



5-31-2018

Forgotten Cases: *Worthen v. Thomas*

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Recommended Citation

David F. Forte, *Forgotten Cases: Worthen v. Thomas*, 66 Clev. St. L. Rev. 705 (2018)
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FORGOTTEN CASES: *WORTHEN V. THOMAS*

DAVID F. FORTE**

ABSTRACT

According to received opinion, the case of the *Home Bldg. & Loan Ass'n v. Blaisdell*, decided in 1934, laid to rest any force the Contracts Clause of the United States Constitution had to limit state legislation that affected existing contracts. But the Supreme Court's subsequent decisions belie that claim. In fact, a few months later, the Court unanimously decided *Worthen v. Thomas*, which reaffirmed the vitality of the Contract Clause. Over the next few years, in twenty cases, the Court limited the reach of *Blaisdell* and confirmed the limiting force of the Contract Clause on state legislation. Only after World War II did the Court abandon the Contract Clause by interpreting *Blaisdell* well beyond its original intention. The Court in the 1930s had devised a workable formula that could be still workable today.

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I. INTRODUCTION

There is a standard narrative about the demise of the Contract Clause. In January 1934, the Supreme Court decided *Home Bldg. & Loan Ass'n v. Blaisdell*.¹ Constitutional Law scholars and textbooks say that the coalition of justices that formed the majority in *Blaisdell* withdrew the Court from monitoring the economic policies of the state and federal governments.² *Blaisdell* began the retreat by taking away the limitation to state economic legislation that the Contracts Clause had previously

* Editor's Note: A substantial portion of this Article was previously published in the *Federalist Society Review*. *Cleveland State Law Review* publishes this expanded Article with the permission of the author and the Federalist Society. For the original publication, see David F. Forte, *Forgotten Cases: Worthen v. Thomas and the Contract Clause*, 18 FEDERALIST SOCIETY REV. 48 (2017), <https://fedsoc.org/commentary/publications/forgotten-cases-worthen-v-thomas-and-the-contract-clause>.

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

² *See id.* at 443–44.

imposed.³ However, as the narrative continues, it was a harbinger of much more. Soon, other constitutional dominos would fall. Two months later, the same five-Justice majority—Justices Hughes, Roberts, Stone, Brandeis, and Cardozo—killed the substantive due process right of contract in *Nebbia v. New York*,⁴ and they buried it three terms later in *West Coast Hotel Co. v. Parrish*.⁵ Finally, the same line-up laid to rest restrictions on Congress’s power under the Commerce Clause in *NLRB v. Jones & Laughlin*,⁶ 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 unanimously reaffirmed the vitality of the Contract Clause in *Worthen v. Thomas*.⁷

II. BEFORE *WORTHEN*

By 1934, the Contracts Clause had had a long and not altogether coherent interpretive history. Under Supreme Court precedents, the Clause applied both to public contracts, in which the state was a party, and to private contracts.⁸ It also applied

³ U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”). For example, in KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW (Robert C. Clark et al. eds., 19th ed. 2016), there is a large excerpt of Hughes’s 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 (Vicki Been et al. eds., 7th ed. 2013), following a large excerpt from *Blaisdell*, the authors write, “[a]fter *Blaisdell*, what does the [C]ontract [C]lause prohibit? The answer appears to be very little.” *Id.* at 980. In this volume containing a plethora of cases, *Worthen* is missing. In ERWIN CHEREMINSKY, CONSTITUTIONAL LAW (Vicki Been et al. eds., 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.

⁴ *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding the conviction of a storekeeper for selling milk below the price set by the state in the face of a substantive due process challenge).

⁵ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state law setting a minimum wage for women despite a substantive due process challenge).

⁶ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁷ *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934). The Court heard arguments for *Blaisdell* on November 8–9, 1933 and issued its decision on January 8, 1934. The Court decided *Worthen* 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 [C]ontract [C]lause,” mentioning *Worthen v. Thomas*, but he still credits *Blaisdell* as the source of the effective end of Contract Clause protections. JAMES W. ELY, JR., THE CONTRACT CLAUSE 224 (2016). This Article demonstrates, I aver, that *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.

⁸ *Fletcher v. Peck*, 10 U.S. 87 (1810) (holding that a state’s repeal of a land grant law was unconstitutional under the Contract Clause because it constituted the taking of land from subsequent bona fide purchasers).

to state charters of corporations,⁹ although state obligations under such charters were to be strictly construed.¹⁰ The Clause was primarily retrospective, but contracts were subject to existing state laws when formed.¹¹ The Clause neither limited the state's inherent power of eminent domain¹² nor prevented 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.¹³ However, a state could use its police power to make previously concluded contracts illegal as *contra bona mores*,¹⁴ and the state could not alienate its reserved police powers to prevent it from legislating for the public welfare,¹⁵ including economic welfare.¹⁶ Within each of the aforementioned doctrines, exceptions and even contradictions were present in the Court's precedents.

Then came *Blaisdell*. To forestall a massive foreclosure crisis in the midst of the Great Depression, the Minnesota State Legislature passed the Minnesota Mortgage Moratorium Act in 1933.¹⁷ Under the Act, after a lender foreclosed a property, the mortgagor could have his redemption period extended.¹⁸ During that time, he could cure the loan default.¹⁹ Moreover, during the extended redemption period, the mortgagor could remain in possession of the property, but had to pay the mortgagee the property's fair market value in rent.²⁰ The Act's available benefits lapsed after two

⁹ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (upholding the sanctity of Dartmouth College's original charter under the Contract Clause, thus invalidating a state statute designed to force the college to become a public college).

¹⁰ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (holding that a charter contract should be interpreted as narrowly as possible, and that a contract between the state and a bridge company did not confer exclusive rights).

¹¹ *Ogden v. Saunders*, 25 U.S. 213 (1827) (holding that the Contract Clause prevented states from passing laws affecting contracts already signed, but holding that laws affecting future contracts were presumed to be part of the contract).

¹² *W. River Bridge Co. v. Dix*, 47 U.S. 507 (1848) (holding that the Contract Clause did not limit a state's ability to take a bridge in eminent domain, even when the original contract granted an exclusive right that would be violated by the state's taking).

¹³ *Sturges v. Crowninshield*, 17 U.S. 122 (1819) (holding that states may pass bankruptcy laws so long as such laws do not impair the obligation of the contract).

¹⁴ *Stone v. Mississippi*, 101 U.S. 814 (1880) (holding that a state's police power extends to the regulation of lotteries as a matter of public health and public morals).

¹⁵ *Chi. & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67 (1915) (upholding a state law penalizing railroad owners who failed to maintain drainage openings in railroad embankments, stating that the police power is not alienable, and contract rights are subject to the fair exercise of police power).

¹⁶ *Noble State Bank v. Haskell*, 219 U.S. 104, *amended by* 219 U.S. 575 (1911) (upholding a state banking law requiring contributions to state depositors' guaranty fund as a lawful exercise of the state police power).

¹⁷ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 415 (1934).

¹⁸ *Id.* at 416.

¹⁹ *Id.*

²⁰ *Id.* at 425.

years.²¹ In 1934, the Act came before the Supreme Court to be tested under the Contracts Clause.²²

Blaisdell presented two important questions. First, 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?²³ Second, did the state's adjustment of remedies for contractual breach materially alter the obligations and rights of the parties to the contract?²⁴

Courts had long debated 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.²⁵ By 1934, the issue had been well settled in favor of its permissibility.²⁶ 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.²⁷ This is why the appellant in *Blaisdell* spent much effort arguing the legitimacy of 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 State's police power.²⁸ 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 to stave off a catastrophic collapse of the mortgage market, the Contract Clause notwithstanding.²⁹

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

²¹ *Id.* at 416.

²² *Id.*

²³ *Id.* at 425.

²⁴ *Id.* at 430–31.

²⁵ *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 395 (1926) (upholding an ordinance excluding business-related buildings, including apartment buildings, from certain residential neighborhoods; stating that the exercise of police power was justifiable as protecting health, safety, morals, and general welfare; and emphasizing that the increasingly complex world justified increasingly restrictive local laws).

²⁶ *E.g.*, *Atl. Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914) ("For it is settled that neither the '[C]ontract' [C]lause nor the '[D]ue [P]rocess' [C]lause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community"); *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 the 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").

²⁷ *Blaisdell*, 290 U.S. at 438.

²⁸ *Id.* at 439–40.

²⁹ *Id.* at 445.

that there was an emergency.³⁰ Yet 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.”³¹ In addition, Sutherland insisted, the original purpose of the Contracts Clause was to forbid precisely the kinds of remedies that Minnesota’s State Legislature imposed, as those remedies invaded the core set of obligations of the contracting parties.³² To justify his position, Sutherland marshaled extensive historical evidence from the founding period.³³

To counter Sutherland’s daunting arguments, Hughes took two tacks.³⁴ The first was to deny the constitutional relevance of historical evidence altogether.³⁵ Hughes asserted:

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 to-day [sic], 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 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.”³⁶

In rejecting the relevance of the Framers’ interpretation of the clauses of the Constitution, Hughes’s position would have destroyed the very relevance of the Constitution. Hughes’s opinion would have been more defensible if he followed Justice Marshall’s opinion in *McCulloch v. Maryland*³⁷ and wrote instead that the Constitution need not be confined to the *applications* of the clauses that the Framers might have had in mind while drafting the Constitutional text in question.

Hughes’s second tack was weightier. He argued that the purpose of the Contract Clause was to protect the integrity of a bona fide contract from material disruption by

³⁰ *Id.* at 473 (Sutherland, J., dissenting).

³¹ *Id.*

³² *Id.* at 473–74.

³³ *Id.* at 453 (“The history of the times, the state of things existing when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy. . . . And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted.” (citations omitted)).

³⁴ *Id.* at 427–28, 443.

³⁵ *Id.* at 443.

³⁶ *Id.* (emphasis added) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)).

³⁷ See *McCulloch*, 17 U.S. at 371 (explaining that it would have been impossible for the Founders to foresee and incorporate into the Constitution the variety of circumstances in America’s ever-changing and ever-improving political society).

the state.³⁸ 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.³⁹

Moreover, the purpose of the law was to stabilize the mortgage market so that thousands of other mortgages would not be put at risk.⁴⁰ Hughes asserted:

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.⁴¹

In his dissent, Justice Sutherland recognized that Hughes had dangerously interpreted Marshall's notion of an adaptable Constitution.⁴² He honed in on Hughes's mistake, stating:

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.⁴³

The Framers wrote the Contract Clause precisely to prevent this kind of remedy in this kind of emergency. Minnesota's Act was exactly the type of legislation that the Clause removed from state discretion.⁴⁴ 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

³⁸ *Blaisdell*, 290 U.S. at 427–28.

³⁹ *Id.* at 425.

⁴⁰ EDWARD VINCENT MURPHY, CONG. RES. SERV., RL34653, ECONOMIC ANALYSIS OF A MORTGAGE FORECLOSURE MORATORIUM at summary (2008).

⁴¹ *Blaisdell*, 290 U.S. at 439–40 (citations omitted).

⁴² *Id.* at 448–49 (Sutherland, J., dissenting).

⁴³ *Id.* at 451 (emphasis added).

⁴⁴ *Id.* at 472.

the Constitution provided.⁴⁵ Yet, only a few months later, in *Worthen v. Thomas*, Hughes and Sutherland renewed their debate, but with a markedly different result than in *Blaisdell*.⁴⁶

III. 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.⁴⁷ Worthen brought suit when the Thomases failed to keep up with their rental payments⁴⁸ and gained a judgment of \$1,200.⁴⁹ Ralph Thomas subsequently passed away, and Worthen discovered that Thomas had a life insurance policy worth \$5,000 payable to his wife.⁵⁰ Worthen then served a writ of garnishment on the insurance company.⁵¹ Thereafter, the Arkansas State Legislature passed a law that exempted from process of attachment any proceeds of a life or accident insurance policy.⁵² Due to the new law, the insurance company moved to dismiss the writ of garnishment; Worthen answered, asserting the Arkansas law contravened the Contracts Clause of the United States Constitution.⁵³

The Supreme Court unanimously agreed with Worthen.⁵⁴ Again, Hughes authored the Court's opinion, joined by Justices Roberts, Stone, Brandeis, and Cardozo.⁵⁵ He took pains to show why *Blaisdell* constituted a narrow exception to the sweep of the Contract Clause's prohibition.⁵⁶ He no longer claimed that the interpretation of the meaning of the Constitution changed with new circumstances.⁵⁷ Rather, he fashioned a test—analogueous 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.⁵⁸ He contended:

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

⁴⁵ *Id.* at 448.

⁴⁶ *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 426, 434 (1934).

⁴⁷ *Id.* at 429.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 429–30.

⁵³ *Id.* at 430.

⁵⁴ *Id.* at 434.

⁵⁵ *Id.* at 429; Richard E. Berg-Andersson, *Justices of the United States Supreme Court*, GREEN PAPERS, <https://www.thegreenpapers.com/Hx/JusticesUSSC.html> (last updated Oct. 2, 2017).

⁵⁶ *Worthen*, 292 U.S. at 433.

⁵⁷ *Id.*

⁵⁸ *Id.*

conditions appropriate to the emergency. . . . Accordingly, in the case of *Blaisdell*, we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted.⁵⁹

In *Worthen*, Mrs. Thomas argued that the State merely adjusted certain remedies with only an incidental impact on existing contracts.⁶⁰ The Court found her argument “unavailing” because there were—as later Courts might put it—no narrowly drawn limitations to meet a compelling need.⁶¹ The Court stated:

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.⁶²

This time, Hughes quoted Justice Marshall—a strong defender of the broad sweep of the Contract 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.”⁶³

Justice Sutherland and his three allies concurred “unreservedly” in the judgment.⁶⁴ However, Sutherland insisted that the situation of *Blaisdell* compared to that in *Worthen* was no different.⁶⁵ Arguing that the Contract Clause must not have an “emergency” (or “strict scrutiny”) exception, he stated:

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.⁶⁶

IV. THE *WORTHEN* RULE PREVAILS

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

⁵⁹ *Id.* at 433–34.

⁶⁰ *Id.* at 432.

⁶¹ *Id.*

⁶² *Id.* at 431.

⁶³ *Id.* at 432 (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 198 (1819)).

⁶⁴ *Id.* at 434 (Sutherland, J., concurring).

⁶⁵ *Id.*

⁶⁶ *Id.* at 434–35.

was *Blaisdell* the blip? In subsequent Contract Clause cases in the 1930s, whenever *Blaisdell* or *Worthen* was mentioned, there is no doubt that whatever tension there was between the two cases was resolved in favor of the latter. For example, a week after the Court decided *Worthen*, Justice Brandeis noted in his opinion in *Lynch v. United States* that “[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.”⁶⁷ It is significant that Brandeis, who sided with Chief Justice Hughes in *Blaisdell*, now emphasized *Worthen* and the strong defense of the Contract Clause in Justice Sutherland’s dissent in *Blaisdell*.⁶⁸

Worthen’s dominance is not difficult to understand. First, *Worthen* was unanimously decided.⁶⁹ 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 to uphold the fundamental contractual relationship between the parties.⁷⁰ In fact, from *Worthen* onward, the Court saw an uptick in Contract Clause cases.⁷¹ From the time Hughes became Chief Justice in 1930 until the Court decided *Blaisdell* in 1934, the Court heard eight Contract Clause cases.⁷² Yet from 1934’s *Worthen* through 1937, twenty Contract Clause cases came before the Court, and the Court struck down the state law at issue in five of them.⁷³ 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 in *W.B. Worthen v. Kavanaugh*.⁷⁴ The Court once again unanimously ruled in favor of *Worthen*.⁷⁵ Arkansas law permitted municipalities to issue bonds to pay for improvements to city

⁶⁷ *Lynch v. United States*, 292 U.S. 571, 580, 580 n.8 (1934) (citing *Worthen*, 292 U.S. 246, “and cases cited by Mr. Justice Sutherland in *Home Building & Loan Assn. v. Blaisdell*.”).

⁶⁸ *Id.* at 580 n.8.

⁶⁹ *Worthen*, 292 U.S. at 426.

⁷⁰ *Id.* at 433.

⁷¹ See BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 98 (1937).

⁷² *Id.* at 99.

⁷³ *Id.*; *Hale v. State Bd. of Assessment & Review*, 302 U.S. 95 (1937); *Dodge v. Bd. of Educ.*, 302 U.S. 74 (1937); *Wright v. Vinton Branch of Mountain Tr. Bank*, 300 U.S. 440 (1937); *Phelps v. Bd. of Educ.*, 300 U.S. 319 (1937); *Henderson Co. v. Thompson*, 300 U.S. 258 (1937); *Stockholders of Peoples Banking Co. v. Sterling*, 300 U.S. 175 (1937); *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 300 U.S. 124 (1937); *Midland Realty Co. v. Kan. City Power & Light Co.*, 300 U.S. 109 (1937); *Barwise v. Sheppard*, 299 U.S. 33 (1936); *Schenebeck v. McCrary*, 298 U.S. 36 (1936); *Int’l Steel & Iron Co. v. Nat’l Sur. Co.*, 297 U.S. 657 (1936); *Wright v. Cent. Ky. Nat. Gas Co.*, 297 U.S. 537 (1936); *Ingraham v. Hanson*, 297 U.S. 378 (1936); *Violet Trapping Co. v. Grace*, 297 U.S. 119 (1936); *Treigle v. Acme Homestead Ass’n*, 297 U.S. 189 (1936); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *U.S. Mortg. Co. v. Matthews*, 293 U.S. 232 (1934); *Worthen*, 292 U.S. 426; *Seattle Gas Co. v. Seattle*, 291 U.S. 638 (1934); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619 (1934).

⁷⁴ *Kavanaugh*, 295 U.S. 56.

⁷⁵ *Id.*

property.⁷⁶ The security given to the bondholders in cases of municipal default was to allow them to foreclose on properties of homeowners who failed to pay their assessment for the improvement in question.⁷⁷ In the midst of the Great Depression, the Arkansas State Legislature responded to municipal defaults by passing debtor relief measures that extended the foreclosure period from sixty-five days to at least two and a half years and reduced the penalty on the delinquent home owner from twenty percent to three percent.⁷⁸ 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.”⁷⁹ Arkansas’s claim that it was meeting an emergency was unconvincing.⁸⁰ Cardozo concluded, “[n]ot *Blaisdell*’s case, but *Worthen*’s . . . supplies the applicable rule.”⁸¹

The same year, Chief Justice Hughes further narrowed the emergency exception of *Blaisdell* in *A.L.A. Schechter Poultry Corp. v. United States*.⁸² In deciding that the National Recovery Act exceeded the legislative 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 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.⁸³

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

Statutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this [C]ourt when, as in *Home Building & Loan Association 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.*

⁷⁶ *Id.* at 57.

⁷⁷ *Id.*

⁷⁸ *Id.* at 60–61.

⁷⁹ *Id.* at 61.

⁸⁰ *Id.* at 63.

⁸¹ *Id.* (citation omitted).

⁸² *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549–50 (1935).

⁸³ *Id.* at 528.

Worthen Co. v. Kavanaugh, when it appeared that this substantive right was substantially abridged. Compare *W.B. Worthen Co. v. Thomas*.⁸⁴

The following year, 1936, the Court—again unanimously—struck down a state law under the Contracts Clause in *Treigle v. Acme Homestead Ass’n*.⁸⁵ In that case, Louisiana had enacted a law that removed a shareholder’s rights to recoup his investment and share of the profits when he withdrew from a building and loan association.⁸⁶ Although the Acme Homestead Association asserted that the law was framed to deal with an existing emergency, Justice Roberts, writing for the Court, dismissed the argument.⁸⁷ Justice Roberts asserted that the law did “not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members [were] neither temporary nor conditional. Compare *W.B. Worthen Co. v. Thomas*.”⁸⁸

Thus, in three Contract Clause cases the Court heard after *Blaisdell*, the Court unanimously struck down the state statutes at issue for unconstitutionally impairing contracts.⁸⁹ Moreover, three justices who were in the *Blaisdell* majority made efforts to restrict and limit the impact of that decision when they wrote subsequent opinions.⁹⁰ By 1937, *Worthen* and a now limited *Blaisdell* 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 Clause⁹¹ 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.⁹²

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, only one of them had a Justice dissent.⁹³

⁸⁴ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 580 (1935) (citations omitted) (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).

⁸⁵ *Treigle v. Acme Homestead Ass’n*, 297 U.S. 189, 198 (1936).

⁸⁶ *Id.* at 192.

⁸⁷ *Id.* at 195.

⁸⁸ *Id.* (citations omitted).

⁸⁹ See, e.g., *Treigle*, 297 U.S. at 198; *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 57 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

⁹⁰ See *Treigle*, 297 U.S. at 191; *Kavanaugh*, 295 U.S. at 57; *Worthen*, 292 U.S. at 429.

⁹¹ See *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 300 U.S. 124, 128–29 (1937).

⁹² *Worthen*, 292 U.S. at 432–33.

⁹³ *Hale v. State Bd. of Assessment & Review*, 302 U.S. 95 (1937) (Sutherland, J., dissenting, joined by McReynolds and Butler, JJ.); *Dodge v. Bd. of Educ.*, 302 U.S. 74 (1937); *Wright v. Vinton Branch of Mountain Tr. Bank*, 300 U.S. 440 (1937); *Phelps v. Bd. of Educ.*, 300 U.S. 319 (1937); *Henderson Co. v. Thompson*, 300 U.S. 258 (1937); *Stockholders of Peoples Banking Co. v. Sterling*, 300 U.S. 175 (1937); *Richmond Mortg. & Loan Corp.*, 300 U.S. at 124; *Midland Realty Co. v. Kan. City Power & Light Co.*, 300 U.S. 109 (1937); *Barwise v. Sheppard*, 299 U.S. 33 (1936); *Schenebeck v. McCrary*, 298 U.S. 36 (1936); *Int’l Steel & Iron Co. v. Nat’l Sur. Co.*, 297 U.S. 657 (1936); *Wright v. Cent. Ky. Nat. Gas Co.*, 297 U.S.

Notably, 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.⁹⁴ The Court's emphasis ensured that the *Blaisdell* exception to the general rule of the Contract Clause, as set forth in *Worthen*, remained limited. Thus, in *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. 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.⁹⁵

But, he continued, in this particular 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.⁹⁶

Chief Justice Hughes applied the same rationale two years later in *Honeyman v. Jacobs*.⁹⁷ Also, in a similar case two years after *Honeyman*, Justice Douglas declared, “[m]ortgagees are constitutionally entitled to no more than payment in full.”⁹⁸ Thus, the *Worthen* rule prevailed.

V. TRANSITION

In sum, contrary to the traditional tale, the *Blaisdell/Worthen* rule survived the judicial revolution of 1937 through 1938, though there were signs of impending changes. In 1938, Justice Van Devanter resigned, and Justice Hugo Black replaced

537 (1936); *Ingraham v. Hanson*, 297 U.S. 378 (1936); *Violet Trapping Co. v. Grace*, 297 U.S. 119 (1936); *Treigle*, 297 U.S. 189; *Kavanaugh*, 295 U.S. 56; *U.S. Mortg. Co. v. Matthews*, 293 U.S. 232 (1934); *Worthen*, 292 U.S. 426; *Seattle Gas Co. v. Seattle*, 291 U.S. 638 (1934); *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619 (1934).

⁹⁴ See, e.g., *Richmond Mortg. & Loan Corp.*, 300 U.S. at 128–29.

⁹⁵ *Id.* (footnotes omitted).

⁹⁶ *Id.* at 130.

⁹⁷ *Honeyman v. Jacobs*, 306 U.S. 539, 542 (1939) (affirming appellant's purchase of a foreclosure mortgage, but overruling his motion for a deficiency judgment per new regulation, § 1083a of the Civil Practice Act of New York).

⁹⁸ *Gelfert v. Nat'l City Bank*, 313 U.S. 221, 233 (1941) (footnote omitted).

him.⁹⁹ Justice Sutherland was no longer on the Court, and Justice Cardozo was too ill to participate in most of the Court's business.¹⁰⁰ Nonetheless, the Court did invalidate an Indiana law under the Contract Clause, but did so on grounds that could make future invocations of the Clause's protection more problematical.¹⁰¹

The Indiana Teachers' Tenure Act of 1927, which was incorporated into teachers' contracts with school districts, provided tenure to teachers who served for five years; the law permitted subsequent termination solely for just cause.¹⁰² However, the 1927 Act was repealed in 1933 for certain classes of jurisdictions, such as townships as opposed to cities.¹⁰³ Subsequently, a tenured teacher in a township had her contract terminated.¹⁰⁴ She challenged the termination and ultimately the Supreme Court decided her case in 1938 in *Indiana ex rel. Anderson v. Brand*.¹⁰⁵ The Court held that the repeal of the Tenure Act of 1927 violated the Contracts Clause.¹⁰⁶ Yet, in articulating the rule, Justice Roberts took the bite out of future invocations of the Contract Clause by lowering the level of scrutiny to be applied:

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.¹⁰⁷

In this case, however, the Court found that "the repeal of the earlier act by the later was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed."¹⁰⁸ In effect, the decision was based on a hidden Equal Protection grounding because Roberts, who wrote for the majority, thought the law's distinction between townships and cities was irrational.¹⁰⁹ In his dissent, Justice Black began a campaign to disable the Contract Clause, asserting that the teacher held her

⁹⁹ *Willis Van Devanter, 1911–1937*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_devanter.html (last visited Jan. 25, 2018).

¹⁰⁰ See *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938) ("Justice Cardozo took no part in the consideration or decision of this case."); *George Sutherland, 1922–1938*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_sutherland.html (last visited Jan. 25, 2018) (noting that Justice Sutherland retired on January 17, 1938).

¹⁰¹ *Brand*, 303 U.S. at 108–09.

¹⁰² *Id.* at 102–03.

¹⁰³ *Id.* at 104.

¹⁰⁴ *Id.* at 97.

¹⁰⁵ *Id.* at 95.

¹⁰⁶ *Id.* at 109.

¹⁰⁷ *Id.* at 108–09, n.17 (citing *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 431–32 (1934); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934)).

¹⁰⁸ *Id.* at 109.

¹⁰⁹ *Id.*

position not under a 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.¹¹⁰

In 1941, Justice Roberts had one last hurrah for the Contract Clause in *Wood v. Lovett*.¹¹¹ In 1935, the Arkansas State Legislature passed a statute that guaranteed distressed sale purchasers of land clear title despite irregularities in proceedings prior to the sale.¹¹² In those disrupted economic times, Arkansas wanted such purchasers to enjoy clear title.¹¹³ But in 1937, Arkansas repealed the law, placing earlier land purchasers at risk of having their titles contested.¹¹⁴ By a 5–3 vote, the Court voided the repeal statute.¹¹⁵ Justice Black again dissented, and this time Justices Douglas and Murphy joined.¹¹⁶ In his dissent, Black emphasized the sovereign capacity of the state to alter its land and taxation statutes.¹¹⁷ Citing *Blaisdell* no less than nineteen times, Black made it the centerpiece of his theory of the Contract Clause.¹¹⁸ He maintained that “[t]he *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the [C]ontract [C]ause were not intended to reduce the legislative branch of government to helpless impotency.”¹¹⁹ Neither the majority nor Justice Black mentioned *Worthen*.¹²⁰

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.¹²¹ To illustrate, in 1940, the Court upheld New Jersey legislation that revised the rights of shareholders of building and loan associations against a Contract Clause challenge.¹²² 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

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

¹¹¹ *Wood v. Lovett*, 313 U.S. 362 (1941).

¹¹² *Id.* at 364–65.

¹¹³ *Id.* at 367.

¹¹⁴ *Id.* at 365.

¹¹⁵ *Id.* at 366, 372.

¹¹⁶ *Id.* at 372, 386 (Black, J., dissenting).

¹¹⁷ *Id.* at 376–77.

¹¹⁸ *Id.* at 372–86.

¹¹⁹ *Id.* at 383 (citing *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940)).

¹²⁰ *See id.* at 362–86 (omitting any mention of *Worthen*).

¹²¹ *Id.* at 372 (Black, J., dissenting).

¹²² *Veix*, 310 U.S. at 38.

contracts give way to this power, as do contractual arrangements between landlords and tenants.¹²³

Reed gave no emergency or strict scrutiny-like qualification.¹²⁴ Thus, there was a transition from the strict scrutiny standard applied and endorsed in *Worthen* to deference to the state over economic legislation pursuant to the police power.

VI. *BLAISDELL* REDUX

By 1945, the Court was prepared to give the coup de grace. Every year since 1933, New York State passed one-year moratoriums on foreclosure proceedings on mortgages that were in default.¹²⁵ In 1944, the East New York Savings Bank brought a foreclosure proceeding in which it contested the constitutionality of New York's latest moratorium act.¹²⁶ In his opinion for the Court, Justice Frankfurter made no mention of *Worthen*.¹²⁷ Instead, he raised *Blaisdell* to the highest level of authority and took it far beyond the limitations that Hughes originally established in the case and in his subsequent refinements:

Since *Home Bldg. & L[oa]n Ass'n v. Blaisdell*, 290 U.S. 398, 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 Ass'n*, 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,” 290 U.S. at 434, 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.¹²⁸

Justice Frankfurter further invalidated the belief that deference was due to a legislature only in emergency situations, declaring, “[j]ustification for the 1943 enactment is not negated because the factors that induced and constitutionally supported its

¹²³ *Id.* at 38–39 (footnotes and citations omitted).

¹²⁴ *Id.* at 39.

¹²⁵ In 1941, the extension had been for two years. *E.N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 231 (1945).

¹²⁶ *Id.* at 230–31.

¹²⁷ *Id.* at 230–35 (omitting any mention of *Worthen*).

¹²⁸ *Id.* at 231–32 (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)) (citing *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942); *Gelfert v. Nat'l City Bank*, 313 U.S. 221, 233 (1941); *Veix*, 310 U.S. at 32; *Honeyman v. Jacobs*, 306 U.S. 539 (1939)).

enactment were different from those which induced and supported the moratorium statute of 1933.¹²⁹ Frankfurter's opinion was a wilful distortion of history and precedent to accommodate a new role for the Court.

The post-New Deal Court decided that it was inappropriate for a judicial body to second-guess economic decisions by legislative bodies, whether state legislatures or Congress.¹³⁰ It also pronounced that the property protections in specific parts of the Constitution, such as the Contract Clause and the Takings Clause, had to become issues determinable by the political branches.¹³¹

Frankfurter's revised *Blaisdell*-centric reinterpretation of the Contract Clause stuck. Twenty years later, in *El Paso v. Simmons*, Justice White championed Frankfurter's position.¹³² In that case, land purchased from, but forfeited to, the State of Texas could be reclaimed under certain conditions.¹³³ Texas later passed a law limiting the period for a reinstatement claim to five years.¹³⁴ On an assertion of a Contract Clause violation, the Supreme Court found for El Paso, which had bought the land from the State.¹³⁵ 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 "[n]ot 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. . . ." [*Blaisdell*], 290 U.S.[] at 434–35. 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, 232–33.¹³⁶

¹²⁹ *Id.* at 235.

¹³⁰ *Id.* at 234.

¹³¹ *Id.* at 232.

¹³² *El Paso v. Simmons*, 379 U.S. 497, 508–09 (1965).

¹³³ *Id.* at 498–99.

¹³⁴ *Id.* at 499.

¹³⁵ *Id.* at 509.

¹³⁶ *Id.* at 508–09 (first quoting *Stephenson v. Binford*, 287 U.S. 251, 276 (1932); then quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434–35, 437 (1934); then quoting *E.N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232–33 (1945)).

On the other hand, Justice Black, who a quarter century earlier 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 Ass[']n 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. 426.¹³⁷

After Justice Black passed away in 1971,¹³⁸ there was a brief, but ultimately pallid, resurgence of the Contract Clause. In *United States Trust Co. v. New Jersey*, the Court invalidated the repeal of a statutory covenant.¹³⁹ The covenant guaranteed to bondholders that revenues from a public transportation system would not be diverted to subsidize upgrades and maintenance.¹⁴⁰ 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 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."¹⁴¹ The opinion did not mention *Worthen*.¹⁴²

A year later, in *Allied Structural Steel Co. v. Spannaus*, the Court voided a Minnesota law that forced a revision of a private company's pension obligations.¹⁴³ There, Justice Stewart accurately summarized the law emanating from *Blaisdell* and *Worthen*, emphasizing how limited *Blaisdell*'s reach was.¹⁴⁴ However, instead of applying the *Blaisdell/Worthen* standard, he simply ignored it and proceeded to continue the middle-tier test from Justice Blackmun's opinion in *United States Trust*: "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."¹⁴⁵ If the answer to that question is

¹³⁷ *Id.* at 523–24, 526 (Black, J., dissenting) (first citing *Blaisdell*, 290 U.S. at 398; then citing *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934)).

¹³⁸ *Justice Black Dies at 85; Served on Court 34 Years*, N.Y. TIMES (Sept. 25, 1971), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0227.html#top>.

¹³⁹ *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 32 (1977).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 25 (footnote omitted).

¹⁴² *Id.*

¹⁴³ *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 243 (1978).

¹⁴⁴ *Id.* at 242–43.

¹⁴⁵ *Id.* at 244 (footnote omitted).

affirmative, then, was the legislation “necessary to meet an important general social problem”¹⁴⁶

Allied Structural Steel was the high point, such as it was, of the Contract Clause’s effectiveness in the years after the New Deal. A few years later in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, a unanimous Court found for the state, weakening the middle-tier test.¹⁴⁷ “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.”¹⁴⁸ Subsequent cases returned to the near total deferential model invented by Justice Frankfurter in 1946.¹⁴⁹ In fact, since *Allied Structural Steel*, the Supreme Court has not voided any state law under the Contract Clause.¹⁵⁰

VII. CONCLUSION

In 1934, by folding *Blaisdell* into *Worthen*, the Supreme Court reached a workable standard under which courts could judge cases where state legislation impaired pre-existing contracts: a state law that materially impaired an obligation of one of the parties to a pre-existing contract violated the Contract Clause unless there was such an emergency that a narrow and limited exception could be permitted and which exception preserved the underlying benefits of the contract to the parties.¹⁵¹ The near-unbroken run of unanimous decisions following *Worthen* through the 1930s demonstrates that a workable consensus was reached.

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 legal effect.

The 1930s was different. 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.

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¹⁴⁶ *Id.* at 247.

¹⁴⁷ *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 421 (1983).

¹⁴⁸ *Id.* at 411–13 (quoting *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22–23 (1977)).

¹⁴⁹ *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).

¹⁵⁰ Jeffrey A. Berger, *The Contracts Clause Time for a Rebirth*, 24 WASH. LEGAL FOUND. 29 (2009).

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