REWRITING THE TERMS: THE CONTRACT CLAUSE AND SPECIAL-INTEREST LEGISLATION IN *RUI ONE CORP. V. CITY OF BERKELEY*

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The City Council of Berkeley, California is well known for its energetic adherence to the left wing of American policy and politics. A ready example is its March 2004 determination that Congress should formally censure President Bush and Vice President Cheney; impeachment was the favored recommendation but was deemed impractical.[1] Such quixotic endeavors aside, the City Council has also engaged in an intermittent campaign against property and economic rights. In June 2004, for example, it passed a resolution in support of amendments to the United States and California Constitutions "to declare that corporations are not granted the protections or rights of persons."[2] And in July 2004, the Council amended the City's rent ordinance by adopting a measure that bars landlords from evicting tenants who illegally sublet their apartments.[3]

The subject of this comment is yet another manifestation of the Council's proletarian regulatory impulse. In September 2000, at the behest of a labor union, the Council enacted an amendment to the City's "living wage" ordinance applicable to a very narrow class of businesses operating on publicly leased real estate at the Berkeley Marina. This ordinance infringed important constitutional rights, and its validation by a Ninth Circuit panel majority in *RUI One Corp. v.*

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1. Mr. Tom Bates, the mayor of Berkeley, appropriately stated, "If we go ahead with this, they'll just say, 'Look at what those crazy people in Berkeley did!' It will be a farce." Martin Snapp & John Simerman, *Council Votes to Support Censure of President Bush*, CONTRA COSTA TIMES, Mar. 12, 2004, at 4, *available at* 2004 WL 72131693. Not every member of the Council was so reasonable: "Bush was never elected; he took over in a coup. He should be put in jail." *Id.* (quoting Councilwoman Dona Spring).

2. Editorial, *Not a "Natural Person,"* PROVIDENCE J. (Rhode Island), July 6, 2004, at B04, *available at* 2004 WL 83582167.

3. The measure, which would require landlords to prove "reasonable justification," was ratified by voters on the November ballot. *See* Elysha Tenenbaum, *Change to Ordinance Would Give Renters Right to Sublet*, U-WIRE, July 12, 2004, *available at* 2004 WL 82207060.

City of Berkeley[4] constitutes a troubling precedent likely to be used by states and municipalities nationwide to justify the singling out and burdening of individual business enterprises. The Contract Clause, despite several narrowing interpretations by the U.S. Supreme Court, ought to shield private citizens from precisely this sort of narrow, opportunistic legislation.

I. FACTUAL BACKGROUND

Restaurants Unlimited, Inc. ("Restaurants Unlimited") is a Washington corporation and the owner of some thirty restaurants,[5] including the one at issue here, Skates on the Bay ("Skates").[6] Since November of 1984, Skates has been operated on property at the Berkeley Marina, a facility consisting of fifty-two acres of water with nearby shopping, dining and recreational facilities.[7] The City of Berkeley holds the real estate adjacent to the marina is held in public trust under a 1913 grant from the State of California.[8] In 1967, the City leased the lot on which Skates now does business to the predecessor in interest of Restaurants Unlimited; in 1996, Restaurants Unlimited subleased the property to its subsidiary, RUI One Corporation. ("RUI").[9] The lease requires RUI to "maintain and operate thereon a major first-class restaurant and cocktail lounge for the convenience and promotion of commerce, navigation and fishery in the Berkeley Marina and for no other purpose."[10] The lease runs for a term of fifty years—until the end of 2017—and requires an annual rental payment of the greater of $11,400 or three percent of Skates' gross receipts.[11] The last renegotiation of the lease took place in 1996

4. 371 F.3d 1137 (9th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3399 (U.S. Jan. 10, 2005) (No. 04-582).

5. Cindy Peng, *Appeals Court Upholds Berkeley's Living Wage Law*, U-WIRE, June 21, 2004, *available at* 2004 WL 82205284.

6. *See* RESTAURANTS UNLIMITED, INC., SKATES ON THE BAY WEB SITE, *at* http://www.skatesonthebay.com (last visited January 4, 2005).

7. *See* CITY OF BERKELEY, MARINA HOME PAGE, *at* http://www.ci.berkeley.ca.us/marina (last visited January 4, 2005).

8. *See RUI One Corp.*, 371 F.3d at 1144 (noting that the total grant to the City of Berkeley was 4388 acres of tidelands); *see also* BERKELEY, CAL., MUNICIPAL CODE § 13.27.020, *available at* http://www.ci.berkeley.ca.us/bmc/default.asp (last visited January 4, 2005).

9. *See* Appellant's Opening Brief at 8, RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004) (No. 02-15762).

10. *RUI One Corp.*, 371 F.3d at 1146.

11. *Id.* On June 30, 2007, the rental payment increases to the greater of $11,400 or 3.3% of Skates' gross receipts. *Id.* Skates has been a successful venture, and so the annual rental payment has typically consisted of the percentage of gross receipts. *See* Appellant's Opening Brief at 10 ("Berkeley continues to reap the benefits of its bargain—for the past three years, RUI has paid an average of approximately $196,820 in annual rent to Berkeley.").

upon the sublease to RUI, at which time RUI agreed to, among other things, an increase in rent reflecting the market value of the public trust land.[12]

The Berkeley City Council enacted its "living wage" ordinance ("LWO") on June 27, 2000.[13] "Living wage" ordinances such as Berkeley's require the payment of wages considerably higher than the federally imposed minimum; their aim is "to allow covered full-time wage earners to support a family residing in the locality at a subsistence level."[14] The Berkeley LWO requires the payment of a wage of $9.75 per hour if the employer also provides specified medical benefits, or $11.37 per hour without such benefits.[15] The ordinance applies only to "employers that received some form of financial benefit from the City," such as a municipal contract or a lease on public property.[16] It exempts any employer who enters into a collective bargaining agreement expressly providing for the applicable labor union's waiver of the "living wage" requirement.[17] Importantly here, the mandates of the LWO are put into effect by requiring that any municipal contract or lease "contain provisions requiring it to comply with the requirements of this chapter as they exist on the date when the employer entered its agreement with the City or when such agreement is amended."[18] In other words, the requirements of the LWO are enforced only against those parties who *voluntarily* assume such contractual obligations upon signing or renegotiating a contract or lease with the City.[19] Municipal contractors and lessees are aware ex ante of their obligation to pay a "living wage," and therefore they are able to bargain for rental payments and other terms accordingly.[20] The LWO, in sum, applies

12. *RUI One Corp.*, 371 F.3d at 1146; *see also* Appellant's Opening Brief at 8–9.

13. *See RUI One Corp.*, 371 F.3d at 1143 (citing Berkeley, Cal., Ordinance No. 6548-N.S. (2000)).

14. *Id.* (citing ACORN LIVING WAGE RESOURCE CTR., SETTING A LIVING WAGE LEVEL, *at* http://www.livingwagecampaign.org/wagelevel.php); *but see* Editorial, *The 'Living Wage' Gambit*, WALL STREET J., April 29, 2002, at A18, *available at* 2002 WL-WSJ 3393138 (identifying the real beneficiaries of "living wage" laws as the labor unions).

15. BERKELEY, CAL., MUNICIPAL CODE § 13.27.030. The LWO also required the provision of at least 22 days off per year "for sick leave, vacation, or personal necessity," ten of which may be uncompensated. *Id.* at § 13.27.050(B).

16. *See RUI One Corp.*, 371 F.3d at 1143; *see also* BERKELEY, CAL., MUNICIPAL CODE § 13.27.030(A)–(D).

17. BERKELEY, CAL., MUNICIPAL CODE § 13.27.070(H).

18. BERKELEY, CAL., MUNICIPAL CODE § 13.27.060.

19. *See RUI One Corp.*, 371 F.3d at 1144 (noting that the authors of a feasibility and cost study commissioned by the City "apparently assumed that the living wage ordinance would be implemented for City leases only upon the renegotiation of their lease contracts").

20. *See id.* (acknowledging the City's finding that a portion of the LWO's cost would be

prospectively.

The Berkeley City Council negated this practice on September 19, 2000 when it enacted an amendment to the LWO ("Marina Amendment") regarding employers operating on leased property in the Berkeley Marina.[21] The Marina Amendment makes the requirements of the LWO *immediately* applicable to "[e]ntities within the boundaries of the Marina Zone which employ six or more employees and generate $350,000 or more in annual gross receipts."[22] Employers subject to this amendment, unlike those subject to the LWO's general provisions, were given no opportunity to negotiate for offsetting reductions in rental payments. The City Council supported its enactment of the Marina Amendment with the following "findings":

> (1) [T]he public interest is served by requiring large Marina employers to pay their employees a living wage because operating a business in the public trust land of the Marina is a privilege, which should not be abused by contributing to the problems associated with inadequate compensation of workers; (2) the City expends considerable resources in maintaining and promoting the Marina, in turn affording Marina businesses significant financial benefits, a reasonable portion of which should be used to provide employees with appropriate wages and benefits; and (3) members of the public who visit the Marina have a limited choice of businesses to patronize in that area, and should not be deterred from visiting the Marina because they do not wish to patronize businesses that do not provide their employees a living wage.[23]

The Marina Amendment was justified, then, merely by the employers' possession of a municipal lease on the public trust property; the City Council did not allege that the need for payment of a "living wage" was any greater at the Berkeley Marina than elsewhere in the city.[24]

Because RUI leases public land at the Berkeley Marina, employs more than six people, generates more than $350,000 in annual gross receipts, and has no collective bargaining agreement in force, the Marina Amendment imposed the requirements of the LWO on RUI's

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borne by "the City, in the form of lower lease revenue upon renegotiation of the leases").

21. *See* Berkeley, Cal., Ordinance No. 6583-N.S. (2000) (amending BERKELEY, CAL., MUNICIPAL CODE ch. 13.27).

22. *RUI One Corp.*, 371 F.3d at 1145; *see also* BERKELEY, CAL., MUNICIPAL CODE § 13.27.030(E).

23. *RUI One Corp.*, 371 F.3d at 1145 (citing Berkeley, Cal., Ordinance No. 6583-N.S. § 1 (2000)).

24. *See* Appellant's Opening Brief at 50–51.

preexisting lease with the City. Of utmost importance here is the Marina Amendment's narrowness; although the ordinance does not single out RUI by name, its provisions are so carefully crafted that they applied to RUI *and possibly to no one else.*[25]

Concluding that the Marina Amendment's narrow and retroactive imposition constituted a violation of its federal constitutional rights, RUI filed suit against the City of Berkeley in the United States District Court for the Northern District of California on October 19, 2000, requesting declaratory and injunctive relief.

II. DISTRICT COURT DECISION

Before the district court, RUI argued that the Marina Amendment violates the Contract Clause,[26] the Equal Protection Clause,[27] and the Due Process Clause.[28] The district court permitted the Hotel Employees & Restaurant Employees Union, Local 2850 ("Local 2850") to intervene on behalf of the City of Berkeley. RUI moved for summary judgment, upon which the district court, in an unpublished opinion, *sua sponte* granted summary judgment for the City. The court thus rejected each of RUI's claims.[29]

III. NINTH CIRCUIT COURT OF APPEALS DECISION

A. Majority Opinion

RUI's arguments fared no better on appeal. Judge Wardlaw, writing for a panel majority of the Ninth Circuit Court of Appeals,[30] rejected its arguments from the Contract Clause and the Equal Protection Clause[31] and thus affirmed the district court's grant of

25. *See* Appellant's Opening Brief at 3; *see also RUI One Corp.*, 371 F.3d at 1166 (Bybee, J., dissenting) ("However, of the three principal leaseholders in the Marina Zone, the Radisson, HS Lordships, and Skates (owned by RUI), only Skates is currently subject to the Marina Amendment. Both the Radisson and HS Lordships have collective bargaining agreements and are thus exempt from the LWO and the Marina Amendment.").

26. U.S. CONST., art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

27. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

28. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

29. *See RUI One Corp.*, 371 F.3d at 1146.

30. Judge Graber joined the majority opinion.

31. RUI also reasserted its argument from the Due Process Clause: the Marina Amendment impermissibly delegated the City's police power to employers and unions. This conclusion, it argued, stemmed from the ordinance's exempting employers operating under a collective bargaining agreement under which the private parties may determine wages and benefits under

summary judgment for the City of Berkeley.

The majority wholly rejected RUI's argument under the Contract Clause[32] and found no violation by the City of Berkeley's enacting the Marina Amendment.[33] Its analysis went no further than the first prong of the Contract Clause inquiry: the Marina Amendment "substantially impairs" no contractual relationship between the City and RUI. Quoting *General Motors Corp. v. Romein*, the court stated, "The first sub-inquiry is not whether any contractual relationship whatsoever exists between the parties, but whether there was a 'contractual agreement regarding the specific . . . terms allegedly at issue.'"[34] RUI's claim failed, therefore, because "no specific provision of the lease agreement addresses payment to or employment benefits for RUI's employees."[35] The majority deemed irrelevant any indirect impact of the Marina Amendment on the several express lease terms cited by RUI.[36]

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no guiding principle provided by the City. *See* Appellant's Opening Brief at 53–57. RUI reasoned that whereas the City has the opportunity to negotiate for a "living wage" with those employers subject to only the LWO, Berkeley cannot do so in relation to employers subject to the Marina Amendment but exempt due to a collective bargaining agreement, thus resulting in the "absolute delegation" of Berkeley's police power to the employers and unions. *See id.* at 54. The majority rejected this argument, holding that the opportunity for employers and unions to enter into a collective bargaining agreement is not a delegation of legislative power, i.e., "the power to make laws and alter them at discretion." *See RUI One Corp.*, 371 F.3d at 1157 (citing BLACK'S LAW DICTIONARY 911 (7th ed. 1999)). The City Council simply provided for a "'familiar and narrowly drawn opt-out provision[].'" *See id.* (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994)).

32. *See* Appellant's Opening Brief at 23–48.

33. According to the Ninth Circuit panel majority's interpretation of U.S. Supreme Court precedent, a violation of the Contract Clause is found when (1) the challenged regulation works a "substantial impairment of a contractual relationship, *see RUI One Corp.*, 371 F.3d at 1147 (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)); (2) the regulation lacks a "significant and legitimate public purpose, such as the remedying of a broad and general social or economic problem," *see id.* (citing *Energy Reserves Group*, 459 U.S. at 411–12); and (3) the regulation is not based upon "reasonable conditions" and is not of "a character appropriate to the public purpose justifying [its] adoption," *see id.* (citing *Energy Reserves Group*, 459 U.S. at 412–13). The court further stated that the first inquiry itself has three subparts: (a) whether there is a contractual relationship; (b) whether the challenged act impairs that relationship; and (c) whether the impairment is substantial. *See id.* (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

34. *RUI One Corp.*, 371 F.3d at 1147 (quoting *Romein*, 503 U.S. at 187). RUI had argued that the Marina Amendment impairs (1) the requirement that RUI charge its patrons a rate consistent with its competitors because the increased labor costs will need to be passed onto customers; (2) the express reservation by RUI of the right to exercise its business judgment in operating the business because the City has effectively substituted its own business judgment regarding labor relations; and (3) the requirement that RUI to perform certain obligations in exchange for the right to quiet enjoyment of the property. *See* Appellant's Opening Brief at 46–48 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978)).

35. *RUI One Corp.*, 371 F.3d at 1147.

36. *See id.* at 1148 ("This argument fails because none of these provisions specifically addresses the wages and benefits that RUI must pay its employees . . . . Nor does the Marina Amendment affect directly the rates RUI charges or RUI's best judgment. The latter two remain

The court further rejected RUI's argument that *implied* contractual terms were substantially impaired by the Marina Amendment.[37] It reasoned that no contractual terms—such as an agreement to maintain RUI's existing pay scale—could be implied in fact because the RUI lease contains an integration clause.[38] Moreover, even if there were a relevant contractual term preventing the City from "imposing an economic burden upon RUI during the period of the lease," the majority held that "such a term would be void as against public policy. For 'the legislature cannot bargain away the police power of a State.'"[39]

RUI's Contract Clause argument gained no traction from the public nature of the Marina lease.[40] The majority held that the stricter scrutiny applicable to a government's impairment of its own contracts is relevant only to the third prong of the Contract Clause analysis, i.e., whether the act was reasonable and of a character appropriate to the stated public purposes.[41] The Marina Amendment had not impaired a contractual relationship in the first instance and therefore the implication of the City of Berkeley's financial self-interest was entirely beside the point. The question of "substantial impairment," the court explained, is simply a "factual determination."[42]

The court next found that the Marina Amendment satisfies the traditional rational basis test applicable to economic legislation and

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entirely within RUI's control.").

37. *See* Appellant's Opening Brief at 33–34 (arguing that RUI's labor costs are so central to the bargained-for considerations that it must be considered a term of the lease).

38. *See RUI One Corp.*, 371 F.3d at 1148 ("Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms."). The court acknowledged *Romein*'s holding that "implied contractual terms can form the basis for a Contract Clause claim," but found that RUI had not established that any alleged, implied term would be "'so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract.'" *See id.* at 1148–49 (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 188–89 (1992)).

39. *Id.* (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977)). The court also pointed to a provision in the lease by which RUI had agreed to "comply with all applicable laws, ordinance[s] and regulations of the City [of Berkeley], County, State and United States Governments." It found that this provision required compliance with all existing and future laws, and therefore RUI was put on notice and had agreed to abide by future regulation such as the Marina Amendment. *See id.* at 1150–51, 1153. Judge Bybee, in dissent, argued that this provision was "simply a boilerplate promise to obey the law," and cannot be read as an "open invitation[] to government parties to alter their contracts." *See id.* at 1169 (citing *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887–88 (9th Cir. 2003)).

40. *See* Appellant's Opening Brief at 19 (citing *United States Trust Co.*, 431 U.S. at 25–26).

41. *See RUI One Corp.*, 371 F.3d at 1152 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983)). "Stricter scrutiny" in the Contract Clause context means that the government must show the challenged act to be "both reasonable and necessary to an important public purpose." *See id.*

42. *Id.*

thus similarly disposed of RUI's argument from the Equal Protection Clause. Citing *FCC v. Beach Communications, Inc.*, the majority simply inquired whether there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[43] The "findings" offered by the City upon passage of the Marina Amendment[44] provided the "plausible reasons" for which the majority was looking. The court held that, regardless of whatever *actually* motivated the City of Berkeley's challenged ordinance,[45] the notion that members of the public may be deterred from visiting the Marina because of businesses that do not pay their employees a "living wage" was "rational speculation" that need not have been supported by evidence or empirical data.[46] That the City may have targeted a single Marina business for the retroactive imposition of the "living wage" requirement—however miniscule its ameliorative impact on the problem of the working poor—was an allegation deemed "'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'"[47] And although a "class of one" may state a colorable Equal Protection claim upon differential treatment with no rational basis,[48] the majority reasoned that since RUI is one of "a number of *large businesses* that occupy and profit from prime real estate," it "can hardly be considered vulnerable."[49]

B. Dissenting Opinion

Judge Bybee, in dissent, took issue with the panel majority's terse dismissal of RUI's argument under the Contract Clause. He first noted that a government's impairment of its own contract warrants a "more stringent examination under the Contract Clause" because "there is an additional risk that it will employ its sovereign powers to

43. *Id.* at 1154 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)); *see also id.* (stating that the existence of any "plausible reasons" for the Marina Amendment ends the inquiry).

44. *See supra* text accompanying note 23.

45. *See RUI One Corp.*, 371 F.3d at 1155 ("According to the Supreme Court, 'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.'" (quoting *Beach Communications*, 508 U.S. at 315)).

46. *See id.* (citing *Beach Communications*, 508 U.S. at 315).

47. *Id.* (citing *Beach Communications*, 508 U.S. at 316; and *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

48. *See id.* at 1156 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)).

49. *Id.* (emphasis added).

alter the settled terms of the contract"; indeed, "the Contract Clause commands that states resist [the] temptation" to "secure by legislation what [they have] failed to achieve through negotiation."[50] Additionally, that the Marina Amendment lacked "neither general nor prospective applicability" gave Judge Bybee pause, and he thus deemed it appropriate to recite the factual background of the Marina Amendment's enactment.[51] Most revealing were the following facts: the City Council's realization that the Marina leases would not have open renegotiations for as long as seventeen years from the LWO's enactment; the urging of the Local 2850 that the City Council make the LWO immediately applicable to the Marina leases because it should not "leave behind . . . the [Marina] workers, who worked so hard to get [the LWO] passed"; and that the union itself wrote and transmitted to the City Council a draft of the Marina Amendment.[52]

In light of these indications of private-interest legislation, Judge Bybee would have found a "substantial impairment" of the contractual relationship between the City of Berkeley and RUI. He would have taken a "broader, and to [his] mind more common-sense, view of the contract," and would have gone beyond the majority's formalistic inquiry as to whether there existed a lease term explicitly addressing the wage level of RUI's employees.[53] This broader view, instead, reveals that the Marina Amendment was the retroactive imposition of a contract term for which the City could have negotiated in 1996:

> The lease is silent on the question of RUI's employee wages and benefits. The fact that the lease, which constitutes the entire agreement between the parties, does not set employee wages and benefits necessarily implies that the parties agreed not to contract on wages and benefits . . . . Berkeley could have insisted on a wages and benefits provision.[54]

The integration clause in the RUI lease, argued Judge Bybee, foreclosed the City's subsequent attempt to impose an additional

50. *Id.* at 1157–58 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978)). Judge Bybee thought it evident that the Marina Amendment "advances the City's own financial self-interest." *Id.* at 1172–73 (arguing that the Marina Amendment will decrease worker dependence on public assistance and will result in higher gross revenues as RUI passes the cost onto customers).

51. *Id.* at 1158–59 (citing the 1999 study commissioned by the City of Berkeley which recommended that a "living wage" requirement be imposed during the next rent negotiating period).

52. *See id.* at 1159–60.

53. *See id.* at 1161 (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

54. *Id.* at 1162.

obligation under the lease—even if accomplished by legislative fiat. Silence in the lease agreement,[55] coupled with a longstanding course of dealing between the City and RUI or its predecessors in interest,[56] establishes an implied agreement of noninterference with employee relations. As such, "Berkeley used its sovereign authority to achieve what it failed to negotiate in its proprietary capacity."[57]

Judge Bybee would also have held that that the generally applicable character of legislation (or lack thereof) is vital to the Contract Clause inquiry.[58] Whereas even generally applicable laws may violate the Contract Clause in some circumstances,[59] a legislative enactment that targets perhaps a single municipal lessee[60] surely should have been subject to an adjusted inquiry. He also found relevant the retroactive nature of the Marina Amendment. Retroactive laws, he stated, are "'generally unjust'" and "'deprive citizens of legitimate expectations and upset settled transactions.'"[61] For Judge Bybee, narrowness and retroactivity combined to constitute an invalid exercise of the City of Berkeley's police power.

This invalidity, according to Judge Bybee's dissent, informs the second and third prongs of the Contract Clause inquiry, and thereby indicates an unconstitutional impairment of RUI's rights. He would have found that the City failed to justify the Marina Amendment with a "significant and legitimate public purpose," and that the City had "merely 'provid[ed] a benefit to special interests with its police power.'"[62] While the LWO may serve to remedy a "'broad,

55. *See id.* at 1162 ("Similarly, contractual silence on wages in an integrated agreement allows the employer, subject to generally applicable local, state and federal laws, to work out its own arrangements with its employees.").

56. *See id.* at 1162–63 (citing *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999)).

57. *Id.* at 1163. Judge Bybee would have also found the impairment to have been substantial, having credited evidence that the Marina Amendment will result in at least a twenty-two percent decrease in RUI's net revenues. *See id.* at 1165. He also found it significant that in 1996 the City of Berkeley found it necessary to negotiate for requirements representing significantly less substantial monetary burdens, such as a $7000 annual payment for landscaping costs and the installation of a $50,000 "grease trap." *See id.* That Skates may remain financially viable despite the Marina Amendment's imposition does not render the impairment insubstantial. *See id.* at 1165–66.

58. *See id.* at 1166–67.

59. *See id.* at 1166 (citing *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989)).

60. *See supra* note 24 and accompanying text.

61. *Id.* at 1167 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998); and *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

62. *Id.* at 1168 (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983)).

generalized economic or social problem,'"[63] the Marina Amendment has "'a very narrow focus' and [is] 'aimed at specific' parties."[64] The best evidence of this, he argued, is that the Marina Amendment benefits only the very few workers employed by RUI.[65] As for the third prong, Judge Bybee would have held that the Marina Amendment is neither reasonable nor necessary to the City's stated purposes. Since the conditions which allegedly motivated the Marina Amendment existed at the time of the lease renegotiation in 1996, and therefore the City could have negotiated at that time for the provision of a "living wage," the impairment was not a reasonable one.[66]

IV. COMMENT

The controversy decided by the Ninth Circuit in *RUI One Corp. v. City of Berkeley* actually has little, if anything, to do with "living wage" legislation.[67] Instead, the case centers on the vulnerability of individual businesses locked into state or municipal contracts or leases, and it highlights the feeble health of constitutional protections related to economic and property rights.

Some of the Marina Amendment's most salient features were neglected by the media coverage of the Ninth Circuit's ruling. First, the ordinance does not simply "mandate[] minimum hourly wages and employee benefits for certain companies that received financial benefits from the city such as city contracts,"[68] but, critically, it does so in a manner that fails to discriminate between city contracts to be negotiated in the future and those already inked and binding in a court of law. The Marina Amendment, in other words, effected the *retroactive* imposition of contractual terms to which RUI had not

63. *Id.* at 1169 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978)).

64. *Id.* (citing *Energy Reserves Group*, 459 U.S. at 412 n.13).

65. *See id.*

66. *See id.* at 1171 (citing *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999)). Judge Bybee would also have held that a contractual impairment is not necessary "if 'an evident and more moderate course would serve its purpose equally well.'" *Id.* (citing *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 31 (1977)). He suggested the City could offer tax incentives to complying employers or directly subsidize the wages of Marina employees. *Id.*

67. Such is the case despite the majority's paean to minimum wage legislation in the first section of its opinion. *See id.* at 1141–43. The majority's misapprehension of the case's relevance was echoed by at least one member of the City Council, who stated, "It's a good precedent for the city to be able to enforce a viable minimum wage." *Appeals Court Upholds Berkeley's Living Wage Law*, U-WIRE, June 21, 2004, *available at* 2004 WL 82205284 (quoting Councilmember Gordon Wozniak).

68. *See* Henry Weinstein, *Berkeley's Living Wage Ordinance Is Upheld in Federal Appeals Court*, L.A. TIMES, June 17, 2004, at B6, *available at* 2004 WL 55919958.

voluntarily agreed during the negotiation of the municipal lease.[69]

Second, the ordinance was not "typical of living wage ordinances adopted nationally."[70] The typical living wage ordinance operates on *all* prospective government contractors or lessees (as does the original LWO), or at least a well-defined but sizeable category of such contractors or lessees, whereas the Marina Amendment singles out an extremely narrow class of municipal lessees located in one geographic area.[71] As stated above, the ordinance is so tightly worded that this narrow class may consist of RUI alone.[72] This second feature —its lack of general applicability—is not just a "new twist on the living wage movement,"[73] but, by virtue of the Ninth Circuit's ruling, is also a troubling new arrow in a state or municipal government's regulatory quiver. The triumphant declaration of Berkeley's city attorney was foreboding: she predicted that the ruling would be "'helpful to other governments legislating in this area' because the decision held that 'you can go after a problem in an incremental fashion . . . . You can target a particular industry, a business that operates in a particular way or in a certain zone of the city.'"[74]

A. Equal Protection

As an initial matter, one should note that RUI's argument under the Equal Protection Clause was not without force. The Supreme Court has invalidated social or economic legislation applied to a "class of one" when there was no rational justification for treating the singled-out entity different than others.[75] It has also done so on the basis of a statute's extreme underinclusivity.[76] But it was unlikely that the equal protection rubric's analytical aptitude could overcome the factual disparity between those precedent cases and *RUI One Corp.* The

69. *See RUI One Corp.*, 371 F.3d at 1160 (Bybee, J., dissenting).

70. *See* Weinstein, *supra* note 67.

71. *See RUI One Corp.*, 371 F.3d at 1144–46; *see also* ACORN LIVING WAGE RESOURCE CTR., LIVING WAGE SUCCESSES, *at* http://www.livingwagecampaign.org/index.php?id=1958 (characterizing the Marina Amendment as "the first area-based living wage policy in the nation").

72. *RUI One Corp.*, 371 F.3d at 1166 (Bybee, J., dissenting).

73. *See* Weinstein, *supra* note 67.

74. *See id.* (quoting City Attorney Manuela Albuquerque).

75. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

76. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–50 (1985) (invalidating a zoning ordinance requiring a special use permit for homes for the mentally retarded). This argument on behalf of RUI is that the Marina Amendment, in attempting to remedy the problem of the "working poor" by requiring payment of a "living wage" by a single employer, is so radically underinclusive that it is irrational and arbitrary.

rational basis scrutiny applied to economic legislation aimed at business enterprises appears to be of a different character than that applied to classifications that are officially "nonsuspect" but potentially subject to a legislature's "animus."[77] That the *RUI One Corp.* majority ascribed to this factual distinction was abundantly clear.[78]

It is instructive that the justifications for the Marina Amendment proffered by the City of Berkeley[79] have nothing to do with the manner of RUI's operation of Skates or its employees and pertain merely to RUI's possession of a municipal lease. In other words, the benefits accruing to RUI from the lease, such as the City's expenditure of funds to maintain and promote the Marina, have no obvious relationship to the problem of inadequate wages – nor to any other societal difficulty that the City might have sought to remedy. The majority's acceptance of these justifications means that a state or municipality, under traditional rational basis scrutiny, is justified in imposing upon a single government contractor or lessee any kind of regulatory burden it wishes. That the uniquely burdened party possesses a public contract or lease would appear to render the legislative act ipso facto not arbitrary. RUI stated the issue this way: "If this is accepted as lawful justification for imposing a social obligation on employers, does it mean that in the future Skates can expect a requirement that it offer free meals to the homeless every Tuesday because it occupies public land and can bear additional costs?"[80]

B. Contract Clause

In essence, therefore, the mere possession of a municipal lease rendered RUI entirely vulnerable to the narrow and retroactive imposition of the Marina Amendment. Consequently, it is the Contract Clause that ought to have provided a remedy. The clause is

77. *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996) (rejecting "animus" on the basis of sexual orientation); Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (rejecting a "bare congressional desire to harm a politically unpopular group" by depriving "hippie communes" of participation in a food stamp program).

78. *See RUI One Corp.*, 371 F.3d at 1156 ("Even though '"[c]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is"' . . . a number of large businesses that occupy and profit from prime real estate can hardly be considered vulnerable. Thus, RUI's claim does not merit any special treatment." (citing *Seariver Maritime Financial Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002))).

79. *See supra* text accompanying note 23.

80. Appellant's Opening Brief at 52–53, RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004) (No. 02-15762).

designed to avoid the fundamental unfairness that would result if a government could rewrite the terms of its bargains via legislative fiat.

The *RUI One Corp.* majority, however, met RUI's Contract Clause argument by raising the specter of *Lochner*-era economic due process,[81] and thereby gave the impression that the argument was unlikely to be taken seriously. The majority, instead, should have heeded the Supreme Court's advice: "We ought not to shy away from our judicial duty to invalidate unconstitutional [legislative acts] solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era."[82] Moreover, it is not the case that "any inquiry beyond the narrowest rendering of the contract risks resurrection of *Lochner v. New York*": economic due process prohibited interference with certain prospective contracts, whereas the Contract Clause forbids state and local governments from retroactively impairing existing contracts.[83]

1. Inapplicability of Prevailing Supreme Court Precedent

The majority treated the Supreme Court's last word on the Contract Clause, *General Motors Corp. v. Romein*, as *the* controlling authority on the issue,[84] and applied its holding in a formalistic, doctrinaire fashion with no regard to the factual divergence between the two cases. As such, closer attention to the controversy in *Romein* is appropriate.

That case, decided in 1992, involved a Michigan statute that permitted employers to decrease the level of workers' compensation benefits paid to disabled employees eligible for compensation from other employer-funded sources (the so-called "coordination" of

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81. The majority, while focusing on minimum wage laws generally rather than on the offending aspects of the Marina Amendment, noted simply, "Although the United States Supreme Court struck down some of the earliest minimum wage statutes under its now-defunct economic due process analysis . . . it eventually upheld their validity . . . ." *RUI One Corp.*, 371 F.3d at 1141–42 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)). It also disparaged RUI's citation to two Contract Clause cases decided "during the heyday of economic due process." *See id.* at 1151 (citing *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, 439 (1923); and *Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U.S. 84, 92–93 (1913)).

82. Ind. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment); *see also* Allied Structural Steel v. Spannaus, 438 U.S. 234, 241 (1978) ("Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment . . . . Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter." (citations omitted)).

83. *See RUI One Corp.*, 371 F.3d at 1164 (Bybee, J., dissenting).

84. *See id.* at 1148 (asserting that RUI had acknowledged "that *Romein* controls our decision").

benefits).[85] General Motors and other petitioners interpreted this statute to permit their reduction of future payments for workers injured before its effective date in 1982, and three years later the Michigan Supreme Court agreed.[86] As employers began demanding reimbursement from employees injured before 1982, the Michigan legislature reacted by passing a bill to repudiate the court decision and prevent the "coordination" of benefits. The petitioners, having been ordered to refund about $25 million to disabled employees, argued that this new law violated the Contract Clause by impairing their employment agreements with these employees.[87]

The U.S. Supreme Court disagreed. Justice O'Connor wrote that the Court need not determine whether a contractual relationship was impaired because "there was no contractual agreement *regarding the specific workers' compensation terms* allegedly at issue."[88] The Court rejected the petitioners' argument that the state had impaired an implied term providing that the employers would pay the amount of benefits required by the law in effect during each payment period. Since the employment contracts were formed before the "coordination" statute's enactment in 1981, actual agreement on the issue was obviously impossible;[89] and a state law upon which contracting parties may rely is not incorporated into the contract unless it affects "the validity, construction, and enforcement" of the contract.[90]

Even under a strict application of the *Romein* analysis (requiring agreement on the precise issue of the challenged legislation), the Ninth Circuit in *RUI One Corp.* should have found a "substantial impairment." The majority cited two recent Ninth Circuit cases[91] in which the courts found impairment of a "contractual expectation" —despite the lack of an *explicit* term on point—created by a "fair reading" of the contract terms and a prior "course of dealing" between the government and private contractor.[92] In like manner, the majority

85. *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 184 (1992).

86. *See id.* at 185 (*citing Chambers v. General Motors Corp.*, 375 N.W.2d 715 (Mich. 1985)).

87. *Id.* at 185–86.

88. *See id.* at 186–87 (emphasis added).

89. *See id.* at 188.

90. *Id.* at 189.

91. *See* RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1149 (9th Cir. 2004) (citing *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003); and *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1099 (9th Cir. 1999)).

92. *See id.* The court distinguished RUI's claim, without further analysis, solely on the ground that its pay scale was not "clearly part of the bargained-for agreement." *See id.*

ought to have acknowledged the longstanding "course of dealing" under which the City of Berkeley imposed obligations and financial burdens upon its lessees on a prospective basis.[93] The Marina Amendment thus nullifies this contractual expectation and imposes "a completely unexpected liability in potentially disabling amounts."[94]

More fundamentally, however, the state law challenged in *Romein* is distinguishable from the Marina Amendment. The differences between the two situations are important and readily discernible: (1) the *Romein* case involved private contracts rather than a contract to which the state was a party, and thus it could not have involved a law forced exclusively upon municipal contractors or lessees; (2) it involved a generally applicable law rather than an imposition on a single business enterprise; and (3) there was no evidence of any motivation to secure a benefit for a special interest group. The Michigan law in *Romein* was simply the clarification of a state-created scheme and had an incidental impact on private contractual relationships.[95] The Marina Amendment, in contrast, is an obligation imposed by legislative decree on a sole municipal lessee for the benefit of the City of Berkeley and a favored labor union.

2. Implications for the Contract Clause Analysis

As stated above, the majority in *RUI One Corp.* disregarded the above-noted factual distinctions and ended its inquiry with a narrow application of the "substantial impairment" prong of the Contract Clause analysis.[96] But these distinctions render prevailing Supreme Court precedent inapplicable, and thus require adjustment of the Contract Clause inquiry in light of its attendant policy considerations. Even assuming arguendo that the RUI lease in no way contemplated the wage levels of RUI's employees, the court ought to have gone further to inquire "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship"[97] in at least one

93. *See id.* at 1162–63 (Bybee, J., dissenting) ("Moreover, Berkeley established a course of dealing with RUI. Berkeley does not allege that it ever, in the more than 30 years that RUI or its predecessor in interest has held a lease at the Marina, previously sought to set the wages its lessees paid their employees.").

94. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978).

95. *Cf.* Exxon Corp. v. Eagerton, 462 U.S. 176, 191–92 (1983) ("The effect of the pass-through prohibition on existing contracts that did contain such a provision was incidental to its main effect of shielding consumers from the burden of the tax increase.").

96. *See RUI One Corp.*, 371 F.3d at 1148–51.

97. *Cf. Allied Structural Steel Co.*, 438 U.S. at 244; Ga. Ry. & Power Co. v. Town of Decatur, 262 U.S. 432, 439 (1923).

of two ways.[98]

The first manner of "substantial impairment" in the *RUI One Corp.* context is the imposition of an entirely new contract term. This broader inquiry—the examination of not only what was altered in the contract, but also of what was added to it—is made appropriate by two aspects of the controversy: the public nature of the RUI lease and the narrow application of the Marina Amendment.[99] Where a state or municipality has enacted a broadly applicable law, the Contract Clause is no barrier because the government is, in essence, reaching *past* the contract at issue to remedy a societal problem. But where a law applies *only* to municipal contractors or lessees on a retroactive basis, the only parties involved in and implicated by the legislation are also parties to a contract. It is apparent in such a case that the government is reaching *into* the contractual relationship and altering it. In the *RUI One Corp.* context, the City of Berkeley did so by grafting onto the RUI lease a new obligation to pay a "living wage."[100] Judge Bybee articulated the logical consequences of the panel majority's holding:

> The Contract Clause's protections cannot be so easily circumvented by faulting RUI for failing to negotiate "specific terms" regarding matters it could not have anticipated. If that were so, then nothing would prevent Berkeley-the-sovereign from requiring RUI to hang new signage, redecorate its dining room, or do anything else that Berkeley-the-market-participant "forgot" to include in its lease. Even worse, Berkeley could legislate terms that it attempted, but failed, to negotiate.[101]

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98. As only public contracts are at issue, invalidation on these bases need only be "a rare phenomenon, turning on the Court's particularized appraisal of the facts before it." *See* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 60 (1977) (Brennan, J., dissenting).

99. *See United States Trust Co.*, 431 U.S. at 25–26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").

100. *Cf. Allied Structural Steel Co.*, 438 U.S. at 245–47. One should also note the Court's statement in *Exxon Corp. v. Eagerton*: "Similarly, the statute at issue in *Allied Structural Steel Co.* directly 'adjust[ed] the rights and responsibilities of contracting parties.' . . . Since the statute applied only to employers that had entered into pension agreements, its sole effect was to alter contractual duties." 462 U.S. at 192. This was contrasted with permissible regulation which has an "incidental effect on pre-existing contracts." *Id.* at 194 (comparing *Producers' Transportation Co. v. Railroad Commission of California*, 251 U.S. 228 (1920)); *see also id.* at 192 (citing *Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935), which invalidated a statute limiting the remedies available to mortgagees); Ross v. City of Berkeley, 655 F. Supp. 820, 833 (N.D. Cal. 1987) ("Unlike a broad rule of general conduct impacting incidentally on the leases in question, it applies exclusively and explicitly to the contractual obligations of the narrow group of lessors and lessees in the Telegraph Avenue commercial district of the City, and confers a direct benefit on one class at the expense of the other.").

101. *RUI One Corp.*, 371 F.3d at 1163 (Bybee, J., dissenting).

In order to constrain such arbitrary lawmaking, any obligation imposed on a narrow class consisting *exclusively* of state or municipal contractors or lessees, for which the municipality could properly have negotiated ex ante,[102] should be understood as a new contract term and thus as an impairment of the preexisting contractual relationship.

An alternative, narrower approach to the Contract Clause in this context would inquire whether the challenged legislation represents the government's foisting of considerable obligations upon a contractor or lessee such that the latter is compelled to abandon its contractual rights.[103] The Marina Amendment, like any other substantial financial obligation the City might have retroactively imposed upon RUI, could impair, albeit indirectly, the City's obligation to lease the premises to RUI for a specified term and under specified conditions. The *RUI One Corp.* majority's holding imposes no obvious limits on the magnitude of a permissible financial imposition, and so presumably the court would countenance one sufficiently burdensome as to render RUI's doing business at the Marina impracticable.[104] State and municipal governments, quite simply, have been given license to arbitrarily force out a disfavored lessee or contractor; the Ninth Circuit's approach thus permits a government "to nullify a duty [it] had previously obligated [itself] to perform."[105] This is the *functional* equivalent of, for example, the state's directly repealing its own covenant with bondholders in *United States Trust Co. of New York v. New Jersey*.[106] Where a state or

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102. The realm of appropriate ex ante negotiation is, in the easiest case, revealed by the items over which the parties actually have negotiated in the past. In the *RUI One Corp.* context, the LWO itself proves the appropriateness of incorporating a "living wage" requirement as a point of voluntary negotiation.

103. This approach would seem to be "narrower" because a new contract term may "substantially impair" a contractual relationship (under the prevailing *Romein* analysis) and yet not be so substantial as to force the contractor or lessee to abandon its rights. This second approach, in other words, represents a de facto higher threshold of impairment.

104. This may be the case even here. RUI presented evidence that the increased annual cost of meeting the requirements of the Marina Amendment "would be approximately between $121,590 in 2001 if RUI's heath benefits qualify . . . or $200,000 if they do not." If RUI cannot credit tips as contributing to a "living wage" level, an option which the Local 2850 opposes, "the total cost is projected to reach $590,742 per year." *See* Appellant's Opening Brief at 17, RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004) (No. 02-15762).

105. *Compare Allied Structural Steel Co.*, 438 U.S. at 244–45 & n.16 ("The narrow view that the Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them . . . has [] been expressly repudiated." (citing, *e.g.*, *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432 (1923))), *with id.* at 258 (Brennan, J., dissenting) ("It is nothing less than an abuse of the English language to interpret, as does the Court, the term 'impairing' as including laws which create new duties.").

106. *See* 431 U.S. at 4–14; *see also RUI One Corp.*, 371 F.3d at 1173 (Bybee, J., dissenting) ("Under the majority's holding, contractual silence authorizes a municipality to impose

municipality accomplishes a debilitating imposition in a manner that avoids the political hurdles of general applicability, it should again be obvious that the government is reaching *into* a contractual relationship and extinguishing it by legislative decree.

3. Policy Considerations

Recognizing the significance of a retroactive imposition on a narrow class consisting exclusively of state or municipal contractors, in sum, represents a "broader, and . . . more common-sense"[107] approach to the Contract Clause in this particular context. Importantly, the approach would be supported by two key policy considerations underlying the Supreme Court's Contract Clause jurisprudence.

First, the Marina Amendment's lack of general applicability is of principal concern.[108] As in *Exxon Corp. v. Eagerton*, the Supreme Court has distinguished a "generally applicable rule of conduct" from one applied directly and exclusively to contracting parties.[109] The Court has done so because a primary purpose of the Contract Clause is to preserve property rights against an unprincipled political majority.[110] A government's burdening of a numerically small class

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additional terms on particular contracting parties - so long as the municipality cloaks the additional requirements in the form of a legislative enactment. Even more than the obvious unfairness of such unfettered license, it erodes democratic accountability by allowing governments to foist the costs of special interest legislation onto politically weak groups." (citing *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445–46 (1915))).

107. *Cf. RUI One Corp.*, 371 F.3d at 1161 (Bybee, J., dissenting).

108. The Ninth Circuit panel majority itself provided evidence of the importance of general applicability. It cited a Santa Monica, California "living wage" ordinance generally imposed on all private employers regardless of city contracts or leases, and then noted without comment that the citizens of Santa Monica promptly repealed the ordinance "via voter initiative." *See id.* at 1142–43 (citing *Santa Monica, Calif., Adopts First 'Living Wage" Law*, WALL ST. J., July 26, 2001, at B4). One is unlikely to see such broad-based political mobilization on behalf of RUI or any other individual entity.

109. *See* 462 U.S. 176, 192 (citing *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–28 (1977); and *Allied Structural Steel Co.*, 438 U.S. at 244).

110. *See RUI One Corp.*, 371 F.3d at 1171 (Bybee, J., dissenting) ("'The principal danger addressed by the contracts clause is that the government will favor one determinate set of persons over another . . . .'" (quoting Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 289 (1988))); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 719 ("To allow a state to repudiate its contracts unilaterally, however, is to invite the very abuses of factional coalition that the contract clause was designed to prevent, for we can be sure that almost every repudiation will provide benefits to some groups at the expense of others."); *see also* Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 926 (1984) ("The procedural approach to the contract clause, with its requirements of generality and prospectively, is therefore desirable policy: It increases the chances that only impairments in the public interest will be made.").

presents "a danger [] that the legislature acted less out of concern for the general good than for special interests or even its own interests."[111] The clause, therefore, should be given robust effect where a failure of the political process is evident, such as where a law targets a single business entity because of its mere possession of a municipal lease. The controversy in *RUI One Corp.* was of this nature, and was replete with evidence of undue influence by a special interest group.[112] Courts should not sanction governmental acts pursuant to an analysis in which "[t]he stated objectives merely give a public policy appearance to what is really private interest legislation."[113]

Invalidation of the Marina Amendment would have been consistent with a second policy of modern Contract Clause jurisprudence. *Home Building & Loan Ass'n v. Blaisdell*[114] and its progeny, which retreated from the robust Contract Clause jurisprudence of the nation's early years,[115] have refocused the analysis with an eye toward safeguarding the state's police power, that is, "the reserved power of the State to protect the vital interests of the community."[116] The *RUI One Corp.* majority rested its holding, in significant part, on this aspect of Supreme Court precedent.[117] Yet restricting a municipality from legislating against a narrow class consisting exclusively of contractors or lessees poses no threat to "the reservation of essential attributes of sovereign power [that is] read into contracts as a postulate of the legal order."[118] The *Blaisdell* Court's concern with retaining the essential

111. *RUI One Corp.*, 371 F.3d at 1172 (Bybee, J., dissenting). One should note, as did Judge Bybee, the Supreme Court's admonition to "examine Contract Clause challenges for 'circumstantial evidence' that 'a small number . . . were singled out from [a] larger group' and search for 'any indication that the . . . political process ha[s] broken down." *Id.* (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 417 (1983)).

112. *See RUI One Corp.*, 371 F.3d at 1160 (Bybee, J., dissenting) ("It exhorted the Council not to 'leave behind . . . the [Marina hotel] workers, who worked so hard to get [the LWO] passed."); *see also* Appellant's Opening Brief at 44, RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004) (No. 02-15762) (noting that the Local 2850 lobbied for the Marina Amendment in order to strengthen its bargaining position with another lessee, the Radisson Hotel). The majority dismissed this evidence with a single footnote. *See RUI One Corp.*, 371 F.3d at 1146 n.7.

113. *See* Associated Builders & Contractors v. Baca, 769 F. Supp. 1537, 1551 (N.D. Cal. 1991).

114. 290 U.S. 398 (1934).

115. *See generally* Robert A. Graham, Note, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398, 401–13 (1993).

116. *See Blaisdell*, 290 U.S. at 439.

117. *See RUI One Corp.*, 371 F.3d at 1149.

118. *See Blaisdell*, 290 U.S. at 435; *see also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 190 (1992) ("Moreover, petitioners' construction would severely limit the ability of state

police power was clarified by its admonition that the "legislation [must be] addressed to a legitimate end; that is, the legislation [must not be] for the mere advantage of particular individuals but for the protection of a basic interest of society."[119] The Marina Amendment, applicable perhaps only to RUI, addresses no *broad* social problem but rather confers benefits upon a favored special interest and thus should be disfavored under Contract Clause scrutiny.[120] Conversely, the "broader . . . more common-sense" approach to the Contract Clause would permit the City Council to enact a *generally applicable* "living wage" ordinance. The RUI-Berkeley lease is thus not "a contract that surrenders an essential attribute of [the City's] sovereignty."[121]

V. CONCLUSION

The strictures of the *Romein* holding are simply not appropriate when a state or municipality has enacted a law that applies only to a narrow class of government contractors or lessees and that imposes a requirement for which the government could have freely negotiated upon entering the agreement. Nevertheless, the U.S. Supreme Court denied RUI's petition for a writ of certiorari on January 10, 2005.[122] In *RUI One Corp. v. City of Berkeley*, therefore, the Court has

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legislatures to amend their regulatory legislation. Amendments could not take effect until all existing contracts expired, and parties could evade regulation by entering into long-term contracts."); United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22 (1977) ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.").

119. *See Blaisdell*, 290 U.S. at 445 (focusing on the reasonable and temporary abatement of an emergency); *see also id.* at 439 ("Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power."). *But see* Veix v. Sixth Ward Bldg. & Loan, 310 U.S. 32, 39 (1940) (abandoning the emergency requirement).

120. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978); *see also* Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983) (distinguishing *Allied Structural Steel Co.* on the ground that "[t]he State had not acted to meet an important general social problem. The pension statute had a very narrow focus: it was aimed at specific employers. Indeed, it even may have been *directed at one particular employer* planning to terminate its pension plan when its collective-bargaining agreement expired." (citing *Allied Structural Steel Co.*, 438 U.S. at 247–48 & n.20)).

Given the non-applicability of the police power justification in this context, the Court should have instead promoted another "general purpose of the Clause," which is "to encourage trade and credit by promoting confidence in the stability of contractual obligations." *See United States Trust Co.*, 431 U.S. at 15 (citing *Blaisdell*, 290 U.S. at 427–28).

121. *See United States Trust Co.*, 431 U.S. at 23; *cf.* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 541 (1987) ("[O]nce the scope of the police power is expanded to encompass the state's interest in advancing the public welfare (including the improvement of resource distribution), the invocation of police power may often conflict with the original purpose of the [Contract] Clause.").

122. 73 U.S.L.W. 3399 (No. 04-582).

bypassed an excellent opportunity to adjust and clarify its Contract Clause jurisprudence.[123] It has instead left standing a significant grant of authority to state and municipal governments to rewrite the terms of their binding agreements one at a time. Prospective parties to such contracts should take note and bargain accordingly.

123. The Court should have reversed and remanded, at which point the Marina Amendment would likely have failed the second (whether justified by a significant and legitimate purpose) and third (whether a reasonable and appropriate response) prongs of the Contract Clause inquiry. *See Allied Structural Steel Co.*, 438 U.S. at 247–48 (holding that the challenged law was not "necessary to meet an important general social problem" because "whether or not the legislation was aimed largely at a single employer, it clearly has an extremely narrow focus" and protects only a "narrow class"); *United States Trust Co.*, 431 U.S. at 31 ("Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.").