CONSTITUTIONAL LAW—CONTRACT CLAUSE—STATE ADJUSTMENT OF PRIVATE EMPLOYER'S OBLIGATIONS UNDER PENSION PLAN VIOLATES CONTRACT CLAUSE—*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

In the summer of 1974, Allied Structural Steel Company (Allied) a Delaware corporation,[1] began to phase out a division construction office located in Minnesota.[2] The corporation consequently discharged eleven of the thirty individuals employed at the facility.[3] Pursuant to the Minnesota Private Pension Benefits Protection Act (Act)[4] Allied notified the State Commissioner of Labor and Industry of its intention to close the Minnesota plant.[5]

At the time of the termination, the corporation's salaried employees were protected under Allied's Salaried Employees' Pension Plan, a scheme which afforded them retirement security.[6] Only

---

[1] Stipulation of Facts at A-39, A-41 Appendix to Appellees' Brief, Fleck v. Spannaus, No. 77-747 (1977) [hereinafter cited as Appendix to Appellees' Brief]. Allied manufactured and constructed structural steel. *Id.* at A-39. Although its principal place of business was located in Chicago Heights, Illinois, the company operated a Minnesota office. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 236 (1978); Appendix to Appellees' Brief, *supra* at A-40. This facility was used for the purpose of monitoring the construction of steel bridges and buildings in thirty states. Appendix to Appellees' Brief, *supra* at A-40.

[2] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978). The Minnesota plant closing was a result of an amalgamation in December of 1974 requiring relocation of the company's main offices and fabricating plant from Hammond, Indiana to Chicago Heights, Illinois. Appendix to Appellees' Brief, *supra* note 1, at A-40–A-41. This process was completed in February of the following year. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 n.8 (1978).

[3] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978). Additional employees eventually were terminated. Appendix to Appellees' Brief, *supra* note 1, at A-41.

[4] MINN. STAT. ANN. § 181B.01 (West Cum. Supp. 1979). Limited to private employers of at least 100 employees, one of whom must be a Minnesota resident, the Act's application was further restricted to companies providing pension benefits pursuant to a § 401 United States Internal Revenue Code plan. MINN. STAT. ANN. § 181B.02 (West Cum. Supp. 1979). Once a covered employer closed a Minnesota facility or terminated a pre-existing pension agreement, the state commissioner of labor and industry was empowered to assess a pension funding charge. MINN. STAT. ANN. §§ 181B.03–.06, .11 (West Cum. Supp. 1979). If the pension trust monies were insufficient to award full pensions to employees of at least ten years, the enactment's pension funding charge provision would be triggered. MINN. STAT. ANN. §§ 181B.03–.06 (West Cum. Supp. 1979). To satisfy the deficiency, the employer was required to purchase deferred annuities payable to company employees at their usual retirement age. MINN. STAT. ANN. § 181B.12 (West Cum. Supp. 1979).

[5] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978); *see* MINN. STAT. ANN. § 181B.08 (West Cum. Supp. 1979).

[6] Appendix to Appellees' Brief, *supra* note 1, at A-39. The Allied Structural Steel Company Salaried Employees' Pension Plan was organized in August 1963 under § 401 of the Internal Revenue Code. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 236 (1978). Pursuant to the non-union program, Appendix to Appellees' Brief, *supra* note 1, at A-39, at age 65 an employee could retire and receive a monthly pension computed by multiplying 1% of his aver-

two salaried employees, however, actually qualified for any monetary benefits.[7] The existence of this plan as well as the corporation's size served to bring Allied within the scope of the Minnesota Private Pension Benefits Protection Act.[8]

Since the remaining nine of Allied's eleven terminated salaried employees failed to fulfill the company's stipulated minimum service requirement,[9] they had no vested pension rights under the plan.[10] The employees had worked for Allied in excess of ten years, however, thus qualifying them as "pension obligees" of the corporation under Minnesota law.[11] Pursuant to the Act, the state assessed a $185,000 funding charge against Allied to satisfy its Pension Fund deficiency.[12]

---

age monthly earnings by the total number of years of employment with Allied. 438 U.S. at 236. The plan provided alternative means, however, by which an employee's pension could vest at age 65. *Id.* at 236–37. In order to qualify, the employee (1) had to have worked 15 years for Allied and reached age 60; or (2) attained 55 years of age at least, while the sum total of age and years of service with Allied equaled 75; or (3) was less than 55 but the combination of age and years of service totalled at least 80. *Id.* Additionally, the company plan provided that employment termination subsequent to satisfaction of an above condition did not preclude payment of pension benefits. *Id.* at 237.

Actuarial predictions of payout requirements provided the basis for Allied's unilateral contributions to the pension trust fund. *Id.* In computing the requisite amounts of these deposits, the company assumed that not all employees would remain with Allied long enough to realize vesting of benefits, due to death or job loss. Brief of Appellant at 3, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) [hereinafter cited as Brief of Appellant].

The company plan lacked a specific requirement that Allied's payments reflect the number of employees. The only enumerated instruction was that the employer's contributions comport with the actuary's determination. 438 U.S. at 237; *see* Appendix to Brief of Appellant, app. at 10a. Not only did the program lack sanctions for failure to adequately contribute, but Allied had unilateral authority to modify or terminate its coverage and disperse the trust assets. 438 U.S. at 237.

[7] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978).

[8] MINN. STAT. ANN. § 181B.02–.06 (West Cum. Supp. 1979). Although Allied's Minnesota employees totalled far fewer than the statutory minimum, the company's nationwide employment figure surpassed 100. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 238 n.6 (1978).

[9] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978). For a discussion of pension eligibility based on length of employment, see note 6 *supra* and accompanying text.

[10] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978).

[11] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978). Although applicable at the time Allied first terminated its Minnesota employees, the state law was superseded, as of January 1, 1975, by the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, 1144(a) (Supp. V 1976). This enactment was designed, *inter alia*, to protect employee pension rights. 29 U.S.C. § 1001(c) (Supp. V 1976). *See* BUREAU OF NATIONAL AFFAIRS, HIGHLIGHTS OF THE NEW PENSION REFORM LAW 5.6 (1974) [hereinafter cited as BUREAU OF NATIONAL AFFAIRS]; H. LAMON JR. & G. RAY, FIDUCIARY RESPONSIBILITIES UNDER THE NEW PENSION REFORM ACT 1(1976) [hereinafter cited as H. LAMON & G. RAY]; S. THOMPSON JR., PENSION REFORM: HOW TO COMPLY WITH ERISA 2-2 (1976) [hereinafter cited as S. Thompson]; notes 123 & 154 *infra*.

[12] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239 (1978).

In response, the company brought suit against Minnesota's Attorney General[13] in federal district court seeking injunctive and declaratory relief.[14] Although the district court judge denied Allied's motion for a preliminary injunction and summary judgment, he complied with the request that a three-judge court be impanelled.[15] Having entertained the parties' motions,[16] the district court issued a certification order to the Minnesota Supreme Court[17] to interpret specific statutory language lacking requisite clarity.[18] In compliance, the state tribunal construed the Private Pension Benefits Protection Act as being wholly applicable to the pending proceedings.[19] The

---

[13] Appendix to Appellees' Brief, *supra* note 1, at A-39.

[14] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 239–40 (1978). Other party-plaintiffs included Allied employees Walter Fleck and Edyth Hamler, and Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, E. A. Righert. Appendix to Appellees' Brief, *supra* note 1, at A-38. Additional co-defendants were Minnesota Department of Labor and Industry Commissioner E. I. Malone, Administrator of the Pension Protection Division of the Minnesota Department of Labor and Industry Phyllis Spielman and the Allied Pension Plan itself. *Id.* at A-39.

Although filed in Illinois, the action was transferred to the District of Minnesota pursuant to 28 U.S.C. § 1404 (1976). Brief of Appellant, *supra* note 6, at 5. Allied argued that the state legislation unreasonably regulated interstate commerce, impaired the obligation of contract, deprived the corporation of its property without due process of law, and created an unreasonable, arbitrary and invidious classification in violation of section one of the fourteenth amendment. Fleck v. Spannaus, 412 F. Supp. 366, 371 (D. Minn. 1976). Concurrent with its constitutional attack, Allied asserted that ERISA precluded an attempt to enforce the Minnesota law. *Id.* at 368. The defendants, on the other hand, argued for abstention, urging that the Minnesota courts be afforded an opportunity to construe the statute. *Id.*

[15] Fleck v. Spannaus, 412 F. Supp. 366, 371 (D Minn. 1976). The statutory authority upon which the judge relied in convening the three-member court is 28 U.S.C. § 2284 (1976), which requires, in pertinent part, that a three-judge district court be convened when mandated by a Congressional Act. *Id.* at 370; 28 U.S.C. § 2284 (1976). Since federal law required that injunctive relief based on the unconstitutionality of a state statute be granted only by a three-judge court, 28 U.S.C. § 2281 (1970) (repealed 1976), Allied's motion was properly granted. *See* 412 F. Supp. at 371.

[16] Fleck v. Spannaus, 421 F. Supp. 20, 21 (D. Minn. 1976). Allied moved for summary judgment to enjoin enforcement of the Pension Act on the identical grounds relied upon in the prior action. *Id.; see* note 14 *supra*. Similarly, the defendants moved for abstention. 421 F. Supp. at 21.

[17] Fleck v. Spannaus, 421 F. Supp. 20, 23 (D. Minn. 1976). This procedure is recommended when unique circumstances exist and when the delay and expense caused by abstention are to be avoided. *Id.*

[18] Fleck v. Spannaus, 421 F. Supp. 20, 23 (D. Minn. 1976). The questions certified to the Minnesota Supreme Court, pursuant to MINN. STAT. ANN. § 480.061 (West Cum. Supp. 1979) included: (1) When did the state provision become null and void?; (2) What impact does lapsing of the statute have on a "cause of action which may have accrued" before its termination, "but upon which no administrative proceeding has been commenced?"; and (3) What is the effect of the Act's expiration on a cause of action which formed the basis "of a pending administrative proceeding on the date of" expiration? Fleck v. Spannaus, 251 N.W.2d 334, 334–35 (1977).

[19] Fleck v. Spannaus, 251 N.W.2d 334, 340 (1977). Specifically, the state court decided that the statute was effective through December 31, 1975, the date on which ERISA's funding, vesting and termination insurance provisions became operative. *Id.*

district court, in addition, dismissed the claims of plaintiffs Fleck, Hamler and Richert[20] and appointed a master to resolve certain factual issues.[21] These findings, stipulated to by the parties,[22] were relied upon by the district court in its final decision on the merits.[23] Here, the three-judge panel sustained the state enactment[24] against Allied's claim that it unconstitutionally impaired the company's contractual obligations to its employees as defined by the Pension Agree-

---

[20] Fleck v. Spannaus, 421 F. Supp. 20, 23 (D. Minn. 1976). The court noted that these individuals were unable to satisfy the standing requirement. *Id.* at 22. The Pension Act was addressed to the relationship between the terminated employees and Allied. *Id.* Accordingly, the court indicated that since the relief which the Act sought to provide could be asserted only against the employer, the rights and obligations of these individuals were not affected. *Id.* The inflicted injury was felt only by the corporation. *Id.* Thus, the remaining plaintiffs were without a personal stake in the controversy. *Id.*

[21] Fleck v. Spannaus, 421 F. Supp. 20, 23 (D. Minn. 1976). According to the Federal Rules of Civil Procedure, the federal district court may appoint a special district master "to report . . . upon particular issues or to . . . perform particular acts or to receive and report evidence. . . ." FED. R. CIV. P. 53(a) & (c).

The court requested that the master ascertain (1) the amount of donations to the company Pension Plan by terminated Allied employees; (2) "the actuarial assumptions" utilized in the retirement program; (3) the total expenditure for pre-paid annuities mandated by the enactment; and (4) any additional items "relevant and necessary for a final determination of the constitutional issues." 421 F. Supp. at 23.

[22] Allied Structural Steel Co. v. Spannaus, No. 3-75 (D. Minn. Sept. 2, 1977) (quoted in Appendix to Appellees' Brief at A-68).

[23] *See* FED. R. CIV. P. 53(e)(2). The Federal Rules of Civil Procedure state that when parties stipulate to the finality of the master's findings of fact, only questions of law shall be considered. FED. R. CIV. P. 53(e)(4).

The special master's report, issued April 7, 1977, indicated the impossibility of ascertaining which Pension Fund contributions by Allied were allocable to the discharged employees. Allied Structural Steel Co. v. Spannaus, No. 3-75 (D. Minn. Sept. 2, 1977) (quoted in Appendix to Appellees' Brief at A-68). In addition to his determination that fund assets were insufficient to pay the terminated employees after paying all employees whose rights under the plan had vested, the master asserted that in computing its annual contributions, Allied did not consider the possibility of plant closure. *Id.* Finally, it was ascertained that the cost of prepaid deferred annuities the corporation would be required to purchase ranged from $114,171.93 to $185,751.00. *Id.*

[24] Allied Structural Steel Co. v. Spannaus, No. 3-75 (D. Minn. Sept. 2, 1977) (quoted in Appendix to Appellees' Brief at A-85). Having categorized the state legislation as a general regulatory impairment of private contracts, the court emphasized the need to ascertain the extent of that impairment. *Id.* at A-70 to 71. This required an assessment of the parties' expectations under the contract. *Id.* at A-70. Although accelerated vesting had not been anticipated by Allied, *id.* at A-73, the district court upheld the Act's validity on the premise that "the obligations imposed . . . [were] not . . . significantly beyond the parties' initial expectations . . . ." *Id.* at A-74. The court noted that the likelihood of cash disbursements to employees and the need to accumulate a reserve were anticipated. *Id.*

The decision placed certain emphasis on the conclusion that the Minnesota legislature was addressing a problem of vital public interest. *Id.* at A-78. In its protection of the economic welfare of senior citizens, *id.* at A-76, the state approach was neither unreasonable nor arbitrary, as viewed by the court. *Id.* at A-79.

ment.[25] On appeal, the United States Supreme Court reversed the lower court judgment in *Allied Structural Steel Co. v. Spannaus*.[26] Holding that the contract clause was violated by the legislation's impairment of Allied's pension agreement obligations, the Court rendered the Act unconstitutional.[27]

The contract clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[28] Essential to a full understanding of this provision, is

---

[25] *Id.* at A-68–69. Allied's attack included an assertion that the statute was violative of the due process, equal protection, and commerce clauses of the United States Constitution. *Id.* Its principal argument, however, rested upon the contract clause. *Id.* Although the district court based its decision almost totally on the contract clause issue, it did consider the employer's alternate contentions. *Id.; see* note 14 *supra*.

Briefly, since "the burden on interstate commerce [was not] excessive," the Act was not viewed as a violation of the commerce clause. Allied Structural Steel Co. v. Spannaus, No. 3-75 (D. Minn. Sept. 2, 1977) (quoted in Appendix to Appellees' Brief at A-80). Nor was it in breach of the due process provision since the statute was directed to a valid public interest regardless of its retrospective operation. *Id.* at A-82. The equal protection argument was equally unsuccessful in that the challenged classification (large, private employers) was a rational one, according to the court. *Id.* at A-83, A-84.

[26] 438 U.S. 234 (1978). Justice Stewart authored the majority opinion. Justice Brennan dissented, joined by Justices White and Marshall. Justice Blackmun took no part in the decision.

[27] *Id.* at 250–51.

[28] U.S. CONST. art. I, § 10. The section in its entirety reads as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10.

This provision was included by the Framers as a remedy to vacillating legislative policy as well as legislative interference with property rights. THE FEDERALIST NO. 44 at 282 (J. Madison). Viewed as protective of personal security, article I, section 10 was designed to "banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." *Id.* at 283; *see* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286 (1827) (article I, section 10 envisioned as protective of property and personal rights from arbitrary legislative action).

Full comprehension of the contract clause's impact on constitutional jurisprudence historically, requires workable definitions of the terms contained therein. The word "law" as used in the provision "comprises statutes, constitutional provisions, municipal ordinances, and administrative regulations having the force and operation of statutes." Congressional Research Service Library of Congress, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 383 (1973) [hereinafter cited as U.S. CONST. ANN.]; *see, e.g.*, Appleby v. Delaney, 271 U.S. 403 (1926); Cuyahoga Power Co. v. City of Akron, 240 U.S. 462 (1916); Bier v. McGehee, 148 U.S. 137 (1893). Although judicial decisions are typically excluded from contract clause operation, "there are important exceptions to this rule. . . ." U.S. CONST. ANN., *supra* at 383–86. *See* Muhlker v. New York and Harlem R.R. Co., 197 U.S. 544, 570 (1905). *But see* Central Land Co. v. Laidley, 159 U.S. 103, 109 (1895). For a general discussion of the applicability of the contract clause to judicial decisions, *see* U.S. CONST. ANN. *supra* at 383–86.

The "obligation "can best be described as that which "makes the agreement binding on the parties." *Id.* at 386. "The concept of obligation is an importation from the Civil Law and its appearance in the contracts clause is supposed to have been due to James Wilson, a graduate of

a familiarity with its genesis. The clear intent of the framers in drafting the clause was to ensure a degree of contract stability by preventing state legislative interference with private agreements.[29] Specifically, the contract clause was a prophylactic response to further statutory adjustments in the creditor-debtor relationship.[30] It was not envisioned, however, as a means of enforcing contracts which otherwise would be void.[31]

Despite its vital importance in the Republic's first century of constitutional jurisprudence,[32] the contract clause's popularity as a

---

Scottish universities and a Civilian." *Id.* One of the earlier articulations regarding contractual obligations is found in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), where Chief Justice Marshall remarked: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is . . . the obligation of his contract." *Id.* at 197. The inclusion of "obligation" in article I, section 10 was the result of careful consideration by the Framers. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 257 (1827) (separate opinion) (Washington, J.). Without it, the prohibition would have imported a meaning different from that which was intended. *Id.* (separate opinion) (Washington, J.). The Supreme Court, however, has recognized a restriction on contractual obligations. Specifically, the judiciary has held that state law as an element of every contract, serves as an implicit limitation on the scope of the agreement's obligations. United States Trust Co. v. New Jersey, 431 U.S. 1, 19–20 n.17 (1977); East New York Bank v. Hahn, 326 U.S. 230, 232 (1945); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259 (1827) (separate opinion) (Washington, J.); *see* U.S. CONST. ANN., *supra* at 386.

The third ingredient in the constitutional prohibition is the "impair[ment]", best defined as an act which "invalid[ates], . . . releases or extinguishes" contractual obligations. 290 U.S. at 431. *See also* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819).

[29] 3 ELLIOT'S DEBATES 478 (1968); 4 ELLIOT'S DEBATES 191 (1968); *see* Brief of Appellant, *supra* note 6, at 10.

[30] G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 604 (9th ed. 1975); *See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 465 (1934) (Sutherland, J., dissenting).

Reacting to the widespread economic distress following the American Revolutionary War, the states adopted specific remedial legislation. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 204 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354–55 (1827) (Marshall, C.J., dissenting). These enactments included issuance of paper money, extension of payment period stipulated to in contracts, and approval of worthless property as valid tender in satisfaction of debts. 17 U.S. (4 Wheat.) at 204. It was this type of contractual impairment, aimed at relieving the debtor in a time of emergency, which prompted inclusion of the contract clause in the Federal Constitution. G. GUNTHER, *supra* at 604.

[31] Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 517 (1944). Promises which lacked consideration or were against public policy were not affected by the contract clause. *Id.* Agreements which provided for interest rates in excess of that allowed under state usury laws as well as those which were violative of the Statute of Frauds or the Statute of Limitations were equally unenforceable at the time the Constitution was adopted. *Id.*

[32] 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 267 (1965); Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 84 (1977). Prior to the adoption of the fourteenth amendment, the contract clause was the primary restraint on state economic encroachment, B. SCHWARTZ, *supra* at 268, the "doctrinal foundations" of which were established by the Marshall Court. *Id.* at 267. Convinced the Constitution was designed to protect property rights, Chief Justice Marshall employed the contract clause for the preservation

limitation on state power waned after 1890.[33] It was in this year that the Supreme Court relied, in part, on the fourteenth amendment due process clause rather than the contract clause, to invalidate a state regulatory law.[34] Soon thereafter, substantive due process became

---

of those rights. *Id.* at 268–69. In response to the industrial revolution of the late nineteenth century, the principles developed during the Marshall era were consistently utilized in post Civil War contract clause jurisprudence. *Id.* at 268.

[33] B. SCHWARTZ, *supra* note 32, at 268; *see* G. GUNTHER, *supra* note 30, at 603–04; Comment, *The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation*, 2 SO. ILL. U. L. J. 258 (1978).

[34] Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890). Pursuant to an 1856 Minnesota enactment, the Minneapolis and Cedar Valley Railroad Company (Minneapolis) was granted a charter to construct an intrastate railway. *Id.* at 453. Section nine of that act empowered the corporate directors to formulate necessary rules and regulations regarding the rates and collection of tolls, while section thirteen established Minneapolis' authority to combine with other railroads and "consolidate its stock" with another corporation. *Id.* Soon thereafter, the state of Minnesota validly acquired the "rights, franchises and property" of Minneapolis. *Id.* It subsequently conveyed these rights to the Minneapolis, Faribault and Cedar Valley Railroad Company (Faribault), a Minnesota corporation. *Id.* at 454. In 1867, the entire rail line constructed by Faribault was conveyed to the Chicago, Milwaukee and St. Paul Railway Company (Chicago), which received Minneapolis' original franchises. *Id.*

In 1887, the state legislature enacted a statute regulating common carriers and establishing a Railroad and Warehouse Commission. *Id.* at 418. Particularly, the provision required that all rates adopted by common carriers "be equal and reasonable," *id.* at 424–26, that a schedule of charges be printed for public inspection, *id.* at 428–29, and that any deviation from the scheduled rate, absent prior public notice, was unlawful. *Id.* at 430–32. A further section of the Minnesota enactment empowered the Railroad and Warehouse Commission to compel adjustment of any unfair tolls. *Id.* at 433–35.

In response to a complaint that Chicago was imposing "unreasonable" and "unequal" rates for the transportation of milk, *id.* at 435–36, the commission conducted an investigation of the allegations, *id.* at 437, and subsequently, directed the company to change its rates in accordance with the schedule established by the commission. *Id.* at 438. As a result of Chicago's noncompliance, *id.*, the commission filed an application for a writ of mandamus, *id.* at 439, which was consequently issued. *Id.* at 440.

Central to Chicago's argument before the United States Supreme Court, was the claim that the State was bound by the terms of the charter contract executed between the territory of Minnesota and Minneapolis, enabling the latter to regulate its rates of toll. *Id.* at 454. It was therefore contended "that . . . legislation . . . infringing upon that right impair[ed] the obligation of the contract." *Id.*

Unpersuaded by Chicago's position, Justice Blatchford, writing for the Court, held that section nine of the original charter could not "be properly interpreted as authorizing [the Court] to hold that the State parted with its general authority itself to regulate . . . the rates . . . ." *Id.* at 455. Having established the State's capacity to monitor the amount of tolls exacted by the railway company, the Court's inquiry turned to an appraisal of the adopted legislative scheme. *Id.* at 456. Bound by the Minnesota Supreme Court's statutory construction, *id.* at 456, the majority of the Court concluded that the enactment violated the due process clause. *Id.* at 457. Since section nine lacked a requirement of judicial review of the railroad commission's decision, the provision was mistakenly recognizing the commission as "possessing the machinery of a court of justice." *Id.* Procedurally, the company was denied a hearing, notice, and an opportunity to present witnesses. *Id.* Of equal import was the Court's substantive due process assessment. Specifically, Justice Blatchford objected to the commission's encroachment on the judiciary's responsibility for determining the reasonableness of rates. *Id.* at 458.

an accepted instrument of judicial analysis.[35] Viewed as a "more inclusive sanctuary" of economic rights than the article I, section 10 provision, the due process clause served as a broad constitutional check upon state legislative initiatives.[36] Parallelling the rise of economic substantive due process protection,[37] therefore, was a decline in contract clause litigation.[38] After thirty years of judicial

---

For a demonstration of pre-*Chicago* judicial scrutiny of legislative judgments signalling an impending receptivity to substantive due process attacks, *see generally* Mugler v. Kansas, 123 U.S. 623 (1887); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886); Railroad Comm'n Cases, 116 U.S. 307 (1886); Munn v. Illinois, 94 U.S. 113 (1876).

[35] G. GUNTHER, *supra* note 30, at 556; *see* Allgeyer v. Lousiana, 165 U.S. 578, 589–91 (1897).

[36] B. SCHWARTZ, *supra* note 32, at 268; Comment, *supra* note 33, at 258.

[37] *See id.* The case most symbolic of the increased reliance on the due process clause as a shelter for economic and property rights was Lochner v. New York, 198 U.S. 45 (1905). *See* G. GUNTHER, *supra* note 30, at 548. In *Lochner*, the Supreme Court determined the constitutionality of a state provision prohibiting bakery employment in excess of ten hours a day or sixty hours per week. 198 U.S. at 52–53. Although the Court explicitly recognized a "right of contract" between employer and employee, *id.* at 53, 57, the tribunal declined to discuss the effect of the contract clause on the legislation. *See id.* Instead, Justice Peckham's opinion stated that the haven of this individual liberty was the fourteenth amendment's due process clause. *Id.* at 53.

Although the Court recognized the existence of the state police power, *id.*, it equally noted that the sovereign's ability to act pursuant thereto should not go unbridled. *Id.* at 56. In balancing state legislative power against "the right of the individual to liberty of person and freedom of contract," *id.* at 57, the Court held that New York had exceeded the limit of its constitutional power. *Id.* at 58. The majority concluded that the enactment, as a means of protecting the public health generally or that of bakers specifically, lacked the requisite direct relation to those ends. *Id.* at 58, 64. *But see id.* at 69–70 (Harlan, J., dissenting). Although the due process clause served as the basis of successful constitutional challenges to state regulatory laws, a number of enactments survived due process attack. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 434, 438 (1917) (validity of Oregon law limiting factory employment to ten hours per day upheld as proper exercise of police power); Muller v. Oregon, 208 U.S. 412, 416, 423 (1908) (Oregon statute's maximum ten-hour day provision for females employed in a laundry declared constitutional); *see* G. GUNTHER, *supra* note 30, at 565.

Still, the degree of judicial intervention in state legislative schemes following *Lochner* was considerable. G. GUNTHER, *supra* note 30, at 565; *see* Paulsen, *The Persistence of Substantive Due Process In The States*, 34 MINN. L. REV. 91, 91 (1950). The Supreme Court struck down a wide range of state regulatory enactments. Laws prohibiting employer and employee from executing a contract forbidding employee membership in a Union while engaged by the employer were declared invalid. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 6, 26 (1915); Adair v. United States, 208 U.S. 161, 168–70, 180 (1908). Also adjudged unconstitutional were statutes prescribing minimum wages for women. *See* Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923). Equally invalid was particular price-fixing legislation. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 239, 245 (1929); Ribnik v. McBride, 277 U.S. 350, 357 (1928); Tyson & Brother v. Banton, 273 U.S. 418, 429, 445 (1927).The Supreme Court also failed to sustain enactments which restricted entry into a field of business. *See e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 271–72, 279–80 (1932); Adams v. Tanner, 244 U.S. 590, 591, 596–97 (1917).

[38] B. SCHWARTZ, *supra* note 32, at 268; Comment, *supra* note 33, at 258. For a discussion of the parallel development of the contract and due process clauses, see Comment, *supra* note 33, at 259–77.

scrutiny, however, Supreme Court invalidation of state economic regulations under the fourteenth amendment also ebbed.[39]

Although the contract clause was drafted as a protection of private agreements,[40] its initial use involved the constitutionality of public contracts.[41] Of significance is the Supreme Court's treatment of the public contract issue in *Fletcher v. Peck*.[42] In 1796, the Georgia legislature invalidated a prior state land sale act because of the tendering of bribes to the legislators from those to whom the property was conveyed.[43] In addition to being the first case in which the high

---

[39] G. GUNTHER, *supra* note 30, at 604; Comment, *supra* note 33, at 264. In response to the needs of the populace during the Depression of the 1930's, state legislatures instituted a variety of recovery-oriented programs. Paulsen, *supra* note 37, at 94. Supreme Court reaction to the political, economic and social environment evinced a decisive policy change more supportive of state economic regulation, *id.*, as demonstrated in Nebbia v. New York, 291 U.S. 502 (1934). Despite equal protection and due process arguments by the appellant grocery store proprietor, the Court in *Nebbia* upheld the validity of statutory price fixing of milk in pursuance of public health. *Id.* at 515, 539. *See also* Paulsen, *supra* note 37, at 94.

This departure from pre-Depression judicial philosophy was conclusively more than a mere aberration, as exemplified by subsequent case law. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236, 241 & n.1, 243, 244 (1941) (Minnesota statute prescribing maximum fees collectable by private employment agencies sustained against due process challenge, overruling Ribnik v. McBride, 277 U.S. 350 (1928); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937) (minimum wage law for women upheld as proper exercise of state police power, thus overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923); *see* note 37 *supra*. *See also* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

Moreover, the "hands-off" approach initially adopted in *Nebbia* continued as viable court policy long after the effects of the Depression were absorbed by society. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 726–27, 732–33 (1963) (relief from Kansas statute which limited business of debt adjusting to lawyers could be afforded only by legislature). The Supreme Court clearly was unwilling to act in the capacity of a "superlegislature" by reviewing legislative policy decisions. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); *see* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955). Contemporary illustrations of the Court's present deference to state economic regulation are Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 116–17, 138 (1978) (denial of application by city Landmarks Preservation Commission to construct office building on top of designated landmark upheld on general welfare grounds); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82, 83, 84 (1978) (legislation prescribing means for compensating nuclear power plant accident victims sustained against due process attack).

[40] B. SCHWARTZ, *supra* note 32, at 274; Comment, *supra* note 33, at 259; *see* notes 29–31 *supra* and accompanying text for a discussion of the genesis of the contract clause. This intent to protect private agreements was first given effect in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), where the Supreme Court invalidated New York legislation aimed at relieving a debtor from contractual obligations. *Id.* at 208. For further discussion of the *Sturges* case, see note 28 *supra*.

[41] G. GUNTHER, *supra* note 30, at 604; Comment, *supra* note 33, at 259.

[42] 10 U.S. (6 Cranch) 87 (1810).

[43] *Id.* at 88–89, 127–28, 129. In 1795, the Georgia legislature sold parcels of land to James Gunn and others, the contract for which was a state "act of sale." *Id.* at 127–28. The bill's passage was the result of bribes offered legislators by those to whom the property was conveyed. *Id.* at 129. One year later, the legislature declared the 1795 enactment null and void.

bench declared a state enactment constitutionally invalid,[44] *Fletcher* articulated three contract principles of vital importance. Initially, Chief Justice Marshall equated contractual agreements with grants.[45] He then extended the purview of the contract clause to include grants[46] and expanded its scope of operation to comprehend those conveyed by the state.[47]

The Supreme Court did not, however, limit the application of these concepts to public land conveyances.[48] Rather, it broadened contract clause protection to embrace other state contractual agreements,[49] such as that found in *Dartmouth College v. Woodward*.[50] In Dartmouth College, the New Hampshire legislature unilaterally amended Dartmouth College's royal charter of incorporation.[51] Chief

---

Id. at 89. Robert Fletcher, who received the Gunn property from the previous owner, John Peck, *id.* at 127, brought suit against Peck for breach of warranty of title. *Id.* at 129.

[44] B. SCHWARTZ, *supra* note 32, at 275.

[45] 10 U.S. (6 Cranch) at 137. Citing Blackstone, Chief Justice Marshall posited that an executed contract, "differs in nothing from a grant." *Id.* at 136–37. The Chief Justice continued: "The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties." *Id.* at 137. Chief Justice Marshall maintained: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." *Id.*

[46] *Id.* Having decided that a grant is a contract, *see* note 45 *supra* and accompanying text, the Court concluded that the general language of the contract clause must comprehend this species of agreement. *Id.* Chief Justice Marshall commented that "[i]t would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected." *Id.*

[47] *Id.* Chief Justice Marshall could find no reason to exempt state contracts from the article I, section 10 prohibition, the general language of which resisted the exclusion. *Id.*

[48] U.S. CONST. ANN. at 394.

[49] *See, e.g.*, New Jersey v. Wilson, 11 U.S. (7 Cranch) 164, 165 (1812). In 1758 the New Jersey legislature confirmed a State-Indian agreement whereby the latter released claims to certain lands in consideration for which New Jersey purchased other property for Indian residence. *Id.* at 165. A further provision exempted the tract of land from taxation. *Id.* Desiring to emigrate to New York in 1801, the Indians obtained legislation authorizing the sale of their New Jersey land. *Id.* at 165–66. Two years later the property was conveyed to a third party, absent any mention of the prior tax exemption. *Id.* at 166. Subsequently, the legislature repealed the tax privilege and assessed liability. *Id.* Chief Justice Marshall, speaking for the Court, opined that the exemption was attached to the property as a right of the Indians to which the third party purchaser succeeded. *Id.* at 167. The Court concluded that the third party buyer "stands, with respect to this land, in [the Indians'] place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it." *Id.*

[50] 17 U.S. (4 Wheat.) 518 (1819).

[51] *Id.* at 626, 631–32. On June 27, 1816, the New Hampshire legislature enacted a statute entitled, " 'an act to amend the charter, and enlarge and improve the corporation of Dartmouth College.' " *Id.* at 626. Among other charter changes, the 1816 provision increased the number of trustees, gave the state executive the power to appoint additional members, and established a board of twenty-five overseers empowered "to inspect and control the most important acts of the trustees." *Id.* Additionally, the president of the New Hampshire Senate, the speaker of the New Hampshire House of Representatives, and Vermont's governor and lieutenant governor

Justice Marshall again authored the majority opinion,[52] where he addressed the public charter issue.[53] The Chief Justice argued that the 1769 charter of incorporaton granted to Dartmouth College[54] contained every ingredient of a valid and complete contract.[55] Having established this premise, the Court asserted the applicability of article I, section 10 to the agreement.[56] Although the framers contemplated the preservation of rights possibly exclusive of those attendant corporate charters,[57] Chief Justice Marshall concluded that this alone could not circumscribe the provision's operation.[58] There was no explicit indication within the constitution or opinion expressed by its contemporaneous supporters which would justify exemption from article I, section 10 protection.[59] Additionally, there was no basis for a construction of the constitution which would require exemption.[60] Having extended the boundaries of contract clause protection to encompass corporate grants, the Court reviewed the validity of a New Hampshire legislative amendment to Dartmouth's charter.[61] In substituting "[t]he will of the State . . . for the will of the donors, in

---

were made ex officio members of the board of overseers. *Id.* The New Hampshire governor and council filled the remaining board positions. *Id.* Subsequent legislation made effective the provisions of the June 27, 1816 enactment. *Id.*

Unwilling to accept the above charter alterations, a majority of the college trustees brought suit for return of Dartmouth's corporate property which had been held by an individual as a result of the amending legislation. *Id.* at 626–27.

[52] *Id.* at 624.

[53] *Id.* at 626.

[54] *Id.* at 626. On December 13, 1769, the Crown incorporated twelve persons as the Dartmouth College Board of Trustees, granting them and their successors corporate privileges and powers. *Id.* This authority enabled that body to appoint individuals to Board vacancies. *Id.*

[55] *Id.* at 627. The incorporation application submitted to the Crown stipulated that substantial contributions offered to the institution were contingent upon approval of the application. *Id.* As a result of the granting of the charter, the property was conveyed. *Id.* The donors, trustees and Royal Crown were the original parties to the contract executed for valuable consideration. *Id.* at 643–44.

[56] *See id.* at 644.

[57] For a discussion of the framers' intent, see notes 28–31 *supra* and accompanying text.

[58] 17 U.S. (4 Wheat.) at 644. Chief Justice Marshall premised that "[i]t [was] not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted." *Id.* at 644. Rather, the Chief Justice noted that "had this particular case been suggested, the language would have been so varied, as to exclude it or it would have been made a special exception." *Id.* Chief Justice Marshall concluded that corporate charters, being within the language of the contract clause, were constitutionally protected thereby, "unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." *Id.* at 645.

[59] *Id.* at 645.

[60] *Id.*

[61] *Id.* at 650–54. For a discussion of facts in *Dartmouth College*, see note 51 *supra* and accompanying text.

every essential operation of the college,"[62] the state enactment was held violative of the impairment prohibition.[63]

As a result of the *Fletcher* and *Dartmouth College* decisions, Chief Justice Marshall had artfully constructed a "sheltering edifice" protective of public contracts.[64] Soon thereafter, the Supreme Court applied the Chief Justice's contract clause jurisprudence to private agreements. Although his campaign to shield these contractual obligations from all governmental infringement proved to be an initial success,[65] subsequent contract clause adjudication found Chief Justice Marshall articulating the minority viewpoint.[66] Unwilling to accept the absolute bar construction of article I, section 10,[67] the Supreme Court excluded both prospective legislation and valid remedy modifications from the contract clause's operation.[68]

---

[62] 17 U.S. (4 Wheat.) at 652. The Court found that the authority to govern the college and control its assets was transferred from the trustees to the state. *Id.* For the specific charter alterations which prompted this conclusion, see note 51 *supra* and accompanying text.

[63] 17 U.S. (4 Wheat.) at 654.

Although the *Dartmouth College* decision restricted state-initiated modifications of public agreements, its effect on economic and legal developments has been mitigated by a loophole explicitly articulated in Justice Story's concurrence. *See* G. GUNTHER, *supra* note 30, at 605. As "a means by which much of the practical impact of the high-bench holding might be avoided," B. SCHWARTZ, *supra* note 32, at 301, the Justice suggested that the legislature reserve the authority to alter a corporate charter in the instrument itself. 17 U.S. (4 Wheat.) at 712 (Story, J., concurring). Justice Story asserted that "[w]hen a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself." *Id.* at 675 (Story, J., concurring). The Justice added that "[u]nless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, ..." *Id.* (Story, J., concurring). Accordingly, Justice Story concluded that the state must expressly reserve this power in the grant in order to assert the authority to exercise it. *Id.* at 712 (Story, J., concurring). As a result of this expression, a number of states constitutionally or statutorily provided that charters "be subject to alteration, amendment or repeal at the pleasure of the legislature." Looker v. Maynard, 179 U.S. 46, 52 (1900). Other jurisdictions, however, neglected to reserve adequate powers of amendment. G. GUNTHER, *supra* note 30, at 605. This position was reflective of the day's laissez-faire philosophy. *Id.*

[64] B. SCHWARTZ, *supra* note 32, at 278.

[65] *See id.* at 279.

[66] *Id.*; *see* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

[67] *See* B. SCHWARTZ, *supra* note 32, at 272. It was Chief Justice Marshall's position, as articulated in *Ogden*, that the contract clause barred absolutely any and all state interference with contractual obligations. 25 U.S. (12 Wheat.) at 335.

[68] G. GUNTHER, *supra* note 30, at 606. Erosion of the Marshall philosophy began in *Ogden*, where the Court upheld the legality of a New York insolvency law based on the prospective-retrospective distinction. *See* 25 U.S. (12 Wheat.) at 267. Limiting the bar interposed by article I, section 10 to state impairment of preexisting agreements, the four-man majority found "nothing unjust or tyrannical in punishing offenses prohibited by law, and committed in violation of that law." *Id.* at 267. The Court further noted that it was neither "unjust [n]or oppressive to declare . . . that contracts subsequently entered into . . . be discharged . . . different[ly] from

Begun while Marshall served as Chief Justice, the process of retreat survived his tenure. Intent on restricting the expansive interpretation afforded the contract clause by its predecessors, the post-Marshall Courts exempted a variety of agreements from the provision's purview,[69] extended reliance on the remedy-obligation distinction,[70] and recognized grounds upon which statutory interference could be legitimized.[71] This judicial reevaluation was given effect in

---

that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged" in a fashion adverse to the terms of the agreement. *Id.* Unlike his colleagues who believed "retrospective laws were alone in the contemplation of the [Constitutional] Convention," *id.*, Chief Justice Marshall's assessment of the clause's language led him to conclude that had the framers intended retrospective operation only, the provision would have been more particularly worded. *Id.* at 355, 356 (Marshall, C.J. dissenting).

As a result of the *Ogden* determination, the contract clause limited retrospective state contract alterations. B. SCHWARTZ, *supra* note 32, at 273. Soon thereafter, the Marshall Court enunciated a further restriction on the provision's application. In Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827), the high bench scrutinized and upheld, as constitutional, legislative abolition of imprisonment for debt. 25 U.S. (12 Wheat.) at 378. As articulated by Justice Thompson, the essence of the decision was the distinction between remedy and obligation. *Id.* Although the enactment impaired the former, the lack of state interference with the latter, rendered the legislation valid. *Id.* For a general discussion of the remedy-obligation distinction, see Hale, *supra* note 31, at 533–57.

[69] *See, e.g.*, Morley v. Lake Shore Ry. Co., 146 U.S. 162, 169 (1882) (court judgment is not contract within meaning of article I section 10). Maynard v. Hill, 125 U.S. 190, 210 (1888) (excepting marriage agreement from clause's definition of contract, the Court reasserted state's right to act in field of divorce); Beers v. Arkansas, 61 U.S. (20 How.) 527, 528, 529 (1857) (state legislation altering procedure by which suits against sovereign could be maintained was upheld against contract clause attack as act designed to monitor state proceedings in which it is party defendant). Generally, "[t]he contracts designed to be protected by the tenth section of the first article . . . . are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested." Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416 (1850) (emphasis in original).

[70] Penniman's Case, 103 U.S. 714, 717, 720 (1880). Although the *Penniman* Court conceded legislative incapacity to deny a remedy or encumber it with contingencies so as to substantially impair the remedy's worth, *id.* at 720, it held abolition of imprisonment for debt did not alter a contractual remedy to the point of impairing the obligation of the agreement. *Id.* As noted in the *Morley* decision, "[m]uch discussion has been had in many cases . . . in the attempt to fix definitely the line between . . . alterations of . . . remedy which are deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights." 146 U.S. at 170.

[71] Stone v. Mississippi, 101 U.S. 814, 820 (1879). In upholding the constitutionality of an enactment outlawing lotteries, *id.* at 821, the high bench in *Stone* sanctioned the impairment of a state charter extending a twenty-five year franchise to conduct a lottery. *Id.* at 814, 817, 821. Based on the premise that "the legislature cannot bargain away the police power of a State," the Court opined that agencies created by people to govern are free to form corporations, and confer limited citizenship upon them. *Id.* at 817, 820. Since their privileges are limited, however, these government creatures are subject to those regulations "established for the preservation of health and morality," according to the Court. *Id.* at 820. Having articulated a rationale for constitutionally acceptable infringements of article I, section 10, the Supreme Court highlighted the detrimental effect lotteries have on "the checks and balances of a well-ordered community" and condoned their statutory abolition. *Id.* at 821.

The state's need to protect and advance the community welfare pursuant to its police

Home Building & Loan Association v. Blaisdell,[72] the first major contract clause decision of the twentieth century.[73] Pursuant to the Minnesota Mortgage Moratorium Act,[74] which postponed foreclosure sales and extended the redemption period on mortgaged real property,[75] the mortgagor attempted to redeem land sold after an otherwise valid foreclosure which occurred prior to the statute's enactment.[76] In defending the legality of the measure against an article I, section 10 challenge,[77] the *Blaisdell* Court articulated a standard by which regulatory legislation could be sustained.[78] According to Chief Justice Hughes, speaking for the Court,[79] constitutional validity required that the enactment be addressed to a valid end and the measures taken be both appropriate and reasonable to that end.[80] The

---

power was further emphasized in Manigault v. Springs, 199 U.S. 473 (1905). In *Manigault*, the state, by authorizing the defendant to erect a dam for low land river drainage, allegedly impaired a private contractual arrangement. *Id.* at 477. Prior to the enactment of the statute effecting this initiative, the defendant had agreed with the plaintiff to remove his dam on a creek so that the plaintiff's property could receive a steady supply of water. *Id.* The Court, nonetheless, legitimized the legislation as a valid "exercise of the sovereign [state] . . . to protect the lives, health, morals, comfort and general welfare of the people . . . ." *Id.* at 480. Although the judiciary recognized limitations on the police power in certain instances, *see generally* Detroit United Ry. v. Michigan, 242 U.S. 238 (1916), it acknowledged a broad discretionary capacity of the state to promote the common weal. 199 U.S. at 480. The Court also voiced its reluctance to interfere with that exercise of discretion. *Id.* at 480–81. *See also* Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897).

[72] 290 U.S. 398 (1934).

[73] Comment, *Revival of the Contract Clause*, 39 OHIO ST. L. J. 195, 198 (1978). Earlier cases with less constitutional impact than *Blaisdell* include Stephenson v. Binford, 287 U.S. 251 (1932), Manigault v. Springs, 199 U.S. 473 (1905), and Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897).

[74] The 1933 enactment, designed as relief from the Depression, automatically lapsed two years after its passage. 290 U.S. at 415–16.

[75] *Id.* at 416. "The statute [did] not, [however,] impair the integrity of the mortgage indebtedness," in that "[t]he obligation for interest remain[ed]" unaffected. *Id.* at 425. The sale remained intact as well as the mortgagee-purchaser's right to title in fee or a deficiency judgment, upon the mortgagor's failure to redeem within the specified period. *Id.* Unaltered by the enactment, were other conditions of redemption including the requirement that the mortgagor tender court-determined rental value while in possession to be applied "to taxes, insurance, and interest on the mortgage indebtedness." *Id.*

[76] *Id.* at 418.

[77] *Id.* at 447. An earlier Court had invalidated a similar statutory provision in Bronson v. Kinzie, 42 U.S. (1 How.) 311, 319–20 (1843). Rather than overruling *Bronson*, the *Blaisdell* Court distinguished that decision as involving a more oppressive enactment. *Id.* at 431–32; *see* Comment, *supra* note 73, at 198 n.28 and notes 74–75 *supra* for a discussion of the *Blaisdell* statute.

[78] 290 U.S. at 438.

[79] *See id.* at 415. Justice Sutherland rendered the dissenting opinion in which Justices Van Devanter, McReynolds and Butler concurred. *Id.* at 448, 483.

[80] *Id.* at 438. This means-end test was referred to in the earlier Stephenson v. Binford case, 287 U.S. 251, 272, 273 (1932), but the application of that test to the private contract situation was not the sole basis of the *Stephenson* Court's decision. 287 U.S. at 276.

Court in its application of the "means-end" approach, therefore, inquired into the reasonableness of the Minnesota provision.[81] Citing the authority of the state to preserve its economic vitality,[82] the majority concluded that the extent of the deprivation of the private right was comparatively minor.[83]

Although the *Blaisdell* court considered the depressed economy a necessary factor in its assessment of the enactment's reasonableness,[84] a number of subsequent decisions limited the importance of exigency as a facet of contract clause adjudication.[85] Those that did recognize the pertinence of this approach invalidated remedial legislation notwithstanding the existence of a public emergency.[86] Still, the

---

[81] 290 U.S. at 445.

[82] 290 U.S. at 444–45. Reasserting the concept of harmonizing the article I, section 10 prohibition "with the necessary residuum of state power," *id.* at 435, the *Blaisdell* Court emphasized the prohibition imposed on state abdication of its responsibility to legislate for the public good. *Id.* at 436; *see generally* Stone v. Mississippi, 101 U.S. 814, 819 (1879). Accordingly "[i]t cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity. . . ." 290 U.S. at 439. Indicating that the economic environment may be sufficiently calamitous to justify a legislative initiative, *id.* at 437, Chief Justice Hughes concluded that "[a]n emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community." *Id.* at 444.

[83] 290 U.S. at 445–46. Not only were "[t]he conditions upon which the period of redemption [was] extended" reasonable, but most of the obligations incurred as a result of the mortgage contract were left undisturbed. *Id.*

Although prior Courts had relied on the remedy-obligation distinction in resolving contract disputes, *see* notes 68 & 70 *supra* and accompanying text, the *Blaisdell* Court did not base its decision thereon, since the Supreme Court previously ruled in *Bronson v. Kinzie* that legislation extending the redemption period infringed the obligation of contract. Bronson v. Kinzie, 42 U.S. (1 How.) 311, 319–20 (1834). *See* notes 70 & 77 *supra* and accompanying text. *See also* Comment, *supra* note 73, at 198 & n.28.

[84] 290 U.S. at 444–45. In upholding the validity of the legislation in *Blaisdell*, Chief Justice Hughes concluded that the economic emergency afforded the state the authority to exercise its reserved power for the protection of the community welfare. *Id.* at 444. He further added that "[t]he legislation is temporary in operation. It is limited to the exigency which called it forth." *Id.* at 447.

[85] Comment, *supra* note 73, at 199. In Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940), a 1932 New Jersey enactment altered the manner and procedure in which withdrawing members of building and loan associations could receive payment. 310 U.S. at 34–35. The measure also foreclosed the ability to sue for the withdrawal value as long as the new procedure was followed. *Id.* at 35. In sustaining the provision as a legitimate regulation pursuant to the state's police power, *id.* at 37, 40, the Supreme Court asserted the insignificance of both the legislation's permanence and the absence of an immediate emergency. *Id.* at 39. *See also* East New York Savings Bank v. Hahn, 326 U.S. 230 (1945).

[86] *See e.g.*, Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 195, 197–98 (1936) (not intended to temporarily cope with existing emergency, law collapsed under application of means-end test and fourteenth amendment due process clause); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 59, 62 (1935) (although legislative measure stipulated existence of exigency, changes effected by enactment were viewed as "oppressive"); W.B. Worthen Co. v. Thomas, 292 U.S.

contemporary trend appeared to illustrate judicial support of state statutory initiative.[87] With rare exception,[88] post-Depression decisions sustained measures against contract clause attack.[89] The evaluation of the article I, section 10 prohibition proffered by the Supreme Court in *United States Trust Co. v. New Jersey*,[90] however, indicated a departure from the norm.[91] In 1974, both New York and New Jersey repealed a mutual covenant designed to foreclose the states and the Port Authority of New York and New Jersey from applying monies received or pledged from outstanding bonds to other than purposes permitted by the agreement.[92] As a result, the asserted impairment was that the repealing legislation, in permitting the Port Authority to assume increased deficits for improved mass transit, allowed a depletion of the pledged revenues and reserves.[93] Prefacing its decision with an assurance that the contract clause still maintained a meaningful position in contemporary constitutional jurisprudence,[94]

426, 432, 433, 434 (1934) (noting that "legislation was not limited to . . . emergency" and absence of "conditions apposite to emergency relief," (Court voided enactment as violative of means-end standard). *See generally* Wood v. Lovett, 313 U.S. 362 (1941).

[87] G. GUNTHER, *supra* note 30, at 611.

[88] *See* 313 U.S. 362 (1941).

[89] G. GUNTHER, *supra* note 30, at 611. In El Paso v. Simmons, 379 U.S. 497 (1965), the Supreme Court reviewed the constitutionality of a Texas statute which, *inter alia*, limited to five years the time within which land conveyed by the state could be reinstated after forfeiture due to nonpayment of interest. 379 U.S. at 499. Appellee Simmons' predecessors in title to lands bought from the state fell behind in interest payments. *Id.* at 500. A notice of forfeiture and a copy of the statute noting the five-year reinstatement limitation were sent to the purchaser of record. *Id.* Both were returned unclaimed. *Id.* Subsequently, Simmons received a quitclaim deed to the property and filed an application for reinstatement which was denied since the five-year reinstatement period had passed. *Id.* at 500–01. In upholding the enactment's validity, *id.* at 509, Justice White, speaking for the Court, stated that "not every modification of a contractual promise . . . impairs the obligation of contract under federal law. . . ." *Id.* at 506–07. *See also* East New York Savings Bank v. Hahn, 326 U.S. 230, 235 (1945) ("[i]t would . . . be strange if there were anything in the Constitution of the United States which denied the State the power to safeguard its people. . . ."); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940). For a discussion of the facts in *Veix*, see note 85 *supra*.

[90] 431 U.S. 1 (1977).

[91] Comment, *supra* note 73, at 195. The majority "regrettably departs from the virtually unbroken line of our cases that remained true to the principle that all private rights of property, even if acquired through contract with the State, are subordinated to reasonable exercises of the States' lawmaking powers in the areas of health." 431 U.S. at 50 (Brennan, J., dissenting). For a general discussion of the *United States Trust* decision, *see* Karst, *supra* note 32, at 83–94.

[92] 431 U.S. at 3, 9–10. The 1962 covenant, which was statutorily given effect in both New Jersey and New York, constituted an agreement between the states and Port Authority bondholders. The legislation's purpose was to restrict mass transit deficit operations of the Authority. *Id.* at 9.

[93] *Id.* at 20–21.

[94] *Id.* at 16. Disagreeing with the Court's contract clause analysis the minority labelled *United States Trust* as representing the "resuscitation of long discarded Contract Clause doctrine. . . ." *Id.* at 44 (Brennan, J., dissenting).

the Court articulated a "novel standard" of scrutiny.[95] Specifically, state infringement of both public and private obligations had to be necessary and reasonable.[96] Unable to withstand the application of this two-pronged approach, the legislation succumbed to the contract clause challenge.[97]

It is against this background that the *Allied* Court resolved the second major contract clause dispute of the decade. Although the state's police power can be exercised for the promotion of the commonweal irrespective of the resultant impact on previously executed agreements,[98] the Supreme Court noted that limitations on statutory modification of contractual relationships are imposed by article I, section 10.[99] There being no question as to the existence of a legislative alteration in the contractual relationship between Allied Structural Steel Company and its employees,[100] the Court's initial inquiry focused on the degree of infringement effected.[101] In its measurement

---

[95] *Id.* at 53 (Brennan, J., dissenting). *See also* Comment, *supra* note 73, at 203.

[96] 431 U.S. at 25. Assessment of the statute's necessity can be a bi-level consideration. *Id.* at 29. The inquiry is (1) would "a less drastic modification" of the agreement have effected the states' purpose and (2) were alternate means available to achieve the public goal without affecting the contract. *Id.* at 29–30. The reasonableness requirement demands that the challenged legislation address modified conditions foreseeable at the formation of the agreement. *Id.* at 31. For a critique of the necessary and reasonableness standard, see Karst, *supra* note 32, at 86–94.

In applying the two-pronged approach, the majority posited that "complete deference to a legislative assessment of reasonableness and necessity [was] not appropriate [where] the State's self-interest is at stake." 431 U.S. at 26. Regarding private contracts, however, the Court stated that it would "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 23.

[97] *Id.* at 32. Applying the first level of the necessity test, *see* note 96 *supra*, the Supreme Court concluded that a less severe contractual alteration would have permitted the attainment of mass transit, energy conservation, and environmental protection goals without nullifying the contractual restrictions on the application of Port Authority monies to commuter railroad needs. 431 U.S. at 29–30. Applying the second level of the necessity test, the Court argued that New Jersey and New York could have adopted alternative methods of discouraging reliance on automobiles while encouraging mass transit improvements, without modifying the covenant. *Id.* The Court reasoned that both the need for mass transit and its propensity to produce deficits when publicly owned were well known at the time the 1962 covenant was made. *Id.* at 31–32. The Court argued that the agreement was adopted with a full understanding of these issues, *id.*, and that the purpose of the agreement was to insulate the monies from mass transportation-caused deficits. *Id.* at 32. According to the majority, the perception of the importance of mass transit, environmental protection, and energy conservation was the same in 1962 as in 1974, merely having intensified in degree. *Id.*

[98] 438 U.S. at 241; *see* notes 71 *supra* and accompanying text.

[99] 438 U.S. at 242. A powerful prohibition on legislative regulation during the United States' first century of constitutional jurisprudence, the contract clause's subsequent dormancy during the rise of the fourteenth amendment, the high bench reasoned, did not indicate the provision's death. *Id.* at 241; *see* notes 32–38 *supra* and accompanying text.

[100] 438 U.S. at 240. For a discussion of the employer-employee pension agreement, see note 6 *supra* and accompanying text.

[101] 438 U.S. at 244. The Court noted that it would scrutinize a minor contractual impairment with less particularity than one which substantially altered the relationship. *Id.* at 245.

of the impairment's severity, the Court considered Allied's "legitimate contractual expectation" of its obligation based on its pension plan.[102] Accordingly, the Supreme Court noted, that obligation was to contribute annual benefits to the pension fund based on the agreement's vesting requirements.[103] Not only did the state's interference render Allied's otherwise sufficient prior contributions inadequate,[104] but, as the majority indicated, it altered the corportion's obligation in an area where the reliance factor was pivotal.[105] The Supreme Court concluded, therefore, that the Minnesota enactment substantially altered a fundamental term of the contract[106] to the extent of modifying the company's obligation and imposing a totally unexpected monetary responsibility "in potentially disabling amounts."[107]

Despite prior approval of a wide range of legislative infringements regardless of their severity,[108] the Court was unable to find a basis upon which the state law might be salvaged.[109] The majority noted that unlike legislation which had survived the contract clause

---

[102] *Id.* at 245–46. Relying "heavily and reasonably" on the private agreement, Allied had no cause to anticipate the vesting of employee benefits prior to the time stipulated in the pension plan. *Id.* For a discussion of the Salaried Employees' Pension Plan, see note 6 *supra*.

[103] 438 U.S. at 245. For a discussion of the method employed in calculating the annual allocations, see note 6 *supra*.

[104] 438 U.S. at 246. As a result of the Act's ten-year vesting stipulation, Allied was forced to recompute its prior contributions to the pension fund. *Id.* Since the company's allocation totalled $185,000 less than that needed to meet its obligation pursuant to the enactment, Allied was assessed a pension funding charge in that amount. *Id.* at 247.

[105] *Id.* at 246. The *Allied* majority likened the company's pension plan to other types of insurance in that it required amassing substantial sums to cover contingencies. *Id.* Citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court averred that although foreseeable risks were included in the calculation of liability, the occurrence of significant unforeseen contingencies, such as the modification of pension laws, "jeopardizes the [employer's] solvency and, ultimately, the [employees'] benefits." *Id.* at 246–47 (quoting from 435 U.S. at 721).

[106] *Id.* at 246.

[107] *Id.* at 247. Significantly, the Minnesota enactment did not limit an employer's liability upon termination of a covered pension plan, as does ERISA. 29 U.S.C. § 1362 (1976). *See* notes 157–58 *infra* and accompanying text.

[108] *See, e.g.*, El Paso v. Simmons, 379 U.S. 497, 516–17 (1965); East New York Savings Bank v. Hahn, 326 U.S. 230, 234–35 (1945); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 40–41 (1940); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–45, 447 (1934); Stephenson v. Binford, 287 U.S. 251, 278 (1932); Manigault v. Springs, 199 U.S. 473, 485, 486, 487 (1905); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 697 (1897); Penniman's Case, 103 U.S. 714, 717, 720 (1880); Stone v. Mississippi, 101 U.S. 814, 821 (1879); Beers v. Arkansas, 61 U.S. (20 How.) 527, 530 (1857); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 549, 552–53 (1837); Mason v. Haile, 25 U.S. (12 Wheat.) 370, 378–79 (1827); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368–69 (1827).

[109] *See* 438 U.S. at 250.

challenge, the Minnesota enactment lacked the characteristics necessary to remove it from the provision's operation.[110] Rejecting the state's argument,[111] the Supreme Court refused to recognize a similarity between the Private Pension Benefits Protection Act and the *Blaisdell* legislation.[112] Since it had limited application,[113] the Act could not be characterized as one enacted to meet a vital and general social problem.[114] According to the Court, it was not designed as a response to a "broad and desperate emergency economic conditio[n]" similar to that which was addressed by the *Blaisdell* legislation.[115] Although the Court earlier had upheld provisions operative in a field already subject to state regulation,[116] the majority opined that this article I, section 10 exception was equally inapposite since the Minnesota enactment represented an invasion of previously unrestricted territory.[117] Also pertinent to the Supreme Court's decision was the fact that the legislation was "a severe, permanent, and immediate" alteration of irrevocable and retroactive effect.[118] Since the Minnesota measure could not be construed as within any of the judicially-created exceptions to the contract clause's operation,[119] the

---

[110] *Id.*

[111] In support of its position that the Minnesota provision protected the general health and welfare, the appellees' brief noted the vast number of private employees "potentially affected" by the Act as well as the resultant savings in state health and welfare costs. Brief of Appellees at 12–13, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) [hereinafter cited as Brief of Appellees]. Minnesota further argued that a lack of adequate pension funds would have a devastating effect on those who must survive on social security benefits. *Id.* at 13. Accordingly, without a sufficient pension, elderly residents would be unable to maintain a minimum standard of living. *Id.* at 13–14. The appellees tangentially noted that "the mass forfeiture of retirement benefits . . . can result in adverse consequences for the surrounding community through reduced purchasing power and an increased demand for welfare funds and related public services." *Id.* at 14 n.23.

[112] 438 U.S. at 250.

[113] *Id.* at 248.

[114] *Id.* at 248–49. Apparently persuaded by the appellant's argument that a significant public goal was lacking, *see* Brief of Appellant, *supra* note 6, at 16–17 & 17 n.3, the Allied Court characterized the measure as having "an extremely narrow focus." 438 U.S. at 248. The measure only affected Minnesota employers who moved out of the state and who had voluntarily established an employee pension plan. *Id.* at 250. For a discussion of the Act's practical operation, see note 4 *supra*.

[115] 438 U.S. at 249. Unlike the *Blaisdell* enactment, the Minnesota provision "impos[ed] a sudden, totally unanticipated, and substantial[ly] retroactive obligation upon the company to its employees . . . ." *Id.*

[116] *Id.*; *see, e.g.*, Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940).

[117] 438 U.S. at 250.

[118] *Id.* at 250; *cf.* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447 (1934)(state enactment upheld on ground, *inter alia*, that it was temporary emergency measure necessitated by Depression).

[119] 438 U.S. at 250.

state impairment of Allied's pension obligation was held constitutionally invalid.[120]

A strong dissent by Justice Brennan, in which Justices White and Marshall concurred, however, found the Court's approbation of the statute unpalatable.[121] Characterizing the enactment as "positive social legislation"[122] responsive to the frustrated expectations of terminated employees covered by private pension plans,[123] the minority disputed the conclusion that Allied's contractual obligation had been unconstitutionally impaired.[124] Relying on the language of article I, section 10, Justice Brennan considered the Minnesota provision to be outside its operation,[125] since the Act's only impact on the Allied pension plan was to create additional responsibilities.[126] Consonant with the history and terms of the clause, therefore, the dissent concluded that the legislative measure did not unjustifiably interfere with the actual obligation of contract.[127] The minority was critical particu-

---

[120] *Id.* at 250–51. Relying on *W.B. Worthen Co. v. Thomas*, rather than *Blaisdell*, the majority concluded "that if the Contract Clause mean[t] anything at all, it mean[t] that Minnesota could not constitutionally do what it [had] tried to do to Allied Structural Steel Company. *Id.*

[121] *Id.* at 251 (Brennan, J., dissenting).

[122] *Id.* (Brennan, J., dissenting).

[123] *Id.* at 252 (Brennan, J., dissenting). Distinguishing reasonably foreseeable discharges for inadequate job performance from a typically unexpected plant closure, the dissent indicated that it was the latter unforeseen contingency to which the enactment was addressed. *Id.* at 253 (Brennan, J., dissenting). Justice Brennan also emphasized that the "impetus for the law [was] a legislative belief" in the oftentimes implict unfairness of private pension agreements to covered employees. *Id.* at 252 (Brennan, J., dissenting); *see* Fleck v. Spannaus, 251 N.W.2d 334, 338 (1977); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 (Supp. V 1976); T. LAMON & G. RAY, *supra* note 11, at 1; S. THOMPSON, *supra* note 11 at 2–2; *see* notes 11 *supra* & 154 *infra*. Specifically, he noted that employers repeatedly fail to provide employees with sufficient pension plan information, 438 U.S. at 252 (Brennan, J., dissenting), and often neglect to contribute adequately to the pension fund, resulting in unanticipated decreases in employee benefits. *Id.* (Brennan, J., dissenting). For a general discussion of the problem of and solutions to frustrated employee pension rights, see Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952 (1963).

[124] 438 U.S. at 251 (Brennan, J., dissenting).

[125] *Id.* at 258 (Brennan, J., dissenting). The dissent noted that although the contract clause's applicability has been extended beyond the classic debtor relief laws, the constitutional prohibition was not designed to proscribe all interference with contractual expectations. *Id.* at 257 & n. 5 (Brennan, J., dissenting).

[126] *Id.* at 251 (Brennan, J., dissenting). Narrowly defining the term "impairing," the minority felt it "an abuse of the English language" to equate the creation of new duties with the infringement of contractual obligations. *Id.* at 258 (Brennan, J., dissenting). For earlier definitions of "impairment," see note 28 *supra*.

[127] 438 U.S. at 258–59 (Brennan, J., dissenting). Citing Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 412–13 (1829), for the proposition that the creation as opposed to the destruction of a contract is constitutionally valid, Justice Brennan reasoned that "[s]ince *creating* an obligation where none had existed previously is not an *impairment* of contract, it . . . should follow necessarily that legislation increasing the obligation of an existing contract is not an impairment." *Id.* (Brennan, J., dissenting) (emphasis in original). *Contra*, Georgia Ry. & Power Co. v. Town of

larly of the Court's "most exacting scrutiny" of the statute which merely " 'superimpos[ed]' " additional obligations on Allied.[128] It was further noted that the "vague criteria" which comprised this scrutiny would "vest judges with broad subjective discretion to protect property interests that happen to appeal to them."[129]

Unable to discern a manner in which the contract clause's applicability could be established,[130] the dissent reasoned that any constitutional infirmity in the Act would have to be derived from the due process clause of the fourteenth amendment.[131] *Usery v. Turner Elkhorn Mining Co.*[132] provided the basis upon which the minority assessed the fourteenth amendment challenge.[133] Likening the circumstances in *Usery* to those of *Allied*,[134] Justice Brennan's analysis of the enactment in *Allied* paralleled that employed by Justice Marshall in *Usery*.[135] As a "reasonable legislative judgment" responsive

---

Decatur, 262 U.S. 432 (1923); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 90–93 (1978).

[128] 438 U.S. at 260–61 (Brennan, J., dissenting). The minority pointed out that earlier decisions had sustained the legislative creation of duties. *Id.* at 261–62 (Brennan, J., dissenting). *See generally* Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[129] 438 U.S. at 261 (Brennan, J., dissenting). Objecting to this "broad subjective discretion" accorded judges, Justice Brennan asserted that the "vague criteria" were "extremely malleable." *Id.* (Brennan, J., dissenting). Factors such as whether the enactment purports to deal with a general social problem, its length of operation, whether it applies to a broad class of individuals and whether it affects a field already subject to regulation, specifically were considered objectionable by the dissenters. *Id.* (Brennan, J., dissenting).

[130] *See* notes 125–27 *supra* and accompanying text.

[131] 438 U.S. at 251 (Brennan, J., dissenting).

[132] 428 U.S. 1 (1976). For a discussion of the facts in *Usery*, see note 134 *infra*.

[133] 438 U.S. at 263 (Brennan, J., dissenting).

[134] *Id.* (Brennan, J., dissenting). Congressionally initiated, the *Usery* legislation compelled coal mine operators to compensate employees who had contracted pneumoconiosis ("black lung disease"). 428 U.S. at 10. It was further stipulated that coal miners who retired prior to the passage of the enactment were equally entitled to its benefits. *Id.* at 12. The impact of the federal legislation was to impose on the operators an additional obligation based on prior acts, irrespective of the employers' knowledge of the potential health hazard to the miners. *Id.* at 17. Sustaining Congress' discretionary power to deal with serious social problems, the Supreme Court upheld the enactment as a "rational measure." *Id.* at 18.

[135] 438 U.S. at 263 (Brennan, J., dissenting). As in *Usery*, the impetus for the provision in *Allied* was a legislatively recognized need for a solution to a general social problem. *Id.* (Brennan, J., dissenting). The noted distinctions, however, were that the Minnesota provision was not wholly retroactive and that the statutorily imposed burden in *Usery* was greater than that created in *Allied*. *Id.* at 263–64 (Brennan, J., dissenting). Referring to the "minor economic burdens" imposed by the Minnesota provision, the dissent found them neither " 'sudden' " nor " 'unanticipated.' " *Id.* at 253, 254 (Brennan, J., dissenting). Justice Brennan explained that unless a business closed, the statute was ineffectual and as such was merely one of a number of factors to be considered in a plant closure and employee termination decision. *Id.* at 254–55 (Brennan, J., dissenting).

to a severe social problem,[136] the state measure was viewed by the minority as consistent with the due process clause.[137]

The Allied decision conclusively demonstrates the adoption of a new constitutional norm in contract clause jurisprudence.[138] Although *Allied's* predecessor, *United States Trust*, also departed from the accepted contract clause construction,[139] its ultimate impact could not then be readily ascertained.[140] *Allied* provided the Supreme Court with an opportunity to make that assessment. Previously vulnerable to a variety of legislative alterations,[141] the obligations attendant public and private agreements were accorded a greater degree of insulation from legislative interference under *United States Trust* and *Allied* respectively. Viewed together, therefore, these two landmark decisions represent more than an aberration from judicial policy. Rather, they serve to resurrect the contract clause as a shelter for economic and property rights.[142]

Unlike *United States Trust*, however, the *Allied* decision is devoid of any articulated constitutional standard upon which the majority's holding is based.[143] The Supreme Court did not expressly invoke the *United States Trust* reasonable and necessary test[144] in its assessment of the enactment's constitutionality. Neither was there

---

[136] *Id.* at 264 (Brennan, J., dissenting).

[137] *Id.* (Brennan, J., dissenting). In arriving at its determination, the minority labelled as irrelevant the fact that the Act's coverage was limited to large employers, *see* note 4 *supra* and accompanying text, since the legislature is entitled to operate where assistance is most needed. 438 U.S. at 264 (Brennan, J., dissenting).

[138] *Compare* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) *with* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) *and* East New York Savings Bank v. Hahn, 326 U.S. 230 (1945). For a discussion of the *Blaisdell* decision, see notes 72–84 *supra* and accompanying text.

[139] Comment, *supra* note 73, at 211–12. *Compare* United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) *with* El Paso v. Simmons, 379 U.S. 497 (1965). For a discussion of the *United States Trust* decision, see notes 90–97 *supra* and accompanying text.

[140] *See* Comment, *supra* note 33, at 274, 275–76, 277; 30 BAYLOR L. REV. 191, 198 (1978).

[141] For a list of cases in which the Court sustained legislation against contract clause challenges, see note 108 *supra*.

[142] Although the due process clause had largely replaced the article I, section 10 prohibition after 1890 as a source of protection for these interests, the Supreme Court subsequently discarded the fourteenth amendment provision as a shield against state economic regulation. *See* notes 33–39 *supra* and accompanying text. As a result, the Constitution's use to curtail legislative infringement of economic rights was effectively diminished. *See*, G. GUNTHER, *supra* note 30, at 591. The *United States Trust-Allied* rebirth of the contract clause, however, fills that judicially-created void without overruling prior interpretations of the due process clause.

[143] For a discussion of the basis upon which the *Allied* decision rested, see notes 112–20 *supra* and accompanying text.

[144] For a discussion of the reasonable and necessary standard, see note 96 *supra* and accompanying text.

specific mention of available alternative standards. The sole reference to prior Court-established doctrine is an enigmatic application of the *W.B. Worthen Co. v. Thomas*[145] rule. In *Thomas*, the Court concluded that the unconditional and permanent nature of the challenged legislation rendered it unreasonable and hence unconstitutional under the means-end standard.[146] By implication, this appears to be the test the *Allied* Court adopts in sustaining the contract clause challenge. Dissimilar to the *Blaisdell* enactment[147] and outside Court-created exceptions to article I, section 10 protection,[148] the Minnesota statute was apparently invalidated as an unconditional, permanent and unreasonable alteration of a private contractual agreement.

Although the *United States Trust* reasonable and necessary test evolved from a public contract setting,[149] that Court's language indicated that this standard was equally applicable to judicial scrutiny of private agreements.[150] Both the Allied Structural Steel Company and the State of Minnesota recognized the applicability of the *United States Trust* approach[151] as did the district court in fashioning its decision.[152] Despite the apparent relevance of the two-pronged test, however, the *Allied* majority avoided reviewing the legislative measure under the reasonable and necessary standard. Application of this test would have resulted in a more particularized assessment of the enactment's constitutionality.

Under the test's necessity prong, the initial inquiry would have focused on the legislation's purpose.[153] The general social dilemma

---

[145] 292 U.S. 426 (1934); *see* 438 U.S. at 250.

[146] 292 U.S. at 433–34. In assessing the constitutionality of the state enactment, the *Thomas* Court asserted "that the relief afforded must have [a] reasonable relation to the legitimate end to which the State is entitled to direct its legislation." *Id.* at 433. Unlike the *Blaisdell* statute, which satisfied this means-end standard, *id.* at 433–34, the *Thomas* provision's permanent and unconditional character rendered it unreasonable and therefore invalid under the test. *Id.* at 434.

[147] 438 U.S. at 248–49, 250.

[148] *Id.* at 250.

[149] 431 U.S. at 3, 9. For a discussion of the facts in *United States Trust*, see note 92 *supra* and accompanying text.

[150] 431 U.S. at 25; *see* Comment, *supra* note 33, at 271. Referring to private contractual obligations, the Court specifically stated that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25.

[151] *See* Brief of Appellant, *supra* note 6, at 16–19; Brief of Appellees, *supra* at 9, 15–21.

[152] *See* Allied Structural Steel Co. v. Spannaus, No. 3-75 (D. Minn. Sept. 2, 1977) (quoted in Appendix to Appellees' Brief at A-70). In its assessment of the basis upon which the district court rested its decision, the appellee Minnesota felt that "the lower court correctly noted that the most . . . definitive statement of th[e] standards" for reviewing statutes under contract clause attack is contained in the *United States Trust* case." Brief of Appellees, *supra* note 111, at 10.

[153] *See* note 96 *supra*. Implicit in ascertaining the legislation's necessity is a determination of the purpose to be effected by its implementation. *Id.*

of retirement security[154] certainly warranted state intervention. The need for protection against the depletion of pension funds was heightened by the nature of the Allied pension agreement.[155] The question then remains whether pension protection and retirement security could have been achieved in a more moderate manner.[156] A comparison of the Minnesota statute and the federal Employee Retirement Income Security Act (ERISA) provides the answer. Unlike the state measure, the federal legislation tempered the potentially devastating impact a substantial pension fund deficiency would have on an employer's financial stability by limiting his liablity. Upon termination of a covered pension plan, ERISA provides that an employer must tender monies equal to the lesser of the pension fund deficiency or thirty percent of the employer's net worth.[157] The Minnesota statute, however, lacked this degree of flexibility. It required the state to assess a pension funding charge in the amount of the deficiency, apparently regardless of the effect on the employer's solvency.[158] A further example of the Act's immoderate operation was its stipulation that employee pension benefits vest after ten years of service.[159] The federal enactment, on the other hand, provides alternative pension schedules only one of which requires 100% vesting after ten years of employment.[160] As this comparison illustrates,

---

[154] *See* 29 U.S.C. § 1001(a) (Supp. V 1975). Recognition of pension protection as a broad social problem was demonstrated by a Congressional policy declaration in ERISA. *See id.* It was there noted "that the continued wellbeing and security of millions of employees and their dependents are directly affected by [pension] plans [which] are affected with a national public interest. . . ." *Id.*; *see* Bernstein, *supra* note 123, at 953. In establishing "minimum standards" to "assur[e] the equitable character of such plans and their financial soundness," Congress explicitly indicated an intent "to provide for the general welfare. . . ." *Id.*; *see* Bureau of National Affairs, *supra* note 11, at 5; S. THOMPSON, *supra* note 11, at 2-2; notes 118–23 *supra*. Commenting on a New Jersey law similar to the Minnesota provision, Governor Cahill remarked: " 'This legislation affects an area of vital concern . . . to business and each and every employee throughout the State.' " He continued: " 'The plight of the working man without adequate protection for his retirement under private pension systems is one that cries out for relief.' " Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 172, 200, 365 A.2d 1, 11, 26 (Ch. Div. 1976) (private pension benefits protection measure declared unconstitutional).

[155] *See* 438 U.S. at 237. The absence of a requirement that the employer tender specific payments to the pension fund plus the lack of any sanction for failure to adequately contribute, *id.*, renders the pension benefits insecure at best. The fact that Allied had the unilateral authority to modify or terminate the plan's coverage, *id.*, hardly comports with the notion of retirement security.

[156] For a discussion of the reasonable and necessary test in which the severity of a statute's effect is always a consideration, see note 96 *supra*.

[157] 29 U.S.C. § 1362(a), (b) (1976).

[158] MINN. STAT. ANN. §§ 181B.03–.06, .11 (West Cum. Supp. 1979).

[159] MINN. STAT. ANN. §§ 181B.03–.06 (West Cum. Supp. 1979).

[160] 29 U.S.C. § 1053 (1976).

a more temperate scheme could have been adopted by the Minnesota legislature. Measured by the necessity prong of the United States Trust reasonable and necessary construct, therefore, the Act unconstitutionally impairs Allied's pension agreement.[161]

The dissent's approach suffers from a basic inaccuracy. By narrowly construing "impairments" as being exclusive of legislatively imposed additional responsibilities, the minority has unreasonably restricted the applicability of the contract clause.[162] As a result, the remainder of Justice Brennan's opinion is tainted. To deny operation of the contract clause[163] and to invoke a due process analysis,[164] is to reject accepted judicial interpretations of "impairment,"[165] and to revive a wholly unavailable provision.[166]

Since the *United States Trust* reasonable and necessary standard yields the same result as that reached by the *Allied* majority,[167] the

---

[161] For a discussion of the reasonable and necessary standard, see note 96 *supra*. The *United States Trust* Court expressed a willingness to defer to a legislative assessment of reasonableness and necessity regarding private agreements. *See* note 96 *supra*. The comparatively "severe" manner in which the state sought to protect employee pension benefits, *see* notes 157–60 *supra*, however, indicates that deference to the legislature's judgment would not be warranted. 438 U.S. at 247. Under the *United States Trust* test, the scrutinized legislation must be both necessary and reasonable to support a finding of constitutionality. *See* note 96 *supra* and accompanying text. Since the Minnesota enactment fails to satisfy the necessity requirement, further review as to the provision's reasonableness would not be needed.

[162] *See* 92 HARV. L. REV., *supra* note 127, at 90–93. For a discussion of the dissent's interpretation of constitutional "impairment," see notes 124–27 *supra* and accompanying text. For a discussion of accepted definitions of impairment, see note 28 *supra* and accompanying text. *See generally* United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977). The enactment's imposition of new responsibilities, in a practical sense, served to invalidate Allied's otherwise legitimate pension agreement. *See* 92 HARV. L. REV., *supra* note 127, at 93. For this reason, Justice Brennan's interpretation of "impairment" rests on an unwarranted distinction between altering contractual obligations and imposing additional burdens. *See id.* Although the framers were concerned primarily with state adjustment of debtors' obligations in fashioning the contract clause, see notes 28–31 *supra* and accompanying text, the prohibition was designed to be of broader application. 92 HARV. L. REV., *supra* note 127, at 918 n.35. One of the evils it was to prevent was the imposition of additional duties. *See id.* at 91–92.

[163] *See* notes 124–27 *supra* and accompanying text.

[164] For a review of the minority's due process approach, see notes 131–37 *supra* and accompanying text.

[165] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819); 92 HARV. L. REV., *supra* note 127, at 91–93. *See also* note 162 *supra*.

[166] Although substantive due process analysis serves as the basis for judicial scrutiny of noneconomic legislative measures, this approach is inapplicable to challenged state economic regulations. *See generally* Ferguson v. Skrupa, 372 U.S. 726 (1963); West Coast Hotel Co. v. Parrish, 300 U.S. 370 (1937); Nebbia v. New York, 291 U.S. 502 (1934). For a discussion of the death of substantive due process as a bar to state economic regulation, see note 39 *supra*.

[167] *See* 438 U.S. at 250–51. For a review of the *Allied* Court's rationale in striking down the Minnesota enactment, see notes 99–120 *supra* and accompanying text. For an analysis of the *Allied* enactment under the *United States Trust* reasonable and necessary test, see notes 153–61 *supra* and accompanying text.

United States Trust test should have formed the basis of the Court's determination. By invoking the *Thomas* rule, the *Allied* decision has denied future tribunals the benefit of a universally accepted standard by which legislative impairments of public and private agreements can be scrutinized. Future courts will hopefully recognize the desirability of the reasonable and necessary standard as a foundation upon which the contract clause can be resurrected.

Jeff A. Krompier