface that State’s dignity and would not have been acceptable to the Framers. The proper analysis, wrote Justice Thomas, involves an appraisal of “the sovereign immunity embedded in our constitutional structure and retained by the States when they joined the Union...” The Court stated that the Constitution would not allow a curtailing of the States’ sovereignty through means “anomalous and unheard of when the Constitution was adopted.”

Similarly, the Court should not allow the curtailing of an important constitutional restriction on the States’ sovereignty through mechanisms, like Emergency Managers, which would have been unknown to the Framers. Just as the Court found it determinative that the FMC’s administrative proceeding had the character of a formal judicial hearing, it should find it relevant that the exercise of a legislative option has the character of a formal enactment of law by the legislature itself. Thus, this Comment predicts that the Court will analyze whether an action is legislation under “pass any . . . Law” by examining that action’s character as opposed to merely its form in a future controversy, interpreting “pass any . . . Law” appropriately broadly.

CONCLUSION

The Contract Clause of the Constitution has gone through several periods of evolution, generally being weakened over time. The Framers intended that the Clause be a substantive restriction on the States’ ability to impair contracts, and it still does provide that function in a diminished capacity. However, various improper, narrow interpretations of what constitutes a legislative act threaten to undermine what power the Clause has left. Four reasons suggest that courts should discard these improper interpretations and narrow readings of “pass any . . . Law.” First, the Framers of the Constitution believed that the language would provide a “bulwark” against state infringement of private interests. Narrow interpretations of what constitutes a state law can avoid that bulwark entirely. Second, proper interpretations of the relevant case law, New Orleans Waterworks and Ross, show that the character of an action is what is relevant, not its form. The two-step framework this Comment proposes coherently frames the findings of those

224 Id. at 750.
225 See id. at 760.
226 Id. at 754.
227 Id. at 755 (quoting Hans v. Louisiana, 134 U.S. 1, 18 (1890) (finding States immune from suits by their own citizens under federal-question jurisdiction in a Contract Clause case)).
two cases and would advance consistent adjudication. Third, as a matter of policy and common sense, allowing legislatures to delegate legislative authority to avoid the Contract Clause knows no limiting principle. Any state legislature seeking to avoid the Clause would have a free hand to do so for any grant of a legislative option. Finally, with Federal Maritime Commission v. South Carolina Ports Authority, the Supreme Court has signaled a willingness to view issues regarding the definition of what is judicial, and perhaps by implication, what is legislative, with an eye to what the Framers intended. The Framers did not intend the Contract Clause to be a meaningless entry into the Constitution, and carried to the extreme, delegating around the provision would indeed render it meaningless.