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Far From a "Dead Letter": The Contract Clause and *North Carolina Association of Educators v. State*

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FAR FROM A "DEAD LETTER": THE CONTRACT CLAUSE AND *NORTH CAROLINA ASSOCIATION OF EDUCATORS V. STATE*[*]

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The Contract Clause, which prohibits state interference with the obligations of contracts, has fallen from its prior preeminence in American jurisprudence. During early American history, in the words of the Supreme Court, the Contract Clause "was perhaps the strongest single constitutional check on state legislation." In 1878, the Court declared that there "was no more important provision in the federal Constitution" than the Contract Clause. Yet, years later, the Contract Clause was so rarely invoked and of such "negligible importance" that some argued that it may as well have been "stricken from the Constitution." For much of the twentieth century, the Contract Clause was more of a historical footnote than a prevailing argument.

A recent case in the Supreme Court of North Carolina demonstrates the renewed prominence of the Contract Clause. The case, North Carolina Association of Educators v. State*, concerned a challenge to a state statute that revoked career status for teachers. The state supreme court struck down the state statute on Contract Clause grounds.*

Rather than a dead letter, the Contract Clause remains relevant in modern times. This Article provides a concise overview of the Contract Clause and an analysis of this recently decided North Carolina case. The case and its treatment of the Contract Clause present lessons for jurists and litigants in North Carolina and across the country.

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INTRODUCTION

What the state giveth, so may the state taketh away? When it comes to contracts with the states, the answer is no, due to the Constitution's Contract Clause.[1] In relevant part, the Clause forecloses the ability of states to "pass any . . . [l]aw impairing the Obligation of Contracts."[2] The Clause prohibits states from taking actions that would retroactively interfere with obligations that arise under contract.[3]

The Contract Clause was a response to considerable historical need during America's founding period. In Federalist No. 44, James Madison noted that the "sober people of America" were "weary of the fluctuating policy" of legislative interferences in cases affecting

1. *See* U.S. CONST. art. I, § 10, cl. 1.

2. *Id.* For a definitive treatment of the Contract Clause from its origins to the modern day, see generally JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016).

3. Elmer W. Roller, *The Impairment of Contract Obligations and Vested Rights*, 6 MARQ. L. REV. 129, 129 (1922).

personal rights.[4] Madison argued that the Clause was a "constitutional bulwark in favor of personal security and private rights."[5] In Chief Justice John Marshall's characterization, the state intrusion upon contracts at the time of the founding "had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith."[6]

Chief Justice Marshall posited having all contracts subject to legislative control would be untenable, for to do so would mean that each contract would contain a condition that its obligations might be discharged as the legislature prescribed.[7] In Marshall's reasoning, states were "restrained from impairing the obligation of contracts, but they furnish[ed] the remedy to enforce them, and administer[ed] that remedy in tribunals constituted by themselves."[8] Put another way, if there was no Contract Clause, states entering into contracts could cancel the contract by edict while also setting the law by which contracts disputes are adjudicated.[9]

This Article explores the Contract Clause within the context of a recently decided Supreme Court of North Carolina case, *North Carolina Association of Educators v. State*[10] ("*NCAE*" or "*NCAE v. State*"). The case resulted from State actions that had the effect of eliminating tenure over time for public school teachers who had such status and prohibiting those that did not from ever obtaining tenure, or more technically termed, achieving "career status."[11] Ultimately, the case was decided on Contract Clause grounds, with the state supreme court ruling that the removal of career status for teachers was unconstitutional and violative of the Contract Clause.[12]

The ruling in *NCAE v. State* demonstrates the continuing relevance of the Contract Clause, which was once thought to be a dead letter. Demonstrating that the Contract Clause is far from

4. THE FEDERALIST NO. 44, at 229 (James Madison) (Ian Shapiro ed., 2009).

5. *Id.*

6. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354–55 (1827) (Marshall, C.J., dissenting) (discussing his concerns about a legislature's power to change the "relative situation of debtor and creditor," which "had been used to such an excess by the state legislatures").

7. *See id.* at 339.

8. *Id.* at 350–51; *see also* JASON MRAZ, *The Remedy (I Won't Worry)*, *on* WAITING FOR MY ROCKET TO COME (Elektra 2002) ("[Y]ou were born on the Fourth of July . . . [A]nd what kind of God would serve this? We will cure this dirty old disease.").

9. *See Ogden*, 25 U.S. (12 Wheat.) at 352–53 (Marshall, C.J., dissenting).

10. 368 N.C. 777, 786 S.E.2d 255 (2016).

11. *Id.* at 779, 786 S.E.2d at 257–58.

12. *Id.* at 792–93, 786 S.E.2d at 266.

obsolete, the *NCAE* ruling presents powerful Contract Clause argumentation that can shape the future of public employee tenure across the country.[13] While teacher tenure politics are controversial, the constitutional questions involving the Contract Clause are salient across various domains and contexts.[14]

Part One provides a concise overview of the Contract Clause and the historical antecedents for the state supreme court's decision in *NCAE v. State*. Part Two explores the *NCAE* case in depth, from the trial court opinion to that of the state supreme court, paying particular attention to the jurists' use of Contract Clause arguments. Part Three considers public employment law principles generally. Part Four reviews public employment law in North Carolina. Part Five utilizes the framework of the *NCAE* case to analyze the case's and the Contract Clause's potential applicability to other public employees in North Carolina and around the country.

I. CONTRACT CLAUSE JURISPRUDENCE: A BRIEF HISTORY

The Contract Clause was, for a time, one of the most heavily litigated provisions of the Constitution.[15] Until the late 1800s, no other clause, apart from the Commerce Clause, was the subject of the Supreme Court's attention more than the Contract Clause.[16] As one example, the Supreme Court found that a corporate charter given to Dartmouth College could not be modified by state law without the express reservation of the power to modify that contract.[17] According to one estimate, the Clause had been considered by the Court in approximately forty percent of its cases involving the validity of state legislation prior to 1889.[18] The Contract Clause was "the most widely used protection of individual property rights against state regulation"

13. Tommy Tobin, *N.C. Case May Change Teacher Tenure in U.S.*, CHARLOTTE OBSERVER (Apr. 23, 2016), http://www.charlotteobserver.com/opinion/op-ed/article73382107.html [http://perma.cc/M9D9-KKST].

14. For example, the Supreme Court recently decided a case regarding the applicability of the Contract Clause to a life insurance question. *See* Sveen v. Melin, 138 S. Ct. 1815, 1824–26 (2018) (holding that Minnesota's retroactive application of a law nullifying an ex-spouse's beneficiary designation on a life-insurance policy does not violate the Contract Clause).

15. James W. Ely, Jr., *The Contract Clause During the Civil War and Reconstruction*, 41 J. SUP. CT. HIST. 257, 272 (2016).

16. BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 91–92 (1938).

17. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819).

18. WRIGHT, *supra* note 16, at 95.

and was so successful that nearly half of the state laws challenged under the Clause were declared invalid by the Court.[19]

In 1878, Justice William Strong wrote that there was "no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts."[20] For Justice Strong, protecting the Contract Clause was "one of the highest duties" of the Court so as "to take care the prohibition shall neither be evaded nor frittered away."[21] Indeed, in the words of a later Court, the Contract Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation."[22]

Following the 1870s and the rise of due process theories rooted in the Fifth and Fourteenth Amendments, the Contract Clause experienced a considerable decline in both relevance and utility in constitutional argumentation.[23] The Contract Clause fell into disfavor because the Due Process Clause had a far broader scope of application.[24] Courts wrestling with the Contract Clause had to overcome its limitations, such as when individual contractual rights faced countervailing pressures from states articulating their "inalienable" police power.[25] One of the limitations involved with the application of the Contract Clause is the inherent tension between a state's abilities to regulate under their police powers, including furnishing *remedies*, and the Clause's prohibition on limitations regarding the *obligations* of contract.[26] In addition to this remedies-obligations distinction, the Contract Clause was also limited in its application to current contracts, not contracts that were contemplated

19. Janet Irene Levine, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation*, 12 LOY. L.A. L. REV. 927, 930 (1979) (quoting WRIGHT, *supra* note 16, at 95).

20. Murray v. Charleston, 96 U.S. 432, 448 (1878).

21. *Id.*

22. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).

23. *See* Ely, *supra* note 15, at 272 ("[T]he decade of the 1870s constituted a high water mark for the significance of the Contract Clause in constitutional history."); Levine, *supra* note 19, at 930–31.

24. Carlen A. Petersen, *The Contract Clause: The Use of a Strict Standard of Review for State Legislation That Impairs Private Contracts*—Allied Structural Steel Co. v. Spannaus, 28 DEPAUL L. REV. 503, 506 (1979). As noted by the Court itself, "the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history." *Allied Structural Steel Co.*, 438 U.S. at 241.

25. *See* Petersen, *supra* note 24, at 506.

26. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200–01 (1819) (discussing whether imprisonment for a debt was a remedy or obligation of the contract).

or possible in the future.[27] Courts, going into the New Deal, needed to square the constitutional grant of state police powers with the Contract Clause's restriction of those powers.

In 1934, *Home Building & Loan Ass'n. v. Blaisdell*[28] ushered in another era of Contract Clause jurisprudence, aiming to balance the competing interests of state power against the restrictions of the Contract Clause. The *Blaisdell* Court attempted to bring balance to the force of the Contract Clause:

> Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other.[29]

Subsequent courts have noted that *Blaisdell* stands for the proposition that the prohibitions of the Contract Clause "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people."[30] The *Blaisdell* decision was used subsequently to provide for "lenient evaluation[s] of state legislation that impair[ed] contracts."[31] Following *Blaisdell*, the Court came to apply a loose test that balanced the means and ends of state action. For example, the Court in *City of El Paso v. Simmons*[32] deferred to the "wide discretion on the part of the legislature in determining what is and what is not necessary."[33] The Court has even gone so far as to say that state police power is "an implied condition of every contract," which is "as much part of the contract as though it were written into it" and that a "[s]tate's exercise of its power enforces, and does not impair, a contract."[34] The Court's finding that the power of the state "is not diminished because a private contract may be affected" is demonstrative of the extent to which the balancing test threatened to eviscerate the Contract Clause, tipping the balance in favor of upholding the challenged action.[35]

27. Petersen, *supra* note 24, at 505; *see also* WRIGHT, *supra* note 16, at 28.

28. 290 U.S. 398 (1934).

29. *Id.* at 439.

30. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983) (quoting *Blaisdell*, 290 U.S. at 434).

31. Levine, *supra* note 19, at 931.

32. 379 U.S. 497 (1965).

33. *Id*. at 508–09 (quoting E.N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 233 (1945)).

34. E.N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232 (1945).

35. *Id.* at 233.

Following the New Deal's balancing test that favored state action, the Contract Clause's continued vitality was held in doubt. Indeed, only one time in the thirty-seven years from 1940 until 1977 did the Supreme Court find state action unconstitutional as violating the Contract Clause.[36] Leading contemporary constitutional commentators argued that "the clause [was] of negligible importance, and might well be stricken from the Constitution."[37] Some have argued that the emergence of Due Process Clause jurisprudence led to the same results as "if the [C]ontract [C]lause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property."[38]

The late 1970s brought a pair of cases, *United States Trust Co. of New York v. New Jersey*[39] and *Allied Structural Steel Co. v. Spannaus*,[40] that revitalized the Clause's utility in constitutional argumentation.[41] In *United States Trust Co.*, the states of New York and New Jersey passed legislation repealing a statutory covenant, which had the effect of modifying the terms of certain bonds.[42] The Court found for the bondholders on Contract Clause grounds[43] and articulated the modern test for judicial review of Contract Clause cases involving public contracts: whether an impairment to a contract is *reasonable* and *necessary* to serve an *important* public purpose.[44] This test was a departure from *Blaisdell*'s balancing test, that the police power of a state would sustain state action if that action was addressed "to a legitimate end and the measures taken are reasonable and appropriate to that end."[45] Not only would state actions need to serve an important purpose but the methods used would now need to be both reasonable and necessary to achieve that purpose.

Over time, the *United States Trust Co.* test has been articulated as a three-pronged analysis, wherein courts inquire "(1) whether a contractual obligation is present, (2) whether the state's actions

36. Levine, *supra* note 19, at 938 n.75. That case was *Wood v. Lovett*, 313 U.S. 362, 369 (1941).

37. HAROLD W. CHASE & CRAIG R. DUCAT, EDWARD S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (13th ed. 1973).

38. Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 890–91 (1944).

39. 431 U.S. 1 (1977).

40. 438 U.S. 234 (1978).

41. *See* Jordan Bleznick, Comment, *Revival of the Contract Clause*, 39 OHIO ST. L.J. 195, 195 (1978).

42. *U.S. Tr. Co. of N.Y.*, 431 U.S. at 9–10, 14.

43. *Id.* at 32.

44. *See id.* at 25.

45. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1934).

impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose."[46] The *United States Trust Co.* Court found a state was not "completely free to consider impairing the obligations of its own contracts on par with other policy alternatives" the state was considering.[47]

The *United States Trust Co.* case involved state bonds sold with a particular covenant, which the state had retroactively repealed years later to free money for other purposes. Reciting the facts, the Court noted that the covenant's purpose was to invoke the Contract Clause as a security against repeal for the bondholders.[48] In this context, the Court analyzed the differences between a state action affecting private contracts and those actions that impaired the obligations of a state's own contracts. The Court found a different basis for reserved police power arguments when the state affected its own contracts, as the state's self-interest was at stake.[49] The *United States Trust Co.* Court noted that a state's own contracts would face greater judicial scrutiny under the Contract Clause than would laws regulating contractual relationships between private parties.[50] To this point, the Court wrote,

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[51]

In *United States Trust Co*., the Court had the opportunity to read the Contract Clause out of the Constitution. It chose not to do so. Instead, the Court noted that the Contract Clause exists and limits state action.[52] In 1978, a second Supreme Court case, *Allied*, made it even more clear: "the Contract Clause remains part of the Constitution. It is not a dead letter."[53]

46. Bailey v. State, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998) (citing *U.S. Tr. Co. of N.Y.*, 431 U.S. 1, 17–32); *see also* Gen. Motors v. Romein, 503 U.S. 181, 186 (1992) (inquiring "whether the impairment [was] substantial," as required by the third prong).

47. *U.S. Tr. Co. of N.Y.*, 431 U.S. at 30–31.

48. *Id.* at 18.

49. *Id.* at 25–26.

50. *See id.* at 22–26.

51. *Id.* at 26.

52. *Id.* at 16 (noting that case law does not indicate that "the Contract Clause [is] without meaning in modern constitutional jurisprudence, or that its limitation on state power [is] illusory").

53. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).

In *Allied*, the Court wrestled with a Minnesota law that affected employee pension plans and associated fees. The Court noted that the "severity of the impairment" to the contractual obligations "measures the height of the hurdle the state legislature must clear."[54] In evaluating the application of the Contract Clause to modern times after *United States Trust Co.*, the *Allied* Court noted that "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[55] Whereas *United States Trust Co.* evaluated the impairment of a contract with the state, *Allied* extended the Court's revitalized Contract Clause standards to private contracts.[56] After *United States Trust Co*. and *Allied*, the Contract Clause serves as a limitation on states when they enact new legislation, even when a statute details its intended benefits to society.[57]

Today, *United States Trust Co.* and *Allied* guide modern jurists and litigants in assessing whether state actions violate the prohibitions of the Contract Clause.[58] Even so, the utilization and relevance of Contract Clause jurisprudence remains far less common today than in its nineteenth century heyday. For example, cases involving public employees have more commonly utilized due process arguments rather than the Contract Clause.[59] The use of Contract Clause jurisprudence regarding public employees has been relatively rare compared to arguments relating to due process rights.[60] Between the *United States Trust Co.* decision in 1977 and 1990, the Supreme Court

54. *Id.* at 245.

55. *Id.* at 242.

56. *See* Petersen, *supra* note 24, at 518.

57. *Id.*

58. *See, e.g.*, Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs., 876 F.3d 926, 932 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2624 (2018) (mem.); Metro. Life Ins. Co. v. Melin, 853 F.3d 410, 412 (8th Cir. 2017), *rev'd sub nom.* Sveen v. Melin, 138 S. Ct. 1815 (2018); Nev. Emps. Ass'n v. Keating, 903 F.2d 1223, 1226 (9th Cir. 1990). *See generally* Ely, *supra* note 15, at 241–45 (describing the Contract Clause within a more recent context).

59. *See* Recent Case, North Carolina Ass'n of Educators, Inc. v. State*, No. 13 CVS 16240, 2014 WL 4952101 (N.C. Super. Ct. June 5, 2014)*, 128 HARV. L. REV. 995, 997–98 ("Although the Supreme Court has more commonly analyzed tenure rights through the lens of due process, New Deal–era precedent recognizes that constitutionally protected contractual rights may inhere in the legislative grant of teacher tenure." (footnote omitted)).

60. *See id.*

did not examine the constitutionality of a public contract under the Contract Clause.[61]

However, several more modern cases at the intermediate appellate court level have attacked state actions on Contract Clause grounds. One case in the Fourth Circuit involved a teachers' union in Baltimore that alleged that a new furlough program resulting in salary reductions violated the Contract Clause as an impermissible impairment of their contracts with the city.[62] The Fourth Circuit ruled that the augmentations to the teachers' contracts did not violate the Contract Clause given the necessity due to the city's fiscal circumstances at that time. The Fourth Circuit panel went so far as to note that the judiciary may not be the proper forum for such a challenge:

> The authority of the states to impair contracts, to be sure, must be constrained in some meaningful way. The Contract Clause, however, does not require the courts—even where public contracts have been impaired—to sit as superlegislatures, determining, for example, whether it would have been more appropriate instead for Baltimore to close its schools for a week, an option actually considered but rejected, or to reduce funding to the arts, as appellees argue should have been done. Not only are we ill-equipped even to consider the evidence that would be relevant to such conflicting policy alternatives; we have no objective standards against which to assess the merit of the multitude of alternatives.[63]

Moreover, the Fourth Circuit panel noted that the circumstances of public employees were unique and the terms of their public employment may need to change during certain times. The court ruled that: "[p]ublic employees—federal or state—by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest."[64]

61. *Nev. Emps. Ass'n*, 903 F.2d at 1226 ("The Supreme Court has not examined the constitutionality of a state law which impairs a public contract since *Trust Co.*").

62. Balt. Teachers Union v. Mayor of Balt., 6 F.3d 1012, 1014 (4th Cir. 1993).

63. *Id.* at 1021–22. *But see* Mass. Cmty. Coll. v. Commonwealth, 649 N.E.2d 708, 716 (Mass. 1995) (finding that unpaid furloughs for certain state employees violated the Contract Clause); Opinion of the Justices (Furlough), 609 A.2d 1204, 1211 (N.H. 1992) ("[T]he state cannot resort to contract violations to solve its financial problems.").

64. *Balt. Teachers Union*, 6 F.3d at 1021 ("It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice.").

In 1997, the First Circuit heard a challenge from Maine public school teachers relating to alterations to the state's public pensions.[65] The circuit court reversed the district court's finding of a Contract Clause violation, reasoning that the Contract Clause required clear and unmistakable evidence that the state intended to bind itself contractually, using the aptly named "unmistakability doctrine" of Contract Clause jurisprudence.[66] The panel ruled that "[a]s Contract Clause challenges arise," courts must look to the language of statutes "to determine, as a threshold matter, whether the unmistakability doctrine is satisfied."[67]

Before the Second Circuit, a teachers' union in Buffalo attacked state actions passed in relation to the city's fiscal crisis, including a wage freeze that had the effect of nullifying a two percent wage increase that the unions had negotiated as part of their labor contracts with the city.[68] The court found that the temporary wage freeze satisfied the three-prong test, as it was both necessary and reasonable to achieve the important public purpose of stabilizing Buffalo's precarious fiscal position, particularly because of the prospective and temporary nature of the wage freeze.[69]

In a case from the Ninth Circuit, public employees in Hawaii challenged a statute that would enable the state to postpone the issuance of their paychecks by a few days.[70] In conducting a Contract Clause analysis at the preliminary injunction stage, the panel found in favor of the public employees, reasoning that the state's interference with the public employees' contractual rights to prompt payment were substantial.[71] The court reminded the state that the public employee plaintiffs were "wage earners, not volunteers" and had a "right to rely on the timely receipt of their paychecks."[72]

The above review is not intended as a comprehensive treatment of all cases arising under the Contract Clause across the country since the nation's founding. Instead, it is meant to provide historical and

65. Parker v. Wakelin, 123 F.3d 1, 2 (1st Cir. 1997).

66. *Id.* at 5 (citing U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 17–18 n.14 (noting that a statute may be treated as a binding contract "when the language and the circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state")).

67. *Id.* at 9.

68. *See* Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 367 (2d Cir. 2006).

69. *See id.* at 371–72.

70. Univ. of Haw. Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1099 (9th Cir. 1999).

71. *See id*. at 1106.

72. *Id.* ("Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.").

legal context to the Supreme Court North Carolina's decision in *NCAE v. State*. In that case, the state supreme court found itself with a challenge to state action that would have retroactively revoked tenure, also known as "career status," for teachers.

II. APPLYING THE CONTRACT CLAUSE—*NCAE V. STATE*

The *NCAE* litigation provides a clear example of the modern salience of the Contract Clause: state action affecting the rights of parties to contracts with the state. Specifically, the plaintiffs challenged a state law repealing tenured status for those that had obtained this protected classification. In effect, the case may "give pause to those seeking to eliminate tenure in any respect."[73] As such, the reasoning of each layer of judicial review is important to more fully appreciate the relevance of the case to other public employees in the state and around the country.

In June 2014, Judge Robert H. Hobgood ruled, inter alia, that the repeal of the Career Status Law violated the Contract Clause.[74] In June 2015, the North Carolina intermediate appellate court upheld the ruling.[75] In April 2016, the state supreme court again upheld the trial court's decision on Contract Clause grounds, effectively demonstrating that the Clause is far from a dead letter.[76]

A. Trial Court Ruling

The *NCAE* teachers first brought their challenge in Wake County trial court, where the judge applied *United States Trust Co.*'s three-prong test and determined that the repeal of teacher tenure for career status teachers was unconstitutional, as it upset protected contract rights. As noted above, courts utilizing the *United States Trust Co.* test must consider "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3)

73. Recent Case, *supra* note 59, at 1001.

74. N.C. Ass'n of Educators v. State, No. 13 CVS 16240, 2014 WL 4952101, at *5, (N.C. Super. Ct. June 6, 2014). The trial court also examined a provision by which teachers were incentivized to voluntarily relinquish their career status, which was determined to be inseparable from the revocation of career status itself. It was struck down as violative of the constitutional vagueness doctrine as it "provide[d] no discernible, workable standards to guide local school districts in its implementation." *Id.* As this so-called "25% Provision" was deemed inseparable from the repeal of career status, this paper will focus on the revocation of career status. *Id.*

75. N.C. Ass'n of Educators v. State, 241 N.C. App. 284, 305, 776 S.E.2d 1, 16 (2015).

76. N.C. Ass'n of Educators v. State, 368 N.C. 777, 792, 786 S.E.2d 255, 266 (2016).

whether the impairment was reasonable and necessary to serve an important public purpose."[77]

In its application of the three-pronged *United States Trust Co.* test, the trial court first found that the teachers who had earned career status prior to Career Status Repeal on July 26, 2013 "have contractual rights in that status and to the protections established by the Career Status Law."[78] Next, the trial court found that the state's actions had the effect of eliminating the law's contractual protections and, therefore, "substantially impair[ed] the contractual rights of career status teachers."[79] Finally, the court concluded that the impairment of these contractual rights "was not reasonable and necessary to serve an important public purpose."[80] The trial court was particularly clear, writing that "[e]ven if there was an actual need for school administrators to have greater latitude to dismiss ineffective career status teachers, that objective could have been accomplished through less drastic means, such as by amending the grounds for dismissing teachers for performance-related reasons."[81]

The trial court's reasoning was straightforward: the teachers accepted the terms of their contracts when they accepted their jobs. These terms included the employee benefit for career status eligibility and became part of the offer of employment, on which the teachers relied when they accepted the terms.[82] The judge therefore found that the state action interfered with the terms of the contract for those teachers whose rights had vested.

The trial court also examined the state's law of the land provision as an independent additional ground for its ruling.[83] This provision operates similarly to a takings claim and represents a more conventional due process-based argument.[84] Under the law of the land clause of the North Carolina Constitution, the state is not able to deprive individuals of their property except by the "law of the land."[85] North Carolina courts have interpreted this state constitutional clause

77. Bailey v. State, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998) (citing U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 17–32 (1997)).

78. *N.C. Ass'n of Educators*, 2014 WL 4952101, at *4.

79. *Id.*

80. *Id.*

81. *Id.* at *5.

82. *Id.* at *4.

83. *Id.* at *5 ("Contract rights, including those created by statute, constitute property rights that are within the Law of the Land Clause's guarantee against uncompensated takings.").

84. *See* Long v. City of Charlotte, 306 N.C. 187, 195–96, 293 S.E.2d 101, 107–08 (1982).

85. N.C. CONST. art. I, § 19 ("No person shall be . . . in any manner deprived of his . . . property, but by the law of the land.").

as prohibiting government takings of property without just compensation.[86] Additionally, North Carolina courts have ruled that government takings of property also provide procedural protections of private rights against the lawmaking power of the legislature.[87] Here, the trial court found that the contractual rights of career teachers constituted property that could not be "taken" by the state without just compensation.[88]

Indeed, *Bailey v. State*'s law of the land test provided a strong foundation for the trial court's determination of both prongs of its takings analysis.[89] The court cited *Bailey* to support its ruling that career status teachers had vested property rights in their public employment contracts. In doing so, the court considered: (a) whether there was a property right involved and (b) whether that property right had been subject to a government taking without just compensation.[90]

Relying on *Bailey*, the trial judge distinguished the contractual rights of career status teachers with those who had not yet achieved career status.[91] *Bailey* analyzed the state's retirement benefit programs that had been in place for state and local employees from 1939 to 1989. Inter alia, the state legislature in 1989 changed a taxation exemption for retirement benefits from one that was unlimited to one that had a maximum of $4000 on annual benefits that would be exempted from state taxation.[92] The *Bailey* court examined the contractual rights of the public employees and found that the contractual right to rely on the terms of the retirement plan existed at the moment at which the retirement benefit rights vested.[93] Accordingly, the *Bailey* court determined that all public employees whose retirement benefits had vested prior to the enactment of the

86. *See Long*, 306 N.C. at 195–96, 293 S.E.2d at 107–08.

87. Bailey v. State, 348 N.C. 130, 142–43, 500 S.E.2d 54, 61 (1998) (citing Trs. of the Univ. of N.C. v. Foy, 5 N.C. 58, 88 (1805)).

88. *N.C. Ass'n of Educators*, 2014 WL 4952101, at *5.

89. *Id.* (citing *Bailey*, 348 N.C. at 154, 500 S.E.2d at 68).

90. *Id.* The fact that the career status was not referred to as a "contract" does not control the case, as the career status rights could be expressed as contractual rights without the explicit word "contract" being used. *See* Recent Case, *supra* note 59, at 999 n.41.

91. *N.C. Ass'n of Educators*, 2014 WL 4952101, at *5.

92. *Bailey*, 348 N.C. at 139, 500 S.E.2d at 59.

93. *Id.* at 141–42, 500 S.E.2d at 60–61 (citing Simpson v. N.C. Local Gov't Emps. Ret. Sys., 88 N.C. App. 218, 223–24, 345 S.E.2d 90, 94 (1987)); *see also* Faulkenbury v. Teachers' and State Emps.' Ret. Sys., 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997) (affirming *Bailey*'s reliance on the principal that "the relation between the employees and the governmental units [is] contractual").

1989 cap must be exempt from the state tax, regardless of whether the benefits would be attributable to work prior to or after the 1989 enactment.[94] The tax exemption had become a term or condition of the retirement system to which the public employees had a contractual right.[95] In articulating the relationship between the law of the land and contract rights, the *Bailey* court found that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action."[96]

Applying *Bailey* to the instant case, the trial court found that contract-based property rights vested upon obtaining career status.[97] As such, the court denied standing to teachers who were currently in their probationary periods and had not yet achieved career status.[98] For plaintiff-teachers who had achieved career status, the court held that their rights had vested and the repeal of the career status constituted a taking without compensation.[99]

B. Court of Appeals' Majority Opinion

The trial court's decision was appealed to the North Carolina Court of Appeals on both of its independent grounds: first, that the repeal of Career Status violated both the Contracts Clause of the United States Constitution and, second, that repeal violated the law of the land clause of the state constitution.[100] Two appellate judges upheld the trial court ruling, with the third concurring in part and dissenting in part.

The appellate court, reviewing the matter de novo, dutifully applied the *United States Trust Co.* test.[101] The appellate court first examined whether contractual obligations existed between the teachers and the state.[102] Inter alia, the state argued that previous federal and state precedent was distinguishable and that it would be more appropriate to consider the individual teacher's contracts with

94. *Bailey*, 348 N.C. at 142, 500 S.E.2d at 61.
95. *Id.* at 146, 500 S.E.2d at 63.
96. *Id.* at 144, 500 S.E.2d at 62.
97. N.C. Ass'n of Educators v. State, No. 13 CVS 16240, 2014 WL 4952101, at *4, (N.C. Super. Ct. June 6, 2014).
98. *Id.* at *5.
99. *Id.*
100. N.C. Ass'n of Educators v. State, 241 N.C. App. 284, 286, 776 S.E.2d 1, 4 (2015).
101. *See id.* at 293, 776 S.E.2d at 8–9.
102. *See id.* at 294, 776 S.E.2d at 9.

the individual school districts rather than with the state itself.[103] In short, a teacher was not contracting with the state when he or she obtained tenure; instead, the vested contract right existed between the teacher and the individual school district. The court of appeals called this approach "totally baseless"[104] and "wholly unpersuasive."[105] In addition to federal and state precedent dating back to 1938,[106] the court relied upon the Supreme Court of North Carolina's more recent ruling in *Wiggs v. Edgecombe County*.[107]

In *Wiggs*, a county law enforcement official retired early after decades of service and received a "special separation allowance" under state law.[108] Subsequently, he took up part-time employment working as a police officer at a local airport.[109] The county reacted to this news by passing a retroactive resolution that would curtail "special separation allowances" when a retiree obtained employment with another local government entity.[110] Relying on the Contract Clause, the *Wiggs* court held that the county did not have authority to pass a retroactive restriction that would apply to a vested contractual right.[111]

According to the court of appeals in *NCAE*, the public school teachers were similarly situated to Officer Wiggs. Both cases demonstrated the Supreme Court of North Carolina's "long-standing recognition that when the General Assembly revokes valuable employment benefits that are obtained in reliance on a statute and that offset the relatively low salaries of public employees, it violates the Contract Clause."[112]

In reaching its conclusion on the first prong of the *United States Trust Co.* standard, the court of appeals buffeted its reasoning with policy arguments arising from labor economics.[113] According to the

103. *Id.*

104. *Id.*

105. *Id.* at 299, 776 S.E.2d at 12.

106. *Id.* (rejecting the State's attempt to distinguish the North Carolina Career Law statute from the statute at issue in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)).

107. *Id.* at 296, 776 S.E.2d at 10 (citing Wiggs v. Edgecombe Cty., 361 N.C. 318, 324, 643 S.E.2d 904, 908 (2007)).

108. Wiggs v. Edgecombe Cty., 361 N.C. 318, 319, 643 S.E.2d 904, 905 (2007).

109. *Id.*

110. *Id.*

111. *Id*. at 324, 643 S.E.2d at 908.

112. *N.C. Ass'n of Educators*, 241 N.C. App. at 297, 776 S.E.2d at 10.

113. *Id.* at 297–98, 776 S.E.2d at 10–11. Indeed, the *NCAE* court devoted over a full page of its ruling to an extended quote from a labor economist, who noted that teachers' salaries make career status protections more valuable than they otherwise would be, as

court, the career status served as a statutory promise upon which the teacher relied as an inducement to enter public employment and remain in the low-paying position.[114] In doing so, the state benefited from experienced teachers, and the teachers benefited from this valuable employment protection.

With regard to *United States Trust Co.*'s second prong, the court of appeals similarly found for the public school teachers, calling it "not a difficult question."[115] For the court, the impact upon the contractual obligation was obvious from the facts: under the career status provision, the plaintiff-teachers would have continuing contracts, whereas the career status repeal would limit these contracts to a maximum of four years.[116] Once a contractual obligation is recognized, North Carolina precedent appears to favor a finding of substantial impairment in the areas of both retirement benefits, like in *Bailey*,[117] and additional payments, like in *Wiggs*.[118]

The State argued that the career status was merely a contract modification and that the plaintiffs should have lodged a breach of contract claim. Even if the contract was impaired, the State argued, the modification was not a significant impairment.[119] In support, the State pointed to a recent Fourth Circuit case that upheld a city's modification of its pension plan from a variable benefit to a cost-of-living adjustment under applicable state law contract doctrine.[120] The court of appeals was unpersuaded, noting that the authority cited by the State was "misconstrue[d]" and "not even remotely applicable to the present facts."[121] Indeed, the court found that the authority upon which the State relied: (a) heavily tracked another state's controlling law and (b) misconstrued the basis for a Contract Clause claim.[122]

The State had the burden of establishing the third prong, specifically that the career status repeal was reasonable and necessary

teachers are underpaid relative to comparable positions and receive only minor raises during the first several years of teaching. *Id.*

114. *Id.* at 298–99, 776 S.E.2d at 12 ("We therefore conclude further that, as in *Faulkenbury*, *Bailey*, and *Wiggs*, the State has reaped benefits by using the Career Status Law as an inducement by which to attract and retain public school teachers in spite of the relatively low wages it pays them.").

115. *Id.* at 301, 776 S.E.2d at 13.

116. *Id.*

117. *See* Bailey v. State, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998).

118. *See* Wiggs v. Edgecombe Cty., 361 N.C. 318, 319, 643 S.E.2d 904, 905 (2007).

119. *N.C. Ass'n of Educators*, 241 N.C. App. at 301, 776 S.E.2d at 13.

120. *Id.* (citing Cherry v. Mayor of Balt., 762 F.3d 366, 369–74 (4th Cir. 2014)).

121. *Id.* at 301–02, 776 S.E.2d at 13–14.

122. *Id.*

for an important public purpose.[123] While the state has some deference in determining what is reasonable and necessary,[124] complete deference would be inappropriate given that the state's self-interest is directly implicated.[125] In this case, the State argued that the dismissal of ineffective teachers would improve the educational experience for all public school teachers and would further the North Carolina constitutional guarantee of a right to "the privilege of education."[126] According to the State, repealing career status would give local school boards more flexibility in managing their pool of available teachers and increase the quality of teachers within that pool.[127] The court of appeals was unsympathetic to this argument,[128] finding ample ability to dismiss underperforming teachers during the probationary period and in the Career Status Law itself.[129]

While the North Carolina Court of Appeals found that the repeal of career status for public school teachers "serve[d] no public purpose whatsoever,"[130] the court was unpersuaded that even if it did advance a public purpose, the State did not carry its burden to demonstrate that the repeal was reasonable and necessary to forward that purpose.[131] The court of appeals compared the reasonability and necessity of the repeal of teacher tenure with those of the Supreme Court of North Carolina's prior cases, *Faulkenbury v. Teachers' and State Employees Retirement System*[132] and *Bailey*.[133] In those prior cases, the state supreme court rejected the State's arguments that the abrogation of contractual rights was reasonable and necessary even if the public purpose was legitimate.[134] In addition to analyzing state

123. *Id.* at 302, 776 S.E.2d at 14.

124. *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412–13 (1983) ("[C]ourts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (quoting U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 23 (1977))).

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

126. *N.C. Ass'n of Educators*, 241 N.C. App. at 302, 776 S.E.2d at 14 (quoting N.C. CONST. art. I, § 15).

127. *Id.* at 302–03, 776 S.E.2d at 14.

128. *Id.* at 303, 776 S.E.2d at 14–15.

129. *See id.* at 303, 776 S.E.2d at 14 (permitting school districts to dismiss career status teachers for "inadequate performance," defined as "the failure to perform at a proficient level on any standard of the evaluation instrument" or "otherwise performing in a manner that is below standard" (quoting N.C. GEN. STAT. § 115C-325(e)(1), (3) (2017))).

130. *Id*. at 304, 776 S.E.2d at 15.

131. *Id.*

132. 345 N.C. 683, 483 S.E.2d 422 (1997).

133. *N.C. Ass'n of Educators*, 241 N.C. App. at 304, 776 S.E.2d at 15.

134. *See* Bailey v. State, 348 N.C. 130, 152, 500 S.E.2d 54, 66–67 (1998) (capping tax-exempt retirement benefits); *Faulkenbury*, 345 N.C. at 693–94, 483 S.E.2d at 429 (correcting the operation of the state pension plan).

precedent, the North Carolina Court of Appeals in the instant case also found that: (a) less drastic alternatives were available to the state and (b) reforms to the teacher hiring and retention system could have been more targeted to the public purpose had it been necessary for local school boards to obtain greater flexibility in their hiring.[135]

The court also examined the independent law of the land basis for the trial court's determination. Inter alia, the State argued that it complied with the law of the land clause by articulating a legitimate government purpose and that the statute was rationally related to that purpose.[136] Further, the State argued that the act of the state legislature should be given deference due to a presumption of constitutionality and that, even then, the argument should be settled in the legislature rather than the courts.[137]

The appellate court largely dismissed the State's cited case authority as "wholly misplaced" because the case upon which the State heavily relied did not involve a takings claim.[138] Instead, the court of appeals focused on *Bailey*'s law of the land standard. The logic the court utilized was straightforward and focused on the similarities between the plaintiffs in *Bailey* and those in the present case:

> Here, as in *Bailey*, Plaintiffs contracted, as consideration for their employment, that after fulfilling the Career Status Law's requirements, they would be entitled to career status protections. Here, as in *Bailey*, the Career Status Repeal purports to abrogate those protections and thus constitutes a taking of Plaintiffs' private property. Here, as in *Bailey*, the Career Status Repeal offers no compensation for this taking. Thus, here, as in *Bailey*, the Career Status Repeal violates the Law of the Land Clause.[139]

Accordingly, the court of appeals held that the repeal of career status for public school teachers violated the state constitution's law of the land provision in addition to the Contract Clause, finding each as a separate and independent basis for its decision.[140]

135. *N.C. Ass'n of Educators*, 241 N.C. App. at 305, 776 S.E.2d at 15–16.
136. *Id.* at 306, 776 S.E.2d at 16–17.
137. *Id.* at 306–07, 776 S.E.2d at 17.
138. *Id.* at 307, 776 S.E.2d at 17.
139. *Id.* at 308, 776 S.E.2d at 17–18.
140. *Id.* at 308–09, 776 S.E.2d at 17–18. The State also lodged an argument alleging a violation of state civil procedure. The majority found this argument "without merit." *Id*. at 309–11, 776 S.E.2d at 18–19.

C. Court of Appeals' Dissent

The dissenting opinion, written by Judge Chris Dillon, concurred in part and dissented in part. Judge Dillon concurred with the majority that (a) probationary teachers who had not achieved career status lacked standing and (b) the career-status teachers had a constitutionally protected property interest in their continued public employment. For Judge Dillon, the law was unconstitutional to the extent that it allowed a school board to deprive a teacher of his or her property interest without a hearing.[141]

Judge Dillon emphasized the deference given by the courts to acts of legislation, specifically the presumption of a statute's constitutionality.[142] With this presumption, Judge Dillon distinguished an individual teacher's property right from a contractual right.[143] He cited two United States Supreme Court cases from 1937 to support this distinction.[144] In Judge Dillon's reading, these cases established a rule that legislation is presumed not to create private contractual rights but, instead, to declare the policy of the state.[145]

Judge Dillon relied heavily upon *Phelps v. Board of Education*[146] in rendering his decision.[147] In that case, a New Jersey teacher tenure law prohibited a local school board from reducing teacher salaries or discharge without cause after three years of service.[148] The *Phelps* Court found that the state law did not become a term of the contracts under which the public school teachers were employed.[149] Instead, the state law limiting teacher tenure regulated the conduct of the local school board as an entity of the state.[150] As characterized recently elsewhere, *Phelps* stands for the proposition that laws creating regulatory rights might not create contract rights subject to the

141. *Id.* at 319, 776 S.E.2d at 25 (Dillon, J., concurring in part and dissenting in part).

142. *Id.* at 320, 776 S.E.2d at 25.

143. *Id.*

144. *Id.* at 320–21, 776 S.E.2d at 25 (first citing Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937), then citing Phelps v. Bd. of Educ., 300 U.S. 319, 323 (1937)).

145. *Id.* at 320–21, 776 S.E.2d at 25–26.

146. 300 U.S. 319 (1937).

147. *N.C. Ass'n of Educators*, 241 N.C. App. at 321, 776 S.E.2 at 26 (Dillon, J., concurring in part and dissenting in part).

148. *See Phelps*, 300 U.S. at 323.

149. *Id.*

150. *Id.* ("Although the act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher.").

Contract Clause.[151] Applying the *Phelps* holding to the North Carolina law, Judge Dillon suggested *Phelps* would control the determination and that the Career Status Law created a legislative status, not a private contractual right, for teachers.[152] In support of his conclusion, Judge Dillon cited the supreme courts of nine other states that held that tenure for public employees did not create a constitutionally protected contract right.[153]

It is necessary to mention three pertinent details about the *Phelps* decision. First, as the majority opinion noted,[154] the *Phelps* decision and the other 1937 case upon which the dissent is predicated were not cited by any of the parties before the court at any point during the litigation.[155] Accordingly, the majority considered these arguments abandoned. Second, the *Phelps* decision—while not overruled—was decided prior to *United States Trust Co.* in 1977. While it is unclear whether the *Phelps* decision would play out the same way if heard after 1977, it should also be noted that the court distinguished *Phelps* in a subsequent teacher tenure case in 1938's *Indiana ex rel. Anderson v. Brand*, upholding an Indiana tenure law.[156] In applying *Phelps*, courts have examined, as a threshold question, whether contractual rights were created.[157] A more nuanced analysis could have laid out why *Phelps* applied but *Brand* did not. Third, the

151. *See* Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch., 876 F.3d 926, 932 (7th Cir. 2017) ("Statutes typically create regulatory rights not subject to the Contract Clause. But when a legislature uses contractual language that induces public reliance, it can create an enforceable contract . . . ." (citing *Phelps*, 300 U.S. at 323)).

152. *N.C. Ass'n of Educators*, 241 N.C. App. at 321, 776 S.E.2d at 26 (Dillon, J., concurring in part and dissenting in part).

153. *Id.* at 321–22, 776 S.E.2d at 26 (citing Proska v. Ariz. State Sch. for the Deaf & Blind, 74 P.3d 939, 943–44 (Ariz. 2003); Pineman v. Oechslin, 488 A.2d 803, 808–10 (Conn. 1985); Crawford v. Sadler, 34 So.2d 38, 39 (Fla. 1948); Fumarolo v. Bd. of Educ., 566 N.E.2d 1283, 1306 (Ill. 1990); Munsch v. Bd. of Comm'rs, 3 So.2d 622, 624–25 (La. 1941); Lapolla v. Bd. of Educ., 26 N.E.2d 807, 807 (N.Y. 1940); Malone v. Hayden, 197 A. 344, 352–53 (Pa. 1938); Wash. Fed'n of State Emps., AFL-CIO v. State, 682 P.2d 869, 872 (Wash. 1984); Morrison v. Bd. of Educ., 297 N.W. 383, 386 (Wis. 1941)).

154. *See id.* at 312, 776 S.E.2d at 20 (majority opinion).

155. *Id.* In a footnote, Judge Dillon provided a defense for his sua sponte reliance on *Phelps* and *Dodge v. Bd. of Educ.*, 302 U.S. 74 (1937), noting that neither case was cited in the litigation. *Id.* at 321 n.2, 776 S.E.2d at 26 n.2 (Dillon, J., concurring in part and dissenting in part) ("The majority is troubled by my reliance on *Phelps* and *Dodge* since these cases were not cited or argued by the State. However, the State does argue that the Repeal does not violate the Contract Clause, and I believe it is appropriate for this Court to rely on Supreme Court opinions and other legal authority which may be controlling or relevant in determining the law on a constitutional issue raised by a party.").

156. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 107 (1938).

157. *See, e.g.*, Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch., 876 F.3d 926, 932 (7th Cir. 2017). The *Elliott* court noted that legislatures that craft tenure laws that "induce[] public reliance" can create an enforceable contract subject to the Contract Clause. *Id.*

Phelps Court deferred to the courts of individual states about the determination of contractual rights.[158] While Judge Dillon cited that the supreme courts of other states have ruled against contractual rights for public school teachers, the majority could not find a North Carolina teacher tenure case that involved vested contractual rights that implicated the law of the land clause or the Contract Clause.[159]

Judge Dillon's dissent also distinguished teacher tenure rights from deferred compensation arrangements, such as those in *Wiggs* and *Faulkenbury*.[160] Teacher tenure is not "earned" in the same way as deferred compensation, according to Judge Dillon but instead the eligibility for the status is provided after four years of service.[161] Even then, the career status is not automatic but must be granted by the local school board, unlike a pension plan or deferred compensation arrangement. Judge Dillon pointed to state cases in Washington and California that purportedly support treating tenure rights differently than deferred compensation.[162]

Judge Dillon's dissent did not explicitly mention the state's law of the land clause but instead focused exclusively on the federal Contract Clause. As a result, Judge Dillon's opinion addressed only one of the two grounds that Judge Hobgood had found in declaring the law unconstitutional. While the court of appeals does apply a de novo standard of review for orders of summary judgment,[163] Judge Dillon excluded from his reasoning a separate and independent ground for the trial court's determination.

D. State Supreme Court

The Supreme Court of North Carolina decided the *NCAE* case in April 2016.[164] At the time of the opinion, the court was facing a critical and unusual election in November 2016. The court has seven

158. Phelps v. Bd. of Educ., 300 U.S. 319, 322 (1937) ("[W]here a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state.").

159. *N.C. Ass'n of Educators*, 241 N.C. App. at 314, 776 S.E.2d at 21.

160. *See id.* at 324, 776 S.E.2d at 27–28 (Dillon, J., concurring in part and dissenting in part).

161. *See id*. at 324, 776 S.E.2d at 28.

162. *Id.* (citing Washington Fed'n of State Emps., AFL-CIO v. State, 682 P.2d 869, 872 (Wash. 1984) and Kern v. City of Long Beach, 179 P.2d 799, 801–03 (Cal. 1947)).

163. N.C. R. CIV. P. 56(c); *see also In re* Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("Our standard of review of an appeal from summary judgment is de novo.").

164. N.C. Ass'n of Educators v. State, 368 N.C. 777, 777, 786 S.E.2d 255, 255 (2016).

seats, which are all technically non-partisan.[165] Even so, judicial candidates' party affiliations are known, party endorsements are solicited, and political ideologies loom large in this politically diverse state.

At the time of the *NCAE* opinion, the court was composed of four Republican members, including Chief Justice Mark Martin.[166] Democrats occupied the three remaining seats on the court.[167] If a vote had split solely along party lines, the Republican members of the court would have prevailed.

In November 2016, Justice Robert Edmunds, a Republican, was facing reelection.[168] In the run-up to the election, the state legislature changed the state's supreme court election laws from a contested process to one where Edmunds would run for "retention."[169] This retention election would be an up-or-down vote on whether to keep Justice Edmunds rather than a contested process against other candidates. When the retention bill was found unconstitutional, Justice Edmunds faced a challenger for his seat on the court, and he ultimately lost the seat to Democrat Mike Morgan.[170]

The conservative political composition of the Supreme Court of North Carolina at the time made it plausible that the *NCAE* court would return a narrowly tailored verdict upholding the repeal of teacher tenure based on the arguments of Judge Dillon's dissent. That said, such a ruling likely would have created a rift in the case law between the precedent in *Wiggs*, *Faulkenbury*, and *Bailey*. The Supreme Court of North Carolina would have needed to deftly distinguish *NCAE*, the teacher tenure case, from its past precedent or potentially overturn its prior rulings in order to reach a reversal.[171]

165. *Supreme Court of North Carolina*, N.C. CT. SYS., http://www.nccourts.org/Courts/Appellate/Supreme/ [https://perma.cc/XP3A-Y6HG].

166. *Mark D. Martin*, N.C. CT. SYS., https://appellate.nccourts.org/Bios/index.php?c=1&Name=Martin [https://perma.cc/RYR6-SF2Y].

167. *See* Gary Robertson, *Morgan Victory Returns Democratic Majority to NC Supreme Court*, ASHEVILLE CITIZEN TIMES (Nov. 24, 2016), https://www.citizen-times.com/story/news/2016/11/24/morgan-victory-returns-democratic-majority-nc-supreme-court/94386322/ [https://perma.cc/A3VN-KCSN].

168. Frank Stasio & Laura Pellicer, *Bob Edmunds Vies to Maintain Seat in NC Supreme Court Election*, WUNC (Oct. 18, 2016), http://wunc.org/post/bob-edmunds-vies-maintain-seat-nc-supreme-court-election#stream/0 [https://perma.cc/PGH9-TS46].

169. *See* Anne Blythe, *NC Supreme Court Retention Election Law to be Overturned*, NEWS & OBSERVER (Raleigh Feb. 18, 2016), http://www.newsobserver.com/news/politics-government/state-politics/article61148607.html [https://perma.cc/5TLT-6BFH].

170. *See* Robertson, *supra* note 167.

171. *Cf.* FUN, *Some Nights*, *on* SOME NIGHTS (ATLANTIC 2012) (describing a search for meaning amid apparent contradictions, asking "Oh, Lord, I'm still not sure what I stand for. What do I stand for?").

It is within this context that the court's unanimous opinion, as authored by Justice Edmunds, affirmed the trial court's opinion that the career status repeal was unconstitutional on Contract Clause grounds.[172] The court did not reach a decision on the law of the land claim, finding that the Contract Clause grounds were sufficient.[173] Put differently, the state's supreme court decided the case in such a way that it was not solely based on the law of North Carolina but on that of the United States. In doing so, the Supreme Court of North Carolina increased the likelihood that other courts across the country could find its reasoning persuasive when deciding similar cases.

Relatedly, in retelling the case's procedural posture, the *NCAE* court subtly recast the court of appeals' decision on the law of the land clause. Concerning the court of appeals' majority opinion, the court wrote:

> The majority concluded that the trial court correctly found the repeal of the Career Status Law violated the United States Constitution's Contract Clause as to teachers who had already earned career status at the time of repeal. *Based on this Contract Clause violation*, the Court of Appeals further held that plaintiffs' contract right was a property interest that was being unjustly taken away by the repeal without compensation to plaintiffs, in violation of the Law of the Land Clause of the North Carolina Constitution.[174]

A casual glance would miss the important distinction. The court of appeals did not base its determination on a violation of the Contract Clause alone. Applying *Bailey*, the court of appeals found that the vested contractual right of teachers also represented a property right, "the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause."[175] While the characterization of the court of appeals' decision is not incorrect, it is misleading insofar as it did not reflect both the trial court's and the appellate court's intention that the law of the land clause violation was a separate and independent

172. N.C. Ass'n of Educators v. State, 368 N.C. 777, 792–93, 786 S.E.2d. 255, 266 (2016).

173. *Id.* at 792, 786 S.E.2d at 266 ("Because we hold the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution, we need not address plaintiffs' alternative claim based on Article I, Section 19 of the North Carolina Constitution.").

174. *Id.* at 785, 786 S.E.2d at 262 (emphasis added) (citations omitted).

175. N.C. Ass'n of Educators v. State, 241 N.C. App. 284, 307, 776 S.E.2d 1, 17 (2015) (citing Bailey v. State, 348 N.C. 130, 154–55, 500 S.E.2d 54, 68–69 (1998)).

ground for their decisions. The trial and appellate courts had conducted both the Contract Clause analysis, as well as a due process-based analysis based on taking property without just compensation.

Applying the *United States Trust Co.* three-pronged test, the Supreme Court of North Carolina considered whether a contractual obligation arose from the repealed Career Status Law. The *NCAE* court cited *Phelps* and *Dodge*, among other cases, to support the court's deep reluctance to find a contract created by statute without compelling supporting evidence.[176]

At first, the court seemed highly sympathetic to Judge Dillon's dissent. It sidestepped the fact that Judge Dillon arrived at the citations to *Phelps* and *Dodge* sua sponte, and it emphasized the presumption that state laws are constitutional.[177] The state supreme court went so far as to distinguish the case from both *Bailey* (concerning retirement benefits) and *Faulkenbury* (concerning disability retirement payments), in which the statutes themselves created the vested career status and featured benefits that had been earned by service over time.[178] By contrast, the public school teachers in the instant case did not have "vested career status rights at the end of the probationary period."[179] This may have come as a surprise to the teachers themselves, who looked to the Career Status Law as their pathway to tenure. Not so, according to the Supreme Court of North Carolina. Instead of granting tenure to the teachers, the Career Status Law was

> a regulation of conduct through which local school boards can exercise their discretion to enter into contracts with teachers for whom they approve career status. The Career Status Law contemplates the creation of *individual contracts between school boards and teachers but does not itself establish any benefit provided to teachers* by the State nor create any relationship between them.[180]

176. *N.C. Ass'n of Educators*, 368 N.C. at 786–87, 786 S.E.2d at 262–63 ("Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals.").

177. *See id.* at 785–86, 786 S.E.2d at 262 ("This Court presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck down unless found unconstitutional beyond a reasonable doubt." (citations omitted)).

178. *Id.* at 788, 786 S.E.2d at 263–64.

179. *Id.* at 788, 786 S.E.2d at 264.

180. *Id.* (emphasis added).

In a clever way, the state supreme court threaded a needle: using the arguments of Judge Dillon's dissent, the court nonetheless upheld the teacher tenure structure. The court concluded that the Career Status Law did not, in itself, create a vested contractual right but instead created the framework from which teachers and individual school boards formed contracts that granted teachers vested rights.[181] When those contracts were created, according to the court, the state legislature "no longer could take away that vested right retroactively in a way that would substantially impair it."[182]

Using both contract law theory and the evidentiary record, the state supreme court found that the teacher-plaintiffs relied upon the promise of the career status protections in making their contracts with their school boards.[183] Moreover, the court found that the Career Status Law did not grant vested contractual rights by itself but was instead an implied term in the contracts between the teachers and the school boards upon which the teachers relied.[184]

Finding that the teachers had contractual rights, the *NCAE* court then inquired whether there was a substantial impairment of these rights.[185] Finding that the rights "boiled down to enhanced job security," the state supreme court held that the changes were a substantial impairment of these promised protections, including the promise of continuing employment and the right to a hearing.[186]

Following the third prong of *United States Trust Co.*, the court next turned to whether the substantial impairment of the contractual right was a reasonable and necessary means of achieving a legitimate public purpose.[187] While the court noted that the burden was on the State to justify an otherwise unconstitutional impairment of contract, the *NCAE* court did note that "[t]he Contract Clause is not meant to bind the hands of the [s]tate absolutely."[188] Here again, the court captured the spirit of Judge Dillon's dissent but ultimately sided with the teachers.

The State articulated its public policy goal as culling "'adequate' but marginal teachers with career status" as part of an overall effort

181. *Id.* at 789, 786 S.E.2d at 264.

182. *Id.*

183. *Id.* at 789–90, 786 S.E.2d at 264.

184. *Id.* at 789, 786 S.E.2d at 264.

185. *Id.* at 790, 786 S.E.2d at 265 ("We next move to the second part of a Contract Clause analysis in which we consider whether the vested rights found above were substantially impaired.").

186. *Id.*

187. *Id.* at 791, 786 S.E.2d at 265.

188. *Id.*

to improve public instruction in the state.[189] The *NCAE* court found that "no evidence indicate[d] that such a problem existed."[190] Instead, the evidentiary record and the statute itself demonstrated that "inadequate performance" provided sufficient grounds for dismissal even under the Career Status Law.[191] Under the *United States Trust Co.* test, a state must have a legitimate purpose for the challenged action. Here, the court was skeptical of the adequacy of the state's purpose.

Even if the dismissal of "adequate" teachers had been a legitimate public purpose, however, the means for doing so must also be necessary and reasonable under the *United States Trust Co.* test.[192] Referring back to its review of statutory changes in career status for teachers from 1971 to 2013, the state supreme court found that the state had considerable alternatives that would be "less sweeping" than a complete revocation of teacher tenure.[193] Accordingly, the court found that the State failed to meet its burden in demonstrating why the retroactive repeal of tenure was necessary and reasonable.[194]

While the court found the repeal unconstitutional on Contract Clause grounds, it did not address the law of the land claims.[195] This raises both concern and opportunity. The state supreme court's action may signal to lower courts that it is acceptable to sever *Bailey*'s Contract Clause finding from that of its law of the land holding and simply rule on one ground rather than two separate and independent grounds. The diminishment of the law of the land clause from a separate independent ground in the lower courts to a footnote in the state supreme court might lead some courts faced with similar circumstances to conclude that (a) ruling on two grounds is duplicating effort and would not promote judicial efficiency, and (b) if one ground is sufficient, then it should be the federal constitutional ground of the Contract Clause rather than the law of the land's takings analysis under *Bailey* and its progeny.

189. *Id.* at 791, 786 S.E.2d at 266.

190. *Id.*

191. *Id.* at 792, 786 S.E.2d at 266; *see also* N.C. GEN. STAT. § 115C-325(e)(1), (3) (2017).

192. *N.C. Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265.

193. *Id.* at 792, 786 S.E.2d at 266.

194. *Id.*

195. The court noted that ruling on the law of the land clause was unnecessary as the Contract Clause was sufficient grounds in itself. *Id.*

III. BACKGROUND ON PUBLIC EMPLOYMENT LAW GENERALLY

Public employees do not simply obtain a job from their government employer; they may also obtain a constitutionally protected interest in their property and liberty.[196] In arguing for the professionalization of the administration of public programs, into the field we now know as public administration, Woodrow Wilson noted that one of the goals of this new field was to make the business of government "less unbusinesslike."[197] Wilson regarded public administration as a field of business, noting that "a body of thoroughly trained officials" was a "plain business necessity."[198]

Scholar Graham Allison once wrote that private and public management are "at least as different as they are similar, and that the differences are at least as important as the similarities."[199] One salient difference between the public and private sectors is the management of personnel. Allison noted that private-sector managers had greater latitude and more authority to direct personnel.[200] Conversely, Allison noted that the public-sector managers often "found the civil service system a much larger constraint on his actions and demand on his time than he had anticipated."[201]

Relevant to the issues presented in *NCAE v. State*, public-sector employees can acquire a constitutionally protected right to their continued public employment; public employees do not simply obtain a job from their government employer, they may also obtain constitutionally protected interest in their property and liberty.[202] In *Cleveland Board of Education v. Loudermill*,[203] among other cases, the Supreme Court found that civil servants have constitutional

196. *See* Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 797 (2007); *see also* MARTI HOUSER, LISA SALKOVITZ KOHN & GEORGE S. CRISICI, AM. BAR ASS'N, INDIVIDUAL RIGHTS IN PUBLIC SECTOR EMPLOYMENT § III (2008), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/143.authcheckdam.pdf [https://perma.cc/J3TT-M3GZ].

197. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201 (1887).

198. *Id.* at 216.

199. Graham T. Allison, *Public and Private Administrative Leadership: Are They Fundamentally Alike in All Unimportant Aspects?*, *in* LEADERSHIP AND ORGANIZATIONAL CULTURE: NEW PERSPECTIVES ON ADMINISTRATIVE THEORY AND PRACTICE 214, 234 (Thomas J. Sergiovanni & John E. Corbally eds., 1984).

200. *Id.* at 221.

201. *Id.* at 232. While Allison's comparison of the public and private manager is now several decades old, it continues to provide insight on impressionistic differences between the management of personnel in the public and private spheres.

202. *See* Garry, *supra* note 196, at 799; *see also* HOUSER ET AL., *supra* note 196, § III.

203. 470 U.S. 532 (1985).

protections in their jobs that necessitate due process procedures.[204] In effect, by taking away a civil servant's job, an employment matter can become a takings case. As noted by the *Loudermill* Court, the substantial interest in public employees retaining their jobs outweighed the interest of the state in removing them from their positions quickly.[205]

Public school teachers, in particular, are now facing a wave of challenges across the country to their vested employment protections. Proposals limiting teacher tenure have been debated in eighteen states, with two states—Florida and North Carolina—passing laws that eliminate teacher tenure entirely.[206] With over three million public school teachers nationwide, the ongoing issues facing teachers in one state can influence what may occur in other states.

Recently, in *Vergara v. State*,[207] a California intermediate appellate court upheld the state's teacher tenure law, which provided tenure to teachers after two years.[208] A group of students lodged an equal protection challenge to the statute.[209] Their complaint alleged that teacher tenure allowed "grossly ineffective" teachers to become employed and maintain their employment in school systems, especially disproportionally within those schools affecting students in minority and economically disadvantaged communities[210] The state appellate court reversed the trial court's repeal of the statute,[211] finding that the students had failed to prove that they were more likely to be taught by ineffective teachers than any other group of students.[212] The California Supreme Court denied review, letting the intermediate appellate court's ruling stand.[213]

The California appellate court limited its *Vergara* decision to the "particular constitutional challenge that plaintiffs decided to bring," namely, the rights of students under equal protection theory. This narrow ruling suggests that other constitutional grounds could have

204. *Id.* at 542.
205. *Id.* at 544.
206. *See* Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, AM. EDUCATOR, Summer 2015, at 4, https://www.aft.org/sites/default/files/ae_summer2015_kahlenberg.pdf [https://perma.cc/RZA2-U5KZ].
207. 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016).
208. *Id.* at 557–58.
209. *Id.* at 538.
210. *Id.* at 539.
211. *Id.* at 557–58.
212. *Id.* at 538.
213. *Id.* at 558.

led to a different judicial outcome.[214] In April 2016, the Supreme Court of North Carolina decided such a case: *NCAE v. State*.

Instead of focusing on the rights of students, *NCAE v. State* concerned the constitutional rights of teachers.[215] Specifically, in 2013, the North Carolina General Assembly acted to rescind career status for public school teachers.[216] In a separate action, the General Assembly also enabled county governments to decide whether to eliminate career status for local tenured employees.[217] Previously, public school teachers and certain public employees could obtain career status after completing a probationary period.[218] Career status granted government employees certain protections, including dismissal for cause and due process rights.

IV. BACKGROUND ON PUBLIC EMPLOYMENT LAW IN NORTH CAROLINA

As in the vast majority of states, the default employment status in North Carolina for most workers is "at-will" employment.[219] Under North Carolina law, employment is "terminable at the will of either party irrespective of the quality of performance by the other party" unless something else (i.e., a contract) evinces something other than an at-will relationship.[220] In North Carolina, "unless something 'else'

214. *See id.* at 557 (noting that a higher number of grossly ineffective teachers "may not present a problem with policy, but it does not, in itself, give rise to an equal protection violation").

215. N.C. Ass'n of Educators v. State, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016).

216. Current Operations and Capital Improvements Appropriation Act, ch. 360, sec. 9.6(a), § 115C-325, 2013 N.C. Sess. Laws 995, 1091 (codified at N.C. GEN. STAT. § 115C-325 (2013)).

217. Act of June 29, 2012, ch. 126, sec. 1, § 153A-77(d), 2012 N.C. Sess. Laws 416, 419 (codified at N.C. GEN. STAT. § 153A-77(d) (2017)).

218. An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, ch. 883, sec. 1, § 115-142(c), 1971 N.C. Sess. Laws 1396, 1396 (repealed 2013).

219. *See* Diane M. Juffras, *Public Employment Law*, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA, art. 19, at 2 (2007) ("When a North Carolina employer hires someone, the legal presumption that governs the working relationship is that the employment is 'at will.'"); *The At-Will Presumption and Exceptions to the Rule*, NAT'L COUNCIL OF ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/Z5VW-5JG7].

220. Still v. Lance, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). *See generally* Robert Joyce, *"Employment at Will" vs. "Right to Work"*, COATES' CANONS: N.C. LOC. GOV'T L. (Jan. 8, 2013), http://canons.sog.unc.edu/?p=6957 [https://perma.cc/X9S4-SA43] (providing an overview of at-will employment in North Carolina).

protects the employee, his or her status is 'at will.'"[221] At-will employment status enables employers to dismiss an employee at any time for any reason, or for no reason, unless there is a specific law against doing so.[222] Under many at-will employment laws, employers may also alter their employees' wages, work schedules, benefits, or paid time off without legal penalty.[223] Employees in an at-will relationship may also terminate their employment at their own discretion without legal liability.[224]

While at-will employment is the default, it may be modified by contract. For example, employees may have an employment contract with their employer promising that employees may only be terminated for "just cause."[225] If the employment status is modified via employment contract, then the employee can move from at-will to protected employment.

Public employees in North Carolina may also have particular protections that affect whether they are employed at-will.[226] Under federal jurisprudence, when a public employer grants a public employee a "legitimate claim of entitlement" to continued employment, it has created a property interest in that employee's "continued [public] employment."[227] Moving a public employee from at-will to just cause, or similar protections, can create such a property interest.[228]

The creation of the property interest in continued public employment triggers constitutional due process protections. Under the Fifth and Fourteenth Amendments, due process is owed when governments deprive citizens of property.[229] Protected public employees have three distinct due process requirements: (a) notice to the employee, (b) an opportunity for the employee to respond, and (c) a final decision by an impartial decision maker.[230] These due process protections can create additional procedural requirements for

221. Joyce, *supra* note 220. The four methods discussed in this section, including local ordinance and employment contracts, can provide this "something else" to create a non-at-will employment relationship in North Carolina.

222. *The At-Will Presumption and Exceptions to the Rule*, *supra* note 219.

223. *Id.*

224. *Id*.

225. *See id.*

226. *See* Joyce, *supra* note 220.

227. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

228. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985); Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992).

229. *Loudermill*, 470 U.S. at 541.

230. *Id.* at 546; *see also* Crump v. Bd. of Educ., 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990) (noting the necessity of an impartial decision maker).

employers looking to dismiss or discipline protected public employees compared with those employed at will.

Until recently, North Carolina had at least four methods of moving public employees from at-will to a protected status: (1) employment contract; (2) local ordinance; (3) "career status" for teachers, otherwise known as teacher tenure; and (4) the State Human Resources Act ("SHRA"). Any of these four methods may trigger due process protections for public employees in North Carolina.

A. Employment Contract

At-will employment is the default employment status in North Carolina.[231] A public employer could arrange an employment contract with a government employee that promised additional protections beyond the at-will default. In doing so, the protections afforded by the contract would govern the employment relationship rather than the default at-will rule.

B. Local Government Ordinance

The North Carolina legislature has delegated broad authority for human resources management to the city and county governments.[232] Accordingly, city councils or county commissioners may enact an ordinance giving employees just cause protections.[233] If a local governmental body so chooses, an employee who passes a probationary period may only be dismissed if the employer can show good cause.

The method by which a city council or county commission adopts these protections has important legal ramifications. In North Carolina, only an ordinance can create a "legitimate claim of entitlement" to employment, and, therefore, a property interest in the job requiring due process before dismissal.[234] Other methods, such as inclusion in a personnel manual, are insufficient to create such a legal protection.[235]

231. Juffras, *supra* note 219, at 2.

232. *Id.*

233. *See* Joyce, *supra* note 220.

234. Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992).

235. *See* Kearney v. Cty. of Durham, 99 N.C. App. 349, 351–52, 393 S.E.2d 129, 130 (1990).

C. Teacher Tenure—Public School Teachers

Beginning in 1971, the North Carolina legislature provided all public school teachers particular protections regarding the terms of their dismissal and enumerated the specific reasons for which they could be terminated.[236] After completing a probationary period of four years, teachers could be granted career status after a vote of the local school board.[237] Upon achieving career status, a teacher could be dismissed or demoted only for one of the fifteen enumerated reasons.[238] Teachers with such status were also granted procedural notice and hearing rights.[239]

In 2013, the North Carolina General Assembly amended the Career Status Law.[240] Inter alia, the new law largely barred any new candidate from obtaining career status as of August 1, 2013.[241] As of July 1, 2018, the law would revoke the career status of all teachers who had previously earned the protections associated with teacher tenure.[242] This new system is best described as at-will employment, given that the renewal decision for each teacher would be at the discretion of the school board.[243]

Within months of the repeal of the Career Status Law, the North Carolina Association of Educators and six public school teachers filed suit seeking declaratory and injunctive relief. The North Carolina Association of Educators lobbies on behalf of North Carolina public school teachers and employees in matters of public policy in the state legislature.[244] The question before the state supreme court was

236. An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, ch. 883, sec. 1, § 115-142(c), 1971 N.C. Sess. Laws 1396, 1397–98 (repealed 2013).

237. An Act to Modify the Hearing Process Applicable to Probationary Teachers, ch. 326, sec. 1, § 115C-325(c)(1), 2009 N.C. Sess. Laws 528, 528 (repealed 2013).

238. N.C. GEN. STAT. § 115C-325(e)(1) (2017).

239. An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, sec. 1, § 115-142(c), 1971 N.C. Sess. Laws at 1399–1402.

240. Current Operations and Capital Improvements Appropriation Act of 2013, ch. 360, sec. 9.6(a), § 115C-325, 2013 N.C. Sess. Laws 995, 1091 (codified at N.C. GEN. STAT. § 115C-325 (2017)) ("'Career employee' as used in this section means an employee who was awarded career status with that local board as a teacher prior to August 1, 2013.").

241. *Id.* sec. 9.6(f).

242. *Id.* sec. 9.6(b), (j).

243. *Id.* sec. 9.6 (b), (g).

244. *See* Will Doran, *Is North Carolina's Biggest Teachers' Lobby Breaking the Law, or Being Targeted?*, NEWS & OBSERVER (Raleigh Nov. 24, 2017, 9:00 AM), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article186136258.html [https://perma.cc/2XEH-4CUB]; *Who We Are*, N.C. ASS'N OF EDUCATORS, http://www.ncae.org/who-we-are/ [https://perma.cc/PE33-VQHS]; *see also Setting the Record Straight*, N.C. ASS'N OF EDUCATORS, http://www.ncae.org/setting-the-

whether a state law could remove the career status protections for current public employees.[245]

D. The State Human Resources Act & Recent Changes for County Health Officials

Most county employees are subject to county employment procedures and are employed under an at-will status.[246] Broadly speaking, these employees may be dismissed, disciplined, or demoted without just cause.

The SHRA defines the recruitment, selection, and termination of four county-level functions: public health, mental health, social services, and emergency management.[247] In 1975, the SHRA (then titled the State Personnel Act) was amended to change the employment status of employees within the Act's coverage.[248] With this amendment, career employees under the SHRA were given just cause protections against discipline and dismissal.[249]

The just cause protection created a property interest in continued public employment for career employees at the state and local levels.[250] This property interest necessitated due process for career employees subject to disciplinary proceedings. This protection continues to extend to state and local career employees subject to the Act.[251] As a general rule, public employees in county health and social service departments are employed at the county level but are subject

record-straight/ [https://perma.cc/SC9H-62U6] ("The NCAE is not a union, as it does not have bargaining rights. North Carolina is a non-union state.").

245. N.C. Ass'n of Educators v. State, 368 N.C. 777, 778–79, 786 S.E.2d 255, 257–58 (2016).

246. Juffras, *supra* note 219, at 2. ("For most city and county employees, there is a presumption of employment at will, unless the employee proves otherwise.").

247. N.C. GEN. STAT. § 126-5(a)(2) (2017). The 1965 version of the State Personnel Act included employees of local social service, public health, mental health, and civil defense agencies that received federal funds. State Personnel Act, ch. 640, § 2, 1965 N.C. Sess. Laws 708, 710 (codified as amended at N.C. GEN. STAT. § 126-5(a)(2) (2017)).

248. Act of June 18, 1975, ch. 667, §§ 8–10, 1975 N.C. Sess. Laws 809, 810–12 (codified as amended at N.C. GEN. STAT. § 126-35(a) (2017)).

249. *Id.* § 10.

250. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985) (establishing the standard for a public employee's property interest in continued public employment).

251. N.C. GEN. STAT. § 126-35(a) (2017) ("No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.").

to the SHRA and, therefore, may receive career status protections as tenured employees.[252]

Once career status employees pass a certain probationary period, they are subject to the SHRA and its guarantee of just cause dismissal and due process protections.[253] As such, employers must have cause to terminate their employment or demote them. In addition, career employees are afforded grievance procedures and impartial review through an administrative process in Raleigh, the state capital.[254]

Under a recent legislative act, Session Law 2012-126, county governments around the state may now opt out of SHRA protections by choosing to consolidate their human services functions into a new agency.[255] In other words, two or more county agencies could be combined into a new "consolidated human services agency."[256] While the law creates a complex array of detailed processes and exceptions, Session Law 2012-126 enables county commissioners to shut down one or more county agency entities and create a new agency.

The 2012 law does not provide definitions for certain relevant terms, and that omission can cause substantial uncertainty. For example, the term "Human Services" is not defined within the law. The broad umbrella term "Human Services" could mean that county leaders might decide to fold a diverse array of previously distinct function areas into a new consolidated agency. It is understood to incorporate county public health and social services agencies, but it may also include other types of services provided by a county, such as aging, veterans affairs, or transportation.[257] Similarly, "consolidated" and "consolidated human service agency" are also undefined within the 2012 law.[258]

252. Aimee Wall, *An Update on Recent Changes for Local Human Services Agencies*, COATES' CANONS: N.C. LOC. GOV'T L. (Apr. 23, 2013), http://canons.sog.unc.edu/?p=7090 [https://perma.cc/54F9-AXRD].

253. N.C. GEN. STAT. § 126-1.1, -35(a) (2017) ("No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.").

254. *Id.* § 126-35(a).

255. Act of June 29, 2012, ch. 126, sec. 1, § 153A-77, 2012 N.C. Sess. Laws 416, 419 (codified at N.C. GEN. STAT. § 153A-77(d) (2017)).

256. *See* Wall, *supra* note 252.

257. According to Wall, local governments have three options to choose from under the 2012 law. *Id.* If management chooses one of the two specific options allowing for consolidation, they are explicitly barred from consolidating certain local management entities. *Id.* For example, local management entities that handle mental health, substance abuse, and developmental disabilities generally cannot be incorporated into a consolidated human services agency. *See* N.C. GEN. STAT. § 153A-76 (2017).

258. *See* Wall, *supra* note 252.

County consolidation of local government entities can strip career status employees of their protected status. In many cases, the consolidation will eliminate one or more current local government entities. If counties elect to consolidate, under certain procedures,[259] the county may close an agency in which the county employees previously fell under the SHRA's ambit. Under Session Law 2012-126, the employees of the new consolidated human services agency are not subject to the SHRA unless the county commissioners explicitly elect to have the SHRA extend to the newly created agency.[260] By creating a new consolidated agency out of two or more local government agencies, state law dictates that the employees of the new consolidated agency are not subject to the SHRA.[261] The newly consolidated agency employees would be subject to the SHRA if, and only if, county commissioners expressly elect to keep the employees under the SHRA.[262] Career status employees of these now-defunct county agencies, previously covered under the SHRA, might be moved into these new consolidated agencies and lose their protected status when they are rehired as employees of a new agency or not rehired at all. Put simply, state law enables counties to lift certain workers from SHRA career status protections by transitioning them into a new consolidated agency wherein they would not have those protections.

One out of every three counties in North Carolina has consolidated its county departments, including some of its most populous counties such as Wake, Buncombe, Guilford, and Mecklenburg.[263] More counties are considering consolidation.

The legal repercussions of moving a local career employee into a consolidated human services agency subject to at-will human resources management remain unclear. Doing so may create legal risk for county governments, particularly after the Supreme Court of North Carolina's decision in *NCAE v. State*, which upheld career status protections for teachers who had obtained the protected

259. *Id.*

260. Act of June 29, 2012, sec. 1, § 153A-77(d), 2012 N.C. Sess. Laws at 419; *see also* Wall, *supra* note 252.

261. *See* N.C. GEN. STAT. § 153A-77(a) (2017); *see also* Wall, *supra* note 252.

262. § 153A-77(d).

263. Jill D. Moore & Aimee N. Wall, *PH and SS Organization and Governance: Resolutions as of April 2018*, UNC SCH. OF GOV'T, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/CHSA%20map%2004.2018%20v2.pdf [https://perma.cc/QTT5-8XA3]. Notably, these counties include Raleigh, Asheville, Greensboro, and Charlotte, respectively.

status.[264] Just as the *NCAE* litigation could be applied to public school teachers in other states, the case may also be applicable to this separate group of public employees in the newly consolidated health departments.

V. ON THE APPLICATION OF *NCAE V. STATE* IN NORTH CAROLINA AND ELSEWHERE

Rather than fashion a holding based on state law principles, the *NCAE* court hung its holding on the Contract Clause alone.[265] In doing so, the court increased the likelihood that other courts across the country may find its reasoning persuasive when deciding similar cases.

A. Applying the Lessons of NCAE *in North Carolina*

In North Carolina, another group of public employees, namely those affected by statutory changes to the SHRA, seem similarly situated to the public school teachers in the *NCAE* litigation. Certain public employees who were previously protected by North Carolina's SHRA may lose their protected status after a recent change to state law. This law enables counties to consolidate their human services functions into a new agency.[266] After this new agency is created, public employees who had previously obtained career status under the SHRA could lose that status. In both cases, state law allowed them to obtain particular employment protections, which once achieved would remove them from at-will employment status. Recent state action has had the effect of removing these protections.

Even with the similarities between the two groups of public employees, four important distinctions remain: (1) the statutory regime providing the career status; (2) the method by which career status is removed; (3) whether the career status employee has been rehired; and (4) the diversity of public employees affected.

264. N.C. Ass'n of Educators v. State, 368 N.C. 777, 792–93, 786 S.E.2d 255, 266 (2016).

265. *Id.*

266. N.C. GEN. STAT. § 153A-77(b)–(d) (2017). Before the legislation was enacted, a county with a population of over 425,000 could elect to create a consolidated human services agency. Act of May 20, 1987, ch. 217, sec. 1, § 153A-77, 1987 N.C. Sess. Laws 291, 291, *repealed by* Act of June 29, 2012, ch. 126, sec. 1, § 153A-77, 2012 N.C. Sess. Laws 416, 419 (codified at N.C. GEN. STAT. § 153A-77 (2017)). The state's two largest counties—Wake and Mecklenburg—did just that. *See* Wall, *supra* note 252. The legislation removed the population threshold from that law, which opened the door for all counties to consider whether they should consolidate. Act of June 29, 2012, sec. 1, § 153A-77, 2012 N.C. Sess. Laws at 419.

First, teacher tenure was created under a different statutory arrangement than the SHRA. While the career status achieved under the SHRA and the state teacher Career Status Law are similar, they are distinct laws and provide for distinct process requirements. Both remove the career status employee from at-will employment but do so under two distinct statutory regimes with their own legislative histories. As the two statutory regimes are different, the *NCAE* litigation does not directly implicate employees under the SHRA. Even so, the lessons from the *NCAE* litigation can inform arguments and potential future litigation for public employees that have lost their SHRA protection.

Second, the state legislature created different processes to remove career status from the two sets of public employees. For public school teachers, career status was repealed by the state legislature, and the repeal was set to take place over several years. For employees under the SHRA, counties have an option to consolidate their human service entities into a new agency. If they elect to do so, their default option is to remove the employees from SHRA protection. In effect, the state law empowers a county commission to change the structure of its public agencies and decide whether SHRA protections will flow to the employees of the newly created agency.

While in both cases a state act has had the effect of removing public employees from career status, a narrow interpretation could create distinguishing treatment. In the *NCAE* litigation, it was clear that the career status was removed by the state itself. If SHRA-applicable public employees were to litigate their status removal, they may face the counterargument that the county board—not the state—was the entity denying the career status. The new agency was authorized and created by the county board under the Consolidated Human Services Act, but the decision to apply SHRA protections was made by the county, not the state.

Even so, the *NCAE* court's reasoning may increase the strength of the SHRA-applicable employee's case. In *NCAE*, the Career Status Law did not grant vesting contractual rights—it was an implied term in the contracts between school boards and individual teachers, and the state law created a framework for school boards and teachers to craft these contracts. Local SHRA-applicable public employees might argue that the SHRA provided similar background for the employment contracts between their public employer and themselves.

As the *NCAE* court acknowledged,[267] the state law allowed for discretion among local public bodies in making employment contracts. For SHRA employees, the counties previously had this discretion in making contracts, and the employees may have relied on the SHRA as an implied term of their employment contracts. When they were granted tenure, these public employees would have also had vested contractual rights which were impaired by the state's subsequent action to allow for human service agency consolidation.

Third, the nature of the different processes by which career status is removed may create confusion about whether the career status employee has been rehired. After the repeal of North Carolina's teacher tenure law, the school district presumably remained intact. Although individual teachers may have lost an employment protection, their employer continued to exist. In the case of a consolidated human services agency, the county could eliminate an agency as a separate organizational entity and fold it into a newly created consolidated agency. The career status that a public employee had previously obtained under the SHRA might not transfer to the new agency, in part because their previous employer may no longer exist as an organization.

If the county organization no longer exists, then all employees might be considered new hires or rehires outside of the SHRA protections. A court faced with this question could conceivably arrive at the conclusion that the same worker doing the same task is in the same job. An alternative conclusion, however, is also reasonable—namely, the change in the organization's legal status as an entity could mean that all employees must be newly hired into the new organization.

Fourth, teachers are a defined group of public employees while human services employees are undefined in current North Carolina law. The SHRA protects the employees of certain county functions, such as emergency management, health, and social services. Other county functional areas are not included within the SHRA's protections, such as aging, transportation, or veterans affairs. Counties are free to include a medley of county operations within a consolidated agency, and many have done so.[268] As such, the employees of the consolidated agency may include those previously

267. *See N.C. Ass'n of Educators*, 368 N.C. at 788–89, 786 S.E.2d at 264.

268. *See CHSA Organizational Charts*, UNC SCH. OF GOV'T, https://www.sog.unc.edu/resources/microsites/north-carolina-public-health-law/chsa-organizational-charts [https://perma.cc/V4JM-8KCG].

governed by the SHRA as well as those who were not.[269] Consequently, human resources policies and ordinances targeting these consolidated agencies may grant employee protections that were greater or less than county employees had previously enjoyed.

The legal status of career employees in newly created consolidated agencies is currently uncertain. Similar to the career status for public school teachers, the SHRA provided constitutional property interests and due process to certain state and local government employees after a probationary period. Local governments now have an option to remove the career status protections for many of these SHRA-applicable local government employees.[270] While the *NCAE* case does not bear directly on these SHRA-protected local government employees, the legal reasoning is similar for both public school teachers and public employees affected by North Carolina's recent career status repeals at the local government level. Put another way, the case's Contract Clause arguments have broader applicability beyond just the context of the public school teacher plaintiffs involved.[271]

Public employees might also consider strategic interventions outside of litigation. As an alternative option, public employees could rally and organize to petition their elected representatives to reinstate their previous employment protections. For example, public employees could lobby their county commissioners to revisit the decision to remove SHRA protections. As the state has delegated decision making on extending SHRA protections to the county level, each county could make this determination itself for county employees in newly consolidated human service agencies.

While the situations of public school teachers and that of SHRA-applicable public employees have some distinguishing characteristics, the situations are comparable enough as to lead to a judicial finding that they are similarly situated.

The State likely will be better prepared for future challenges to career status revocation than they were in the *NCAE* case. In particular, Judge Dillon's citation to *Phelps* and other cases could

269. As noted above, some local management entities that handle certain responsibilities (e.g., mental health, substance abuse, and developmental disabilities) cannot be incorporated into a consolidated human services agency under certain consolidation options in most of North Carolina's counties. *See* N.C. GEN. STAT. § 153A-76(5)–(7) (2017).

270. *See* Act of June 29, 2012, sec. 1, § 153A-77, 2012 N.C. Sess. Laws at 419.

271. *See, e.g.*, State of Nev. Emps. Ass'n. v. Keating, 903 F.2d 1223, 1225, 1228 (9th Cir. 1990) (finding that state legislation unconstitutionally impaired contractual obligations affecting public employees'—not limited to teachers—pensions).

provide a roadmap to bolster a defense of state action. Moreover, the SHRA statute has a different history, calls for different procedures, and contains different language than the state's teacher tenure law and its repeal, enabling courts to potentially distinguish these characteristics.

Lessons from the *NCAE* appellate process about relevant authority likely will lead future litigants to tailor authority to guiding North Carolina case law, especially the cases of *Bailey*, *Faulkenbury*, and *Wiggs*. Arguments that distinguish career status employment protection from the deferred compensation in those cases are likely to be emphasized in defense of the state action, as they were in Judge Dillon's dissent.

Indeed, Judge Dillon, in a unanimous North Carolina Court of Appeals opinion, recently cited favorably to the supreme court's *NCAE* decision. In a 2016 case involving state magistrates and the aptly titled "Salary Statute," the magistrates alleged that they had been promised future pay increases with a salary step schedule set by statute.[272] Judge Dillon compared the magistrates who were suing over future changes to their salaries to the teachers in *NCAE* who had not yet obtained tenure.[273] Ultimately, the court of appeals in that case found that the state legislature was "free to alter the salary schedule before the work supporting each [salary] step increase is performed by a magistrate."

As demonstrated in the lower levels of the *NCAE* litigation, the combination of the state constitution's law of the land provision in addition to the Contract Clause appears to provide a potent combination in support of public employees' position when protected contractual rights are threatened by state action. While the United States Supreme Court has more commonly addressed such cases on due process grounds,[274] *NCAE v. State* provides a relatively novel approach to litigating public employment status. Jurists and advocates in public employment matters in North Carolina and elsewhere may be interested in adapting and applying such arguments to the facts before them.

272. Adams v. State, __ N.C. App. __, __, 790 S.E.2d 339, 341 (2016), *rev. denied* __ N.C. __, 803 S.E.2d 386 (2017).

273. *Id.* at __, 790 S.E.2d at 343 ("The actions of the General Assembly in suspending step increases *for future work* did not take away any benefit already earned by Plaintiffs, whereas in *N.C. Ass'n of Educators*, the successful plaintiffs had already worked the requisite years to earn career status." (citation omitted)). The Contract Clause reasoning of *NCAE* and *Adams v. State* were also utilized in the unpublished opinion *Terry v. State*, No. 14 CVS 12342, 2017 WL 491930, at *4–7 (N.C. Ct. App. Feb. 7, 2017).

274. Recent Case, *supra* note 59, at 997.

B. Applying the Lessons of NCAE *Across the Country*

Tenure of public employees is a controversial topic in North Carolina and across the country. The *NCAE* litigation provides an opportunity to separate the politics from the law and focus squarely on the legal protections afforded to public employees in exchange for their relatively modest salary and public service.

While the career status of North Carolina teachers and other public employees has important distinctions, the lessons of the recently decided *NCAE* litigation are highly applicable for future advocates for SHRA-applicable local employees and are persuasive in other jurisdictions considering similar cases. As noted elsewhere, the "Contract Clause may . . . provide a shield against lawmakers' efforts to strip tenured teachers of their tenure rights."[275] In states that recognize contractual rights in legislative grants of employment benefits, *NCAE* demonstrates that the grant of career status—tenure by another name—creates constitutionally protected contractual rights.[276] As applied to other jurisdictions, the trial court decision and the court of appeals majority's policy arguments also offer compelling reasons in favor of maintaining teacher tenure.[277] It would behoove advocates on both sides of the issue to consider both the legal and policy arguments advanced at each stage of the *NCAE* litigation as these arguments provide a blueprint for future arguments, albeit with different statutory backgrounds. As noted elsewhere, the complete elimination of teacher tenure is not the sole means through which the tenure system might be reformed.[278]

As a decision of a state's highest court, the *NCAE* decision is particularly persuasive. The decision's persuasive value increases when paired with a recent federal case, which came to a similar conclusion. That case, *Elliott v. Board of School Trustees of Madison Consolidated Schools*,[279] involved the termination of a tenured school teacher following state action that affected the way teacher's contracts were cancelled.[280] At the district court level, the judge noted that it was undisputed that teacher tenure was a contractual right in

275. *Id.* at 1002.

276. *Id.*

277. *Id.*

278. *Id.* (citing legislative developments in New York and California that would streamline the process for firing and disciplining teachers accused of misconduct).

279. No. 1:13-cv-319-WTL-DML, 2015 U.S. Dist. LEXIS 30309 (S.D. Ind. March 12, 2015), *aff'd* 876 F.3d 926 (7th Cir. 2017), *cert. denied*, No.17-1259, 2018 U.S. LEXIS 3550 (2018).

280. *Id.* at *3–6.

that state but that the parties disagreed as to the scope of that right. Ultimately, the federal judge ruled in favor of the teacher, finding that the state's change to the teacher tenure system was unnecessary to accomplish the goal of improving teacher quality since adequate measures already existed to address the state's concerns.[281] The state's change was therefore unconstitutional as applied to the plaintiff.[282]

The *NCAE* decision and the *Elliott* decision, affirmed in the Seventh Circuit, are far from the first cases related to public employment protections and the Contract Clause, and they are unlikely to be the last. Future litigants and jurists should take heed that Contract Clause arguments can be both powerful and persuasive.

Given that the *NCAE* decision interpreted the language of the Federal Constitution's Contract Clause, the decision may be particularly persuasive in other jurisdictions in which the state constitution's equivalent to the Contract Clause mirrors the language of the Federal Constitution. Given that the language that the Supreme Court of North Carolina interpreted would be mirrored in the state constitution elsewhere, the other states' reviewing courts might find the *NCAE* court's reasoning highly persuasive. According to one recent commentator, "eliminating tenure altogether is impractical because doing so may violate the Contracts Clause . . . [b]ecause eliminating tenure effectively eliminates teachers' rights to employment contracts that are guaranteed by the constitutions of both the United States and the individual states . . . ."[283] That commentator went on to conclude that in light of the legal challenges posed by the Contract Clause, "completely eliminating tenure is not a viable option for legislatures in future modifications to teacher tenure."[284] Several state constitutions, including those of Idaho, Michigan, and Indiana, have contract clause language similar to that of the Federal Constitution's Contract Clause.[285]

281. *Id.* at *35–36 (first citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978) ("[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem."); then citing U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 29–31 (1977) ("[I]t cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan . . . a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.")).

282. *Id.*

283. Kimberly M. Rippeth, *Running the Race: An Evaluation of Post-Race-to-the-Top Modifications to Teacher Tenure Laws and a Recommendation for Future Legislative Changes*, 50 AKRON L. REV. 141, 161 (2017).

284. *Id.* at 163.

285. *See, e.g.*, IDAHO CONST. art. I, § 16 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."); IND. CONST. art. I, § 24 ("No

CONCLUSION

Public employees generally enjoy greater employment protections in their work than their private-sector counterparts. For example, the United States Supreme Court in *Loudermill* established a constitutionally protected right for public employees in their continued public employment.[286] It is well known that state actions that interfere with this vested right constitute a government takings and trigger due process protections. What is comparably rare is the utilization of Contract Clause-based arguments with regard to public employment protections.

North Carolina is on the frontlines of an ongoing national debate about the appropriate level of employment protections for public employees. As noted above, public managers face comparably greater constraints in terms of personnel than their private-sector counterparts.[287] Nearly twenty states have proposed weakening teacher tenure laws, but North Carolina is among the few states that have passed legislation barring teachers from such protection.

Using a case study of North Carolina public-sector employees in education and in health departments, this analysis found that the ongoing debates in North Carolina present lessons for litigants and jurists across the country. The Supreme Court of North Carolina's analysis of the Contract Clause created persuasive precedent for policymakers and judges in other states to consider when debating policy options and deciding similar cases in coming years.

ex post facto law, or law impairing the obligation of contracts, shall ever be passed."); MICH. CONST. art. I, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.").

286. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985).

287. Allison, *supra* note 199, at 221.