CONSTITUTIONAL LAW — CONTRACTS CLAUSE — LOUISIANA SUPREME COURT PERMITS RETROACTIVE EXTENSION OF PRESCRIPTIVE PERIOD IN INSURANCE CONTRACTS. — *State v. All Property & Casualty Insurance Carriers*, 937 So. 2d 313 (La. 2006).

Disasters — whether of human or natural origin — expose citizens to extreme hardship, and legislative responses deserve considerable judicial deference even when they substantially impair contract rights. As both a constitutional and a policy matter, however, boundaries must still be drawn. The Contracts Clause, along with the Due Process and Takings Clauses, has traditionally marked these limits, although its application has suffered from a lack of clarity and consistency.[1] Recently, in *State v. All Property & Casualty Insurance Carriers*,[2] the Supreme Court of Louisiana upheld a retroactive extension of the prescriptive period[3] for filing insurance claims relating to Hurricanes Katrina and Rita against a Contracts Clause challenge. Although the court relied on the proper four-prong test developed by the U.S. Supreme Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*,[4] it applied the test erroneously by overlooking relevant precedent and failing to address the full implications of the facts. This mistaken decision absolves the legislature of responsibility for leaving the insured at risk, thereby incentivizing the very sort of shortsighted policymaking that the retroactive law was enacted to correct.

Hurricanes Katrina and Rita struck on August 29 and September 25 of 2005, respectively, leaving a severely dislocated population and a bevy of potential insurance claims in their wake.[5] The Louisiana statute governing insurance contracts provided a minimum prescriptive period of only one year[6] — shorter than that of any other Gulf Coast state[7] — and created the prospect of numerous disadvantaged policy holders forfeiting their claims.[8] To forestall such a scenario, the Louisiana Legislature passed two acts (the Acts) that together extended the prescriptive period for claims arising out of Hurricanes Katrina and

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[1] *See generally* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995).

[2] 937 So. 2d 313 (La. 2006).

[3] A prescriptive period is functionally equivalent to a statute of limitations.

[4] 459 U.S. 400, 410–13 (1983).

[5] *Ins. Carriers*, 937 So. 2d at 316.

[6] LA. REV. STAT. ANN. § 22:629(B) (2006); *see also Ins. Carriers*, 937 So. 2d at 325 n.12.

[7] *See* ALA. CODE § 6-2-34 (Supp. 2005) (six-year period); FLA. STAT. ANN. § 95.11(2)(b) (West 2002) (five-year period); MISS. CODE ANN. § 15-1-49 (2006) (three-year period); TEX. CIV. PRAC. & REM. CODE ANN. § 16.070 (Vernon 2006) (two-year period).

[8] The prescriptive period technically limits the right of action, but it effectively sets the time period for recovery on a claim through the insurer.

Rita for an additional year.[9] The Attorney General sought a declaratory judgment finding the Acts constitutional and petitioned the Supreme Court of Louisiana for certiorari.[10] Exercising its supervisory jurisdiction, the court granted the writ and remanded the case to the state district court for an expedited hearing.[11] After the district court found the Acts constitutional,[12] the Attorney General requested immediate review, which the Louisiana Supreme Court granted.[13]

The court unanimously affirmed the judgment of the state district court. Writing for the court, Justice Traylor first construed the Acts to apply retroactively[14] and then found them to be substantive in nature.[15] Turning to the issue of constitutionality, the court began by addressing respondent insurers' claim that the Acts violated the "virtually identical"[16] provisions of the Federal and State Contracts Clauses,[17] applying the four-step test set out by the U.S. Supreme Court in *Energy Reserves*.[18] First, Justice Traylor reasoned that although extensive prior regulation of the insurance industry lessened

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[9] 2006 La. Acts 739; 2006 La. Acts 802.

[10] *Ins. Carriers*, 937 So. 2d at 317. The Attorney General initially filed in state district court. The insurers removed to federal district court, but the case was remanded for lack of jurisdiction. *Id.* at 318.

[11] *Id.* at 318.

[12] *Id.* at 317. The district court opinion is unpublished, and the Louisiana Supreme Court opinion notes Judge Bates's reasoning in only two instances: she dismissed the federal preemption claim on the ground that there was no showing of a conflict, *id.* at 329, and she rejected the procedural due process claim "because the Acts themselves put property and casualty insurance carriers on notice," *id.* at 330.

[13] *Id.* at 318. The State did not suffer adverse judgment, but the court rejected respondents' claim that this stripped it of jurisdiction. *See id.* at 318 n.5.

[14] *Id.* at 322 (citing explicit language in the Acts that "clearly indicate[d] the legislature's intent that their provisions be applied both retroactively and prospectively").

[15] *Id.* at 322–23 (citing Chance v. Am. Honda Motor Co., 635 So. 2d 177, 178 (La. 1994)).

[16] *Id.* at 323 (quoting Morial v. Smith & Wesson Corp., 785 So. 2d 1, 11 (La. 2001); Segura v. Frank, 630 So. 2d 714, 728 (La. 1994)) (internal quotation marks omitted).

[17] The Federal Constitution states that "[n]o state shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. CONST. art. I, § 10. The Louisiana Constitution states that "[n]o . . . law impairing the obligation of contracts shall be enacted." LA. CONST. art. I, § 23.

[18] The Louisiana Supreme Court gave a concise statement of the test:

> [F]irst, the court must determine whether the state law would, in fact, impair a contractual relationship; second, if an impairment is found, the court must determine whether the impairment is of constitutional dimension; third, if the state regulation constitutes a substantial impairment, the court must determine whether a significant and legitimate public purpose justifies the regulation; finally, if a significant and legitimate public purpose exists, the court must determine whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Ins. Carriers, 937 So. 2d at 324 (quoting *Segura*, 630 So. 2d at 729) (internal quotation marks omitted). In *Segura*, the Louisiana Supreme Court relied on *Energy Reserves* to articulate this test. *See Segura*, 630 So. 2d at 729 (citing Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410–13 (1983)).

the severity of the impairment,[19] the Acts effected "more than minimal alteration of the insurers' contractual obligations."[20] The court therefore found a constitutionally cognizable impairment, satisfying the first two prongs of the Contracts Clause test and mandating consideration of the Acts' public purpose.[21] Moving to the third prong, the court reasoned that "the public purpose requirement is primarily designed to prevent a state from embarking on a policy motivated by a simple desire to escape its financial obligations."[22] Justice Traylor then cited the legislature's own stated purpose for Act 802 — to "prevent additional hardship to property owners who have already been overwhelmed and daunted by . . . hardships"[23] — and accepted it as "significant and legitimate."[24]

Because the first three inquiries were all answered in the affirmative, the court proceeded to consider the essential reasonableness of the Acts under the fourth prong, balancing the public purpose against the impairment. Although the State was a party to some affected contracts, thereby requiring a "stricter standard of review,"[25] the court found this "incidental to the scope of the matter at issue" as the Acts were "not providing a benefit to a special interest."[26] Justice Traylor instead focused on two elements that pointed to constitutionality: the lowered reasonableness of expectations in the highly regulated insurance industry and the fact that the contractual infringements were "limited in both time and scope."[27] These factors were determinative in the court's conclusion that the Acts were a legitimate exercise of legislative power.[28]

The Supreme Court of Louisiana erred in its application of the fourth prong of the Contracts Clause test, which considers "whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption."[29]

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19 The court noted that it had previously held that "the Louisiana insurance industry is pervasively regulated." *Ins. Carriers*, 937 So. 2d at 325 (quoting Habeney v. Bellow, 645 So. 2d 624, 624 (La. 1994)) (internal quotation marks omitted).

20 *Id.*

21 *Id.* at 324–25.

22 *Id.* at 325 (quoting *Segura*, 630 So. 2d at 731) (internal quotation mark omitted).

23 *Id.* at 326 (quoting 2006 La. Acts 802, § 1) (internal quotation mark omitted).

24 *Id.*

25 *Id.* at 327 (citing Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 n.14 (1983); U.S. Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977)).

26 *Id.*

27 *Id.*

28 *Id.* The court proceeded to reject the insurers' remaining claims with less extensive treatment. *Id.* at 327–30.

29 *Id.* at 324 (quoting Segura v. Frank, 630 So. 2d 714, 729 (La. 1994)) (internal quotation mark omitted).

Conducting only a cursory Contracts Clause analysis, the court overlooked two U.S. Supreme Court cases: *United States Trust Co. v. New Jersey*,[30] which took a hard look at all of the circumstances surrounding the legislature's decision to impair a contract, and *Home Building & Loan Ass'n v. Blaisdell*,[31] which provides an example of a constitutionally permissible contract modification. It further failed to draw lessons from the factually similar case of *Hellinger v. Farmers Group, Inc.*[32] These cases suggest a reframing of the facts — especially the previous regulation of the insurance industry and the limited nature of the impairment — that shifts the fourth-prong inquiry in favor of the respondents. Moreover, the Louisiana Supreme Court's mistaken holding has negative policy implications: by incentivizing government irresponsibility, it promises to disadvantage both victims of disasters and those whose contractual rights are at stake.

In *U.S. Trust*, the Supreme Court applied the Contracts Clause to strike down an attempted repeal of legislation that itself created a contract, emphasizing that the State was a party to the contract it sought to modify and that less intrusive means were available.[33] Additionally, the Court found that the impairment was not "reasonable in light of the surrounding circumstances" because the initial legislation was adopted "with full knowledge" of the very same concerns that ultimately led to the attempt to repeal it.[34] Thus, in determining whether an impairment is "of a character appropriate to the public purpose,"[35] the reviewing court must take a broad view by considering the three elements just noted: the State's own contractual status, the availability of less intrusive means, and the nature of the State's previous involvement with the contract.

The *Insurance Carriers* court considered the facts selectively and failed to take sufficient account of these three factors. First, as *U.S. Trust* held, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."[36] Although the State was not party to all of the contracts in *Insurance Carriers*, as it was in *U.S. Trust*, the difference is merely one of degree. Not only is Louisiana a major property owner,[37] but it stands to be as-

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[30] 431 U.S. 1 (1977).
[31] 290 U.S. 398 (1934).
[32] 111 Cal. Rptr. 2d 268 (Ct. App. 2001).
[33] *U.S. Trust*, 431 U.S. at 30–31.
[34] *Id.* at 32.
[35] *Ins. Carriers*, 937 So. 2d at 324 (quoting Segura v. Frank, 630 So. 2d 714, 729 (La. 1994)).
[36] 431 U.S. at 30–31.
[37] As the respondent insurance company noted in its brief:
> The State has not yet sued insurers as an assignee, and but for Act 802, any such claims would have been prescribed as of the one year anniversary of the hurricanes. Thus, Act

signed the otherwise valueless claims of many homeowners — even those who may have been satisfied with their coverage.[38] Further, the Acts' promotion of the interests of the State is not reasonably related to the asserted purpose of protecting disadvantaged citizens.[39] The court's dismissal of this element as "incidental,"[40] therefore, grants an inappropriately high level of deference to the legislature.

Similarly, the court gave no consideration to the availability of less intrusive and more reasonable alternatives. The respondents offered two possible options: a law that would either "only [give] rights to original policyholders, and not assignees such as the State," or one that would "establish[] objective standards for who was entitled to more time to sue."[41] Alternatively, the State could have retained the basic structure of the Acts but subsidized the claims through taxation, thereby recreating the initial contracting situation by spreading the cost of a longer prescriptive period among the insured.[42]

Finally, the court failed to consider the full scope of the legislature's role in the contractual relationships that it altered. It did not mention, let alone weigh, the reliance developed as a result of the nearly fifty-year tenure of the one-year prescriptive period.[43] Further, although the court gave full accord to the lowering of contract expectations effectuated by Louisiana's pervasive regulation of the insurance industry,[44] it did not consider the central role played by the legislature in setting and maintaining the prescriptive period. Unlike its neighboring states, which apply generic contractual statutes of limitations, Louisiana specifically provides a one-year period for insurance contracts[45] in a statute that the legislature revisited in 1983, 1987, and 1991.[46] This history belies any claim that the short period was simply an overlooked technicality. Similarly, the fact that other Gulf Coast states have longer periods was used by the court only to show that the lack of a "nationwide standard" undermined the insurers' contract expectations,[47] but it also demonstrates that Louisiana's adoption of the

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> 802 essentially created a new right for the State to be able to sue the insurers that it would not have had but for Act 802 . . . .

Brief for the Defendant-Respondent, *Ins. Carriers* (No. 2006-CD-2030), 2006 WL 2840042 at *20 [hereinafter Respondent's Brief].

38 *See id.* at *18 (describing how the Acts permit the State to file otherwise precluded claims that it is assigned through the Louisiana Recovery Authority's Road Home Program).

39 *See id.* at *19.

40 *Ins. Carriers*, 937 So. 2d at 327.

41 Respondent's Brief, *supra* note 37, at *23.

42 The realized risk is of course more expensive than was the unrealized risk.

43 Respondent's Brief, *supra* note 37, at *16.

44 *See Ins. Carriers*, 937 So. 2d at 324–25.

45 *See supra* p. 844.

46 *See* LA. REV. STAT. ANN. § 22:629 (2006).

47 *See Ins. Carriers*, 937 So. 2d at 325 n.12.

short prescriptive period was not the mere parroting of national or regional consensus. Thus, the State took responsibility for the prescriptive period only to pass the costs of that responsibility to the insurers.

Related problems with the court's reasoning become clear after examining *Blaisdell*, a seminal case in which the Supreme Court rejected a Contracts Clause challenge to a Depression-era law permitting courts to make an equitable determination to forestall mortgage foreclosure by extending the period of redemption.[48] Importantly, the emergency addressed by the law required a solution that included retention of ownership, akin to a specific performance remedy.[49] Also, the Court emphasized that the law was limited in nature — it included numerous safeguard mechanisms, the mortgagee retained substantial value, and, most importantly, any actual extension depended on individual facts.[50] The Court stressed that, because the mortgagor had to pay reasonable rental value during the extended period,[51] the law gave "regard to the interest of mortgagees as well as to the interest of mortgagors."[52]

In the instant case, however, these elements were not present. First, the public purpose was entirely reducible to monetary need. Because money is fungible, the legislature deserves less latitude when performing retroactive financial reallocation than when mandating specific performance. Second, one of the key points relied on by the *Insurance Carriers* court was that the impairment was "limited in both time and scope."[53] However, the practical consequences — not the quantity of modifications or the putative importance of a certain term — are most relevant to determining whether an impairment is "limited." Although the Acts made a technically minor change, the extension will often mean the difference between zero and full liability for insurers. Finally, unlike the mortgagees in *Blaisdell*, the insurers suffered substantial impairment "without any corresponding increase in premium payment to offset any additional costs."[54] This fact is especially troubling when viewed in relation to the two elements already mentioned: it further undermines the notion that the Acts were of a limited nature and, in the absence of a specific performance rationale, it shows that the Acts effected a one-way transfer of wealth from insurer to insured.

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[48] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416–18 (1934).

[49] *See id.* at 420 (noting that "the appellees, husband and wife, occupied the premises as their homestead, . . . offering the remaining rooms for rental").

[50] *Id.* at 416, 445. It should also be noted that this retention of value results in part from the fact that a mortgage is less of an all-or-nothing proposition than is insurance coverage.

[51] *Id.* at 445 (finding that mortgagees were not "left without compensation for the withholding of possession").

[52] *Id.* at 446.

[53] *Ins. Carriers*, 937 So. 2d at 327.

[54] Respondent's Brief, *supra* note 37, at *14.

Moreover, the law at issue in *Blaisdell* merely authorized courts to make an individual, equitable determination.[55] Interestingly, Louisiana law has long provided a strikingly similar remedy via the doctrine of *contra non valentem*, which excuses good-cause inabilities "to exercise [a] cause of action when it accrues."[56] The *Insurance Carriers* court rejected the claim that, in light of this doctrine, the Acts merely protected "people who, by definition, could *not* justify their delay,"[57] finding instead that the legislature acted permissibly to "avoid mass confusion and an increase in filings."[58] However, the existence of the doctrine significantly reduces the governmental interest in impairing contracts to protect those citizens who would already be protected. The remaining justification for adopting such an expansive law — avoiding confusion and clogged court dockets — entails a far less substantial interest than that given primary emphasis — "prevent[ing] additional hardship to property owners."[59] This is especially true since the State stands to be a principal beneficiary of a set-time, non-fact-specific extension.[60]

Finally, the court missed critical insights from a California case that involved similar legislation following the Northridge earthquake.[61] In *Hellinger*, the statute of limitations was extended in order to account for widespread fraudulent dealing.[62] Because the problem was dishonest insurance estimators rather than the statute of limitations, the punitive nature of the law was justifiable.[63] Moreover, this specific rationale was reflected in the terms of the law, which extended the statute of limitations only for those who had contacted their insurer by a date "well before the statute was enacted" and who had not litigated to finality.[64]

The Acts had far broader sweep than the California law despite the Louisiana insurers' lack of culpability. Beyond basic reasonableness, this fact points to a fundamental distinction between the actions of the two legislatures. In *Hellinger*, the law extended the right of action for those whose claims had potentially been unjustly handled but gave no

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[55] *See id.* at *20–21.

[56] *Ins. Carriers*, 937 So. 2d at 327 n.13.

[57] Respondent's Brief, *supra* note 37, at *21.

[58] *Ins. Carriers*, 937 So. 2d at 327 n.13.

[59] *Id.* at 326 (quoting 2006 La. Acts 802, § 1) (internal quotation mark omitted).

[60] By the Acts, "the State gives itself time to file these suits it would not [otherwise] have." Respondent's Brief, *supra* note 37, at *18. Not only does it stand to possess assigned claims, *id.*, but as a "sophisticated entity that should understand its rights," *id.* at *19, it had a weaker *contra non valentem* claim.

[61] Hellinger v. Farmers Group, Inc., 111 Cal. Rptr. 2d 268, 273–74 (Ct. App. 2001).

[62] *Id.* at 275.

[63] *Id.* at 275–76.

[64] *Id.* at 283. The case was also distinguishable from *Ins. Carriers* on the ground that California was not a contracting party. *Id.* at 282.

benefit to those who had missed the deadline. As such, it functioned to *restore* the initial risk allocation. The same cannot be said of the Acts. There, the risk that actually materialized — the insured's being unable to file a claim within one year — was never accepted by the insurers or paid for by the insured. The Acts therefore severely *distorted* the original contractual relationship. The respondents claimed that their rates were set in reliance on the prescriptive period.[65] Rather than rejecting this claim — which would have been difficult given the U.S. Supreme Court's recognition that premiums are set by a "painstaking assessment of the insurer's likely liability"[66] and the court's own disposition on the issue[67] — the court held that even if true it would not change the analysis.[68] However, the insurers' reliance on a one-year prescriptive period does matter: they neither accepted nor were compensated for the increased risk that the Acts forced them to take.[69]

When the situation is viewed as a whole, then, as mandated by *U.S. Trust*, a very different picture from the one presented by the court emerges: the State of Louisiana, having taken on the responsibility of regulating the insurance industry, made a conscious decision not to adopt a prescriptive period commensurate with other hurricane-prone states, thereby accepting greater risk for its citizens. When this risk came to fruition, the legislature made the self-interested decision to pass the costs on to insurers. Involving neither the specific performance necessity of *Blaisdell* nor the recalibrating function of *Hellinger*, the Acts were not of a character appropriate to the public purposes claimed as justification.

As a policy matter, the *Insurance Carriers* decision functions to incentivize shortsighted, politically charged decisions by permitting states to take on long-term risk in exchange for short-term benefit and then reapportion the risk after it has been realized. It also represents a failure to apply the Contracts Clause forcefully by considering the total circumstances of the State's action, an approach that rendered the court unable to distinguish laws appropriately readjusting benefits and burdens from those in which the State exploits contractual relationships merely to transfer wealth. The hardships facing citizens as a result of the short prescriptive period are a product of legislative shortsightedness. The State must bear responsibility for its own mistake.

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[65] Respondent's Brief, *supra* note 37, at *14.

[66] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 246–47 (1978) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 721 (1978)).

[67] The court effectively assumed the truth of the insurers' factual claim. *See Ins. Carriers*, 937 So. 2d at 330 n.18.

[68] *Id.*

[69] *Cf.* Pa. Coal v. Mahon, 260 U.S. 393, 416 (1922) ("So far as [parties] have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.").