DORMANT MINERAL INTERESTS AND THE CONTRACT CLAUSE: *VAN SLOOTEN v. LARSEN*

Dormant mineral interests[1] severely diminish the effective use of our natural resources.[2] The inability to exploit these needed energy

1. Dormant mineral interests are gas and oil interests that sellers of land severed from the surface rights by a clause in the conveyance reserving the rights to the grantor. Rathbun v. Michigan, 284 Mich. 521, 280 N.W. 35 (1938). The reservation in the contract creates "two separate and distinct estates in land." Asher v. Gibson, 198 Ky. 285, 248 S.W. 862 (1923). One estate consists of the mineral rights and one of the surface rights. Each is subject to the laws of descent, and each can be conveyed separately from the other. Kincaid v. McGowan, 88 Ky. 91, 4 S.W. 802 (1887). At times the mineral rights become so dominant that a court will permit the mineral owner to destroy the surface estate in order to extract minerals. Peabody Coal Co. v. P.C. Pasco, 452 F.2d 1126 (6th Cir. 1971).

Common law courts called these interests corporeal hereditaments, which the owners could not abandon. Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980). *See generally* Robertson, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227 (1969).

2. Several persons combine to buy a gas and oil interest, because the cost is usually very high. Brief of Appellant at iv, Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978) (companion case to Van Slooten v. Larsen, 86 Mich. App. 437, 272 N.W.2d 675 (1978); *see* note 13 *infra*). Through the years, by conveyance or succession, the ownership becomes held by even more people, each having a small percentage, but many of whom are not even acquainted with the other owners. Brief of Appellant at iv. If one owner were to decide he wanted to develop the oil or gas resources in the land, he would be required to locate all other fractionalized interest holders. *Id.* This chore may prove insurmountable, even after only one generation from the initial sale, since by this time a plethora of owners already exists. *Id.* Further, because these owners are not required to pay property taxes in many states (including Michigan), and/or they do not live within the local area, tracing them becomes even more difficult. *Id.* at v.

The mineral interest owner willing to search for natural resources (assuming the absence of a statute resembling the Michigan Dormant Minerals Act; *see* note 10 *infra*) has only one risky alternative. He can drill without the consent of the other owners with the risk that he will not receive equitable compensation for the drilling costs when the other owners come to collect their profit percentages. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129, 133 (1964) [hereinafter cited as *Methods*]. The non-consenting owner is entitled to profits after deducting the drilling costs, but frequently courts do not reimburse entirely, leaving the drilling owner with a loss. *Id.* at 131-32. The risk becomes especially severe because courts often fail to provide com-

sources has restrained title marketability[3] and threatens to further increase energy costs throughout the country.[4] The higher costs of energy needed for transportation and residential temperature control have drastic effects on urban housing patterns.[5] Increased transportation costs cause many urban workers to relocate closer to their places of employment,[6] and increased costs of maintaining a single-family home may result in a higher urban density of multifamily units.[7]

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pensation for the drilling of dry wells. *Id.* at 132. Considering the tremendous capital outlay involved, this is not a very feasible alternative, especially if drilling proves fruitless. Brief of Appellant at v. In most areas then, including Michigan, the owners refrain from drilling until they have received full consent. *Id.* at vi.

The problem facing a willing owner of oil or gas interests is even more severe because he can only discover the minerals with accuracy by exploration. The owner can use geological investigation, but the reliability of the available tests is dubious. A sensible owner will not pay for expensive testing which could itself prove unreliable, particularly when the expenditure is without assured contribution from other owners. Excavation of other mineral interests is more feasible because discovery of these resources is geologically possible by mere observation of surface condition. *Id.*

Oil companies can profit only by testing large areas. An owner of a mineral interest, therefore, may lose the opportunity to have his land tested, perhaps explored, if adjacent lands are unavailable due to unascertained interest holders. Further, if an owner is in an area being explored, he may deprive his neighbor of any benefits, because the driller's oil or gas well may deplete the reservoir underlying both pieces of property. Brief of Appellant at vii.

Additionally, in a handful of jurisdictions, namely Louisiana, West Virginia and Illinois, another problem inhibits exploration. In these jurisdictions, the taking of mineral resources from the land constitutes waste which can be enjoined by any cotenant. This creates a situation where, the smaller the interest, the more willing the owner is to hold out for a bonus in exchange for his approval. *Methods, supra*, at 131.

3. Incidental to the inability to obtain the gas and oil resources, of course, is the tremendous restraint on alienation. Titles to these subsurface interests are virtually not marketable, because of the great difficulty purchasers would have in developing the resources. Thus, absent legislative action, the mineral rights are destined to remain in the same owners, with little possibility of development. *See generally* Brief of Appellant at iv-xi.

4. G. BROWN, MEASUREMENT OF THE IMPACT OF THE ENERGY SITUATIONS ON URBAN TRENDS, *Appendix to* URBAN TRENDS AND THE ENERGY SITUATION: PROCEEDINGS OF THE COMMITTEE ON INVESTMENT CONSEQUENCES OF URBAN GROWTH TRENDS 33 [hereinafter cited as URBAN GROWTH TRENDS].

5. *Id.* at 33.

6. *Id.* The higher the cost of energy for transportation (commuting expense), the closer will urban workers tend to live to their places of employment. This will cause greater density in the urban work areas. *Id.*

7. *Id.* As the cost of energy increases, the cost of building or living in a single-family dwelling will increase relative to that of a multi-family unit. This creates a disincentive in the construction or purchase of single-family dwellings; urban areas thus become more densely populated with multifamily units.

Confronted with this important public issue, several states have enacted statutes[8] to alleviate the dormant mineral interests problem. The statutes, however, have not escaped constitutional challenge under the contract clause.[9] Michigan passed the Dormant Minerals Act[10] which deems oil or gas interests abandoned if the owner does not take possession, transfer, or record the interest for a period of twenty years.[11] In *Van Slooten v. Larsen*,[12] the Supreme Court of Michigan held that the Michigan statute did not violate the contract

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8. *See* note 60 *infra*.

9. U.S. CONST. art. I, § 10: "No state shall . . . pass any bill of Attainder, ex post facto law, or law impairing the obligation of Contracts." *See, e.g.* notes 64-73 and accompanying text *infra*.

10. MICH. COMP. LAWS § 554.291 (MICH. STAT. ANN. § 26.1163(1) (Callaghan 1970)), stating that:

> Sec. 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands . . . during such period for 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interests or actual production or withdrawal of oil or gas, from said lands, . . . record a claim as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership.

Id.

Harold Street proposed the statute in an article written in 1963. Street, *Need for Legislation to Eliminate Dormant Realty Interests*, 42 MICH. ST. B.J. 49 (1963) [hereinafter cited as *Need for Legislation*].

A similar statute passed by the Michigan legislature is the Michigan Marketable Title Act. MICH. COMP. LAWS ANN. § 565.101 (MICH. STAT. ANN. § 26.1271 (Callaghan 1970)). This statute, however, does not solve the problem of dormant mineral interests. *Methods*, *supra* note 2, at 152. The state specifically had to address this problem in a new statute. *Need for Legislation*, *supra*, at 50.

11. The statute is generally a good vehicle for alleviating the dormant mineral interests problem. Those interested in developing the resources are afforded the opportunity to locate the owners. If an interest holder records, he can be contacted. If he fails to record, the surface holder, who can easily be located by title search, takes the interest. After all holders are located, oil companies, for example, can purchase the rights, or interested owners can obtain consent to explore.

The statute achieves its goal more effectively if the interest holders do not record. Since there are probably fewer surface owners than mineral interest holders, when the holders fail to record, fewer individuals must be placated before exploration. However, even if the holders do record, the statute is of tremendous value to the state,

clause of the United States Constitution.[13]

In 1943, a property owner conveyed her land while contractually reserving her interests in the subsurface gas and oil rights.[14] The grantor, however, never recorded her reserved interests.[15] Defendants, heirs to the original grantor and others, did not record their interests in the mineral rights until 1970.[16] Plaintiff, successor to the grantee's interest in the 1943 sale, claimed title to the subsurface rights by operation of the Dormant Minerals Act.[17] Defendant asserted that the statute violated the contract clause.[18] The Supreme Court of Michigan, in finding that the statute had only insubstantially impaired "the obligation of contract" rejected this argument.[19]

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because these owners then become easily locatable, resulting in the facilitation of resource development. *See Need for Legislation*, *supra* note 10.

The statute is not perfectly reasonable because it does not distinguish between those owners who could be located and those who are non-ascertainable. *See* notes 103-04 and accompanying text *infra*. Perhaps the state legislature drafted the statute broadly because its purpose can better be achieved with the extinguishment of all interests rather than only unknown interests. As mentioned, if the interests are extinguished fewer owners remain because more surface holders receive interests and the other mineral interest owners lose their rights. With a decrease in the number of owners, the opportunity for exploration increases. Nonetheless, the legislature made a judgment to draw the statute broadly (perhaps even to reduce the cost of giving notice to accessible owners), a judgment which the courts will generally view with deference. See notes 108-09 and accompanying text *infra*.

12. 410 Mich. 21, 299 N.W.2d 704 (1980).

13. *Id.* The contract clause was implicated in *Van Slooten* because the statute impairs obligations created in the land conveyance agreement upon the owner's failure to comply. *Id.* at 39, 299 N.W.2d at 708. Courts have generally recognized that property rights are protected by the contract clause. Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So.2d 775 (1944) (a Florida statute extinguished property interests if the owner failed to record).

The Supreme Court of Michigan at the same time decided the companion case to *Van Slooten*, Bickel v. Fairchild, 410 Mich. 21, 299 N.W.2d 704 (1980), which presented identical issues of law. *Van Slooten* and *Bickel* are the first cases to specifically address the constitutionality of the Michigan Dormant Minerals Act. Other state courts, however, have evaluated similar statutes. *See* notes 64-73 and accompanying text *infra*.

14. Van Slooten v. Larsen, 86 Mich. App. 437, 441, 272 N.W.2d 675, 676 (1978).

15. *Id.*

16. *Id.*

17. *Id.*

18. 410 Mich. at 39, 299 N.W.2d at 708. The trial court found for the defendant, holding the statute unconstitutional. The court of appeals reversed. Van Slooten v. Larsen, 86 Mich. App. 437, 272 N.W.2d 675 (1978).

19. 410 Mich. at 40-41, 299 N.W.2d at 708-09. The majority addressed other con-

A vigorous dissent, applying a balancing test under the federal contract clause, would have held the statute unconstitutional.[20]

The framers of the Constitution designed the contract clause to restrain arbitrary state[21] interference with private and public agreements.[22] The clause does not absolutely prohibit[23] legislatures from passing laws that impair the obligation of contracts;[24] it restricts the state only when the public need does not justify the private interfer-

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stitutional issues, including both substantive and procedural due process. *Id.* at 41-45, 299 N.W.2d at 708-10.

The court disposed of three substantive due process arguments: 1) the act did not unconstitutionally convert a property right into a cause of action because the interest holder only had to record and was not required to initiate a suit, 2) the forced abandonment of corporeal hereditaments did not deny substantive due process, since the statute served a public purpose and provided a reasonable relationship between the means chosen and public purpose sought to be promoted, 3) the statute did not create an unconstitutional presumption. *Id.* at 43-52, 299 N.W.2d at 709-16.

The court also rejected the defendants' procedural due process argument. After balancing the competing interests involved, the court ruled that the state was not required to provide a pre-deprivation hearing. The convention of procedural regularity, therefore, does not require the statute to give notice of a hearing. *Id.* at 52-55, 299 N.W.2d at 715-16. Also, the court earlier stated that the statute itself constitutes sufficient notice of the recording requirement. *Id.* at 52 n.28, 299 N.W.2d at 714 n.28.

20. *Id.* at 56-65, 299 N.W.2d at 716-20.

21. The prohibition against the impairment of the obligation of contracts does not apply to the federal government. Amalgamated Meat Cutters & Butcher Workmen of N. America v. Connally, 337 F. Supp. 737, 763 (D.D.C. 1971) (not applicable to President's stabilization of prices, wages and rents under the Economic Stabilization Act of 1970).

22. Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 216, 354, 355 (1827). The initial tone of the Framers' debate over the clause indicates a specific fear that the legislatures would provide instant relief for debtors from contractual obligations. Holiday Magic, Inc. v. Warren, 357 F. Supp. 20 (E.D. Wis. 1973), *vacated on other grounds*, 497 F.2d 687 (7th Cir. 1974). Despite this specific intent, courts generally have interpreted the clause to insure "protection from unjust acts of legislation in any form." 25 U.S. (12 Wheat.) at 216.

23. In the 19th century, the prohibition provided a significant restraint. Prior to 1889, the Supreme Court considered the contract clause in approximately forty percent of all questions concerning the constitutionality of state legislative action. In fact, the contract clause argument was so persuasive that at that time almost half of all Supreme Court decisions declaring state legislation invalid were justified by adherence to the contract clause. B. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 5 (1938).

24. The judicial decisions have consistently adhered to the position that the contract clause is not an absolute prohibition. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934). (A Minnesota statute that impairs land purchase agreements held constitutional).

ence.[25] The United States Supreme Court, in defining the scope of the doctrine, confronts a most difficult analysis. By its nature, the inquiry cannot be reduced to a precise mathematical formulation, but involves a delicate balance of state and individual interests.[26]

The landmark decision in contract clause analysis is *Home Building & Loan Association v. Blaisdell*.[27] In *Blaisdell*, plaintiff challenged the constitutionality of a Minnesota statute[28] which, during the depression,[29] retroactively extended the statutory redemption[30] period following foreclosure purchase agreements.[31] The Supreme Court ruled that because the statutory purpose was legitimate and the means adopted were reasonable and appropriate,[32] the Minnesota act

25. El Paso v. Simmons, 379 U.S. 497, 508-09 (1965); W.B. Worthen v. Thomas, 292 U.S. 426, 433 (1934) (for a thorough discussion of *Simmons* and *Thomas*, see note 39 *infra*); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934) (for a thorough discussion of *Blaisdell*, see notes 27-38 and accompanying text *infra*).

26. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 390, 428 (1934).

27. 290 U.S. 398 (1934).

28. The Minnesota Mortgage Moratorium Law, 1933 MINN. LAWS 339.

The statute allowed local courts discretion to extend the statutory redemption period (*see* note 30 *infra*) after foreclosure sale for such time as the court deemed fair. The extension could last only as long as the emergency caused by the depression with the further restriction that it not extend beyond May 1, 1935. In addition to the extension, the statute required the mortgagor to pay fair rental value of the property and apply this sum to taxes, insurance, interest and principal. 290 U.S. at 415-18.

29. *Id.* at 416. The statute described that, because of the severe economic situation resulting in low prices, high unemployment, and extremely difficult credit, owners of real property would be unable to make the necessary mortgage payments. The statute was designed to alleviate the severity of the emergency by providing additional opportunity for the owners to recover property lost through foreclosure. 1933 MINN. LAWS 339.

30. Redemption is defined as "The realization of a right to have the title of a property restored free and clear. . . . The act of a vendor of property in buying it back again from the purchaser. . . ." BLACK'S LAW DICTIONARY 1149 (5th ed. 1979).

31. 290 U.S. at 416. Defendant lost his property due to foreclosure and successfully petitioned the local court for an extension on his period of redemption. Plaintiff, who purchased the land at the foreclosure sale, claimed that the extension provided by the new statute impaired the obligation of his purchase agreement. Plaintiff expected to get clear title to the land two weeks after the statute was passed. The statute postponed the plaintiff's receipt of clear title, or even could have prevented plaintiff's acquisition of the land altogether if the defendant redeemed during the extension period. Plaintiff asserted that the contract clause prohibited the statute. *Id.* at 416-26.

32. *Id.* at 442. The Court believed, by this test, it was establishing a "rational compromise" between public need and individual rights. *Id.*

did not violate the contract clause.[33]

The *Blaisdell* Court held that an implied reservation of the state's protective powers inheres in all contracts.[34] Thus, when the state exercises these powers by adopting legislation, the new law does not conflict with the contractual arrangement; rather, the contract implicitly incorporates the new statutory terms.[35] The Court established a reasonableness standard to determine when the Constitution permits the state to exercise these reserved powers, allowing public expedience to override private interests.[36] The Court considered several factors pertinent to its constitutional analysis. In particular, the Court considered: 1) whether a public emergency existed; 2) whether the statute addressed the protection of a societal rather than a private interest; 3) whether the relief closely fits the emergency while being available only upon reasonable conditions; 4) whether the statute is generally not unreasonable; and 5) whether the legislation operates only temporarily.[37] By balancing these criteria, the Court found that

33. *Id.* at 447. The Court pointed out that the emergency did not expand the scope of the legislative authority, but rather justified the employment of a power inherent in state sovereignty. *Id.* at 425-26.

34. *Id.* at 435-36.

35. *Id.* Perhaps the Court's reliance on the existence of an implied condition in every contract of the state's reserved protective power is unfounded in logic. In order to treat all parties fairly, the law will imply conditions into contracts. The parties, however, by contract, can expressly negate those conditions that otherwise the law will imply. Logically then, if the parties in *Blaisdell* had expressly agreed that there would be no contractual modification during an emergency, the contract could not impliedly incorporate the statutory terms. The statute would, in fact, directly conflict with the express contractual arrangement and thus would impair the obligation of contract. Certainly, if such an expression had been made in the contract, the *Blaisdell* Court still would not have invalidated the statute. One might conclude that the Court intended a validation of the police power apart from any principle of contract law, as long as the end was legitimate and the means reasonable and appropriate. 1 U. CHI. L. REV. 639 (1934).

The Court does not rely entirely on the contract analysis that denies any impairment. Either of these approaches, the implied contract theory or the theory based on "the general good of the people," ultimately requires a court to make the same analysis—whether the legislation is reasonable and appropriate, and serves a legitimate state interest. 290 U.S. at 438. Chief Justice Hughes, throughout the opinion, recites what he believes to be the majority view that statutes can impair the obligation of contracts in order to achieve "the general good of the people." *Id.* at 437. For a thorough discussion of *Blaisdell*, see Note, *Constitutionality of Mortgage Relief Legislation*: Home Building and Loan v. Blaisdell, 47 HARV. L. REV. 660, 661-62 (1934).

36. 290 U.S. at 438-39.

37. *Id.* at 445-47, 451. The *Blaisdell* Court considered the above five criteria. The Court found that the Depression created an emergency which made mortgage pay-

the Minnesota statute was a constitutional exercise of the state's sovereign powers.[38]

The Supreme Court did not significantly modify the *Blaisdell* analysis until 1978[39] in *Allied Structural Steel v. Spannaus*.[40] In *Spannaus*,

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ments impossible. The emergency did not broaden the scope of the legislative authority, but merely justified the employment of a power inherent in state sovereignty. *Id.* at 451. *See* note 29 *supra*. As to the second criteria, the Court noted that the legislature had adopted the statute for the protection of the people from a public disaster. 290 U.S. at 445. *See* note 29 *supra*. The third and fourth criteria seem to overlap to a large extent. The Court noted several factors bearing on both of these questions. The Court pointed out that the mortgage indebtedness was not destroyed, the interest continues, and the sale was still valid. Further, the purchaser could still acquire title or a deficiency judgment if the mortgagor did not redeem, and the conditions placed on redemption were maintained. In addition, the mortgagor was required to pay the fair rental value of the land to be applied towards the payment of insurance, interest, taxes and mortgage indebtedness. This provided compensation to the purchaser for his inability to use the land during the extension period. The Court found that the statute was a reasonable attempt to strike a balance between mortgagors' and purchasers' rights. 290 U.S. at 445-46. Finally, the legislation clearly met the fifth criterion. The Court asserted that the legislature authorized the statute to operate only during the emergency for which it was created, and in no case more than two years. *Id.* at 447.

38. *Id.* at 447.

39. During the decade ending in 1945 the Court evaluated contract clause questions with reference to the criteria established in *Blaisdell*. Cases decided immediately subsequent to *Blaisdell* indicated a substantial role for the contract clause. The first such case, also decided in 1934, was W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934). The Court found that an Arkansas statute, which exempted the proceeds of life insurance from attachment by creditors, was not reasonable because the legislature adopted means that were not narrowly drawn to the achievement of the legislative ends. The statute was not temporary, and failed to provide any condition for the protection of the creditor. "The Act contains no limitations as to time, amount, circumstances or need." *Id.* at 434-35. Justice Sutherland vigorously disagreed with the majority methodology. In his constitutional analysis, Sutherland saw no difference between the Arkansas statute and the Minnesota statute in *Blaisdell*. Again, he failed to see how "emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction upon state power in respect of the impairment of contractual obligations." *Id.* at 434-35 (Sutherland, J., concurring).

In W.B. Worthen v. Kavanaugh, 295 U.S. 56 (1935), an Arkansas statute sharply diminished the remedies available to mortgagees. As in *Blaisdell*, the Court abrogated the distinction made years earlier that legislation could impair remedies and not obligations. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 212 (1827) (A New York statute destroyed a debt owed to plaintiff. The Court held that, since the statute did not operate retroactively to extinguish interests created before the statute, it was constitutional); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), (The Court invalidated a New York statute which destroyed debts created prior to the statute. The Court, in dicta, asserted that the law would even be unconstitutional if it extinguished interests arising after the passage of the statute. *Ogden*, however, later denied this

constitutional extension). Justice Cardozo, writing the majority opinion in *Kavanaugh*, held that the statute was drawn too broadly, permitting unnecessary interference with private rights. 295 U.S. at 62-63.

The Court in Triegle v. Acme Homestead Ass'n, 297 U.S. 189 (1936), relied on *Blaisdell*'s first criterion (*see* note 37 *supra*) to invalidate a Louisiana statute which changed the rights of withdrawing members of building and loan associations. The Court held that because the statute only impaired rights of members in relation to each other, the state did not address a public issue and consequently, the statute was unconstitutional. *Contra*, Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940). (The Court upheld a similar New Jersey statute as constitutional. The Court found that the legislation promoted a public purpose.)

The Supreme Court did not continue its trend of invalidating state legislation. Instead, in East N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945), the Court upheld a New York statute which extended for an additional year a prohibition on foreclosure of mortgages. In finding the statute constitutional, the Court reformulated the *Blaisdell* test.

> The *Blaisdell* case and decisions rendered since . . . yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state 'to safeguard the vital interests of the people,' 290 U.S. 398, 434, is not to be garnished by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

Id. at 232. *See also* Faitoute Iron & Steel v. City of Asbury Park, 316 U.S. 502 (1942) (The Court held constitutional a New Jersey statute which authorized the state to adjust debts of insolvent municipalities). For a general discussion of post-*Blaisdell* contract clause decisions, see Vernon, *The Contract Clause and the Court: A View of Precedent and Practice in Constitutional Adjudication*, 54 TUL. L. REV. 117 (1979).

By 1965, as evidenced in the Supreme Court decision of El Paso v. Simmons, 379 U.S. 497 (1965), the clause provided little, if any, restraint on state legislative action. G. GUNTHER, CONSTITUTIONAL LAW 561 (10th ed. 1980). *Simmons* involved a 1910 sale by Texas of public land to private individuals at a very low down payment (one-fortieth of the price, 379 U.S. at 510) and an equally low interest rate. The Texas law provided that, upon payment of interest, the contract would be terminated and the land forfeited. As long as the land had not been sold again by the state, the purchaser could re-assert his rights upon written request and payment of the delinquent interest. Then, in 1941, the legislature amended the original statute, limiting the reinstatement to five years from the forfeiture date. Plaintiff, Simmons, defaulted in 1947 and the state denied his request for reinstatement made after the five-year period. The state sold the land to El Paso, and Simmons brought suit, claiming that the 1941 amendment unconstitutionally impaired the obligation of contract. The Court relied on *Blaisdell* to find the statute constitutional. It established a balance between state and private interests. The Texas legislature found that the unlimited period of reinstatement had caused a plethora of clouded titles, preventing unobstructed marketability and prohibiting an effective use of the land. This public interest outweighed the private interest, especially because there was only a minor impairment and more importantly, this impairment was not focused at the essence of the bargain. The purchasers had not bought the land because of their reliance on the prolonged reinstatement period, and, therefore, relative to the great public need involved, this private interest did not merit protection. Since the public interest warranted this level of private in-

terference, the Court found the statute reasonable. Further, the Court showed an extreme deference to the state legislature in determining reasonableness. The *Simmons* Court cited *East N.Y. Sav. Bank* for the proposition that wide discretion must be given to the state in deciding what legislative measures are necessary. 379 U.S. at 508-09.

In United States Trust v. New Jersey, 431 U.S. 1 (1977), the Court suddenly shifted its position when for the first time in nearly 40 years it invalidated a statute as violating the prohibition against the impairment of contract. The action revitalized the strength of the contract clause. In 1921, New York and New Jersey agreed to establish a joint port authority. 1921 N.Y. LAWS. ch. 154 (current version at N.Y. UNCONSOL. LAWS § 6401 (McKinney 1977)); 1921 N.J. LAWS ch. 151 (current version at N.J. STAT. ANN. § 32:1-1-24 (West 1964)). Later in 1962 New Jersey made a promise in a statutory covenant. The promise was designed to induce investors to buy bonds for the purpose of purchasing the Hudson and Manhattan Railroad and the construction of the World Trade Center. The statutory promise provided that the money pledged as security on the bonds would not be used to subsidize the railroad. A 1974 statute then repealed the 1962 promise. Thus, the Court was faced with a determination of whether the state unconstitutionally impaired the obligation it created in the 1962 statutory covenant.

The *United States Trust* Court reiterated a common position in contract clause analysis: " 'the legislature cannot bargain away the police powers of the state.' Stone v. Mississippi, 101 U.S. 814, 817 (1880)." 431 U.S. at 23. *See also* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848) (The state cannot alienate the power of eminent domain); New Jersey v. Wilson, 11 U.S. (7 Cranch.) 164 (1812) (The state can alienate the taxing and spending powers.) If the state does attempt to contract away an inalienable power, the contract is void and no contract clause analysis is required. The Court found that the New Jersey statute involved a financial obligation. It then held that a state could validly alienate its financial powers. 431 U.S. at 24.

The *United States Trust* Court then had to determine the issue of whether the statute violated the contract clause. The Court applied the *Blaisdell* test, requiring the statute to be reasonable and necessary while serving a legitimate public need. The test was modified somewhat, because the 1974 repeal impaired a state obligation. The Court asserted that, unlike Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942), there should be no deference to the legislature to determine what is reasonable simply because of the state's self-interest in impairing its own contracts. In essence, a higher level of scrutiny is established for impairment of public obligations.

The state put forth the public purpose of encouraging public transportation as opposed to private automobiles. The city articulated that the statute was necessary because the new mass transit facilities could not raise enough revenue to function efficiently nor could the city spend more money, as it already had reached the permitted deficit level. The Court stated that other less intrusive means were available to achieve this purpose; if nothing else, a less severe modification of the 1962 covenant may have sufficed. 431 U.S. at 25-30. Further, in comparing the case to *Simmons*, the Court found that the repeal was not reasonable. In *Simmons*, the effects of the unlimited period to reinstate were unforeseen while in this case the state knew of the prevailing need for mass transportation, and should have foreseen it in 1962. The state's failure to account for the foreseeable contingency bars the statute from validity under the Constitution, especially in light of the drastic nature of the alteration (the statute

a Minnesota statute[41] directed plaintiff, a corporation, to pay pension benefits not required under the contractual agreement plaintiff had made with its employees.[42] The Court, referring to the *Blaisdell* test, recited the essential criteria,[43] but added a new element to the analysis. If the impairment of contract is not substantial, the inquiry will terminate immediately in favor of constitutionality. If, however, the alteration in the obligation exceeds a certain threshold level of severity, the full *Blaisdell* analysis becomes necessary.[44] In defining the level of severity needed to merit a full analysis, the Court referred to the value the Framers placed on private contracts.[45] Such a vague definition left courts with little or no guidance in determining what level of severity merits more thorough evaluation. The *Spannaus* Court found the impairment there in issue severe enough to require a *Blaisdell* analysis.[46] It then concluded that the Minnesota statute was

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repealed a promise that induced the investors into purchasing the bonds). *Id.* at 30-32.

40. 438 U.S. 234 (1978).

41. Minnesota's Private Pension Benefits Protection Act, MINN. STAT. ANN. § 181B.01-.17 (West 1974).

42. 438 U.S. 236-39. In *Spannaus*, plaintiff set up a pension plan making employees eligible at age 65, without regard to length of service. The plan also allowed certain other employees to collect payments at specified times. The Minnesota statute provided that all companies which had pension plans and 100 or more employees could be subjected to penalty payments. The statute imposed a penalty if, upon termination of the plan or company transfer from Minnesota, the pension assets were not sufficient to cover full pensions for all employees with ten years of service or more. Plaintiff closed its office and was directed to pay penalties for employees who had no vested rights under the company's plan. Plaintiff brought suit claiming a violation of the contract clause. *Id.* at 236-40.

43. *Id.* at 241.

44. *Id.* at 244-45. For the *Blaisdell* criteria see note 37 and accompanying text *supra*. In establishing this rule, the Court stated that "the severity of the impairment measures the hurdle the state legislation must clear." *Id.* at 244-45. Courts often cite this statement when deciding contract clause issues. *E.g.*, Van Slooten v. Larsen, 410 Mich. 21, 39, 299 N.W.2d 704, 708 (1980).

45. 438 U.S. at 245. For a discussion of the Framers' intent, see note 22 *supra*.

46. *Id.* at 246. The statute directed the company to re-calculate its pension on a ten-year requirement, when payment into the pension plan had been made on a completely different basis. The company based its pension plan on assessment of future liability, calculated according to foreseeable risk. The statute created a major unforeseen expense which destroyed the employer's reliance on prior evaluations and even threatened the company's solvency. This statute, therefore, which imposed a $185,000 pension penalty charge, created a severe impairment of the company's contractual obligation. *Id.* at 245-46.

unconstitutional because it failed to address a broad state interest[47] and was generally unreasonable.[48]

As illustrated by *Spannaus*, courts engaging in contract clause analysis may reject a state's articulated economic purpose. Unlike the economic interest presented in the Minnesota pension statute,[49] courts generally recognize the legitimacy of a state's economic interest in free title marketability and productive use of land resources.[50] For example, federal and state courts have upheld as constitutional both recording acts[51] and marketable title acts,[52] even though they

47. *Id.* at 249. The Court, in comparing this case to *Blaisdell*, found no public emergency, such as the Depression. No great public interest necessitated the legislation. *Id.* at 247-49.

48. *Id.* at 247-50.

49. The Court could not sustain the constitutional presumption in favor of deferring to the legislative findings of reasonableness. Since the statute was only applicable to those who were thoughtful enough to voluntarily set up private pension plans, it was unreasonable in its scope. The statute reached an area that the legislature had never before addressed. Its unexpected and severe nature made the legislation unreasonable. *Id.* at 247-50.

50. *See e.g.*, El Paso v. Simmons, 397 U.S. 479 (1965), discussed in note 39 *supra*.

51. *See* American Land Co. v. Zeiss, 219 U.S. 47 (1911) (the San Francisco earthquake of 1906 destroyed many property records. The statute required owners to institute suits to clear title. It did not constitute a deprivation of property without due process, as long as the statute provided a reasonable opportunity to be heard); Vance v. Vance, 108 U.S. 514 (1883) (a Louisiana statute that required the recording of property "mortgages and privileges" did not violate the contract clause. The Court only demanded that such statutes provide ample time for the owner to comply.); Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830) (New York granted land and then later required the grantees to record their interests. The Court held that the additional recording requirement did not conflict with the contract between the state and the grantee. The contract did not prohibit the state from taking other legislative action in relation to the land, and thus the statute did not impair the obligation of contract.); Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So.2d 775 (1944) (A Florida statute required purchasers of land either to take possession or record. The Supreme Court of Florida held that it was constitutional as long as the statute provided a reasonable time to record.); Connecticut Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N.E. 586 (1887) (A statute provided that a subsequent good faith purchaser was entitled to take if the prior owner failed to record his interest.); First Nat'l Bank v. Clark, 55 Kan. 219, 40 P. 270 (1895) (a statute extinguished a judgment creditor's lien if the creditor failed to record the lien. The legislation provided a reasonable time to record.); Knights of Maccabee v. Nitsch, 69 Neb. 372, 95 N.W. 626 (1903) (a statute required all fraternal organizations to record with the Auditor of Public Accountants all changes in the by-laws or constitutions of such organizations).

Courts generally will only hold a recording act constitutional if it provides a reasonable time for the owner to comply. Courts, however, usually defer to the legislature's determination of reasonableness. *See e.g.*, Terry v. Anderson, 95 U.S. 628 (1877) (a statute shortens a statute of limitations). *See also* Wichelman v. Messner,

operate retroactively to extinguish property interests.

The Supreme Court of Nebraska found that the state's marketable title act[53] did not violate the contract clause of the United States Constitution. In *Hiddleston v. Nebraska Jewish Education Society*,[54] the court upheld a statute that automatically extinguished both rights of reentry on breach of condition subsequent and possibilities of reverter thirty years after their creation.[55] The court applied a reasonableness standard analogous to that established in *Blaisdell*, but applicable both to contract and due process clause analyses.[56] It reasoned that the contractual impairment was not severe because the interests with which the statute interfered represented only remote possibilities of benefit.[57] The *Hiddleston* court held the statute constitutional because the state's strong interest in land marketability justified the relatively slight private interference.[58] The marketable title acts, as presented in *Hiddleston*, are distinguishable from statutes that destroy mineral interests[59] enacted in several states;[60] the latter de-

250 Minn. 88, 83 N.W.2d 800 (1957) (reasonable time requirement for a marketable title act).

52. Marketable title acts are statutes that extinguish powers of termination or possibilities of reverter if the interest holder does not record within a particular period of time. Some statutes, as presented in Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904 (1971) destroy the interest whether or not the interest holder records. *See* Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) (a statute held constitutional which extinguishes interests if the owner had not recorded for 40 years); *contra*, Board of Educ. of Cent. School Dist. No. 1 v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 142 (1965) (a New York statute extinguished rights of reentry and possibilities of reverter if the interest was created before September 1, 1931, and the interest holder failed to record before September 1, 1961. The Court of Appeals of New York held the statute unconstitutional because it violated the contract clause).

53. NEB. REV. STAT. § 76-2, 102 (Reissue 1971).

54. 186 Neb. 786, 186 N.W.2d 904 (1971).

55. NEB. REV. STAT. § 76-2, 102 (Reissue 1971).

56. 186 Neb. 790-91, 186 N.W.2d at 906. The court applies a reasonableness standard applicable to all retroactive legislation whether the constitutional challenge is under the contract or due process clause. It finds several criteria relevant to this analysis: nature and strength of the public interest, the extent of modification of the asserted private right, and the nature of the right altered by the statute. *Id. See* notes 71-72 and accompanying text *infra*.

57. 186 Neb. 790-91, 186 N.W.2d at 907.

58. *Id.* at 790-91, 186 N.W.2d at 906-07.

59. Contos v. Herbst, 278 N.W.2d 732, 745-46 (Minn. 1979) (procedures in the mineral registration statute held to violate due process).

60. *See, e.g.*, FLA. STAT. ANN. § 704.05 (West Supp. 1982); ILL. ANN. STAT. ch.

stroy fee simple estates[61] while the former nullify only possibilities[62] that such estates will later come into existence.[63]

Courts in several states have already ruled on the constitutionality of dormant mineral interest statutes.[64] In three such cases,[65] state supreme courts ignored contract clause implications, and held the statutes unconstitutional entirely on procedural due process grounds.[66] The Supreme Court of Indiana, however, made a complete contract clause analysis in *Short v. Texaco, Inc.*[67] and held that the statute[68] did not violate the Constitution. The court found that the legislation addressed a legitimate state interest, and the means

30, § 197 (Smith-Hurd Supp. 1981); IND. CODE §§ 32-5-11-1 to -8 (1976); LA. CIV. CODE ANN. art. 490 (West 1980); MICH. COMP. LAWS §§ 554.241-.294 (1970) (MICH. STAT. ANN. 26.1163(1) (Callaghan 1970)); NEB. REV. STAT. § 57-228 to -231 (Reissue 1978); N.C. GEN. STAT. §§ 1-42.1-.4 (Supp. 1981); TENN. CODE ANN. § 64-704 (Supp. 1981); VA. CODE § 55-154 (1981).

61. *See* note 1 *supra*.

62. Contos v. Herbst, 278 N.W.2d 732, 745-46 (Minn. 1979).

63. *Compare Contos*, which found this difference important, *with* Wilson v. Iseminger, 185 U.S. 55 (1902) where the Court found this difference to be constitutionally irrelevant. In *Iseminger* the Court held that a Pennsylvania statute that destroyed a fee simple interest was constitutional. The statute concerned ground rent defined as "rent reserved to him and his heirs by the grantor of the land, out of the land itself. . . . It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, and alienable." *Id.* at 59. The statute extinguished such interests when the owners neither demanded ground rent for 21 years nor recorded in three years. The destruction of the severed fee simple interests is most analogous to the operation of the dormant mineral acts. Brief of Appellant at 6, Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978).

64. *See, e.g.*, Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980); Van Slooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980); Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979); Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978); Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

65. Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979); Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 259 N.W.2d 316 (1977) (also found to violate substantive due process).

66. The courts in *Bishop*, *Contos* and *Pedersen* found that the statutes failed to provide adequate notice and an opportunity to be heard.

67. 406 N.E.2d 625 (Ind. 1980).

68. IND. CODE §§ 32-5-11-1 to 11-8 (1976). The Michigan and Indiana statutes are virtually identical, the difference being that Indiana allows the owner only two years after the date of enactment to record the oldest interests. *Compare* IND. CODE §§ 32-8-11-1 to 11-8 (1976) *with* MICH. COMP. LAWS § 554.291 (MICH. STAT. ANN. § 26.1163(1) (Callaghan 1970)). *See* note 10 *supra*.

adopted rationally related to the achievement of the purpose.[69] In contrast, the Supreme Court of Nebraska in *Wheelock v. Heath*[70] reached the opposite conclusion. The court did not rely on the *Blaisdell* test per se[71] but instead, like *Hiddleston*, merged contract and due process clause analyses, questioning only the reasonableness of the legislation.[72] Under this hybrid approach, it held the Nebraska mineral statute[73] unconstitutional.

The United States Supreme Court confronted this constitutional controversy when it heard argument in *Texaco, Inc. v. Short*.[74] The Court took the case on appeal from the Indiana Supreme Court, which earlier had held the Indiana Mineral Lapse Act constitutional.[75] After summarily disposing the contract clause claim,[76] the

69. 406 N.E.2d at 630-31.

70. 201 Neb. 835, 272 N.W.2d 768 (1978). The court, by analogy, cited *Hiddleston* for guidance in invalidating the Nebraska statute. *Id.* at 842-43, 272 N.W.2d at 773-74.

71. The *Blaisdell* test really is made up of specific questions that all enter into a reasonableness determination. The *Blaisdell* court made clear that reasonable and appropriate legislation would be constitutional. *See* notes 37 and 56 and accompanying text *supra*.

72. 201 Neb. 835 at 841-45, 272 N.W.2d at 772-74. Like the *Hiddleston* court, while the *Wheelock* court does not specifically address the *Blaisdell* criteria, it does apply the same general test. Merging the due process and contract clause analysis by questioning only the reasonableness of the statute is quite logical. One scholar even suggested the Constitution would be the same without the contract clause. Courts would reach identical results if they based constitutional decisions on whether the statute provided for a reasonable deprivation. Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 890-91 (1944). Further support is given in *Blaisdell* itself for the approach leading to identical results under both clauses in the Constitution. The *Blaisdell* Court disposed of the due process argument by stating that all previous contract clause discussion was applicable to due process as well. 290 U.S. at 448. For a general discussion of the constitutionality of retroactive legislation, see Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

73. NEB. REV. STAT. §§ 57-228 to 231 (Reissue 1978). The Nebraska statute is very similar to the Indiana and Michigan acts. One exception is that, while the mineral interest owner can lose his interest after 23 years, the surface holder must bring an action in equity before the statute deems the mineral interest abandoned. The statute allows a grace period of two years, during which time the law will not extinguish any mineral interests. *Compare* NEB. REV. STAT. §§ 57-228 to 231 (Reissue 1978) *with* IND. CODE §§ 32-8-11-1 to 11-8 (1976) *and* MICH. COMP. LAWS. § 554.291 (MICH. STAT. ANN. § 26.1163(a) (Callaghan 1970)). *See* notes 10-11 *supra*.

74. 102 S. Ct. 781 (1982).

75. *See* notes 67-69 and accompanying text *supra*.

76. 102 S. Ct. at 792-93. In a somewhat lengthy opinion, Justice Stevens, writing

Court concentrated primarily on a procedural due process inquiry.[77] It found that the demand to record was the statute's only contractual impairment,[78] and therefore held that "such a minimal 'burden' on contractual obligation" does not exceed the scope of permissible state action.[79]

The *Texaco, Inc.* opinion fails to clarify whether the Court relied on the *Spannaus* test[80] or made a full *Blaisdell* contract clause analysis.[81] In its discussion of contract clause considerations, the Court seemed to address only the extent of the impairment.[82] The Court labeled the burden only "minimal" and did not interpose any evaluation of the state's interest.[83] Apparently, the Court found it inappropriate to balance the state's interest against the private interest impaired; the impairment did not reach the threshold level required for the more thorough *Blaisdell* test. However, within its specific discussion of the contract clause, the Court cited *Blaisdell* for its general

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for a 5-4 majority, devoted only one paragraph specifically to contract clause evaluation.

77. 102 S. Ct. at 793-96. The appellant Texaco, Inc. claimed that the mineral owners did not receive constitutional notice of the statute's operation on their mineral rights. The Court held basically that the Constitution requires the legislature only to enact the legislation and give the public a reasonable time with which to familiarize themselves with its demands. The Court asserted that persons within the state are charged with the knowledge of any statute that affects their property. Further, because of the two-year grace period in the statute, the mineral owners had ample time to familiarize themselves with the statutory provisions. 102 S. Ct. at 793-94. Distinguishing *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), the Supreme Court stated that the requirement of individual notice applies only to judicial proceedings and not to a self-executing statute such as the Indiana Mineral Act. 102 S. Ct. at 795.

78. Id. at 791-92.

79. Id. at 792. The Court, however, first claimed that the mineral interests concerned were property and not contract rights, intimating that property rights would not be protected by the contract clause. *Id.* This distinction does not seem to be founded in logic, as the mineral owners created their property rights by contracts, which were being impaired. In fact courts have recognized that the contract clause affords protection to property rights. Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So. 2d 775 (1944). The Court, apparently recognizing the inadequacy of its property/contract distinction, then articulated the traditional contract clause analysis. 102 S. Ct. at 792-93.

80. *See* notes 40-48 and accompanying text *supra*.

81. *See* notes 27-38 and accompanying text *supra*.

82. 102 S. Ct. at 792.

83. *Id.*, at 792-93.

test of constitutionality.[84] Furthermore, the Court initially discussed the constitutionality of recording acts and similar legislation in general[85] and in so doing seemed to engage itself in balancing Indiana's[86] sovereign interest against the private interference such statutes create.[87] These parts of the opinion support the view that the Court—albeit subtly—made a more in depth contract clause review than the *Spannaus* test requires.

Prior to *Texaco, Inc.*, the Michigan Supreme Court in *Van Slooten* evaluated a constitutional challenge to the Michigan Dormant Minerals Act.[88] Relying only on *Spannaus*, the court held the Michigan legislation did not violate the contract clause.[89] Like the Supreme Court later held in *Texaco, Inc.*, the *Van Slooten* court found that the statute's recording requirement, which inserted a new contractual obligation, constituted the only cognizable impairment.[90] Proceeding from this conclusion, the court found the contractual impairment insubstantial, and therefore not severe enough to reach the threshold level necessary for the court to entertain a *Blaisdell* analysis.[91]

84. *Id.* at 793 n.24.

85. *Id.* at 790-91. For a discussion of the constitutionality of the recording acts see note 51 and accompanying text *supra*.

86. 102 S. Ct. at 791-92. Justice Stevens discussed the state's strong interest in the development of resources and collection of property taxes. *Id.*

87. *Id.* at 792. In this part of the opinion the Court asserted that it was within the state's power to demand statutory compliance of such a minimal nature, when the state sought to promote those important public goals. *Id.*

88. 410 Mich. 21, 299 N.W.2d 704 (1980). For a discussion of the Michigan Dormant Minerals Act see notes 10-11 *supra*.

89. *Id.* at 39-41. 299 N.W.2d at 708-09. The Court also discussed El Paso v. Simmons, 379 U.S. 497 (1965), by analogy in upholding the statute. Basically, the court found that if the United States Supreme Court upheld the constitutionality of the statute in *Simmons* then the Dormant Minerals Act certainly would be constitutional. The court also cited Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830) to support its conclusion that recording acts are constitutional. 410 Mich. at 40-41, 299 N.W.2d at 708-09. At no time did the court attempt to apply the facts of this case to the *Blaisdell* criteria, but rather relied on the threshold test of *Spannaus*. Quoting from *Spannaus*, the court asserted that the recording requirement did not create a "high hurdle" for the statute to clear. *Id.* at 39, 299 N.W.2d at 708.

90. *Id.* at 47-50, 299 N.W.2d at 712-13.

91. *Id.* The court did not assert that the mineral interests were themselves insubstantial and that therefore, because of the public good, the Constitution would permit a statute to extinguish the mineral rights. The court avoided a determination of the value of the mineral interests by viewing the demand to record as the statute's only contractual interference. The United States Supreme Court adopted a similar line of reasoning in Jackson v. Lamphire 28 (3 Pet.) 280 (1830). In that case, the Court re-

Chief Justice Coleman in *Van Slooten*, like Justice Stevens writing for the Court in *Texaco, Inc.*, underestimated the breadth as well as the severity of the impairment. This misjudgment could have far-reaching implications on the contract clause as a restraint on state legislation. These courts should not have viewed the demand to record as constituting the only impairment, but also should have looked to the practical effects of the statute.[92] The legislation effectively destroys the contractual covenant the grantor employed to reserve the subsurface rights, thus causing the destruction of an existing fee simple interest.[93]

The *Van Slooten* court, by applying *Spannaus* to the Michigan recording statute, avoided having to balance the state's public purpose against the private interference. So long as courts do not require legislatures to justify similar recording statutes, states enjoy free reign to disturb a broad spectrum of contractual relationships. The *Van Slooten* decision thus could permit the legislature to interfere with any land contract[94] merely by imposing such a recording demand on

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viewed the constitutionality of a recording statute imposed on owners who had acquired land from the state. The Court held that an additional recording requirement did not impair the contractual obligation because there was no covenant in the contract prohibiting any further state action. *Id.* at 289.

Van Slooten is distinguishable from *Lamphire* in that the Michigan statute imposes a recording requirement where the state is not a party to the contract. As established in United States Trust v. New Jersey, 431 U.S. 1 (1977), however, the Court will look with greater scrutiny at a statute which alters a state's contract. *Lamphire* and *Van Slooten* interpose identical recording requirements. In light of the judicial policy set down in *United States Trust*, if the recording requirement on a state contract is constitutional in *Lamphire*, then such a statute certainly would be constitutional in *Van Slooten*, where the court must apply a lesser degree of scrutiny.

92. *See* Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 514 (1942). The Court upheld a statute which provided relief for insolvent municipalities from creditors. The Court asserted that in contract clause analysis, a court must look to the practical effects of the statute. In quoting from Davis v. Mills, 194 U.S. 451, 457 (1903), the Court opined that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' " *Id.*

93. *See* note 100 *infra*. This will be the practical effect, especially because many of the interest holders are not even aware of the statute.

94. The *Van Slooten* court seemed to limit its finding to the recording of land contracts. Such a ruling, however, easily could be extended by later courts, which may seek to apply the doctrine to contracts of any kind. The *Van Slooten* court evaluated the severity of the impairment based on the fact that the interest holders did not rely on the absence of a recording requirement when entering into the land contract; the impairment, therefore, was insubstantial. 410 Mich. at 39-41, 299 N.W.2d at 708-09. Since few parties entering into a contract of any kind ever rely in this manner, a court could make the same reliance conclusion with almost any contract. If the doc-

owners whose property interests the government seeks to destroy. Upon failure to record as prescribed, the owner will lose his contractual property rights. The Constitution certainly should not allow the state unrestricted ability to use recording statutes as a pretext for destroying contractual obligations.[95]

The *Van Slooten* court, therefore, warrants criticism for its finding of an insubstantial impairment. Otherwise, the contract clause provides few meaningful restrictions. Courts must not read the *Spannaus* test[96] to classify impairments rising to the magnitude of that in *Van Slooten* as insubstantial. The test would abrogate entirely the Framers' design to restrain state legislatures[97] if it allowed a constitutional validation in *Van Slooten* without a full contract clause analysis.[98] While the court approached the problem improperly, it clearly arrived at the correct result.[99] The dissent, properly finding a substantial impairment in the destruction of a fee simple estate,[100] proceeded to invoke the *Blaisdell* test.[101] Justice Levin asserted that the

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trine is taken to its fullest extension, a statute can require the recording of any contractual interest and deprive the owner upon his failure to record. While the statute will strip a party of contractual rights, the court will view the impairment as insubstantial and hold the statute constitutional.

95. Although the *Texaco, Inc.* decision is ambiguous, if the Supreme Court relied on *Spannaus*, then the identical argument is appropriate for Stevens' opinion.

96. *See* notes 40-48 and accompanying text *supra*.

97. *See* note 22 and accompanying text *supra*.

98. It is at least arguable that *Texaco, Inc.* held the statute constitutional after entertaining this full analysis. Even if it did, however, the failure to recognize the consequence of the statute (destruction of a fee simple interest; *see* notes 92-93 and accompanying text *supra*) as the actual impairment can be crucial. By miscalculating the severity of the impairment, the Supreme Court inappropriately denied weight to the private interests involved when it balanced the public and private concerns. The Court, by finding the more substantial impairment would have seen a more accurate outcome in such a balance, and perhaps may have found that the public need did not justify such severe private interference.

99. *See* notes 106-10 and accompanying text *infra*. The ultimate outcome in Texaco, Inc. v. Short, 102 S. Ct. 781 likewise seems correct.

100. The dissent cited the *Spannaus* test indicating that a substantiality inquiry is proper. According to the dissent the impairment should be measured by both the "obligation" and "consequences of the failure to meet the new obligation." 410 Mich. at 60, 299 N.W.2d at 718. The Justice asserted that, as in *Spannaus*, the new requirement was unforeseen. Further, the statute almost assuredly would destroy many interests. The dissent therefore would have found the impairment substantial. *Id.* at 60-61, 299 N.W.2d at 718.

101. *Id.* at 57, 299 N.W.2d at 716-17. The dissent recited the five criteria of *Blaisdell*. For the *Blaisdell* criteria see note 37 and accompanying text *supra*. In order to

statute violated the contract clause because the legislature had neither appropriately nor reasonably tailored it to the asserted public purpose.[102] The justice opined it reasonable to extinguish interests of non-ascertainable owners, but constitutionally inappropriate to deem abandoned the rights of those whom the state could easily locate.[103] Thus, the overinclusive statute interfered unnecessarily with private agreements.[104]

While accurately assessing the practical impact of the Michigan statute, the *Van Slooten* dissent failed to perceive the severity of the marketability and land resource problems that dormant mineral interests create.[105] *Blaisdell* contemplated that public problems of this magnitude would not lie beyond legislative solution. The nation is confronted with an energy crisis;[106] during this emergency, courts

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set the stage for his opinion, Justice Levin then discussed the history of contract clause analysis, from the post-*Blaisdell* cases to *Spannaus*. Id. at 57-59, 299 N.W.2d at 716-18. See note 39 *supra*.

102. *Id.* at 62-63, 299 N.W.2d at 719. The Justice recognized the state's purpose of improving land resource exploration and found it legitimate. *Id.* at 62, 299 N.W.2d at 719.

103. *Id.*

104. *Id.* The Justice concluded that the statute was too over-inclusive to pass constitutional scrutiny. The Michigan statute, because it fails to distinguish between accessible and inaccessible owners, was compared to the statute held invalid in W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935). For discussion of *Kavanaugh*, see note 39 *supra*.

Justice Levin also proposed statutory methods that would have been more reasonable. He pointed out that the legislature could have adopted methods short of forfeiture. For example, the Justice suggested that the statute could have established a "royalty rate" such that the statute would force a lease upon an owner who failed to record. The lease would enable interested parties to develop the land resources. 410 Mich. at 63, 299 N.W.2d at 719.

In addition, Justice Levin found that the statute is unreasonable because there is no effort whatsoever to protect the interest holder. There is no attempt to locate the owner, no attempt to compensate the interest holder from the proceeds of any resource development, and no attempt to notify the owner of any threat to his holdings. *Id.* at 63, 299 N.W.2d at 719-20. *Contra*, *id.* at 52 n.28, 299 N.W.2d at 714 n.28 (where the majority opinion states that the statute itself provides sufficient notice of the recording requirement).

105. The majority opinion, of course, did not have to address this issue. It dealt with the contract clause argument by asserting that the contractual impairment did not satisfy the threshold level of severity required by the *Spannaus* test. Such additional inquiry into the strength of the state's interest is therefore irrelevant to this opinion's analysis. *See* notes 72-74 *supra*.

106. Brief of Appellant at xi, Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978).

must not interpret the Constitution to prohibit remedial measures such as that taken by Michigan.[107] The reasonableness and appropriateness of a statute must be viewed in light of judicial deference to legislative judgment, a policy illuminated throughout the history of contract clause analysis.[108] The dissent does not place enough emphasis on this judicial mandate.[109] While the dissent applied the proper test, its conclusion cannot withstand the value imperatives prescribed in *Blaisdell*. The majority appropriately found the Dormant Minerals Act constitutional, but should have done so by adherence to the contract clause balancing principles in *Blaisdell* and applied by Justice Levin.

The *Van Slooten* court reached the proper result; a contrary outcome would have drastically diminished Michigan's ability and sovereign discretion to alleviate a threatening public problem.[110] *Van Slooten*, like *Texaco, Inc.*, may indicate a more restrictive view of the contract clause in its capacity to invalidate state legislation[111] at a time when the clause seemed to be gaining strength, evidenced in decisions such as *Spannaus*.[112] The sharp changes in judicial attitude, reflected in decisions before and after *Blaisdell*,[113] may continue. Perhaps when the United States Supreme Court confronts what it believes to be an intolerable state interference with contractual obligations, the Court will be able to better articulate the extent

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107. *Id. Blaisdell* contemplated that the meaning of "emergency" should not be construed narrowly. As stated in W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934), the state's power is made available "by a great public calamity such as fire, flood or earthquake, and the State's protective power could not be said to be nonexistent when the urgent public need demanding relief was produced by other and economic causes." *Id.*

108. *See, e.g.*, Faitoute Iron & Steel Co. v. City of Asbury Park, 310 U.S. 502 (1942). For discussion of *Faitoute* see notes 39, 92 *supra*.

109. 410 Mich. at 59-60, 299 N.W.2d at 718. Justice Levin only purported to apply the policy of deference. By stating that the deference must be "harmonized with the court's duty to apply the constitutional prohibition," *id.* at 59, 299 N.W.2d at 718, Levin appeared to be paying little attention to this judicial policy. In fact, in the remainder of the opinion, he did not seem to resolve doubt as to reasonableness in favor of the legislative judgment.

110. *See* note 2 *supra*.

111. The somewhat summary manner in which the *Texaco, Inc.* Court dealt with the issue, may be indicative of the strength the Supreme Court feels it possesses. *See* note 76 and accompanying text *supra*.

112. G. GUNTHER, *supra* note 39 at 556.

113. *See* note 39 *supra*.

to which the contract clause imposes limits on state legislatures.[114] Until then, the courts remain free to apply imprecisely the otherwise well reasoned rationale of the *Blaisdell-Spannaus* contract clause approach.

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114. *Van Slooten v. Larsen* was appealed to the United States Supreme Court, Docket No. 80-1624. The Court, less than one week after its decision in *Texaco, Inc. v. Short*, dismissed *Van Slooten* for "want of a substantial federal question." (Telephone Discussion with the clerk's office of the United States Supreme Court). This dismissal should not be surprising. The Court, failing to join this case with *Texaco, Inc.*, which had identical issues, had nothing to decide in *Van Slooten*. Hence, the Court dismissed it.