Virginia House Bill 881: Constitutional and Constructive

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I. Introduction

The objectives of the Commonwealth of Virginia's Energy Policy include first and foremost that "it shall be the policy of the Commonwealth to…promote the use of renewable energy sources."[1] Comprehensive energy policy is being re-evaluated in light of climate change, increasing energy demand, and energy independence. States across the country increasingly focus on advancing solar power as a vital part of the energy solution. However, private obstacles created without energy policy in mind can hamper wide-scale implementation of these technologies, and socially optimal energy objectives frequently require government intervention.

The focal point of this paper is the Virginia General Assembly House Bill 881 (H.B. 881), a recent attempt to remove one such barrier to solar development—restrictive covenants prohibiting solar collection devices. Opponents to H.B. 881 raise a challenge through the contracts clauses of the U.S. and Virginia Constitutions. This paper compares H.B. 881 to similar legislation in other states, explains why H.B. 881 is likely to survive challenges under the contracts clauses, and highlights ways to increase the bill's chances of enactment.

II. H.B. 881 Background

In 2007, the Virginia General Assembly passed the Virginia Energy Plan, a statement of objectives and principles to help Virginians use energy wisely, provide new energy resources,

[1] Va. Code § 67-102.

and to begin addressing challenges from greenhouse gas emissions.[2] Section 67-701 of the Virginia Energy Plan restricts community associations from prohibiting solar energy collection devices through the use of restrictive covenants that go into effect after July 1, 2008.[3] Under the current law, effective July 1, 2008, community associations may not prohibit owners from installing or using any device that makes use of solar energy.[4] Community associations may establish reasonable restrictions as to the size, place, and manner regarding the placement of such devices on private property and community areas. However, the statute includes limitations on that prohibition by expressly not invalidating any provision of a restrictive covenant regarding the installation or use of any such devices where such provision was in effect before July 1, 2008. Section 67-701 currently allows the amendment of restrictive covenants to prohibit or restrict the installation of solar collection devices.

H.B. 881 is a proposed amendment to § 67-701 that would invalidate any new or existing restrictive covenant adopted by a community association that prohibits or restricts the installation

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[2] Virginia Energy Plan Highlights, http://www.dmme.virginia.gov/DE/VAEnergyPlan/VEPBriefing.pdf (last visited April 23, 2010).

[3] Va. Code § 67-701.

> "A. Effective July 1, 2008, no community association shall prohibit an owner from installing or using a solar energy collection device on that owner's property. However a community association may establish reasonable restrictions concerning the size, place, and manner of placement of such solar energy collection devices.
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> B. The community association may prohibit or restrict the installation of solar energy collection devices on the common elements or common area within the real estate development served by the community association. A community association may establish reasonable restrictions as to the size, place, and manner of placement or installation of any solar energy collection device installed on the common elements or common area.
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> C. This section shall not apply with respect to any provision of a restrictive covenant that restricts the installation or use of any solar collection device if such provision became effective prior to July 1, 2008.
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> Nothing in this section shall be construed to (i) invalidate any provision of a restrictive covenant that prohibits or restricts the installation or use of any solar collection device if such provision was in effect before July 1, 2008, or (ii) prohibit the amendment of a restrictive covenant to prohibit or restrict the installation or use of any solar collection device, or to remove prohibitions or restrictions on the installation or use of any solar collection device if such amendment is adopted by the membership of the community association in accordance with such association's governing documents."

[4] Va. Code § 67-700. This section provides the definition of "solar energy collection device" as "any device manufactured and sold for the sole purpose of facilitating the collection and beneficial use of solar energy, including passive heating panels or building components and solar photovoltaic apparatus."

or use of any solar energy collection device.[5] The amendment would make the legislation retroactively applicable to restrictions that became effective *before* July 1, 2008. The amendment would also remove the language that creates an exemption for restrictive covenants that prohibit or restrict solar collection devices. The amendment would also functionally prevent homeowner associations from enacting restrictive covenants that prohibit the installation and use of solar collection devices. In other words, H.B. 881 proposes to prohibit community associations from prohibiting solar energy collection devices through restrictive covenants, regardless of when such provisions became effective.

III. The Constitutional Challenge to State Legislation Prohibiting Restrictive Covenants Against Solar Collection Devices

Opponents of H.B. 881 contend that the bill's passage would impair existing contracts in violation of the contracts clauses in both the federal and Virginia Constitutions. Under the United States Constitution, "No State shall…pass any…Law impairing the Obligation of Contracts."[6] The Virginia Constitution echoes that language, stating "the General Assembly shall not pass any law impairing the obligation of contracts."[7] The contract clauses of both the United States and Virginia constitutions protect against the same fundamental invasion of contract rights,[8] and the Virginia contract clause has been interpreted by this Court in a manner similar to the treatment of the federal clause by the United States Supreme Court. The constitutionality question raised concerns about H.B. 881, and in order for H.B. 881 to progress beyond committee, that question must be answered.

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[5] Virginia General Assembly 2010 Session Bill Tracking, http://leg6.state.va.us/cgi-bin/legp604.exe?101+sum+hb881 (last visited April 23, 2010). The status of bills in the Virginia General Assembly may be tracked online. The status of H.B. 881 is available at: http://leg6.state.va.us/cgi-bin/legp604.exe?101+sum+hb881.

[6] U.S. Const. art. I, § 10, cl. 1.

[7] Va. Const. art. I, § 11.

[8] A. Howard, Commentaries on the Constitution of Virginia 203 (1974).

In evaluating whether H.B. 881 is constitutional, one logical starting point is to look to similar legislation in other states and whether constitutional challenges have affected the legislation's force. While many states have passed legislation prohibiting unreasonable restrictive covenants against solar collection devices (including Arizona, Maryland, California, Nevada, Indiana, Delaware, Wisconsin, New Mexico and Massachusetts[9]), no state has faced litigation over the constitutionality of these restrictions.

There are three possible explanations for this kind of legislation has not been challenged on constitutional grounds in other states. First, if H.B. 881 is different in substance or language from related state legislation in other states, then H.B. 881 may be uniquely situated to face a constitutional challenge. However, this explanation fails because the statutory language H.B. 881 is remarkably similar or even less restrictive upon community association covenants than the language of legislation in other states on the same topic. There is nothing uniquely burdensome about H.B. 881. If anything, the language in H.B. 881 is more likely to be found constitutional than the legislation from other states because it is more permissive than the language used in other states. Some of these states include in their legislation narrow parameters as to what kind of community association restrictions against solar power would qualify as reasonable. For example, the Maryland code prohibiting unreasonable limitations on solar collector systems clarifies that unreasonable limitations are those that "(i) Significantly increases the cost of the solar collector system; or (ii) significantly decreases the efficiency of the solar collector system."[10] H.B. 881 is more permissive by not containing any narrow definition of "reasonable" limitations. Instead, H.B. 881 states that "a community association may establish reasonable

[9] Database of State Incentives for Renewables & Efficiency. http://www.dsireusa.org/ (last visited April 23, 2010).
[10] Md. Code § 2-119.

restrictions concerning the size, place, and manner of placement of such solar energy collection devices."[11]

The second possible explanation for the lack of constitutional challenges on legislation similar to H.B. 881 is that such legislation is very new due to the fact that solar technologies have only recently been developed. If only a short period of time has passed between the enactment of legislation and the present, there may not have been enough time between the enactments of such legislation for a lawsuit regarding this issue to arise. However, this explanation is also highly unlikely. New Mexico and California were the first states to enact this type of legislation in 1978, but some states only recently passed legislation on the topic. Generally, legislation regarding solar collection devices is new because the technology has only recently developed. The fact that some legislation in this area is now over thirty years old decreases the veracity of this contention, but the fact that a suitable plaintiff has not yet appeared may be one reason.

The third and most probable reason that state legislation like H.B. 881 has not faced challenge under the contracts clause is that state governments act within their scope of their police power in passing this kind of legislation. The remainder of this paper discusses this possibility with respect to the example of H.B. 881.

IV. Legal Analysis and Likely Outcomes

Case law suggests that H.B. 881 will be able to withstand constitutional challenges for many reasons. H.B. 881 is consistent with the purpose of the contracts clauses, passes the federal test for constitutionality under the contracts clause, and will certainly survive Virginia scrutiny.

A. The Federal Contracts Clause

[11] H.B. 881, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

The United States Constitution provides that "No State shall…pass any…Law impairing the Obligation of Contracts."[12] Following the revolutionary period, States sometimes developed legislation that would forgive the debts of private parties in interference with contractual obligations.[13] The original purpose of the federal contracts clause was to instill confidence of creditors contracting in the newly formed country immediately after the Revolutionary War. Chief Justice Marshall explained the origins of the contracts clause in his 1827 concurrence of *Ogden v. Saunders*, stating that "The power of changing the relative situation of debtor and creditor, of interfering with contracts…had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man."[14]

However, the Supreme Court has made abundantly clear that the absolute language of the contracts clause is not to be read with literal exactness.[15] Instead, the scope of the constitutional prohibition against state laws impairing contracts will be interpreted to accommodate the inherent police power of the State to safeguard the vital interests of its people.[16] The language of the contracts clause balances individual contract obligations against the state's valid interest in exercising its police power. The courts will apply increased scrutiny when a state government uses legislation to impair its own contractual obligations.[17] When evaluating whether a law

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[12] U.S. Const. art. I, § 10, cl. 1.
[13] *See generally Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).
[14] *Ogden v. Saunders*, 25 U.S. 213 (1827)(*Marshall, J. dissenting*).
[15] *Ogden v. Saunders*, 25 U.S. 213 (1827).
[16] *Blaisdell*, 290 U.S. at 434.
[17] *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 26-27 (1977)(courts use heightened scrutiny applies when a State enters into contractual obligations and then proposes state legislation impairing such contracts).

violates the contracts clause with regard to private contracting parties, the Supreme Court applies the test from *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*[18]

The three-step test for constitutionality under the contracts clause begins with the threshold inquiry of whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.[19] The severity of the impact will increase the level of scrutiny to which the legislation will be subjected.[20] Total destruction of contractual expectations is not required for finding substantial impairment.[21] If the state regulation constitutes a substantial impairment, then the court will proceed to the next step of the test.

Second, the State must have a significant and legitimate public purpose justifying the substantial impairment on contractual relationships,[22] such as the remedying of a broad and general social or economic problem.[23] The public purpose need not be an emergency or temporary situation in order to find the state law constitutional under the contracts clause.[24]

After identifying a legitimate public purpose, the final inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.[25] In other words, the court will evaluate whether the law is reasonable and is appropriately tailored to the purpose of the legislation. When the state government is not one of the contracting parties, the

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[18] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).
[19] *Id.* at 411 (citing *Allied Structural Steel Co v. Spannaus*, 438 U.S. 234, 244 (1978).
[20] *Allied Structural Steel Co.*, 438 U.S. at 245.
[21] *United States Trust Co.,* 431 U.S. at 26-27.
[22] *Energy Reserves Group*, 459 U.S. at 411-12 (citing *United States Trust Co.*, 431 U.S. at 22).
[23] *Id.* (quoting *Allied Structural Steel Co.* 438 U.S. at 247).
[24] *Id.* at 412.
[25] *Id.*

courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.[26]

B. The Virginia Contracts Clause

The Virginia Constitution echoes the contracts clause of the federal Constitution in stating, "the General Assembly shall not pass any law impairing the obligation of contracts."[27] Both the federal and Virginia contract clauses protect against the same fundamental invasion of contractual obligations.[28] While decisions of Constitutional interpretation by the Supreme Court of the United States are not binding on the Virginia Supreme Court in interpreting the *Virginia* Constitution, the Virginia Supreme Court has followed the same pattern of analysis in determining whether state law violates the state constitution.[29]

One nuance worthy of attention within the Virginia Supreme Court's analysis of state legislation is that Virginia courts go further than the Supreme Court of the United States in deferring to the state legislature. The Virginia Supreme Court holds that every statute passed by the General Assembly "carries a strong presumption of validity" and unless it "clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it."[30] Therefore, if a Virginia law is able to withstand scrutiny under the federal contracts clause, then it will almost certainly survive Virginia state scrutiny.

C. Application of the *Energy Reserves Group* Test to H.B. 881

Under the *Energy Reserves Group* test, H.B. 881 is highly likely to be found constitutional for four reasons. First, H.B. 881 does not impact the types of contracts protected

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[26] *Id.* at 412-13.
[27] Va. Const. art. I, § 11.
[28] A. Howard, Commentaries on the Constitution of Virginia 203 (1974).
[29] *The Working Waterman's Association of Virginia, Inc. v. Seafood Harvesters, Inc.,* 227 Va. 101, 314 S.E.2d 159 (1984).
[30] *City Council v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).

by the contracts clauses, and therefore the purpose of the contracts clause would not be advanced in finding H.B. 881 unconstitutional. Second, H.B. 881 would not substantially impair existing contracts because the scope of H.B. 881 is very narrowly focused towards very specific provisions within restrictive covenants prohibiting solar collection devices. Third, H.B. 881 is grounded in significant, legitimate interests of the state to facilitate the development of clean energy in order to further the health, safety, and welfare of the people. Lastly, H.B. 881 constitutes a reasonable adjustment to the rights of parties involved in restrictive covenants and is appropriately tailored to meet its objectives without unreasonable interference in community agreements. For these reasons, H.B. 881 is constitutional with regard to the contracts clauses of the Virginia and United States Constitution.

1. H.B. 881 does not impact the types of contracts protected by the contracts clauses.

The purpose of the contracts clause would not be served by finding H.B. 881 unconstitutional because the bill does not decrease the confidence of creditors considering investments in the United States. H.B. 881 proposes an amendment of Virginia code that would expanding the law to invalidate any provision of a restrictive covenant that prohibits or restricts the installation of any solar collection device. H.B. 881 fundamentally differs from previous statutes challenged under the contracts clause because it only impacts restrictive covenants.

Homeowners associations commonly use restrictive covenants to maintain property values by requiring properties to meet particular standards and prohibiting certain modifications or uses of the property. Unlike contracts that only bind actual parties to the agreement, restrictive covenants generally extend to a particular property and to all subsequent owners of the property. These covenants function to impose community-wide rules in order to benefit all property owners with increased property values. In that sense, restrictive covenants both provide benefits and impose burdens on each subjected property owner.

The Framers intended the contracts clause to protect creditors making contracts in the United States. The restrictive covenants that could be impacted by H.B. 881 do not involve any sort of creditor-debtor relationship. By nature, restrictive covenants in the residential setting are agreements that impose benefits and burdens on owners of property and do not directly affect financial relationships. The interests at stake with restrictive covenants prohibiting the installation and use of solar collection devices are the expectations of community members. These interests fundamentally differ from the ones at stake with regard to statutes that have been found unconstitutional under the contracts clauses.

In practice, the Supreme Court rejects as unconstitutional state laws that impair the obligations of financial contracts. The first modern statute to be tested under the contracts clause in *Home Building & Loan Association v. Blaisdell* was a Minnesota mortgage moratorium statute that retroactively impaired contract rights.[31] The interests at issue under the Minnesota Mortgage Moratorium Law were financial. The law temporarily restricted the ability of mortgage holders to foreclose during the economic depression of the mid 1930s. The contracts in question were mortgages, and the terms impacted by the state law were financial in nature. In the *Allied Structural Steel Co. v. Spannaus* case, the interests in question were also financial—a Minnesota statute required employers who were closing offices in the state to pay a "pension funding charge" unless the pension fund at that time was sufficient to provide full benefits for all employees with at least 10 years of seniority. The question in *Allied Steel* was whether the plaintiff would be required to pay a fee to the state government. The most recent contracts clause

[31] 290 U.S. 398 (1934).

challenge before the Virginia Supreme Court was the Virginia Wine Franchise Act which removed a wine's suppliers right to terminate at-will contracts with wine distributors. [32]

Unlike all of those cases, H.B. 881 does not implicate financial interests, but rather the expectations of community members and, indirectly, property values. The impact on property values may be financial, but the impact of removing restrictive covenants against solar collective devices is uncertain. The effect on property values may be positive as a result of H.B. 881. In any case, courts are not generally in the business of deciding which contract types are more worthy of protection than others, but restrictive covenants that could be impacted by H.B. 881 are not the kind of contracts considered by the Framers when they included the contracts clause in the Constitution.

Additionally, in all of the previously mentioned cases, the courts analyzed and arbitered debtor-creditor relationships where one party was likely to gain a windfall if the legislation withstood scrutiny. Here, H.B. 881 would not provide a financial windfall to any individual contracting party. Restrictive covenants commonly involve multiple property owners, all subject to the terms, restrictions, and *benefits* of the contract. By nature of covenant relationships, the impact of H.B. 881 equal among contracting parties.

2. H.B. 881 does not constitute substantial impairment of contractual obligations.

Although this analysis is somewhat incomplete without an actual contract to evaluate, reviewing courts are highly unlikely to find that H.B. 881 substantially impairs contracts. As mentioned in a previous section, the first step in the analysis requires the inquiry of whether the bill operates as a substantial impairment of a contractual relationship.[33] The severity of the

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[32] *Heublein, Inc. v. Department of Alcoholic Beverage Control of the Commonwealth of Virgina*, 237 Va. 192, 376 S.E.2d 77 (1989)
[33] *Allied Structural Steel Co v. Spannaus*, 438 U.S. at 244.

impairment measures the height of the hurdle the state legislation must clear—minimal alteration of contractual obligations may end the inquiry.[34]

The Virginia Supreme Court provides an example of a state law that does not meet the threshold of constituting substantial impairment of contractual obligations in *The Working Waterman's Association of Virginia, Inc. v. Seafood Harvesters, Inc.* case.[35] The plaintiffs in that case claimed that a Virginia law prohibiting the use of hydraulic dredges to catch hard shell clams unconstitutionally violated their leases of oyster grounds to "plant, grow, store and harvest clams."[36] The court held that the statute constituted only a minimal alteration of the plaintiff's rights under the lease, despite the fact that harvesting clams on the leased grounds was not economically feasible without the use of the hydraulic dredge.[37] In that case, a statute eliminating the value of the plaintiffs' lease was upheld as a minimal impairment of contractual obligations. H.B. 881 would have a far more minimal impairment of contractual obligations than the statute prohibiting the use of hydraulic dredges.

Similar to the statute upheld in *Working Waterman's Ass'n,* H.B. 881 only prohibits one mode or method of restriction. The bill only prohibits community associations from enforcing restrictions regarding an individual *owner's* property. Alternative means of restrictions against solar energy collection devices remain available to interested parties. Under H.B. 881, applicable restrictive covenants may enforce restrictions prohibiting installation of such devices on *common elements or areas* within the development served by the community association. Only restrictive covenants that (1) were effective prior to July 1, 2008, (2) prohibited installation or use of solar energy collection devices, (3) on that *owner's property* will be invalidated. If the General

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[34] *Id.*
[35] *Working Waterman's Ass'n*, 227 Va. 101; 314 S.E.2d 159 (1984).
[36] *Id.* at 108.
[37] *Id.* at 112.

Assembly enacts H.B. 881, community associations retain the ability to establish reasonable restrictions concerning the size, place, and manner of placement of solar energy collection devices. Unlike the plaintiffs in *Working Waterman's Ass'n,* community associations may retain value in their existing restrictive covenants to ensure a common theme and restrict certain undesirable activities in their developments. H.B. 881 impairs existing contracts less than the statute upheld in *Working Waterman's Ass'n,* and therefore a reviewing court would likely find that H.B. 881 does not substantially impair contractual obligations.

3. The stated objectives of the Virginia Energy Plan reflect the Commonwealth's significant, legitimate interests in enacting H.B. 881.

Even if it did substantially impair private contracts, H.B. 881 would be constitutional under the contracts clause because it serves the significant and legitimate interests of the state to facilitate the development of clean energy in furtherance of the health, safety, and welfare of Virginia citizens.

In order for a statute to be constitutional under the contracts clause, the State must have a significant and legitimate public purpose justifying the substantial impairment on contractual relationships,[38] such as the remedying of a broad and general social or economic problem.[39] The problem need not be an emergency or temporary in nature to constitute a significant and legitimate public purpose of the state. For example, the Supreme Court of the United States upheld Kansas legislation imposing price controls on the intrastate gas market because the statute furthered significant and legitimate state interests.[40] The Court upheld the Kansas legislation despite the fact that it impaired contracts because the act reinforced significant state interests in

[38] *Energy Reserves Group*, 459 U.S. at 411-12 (citing *United States Trust Co.*, 431 U.S. at 22).
[39] *Id.* (quoting *Allied Structural Steel Co.* 438 U.S. at 247).
[40] *Id*.

protecting consumers from deregulated natural gas prices.[41] In upholding the legislation in *Energy Reserve Group*, the Supreme Court upheld part of a state's energy policy as a significant state interest.

Similarly, H.B. 881 would protect consumers by remove a barrier to the production of local energy in accordance with the 2008 Virginia Energy Plan. Section 67 of the Code of Virginia constitutes the Virginia Energy Plan with stated goals of increasing energy independence and clean fuel technologies while reducing greenhouse gas emissions by 30 percent in 2025.[42] Expanded solar energy production can further each of those goals as a renewable, zero-emission energy source. The broad definition of "solar energy collection device" in § 67-700 indicates that many solar technologies may play a role in furthering the Virginia Energy Plan.[43] Virginia is a net importer of energy,[44] and the use of solar energy collection devices addresses that problem in two ways. First, encouraging the use of solar energy collection devices could serve to increase electricity usage by photovoltaic panels. Such devices could provide small-scale electricity production for consumer use, saving Virginia consumers money. Additionally, the use of passive heating panels decreases energy used for heating water and residential areas, and simultaneously decreases demand for energy outside the state.

Existing Virginia legislation in § 67-701 already emphasizes the importance of renewable energy sources such as solar by precluding community associations from imposing unreasonable

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[41] *Id.*
[42] Virginia Energy Plan Highlights, http://www.dmme.virginia.gov/DE/VAEnergyPlan/VEPBriefing.pdf (last visited April 23, 2010).
[43] Va. Code § 67-700. "Solar energy collection device" means any device manufactured and sold for the sole purpose of facilitating the collection and beneficial use of solar energy, including passive heating panels or building components and solar photovoltaic apparatus.
[44] *Id.*

restrictions on the placement of solar energy collection devices after July 1, 2008.[45] H.B. 881 would expand the impact by applying the prohibition retroactively, removing more barriers to the small-scale production of clean energy with only minimal interference on community agreements. H.B. 881 further advances the significant and legitimate state interests advanced by the Virginia Energy Plan.

4. H.B. 881 constitutes a reasonable adjustment of rights and responsibilities of contracting parties and is appropriate to its purpose.

H.B. 881 constitutes a reasonable adjustment to the rights of parties involved in restrictive covenants and is appropriately tailored to meet its objectives.

The final prong of the *Energy Reserves Group* test requires that the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.[46] When the state government is not one of the contracting parties, the courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.[47]

The Virginia Supreme Court provides an example of the kind of state legislation that is not of a character appropriate to the public purpose in *Heublin, Inc. v. Department of Alcoholic Beverage Control.*[48] In that case, the General Assembly enacted Va. Code § 4-118.27, which removed the discretionary right of a wine supplier to terminate at-will contracts with distributors during the six-month period before the statute was enacted.[49] The Department of Alcoholic Beverage Control asserted that the law's purpose was to preserve the existing system of a wine

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[45] Va. Code § 67-701.
[46] *Energy Reserves Group*, 459 U.S. at 412.
[47] *Id.* at 412-13.
[48] *Heublein*, 237 Va. 192, 376 S.E.2d 77.
[49] *Id.* at 194.

distribution to allow for the control of alcoholic beverages in Virginia.[50] Proponents of the law argued that without the provision precluding termination of at-will contracts, suppliers would be able to engage in retaliatory terminations of existing contracts with wholesalers with differing views regarding alcohol regulation.[51] However, the Virginia Supreme Court found that the law failed to execute that purpose because any terminated contract would require the supplier to execute a similar contract with another Virginia wholesaler.[52] When the legislation fails on its face to accomplish its stated purpose, the Virginia Supreme Court will not uphold it.

H.B. 881 would survive similar scrutiny by a reviewing court because it adjusts the rights of contracting parties in restrictive covenants in a reasonable manner, and it is appropriately tailored to meet its objectives. As mentioned above, parties subject to H.B. 881 would retain numerous tools to uphold their property values and reflect the ideals of the community. For example, community associations under H.B. 881 would retain the ability to create restrictive covenants with reasonable restrictions concerning the size, place, and manner of placement of solar energy collection devices on any property within its real estate developments. Community associations will retain the ability to prohibit solar energy collection devices on buildings and property served by the association.[53]

H.B. 881 is narrowly tailored by only voiding restrictions that entirely prohibit an owner from installing or using a solar energy collection device on *his own* property. In many respects, H.B. 881 protects property rights by ensuring that an individual seeking to produce renewable

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[50] *Id.* at 197.
[51] *Id.*
[52] *Id.*
[53] *See* H.B. 881, 2010 Gen. Assem., Reg. Sess. (Va. 2010). "The community association may prohibit or restrict the installation of solar energy collection devices on the common elements or common area within the real estate development served by the community association."

energy will not be prohibited by neighbors concerned about their view. Such neighbors shall retain their right under § 67-701 to make reasonable restrictions on the size, place, and manner of placement of the devices on property owners subject to the community association. H.B. 881 effectively advances its stated goals by striking a balance between individual property owners and community associations that favors renewable energy.

V. Recommendations & Conclusion

The public policy basis for the bill endorses those stated in the Virginia Energy Plan, and enactment of H.B. 881 would put Virginia one step closer to being energy independent while still limiting greenhouse gases. The purposes of the bill underscore why the bill should pass, and this paper serves to show that H.B. 881 can pass. To make that point more clear, the Virginia General Assembly could make the constitutionality of H.B. 881 more obvious in the following ways.

First, adding a policy purpose statement as a preamble to the bill could rebut any charges that the bill is not being passed with the required significant and legitimate state interests in mind. A statement of purpose with the bill could clarify the purposes driving the bill instead of simply referring to the goals of the Virginia Energy Plan. A statement could also ensure that a reviewing court could easily articulate the important interests at stake. Second, research regarding the economic and energy impacts of H.B. 881 would support the assertion that the bill can actually achieve its purpose. To avoid the fate of the Virginia Wine Franchise Act in *Heublein, Inc.*, H.B. 881 should be able to show how it will advance its goals. Prospective statistics are not required by any means for constitutional analysis, but reasoned research can be compelling.

H.B. 881 is timely, important, and constitutional. The enactment of the bill advances Virginia's energy interests and could serve as one more step towards success for Virginia's Energy Plan.

Appendix 1: House Bill 881

(Available at: http://leg6.state.va.us/cgi-bin/legp604.exe?101+ful+HB881)

HOUSE BILL NO. 881

Offered January 13, 2010

Prefiled January 13, 2010

*A BILL to amend and reenact § **67-701** of the Code of Virginia, relating to restrictive covenants for solar energy collection devices.*

Patrons-- BaCote, Abbott, Tyler and Ward; Senator: Locke

Referred to Committee on Counties, Cities and Towns

Be it enacted by the General Assembly of Virginia:

1. That § **67-701** of the Code of Virginia is amended and reenacted as follows:

§ **67-701**. Covenants regarding solar power.

A. ~~Effective July 1, 2008, no~~ *No* community association shall prohibit an owner from installing or using a solar energy collection device on that owner's property. However a community association may establish reasonable restrictions concerning the size, place, and manner of placement of such solar energy collection devices.

B. The community association may prohibit or restrict the installation of solar energy collection devices on the common elements or common area within the real estate development served by the community association. A community association may establish reasonable restrictions as to the size, place, and manner of placement or installation of any solar energy collection device installed on the common elements or common area.

~~C. This section shall not apply with respect to any provision of a restrictive covenant that restricts the installation or use of any solar collection device if such provision became effective prior to July 1, 2008.~~

~~Nothing in this section shall be construed to (i) invalidate any provision of a restrictive covenant that prohibits or restricts the installation or use of any solar collection device if such provision was in effect before July 1, 2008, or (ii) prohibit the amendment of a restrictive covenant to prohibit or restrict the installation or use of any solar collection device, or to remove prohibitions or restrictions on the installation or use of any solar collection device if such amendment is adopted by the membership of the community association in accordance with such association's governing documents.~~

Appendix 2: Quick Reference Guide to State Legislation Banning Restrictive Covenants Against Solar Energy Devices

This non-exclusive list was compiled using the Database of State Incentives for Renewables & Efficiency, available at http://www.dsireusa.org/.

STATE	RESTRICTS	RETROACTIVITY
Arizona	Covenant/restriction/conditions effectively prohibiting solar energy devices	No (only after April 17, 1980)
California (1978; extended 2008)	Covenant/restriction/conditions effectively prohibiting solar energy devices - Reasonable restrictions allowed	Yes
Indiana (1981)	Covenants/restriction effectively prohibiting or unreasonably restricting	Yes
Maryland (originally passed 1980; grandfathering clause removed 2008)	No restrictive covenants with unreasonable restrictions (excludes historic districts)	Yes (as of 2008)
Massachusetts	Voids any provisions that forbid or unreasonably restrict solar systems	Yes
Nevada (2005)	Voids any covenant, restriction, or condition which prohibits or unreasonably restricts (or has the effect of prohibiting or unreasonably restricting) the owner from using a solar energy system	Yes
New Mexico (1978)	Voids all covenants and restrictions that effectively prohibit the installation of solar collectors	No—effective July 1978
Oregon	No person conveying or contracting to convey may include any provisions that prohibit the use of solar energy systems are void and unenforceable	No-from 1979
Utah (2005)	Governing bodies have the right to refuse any plat or subdivision plan if deed restrictions, covenants or other agreements running with the land prohibit or have the effect of prohibiting reasonably sited and designed solar collectors or other renewable resource devices including clothes lines	Yes