# A Constitutional Analysis of AB 132 Under the U.S. and Wisconsin Contracts Clause

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The purpose of this memo is to examine key provisions of Wisconsin Assembly Bill 132 ("AB" 132"). That bill now proposes to impose on both new and existing automobile dealership contracts a wide variety of new restrictions upon automobile manufacturers at the behest of dealers within the state. It contains no reciprocal new duties on automobile dealers. Each and every one of the proposed new manufacturer duties under AB 132 will require manufacturers to make extensive expenditures for the sole and exclusive benefit of dealers, for which these manufacturers will receive no compensation at all. These provisions will, moreover, be used not only to regulate prospectively new dealership contracts. They will all be used under section 45 of AB 132[1] to the rights and duties under preexisting contracts without the consent of one party to them.

The sole justification offered for all of these changes is that they will work to protect dealers from entering into certain "coercive" transactions that are said to require redress. Yet the definition of coercion in AB 132 is so broad that it could be used to excuse dealers from any and all of their contractual obligations. In my opinion, the proposed legislation represents a raw use of legislative power for which the dealers have not offered any justification of how this legislation benefits any interests other than their own. The utter imbalance created under AB 132 thus

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1 **SECTION 45. Initial Applicability.** (1) This act first applies to an agreement that "exists or is entered into on the effective date of this subsection." Throughout this memo, I shall assume, consistent with Wisconsin law, that the statute has retroactive application even when it is applied to agreements that were formed prior to the passage of the statute, even if their terms were modified in some particulars after its passage. *E.A. Dickinson & Assocs. v. Simpson Elec. Co.*, 509 F. Supp. 736 (W.D. Wis. 1983) (addition of new product line did not make contract prospective under Fair Dealership Law); *Rochester v. Royal Appliance Mfg. Co.*, 569 F. Supp. 736 (W.D. Wis. 1983) (no new agreement when dealer voluntarily withdraws from a territory); *cf. McKay Nissan Ltd. v. Nissan Motor Corp. U.S.A.*, 764 F. Supp. 1318 (N.D. Ill. 1991) (fundamental contract changes must be introduced in order to constitute a new contract or agreement).

makes it highly likely that the entire scheme will be struck down as a retroactive impairment of contract under applicable Wisconsin precedent.

In order to develop this theme I shall proceed as follows. Part I offers a description and economic analysis of the new provisions that the Wisconsin legislature would write into all existing and future contracts. Part II then explains why AB 132 offends the Contracts Clause found in Art. I, section 10, which states that "no state shall . . . pass . . . any law impairing the obligation of contract," and the analogous provision of the Wisconsin state constitution, which is if anything more emphatic: "SECTION 12. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed." A brief conclusion follows.

## PART I.

### *A. The Economic Analysis of Automotive Dealer Protection Acts.*

Virtually all states have some regulation of the relationship between automobile manufacturers (or their importers and distributors—here collectively manufacturers) on the one hand and dealers on the other hand. These agreements have as their common thread the advancement of the interest of dealers, who form a strong local constituency, against the interest of the manufacturers, who usually come from out of state.

The nature of these statutory protections vary widely, but they typically address such vital issues as the termination or relocation of dealerships by the manufacturers, or with the various terms by which these services are provided. As a matter of first principle, a strong consensus exists in the economics profession that these legislative interventions are, even when enacted prospectively, harmful to overall consumer and social welfare. To be sure, there are in all ongoing manufacturer-dealer relationships, the risk that one side or the other will seek to take advantage of the fact that its opposite number has sunk extensive resources into the relationship so that they cannot just quit the deal if new obligations are imposed on them. That risk of expropriation alone, however, is not sufficient to justify government regulation of these dealership relationships. Both sides to these arrangements are sophisticated parties with genuine commercial experience. Any risk of expropriation is known to both. Hence they are fully able to take care to protect themselves against opportunistic behavior by the other side. Accordingly, the central finding in this area has been stated by Professors Francine Lafontaine and Fiona Scott Morton as follows:

> that while privately imposed restraints seem to benefit manufacturers and consumers alike, when restraints such as these are mandated by the government, as they are in the case of car distribution state legislation, they

> lead to higher prices, higher costs, shorter hours of operation, lower consumption—and thus declines in consumer welfare.[2]

In essence, their argument in support of this proposition runs as follows. Where the terms in question are reached by mutual agreement, there is every reason to believe that they work to the mutual advantage of both parties, who would otherwise not choose to sign them. But when these terms are imposed by government acting in response to local political pressures, the check of mutual gain is no longer present. The successful party only has to persuade a majority of the legislature to champion its cause. It need not win over the consent of its trading partner. At this point, the terms of the legislation could easily enrich the successful party and weaken the economic position of the other side to that business relationship. Typically, as the quotation above indicates, these government-imposed mandates cost more than they are worth, which leads to the decline in overall social welfare that is found in the economic literature.

*B. The Use of "Coercion" under AB 132.*

This basic analysis applies to the particular provisions that are found in AB 132. This section first begins with a broad and indefensible definition of the verb "coerce", which covers all actions or refusals to act that are said to "deprive the coerced dealer of a benefit generally available to other dealers of the same line make of motor vehicles or will otherwise materially harm the coerced dealers." SECTION 218.0101.

This definition of the term "coerce" is an attempt to make it appear that the AB 132 operates only as a continuation of the general common law rule that no individual can be bound by a contract that he or she has been coerced to enter. But in this statutory context, the term "coercion" receives a special statutory definition that is at once highly misleading and wildly overbroad. The first quoted clause in effect requires a manufacturer to treat all dealers alike even when there may well be good and sufficient reasons to distinguish among them, based on variations on such key matters as population shifts, changes in product demand, or local regulatory issues.

The second clause in the definition of "coerce" is every bit as mischievous, for it says that any party who insists on enforcing its contractual rights has coerced its trading party, because such action "will materially harm the coerced dealers." Put otherwise, this definition is so broad that it cannot explain why only dealers are coerced. By the same logic automobile manufacturers are coerced as well if they are forced to honor their obligations to the dealers. And ironically, it ignores the obvious coercion when the state by the use of its force prohibits the enforcement of these once valid provisions.

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[2] Francine Lafontaine & Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. (No. 3) 233, 243 (2010).

The key mistake of this statutory definition, therefore, is to depart from every known definition of coercion. Thus the dealers do not complain that they have been victimized by force or by fraud. Those wrongs, if they occur, are remedied by ordinary actions in tort or for breach of contract. Nor can the dealers claim that they are coerced in the sense that the practices that they are attacking are in restraint of trade and thus subject to sanctions under the antitrust laws. They make no such claim for any of these practices. Nor do they claim that the ordinary remedies now available to dealers are not sufficient to protect their legitimate interests.

The draft legislation thus presents a two-fold irony. First, it does use the state power to coerce (i.e. under a threat of force) to perform acts which they have not consented to do. Second, at the same time the dealers at no point explain why the targeted clauses should be regarded as coercive or even misguided. They point to no examples of manufacturer abuses of surprise, deception, abuse or sharp dealing, for which some remedy is required. In essence, their only claim is that they are coerced whenever they are forced to honor their contractual obligations. Applied more generally to all business relationships, this peculiar statutory definition of coercion completely undermines all predictability in the law of contract and makes virtually all obligations unenforceable. No legislation that rests on such rickety foundations should ever be immune from constitutional scrutiny.

To see the risks inherent in this improper definition of "coerce," it is useful to see how they interact with some of the key substantive provisions found in AB 132. Three of these provisions that merit special attention deal with site control, facilities improvements, and exclusivity. In principle there is much to be said on both sides the question as to how these matters should be resolved. In dealing with this question there is, in principle, no powerful objection to having legislation set out the basic parameters for resolving these questions. But the insistence on standardized terms runs into serious problems of implementation for the reason noted above. The broad definition of "coerce" carries with it the clear message that any effort by manufacturers to negotiate separate, firm specific agreements with different dealers is cast under a cloud that treats all such arrangements suspect. The resulting loss of flexibility with respect to these provisions in existing contracts could lead to an overall loss in system wide efficiency that could harm overall efficiency. It is therefore worth while to note some of the substantive difficulties with these individual provisions that might well give rise to concerns in individual cases in light of the broad definition of coercion that precedes them.

Section 6 of AB 132 introduces new section 218.0116, which contains a "site control contract" that subjects to the improper coercion a contractual provision that allows the manufacturer "after the termination, cancellation, or nonrenewal of an agreement, to control the disposition or use of or to lease the dealer's dealership facilities." One obvious reason for this provision is to allow the space to be used, if desired, by a new dealer who might provide better consumer services. The inclusion of broad language that speaks of a manufacturer "who coerces or attempts to coerce a dealer or prospective dealer to enter into a site control contract," casts a cloud over all such negotiations, which is not dispelled by the next sentence that notes that "this subdivision does not prohibit a site control contract for which the dealer or prospective dealer receives a separate and valuable consideration." The danger in this context is that the broad definitions of coercion could be used to attack any such collateral agreement. By blocking variations in this sensitive topic, AB 132's dealer protection measure could impose high costs on the overall distribution network, costs that are borne not only by the manufacturer, but also by consumers and other dealers.

The same observations apply to section 7 of AB 132, which contains section 218.0116 insofar as it seeks a uniform rule to prevent the manufacturer from requiring dealerships to increase their investments in facilities, or that prohibits them from dividing their efforts by adding in a second line of products. Once again, these contractual provisions, which obtained full dealer consent in separate negotiations, are perfectly rational efforts to improve overall service. Requiring a dealer to increase investments in facilities can help insure that weak dealerships do not bring down the overall perception of the quality and worth of the manufacturer's brand, as it applies to both sales and service. Without that provision, some dealers could cut back on investments in order to free ride on the efforts of the manufacturer and other dealers to improve the overall performance of a dealer network. Once again the use of the broad coercion language in this provision casts a pall over the voluntary agreements that again feature "a separate and valuable consideration for improvement." The removal of that coerce language removes much of the uncertainty about the status of individualized contractual negotiations.

Finally, AB 132 Section 8 introduces 218.0116 that deal with exclusive service contracts. As a business matter, manufacturers have strong incentives to enter into agreements that in some settings require dealers show them exclusive loyalty. Manufacturers have to invest heavily in their dealerships through the promotional activities of their products that they run to help bring customers to their dealers. There is a real risk that these investments could be diverted to the promotion of a rivals brand without this form of contractual protection. It is hard to see why this sensible effort to promote the brand should be condemned as coercive without a further explanation. It may well be that in some instances market volume or other circumstances make it sensible for dealers to offer dual product lines. But at that point the two parties can through ordinary negotiations enter into a deal that allows that option, subject to whatever additional provisions that the manufacturer needs to protect its own investment in its brand. In separation, these contractual devices can be tailored to specific situation and thus avoid the overkill that comes with general legislative commands that are blind to the particular circumstances in any individual case. The inclusion of the language that condemns a manufacturer who "unreasonably requires or coerces or attempts to coerce a dealer" also casts a cloud of these important contractual readjustments, and should be removed to facilitate these important negotiations.

The great danger is that the broad use of the verb "coerce" issues a generalized condemnation of all sensible efforts to reach accommodations based on individual circumstances in particular cases. In any industry that features single sellers with multiple dealer outlets, there is an ongoing struggle to decide when equal treatment should give way to individual agreements. There is much to be said for the general proposition that like cases should be treated alike. But in complex distribution cases, all cases need not be alike, given key variations one such key points as sales volume, location, local competition and the like. It therefore is a mistake to introduce, especially on a retroactive basis, a straight jacket that could hurt all participants in the marketplace. In sum, it takes little imagination to see that each of these dealer protection provisions might, if inflexibly applied, impose large costs initially on manufacturers and ultimately on consumers. In a difficult economy it is always wise to be cautious with new government restrictions on contractual behavior that could easily backfire, especially when retroactively applied.

*C. Cost Recovery Bar.* Another troublesome provision of AB 132 is found in Section 17 of the bill which contains the new version of section 218.0125(3) which addresses the question of how to set the price at which the manufacturer has to reimburse the dealer for warranty work. The basic effort in this statute is to require the manufacturer to pay the dealer for its warranty work an amount that the dealer charges customers for similar work that is not done under warranty. One real difficulty with this type of tying arrangement is that the dealer can inflate the charges that it imposes for its nonwarranty work to increase the reimbursement rates that it gets for warranty work. If the percentage of work done off warranty is smaller, any loss in business could be more than offset by the increased recovery from manufacturers for that work. Put otherwise, these efforts to use nondiscrimination provisions are subject to risks, which the statute purports to address by requiring the dealer to show those rates for 100 consecutive transactions. The provision thus reaches a plausible accommodation on that question.

The danger, especially on a retroactive basis of that section is its effort to control a second form of possible abuse, whereby the manufacturer raises other costs to dealers in order to offset any increase in its rates that it must pay dealers for warranty work. The provision that says "The manufacturer, importer, or distributor may not otherwise recover its cost for compensating a dealer for labor and parts under this section," is drafted in very broad language that potentially allows the dealer to challenge manufacturers pricing policies on any of the myriad of transactions between the two sides. That broad language in turn raises the risk that the manufacturer will systematically have to overpay for warranty work to Wisconsin dealers in ways that force it to raise basic prices across the board, including in other states. The hard question here is whether these restrictions make sense, especially on a retroactive basis relative to the current institutional arrangements.

In sum, it seems clear that the extensive efforts to rework these basic dealer contracts assume increased importance because of Section 45 renders it applicable to existing agreements, in which ,manufacturers are effectively kept to one side of the bargain while the other provisions are unilaterally renegotiated to their disadvantage. It is for this reason that it is important to undertake a constitutional analysis of the key provisions of AB 132.

## PART II. CONSTITUTIONAL ANALYSIS.

### *A. The Prospective and Retroactive Application of the Contracts Clause*

The next question is whether this legislation is subject to any constitutional infirmity. As a textual matter, the contracts clause does not distinguish between prospective and retroactive application of the doctrine, and there is much to be said for the position taken by Chief Justice Marshall and Justice Story in dissent in *Ogden v. Saunders*[3] that the contracts clause is meant to be read as it is written, so that it covers both. Modern constitutional law, however, rejects this broad reading of the Contract Clause, and thus allows for prospective regulation of private contracts, subject only to a lower level of rational basis scrutiny under the Due Process or Equal Protection Clauses. See, *Kuhl v. Ford Motor Co.* 71 N.W.2d 420 (Wis. 1955).

The modern position starts with the assumption that individuals and firms are armed in advance with sufficient knowledge of how the law works so that they can take intelligent steps to mitigate the damage, both in their selection of trading partners and in their negotiation of contract terms. Indeed in some cases, where the prospective regulation is so onerous and one-sided, they are able to abandon the market, or perhaps mount a successful due process challenge. Nonetheless, the prospective application of contract restrictions tolerates onerous restrictions on contracts, which tends to reduce the number of new car dealerships that are opened. That barrier to entry thus enriches existing dealerships at the expense of both the manufacturers and consumers.

Existing law under the federal and Wisconsin constitutions are much more hostile to the retroactive invalidation of contractual protections. See, e.g., *Allied Structural Steel Co. v. Spannous*, 438 U.S. 234, 240 (1978), quoted in *Wipperfurth v. U-Haul Co. of Western Wisconsin, Inc*., 304 N.W.2d 767, 771 (Wis. 1981). There is good reason for the distinction between prospective and retroactive legislation. The dislocations generated by retroactive application of any new legislation to existing contracts is much more severe than it is for new contracts, for in these circumstances the party burdened by the restrictions can do nothing to mitigate its impact except to buy his way out of a restriction that should never have been imposed in the first place. In the context of automobile dealerships, the manufacturer that had bargained hard to preserve its institutional flexibility now

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[3] Ogden v. Saunders, 25 U.S. 213 (1827). I have defended that position in Richard A. Epstein, Toward A Revitalization of the Contracts Clause, 51 U. Chi. L. Rev. 703 (1984).

must pay a dealer in order to obtain some goal that it thought that it had protected as a matter of right. In these cases therefore courts respond to the strong social instinct that it is unfair to switch the rules in middle of the game. This is why from the earliest times, courts have given strong protection against the retroactive invalidation of contractual provisions.[4]

*B.* Wipperfurth *and* Kolosso*: A Clash of Constitutional Visions.*

In dealing with the various contract clause issues, it is instructive to contrast two decisions. The first of these is the *Wipperfurth* case, *supra,* in which the Wisconsin Supreme Court struck down a provision of the Wisconsin law, ch. 132 Stat. as applied to existing contracts. In that case, the existing contract between Wipperfurth and U-Haul allowed "either party to terminate the contract on 30-days written notice to the other." *Wipperfurth,* 304 N.W.2d at 771. U-Haul complied with the contract, and Wipperfurth argued that U-Haul could not enforce that provision because ch. 132 allowed termination only for "good cause" as defined by the statute only after 90 days.

Under *Wipperfurth*, Justice Steinmetz held that the statutory provision risked converting an at will relationship into a perpetual one because the dealer when faced with a termination notice, could cure one defect only to set the cycle starting a second time. The court had no doubt that this provision worked a substantial and one-sided change in the contractual arrangement, and struck it down insofar as it applied retroactively. The court also noted with approval the changes in the overall business environment that made it sensible for U-Haul to handle for itself certain functions that it had previously allocated to dealers. In deciding to invalidate the retroactive application of the Clause, the Court deplored the practice of the legislature to introduce a studied ambiguity into the text of the statute, so that courts would have to decide whether it had both retroactive and prospective application. It then read the statute to apply both ways, at which point it struck down the provision for its retroactive application.

There seems little doubt that under this provision, the multitude of provisions in AB 132 work fundamental changes in the contractual relationships by negating key provisions dealing with the consequences of termination, the failure of dealers to make key investments in these provisions and the imposition of the warranty provisions. The conclusion holds, moreover, even each of these provisions is viewed separately from the others, or as a collection of terms. The clear and unmistakable message of *Wipperfurth* is that parties to contracts are entitled to rely on their provisions in the absence of some strong reason for their invalidation, of which none is shown here.

The second key decision on termination provisions is the Seventh Circuit decision in *Chrysler Corp. v. Kolosso Auto Sales.*, 148 F.3d 892 (7th Cir. 1998). At issue

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[4] Sturges v. Crowninshield, 17 U.S. 122 (1819).

in that case was the Wisconsin Stat. § 218.01(3x), which permitted any dealer to challenge for good cause shown any decision by a manufacturer to deny a dealer's request to change the location of its business. That statute marked a substantial deviation from the contractual provision that gave Chrysler sole discretion on whether or not to allow the change. Judge Posner held that the statute was constitutional even as applied to existing contracts. His decision, of course, would be binding only with respect to its interpretation of the Contracts Clause in the U.S. Constitution. It would not in any way overturn the decision of the Wisconsin Supreme Court in *Wipperfurth*, to the extent that it relied on the parallel provision of the Wisconsin constitution.

It is also clear that Judge Posner's opinion follows a line of argument that is flatly inconsistent with the decision taken in *Wipperfurth*. In the first instance, he is wholly untroubled by the retroactive application of this clause. In reaching his conclusion, he at no point deals with the explicit holding in *Wipperfurth*, which he discusses only on the collateral question of whether ch. 132 of the Wisconsin law was meant to be prospective only. At no point does he purport to explain why the §218.01(3x) should be subject to a different analysis from that provided in *Wipperfurth.*

His casual treatment of the Wisconsin precedents thus allows him to embark on an analysis of the overall issue that is in direct conflict with that offered by Judge Steinmetz in *Wipperfurth.* Judge Posner begins with a proposition that no one would care to dispute, which is that the contracts clause has not received a "literal" interpretation." *Kolosso,* 148 F.3d at 894. True enough. But that insight does not explain why his nonliteral interpretation is correct, when there are many different paths down which a nonliteral interpretation could run.

Indeed, Judge Posner has no consistent interpretation of the clause. At one point, Judge Posner acknowledges that there is a "big difference" between a provision that only allows for termination for cause as opposed to one that allows termination at will. And he also acknowledges that if this law were applied to existing employment contracts, it would be "a nontrival impairment of contractual entitlements." Id. at 894.

The question then would be whether this nontrivial impairment could be justified by some state policy. In dealing with this issue, it is clear that the case law recognizes some major social "emergency" of the kind associated with the massive disruption of war on the one hand, see *Marcus Brown Holding Co. v Feldman*, 256 U.S. 170 (1921), cited in *Kolosso,* 148 F.3d at 894, or with depression on the other, *Home Loan Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

These cases do not involve any such calamity. Accordingly, they require some more powerful justification for the retroactive imposition. At this point, Judge Posner adopts two techniques, both of which are flawed, in order to get his preferred result. In the first place, he argues, in contradiction to his earlier observation that the statute introduced a "big" change, that the change was not so large after all. In support of that conclusion, he noted that even without the statute, the dealership could have contested Chrysler's decision under Wisconsin's general statute that required all manufacturer decisions to be made in good faith and for cause. Yet he nowhere explains why if those avenues were as beneficial to the dealership, it did not avail themselves of it.

Instead, to parry this difficulty he makes the extraordinary claim that this now incremental change should be understood only as "largely procedural" and as "fine tuning" of the underlying law. *Id*. at 896. But it makes little sense to insist that a change is big on the one hand, and small on the other. Indeed, if the changes in *Kolosso* are treated as fine tuning and merely procedural, AB 132 is still unconstitutional because these changes are far more comprehensive and systematic than those involved in that case.

Judge Posner's second argument is also fatally flawed. On his view, the contractual provision was "not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause. Should have foreseen it not in detail of course, but sufficiently to have demanded and received compensation." *Id.* at 897. Elsewhere, he asserts not that they should have foreseen this event but assumes probably did, and thus would obtain "a windfall" if this statute was invalidated.[5] Yet that view is subject to major objections.

First, the term "foresight" was not once used in *Wipperfurth,* which took the simpler and more sensible view that a near per se ban applied to the retroactive change of existing contracts. The term foreseeable is sufficiently malleable, that its use could spell the end to any protection against the retroactive invalidation of contractual provisions.

Second, the proposed test of reasonable foresight makes no analytical sense at all. In essence what it says is that the more a state is willing to interfere with vested rights, the more foreseeable it is that they will continue to follow the same course of action. At that point, those states which are consistent violators of the contracts clause get additional authority that is denied to states that adhere to the constitutional command. The argument undermines all rights-based constitutional

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[5] Of great, and we are inclined to say controlling, importance in the determination of whether a law violates the contracts clause is the foreseeability of the law when the original contract was made; for what was foreseeable then will have been taken into account in the negotiations over the terms of the contract. Assuming that Chrysler knew back in 1988 when it struck its deal with Kolosso that the location clause in the franchise contract would eventually be brought under regulation, it probably insisted on building the expected cost of that eventuality into the price or other terms of the contract. If Chrysler thus was compensated in advance for bearing the burden of the regulation, invalidating the regulation would give Chrysler a windfall.

148 F.3d at 894-895.

protections. The entire purpose of a constitution is to rein in state action when it is known to all parties that legislatures are subject to political pressures and factional intrigue. The sure knowledge that these activities will take place is the reason for instituting constitutional safeguard, not for dismantling them. It would be odd therefore to allow any state to use its consistent infractions of the law as a justification for still more infractions.

Third, Judge Posner does not understand the role that compensation plays in interpretation of the either the U.S. or Wisconsin contracts clause. To be sure, the term 'just compensation' is nowhere in the clause, but, as part of the nonliteral apparatus used to interpret the clause, a just compensation provision has long been read into the contracts clause, so that states could for example take back charters from railroads and bridge companies so long as they offered compensation for the franchise lost. See *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848). But Judge Posner does not require the government to pay compensation when it deprives a party of its vested rights.

Instead he claims that once it is foreseeable that infractions will take place, the action can be done without compensation because some form of shadowy compensation has been obtained in advance by a party alert to the legal dangers of its position. As applied in this context, the automobile manufacturer could demand extra compensation to insulate itself from change. *Kolosso*, 148 F.3d at 895. But he offers no clue to explain how much compensation should be offered and why, in light of the massive uncertainties that the future always holds. Nor does he explain why the sound procedure does not dispense with the need for exacting this compensation at the outset of the deal, by requiring the dealers to pay just compensation to the manufacturers once there is precise knowledge (and thus accurate valuation) of the particular infringement that takes place. Suffice it therefore to say that this entire line of argument is wholly at odds with *Wipperfurth*, which still remains the authoritative interpretation of the Wisconsin contracts clause.

More generally, in dealing with current legislation, it appears that the courts apply a three part approach in deciding whether and how to protect vested contract rights. The first stage of this inquiry requires the contract holder to show that there has been a "substantial impairment" of its various contract rights. Substantial means "big" or "major." It does not require a demonstration that the contract will necessarily fail if the restrictions in question are impose. The particular provisions referred to above meet that standard of substantiality. Once the contract right holder has made out the prima facie case, the burden then shifts to the state to explain why this infringement is needed with existing contracts. In dealing with this question, general arguments of the sort that legislative intervention is needed to offset the bargaining imbalance between the parties (which is difficult to demonstrate with dealership contracts generally) will not suffice. Rather, there has to be some particular defect or abuse to which the changes in question are intended to correct, of which there is not the slightest evidence here.

Those cannot be found. As noted earlier, even the prospective application of these legislative interventions are likely to harm consumer and social welfare, so that the burden on the legislature is especially heavy to point out some particular reason for imposing the restriction in question. Broad uses of the term "coerce" moreover cannot achieve that result because those allegations can be made, without any specific support, on behalf of any and all legislative efforts to invalidate particular contractual provisions. Even Judge Posner recognized that Wisconsin could not "change the price in Chrysler's contracts" at its own will. *Kolosso*, 148 F.3d at 895. Surely there is no greater license to change specific substantive provisions that have been clearly articulated and well understood by both parties. At this point, it appears that Wisconsin has offered no serious justification for invalidating these provisions on a retroactive basis. It is, therefore, unnecessary to examine the further question of whether the means chosen to implement the state policy is broader than is needed to achieve its legitimate objectives.

**CONCLUSION** It appears that section 45 of AB 132 is unconstitutional insofar as it purports to impose retroactive obligations on existing contracts, given the lack of any systematic explanation as to why these provisions are needed. In this regard, invalidation is surely required under the clear tests of *Wipperfurth*, which struck down legislative modifications of existing contracts under the Wisconsin and the federal constitution. The outcome is more unclear under the decision in *Kolosso*, whose logic is a direct repudiation of *Wipperfurth*. Yet even under that decision, AB 132 may well be unconstitutional because its major changes cannot by any stretch of the imagination be described as "merely procedural" or "fine tuning."