Forgotten Cases: *Worthen v. Thomas* and the Contract Clause

By David F. Forte

Note from the Editor:

This article discusses the history of interpretation of the Contract Clause and suggests that contemporary commentators have misunderstood that history by emphasizing the *Blaisdell* case at the expense of the more significant *Worthen* decision.

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• Kathleen M. Sullivan & Noah Feldman, Constitutional Law, 19th ed. 639 (2016).

• Geoffrey Stone et al., Constitutional Law, 7th ed. 980 (2013).

• Erwin Chemerinsky, Constitutional Law, 4th ed. 647 (2013).

• James W. Ely, Jr., The Contract Clause: A Constitutional History 224 (2016).

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There is a standard narrative about the demise of the Contract Clause. In January 1934, the Supreme Court decided *Home Building Ass'n v. Blaisdell*. Constitutional law scholars and textbooks tell us that the coalition of justices that formed the majority in *Blaisdell* would soon remove the Court from monitoring the economic policies of the state and federal governments.[1] We are told that *Blaisdell* took away the limitation to state economic legislation that the Impairment of Contracts Clause had previously imposed.[2] But it was a harbinger of much more, the narrative continues. Soon other constitutional dominos would fall. Two months later, the same five-Justice majority of Hughes, Roberts, Stone, Brandeis, and Cardozo killed the substantive due process right of contract in *Nebbia v. New York*,[3] and they buried it three terms later in *West Coast Hotel v. Parrish*.[4] Finally, the same line-up laid to rest restrictions on Congress' power under the Commerce Clause in *NLRB v. Jones & Laughlin*,[5] completing the defeat of any constitutional restrictions on economic legislation.

But the story told by the textbooks is not true. Chief Justice Hughes and his majority did not kill or even mortally wound the Contract Clause in *Blaisdell* in 1934. Five months later, the Court reaffirmed the vitality of the Contract Clause in *Worthen v. Thomas*, and it did so unanimously.[6]

I. Before *Worthen*

By 1934, the Impairment of Contracts Clause had had a long and not altogether coherent interpretive history. Under

1 Home Bldg. Ass'n v. Blaisdell, 290 U.S. 398 (1934).

2 U.S. Const. art. 1 § 10. ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). For example, in Kathleen M. Sullivan & Noah Feldman, Constitutional Law, 19th ed. (2016) there is a large excerpt of Hughes' opinion, a small snippet of Sutherland's dissent, and an implication that *Blaisdell* cleared the decks of nearly all Contract Clause claims, with *Worthen* mentioned as only an exception. *Id.* at 639. In Geoffrey Stone et al., Constitutional Law, 7th ed. (2013), following a large except from *Blaisdell*, the authors write, "After *Blaisdell*, what does the contract clause prohibit? The answer appears to be very little." *Id.* at 980. In this volume containing a plethora of cases, *Worthen* is missing. In Erwin Chemerinsky, Constitutional Law, 4th ed. (2013), *Blaisdell* is excerpted following a note that "the Contract Clause was made superfluous by the Court's protection of freedom of contract under the Due Process Clause of the Fifth and Fourteenth Amendments." *Id.* at 647. *Worthen* is missing.

3 291 U.S. 502 (1934).

4 300 U.S. 379 (1937).

5 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

6 W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934). *Blaisdell* was argued on November 8-9, 1933 and decided on January 8, 1934. *Worthen* was decided on May 28, 1934. In his compendious work on the Contract Clause, James W. Ely, Jr. notes some of the limiting language in *Blaisdell* and states that "the *Blaisdell* opinion did not sound the immediate death knell for the contract clause," mentioning *Worthen v. Thomas*. James W. Ely, Jr., The Contract Clause: A Constitutional History 224 (2016). But he still credits *Blaisdell* as the source of the effective end

Supreme Court precedents, the Clause applied to both public contracts (in which the state was a party) and private contracts (*Fletcher v. Peck*).[7] It also applied to state charters of corporations (*Dartmouth College v. Woodward*),[8] though state obligations under such charters were to be strictly construed (*Charles River Bridge v. Warren Bridge*).[9] The Clause was primarily retrospective, but contracts were to be subject to existing state laws when made (*Ogden v. Saunders*).[10] The Clause did not limit the state's inherent power of eminent domain (*West River Bridge v. Dix*),[11] nor did it prevent a state from adjusting its regime of legal remedies, so long as the newly imposed remedy did not materially impair a party's substantive rights under a contract (*Sturges v. Crowninshield*).[12] However, a state could use its police power to make illegal as *contra bona mores* previously concluded contracts (*Stone v. Mississippi*),[13] and the state could not alienate its reserved police powers to prevent it from legislating for the public welfare (*e.g. Chicago & A.R. Co. v. Tranbarger*),[14] including economic welfare (*Noble State Bank v. Haskell*).[15] Within each of the aforementioned doctrines, there were exceptions if not contradictions in the Court's precedents.

Then came *Home Building Ass'n v. Blaisdell*. In order to forestall a massive foreclosure crisis in the midst of the Great Depression, Minnesota passed the Minnesota Mortgage Moratorium Act in 1933. Under the Act, after a property had been foreclosed, the mortgagor could have his redemption period extended, during which he could cure the default. Moreover, during the extended redemption period, the mortgagor could remain in possession of the property, but had to pay to the mortgagee the fair market value in rent. The Act's available benefits were to lapse after two years. In 1934, the Minnesota Mortgage Moratorium Act came before the Supreme Court to be tested against the Impairment of Contracts Clause.

The two most important questions in in the *Blaisdell* case were 1) Could a state use its police power to restructure *economic* relationships in the private sphere even though that restructuring might affect contractual rights and duties under existing contracts? And 2) Did the state's adjustment of remedies for contractual breach materially alter the obligations and rights of the parties to the contract?

The question of whether the state's police power extended not only to health, safety, and morals, but also to "the general welfare," including economic betterment, had long been debated in the cases, but by 1934, the issue had been well settled in favor of its permissibility.[16] Nonetheless, when a state legislated on economic matters, the impact on contracts was often not merely incidental, as when the state abates a nuisance, but quite direct, thus involving the Contract Clause. That is why the appellant in *Blaisdell* spent much effort in arguing for the legitimacy of such economic legislation, and presumably why Chief Justice Hughes devoted a great deal of his opinion to justifying Minnesota's legislation as a legitimate exercise of the police power. Hughes concluded that the police power permitted the state to take drastic economic measures in a situation of dire emergency, and that the law's extension of the period of redemption was justified in order to stave off a catastrophic collapse of the mortgage market, the Contract Clause notwithstanding.

In dissent, Justice Sutherland (joined by Justices McReynolds, Van Devanter, and Butler) did not deny that economic regulation was within the state's police power, and he did not deny that there was an emergency. But, he stated unequivocally, "the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts."[17] In addition, Sutherland insisted, the original purpose of the Impairment of Contracts Clause was to forbid precisely the kinds of remedies that Minnesota imposed, for they invaded the core set of obligations of the contracting parties. To justify his position, Sutherland marshaled extensive historical evidence from the founding period.

To counter Sutherland's daunting arguments, Hughes took two tacks. The first was to deny the constitutional relevance of historical evidence altogether:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If, by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and

of Contract Clause protections. I think *Blaisdell* and *Worthen* created a workable compromise that was not upset until Justices Black and Frankfurter made more of *Blaisdell* than even Chief Justice Hughes would have wanted.

7 10 U.S. 87 (1810).

8 17 U.S. 518 (1819).

9 36 U.S. 420 (1837).

10 25 U.S. 213 (1827).

11 47 U.S. 507 (1848).

12 17 U.S. 122 (1819).

13 101 U.S. 814 (1880).

14 238 U.S. 67 (1915).

15 219 U.S. 104, *opinion amended*, 219 U.S. 575 (1911).

16 *E.g.*, Manigault v. Springs, 199 U.S. 473, 480-81 (1905) ("This power, which in its various ramifications is known as the police power, is an exercise of sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals . . . . Although [the Act] was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people . . . ."). Atlantic C.L.R. v. Goldsboro, 232 U.S. 548, 558 (1914) ("For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or of the State to establish all regulations that are necessary to secure the health, safety, good order, comfort or general welfare of the community; . . .").

17 *Blaisdell*, 290 U.S. at 473 (Sutherland, J., dissenting).

> outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[18]

In rejecting the relevance of the Framers' interpretation of the clauses of the Constitution, Hughes' position would have destroyed the very relevance of the Constitution. If Hughes had really followed Marshall's opinion in *McCulloch v. Maryland* and had written instead that the Constitution need not be confined to the *applications* of the clauses that the Framers would have engaged in, considering their particular circumstances, it would have been more defensible.

Hughes' second tack was more weighty. He argued that the purpose of the Contract Clause was to protect the integrity of a bona fide contract from material disruption by the state. He emphasized that the law permitting a temporary delay in foreclosure actually preserved the underlying mortgage relationship between the parties:

> The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered.[19]

Moreover, the purpose of the law was to stabilize the mortgage market so that thousands of other mortgages would not be put at risk:

> It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.[20]

In his dissent, Justice Sutherland understood how Hughes had dangerously interpreted Marshall's notion of an adaptable Constitution. He homed in on Hughes' mistake:

> The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that, in appropriate cases, they have the capacity of bringing within their grasp every new condition which falls within their meaning. But their *meaning* is changeless; it is only their *application* which is extensible.[21]

More to the point, it was precisely to prevent this kind of remedy in this kind of emergency that the Contract Clause had been framed. Minnesota's Act was precisely the type of legislation that the Clause had removed from state discretion. Clearly alarmed at the majority's view, Sutherland predicted that permitting Minnesota to make such a reform in these circumstances would be a wedge for further and more extensive incursions into the protections that the Constitution provided. Yet only a few months later, in *Worthen v. Thomas*, Hughes and Sutherland renewed their debate, but with a markedly different result.

II. Enter *Worthen*

In Little Rock, Arkansas, Mr. and Mrs. Ralph Thomas owned a harness company and rented their business premises from W.B. Worthen Company. Worthen brought suit when the Thomases failed to keep up with their rental payments, and it gained a judgment of $1,200. Ralph Thomas then passed away, and Worthen discovered that he had a life insurance policy worth $5,000 payable to his wife. Worthen then served a writ of garnishment on the insurance company. Subsequently, the Arkansas legislature passed a law that exempted from process of attachment any proceeds of a life or accident insurance policy. Because of the new law, the insurance company then moved to dismiss the writ of garnishment; Worthen answered, asserting that the Arkansas law contravened the Impairment of Contracts Clause of the U.S. Constitution.

The Supreme Court unanimously agreed with Worthen. Again, Hughes wrote the Court's opinion, joined by Roberts, Stone, Brandeis, and Cardozo. He took pains to show why *Blaisdell* constituted a narrow exception to the sweep of the Contract Clause's prohibition. No longer did he claim that the interpretation of the meaning of the Constitution had to change with circumstances. Rather, he fashioned a test (analogous to what later courts would denominate a strict scrutiny test) to apply whenever a state sought to justify an action that would normally constitute an impairment of an existing contract:

> We held that, when the exercise of the reserved power of the state, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency . . . . Accordingly, in the case of *Blaisdell*, we sustained the Minnesota

18 *Id.* at 443.

19 *Id.* at 425.

20 *Id.* at 439-40 (citations omitted).

21 *Id.* at 451 (Sutherland, J., dissenting).

> mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted.[22]

In *Worthen*, Mrs. Thomas had argued that the state had merely adjusted certain remedies with only an incidental impact on existing contracts, but the Court found that argument "unavailing," for there were—as later Courts might put it—no narrowly drawn limitations to meet a compelling need:

> There is no limitation of amount, however large. Nor is there any limitation as to beneficiaries, if they are residents of the State. There is no restriction with respect to particular circumstances or relations . . . . The profits of a business, if invested in life insurance, may thus be withdrawn from the pursuit of creditors to whatever extent desired.[23]

This time, Hughes quoted John Marshall—a strong defender of the broad sweep of the Impairment of Contracts Clause—more appropriately from his opinion in *Sturges v. Crowninshield*: "Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."[24]

Justice Sutherland and his three allies concurred "unreservedly" in the judgment.[25] But they insisted that they found no difference in the situation of *Blaisdell* compared to *Worthen.* There must be no "emergency" (or "strict scrutiny") exception to the clause:

> We were unable then, as we are now, to concur in the view that an 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. . . . We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of those provisions may be measured by the length of time they are to continue or the extent of the infraction, and that only those of long duration or of large importance are to be held bad. Such was not the intention of those who framed and adopted that instrument.[26]

III. The *Worthen* Rule Prevails

Well then, was *Worthen* just a temporary hiccup on the way to granting states an unfettered right to exercise their police power to affect the terms of pre-existing contracts? Or was *Blaisdell* the blip? In subsequent Contract Clause cases in the 1930s, when *Blaisdell* or *Worthen* was mentioned, there is no doubt that whatever tension there was between them was resolved in favor of the latter. For example, a week after *Worthen* was decided, Justice Brandeis noted in his opinion in *Lynch v. United States*, "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened," citing *Worthen* and "cases cited by Mr. Justice Sutherland in *Home Building & Loan Assn. v. Blaisdell*."[27] It is striking that Brandeis, who had sided with Chief Justice Hughes in *Blaisdell*, here cited *Worthen* and the strong defense of the Impairment of Contracts Clause in Justice Sutherland's dissent in *Blaisdell*.

The dominance of *Worthen* is not hard to understand. First, *Worthen* was unanimously decided. Second, Chief Justice Hughes took pains to limit the impact of *Blaisdell*'s rule to truly emergency situations where a state used very narrow and temporary means that upheld the fundamental contractual relationship between the parties. In fact, from *Worthen v. Thomas* onward, there was an uptick in Contract Clause cases before the Court under Chief Justice Hughes. From the time when Hughes became Chief Justice in 1930 until *Blaisdell* was decided in 1934, the Court heard eight Contract Clause cases. But from 1934's *Worthen v. Thomas* through 1937, twenty Contract Clause cases came before the Court, and the Court struck down the state law at issue in five of them.[28] In sum, *Blaisdell* did not signal the Court's retreat from considering Contract Clause cases or its reluctance to decide against the state.

W.B. Worthen Company returned to the Supreme Court in 1935, and it won, again unanimously, in *W.B. Worthen v. Kavanaugh*.[29] Under Arkansas law, municipalities were permitted to issue bonds to pay for improvements to city property. The security given to the bondholders in case of municipal default was to allow them to foreclose on properties of homeowners who had failed to pay their assessment for the improvement in question. In the midst of the Depression, presumably with municipalities defaulting, Arkansas passed debtor relief measures, extending the foreclosure period from 65 days to at least two and a half years, and reducing the penalty on the delinquent home owner from 20% to 3%. For the unanimous Court, Justice Cardozo found that, considering all the statutorily permitted delays, "A minimum of six and a half years is thus the total period during which the holder of the mortgage is without an effective remedy."[30] Arkansas' claim that it was meeting an emergency was unconvincing. Cardozo concluded, "Not Blaisdell's case, but Worthen's supplies the applicable rule."[31]

The same year, Chief Justice Hughes himself further narrowed the emergency exception of *Blaisdell* in *A.L.A. Schechter Poultry Corp. v. United States*.[32] In deciding that the National Recovery Act exceeded the powers of Congress, and citing *Blaisdell*, Hughes declared in words that could have been written by Sutherland:

> We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light

22 *Worthen*, 292 U.S. at 433-34.

23 *Id.* at 431.

24 17 U.S. at 198.

25 *Worthen*, 292 U.S. at 434.

26 *Id.* at 434-35.

27 Lynch v. United States, 292 U.S. 571, 580 n.8 (1934).

28 Benjamin Fletcher Wright, Jr., The Contract Clause of the Constitution 99 (1937).

29 295 U.S. 56 (1935).

30 *Id.* at 61.

31 *Id.* at 63.

32 295 U.S. 495 (1935).

> of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[33]

Also in 1935, the refinement and limitation of *Blaisdell* continued in an opinion by Justice Brandeis in which he noted:

> Statutes for the relief of mortgagors, when applied to preexisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell,* they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W.B. Worthen Co. v. Kavanaugh,* when it appeared that this substantive right was substantially abridged. Compare *W.B. Worthen Co. v. Thomas.*[34]

The following year, 1936, the Court—again unanimously—struck down a state law under the Impairment of Contracts Clause in *Treigle v. Acme Homestead Ass'n*.[35] Louisiana had enacted a law that removed a shareholder's right to recoup his investment and share of the profits when he withdrew from a building and loan association. Although the Acme Homestead Association asserted that the law was framed to deal with an existing emergency, Justice Roberts, writing for the Court, simply dismissed the argument: "It does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional. Compare *W.B. Worthen Co. v. Thomas*."[36]

Thus, in three Contract Clause cases that came before the Supreme Court soon after *Blaisdell*, the Court unanimously struck down the state statues at issue in each case for unconstitutionally impairing contracts. Moreover, three justices who had been in the *Blaisdell* majority took pains to restrict and limit the impact of that decision when they wrote the subsequent opinions. By 1937, *Worthen* and a now limited *Blaisdell* had solidified into a workable rule: a state law that materially impairs an obligation of one of the parties to a pre-existing contract violates the Contract Clause, unless there is such an emergency that a narrow and limited exception can be permitted, but only if that exception preserves the underlying benefits of the contract to the parties.

The Court had reached an extraordinary and virtually unanimous consensus. Of the twenty cases that the Court decided after *Blaisdell* through 1937 in which the Contract Clause was at issue, there was a dissent in only one of them.[37]

It is noteworthy that, in a number of cases in which the Court upheld state legislation that significantly altered the remedial rights of one of the parties to a contract, the Court emphasized that the new remedy preserved the underlying value of the contract so that one party would not gain a windfall benefit not contemplated in the original contract. This ensured that the *Blaisdell* exception to the general rule of the Contract Clause, as set forth in *Worthen*, would remain limited. Thus, in *Richmond Mortgage & Loan Corp. v. Wachovia Bank and Trust Co.*, Justice Roberts began by stating the standard:

> The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.[38]

But, he continued, in this case:

> The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due.[39]

Chief Justice Hughes applied the same rationale two years later in *Honeyman v. Jacobs*,[40] and Justice Douglas declared another

33 *Id.* at 528.

34 Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 580 (1935) (striking down a newly enacted provision of federal bankruptcy law that had relieved adjudged debtors of their obligations under existing mortgage contracts. Brandeis applied Contract Clause jurisprudence to the Due Process Clause of the Fifth Amendment).

35 297 U.S. 189 (1936).

36 *Id.* at 195.

37 Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934); Seattle Gas Co. v. Seattle, 291 U.S. 638 (1934); *Worthen*, 292 U.S. 426; United States Mortg. Co. v. Matthews, 293 U.S. 232 (1934); *Kavanaugh* 295 U.S. 56; *Treigle*, 297 U.S. 189; Violet Trapping Co. v. Grace, 297 U.S. 119 (1936); Ingraham v. Hansen, 297 U.S. 378 (1936); Wright v. Central Kentucky Natural Gas Co., 297 U.S. 537 (1936); International Steel & Iron Co. v. National Surety Co., 297 U.S. 657 (1936); Schenebeck v. McCrary, 298 U.S. 36 (1936); Barwise v. Sheppard, 299 U.S. 33 (1936); Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109 (1937); Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124 (1937); Stockholders of Peoples Banking Co. v. Sterling, 300 U.S. 175 (1937); Henderson Co. v. Thompson, 300 U.S. 258 (1937); Phelps v. Board of Education, 300 U.S. 319 (1937); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937); Dodge v. Board of Education, 302 U.S. 74 (1937); Hale v. State Board of Assessment & Review, 302 U.S. 95 (1937) (Sutherland, J., dissenting, joined by McReynolds and Butler, JJ.).

38 300 U.S. at 128-29 (1937).

39 *Id.* at 130.

40 306 U.S. 539 (1939).

two years later in a similar case, "Mortgagees are constitutionally entitled to no more than payment in full."[41]

IV. Transition

Contrary to the traditional tale, the *Blaisdell-Worthen* rule survived the judicial revolution of 1937-38, though there were signs of changes to come. In 1938, Justice Van Devanter resigned and was replaced by Hugo Black. Justice Sutherland was no longer on the Court, and Justice Cardozo was too ill to participate in most of the Court's business. Nonetheless, the Court did invalidate an Indiana law under the Impairment of Contract Clause, but on grounds that could make future invocations of the Clause's protection more problematical.

The Indiana Teachers' Tenure Act of 1927, which was incorporated into teachers' contracts with school districts, gave tenure to teachers who had served for five years; subsequent termination was allowed only for just cause. But the 1927 Act was repealed in 1933 for certain classes of jurisdictions (townships as opposed to cities). Subsequently, a tenured teacher in a township had her contract terminated. She challenged the termination and ultimately had her case decided by the Supreme Court in 1938. In *Indiana ex rel. Anderson v. Brand*, the Court held that the repeal of the Tenure Act of 1927 violated the Impairment of Contracts Clause.[42] But in articulating the rule, Justice Roberts took the bite out of any future invocations of the Contract Clause:

> Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality [citing *Home Bdg. & Loan Ass'n v. Blaisdell*; *Worthen Co. v. Thomas*, *Worthen Co. v. Kavanaugh*; and *Treigle v. Acme Homestead Ass'n*].[43]

The ground in this case, however, for invalidating the law was that "the repeal of the earlier Act by the latter was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed."[44] In effect, the decision was based on a hidden Equal Protection grounding, for Roberts, writing for the majority, thought the law's distinguishing between townships and cities was irrational. In his dissent, Justice Black began a campaign to disable the Contract Clause, asserting that the teacher held her position not under contract but under a statute regulating economic policy over which the state has plenary discretion subject only to the checks of the state's political process.[45]

Justice Roberts had one last hurrah for the Contract Clause in *Wood v. Lovett* in 1941.[46] In 1935, Arkansas had passed a statute that guaranteed distressed sale purchasers of land clear title despite irregularities in proceedings prior to the sale. In those disrupted economic times, Arkansas wanted such purchasers to enjoy clear title. But in 1937, Arkansas repealed the 1935 law, placing earlier land purchasers at risk of having their titles contested. By a 5-3 vote, the Court voided the repeal statute. Justice Black again dissented, this time joined by Justices Douglas and Murphy. Black emphasized the sovereign capacity of the state to alter its land and taxation statutes. Citing *Blaisdell* no less than nineteen times, Black made it the centerpiece of his theory of the Contract Clause: "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."[47] Neither the majority nor Justice Black mentioned *Worthen v. Thomas*.

Justice Black's position soon became the norm as the Court accorded more and more deference to states' judgment in exercising their police power over economic affairs. Already in 1940, the Court had upheld, against a Contract Clause challenge, New Jersey statutes that revised the rights of shareholders of building and loan associations.[48] For the Court, Justice Reed had declared:

> In *Home Building & Loan Association v. Blaisdell* this Court considered the authority retained by the State over contracts "to safeguard the vital interests of its people." The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants.[49]

Reed gave no emergency or strict scrutiny-like qualification.

V. *Blaisdell* Redux

By 1945, the Court was ready to give the coup de grace. Every year since 1933, New York State had passed one-year moratoriums on foreclosure proceedings on mortgages that were in default.[50] In 1944, East New York Savings Bank brought a foreclosure proceeding in which it contested the constitutionality of New York's latest moratorium act. In his opinion for the Court, Justice Frankfurter made no mention of *Worthen v. Thomas*. Instead, he raised *Blaisdell* to the highest level of authority and

41 Gelfert v. Nat'l City Bank, 313 U.S. 221, 233 (1941).

42 303 U.S. 95 (1938).

43 *Id.* at 108-09, n. 17.

44 *Id.* at 109.

45 *Id.* at 110 (Black, J., dissenting).

46 313 U.S. 362 (1941).

47 *Id.* at 383 (Black, J., dissenting).

48 Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940).

49 *Id.* at 38-39.

50 In 1941, the extension had been for two years. E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945).

took it far beyond the limitations that Hughes had originally established in the case and in subsequent refinements:

> Since *Home Bldg. & L. Assn*. v. *Blaisdell*, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice . . . put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since (*e.g., Honeyman v. Jacobs*, 306 U.S. 539; *Veix v. Sixth Ward Assn*., 310 U.S. 32; *Gelfert v. National City Bank*, 313 U.S. 221; *Faitoute Co. v. Asbury Park*, 316 U.S. 502), 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 its people," is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.[51]

And just in case one might think that deference was due to a legislature only in emergency situations, Justice Frankfurter declared, "Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933."[52]

The post-New Deal Court had decided that it was inappropriate for a judicial body to second-guess economic decisions by legislative bodies, whether state legislatures or Congress, and that the property protections in specific parts of the Constitution, such as the Contract Clause and the Takings Clause, had to be turned into issues determinable by the political branches.

Frankfurter's *Blaisdell*-centric reinterpretation of the Contract Clause stuck. Twenty years later, in *El Paso v. Simmons*, Justice White championed Frankfurter's position.[53] In that case, land purchased from but forfeited to the state of Texas could be reclaimed under certain conditions. Texas later passed a law that limited the period for a reinstatement claim to five years. On an assertion of a Contract Clause violation, the Supreme Court found for El Paso (which had bought the land from the state). Justice White declared:

> The *Blaisdell* opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order . . ." 290 U.S. at 434-435. Moreover, the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id*. at 437. The State has the "sovereign right . . . to protect the . . . general welfare of the people . . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232-233.[54]

On the other hand, Justice Black, who a quarter century earlier had championed *Blaisdell* and the near unfettered discretion of the state to order economic relationships, now dissented and took the opposite position:

> The cases the Court mentions do not support its reasoning. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, which the Court seems to think practically read the Contract Clause out of the Constitution, actually did no such thing, as the *Blaisdell* opinion read in its entirety shows and as subsequent decisions of this Court were careful to point out . . . . Chief Justice Hughes, the author of *Blaisdell*, later reiterated and emphasized that that case had upheld only a temporary restraint which provided for compensation, when four months later he spoke for the Court in striking down a law which did not. *W.B. Worthen Co. v. Thomas*, 292 U.S. 426.[55]

After Justice Black passed away in 1971, there was a brief, but ultimately pallid resurgence of the Contract Clause. In *United States Trust Co. v. New Jersey*, the Court struck down the repeal of a statutory covenant that had guaranteed to bondholders that revenues from a public transportation system would not be diverted to subsidize upgrades and maintenance.[56] Justice Blackmun's opinion asserted that the Contract Clause had greater bite when applied to a state's repudiation of its own contracts, and imposed in such a case a middle tier test: "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[57] It did not mention *Worthen v. Thomas*.

A year later, in *Allied Structural Steel Co. v. Spannaus*, the Court voided a Minnesota law that forced a revision of a private

51 *Id.* at 231-32.

52 *Id*. at 235.

53 379 U.S. 497 (1965).

54 *Id*. at 508-09.

55 *Id*. at 523-24, 526 (Black, J., dissenting).

56 United States Trust Co. v. N.J., 431 U.S. 1 (1977).

57 *Id*. at 25.

company's pension obligations.[58] There, Justice Stewart accurately summarized the law emanating from *Blaisdell* and *Worthen*, but instead of applying the *Blaisdell-Worthen* standard, he continued to use the middle tier test from Justice Blackmun's opinion in *United States Trust*: "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[59] If the answer to that question is affirmative, then, was the legislation "necessary to meet an important general social problem"?[60]

Allied Structural Steel was the high point of the Contract Clause's effectiveness in the years after the New Deal. In finding for the state a few years later in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*,[61] a unanimous Court weakened the middle-tier test even further: "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation," but when the state is not a party to the contract, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[62] Subsequent cases have returned to the near total deferential model.[63] In fact, since *Allied Structural Steel*, the Supreme Court has not voided any state law under the Contract Clause.

VI. Conclusion

In 1934, by folding *Blaisdell* into *Worthen*, the Supreme Court had reached a workable standard under which courts could judge cases in which state legislation had impaired pre-existing contracts: a state law that materially impairs an obligation of one of the parties to a pre-existing contract violates the Contract Clause, unless there is such an emergency that a narrow and limited exception can be permitted, and which exception preserves the underlying benefits of the contract to the parties. The near-unbroken run of unanimous decisions following *Worthen* through the 1930s demonstrates that a workable consensus had been reached.

Today, following the post-New Deal judiciary that believed that the validity of economic and social legislation should be left to the state's political branches to decide, all that remains of the Contract Clause's protective sweep is an asymmetric middle-tier test that has little analytic benefit and virtually no effect.

It was different in the 1930s. In the midst of an era when the Court struggled with the appropriate constitutional doctrine to use in judging economic disputes, *Worthen v. Thomas* and its redefinition of *Blaisdell* worked with hardly a ripple. It could work again.

58 438 U.S. 234 (1978).

59 *Id.* at 244.

60 *Id.* at 247.

61 Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983).

62 *Id.* at 411-12 (citing *United States Trust*).

63 *See, e.g.,* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).

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