AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Property

**Sveen v. Melin, \_\_\_ U.S. \_\_\_** (2018)

*Mark Sveen and Kaye Melin were married in 1997 and divorced ten years later. In 1998, Mark Sveen took out a life insurance policy under which Melin was the primary beneficiary and Sveen’s children from a previous marriage, Ashley and Antone Sveen, were the contingent beneficiaries. When Sveen died in 2011, the Sveen children claimed a right to the proceeds from the life insurance under a state law that automatically revoked “any revocable() beneficiary designation() made by an individual to the individual’s former spouse. Melin agreed that her designation was revocable, that Mark Sveen while alive was legally authorized to change the beneficiary of his life insurance policy. She nevertheless claimed that the state law was unconstitutional under the contracts clause of Article I, Section 9 as applied to her because Sveen had designated her as the primary beneficiary before the state law was passed. A federal district court awarded the money to the Sveen children, but that decision was reversed by the Court of Appeals for the Eighth Circuit. The Sveens appealed to the Supreme Court of the United States.*

 *The Supreme Court by an 8-1 vote ruled that the Sveens with the legal beneficiaries. Justice Elana Kagan’s majority opinion held that the Minnesota law was not a substantial impairment of contract obligations. Why did Kagan reach that conclusion? Why did Justice Gorsuch disagree? Why did no other conservative join Gorsuch? Did they reject his understanding of the original meaning of the contracts clause or his application of past precedent to this case? Gorsuch clearly wishes to revive the contracts clause as a limit on state power. Why would he favor revival? What might be the consequences? Would you favor reviving the contracts clause?*

JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I36f1c2d76d2911e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) delivered the opinion of the Court.

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The legal system has long used default rules to resolve estate litigation in a way that conforms to decedents' presumed intent. At common law, for example, marriage automatically revoked a woman's prior will, while marriage *and*the birth of a child revoked a man's. The testator could then revive the old will or execute a new one. But if he (or she) did neither, the laws of intestate succession (generally prioritizing children and current spouses) would control the estate's distribution. Courts reasoned that the average person would prefer that allocation to the one in the old will, given the intervening life events. . . .

. . . . [C]limbing divorce rates led almost all States by the 1980s to adopt another kind of automatic-revocation law. So-called revocation-on-divorce statutes treat an individual's divorce as voiding a testamentary bequest to a former spouse. Like the old common-law rule, those laws rest on a “judgment about the typical testator's probable intent.” They presume, in other words, that the average Joe does not want his ex inheriting what he leaves behind. Over time, many States extended their revocation-on-divorce statutes from wills to “will substitutes,” such as revocable trusts, pension accounts, and life insurance policies. . . . The underlying idea was that the typical decedent would no more want his former spouse to benefit from his pension plan or life insurance than to inherit under his will. . . .

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The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that “[n]o state shall ... pass any ... Law impairing the Obligation of Contracts.” [U.S. Const., Art. I, § 10, cl. 1](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIS10CL1&originatingDoc=I36f1c2d76d2911e8bbbcd57aa014637b&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)). . . . At the same time, not all laws affecting pre-existing contracts violate the Clause. To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has “operated as a substantial impairment of a contractual relationship.”  In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.”

Here, we may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. . . . First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment. . . .

To begin, the Minnesota statute furthers the policyholder's intent in many cases—indeed, the drafters reasonably thought in the typical one. . . . Although there are exceptions, most divorcees do not aspire to enrich their former partners. . . . Or said otherwise, the insured's failure to change the beneficiary after a divorce is more likely the result of neglect than choice. And that means the Minnesota statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term.

And even when presumed and actual intent diverge, the Minnesota law is unlikely to upset a policyholder's expectations at the time of contracting. That is because an insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce. . . . The power of divorce courts over insurance policies is relevant here because it affects whether a party can reasonably expect a beneficiary designation to survive a marital breakdown. We venture to guess that few people, when purchasing life insurance, give a thought to what will happen in the event of divorce. But even if someone out there does, he can conclude only that ... he cannot possibly know. So his reliance interests are next to nil. . . .

Finally, a policyholder can reverse the effect of the Minnesota statute with the stroke of a pen. The law puts in place a presumption about what an insured wants after divorcing. But if the presumption is wrong, the insured may overthrow it. And he may do so by the simple act of sending a change-of-beneficiary form to his insurer. . . . Even supposing an insured wants his life insurance to benefit his ex-spouse, filing a change-of-beneficiary form with an insurance company is as “easy” as, say, providing a landowner with notice or recording a deed.  Here too, with only “minimal” effort, a person can “safeguard” his contractual preferences. . . .

In addressing those precedents, Melin mainly urges us to distinguish between two ways a law can affect a contract. . . . The Minnesota law explicitly alters a person's entitlement under the contract, while . . . recording laws interfere with his ability to enforce that entitlement against others. But we see no meaningful distinction among all these laws. The old statutes also “act[ed] on the contract” in a significant way. They added a paperwork obligation nowhere found in the original agreement—“record the deed,” say, or “notify the landowner.” And they informed a contracting party that unless he complied, he could not gain the benefits of his bargain. . . .

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JUSTICE GORSUCH, dissenting.

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Because legislation often disrupts existing social arrangements, it usually applies only prospectively. This longstanding and “sacred” principle ensures that people have fair warning of the law's demands.  It also prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change. When it comes to legislation affecting contracts, the Constitution hardens the presumption of prospectivity into a mandate. The Contracts Clause categorically prohibits states from passing “*any* ... Law impairing the Obligation of Contracts.” Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where the Contracts Clause is found permits states to take otherwise unconstitutional action when “absolutely necessary,” if “actually invaded,” or “wit[h] the Consent of Congress.”. But in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as “inviolable” would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority.

The categorical nature of the Contracts Clause was not lost on anyone, either. When some delegates at the Constitutional Convention sought softer language, James Madison acknowledged the “‘inconvenience’” a categorical rule could sometimes entail “‘but thought on the whole it would be overbalanced by the utility of it.’” . . . For much of its history, this Court construed the Contracts Clause in this light. The Court explained that any legislative deviation from a contract's obligations, “however minute, or apparently immaterial,” violates the Constitution. *Green v. Biddle* (1823).

More recently, though, the Court has charted a different course. Our modern cases permit a state to “substantial[ly] impai[r]” a contractual obligation in pursuit of “a significant and legitimate public purpose” so long as the impairment is “‘reasonable.’” That test seems hard to square with the Constitution's original public meaning. After all, the Constitution does not speak of “substantial” impairments—it bars “any” impairment. Under a balancing approach, too, how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? . . . .

Even under our modern precedents, though, I still do not see how the statute before us might survive unscathed. . . . [W]hen a state alters life insurance contracts by undoing their beneficiary designations it surely “substantially impairs” them. As Justice Washington explained long ago, legislation “changing the objects of [the donor's] bounty ... changes so materially the terms of a contract” that the law can only be said to “impair its obligation.” *Trustees of Dartmouth College v. Woodward* (1819). . . .

Cases like ours illustrate the point. . . . The case comes to us after no one was able to meet Minnesota's clear and convincing evidence standard to prove Mr. Sveen's intent. But what we do know is the retroactive removal of Ms. Melin undid the central term of the contract Mr. Sveen signed and left in place for years, even after his divorce, until the day he died. . . . As the federal government has recognized, revocation on divorce statutes cannot be assumed to “effectuat[e] the insured's ‘true’ intent” because a policyholder “might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse's custody.” For these reasons, the federal government and nearly half the states today do not treat divorce as automatically revoking insurance beneficiary designations.

Consider next the question of the impairment's reasonableness. Our cases suggest that a substantial impairment is unreasonable when “an evident and more moderate course would serve [the state's] purposes equally well.”  Here, Minnesota's stated purpose is to ensure proceeds aren't misdirected to a former spouse because a policyholder forgets to update his beneficiary designation after divorce. But the state could have easily achieved that goal without impairing contracts *at all*. It could have required courts to confirm that divorcing couples have reviewed their life insurance designations. It could have instructed insurance companies to notify policyholders of their right to change beneficiary designations. It could have disseminated information on its own. Or it could have required attorneys in divorce proceedings to address the question with affected parties. . . . Yet there's no evidence Minnesota investigated any of them, let alone found them wanting.

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The Court first stresses that individuals sometimes neglect their beneficiary designations after divorce. But as we've seen the law depends on a stereotype about divorcing couples that not everyone fits. A sizeable (and maybe growing) number of people *do*want to keep their former spouses as beneficiaries. Even the Court admits the law's presumption will sometimes prove “wrong.”  And that tells us all we need to know. That the law is *only sometimes*wrong in predicting what divorcing policyholders want may go some way to establishing its *reasonableness* at the second step of our inquiry. But at the first step, where we ask only whether the law substantially impairs contracts, the answer is unavoidable. The statute substantially impairs contracts by displacing the term that is the “‘whole point’” of the contract.

The Court's answer to this problem introduces an apparent paradox. If the statute substantially impairs contracts, it says, the impairment can be easily undone. Anyone unhappy with the statute's beneficiary re-designation can just re-re-designate the beneficiary later.

Yet the Court just finished telling us the statute is justified because most policyholders *neglect* their beneficiary designations after divorce. Both claims cannot be true. The statute cannot simultaneously be necessary because people are inattentive to the details of their insurance policies and constitutional because they are hyperaware of those same details.

Perhaps seeking a way out of this problem, the Court offers an entirely different line of argument. Here the Court suggests the statute doesn't substantially impair contracts because it does no more than a divorce court might.  But this argument doesn't work either. *Courts*may apply *pre-existing* law to alter a beneficiary designation to ensure an equitable distribution of marital property in specific cases. That hardly means *legislatures*may retroactively *change* the law to rearrange beneficiary designations for everyone. . . .

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The judicial power to declare a law unconstitutional should never be lightly invoked. But the law before us cannot survive an encounter with even the breeziest of Contracts Clause tests. It substantially impairs life insurance contracts by retroactively revising their key term. No one can offer any reasonable justification for this impairment in light of readily available alternatives. Acknowledging this much doesn't even require us to hold the statute invalid in all applications, only that it cannot be applied to contracts formed before its enactment. I respectfully dissent.