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The Contract Clause: Revived or Revised?

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In two recent cases, the Supreme Court of the United States held that state legislation had impaired preexisting contractual rights and nullified the state acts as violative of the contract clause. The author discusses the Court's most recent pronouncement, criticizing the decision for not applying the "new test" of its earlier decision and for misapplying the traditional analysis developed from the landmark decision of Home Building & Loan Association v. Blaisdell, *290 U.S. 398 (1934). With this revival of the long dormant contract clause, the author speculates as to whether it will be revised to protect individual rights in a modern setting.*

In 1963, the Allied Structural Steel Company, a Delaware corporation with its principal place of business in Illinois and a division office in Minnesota, instituted a pension plan for the benefit of its employees.[1] According to the plan, an Allied employee became eligible to receive a retirement pension at age sixty-five regardless of the length of his service with the company. In addition, the plan provided for the vesting of pension rights[2] at an earlier age if certain conditions regarding length of employment were satisfied. In no case, however, would pension rights vest for anyone with less than fifteen years continuous service with the company.[3] In 1974, the Minnesota Legislature passed the Private Pension Benefits Protection Act[4] (Act) which became effective on April 10th of that year. The Act provided that upon the closing of a place of business cov-

1. The employer-initiated Allied plan was not the result of a collective bargaining agreement, and none of its participants were union employees. The plan qualified as a single employer pension plan under I.R.C. § 401.

2. A vested pension right is a "nonforfeitable right or interest which an employee participant acquires in the pension fund." HOUSE COMM. ON EDUCATION AND LABOR, EMPLOYEE BENEFIT SECURITY ACT OF 1973, H.R. REP. No. 533, 93d Cong., 1st Sess. 5 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4643 [hereinafter cited as H.R. REP. No. 93-533]. Pension vesting refers, therefore, to an employee's right to receive funds credited to his account in the event he should leave or lose his job prior to retirement.

3. Specifically, the Allied plan provided that a salaried employee was entitled to full vesting of his pension for early retirement purposes: (1) if the employee was at least 60 years old and had worked 15 continuous years with Allied; or (2) if the employee was at least 55 years old and the sum of his age and years of continuous company service equaled 75; or (3) if the employee was less than 55 years old and the total of his age and years of continuous company service was 80. An employee who quit or was discharged before age 65 prior to meeting one of these three conditions did not acquire any pension rights under the Allied plan. This particular type of retirement program is known as a fixed benefit plan.

4. MINN. STAT. §§ 181B.01-.17 (1976).

ered by a private pension plan or upon termination of the plan itself, any employee who had completed at least ten years of service with that employer automatically possessed a vested right to all benefits he would have received had the particular plan not been terminated or had the business not been closed.[5] The Act covered private employers of 100 or more individuals[6] and imposed a "pension funding charge" upon those employers who terminated a pension plan or a business in a manner resulting in forfeiture of benefits by employees with ten or more years of consecutive service.[7]

Allied began discharging its Minnesota employees during the summer of 1974 in anticipation of closing its division office. As a result, the Minnesota Department of Labor and Industry undertook an investigation to determine what effect Allied's actions would have on the pension benefits for terminated employees.[8] The Department subsequently notified Allied that a pension funding charge in the amount of $185,751 would be assessed against the corporation to compensate those employees who had qualified for pension benefits under the Minnesota Act but who had not obtained vested rights under the program instituted by Allied. Allied sued the Minnesota Attorney General in federal district court[9] contending, *inter alia,* that the Act violated numerous provisions of the Constitution of the United States. The district court convened a three-judge panel which certified questions to the Supreme Court of Minnesota.[10] After receiving the answers of the supreme court,[11] the district court concluded that the Act did not deprive Allied of any constitutional rights.[12] On direct appeal from this decision, the Supreme Court of the United States, *held,* reversed: A statute which

5. *Id.* §§ 181B.03-.06.

6. Although Allied employed only 30 persons in Minnesota, it came within the purview of the Act because the corporation as a whole had more than 100 employees.

7. The Minnesota Act provided for certain exceptions to the imposition of the pension funding charge, none of which were applicable to Allied Structural Steel. *See* MINN. STAT. § 181B.07 (1976).

8. Notification of termination was required. *Id.* § 181B.08. Allied notified the Department of Labor and Industry that it intended to terminate its Minnesota office. The Minnesota division of Allied was finally closed in February, 1975.

9. The action was initially filed in the Federal District Court for the Northern District of Illinois and later transferred on a venue ruling to the Federal District Court for the District of Minnesota. Fleck v. Spannaus, 412 F. Supp. 366 (D. Minn. 1976). The pension funding charge was not levied against Allied, pending outcome of the litigation.

10. Fleck v. Spannaus, 421 F. Supp. 20 (D. Minn. 1976). The certified questions involved the possible preemption or termination of the Act by the passage of the Federal Employee Retirement Income Security Act of 1974, (ERISA), Pub. L. No. 93-406, 88 Stat. 832 (codified at 29 U.S.C. §§ 1001-1381 (Supp. V 1975)), and the possible effects ERISA would have on the cause of action.

11. Fleck v. Spannaus, ___ Minn. ___, 251 N.W.2d 334 (1976).

12. Fleck v. Spannaus, 449 F. Supp. 644 (1976).

operates retrospectively to increase the compensation due from an employer to an employee under a private pension plan severely alters the contractual obligations between those individuals in violation of the contract clause of the Constitution. *Allied Structural Steel Co. v. Spannaus,* 98 S. Ct. 2716 (1978).

Article I, section 10 of the Constitution prohibits a state from passing any law that impairs contractual obligations.[13] Although a powerful tool for judicial review of state legislation,[14] the contract clause had not been used by the Supreme Court to invalidate state law for nearly forty years. A 1977 decision, *United States Trust Co. v. New Jersey,*[15] revitalized the clause to strike down the retroactive repeal of a statutory bondholders' covenant which limited the uses of certain revenues of the Port Authority of New York and New Jersey.[16] The latent power of the contract clause brought to the surface by *United States Trust* was reemphasized by the *Allied* decision in which the Court invalidated the Minnesota statute solely because it impaired the obligation of a preexisting contract.

The dissent in *Allied* suggested that the framers of the Constitution inserted the contract clause only as a means of protecting the contractual obligations involved in debtor-creditor relationships.[17]

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13. U.S. CONST. art. I, § 10 provides: "No State shall . . . pass any . . .Law impairing the Obligation of Contracts."

14. Justice Black once remarked: "[S]o nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations." Wood v. Lovett, 313 U.S. 362, 382 (1941) (Black, J., dissenting). It is this pervasive character of contractual agreements that gives the contract clause such potential strength.

15. 431 U.S. 1 (1977).

16. In 1962, New York and New Jersey enacted legislation whereby the two states agreed with each other and with Port Authority bondholders on the extent to which revenues and reserve funds pledged as security to such bondholders could be used in the future to subsidize passenger railroad facilities. The alleged purpose of this limitation was the promotion of continued investor confidence in Port Authority bonds. Nevertheless, in 1974, the 1962 covenant was retroactively repealed by both the New York and New Jersey Legislatures, thereby preventing the bondholders from enforcing the covenant which had been in effect when the bonds were purchased. *Id.* at 9.

For a more detailed description of the background of this case, see *id.* at 4-14.

17. Chief Justice Marshall felt otherwise, concluding in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), that the contract clause had been included in the Constitution not to prevent specific types of laws but to establish the proposition that legislative enactments must not interfere with contracts. According to Marshall, "[t]he Convention appears to have intended to establish a great principle, that contracts should be inviolable." *Id.* at 206. Justice Sutherland disagreed, finding the contract clause to have been conclusively framed and adopted to forbid legislation designed to lessen the remedial rights of creditors. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453-65 (1934) (Sutherland, J., dissenting). Similarly, Justice Brennan, although admitting that Supreme Court decisions had not confined the applicability of the clause to "debtor-relief" laws, placed great emphasis on the debtor-creditor relationship as the basis for inclusion of the contract clause in the Constitution. Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716, 2728-29 & n.5 (1978) (Brennan, J., dissenting).

Whether this suggestion is an accurate portrayal of the framers' intent, its limited view was rejected by the Marshall Court which construed the contract clause to extend protection not only to contracts between individuals (whether or not a debtor-creditor relationship existed) but also to all "public contracts," *e.g.*, agreements between states and individuals.[18] The application of the contract clause was subsequently restricted to those cases in which state legislation retroactively impaired existing contracts.[19]

From 1810 (the year the Supreme Court first considered the import of the contract clause)[20] until the latter portion of the nineteenth century, the constitutional prohibition against the impairment of contractual obligations was used by the Court as an important means of ordering the relationships between state and individual.[21] Assertions of contract clause violations were before the Court more frequently during this period than allegations regarding infringements of any other constitutional provision except for the commerce clause.[22] Between the nineteenth and twentieth centu-

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The lack of certainty as to the precise historical meaning to be given the contract clause was succinctly described by an early 20th century commenator, who stated: "It is reasonably safe to assert that there is perhaps no clause in the entire Constitution the origin and intendment of which is subject to greater obscurity and doubt." Johnson, *The Contract Clause of the United States Constitution*, 16 KY. L.J. 222, 222 (1928). *See generally* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 1-25 (1938); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 512-13 (1944).

18. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (corporate charters come within protection of contract clause); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (retrospective interference with the rights and obligations of individuals under a preexisting private contract impairs the obligation of contracts); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (legislative repudiation of a grant of tax exemption violates contract clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (conveyance of public land receives contract protection). *See also* B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 268-79 (1965) (discussion of Chief Justice Marshall's role in expansion of contract clause); B. WRIGHT, *supra* note 17, at 27-60 (same).

19. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) (contract clause applicable to legislative acts but not to judicial decisions); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (contract clause does not prohibit laws which operate only prospectively). The rule in *Ogden* has never been overturned. The *Tidal Oil Co.* proposition has been the subject of certain exceptions. *See, e.g.*, Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1863).

20. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). The case occupies a dual role in constitutional history as it was also the first case in which the Supreme Court held a state statute invalid on constitutional grounds.

21. The influence of the early contract clause decisions on economic and legal developments in the United States has perhaps been overemphasized by historians and legal commentators alike. As Professor Gunther has pointed out, the cases did indeed restrain state activity "but they did not compel legislative paralysis . . . . The lack of statutory restrictions on corporations in the 19th century, for example, was probably more attributable to the legislators' unwillingness to enact such laws than to any constitutionally imposed incapacities." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 605 (9th ed. 1975).

22. B. WRIGHT, *supra* note 17, at 91-92. Almost half of all decisions prior to 1889 in which the Court invalidated state legislation were based upon contract clause violations. *Id.* at 95.

ries, however, the significance of the contract clause as a substantial restraint on state interference with property rights began to wane. Its decline as a controlling force paralleled the rise of substantive due process as the primary measure of the validity of state economic regulation.[23] When the judicial focus later shifted away from substantive due process,[24] the contract clause remained idle as a result of a concomitant expansion in the scope of the state police power.

Although perhaps not easily defined,[25] the concept of inalienable police power rests upon the theory that laws enacted to protect public interests should not be circumvented by arrangements made by individual parties. Certain legislation passed pursuant to the police power may be valid, therefore, regardless of its effect upon contractual obligations.[26] Thus, in the early 1900's when the scope of the police power was deemed to include not only public health, safety and morals but the general welfare as well,[27] the reach of the contract clause necessarily diminished.[28] As the twentieth century

23. Chicago M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890), was the first Supreme Court decision in which the due process clause furnished the basis for holding a state regulatory law invalid. Following this decision, the Court widened the scope of due process in much the same way that the contract clause had been enlarged by the judicial branch in earlier days.

24. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See also* Ferguson v. Skrupa, 372 U.S. 726 (1963). Writing for the Court, Justice Black said: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730. However, the due process clause has been used in subsequent decisions holding legislative acts invalid. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring). *See generally* Tribe, *The Supreme Court, 1972 Term—Foreward: Toward a Model of Rolls in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 5-10 (1973).

25. The term "police power" does not appear in the Constitution. A general listing of what constitutes the police power of a state might include regulation of the following: highways, railways, and motor vehicles; buildings, housing, zoning and urban development; labor relations; health and sanitation; public markets, trade and commerce. Bond, *Enhancing the Security Behind Municipal Obligations:* Flushing *and* U.S. Trust *Lead the Way*, 6 FORDHAM URB. L.J. 1, 9 n.44.

26. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 46-49 (1977) (Brennan, J., dissenting).

27. Justice Brown, writing for the Court in 1905, stated:

> It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the State. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people . . . .

Manigault v. Springs, 199 U.S. 473, 481 (1905).

28. The police power concept prevailed even when courts were construing the doctrine narrowly as evidenced by 19th century cases in which laws enacted to ensure public health and public morals were sustained, free from contract clause limitations. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814 (1879) (lottery franchise to extend for 25 years may be repealed after

progressed and the reach of state police power expanded, the contract clause declined to a point of insignificance.

The demise of the contract clause as a "mighty instrument for the protection of the rights of private property"[29] culminated in 1934 in the landmark case of *Home Building & Loan Association v. Blaisdell.*[30] At issue in *Blaisdell* was a Minnesota statute which imposed a two year moratorium on mortgage foreclosures in order to prevent widespread loss of property during the depression. In *Blaisdell,* the Court accepted the established view that government police power could qualify the contract clause. The concern of the Court, therefore, was whether the statute was a valid exercise of the state's reserved power. That determination rested on whether the statute addressed a legitimate end and the means to that end were reasonable and appropriate. Based on this rationale, the Court sustained the legislation. Moreover, while the Court noted that the temporary nature of the act and the emergency context giving rise to it were crucial, the Court indicated that great freedom was to be accorded the states in their regulatory actions since "the reasonable exercise of the protective power of the State is read into all contracts."[31]

Although the broad language of the *Blaisdell* opinion implied that the contract clause had perhaps been laid to rest, several cases immediately following the decision voided state enactments for not

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three years); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (franchise to carry fertilizer in the street may be repealed).

29. B. WRIGHT, *supra* note 17, at 28. In 1914, a Supreme Court opinion described the contract clause in the following fashion:

> [I]t is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

30. 290 U.S. 398 (1934). *Blaisdell* was decided the same year as Nebbia v. New York, 291 U.S. 502 (1934), the leading case heralding the decline of judicial intervention in economic regulation. In *Nebbia,* the Court stated that "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." *Id.* at 537.

31. 290 U.S. at 444. The rationale of *Blaisdell* was that the reserved powers of a state are implied in every contract. In a later decision, this notion was behind the proposition that the state never impairs a contract because the exercise of its powers is only the enforcement of an implied condition in the contractual agreement. East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232 (1945). However, in an earlier decision, Manigault v. Springs, 199 U.S. 473 (1905), the Court followed a different line of reasoning and conceded that contractual obligations could be impaired by the state because the state's power to protect its citizens was paramount to the established agreements. Both theories involve questioning the validity of the state power at issue and therefore possess a similar underlying rationale.

being as limited in application as the Minnesota law. These decisions lent credibility to the view that the *Blaisdell* majority had merely sustained a particular statute in a particular situation rather than announced a general rule.[32] In subsequent decisions, such as *Veix v. Sixth Ward Building & Loan Association*[33] and *East New York Savings Bank v. Hahn,*[34] the Supreme Court again moved toward a general denial of the contract clause in favor of police power regulations by not retaining the *Blaisdell* limitations of emergency and temporary conditions as prerequisites for sustaining legislation over contract clause objections. Nevertheless, *Wood v. Lovett*[35] in 1941 was the last Supreme Court decision, until 1977, that invalidated a state law as a violation of the contract clause. During that nearly forty year hiatus, the Supreme Court upheld *Blaisdell* in *El Paso v. Simmons,*[36] a decision validating a legislative act which limited to a five year period the reinstatement rights of state land purchasers after forfeiture for nonpayment of interest.[37]

The "dusting off" of the contract clause which occurred in *United States Trust* involved consideration of a "public contract," rather than a private contractual arrangement as was the circumstances in *Blaisdell.* Although the Court noted that unusual deference is given to lawmaking authorities in the face of a challenge by the contract clause, it decided that this deferential policy was inappropriate in a case where the state was a party to the very contract the legislature was attempting to limit.[38] This element of self-interest led the Court to set up a double standard of review. It strictly applied the "reasonable and necessary to serve an important public purpose" test,[39] used in determining the constitutionality of a contract impairing a statute when the state was a party to the contract.[40] With regard to agreements between individuals, however, Justice Blackmun noted that a state was entitled to a less rigid

32. *See* Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); Worthen Co. v. Thomas, 292 U.S. 426 (1934).

33. 310 U.S. 32 (1940).

34. 326 U.S. 230 (1945).

35. 313 U.S. 362 (1941).

36. 379 U.S. 497 (1965).

37. Although the state was a party to the land sale contracts at issue in *Simmons,* the Court did not mention, much less analyze, this factor in its opinion. The decision rests heavily on the *Blaisdell* decision for support.

38. 431 U.S. at 26.

39. *Id.* at 25.

40. For interesting opposing viewpoints on the *United States Trust* dual standard, see Bond, *supra* note 25; 55 U. DET. J. URB. L. 200 (1977). The author of the latter commentary disagreed with the selection of the self-interest element as the basis for the double standard in *United States Trust. Id.* at 209. A similar view was taken in *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 1, 89-90 (1977).

standard of judicial scrutiny when it interfered with private contractual obligations, as in *Blaisdell,* then when it sought to change its own pacts, as in *United States Trust.*[41] Statutes which allegedly impaired the obligations of public contracts would be subject to a stricter standard of review than statutes which allegedly impaired the obligations of private contracts.

The dual standard of review articulated in *United States Trust* was not controlling in *Allied,* where state impairment of preexisting contractual obligations between private parties was alleged. Although noting that the *United States Trust* decision was one in which the state itself was a party to the contract at issue, the *Allied* majority sidestepped the major import of the decision by relegating discussion of the dual standard of review to a somewhat cursory footnote.[42] The Court, while acknowledging the "particular scrutiny" exercised in the *United States Trust* decision,[43] did not come to terms with its own recently articulated two-tiered approach to the contract clause, preferring instead to cite *United States Trust* for the general proposition that "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[44]

In lieu of dealing more fully with *United States Trust,* the Court in *Allied* turned to *Blaisdell* and its immediate progeny.[45] The Court listed the five factors which the Court in *Blaisdell* had deemed supportive of the moratorium legislation: (1) the existence of a state of emergency; (2) relief appropriately tailored to the emergency; (3) a basic societal interest in need of protection; (4) the temporary quality of the legislation; and (5) the reasonable nature

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41. 431 U.S. at 22-23, 25-26.

42. 98 S. Ct. at 2723 n.15.

The footnote, in its entirety, reads:

> [In *United States Trust,* t]he Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, . . . although it was careful to add that "private contracts are not subject to unlimited modification under the police power."

Id. (citation omitted).

43. *Id.* at 2722 (citing 431 U.S. at 22).

44. *Id.*

45. The *United States Trust* case involved consideration of a "public contract" and is, therefore, distinguishable from the *Allied* situation on that ground. Moreover, the *United States Trust* case dealt with the spending and borrowing powers of the state, categories the Court deemed were outside the interests of a state. *See* 431 U.S. at 23-25. *But see id.* at 51-52 (Brennan, J., dissenting) (labeling covenant as "purely financial" should not determine contract clause analysis). Whatever distinction may be drawn between *United States Trust* and *Allied,* however, the Court cannot be said to have addressed adequately its decision in the former in reaching its conclusion in the latter.

of imposed conditions.[46] Upon reviewing the enumerated factors, the Court concluded that had the legislation in *Blaisdell* not possessed these particular characteristics, the Minnesota moratorium statute would not have been sustained. In support of this reasoning, the majority relied upon *Worthen Co. v. Thomas,*[47] *Worthen Co. v. Kavanaugh*[48] and *Treigle v. Acme Homestead Association*[49] as evidence that the rather sweeping language of *Blaisdell* was limited by the factual context of the case.[50]

Justice Brandeis, following *Thomas* and *Kavanaugh*, articulated a similar view when writing for the majority in *Louisville Joint Stock Land Bank v. Radford.*[51] He noted that the statute in *Blaisdell* was directly related and confined to its factual context[52] but was unable to find such a relationship in the case before him. He wrote:

> Statutes for the relief of mortgagors, when applied to preëxisting mortgages, have given rise, from time to time, to serious

46. 98 S. Ct. at 2721-22.

47. 292 U.S. 426 (1934). In *Thomas*, the Court held that "substantial rights" had been altered by the state statute. They reasoned that legislation may have an effect on existing contracts if it met a public need and "the relief afforded [had a] reasonable relation to the legitimate end to which the State [was] entitled to direct its legislation." *Id.* at 433. The Court determined that the sustaining of a mortgage moratorium law in *Blaisdell* was due to its temporary and conditional relief as well as the limited exigency to which the legislation was addressed. In the instant case, the statute considered did not offer either temporary or conditional relief, nor did it contain provisions limiting its time or circumstances. Unable to find the essential public purpose within its factual context, the Court concluded that the legislation substantially impaired preexisting contractual arrangements and violated the contract clause.

48. 295 U.S. 56 (1934). The *Kavanaugh* decision followed the rule laid out in *Thomas.* Writing for the majority, Justice Cardozo found that an Arkansas statute, changing the method of payment of assessments on mortgages held on lands in an improvement district, violated the contract clause. Justice Cardozo referred to the factual context in which the *Blaisdell* case arose and noted the relationship of the legislation to that context. *Id.* at 63. Unable to find the same relationship in the Arkansas statute, it could not be upheld as it impaired the contractual rights beyond any reasonable public purpose.

49. 297 U.S. 189 (1936). In *Triegle*, state legislation was also held to violate the contract clause. The Court found no discernible public purpose, *id.* at 196, in the legislation and found that the means adopted were unreasonable. Though only referring to *Blaisdell* in a footnote, *id.* at 197 n.6, the Court implied that the action there was a proper exercise of police power while in *Treigle* it was not.

The inference that can be drawn from the *Thomas/Kavanaugh/Triegle* line of cases is that whether impairment will be considered substantial enough to find a violation of the contract clause depends upon the factual context in which the legislation arises and the relationship of the statute to that factual context. The references to *Blaisdell* in the above three cases indicated that the Court found the necessary link in *Blaisdell*, between the factual context and the legislation, to hold that the state had properly exercised its reserved powers.

50. For example, the Court in *Blaisdell* declared that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." 290 U.S. at 435.

51. 295 U.S. 555 (1935).

52. *Id.* at 597-98.

> constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell*, . . . they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W.B. Worthen Co. v. Kavanaugh*, . . . when it appeared that this substantive right was substantially abridged.[53]

The constitutionality of a state statute rested on its relationship with the factual context in which the impairment of preexisting rights was considered.

The *Allied* Court's reading of *Blaisdell* in light of cases like *Kavanaugh* should be interpreted as an affirmation of the proposition that only substantial impairment of preexisting contractual rights is to be of constitutional concern. Such a deduction is reasonable given the pervasive character of both contractual arrangements and state police powers within our present society. In attempting to balance these coexisting elements, Justice Stewart's majority opinion in *Allied* posited that the contract clause has never been deemed to obliterate the police power of the state. Yet, Justice Stewart continued, if the clause is to retain any substance of its own, a point must exist at which the prohibition places some limits upon state infringement of contractual relationships.[54] In reaching this point, the Court initially inquired into the degree of impairment and recognized that the contract clause was not subject to an absolute interpretation. Moreover, such inquiry resembled the approach taken in *United States Trust* where Justice Blackmun stated: "[A] finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."[55] Apparently in accord with the *United States Trust* decision at this level of analysis, the *Allied* majority ignored the more significant factor of *United States Trust*: the state is entitled to greater deference from the judicial branch when the state interferes with private contractual obligations, as in *Blaisdell*, than when the state seeks to modify its own covenants, as in *United States Trust*.

Having sidestepped the major import of the *United States Trust* decision, the *Allied* opinion also failed to explore adequately the question of whether an "enlargement of contractual obligation" is to be viewed as an impairment for purposes of contract clause application. In a footnote, the Court cited cases which bolster the

53. *Id.* at 581.
54. 98 S. Ct. at 2721.
55. 431 U.S. at 21.

premise that this proposition has been answered affirmatively in the past, although the matter was not addressed in depth in any of the cited decisions.[56] Dissenting in *Allied,* Justice Brennan argued that while the Minnesota Act increased the burdens placed upon Allied Structural Steel, such burdens were the result of positive social legislation, the impact of which must be dealt with through due process analysis.[57] Although necessarily raising the collateral question of the relationship of the contract clause to due process, the Court's settled acceptance of enlargement as part of impairment indicates that the majority did not view all increased contractual obligations as subsumed by these considerations. Rejecting Justice Brennan's theory, the Court expressed concern for the greater specificity given to state impairment of contractual obligations by article I of the Constitution, a concern which may be determinative, as it was in the instant case, in preventing retroactive application of state law.

In *Allied,* after the Court limited the reach of the *Blaisdell* decision, tempered the *United States Trust* dual standard of review, declared substantial infringement to be the significant constitutional contract concern, and accepted increased obligation as an element of impairment, it proceeded to consider the particular circumstances surrounding enactment of the Minnesota Private Pension Benefits Protection Act and its relationship to the pension program instituted by Allied Structural Steel. Determining that the increased compensation due from Allied to its discharged employees constituted a severe burden,[58] the Court then analyzed the situation before it in terms of the five factors which were found significant in *Blaisdell.* While the *Blaisdell* framework is appropriate, the analysis of the Court results in some misapplication of these factors to the particular facts in *Allied.*

First, the Court cited the Minnesota retirement situation as one lacking an emergency. Regardless of whether this is an arguable issue, the existence of an emergency was not retained as an absolute requirement for sustaining state legislation affecting contractual agreements in either *Veix*[59] or *East New York Savings Bank.*[60] This precedent was recognized in *United States Trust,*[61] and it was unnecessary for the Court to preserve the issue in *Allied.*

56. 98 S. Ct. at 2723 n.16 (citing, *inter alia,* Georgia Ry. & Power Co. v. Decatur, 262 U.S. 432 (1923); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916)). *But see* B. WRIGHT, *supra* note 17, at 101. *See generally* Hale, *supra* note 17, at 514-16.

57. 98 S. Ct. at 2726. (Brennan, J., dissenting).

58. *Id.* at 2723.

59. 310 U.S. 32 (1940).

60. 326 U.S. 230 (1945).

61. 431 U.S. at 22-23 n.19.

Second, the Court proclaimed that the Minnesota Act was not enacted to deal with a broad, generalized economic or social problem; Justice Stewart's opinion characterized the employers covered by the legislation as members of a narrow class.[62] Such a conclusion ignores the substantial concern for private retirement programs evidenced by ERISA, a congressional attempt in 1974 to deal comprehensively with the coverage, vesting and funding aspects of private pension plans throughout the country.[63] The lack of an effective means of assuring economic security in retirement for privately employed individuals was the obvious impetus for the ERISA legislation,[64] and it would be rational to assume that the Minnesota legislators shared labor concerns similar to their elected counterparts in Congress. The Minnesota Act, which was effective for several months prior to passage of ERISA, did, in fact, contain a provision providing that the state law was to become null and void upon passage of comparable federal statutes.[65] This was an indication, perhaps, of a legislative desire to provide corresponding ERISA-type protection for Minnesota citizens pending outcome of similar congressional proposals. The contention of the Court in *Allied*—that the Minnesota law lacked a broad social or economic basis—is thus without solid foundation when viewed in connection with parallel national legislative action.

Ironically, in considering another *Blaisdell* factor—whether the relief provided by the Minnesota Act was appropriate—the *Allied* majority proceeded to describe the ERISA coverage enacted by Congress as sufficient law in the area, citing the short lifespan of the Minnesota Act as a debilitating feature of the pension protection scheme.[66] This reasoning not only contradicts the *Blaisdell* decision, which looked upon the temporary nature of legislation as a positive characteristic, but also avoids the fact that not all of the provisions of ERISA would have applied to Allied employees in the period mentioned by the Court.[67]

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62. 98 S. Ct. at 2724-25.

63. 29 U.S.C. §§ 1001-1381 (Supp. V 1975). ERISA is an acronym for Employee Retirement Income Security Act.

64. For background information and a discussion of major issues of private pension law facing drafters of ERISA, see H.R. REP. No. 93-533, *supra* note 2, at 1-8, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4639-46. *See generally* Snyder, *Employee Retirement Income Security Act of 1974*, 11 WAKE FOREST L. REV. 219 (1975); Note, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539 (1975).

65. MINN. STAT. § 181B (1976). For a discussion of ERISA and the preemption of state law, see 6 FORDHAM URB. L.J. 599 (1978).

66. 98 S.Ct. at 2725 n.21.

67. Although enacted on September 2, 1974, ERISA as applied to the Allied retirement plan would not have guaranteed the payment of a substantial portion of an Allied employee's

Justice Stewart established a more significant concern in declaring that the fifth factor in the *Blaisdell* case,—the reasonable nature of imposed conditions—had been found wanting in *Allied.* For members of the majority, the absence of gradual applicability of the Minnesota Act (a feature of ERISA) and the disruption of the element of employer reliance[68] were crucial to the outcome of the case. While the Court correctly attempted to deal with these admittedly important considerations, it failed to view them in conjunction with the existing Allied plan which created an employee reliance warranting similar judicial concern. The failure of the Court to accord equal consideration to all of the circumstances occasioning passage of the Minnesota Act resulted in the Court inappropriately applying the *Blaisdell* standard of reasonableness.

Whatever lack of merit may be subscribed to the Supreme Court's handling of the *"Blaisdell* factors" in *Allied,* the majority may at least be said to have addressed the relevant contract clause concerns with the admittedly crucial exception of the dual standard of review propounded in *United States Trust.* The more fundamental question to be raised, however, is whether the Minnesota pension situation should have been dealt with under contract clause analysis at all. Justice Brennan's dissent emphatically answered this question in the negative and suggested that due process considerations represent the preferable analytical standard.[69] As previously mentioned,[70] in the face of allegations of contract impairment by the state, a due process analysis requires an inquiry into whether or not the contract clause is merely a superfluous constitutional provision. Assuming that the contract clause has been largely subsumed in the rational relation test of the post-*Blaisdell* substantive due process decisions, it is questionable whether the clause has any meaning independent of due process. Nonetheless, as demonstrated by the *Allied* opinion, at least five members of the Court would subscribe to the clause a vitality all its own.

Even accepting the contract clause as a viable entity, the *Allied* decision might have been augmented by an analysis based on the "taking" clause as suggested in Justice Brennan's dissent.[71] In general, a "taking" analysis centers upon an assessment of the fairness

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vested pension benefit until at least January 1, 1976, the earliest date on which *all* the vesting and funding titles of ERISA could apply to Allied. Fleck v. Spannaus, ___ Minn. ___, 251 N.W.2d 334, 340 (1977).

68. The absence of actuarial considerations of plant shutdowns was discussed in Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals,* 76 HARV. L. REV. 952 (1963).

69. 98 S. Ct. at 2726 (Brennan, J., dissenting).

70. *See* text accompanying note 57 *supra.*

71. 98 S. Ct. at 2732 n.9 (Brennan, J., dissenting).

of burdens imposed by particular legislation, setting aside concern for the public interest deemed to be at stake.[72] Since, as the Court in *Allied* recognized, it is not impairment of contractual obligation which is of constitutional concern but rather *substantial* impairment, the notion of a fairness standard is an inherent feature of contract clause analysis even under present case law. Should the Supreme Court follow this perspective in a situation similar to *Allied,* a like result might appear to be less of an aberration.

With the *Allied* decision following so soon after *United States Trust,* the contract clause has certainly been revived. A careful evaluation of the decisions indicate, however, that the clause has merely been resuscitated rather than revised. Aside from the development of the dual standard of review in *United States Trust* and the affirmation of enlargement of obligation as impairment announced in *Allied,* the Court has retained the traditional analysis of the 1930's. Whether the Court will attempt to unravel the effect of state legislation upon the "multitudinous private arrangements" of society[73] can be but speculation. There is a growing sense, however, that the Court may be increasingly willing to move beyond mere resuscitation, to revitalize and reinterpret contractual obligations in the modern setting.

JEAN F. REED

First Amendment Interest Balancing—Behind Bars?

This casenote examines the recent decision of Houchins v. KQED, Inc., *in which the Supreme Court of the United States narrowly construed the right of access afforded the news media in their coverage of penal facilities. The analysis focuses upon the first amendment methodology utilized by the Court in its decisionmaking process. The author concludes with a critical assessment of the Court's departure from accurate interest balancing techinque.*

Following the suicide of a prisoner in the Alameda County Jail at Santa Rita, California, KQED, a licensed operator of both a radio

72. It has been suggested that a "takings" approach would have better justified the holding of the Court in *United States Trust. See The Supreme Court, 1976 Term,* 91 HARV. L. REV. 1, 90-94 (1977) (fairness-centered takings standard as a measure of clear government-generated costs would be an effective response to the Court's concern for misuse of the police power).

73. Justice Frankfurter used this phrase in East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232 (1945).