
Samuel R. Olken
John Marshall Law School, 7olken@jmls.edu

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Charles Evans Hughes and the
Blaisdell Decision: A Historical
Study of Contract Clause
Jurisprudence

On January 8, 1934, in the midst of a widespread economic depression, the United States Supreme Court decided Home Building & Loan Ass'n v. Blaisdell. By the margin of a single vote, the Court upheld the Minnesota Mortgage Moratorium Act as a reasonable exercise of state police powers during an emergency. Chief Justice Charles Evans Hughes, writing for the Court, rejected the argument that the Act impaired the obligation of a private contract within the meaning of the Contract Clause of the United States Constitution. In dissent, Justice George Sutherland asserted the primacy of contract rights and their protection by constitutional limitations of state authority. The majority and dissenting opinions represented two distinct views of the Contract Clause, each of which reflected divergent perspectives of the role of state governments within the federal system. At the core of this disagreement

* A.B. Harvard College, 1982; J.D. Emory University, 1985. Assistant Professor, John Marshall Law School, Chicago, Illinois. The author gratefully acknowledges the assistance and encouragement of Eric J. Emerson, Pamela Lambos and Timothy R. Rabel during the preparation of this article. A generous research grant from the John Marshall Law School and the faith of Associate Dean Robert G. Johnston contributed significantly to the progress of this project.

1 290 U.S. 398 (1934).
2 Ch. 339, 1933 Minn. Laws 514.
3 Blaisdell, 290 U.S. at 444-47.
4 U.S. CONST. art. I, § 10, cl. 1.
5 Blaisdell, 290 U.S. at 448-83 (Sutherland, J., dissenting).
6 As used in this article, the term federalism refers to the system of government estab-
lay a recurring problem in federalism: the reconciliation of local governmental authority with the freedom and security of private property and contract rights.\(^7\)

From its inception, the Contract Clause engendered dispute over the extent to which state governments could regulate private contracts in the public interest. While it ostensibly prohibited all local legislation that impaired the obligation of contracts, questions arose about its scope and purpose. In the 145 years between the adoption of the Constitution and the *Blaisdell* decision, the United States Supreme Court articulated various inroads upon the Contract Clause, recognizing the authority of states to control those aspects established by the Constitution in 1787. In essence, the Constitution allocated governmental authority between a national, or federal, government and the states. In matters of paramount national concern such as interstate commerce, currency, and international relations, the Constitution limited the powers of the states and vested supreme, if not altogether exclusive, authority in the federal government. Within the federal system ultimate sovereign authority derived from the citizens of the United States and not from the states in which they resided, a fundamental premise that distinguished the Constitution from its predecessor, the Articles of Confederation. In their sovereign capacity citizens designated, by election or other means, governmental representatives at the state and national levels as the country adapted the federal system to a democratic republic. Though it identified distinct spheres of state and federal authority, the Constitution did not set forth in precise detail all aspects of government in the federal system. Its framers merely intended to prescribe an enduring “blueprint for government.” William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 23, 28 (Jack N. Rakove ed., 1990); see also Leonard W. Levy, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 1-29 (1988). It is from this perspective one should therefore assess issues of federalism and constitutional interpretation.

\(^7\) The early Contract Clause disputes revealed an inherent conflict within the political theory of the republic over “the problem of legislative regulation of property rights.” G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, at 601 (1988); see also Benjamin F. Wright, Jr., *The Contract Clause of the Constitution* xvi-xvii (1938). G. Edward White has identified “two apparently contradictory approaches . . . one elevating property rights beyond legislative interference, the other suggesting that all individual rights could yield to the goals of the commonwealth.” White, supra, at 601-02.

The first approach presupposed a “natural right to the acquisition and use of property” and perceived in a republican government a prime means of “securing] individual rights.” Id. at 597. Therefore, legislative interference with private contracts underscored the tension between the public and private interests characteristic of the federal system. *See*, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 294 (1827) (Thompson, J., concurring) (“[T]his has rightly been considered a question relating to the division . . . between the general and State governments.”); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 717 (1984) (“[T]he protection of private contracts against government regulation is inseparably entwined with two elements of a distinctively political cast: individual freedom, of which freedom of contract is but one illustration, and the need to prevent legislative misbehavior, itself a central concern of any constitutional arrangement.”).

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of contract relations that affected the public interest. Through the guise of interpretation, the Court sought to balance the mandatory language of constitutional prohibition with the realities of economic development and governmental power. It was within this context that the Supreme Court addressed the Contract Clause issue presented in *Blaisdell*.

Of the nearly five hundred opinions Charles Evans Hughes wrote during his tenure on the Supreme Court, *Blaisdell* remains among his most controversial and misunderstood. In part, its legacy of confusion emanates from the complexity of the opinion itself. In concluding the Minnesota Act did not violate the Contract Clause, Hughes set forth an intricate balance of constitutional factors, which included elements of just compensation, due process, and the sometimes conflicting precedent of previous Contract Clause jurisprudence. The opinion established a compromise between antithetical views of the Contract Clause as it sought to reconcile the sanctity of contract obligations with the increased recognition of local governmental police powers as a means of preserving the value and collective security of contract rights. Moreover, the opinion also marked Hughes's attempt to compromise his own modest progressive views of the Contract Clause with those of Justices Harlan Stone and Benjamin Cardozo, both of whom advanced a bolder analysis.

Though ample scholarship exists about the Contract Clause, analysis of the *Blaisdell* decision has often lacked historical perspective. Many scholars consider the case an aberration in Contract Clause jurisprudence and contend its emphasis upon flexible constitutional interpretation and the wide latitude of state police powers undermined the security of vested contract rights. These critics believe the decision subverted the original meaning of the clause by introducing notions of equity and public policy into questions of contract impairment. Thus, what was intended as a firm restriction upon state authority has become uncertain and somewhat illusive.

Unfortunately, these perceptions misconstrue both the language of Hughes's opinion and the course of Contract Clause interpreta-

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8 *Blaisdell*, 290 U.S. at 442-44.

tion in the nineteenth and early twentieth centuries. This Article suggests *Blaisdell* did not eviscerate the constitutional protection of contract rights. Instead, it proposes the case fit within traditional inroads upon the Contract Clause that emanated in response to tensions within the federal system over the appropriate role of state governments in regulating private interests. Local control of vested contract rights comprised a particular focal point for this dispute. Insofar as the Court sought to protect the security and performance of contracts from the arbitrary interference of state legislatures, it also recognized the importance of local government in maintaining the value and security of these same agreements. It is from this context one must ultimately assess the case, for its points about the public interest in private contracts reflect an evolutionary process and not distortion of constitutional intent.

In addition, it is necessary to analyze *Blaisdell* from the jurisprudential perspective of Hughes, a keen student of the practical problems of federalism, whose opinion invariably reflected his own understanding of the Constitution, governmental authority and the federal system. Curiously, previous commentary has ignored this vantage point and thus produced critical assessment of the decision that is often sterile and incomplete.

This Article has four parts. Part I discusses the origins of ambiguity in the Contract Clause. Part II presents an overview of Contract Clause jurisprudence developed by the United States Supreme Court in the years before *Blaisdell*. Part III analyzes the main facets of Charles Evans Hughes's jurisprudence. Part IV presents the *Blaisdell* case as a classical problem in American federalism. It then examines both the majority and dissenting opinions from the dual perspectives of historical and legal precedent.

I

THE CONTRACT CLAUSE IN HISTORICAL PERSPECTIVE: GENESIS OF AMBIGUITY AND FUNDAMENTAL CONFLICT

The Contract Clause of the United States Constitution provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts."\(^{10}\) Debate over the precise meaning and scope of this

\(^{10}\) The Contract Clause provides in full:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of At-
provision dominated Supreme Court jurisprudence throughout the first three quarters of the nineteenth century. Thereafter, substantive due process and other theories eclipsed the primary importance of Contract Clause issues. Nevertheless, fundamental questions persisted about the scope of the Contract Clause well into the twentieth century as Blaisdell revealed the complex dimensions of this long standing problem in constitutional law.

Ironically, the inclusion of the Contract Clause within the Constitution elicited sparse debate at either the Constitutional Convention of 1787 or the state ratifying conventions. Prior to the Constitution, the Articles of Confederation established a tenuous union in which individual states retained so much authority the national government became virtually powerless to deal with problems of interstate commerce and the enormous post-Revolutionary War debt that threatened to tear the country assunder. With capital scarce and credit perilous, individual states issued currency and emitted bills of credit. The effect was an unstable economy as the value of money constantly fluctuated, rendering commerce uncertain and highly speculative. A plethora of debtor relief legislation impaired the obligations of private contracts by altering the methods of payment in transactions between debtors and creditors. Stay laws authorized moratoria on debt payments, while other laws permitted installment payments of outstanding debts. Many states allowed payment with commodities of unstable value since gold and silver, the most reliable items, were relatively scarce. Economic and political chaos ensued and ultimately made imperative the crea-

11 Wright, supra note 7, at xiii.
12 Levy, supra note 6, at 124-27; Wright, supra note 7, at 12; Stuart Bruchey, The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic, 1980 Wis. L. Rev. 1135, 1142-43 (“Silence indeed suggests the possibility of indifference, but it also suggests the possibility of a consensus that required no voice.”).

13 Some disagreement exists about the connection between an unstable currency and post-Revolutionary debtor relief laws. Benjamin Wright contends such legislation emerged in response to an inadequate money supply. Wright, supra note 7, at 4-6. In contrast, Stuart Bruchey argues the creation of paper money rendered currency unstable, and its use to pay debts impaired the obligation of contracts. Bruchey, supra note 12, at 1143.

14 See Levy, supra note 6, at 124; Wright, supra note 7, at 4-6; Bruchey, supra note 12, at 1143.
15 Wright, supra note 7, at 5-6; Bruchey, supra note 12, at 1139-42.
tion of a strong federal government with more explicit limitations upon state authority set forth in a written constitution.

Although James Madison and other delegates at the Constitutional Convention of 1787 believed state interference with private contracts demonstrated an inherent flaw in the confederate system of government, no pertinent discussion about this occurred until six weeks after the Convention drafted the Northwest Ordinance. The Ordinance prescribed governmental authority in the Northwest Territories and provided in relevant part:

And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.\(^{17}\)

This provision anticipated the Contract Clause.

Toward the end of the Convention, the delegates began work on Article I, Section 10. First, they adopted a specific prohibition on state power to coin money, give bills of credit, or accept as legal tender for payment of debts anything other than gold or silver. Rufus King of Massachusetts then moved to further curtail state authority with a provision identical to that in the Northwest Ordinance prohibiting legislative interference with private contracts. Initially rejected as overbroad,\(^{18}\) it eventually received approval once John Rutledge of South Carolina suggested the importance of a clause forbidding the states from enacting ex post facto laws and bills of attainder.\(^{19}\)

\(^{16}\) Levy, supra note 6, at 124-25; Wright, supra note 7, at 5-7, 14; Bruchey, supra note 12, at 1136-42.

\(^{17}\) Northwest Ordinance, ch. 7, 1 Stat. 51, 52 (1789).

\(^{18}\) For example, Gouverneur Morris of Pennsylvania thought King's motion unwise because many state laws affected contracts and he suggested instead the federal judiciary could protect private contract rights. Similarly, George Mason of Virginia believed exigent circumstances might warrant state abridgement of private contract rights. In addition, Roger Sherman of Connecticut considered it unnecessary to include a specific provision prohibiting state impairment of the obligation of contracts because other constitutional provisions already limited states' powers to interfere with private rights. See Levy, supra note 6, at 125-26; Wright, supra note 7, at 8.

\(^{19}\) In response to Sherman's concerns, James Wilson of Pennsylvania asserted the proposed clause would only prohibit states from retrospective interference with private contracts. Madison then noted the Constitution already forbade ex post facto laws, but apparently this provision only applied to Congress. Rutledge then, with little explanation, proposed a substitute "motion that the states could pass neither bills of attainder [n]or ex post facto laws." Levy, supra note 6, at 126. Ultimately, the convention adopted Rutledge's motion, which became part of Article I, Section 10, Clause 1 of the Constitution. Wright, supra note 7, at 8-9.
On September 12, 1787, shortly before the Convention ended, the Committee on Style submitted a draft of Article I, Section 10 that included a clause prohibiting the states from impairing the obligation of contracts. Records from the Convention do not explain why the Committee inserted this clause, although it is possible that James Madison and James Wilson, neither of whom necessarily rejected King's earlier proposal, may have, with King, prevailed on other members of the Committee.

Unlike its predecessor, the Contract Clause presumably included public contracts and even agreements procured by fraud since its language did not exclude them. It also differed from the Northwest Ordinance in that it barred only state impairment of contract obligations; the Ordinance contained a broader prohibition against legislative interference with contracts. Once again, the Convention records do not explain this substitution of phrases, or why the final version of the Contract Clause omitted the words "altering or."

This absence of constitutional history highlights the inherent ambiguity of the Contract Clause. Intended as a limitation of state authority to interfere with the enjoyment and security of private contract and property rights, its scope derives from the meaning of its terms. Thus, how one defines contract obligation and impairment determines the reach of the clause. Made part of Article I,
Section 10 without the refinement of its terms by open debate at the Convention, it has become susceptible to various interpretations, all of which reflect, to some degree, divergent perspectives of federalism. Inasmuch as the clause limits state power, it also involves a core problem of federalism: how to reconcile private rights with the sovereign power of states to govern.

In the Virginia Ratifying Convention, Edmund Randolph explained to Patrick Henry that the objective behind the clause was to prevent state interference with private contracts, but omitted explanation of how much interference became impairment. Similarly, James Madison and Alexander Hamilton justified the clause as a "constitutional bulwark in favor of personal security and private rights" and a "precautio[n] against . . . those practices . . . of State governments, which have undermined the formatio[n] of property and credit."

In contrast, Luther Martin of Maryland questioned whether the Contract Clause unnecessarily curtailed the power of states to enact debtor relief laws in times of extreme economic distress. Unlike Madison and Hamilton, he believed such legislation necessary to prevent the complete destruction of debtors at the hands of creditors. Martin also perceived that the Contract Clause potentially restricted local authority to regulate private economic affairs that affected the public interest.

While others shared this concern, relatively little discussion

but may not eliminate those already in place. On the other hand, "obligation," as it is found in the phrase "the law of obligations" and in standard Roman and Civil law usage, refers to the entire relationship and not just one side of it, suggesting that any alteration in the private relationship is governed by the clause.

Epstein, supra note 7, at 709 & n.17. For further discussion of the inherent ambiguity of the term "obligation" see WRIGHT, supra note 7, at 10 & n.22, 11-12.

26 See Epstein, supra note 7, at 707 (positing that the framers probably did not have a single or unifying theory of the Contract Clause and fully considered neither its logical implications nor its precise scope).

27 WRIGHT, supra note 7, at 16.


30 LEVY, supra note 6, at 127; WRIGHT, supra note 7, at 13 & n.28. Justice Sutherland also referred to Martin's speech of November 29, 1787, before the Maryland House of Delegates in his Blaisdell dissent. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 461-62 (1934) (Sutherland, J., dissenting) (discussing original intent and the Contract Clause).

31 For example, George Mason thought Rufus King's proposal for a clause limiting
about this facet of the clause occurred in the state ratifying conventions.\textsuperscript{32} Indeed, the concept of police powers did not really exist when the Constitution was created.\textsuperscript{33} It emerged in rudimentary form over half a century later as lawyers and jurists alike recognized a developing republic might, on occasion, best protect the security of private rights through legislation enacted by the states to promote the public welfare. Though Luther Martin did not articulate this rationale in express terms, one would err in dismissing his point as beyond the original intent of the constitutional framers and so dispute the notion of a police powers limitation upon the scope of the Contract Clause. For it would appear that in 1787 few perceived the Constitution sanctioned the complete emasculation of state authority in all areas of property and contract rights.\textsuperscript{34} In-state interference with contracts might prevent state governments from regulating contract rights that affected the public welfare. \textit{Levy}, supra note 6, at 126; \textit{Wright}, supra note 7, at 8.

\textsuperscript{32} \textit{Levy}, supra note 6, at 127-29 ("[T]he contract clause inspired neither passionate onslaughts from spokesmen for debtors' relief nor vigorous defenses from its proponents."). In fact, there was only cursory discussion of whether the clause applied to both private and public grants and whether it operated both retrospectively and prospectively. \textit{Wright}, supra note 7, at 12-16.


\textsuperscript{34} In 1833 Joseph Story commented:

That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, is admitted; and it has never been so construed. It has always been understood, that the contracts spoken of in the Constitution were those, which respected property, or some other object of value, and which conferred rights capable of being asserted in a court of justice.


In \textit{Ogden}, Chief Justice John Marshall offered his own view of the Contract Clause's origins:

The power of changing the relative situation of debtor and creditor, of interfering with contracts . . . had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great
deed, the extent to which the public interest inhered in both private and public contracts influenced the course of Contract Clause interpretation before the Supreme Court.

II

CONTRACT CLAUSE INTERPRETATION BY THE SUPREME COURT BEFORE BLAISDELL

For nearly the next century and a half, the United States Supreme Court developed three significant inroads upon the scope of the Contract Clause. First, it distinguished between the rights and remedies of contracts, allowing states to regulate only the remedies of public and private agreements. Thereafter, it invoked the doctrine of state reserved powers and developed the theory of inalienable police powers, both of which acknowledged the authority of states to modify contract rights in the public interest. Each of these restrictions raised important questions about the origins and nature of contract obligations. Essentially, two contrasting theories emerged which reflected divergent perspectives of state power within the federal system. One theory emphasized the sanctity of vested contract rights and the necessity for strict constitutional interpretation of the Contract Clause. The other view stressed the paramount importance of local governmental authority in the creation of contractual relationships. Although the Constitution protected the integrity of contract rights, it did not necessarily prevent local governments from regulating those aspects of contract performance that affected the public interest. Logically extended, this approach suggested that limited state interference with private contracts did not always constitute impairment of contract obligations within the meaning of the Contract Clause. To some extent, each of the foregoing tests attempted to establish a compromise between these antithetical views. It is from this constitutional context that Hughes crafted his decision in Blaisdell.

A. The Rights/Remedies Distinction

The traditional distinction between the rights and remedies of a contract emanated from the early decisions of the Marshall Court. From the outset, a majority of the Court interpreted the Contract Clause in an expansive manner, including both private and public

community, and was one of the important benefits expected from a reform of the government.

contracts within its ambit. Under the leadership of Chief Justice John Marshall, the Court invoked the clause to protect land grants, corporate charters, and other types of agreements. Primarily concerned with preserving the security of property and contract rights, Marshall used principles of natural law and staunch federalism in his analysis of the Contract Clause. He feared that the unbridled authority of state governments would impair the

35 See, e.g., Pawlet v. Clark, 13 U.S. (9 Cranch) 292 (1815) (invalidating Vermont's repeal of prior land grants establishing houses of religious worship); Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (ruling Virginia could not rescind a previous legislative land grant to the Episcopal church for a religious school); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (voiding the repeal by the Georgia legislature of a previous land grant to speculators).

36 See, e.g., Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding that a royal charter created contract rights in a corporation that subsequent legislation could not divest without violating the Contract Clause); Terrett, 13 U.S. (9 Cranch) at 55 (ruling that Virginia could not divest one corporation of its property in favor of a successor corporation).

37 See, e.g., Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (ruling that the Kentucky Occupying Claimants Laws impaired the obligation of contracts of Virginia citizens); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (holding that New Jersey could not revoke a previous agreement under which the state legislature exempted certain Indian lands from taxation).


Under general principles of natural law, individuals in a state of nature possess certain inalienable rights, which include the acquisition and possession of property. Without constraints one could potentially destroy another in the pursuit and defense of property. The seventeenth-century British philosopher John Locke posited that individuals enter society from a state of nature to protect their personal property from the assault of others. In return for relinquishing absolute control, they expect government to preserve their use and enjoyment of property. Legal authority exists to protect individual freedom and to make possible the relative security of personal rights in property. See John Locke, The Second Treatise of Government 3-30 (J.W. Gough ed., 1956) (6th ed. 1764).

Lawyers, jurists, and political statesmen applied natural law principles to republican governmental theory during the last quarter of the eighteenth century. See White, supra note 7, at 48-61, 597-602; Wood, supra note 34, at 53-65. For an example of the use of natural law principles before Fletcher, see Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) ("An act of the legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."). Calder ruled that the Connecticut legislature's revocation of a judicial decree concerning a will did not operate as an ex post facto law. See also Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 320 (1795) (Patterson, J., circuit court opinion) (holding that Pennsylvania could not repeal a prior legislative land grant without impairing a contract obligation).

In 1796, Alexander Hamilton noted Georgia could not rescind a prior land grant without violating the Contract Clause and natural law. Hamilton rendered this opinion
value of these rights and so employed this clause as an affirmative limitation on state power.

Not all members of the Court, however, shared Marshall’s views. Justice William Johnson authored a separate opinion in *Fletcher v. Peck* that openly questioned the meaning of the Contract Clause and cautioned against its use as an open-ended limitation of state power. While he believed Georgia had no legal authority to rescind a prior legislative land grant, he refused to invoke the Contract Clause as the principal basis of his decision. He perceived the clause in equivocal terms, uncertain whether it prohibited only laws that impaired the obligation of contracts or all laws that affected contracts. He indicated that under Marshall’s interpretation, state laws prescribing both the enforcement and creation of contracts were void even though they did not necessarily impair the obligation of contracts.

Johnson found this untenable and noted that such laws were “within the most correct limits of legislative powers, and most beneficially exercised.” Unlike Marshall he viewed private rights and local government in a correlative sense; the laws of the latter created the rights and remedies of contracts and property. Natural law, therefore, with its emphasis on the creation of rights anterior to the existence of government, did not create contract and property rights forever beyond the reach of governmental authority.

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39 *10 U.S. (6 Cranch)* 87 (1810) (holding unconstitutional a Georgia law that revoked a prior legislative grant of 35 million acres of western territorial land to private speculators). Under the influence of bribery, the 1795 Georgia legislature conveyed the Yazoo territory to several speculators; the following year a reform legislature repealed the grant. Without prior notice of this repeal, Fletcher purchased 15 thousand acres from Peck, the successor in interest to Gunn, an original grantee. Fletcher sued Peck under a covenant in the deed, asserting Georgia’s right to convey the acreage in 1795. *Id.* at 87-92. For a general discussion of this case, see *WHITE, supra* note 7, at 602-06; *Lynch, supra*, at 18 & n.68.

40 *Fletcher, 10 U.S. (6 Cranch)* at 144-45 (Johnson, J., concurring).

41 *Id.* at 145. Marshall concluded that in its 1795 grant to private speculators, the state of Georgia, through its legislature, created an implied contractual obligation not to revoke its grant or to reassert its rights to the Yazoo land. He ignored the fraudulent inducement of the original grant and noted that once executed, the grant created vested contract rights. *Id.* at 135. To this extent he invoked the Contract Clause as a means “to shield . . . property from the effects of those sudden and strong passions to which men are exposed.” *Id.* at 138.

42 *Id.* at 145.

43 *See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 283 (1827).*

44 Nevertheless, Johnson, like Marshall, readily thought that Georgia’s repeal of its prior land grant was void under natural law. Before he criticized the Contract Clause,
son posited a more narrow scope for the constitutional prohibition of state authority in which states had wide latitude over both the formation of contracts and the enforcement of contract remedies. He anticipated prospective analysis in this area by suggesting that a distinction existed between contract rights and remedies.45

Insofar as subsequent decisions of the Marshall Court used the Contract Clause to protect property and contract rights, they also set forth its limitations. Thus, the Marshall Court both expanded the scope of the Contract Clause and created its potential constraints. While general consensus existed among members of the Court that the clause preserved private interests, disagreement over its limitation of state authority to regulate private and public economic affairs gradually became apparent.46 In particular, Johnson's opinion in *Fletcher* raised a significant theoretical dilemma for those concerned with protecting private rights from state infringement. If Johnson was correct, the Contract Clause only forbade state laws that impaired the obligation of contracts and not those which merely affected the remedy. Implicit in this distinction was the potential to limit the scope of the constitutional prohibition upon state power.

Initial analysis of the rights/remedies distinction focused primarily on the constitutional objective of preserving contract obligations. Marshall, and other justices such as Bushrod Washington, invoked the distinction to emphasize the sanctity of these obligations. Invariably, they broadened the scope of contract rights within the ambit of constitutional protection and explained the concept of contractual obligation.

In *Fletcher*, Marshall had defined a contract as an agreement, "in which a party . . . [undertakes] to do, or not to do, a particular thing."47 Within this definition lay a paramount concern for securing the performance of contracts. For a majority of the Court, an agreement to undertake or not to undertake a particular action signified a promise that created a legal duty of performance. Out of

he stated: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things . . . ." *Fletcher*, 10 U.S. (6 Cranch) at 143.

45 Id. at 145. Johnson's concern for preserving the legitimate exercise of local power over contracts in times of public necessity would ultimately form the theoretical basis of the doctrines of reserved state powers and inalienable police powers.

46 See generally WHITE, supra note 7, at 595-673 (discussing the contours of the Marshall Court's Contract Clause jurisprudence).

47 10 U.S. (6 Cranch) at 136; see also Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819).
this duty arose the obligation of contract. After *Fletcher*, most of the Court equated the right to receive performance of a contractual obligation with a contract right. Faced with the theoretical distinction between contract rights and remedies, the Court viewed contract rights and obligations synonymously. Thus, state legislation that abridged the former, impaired the latter.

From this perspective, the Court invalidated a New York insolvency law that retroactively discharged a debtor from payment of an antecedent debt.\textsuperscript{48} Counsel for the debtor argued that no constitutional impairment occurred because the parties made the contract subject to the conditions of municipal law.\textsuperscript{49} Thus, the insolvency law only affected the remedy for enforcing contract rights.\textsuperscript{50} Marshall, however, narrowly construed the scope of state authority. Writing for the Court, he stated: “Any law which releases a part of this obligation, must, in the literal sense of the word, impair it.”\textsuperscript{51} The New York law infringed upon the creditor’s inalienable right to receive full payment because it discharged the debtor from complete performance. Had the law only released the person of the debtor but not his property from continued liability for the outstanding indebtedness, Marshall might have accepted the debtor’s contention the statute merely affected the remedy and not the performance of the contract.\textsuperscript{52} Indeed, he acknowledged the limited circumstances in which a state could modify a contract remedy so long as it left intact the right of performance.\textsuperscript{53} However, he considered this dis-

\textsuperscript{48} *Sturges*, 17 U.S. (4 Wheat.) 122. While the Court ruled this particular law violated the Contract Clause, it also noted that until Congress exercised its power to enact a uniform bankruptcy law, individual states could pass bankruptcy legislation that did not impair the obligation of contracts. *Id.* at 196-97. The absence of a federal bankruptcy law, therefore, made unnecessary the judicial determination of whether the New York insolvency statute conflicted with Congress’s power under Article I, Section 8, Clause 4 of the Constitution, to establish uniform bankruptcy laws. *Id.* at 197. Marshall apparently did not perceive a distinction between bankruptcy and insolvency laws. See *id.* at 194-95. Instead, he focused on the Contract Clause. For a brief overview of the role of bankruptcy legislation in the unstable economy of the early nineteenth century, see WHITE, supra note 7, at 630-33 (asserting bankruptcy laws altered the significance of vested property and contract rights and reflected changing perceptions of debt).

\textsuperscript{49} *Sturges*, 17 U.S. (4 Wheat.) at 155 (“Every contract must be subjected to, limited, and interpreted, by the law of nature, which every where forms a part, and the best part, of the municipal code . . . .”).

\textsuperscript{50} *Id.* at 178.

\textsuperscript{51} *Id.* at 197.

\textsuperscript{52} *Id.* at 203. The New York law released both the person of the debtor and the debt.

\textsuperscript{53} *Id.* at 200. For example, a state could elect not to imprison a bankrupt without impairing the obligation of contracts, but discharge of the debt would violate the Con-
tinction peripheral to the overriding objective of the Contract Clause: the protection of contract rights from meddlesome state laws.

Justice Washington also thought the Contract Clause prohibited any state infringement of contract performance regardless of the degree of impairment. Any law which permitted even the smallest change in performance or prescribed conditions not expressed in the contract automatically impaired the obligation of contract within the meaning of the constitutional prohibition. He used this rationale to find that the Kentucky Occupying Claimants Laws unconstitutionally impaired the obligation of a preexisting agreement by Kentucky to honor all private rights and interests created under Virginia law to land within Kentucky's borders. By exempting local occupants from liability for waste, rents, and profits, the Kentucky laws devalued the property interests of Virginians who held legal title to the realty and thus interfered with their contract rights. Justice Washington insisted Kentucky could not avoid its contract obligation for reasons of inconvenience or impracticability.

Justice Johnson concurred with the majority for technical reasons, but disagreed with its use of the Contract Clause as a blanket prohibition on state authority. He noted that vast social and economic changes in Kentucky pursuant to its territorial agreement...

54 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84-85 (1823). Four years later in Ogden, Washington seemingly qualified his sweeping statements. 25 U.S. (12 Wheat.) at 257-69 (arguing that municipal law in effect when the parties create a contract inheres within the contract obligation and controls the parties' rights and duties).

55 Green, 21 U.S. (8 Wheat.) at 76-92. Pursuant to the formation of Kentucky as a separate state from Virginia, the two executed a 1789 compact under which Kentucky agreed to honor under Virginia law all titles to Kentucky land granted under patents from Virginia before Kentucky's statehood. The Kentucky laws of 1797 and 1812 created procedural barriers that interfered with property rights derived from Virginia law. Given the vast number of claimants and the amount of acreage, the laws created myriad political, economic, and social problems.

56 Id. at 84, 89. However, his opinion avoided resolution of the underlying issue about the extent to which "solicitude for vested property rights could retard the use and enjoyment of other property rights." White, supra note 7, at 648. Alternatively, Washington could have ruled the compact supreme over state laws under the Supremacy Clause of Article VI of the Constitution. Id. at 646.
with Virginia necessitated deviation from the precise terms of the compact. Strict, technical compliance with the provisions applying Virginia law to Kentucky land disputes made little sense and unduly abridged the legitimate exercise of Kentucky's sovereign authority to enact legislation for the public welfare.\(^57\)

A South Carolina Republican appointed to the Supreme Court in 1804 by Thomas Jefferson, Johnson generally advocated a strong national government and a vigorous federal judiciary.\(^58\) Yet, his interpretation of the Contract Clause revealed deep concern for maintaining the intrinsic power of states to govern their own affairs to the widest extent possible under the federal system set forth by the Constitution. In this respect, his analysis of Contract Clause cases sometimes differed from both Federalist and other Republican members of the Court. Johnson steadfastly maintained the concomitant importance of state authority to prescribe laws in response to economic and social necessities notwithstanding their incidental effects on contract obligations.

Indeed, his *Green* opinion suggested the per se prohibition of state power to regulate property and contract interests might jeopardize the security of private rights by preventing local officials from prescribing rules for their use and enjoyment consonant with the needs of the public.\(^59\) For Johnson, a functional, flexible application of the Contract Clause made possible the recognition of local governmental authority as an integral means of sustaining economic and social stability.\(^60\)

Johnson refined his theory of the Contract Clause in *Ogden v. Saunders*,\(^61\) a pivotal case which confined the Contract Clause prohibition to state laws that impaired preexisting contractual obligations.\(^62\) Analysis of the arguments before the Court reveals how

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\(^57\) *Green*, 21 U.S. (8 Wheat.) at 96-104 (Johnson, J., concurring). Johnson did not specifically address the Contract Clause issue. Instead, he focused on Kentucky's ability to enact legislation pertaining to property. Nevertheless, his observations paralleled his subsequent views in *Ogden*.

\(^58\) For an overview of Johnson's judicial career, see DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954).

\(^59\) *Green*, 21 U.S. (8 Wheat.) at 104.

\(^60\) Years later, Charles Evans Hughes reiterated this notion in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).


\(^62\) *Ogden* was not the first case before the Supreme Court that presented the issue of prospective state legislation as an impairment of the obligation of private contracts. In *McMillan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819), a unanimous Court, per Chief Justice Marshall, concluded that a Louisiana debtor relief law did not have any prospective legal effect on the obligation of a private contract made outside the state by South
the theoretical dichotomy between contract rights and remedies reflected an underlying dilemma about the appropriate limits of state authority. Several justices wrote opinions, all of which examined the implications of this case on the delicate balance between the affirmative exercise of state regulatory authority and the nullification of such power through an expansive reading of the Contract Clause.

In *Ogden*, a divided Court sustained the constitutionality of an 1801 New York insolvency statute that prospectively affected an 1806 bill of exchange executed in New York between Ogden, a debtor from New York, and Jordan, a Kentucky creditor who thereafter assigned his interest in the contract to Saunders. As a defense, Ogden asserted that the statute discharged his obligation of full payment and exempted his future acquisition of property from satisfaction of any outstanding indebtedness.

Specifically, he argued that the parties executed the bill of exchange subject to an implied condition of partial payment created by the preexisting New York insolvency law. The law's prospective nature presumably put the parties on notice of this condition; thus, the law became part of the contract and helped define its rights and remedies. No impairment occurred because New York prescribed conditions to which the parties impliedly assented. Moreover, the statute merely affected the contract remedy and protected the rights of all by making the debtor relinquish his present (but not future) property for the creditor's benefit.

Carolina citizens. The debtor invoked the law as a defense and contended that the legal duty of contract performance was subject to the preexisting operation of the statute. Marshall himself suggested why *McMillan* did not necessarily dispose of the prospectivity issue before the Court:

> [I]t is a general rule . . . that the positive authority of a decision is coextensive only with the facts on which it is made . . . in *McMillan* the contract, though subsequent to the passage of the Act, was made in a different State . . . and, consequently, without any view to the law, the benefit of which was claimed by the debtor.


63 The Supreme Court heard the case on appeal from Louisiana, where Ogden had moved from New York and where Saunders sued him in assumpsit. However, the Court refused on jurisdictional grounds to apply the New York law against a creditor from Kentucky. *Id.* at 358 (Johnson, J., disposing of the case). In addition, the Court held that the power of Congress to establish a uniform bankruptcy law did not preclude New York from enacting its own bankruptcy statute in the absence of a federal one. *Id.* at 274-79.

64 *Id.* at 231-32.

65 *Id.* at 233, 235-36.

66 *Id.* at 235.
Daniel Webster, counsel for the creditor, implicitly recognized the ramifications of this dispute on federalism and stressed the constitutional limits on New York's power to regulate private contracts. In his argument that the Contract Clause prohibited both retroactive and prospective state laws that impaired the obligation of contracts, Webster emphasized that the debtor's legal duty of payment arose from agreement of the parties. Otherwise, if New York law defined the contractual obligation, the state could impair it and make insecure the rights of the creditor.67

Justice Johnson disagreed vehemently. He believed the obligation of a contract emanated primarily from the laws of local government and not, as Marshall and Webster thought, from the will of the parties.68 While moral concerns and those of natural law might temper the legal duty of performance, Johnson thought the positive laws of government set the parameters of contract rights. State law in existence at the time of the contract therefore became part of the agreement insofar as it affected both the rights and remedies of the contract.69

Reluctant to void state legislation that he perceived essential to maintaining the collective security of society during a period of potential economic chaos, Johnson espoused a pragmatic construction of the Contract Clause that reconciled the sanctity of private rights with the overriding power of the state to govern.70 Under the Constitution, all contracts "receive a relative, and not a positive interpretation; for the rights of all must be held and enjoyed in

67 Id. at 240-41, 246-54.
68 Id. at 282-83 (Johnson, J., seriatim opinion).
69 Id. at 283. Johnson asserted laws of society govern the construction and enforcement of contracts. He considered the remedy distinct from the underlying contract obligation of the debtor. As such, the remedy could vary in accord with public exigency whereas the obligation could not. To construe the remedy as part of the contract obligation would restrict state authority over the enforcement and conditions of contract performance. Id.
70 Id. at 286-92. In particular, Johnson rejected a narrow, limited interpretation of contract impairment. "Societies exercise a positive control as well over the inception, construction, and fulfilment [sic] of contracts, as over the form and measure of the remedy to enforce them." Id. at 286. He emphasized that the Constitution was not a document pertaining to man in a state of nature, but one for men in a state of society. From this perspective, literal interpretation of the Contract Clause prohibition was improbable, as it ignored a principal objective of government—the promotion of the public welfare. Id. at 290. Insofar as the clause restricted state legislation that arbitrarily interfered with existing personal and property rights, it did not, Johnson thought, function as a per se limitation of state authority. Id. at 286; see also Robert L. Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 876-80 (1944).
subserviency to the good of the whole.” The creditor had neither an absolute nor an unlimited contract right to a particular remedy. Instead, the parties entered into their agreement subject to the pre-existing authority of local government to prescribe changes in either the enforcement or performance of contract obligations. Insofar as the insolvency law altered the creditor’s remedy, it recognized both the creditor’s and debtor’s rights but prevented the creditor’s interests from “overrid[ing] entirely the general interests of society” and the debtor. Since the New York act preserved the value of performance in a relative sense and helped conserve a measure of economic stability, it fulfilled an important objective of governmental authority and did not necessarily impair the contract within the meaning of the Contract Clause.

The manner in which the Court construed the seminal concepts of contract obligation and impairment reflected disagreement between the justices over the “division of power between the general and State governments.” As a whole, the majority interpreted the Contract Clause as permitting states to regulate certain aspects of the contractual relationship that affected the general welfare. Indeed, Justice Thompson urged judicial deference to state legislatures prescribing “[t]he mode, and manner, and the extent to which property may be taken in satisfaction of debts.” He reasoned expediency and concern for the public good compelled their passage and ultimately governed their efficacy. From this perspective, the majority narrowly construed the meanings of contract obligation and impairment to afford New York wide latitude in maintaining

71 Ogden, 25 U.S. (12 Wheat.) at 282.
72 Id. at 287-89. Johnson also distinguished between state tender laws barred under Article I of the Constitution and insolvency laws enacted to help debtors unable to perform their contractual duties. Rather than discharging the obligation of contracts, insolvency laws merely limited contract rights. In Johnson’s view, the Contract Clause did not expressly prohibit such limitations. Id. at 288-89. Conversely, Article I, Section 10, Clause 1 of the Constitution expressly prohibited the states from making specie other than gold or silver legal tender for the payment of debts. Id.
73 Id. at 291. In this sense, Johnson’s opinion seemingly endorsed the power of states to enact debtor relief legislation that also affected preexisting contracts. However, in a previous segment he indicated New York lacked the authority to modify contracts of citizens from other states. Id. at 288; see also White, supra note 7, at 652.
75 Id. at 294 (Thompson, J., seriatim opinion).
76 Id. at 322 (Trimble, J., seriatim opinion) (discussing the Contract Clause as a special rather than general limitation on state power); see also id. at 256-60 (Washington, J., seriatim opinion).
77 Id. at 309 (Thompson, J., seriatim opinion).
78 Id.
the correlative security of private property within its sovereign borders. In contrast, the Marshall dissent rejected these assumptions and analyzed the Contract Clause in an abstract and expansive manner, devoid of public policy and economic considerations inconsistent with the principles of natural law.

Sixteen years after *Ogden*, the Court curtailed the utility of the rights/remedies distinction as a limitation on the scope of the Contract Clause. In *Bronson v. Kinzie*, Chief Justice Roger B. Ta-

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79 Although Justice Washington reiterated his view that any law which modifies the contract obligation impairs it, *id.* at 256-57, he rejected Webster's argument that universal, or natural law, formed the exclusive basis of the contract obligation, *id.* at 258. Instead, he suggested "the municipal law of the State," *id.* at 259, creates the contract obligation and affects its "validity, construction, or discharge," *id.* at 257. The local law of the contract is paramount to natural law with respect to matters of contract performance. *Id.* at 259. Therefore, the law in effect when parties enter into a contract cannot impair the contract obligation because it inheres in the underlying rights and duties of the contract. *Id.* at 260-61. Thus, a prospective law cannot impair the obligation of contracts. *Id.* at 267. While Washington remained doubtful about the validity of state bankruptcy powers, *id.* at 264, he nevertheless recognized the authority of states to regulate the validity, discharge, construction, performance, evidence, and remedies of contracts, *id.* at 259. He rejected natural law as the exclusive source of contract obligation, believing that within Webster's argument existed the potential to construe the impairment of contract obligations in ways inconsistent with the practical powers of states in the federal system. *Id.* at 258-59.

80 *Id.* at 332-58 (Marshall, C.J., dissenting). Marshall argued that the Contract Clause prohibits both retroactive and prospective laws impairing the obligation of contracts. Relying upon the distinction between contract rights and remedies, he asserted that the New York law affected a contract obligation. He emphasized that parties make contracts with the expectation of literal performance and are able to provide for changes in performance through the terms of the contract if they anticipate the possibility of nonperformance. *Id.* at 343. Unlike Johnson, Marshall believed that the obligation of contracts derived entirely from agreement of the parties and rejected the role of positive law or local government in the creation of contract rights. *Id.* at 346-50. Marshall insisted once the parties formed a contract, its terms became inviolable. *Id.* at 354.

Interestingly, the Court accorded prime importance to the manner in which the underlying purpose of the insolvency legislation advanced an important governmental interest. In so doing, the justices anticipated a chief component of Hughes's rationale in the Minnesota Mortgage Moratorium case, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). See *Hale, supra* note 70, at 880-83. Similarly, the dissent presaged Justice Sutherland's insistence in *Blaisdell* that the Contract Clause mandated strict enforcement of and respect for the obligations of private contracts. See *Blaisdell*, 290 U.S. at 449 (Sutherland, J., dissenting).

81 Prior to Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843), the Court continued to apply the distinction between contract rights and remedies. Between 1827 and 1835 the Marshall Court sustained several state laws that only affected contract remedies. See *Beers v. Haughton*, 34 U.S. (9 Pet.) 329 (1835) (upholding an Ohio law that freed from incarceration penurious debtors); *Watson v. Mercer*, 33 U.S. (8 Pet.) 88 (1834) (sustaining a Pennsylvania law that removed technical flaws in land grants from married women); *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469 (1833) (ruling that a Pennsylvania law that retrospectively altered the procedure for selling land escheated to the
ney articulated that an abridgement of a contract remedy impaired a contract right when it so modified the right that it became worthless. Taney used this rule to invalidate an Illinois law that gave a mortgagor twelve months to redeem his property from foreclosure upon default of an antecedent mortgage. Under this provision, the mortgagor obtained an equitable estate in the premises nonexistent under state law at the time the parties executed the mortgage. The state act further circumscribed the effectiveness of the mortgagee's remedies by preventing the sale of the property by judicial decree for less than two-thirds of its appraisal value.

While Taney acknowledged the authority of Illinois to enact prospective mortgage legislation, he noted that the state could not impair retroactively the mortgagee's contract rights "by burdening the [foreclosure] proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." Thus, he disregarded the authority of Illinois to prescribe legislation for the avowed purpose of regulating land values during an economic recession. He also ignored Johnson's suggestion in *Ogden* that a mortgage represented the type of agreement over which a state should exercise maximum regulatory authority.

To the extent Taney maintained that state law prescribed remedies to enforce contract obligations, he collapsed the distinction between contract rights and remedies and implicitly rejected the

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state in satisfaction of decedents' debts only affected contract remedies); Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831) (upholding a similar Kentucky law as a remedial measure); Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380 (1829) (holding that a state law creating a contract between Pennsylvania claimants and out-of-state claimants did not impair contract obligations); Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827) (allowing Rhode Island to abolish imprisonment for debt). For general discussion of these cases, see White, supra note 7, at 657-60 (asserting that the Marshall Court distinguished between vested contract rights and antecedent property rights and protected the former but not necessarily the latter).

82 42 U.S. (1 How.) 311 (1843).

83 *Id.* at 317. The law in effect when the parties executed the mortgage allowed a foreclosed premises to be sold at public auction to the highest bidder. Moreover, it did not create an equity of redemption period.

84 The Panic of 1837 precipitated a cycle of financial depression and instability that underscored the inflated value of real estate and the relative scarcity of reliable capital. The Illinois laws at issue in *Bronson* represented typical state debtor relief legislation enacted to alleviate the consequences of this panic. See 2 Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY 376 (1922). By 1843 the effects of the Panic of 1837 had largely subsided, thus lessening the sense of urgency about such debtor relief legislation. See Perlman, supra note 33, at 780.

85 *Ogden*, 25 U.S. (12 Wheat.) at 286 (Johnson, J., seriatim opinion) (suggesting a mortgage as an example of the type of contract whose terms courts should not always interpret literally).
theoretical basis of *Ogden*. Instead of comprising a distinct contract component, remedies became part of the underlying legal duty of performance. A state could not withdraw or otherwise make substantial changes in the contract remedy that affected the integrity and value of the contract obligation. In this respect, Taney’s opinion bore more resemblance to those of Marshall in its emphasis on the sanctity of private contract rights than to his own opinions in favor of state power to regulate public contracts.

In dissent, Justice McLean explained the necessity for state power to modify the enforcement of mortgages during an economic recession. If the rights and remedies of a mortgage became merged, then a state could not attempt to offset a recession by altering enforcement of the mortgage without violating the constitutional prohibition. However, since the mortgagee’s remedy existed independently of the contract obligation, a state possessed broad authority to prescribe mortgage conditions for the benefit of the public interest in maintaining stable land values.

After *Bronson*, the distinction between contract rights and remedies became somewhat illusory, as the Court invalidated a series of state laws that retrospectively affected mortgages and other types of contracts executed between private parties. The more substantial the change in contract conditions, the more likely the Court found

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86 Indeed, Taney cautioned against the creation of a distinction between contract rights and remedies that “would render [the Contract Clause] illusive and nugatory; mere words of form, affording no protection [of contracts], and producing no practical result.” *Bronson*, 42 U.S. (1 How.) at 318. While he generally believed states possessed the authority to enact prospective debtor relief legislation, *id.* at 321, and that laws extant at the time of a contract’s creation became an implied part of the contract’s terms, he focused on the retrospective aspects of the Illinois laws and noted how substantial modifications of mortgagees’ remedies diminished the value of their contract rights, *id.* at 318-20. It is from this perspective that Taney made his broad assertions about contract rights and remedies.

87 *Id.* at 318-20.

88 *Id.* at 327-31 (McLean, J., dissenting).

89 *Id.* at 328-29. In particular, McLean asserted the mortgagees had no vested right to a specific remedy. *Id.* at 331. Moreover, because the remedy of a contract differed from its underlying obligation, a state could enact a retroactive law affecting the contract remedy without violating the Contract Clause. *Id.* at 332.

A minority approach in 1841, McLean’s assertion that the Contract Clause did not prohibit all retroactive mortgage legislation eventually resurfaced in slightly different form as one of the lynchpins of Hughes’s majority opinion in *Blaisdell*.

90 See, e.g., W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935) (asserting dividing line between contract rights and remedies obscure); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 552 (1866) (Swayne, J.) (“The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.”).
impairment of a contract right.\(^91\) Legislation that either created an equitable redemption period where none existed at the execution of the mortgage or extended this period in an unreasonable manner violated the Contract Clause.\(^92\) Similarly, laws that imposed minimum prices for the sale of foreclosed land unconstitutionally diminished the mortgagee's rights by hampering the mortgagee's remedies upon the mortgagor's default.\(^93\) The Court also voided state attempts to readjust the balance of power in commercial transactions by divesting creditors of remedies in existence at the formation of otherwise valid contracts.\(^94\) The potential widespread redistributive effects of the foregoing legislation thus diverted use of the rights/remedies distinction away from a means of maintaining state power within the federal system to a method of preserving the

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\(^91\) Epstein, supra note 7, at 746.

\(^92\) See Barnitz v. Beverly, 163 U.S. 118 (1896) (invalidating a Kansas statute giving a mortgagor an eighteen-month redemption period during which the mortgagor was exempt from even paying the rental value of the premises); Howard v. Bugbee, 65 U.S. (24 How.) 461 (1860) (holding that a two-year redemption period unconstitutionally impaired the obligation of a contract).

\(^93\) See Bradley v. Lightcap, 195 U.S. 1 (1904) (invalidating an Illinois law that prescribed minimum foreclosure bids); Gantly's Lessee v. Ewing, 44 U.S. (3 How.) 707 (1845) (ruling unconstitutional an Indiana law prescribing one-half market value of the premises as a prerequisite for sale by foreclosure); McCracken v. Hayward, 43 U.S. (2 How.) 608 (1844) (holding unconstitutional Illinois' requirement of a two-thirds appraisal value of the property for a foreclosure bid).

\(^94\) See Daniels v. Tearney, 102 U.S. 415 (1880) (invalidating a Virginia stay of unlimited duration on civil executions of debts and judicial sales); Edwards v. Kearzey, 96 U.S. 595 (1877) (ruling that a North Carolina one thousand dollar homestead exemption from an execution sale impaired the obligation of a preexisting contract); Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1872) (holding unconstitutional a Georgia law requiring a creditor to file an affidavit of tax payment as a prerequisite to bringing suit for collection of the debt); Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872) (invalidating a Georgia constitutional provision that took away a lien as a creditor's remedy under a preexisting contract); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866) (holding Illinois could not repeal laws extant at the time of a municipal bond issue that specified the amount of tax payable on the interest and principal value of the bonds).

Often counsel did not argue as an alternative theory that the state laws comprised a legitimate exercise of police powers for the general welfare. In part, this is explained by the Court's reluctance, until the first decade of the twentieth century, to place the concept of economic welfare within the purview of the public good. In Kearzey, counsel for North Carolina argued, in part, that the postmortgage creation by the state legislature of the homestead exemption was a legitimate use of local police power. The Court, however, rejected this: "No community can have any higher public interest than in the faithful performance of contracts. . . . 'Policy and humanity' are dangerous guides in the discussion of a legal proposition. . . . The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it." Kearzey, 96 U.S. at 603-04 (emphasis added). Justice Sutherland quoted from this passage in his Blaisdell dissent. See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 470 (1934) (Sutherland, J., dissenting).
value of contract performance.\footnote{For example, in Planter's Bank v. Sharp, 47 U.S. (6 How.) 301, 327 (1847), the Court stated: One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. Thus, it would appear \textit{Sharp} and its progeny applied Justice Washington's rule in \textit{Green v. Biddle}, 21 U.S. (8 Wheat.) 1, 84-85 (1823). On the other hand, the dichotomy remained useful where states merely imposed practical limitations on contract rights without impeding their intrinsic value. See Conley \textit{v. Barton}, 260 U.S. 677 (1923) (sustaining a retroactive application of a Massachusetts law that required a mortgagee to record a factual affidavit within three months after foreclosure); Hooker \textit{v. Burr}, 194 U.S. 415 (1904) (sustaining a retroactive application of a California law extending the redemption period by six months and reducing the monthly interest by one percent); Wilson \textit{v. Iseminger}, 185 U.S. 55 (1902) (upholding a statute modifying the amount of ground rent in a lease); Red River Valley Bank \textit{v. Craig}, 181 U.S. 548 (1901) (sustaining an amendment of a mechanics lien law); Vance \textit{v. Vance}, 108 U.S. 514 (1883) (upholding the retroactive application of a Louisiana constitutional provision requiring owners of tacit mortgages to record them for bona fide purchasers); Connecticut Mut. Life Ins. Co. \textit{v. Cushman}, 108 U.S. 51 (1883)(sustaining an Illinois law that reduced by two percent the interest a mortgagor had to pay to redeem foreclosed property); Curtis \textit{v. Whitney}, 80 U.S. (13 Wall.) 68 (1871) (upholding a law that required the mortgagor or occupant of foreclosed land to receive written notice of sale by foreclosure as a prerequisite to the purchaser receiving the deed).}

\textbf{B. The Doctrine of Reserved State Powers}

The reservation of state powers comprised another significant limitation upon the scope of the Contract Clause. Applicable only to contracts executed between a state and a private party, this theory emerged by the 1830s as a prime method of maintaining local control over corporate enterprise and economic development.\footnote{For general discussions of state corporate charters, see Lawrence M. Friedman, \textit{A History of American Law} 177-202 (1985); Kermit L. Hall \textit{et al.}, \textit{American Legal History: Cases and Materials} 115-17 (1991); Morton J. Horwitz, \textit{The Transformation of American Law} 1780-1860, at 63-139 (1977) (viewing the modification of state charters as an indirect way to subsidize developing industries in a burgeoning market economy); White, supra note 7, at 598-99; Stephen A. Siegel, \textit{Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence}, 60 S. Cal. L. Rev. 1, 29-40 (1986) (discussing the initial judicial pattern of consensus and controversy that marked judicial strict construction of state grants and charters to corporations in the early nineteenth century).} As states chartered private corporations to facilitate various modes of transportation and commerce for the public, they often retained powers of taxation, eminent domain, and general supervision over the quasi-public activities of corporate entities. Sometimes these grants contained specific reservation clauses; however, on many oc-
casions either no such clause existed or the clause contained ambiguous terms. These ambiguities and omissions spawned litigation over the extent to which states could regulate the corporations they chartered. Invariably, the corporations asserted that the Contract Clause prohibited state action that impaired or otherwise diminished the value of rights vested under their charters.97

Unlike the often ambiguous and abstract distinction between contract rights and remedies, the reservation doctrine did not obscure inquiry about the permissible boundaries of state regulatory power within the federal system. Instead, it presented in rather stark terms the difficulty of reconciling such authority with the objective of preserving the sanctity of vested rights under a contract. Though recognized as a limitation upon the scope of the Contract Clause by Joseph Story in his Dartmouth College v. Woodward concurrence98

97 For example, counsel for the Charles River Bridge Company argued that Massachusetts severely diminished the value of the company's implied exclusive franchise to operate a toll bridge across the Charles River when the state subsequently authorized a competing toll-free bridge. Viewing the collection of tolls as within the constitutional protection of property rights, counsel characterized Massachusetts' charter of the Warren Bridge as an attempt to confiscate property that jeopardized the security of the investment interests of the Charles River Bridge proprietors. By diverting income from the bridge, the state impaired the contract rights of its proprietors. See Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 442-58 (1837). Similarly, co-counsel Daniel Webster emphasized that Massachusetts destroyed an integral part of the franchise when it created a rival toll-free bridge. Id. at 531. Webster thought impairment of contracts was "fatal to the confidence of the governed in those who govern; and would destroy the security of all property, and all rights derived under it." Id. at 515.

In dissent, Justice Joseph Story noted that the legislature could not destroy the value of the Charles River Bridge franchise through either direct or indirect means. Id. at 617 (Story, J., dissenting). He opposed strict construction of the Charles River Bridge grant, believing this judicial method impaired the investment interests of those who risked their capital for the progress of public improvements. Id. at 637-38.

In West River Bridge Co. v. Dix, Daniel Webster reiterated the notion that the Contract Clause prohibited state interference with the value of a corporate franchise created by a public charter. Accordingly, he asserted that Vermont could not replace a toll bridge with a free public highway without impairing the charter's contract obligation. 47 U.S. (6 How.) 507, 516-19 (1848).

98 17 U.S. (4 Wheat.) 518, 675 (1819) (Story, J., concurring) (noting that the vested rights of a corporation could not be retroactively controlled or destroyed by statute unless a power for that purpose be reserved to the legislature in the act of incorporation). In Dartmouth College, the Court held unconstitutional a series of New Hampshire acts that revoked the charter of a private, eleemosynary educational institution by making the college a public university subject to state control. The acts transferred property of the original college corporation to the new public university. Daniel Webster, counsel for the college, argued that the Contract Clause secured private rights from legislative interference and contended that the New Hampshire laws unconstitutionally impaired the contract obligation of the original college charter. Writing for the majority, Chief Justice John Marshall implicitly agreed and expressly ruled that the state could not revoke Dartmouth's charter in contravention of the Contract Clause. Id. at
and by the entire Court in *Providence Bank v. Billings*, it was not until Roger B. Taney ascended the bench that the Court employed the reservation doctrine as a way to narrow the spectrum of contract rights within the protection of the Contract Clause.

Through strict construction of corporate grants the Taney Court applied the concept of state reserved powers to assert the primacy of local government over private interests. In *Charles River Bridge v. Warren Bridge*, Chief Justice Taney, writing for the majority, strictly interpreted the language of a toll bridge company charter as not conferring upon its proprietors an exclusive franchise to operate a pedestrian bridge across the Charles River. While he accepted the premise that the charter constituted a contract, he rejected the notion that, in the absence of express terms, it prohibited the state from chartering a subsequent "free" bridge in the same location.

To this extent, he concluded that in public grants to private corporations nothing passes by implication. Massachusetts did not cede forever control over economic and technological development of a public waterway simply because it chartered a private entity to

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653-54. Citing the absence of any reserved powers of modification in the college charter, Story concurred in the Court's decision.

Prior to this case, some state courts had invoked the reservation doctrine. See, e.g., *Wales v. Stetson*, 2 Mass. 143, 146 (1806). Beginning in the late eighteenth century, states often put reservation clauses into corporate charters. *Wright*, *supra* note 7, at 58-60; *Siegel*, *supra* note 96, at 33 n.153.

99 29 U.S. (4 Pet.) 514 (1830) (rejecting the presumption that Rhode Island relinquished its power to tax a bank in the absence of an express immunity conferred upon the bank in its corporate charter); see also *Mumma v. Potomac Co.*, 33 U.S. (8 Pet.) 281 (1834) (upholding authority of state legislatures to dissolve corporations); *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830) (strictly construing a land grant to Revolutionary War veterans). For a discussion of these cases, see *White*, *supra* note 7, at 660-62.

100 36 U.S. (11 Pet.) 420 (1837).

101 Id. at 548-49. At issue was whether the state impaired the obligation of contracts when its subsequent charter of a toll-free bridge diminished the value of an implied exclusive franchise the plaintiffs claimed was derived from the public charter of their bridge in 1785. The proprietors of the Charles River Bridge (plaintiffs-appellants) sought to enjoin the operation of the Warren Bridge, a rival toll-free bridge chartered by Massachusetts in 1828. In 1785, the state granted a charter of incorporation to a group of investors to build the Charles River Bridge over a preexisting ferry route between Charlestown and Boston. By 1830, the Warren Bridge operated toll free within a few feet of the older bridge. The Massachusetts Supreme Judicial Court dismissed the suit, and the Supreme Court heard the case on a writ of error. The Court, per Taney, strictly construed the language of the Charles River Bridge charter and ruled that Massachusetts did not impair the contract obligation therein when it created a competing bridge enterprise.

102 Id. at 548-52.

103 Id. at 545-46.
operate and construct a bridge.¹⁰⁴ Nor did its subsequent charter of a competing bridge diminish the value of the plaintiffs’ implied rights of exclusive toll receipts so as to impair a contract obligation under the Contract Clause.¹⁰⁵

Notwithstanding the private property interest in tolls, the state had paramount power over internal improvements and the public way.¹⁰⁶ An implied contract promise not to modify or revoke a charter involving a matter of substantial public interest would prevent the state from the continued promotion of new avenues of economic development and enterprise that inured to the benefit of all.¹⁰⁷ To confer a monopoly upon one toll bridge company might, in the long run, hamper industrial progress and the most efficient uses of a public waterway.¹⁰⁸ Conversion of a corporate charter into a vested contract right to exclude others from improving the course of internal improvements would allow a privileged elite to operate in the public sphere virtually unchecked by local authority without continued incentive to pursue objectives that would maximize resources and minimize economic waste.¹⁰⁹

¹⁰⁴ Taney denied that the 1785 charter contained an implied contract promise from the state that it would not charter a competing bridge or otherwise diminish the proprietors’ income. Id. at 552. Strictly construing the charter language, he noted its silence about competition and the exclusivity of tolls. Id. at 548-52. “[I]n charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey.” Id. at 549.

¹⁰⁵ Id. at 548-52. But see id. at 608-45 (Story, J., dissenting).

¹⁰⁶ Taney drew an analogy between the taxing power of the state and its authority over transportation and internal improvements. He observed:

And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. Id. at 547. Taney refused to presume that Massachusetts surrendered its power over internal improvements in its grant to the Charles River Bridge proprietors. He believed the public interest in transportation became affected by the 1785 grant of a public way to a single corporation. Id. at 548.

¹⁰⁷ Id. at 552-53.

¹⁰⁸ Id.; see also Horwitz, supra note 96, at 130-39. See generally Stanley I. Kutler, Privilege and Creative Destruction: The Charles River Bridge Case (1971) (discussing how the Taney Court used the doctrine of strict construction to promote local economic development consistent with changing conceptions of the private rights of contract and property and the public welfare).

¹⁰⁹ See Charles River Bridge, 36 U.S. (11 Pet.) at 548. (“The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the func-
A majority of the Court shared Taney's perception that a distinction existed between the acquisition of property rights under a contract and the creation of economic privileges and immunities in potential conflict with the overriding objectives of local government. Insofar as states promoted corporate activity to improve society through special charters, they also retained the authority to provide ample opportunity for new modes of development.110 Strict construction of grants for private development of public resources therefore demonstrates the extent to which the Court eschewed an overly technical interpretation of contract obligation in favor of an affirmative exercise of state regulatory power.111

In its application of the reservation doctrine, the Court acknowledged that within grants by states to private corporations for the development of internal improvements existed a condition subjecting contract rights to the compelling interests of society. As Justice Daniel explained in West River Bridge Co. v. Dix,112 states retained over all contracts the power to modify those terms which conflicted with "the right and the duty [inhering] in every political sovereign

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110 See Horwitz, supra note 96, at 130-39; Siegel, supra note 96, at 55-65.
111 See Charles River Bridge, 36 U.S. (11 Pet.) at 552 (cautioning against literal interpretation of contract rights that would unduly restrict the exercise of state police powers as they affect the course of internal improvements).
community of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large."  For this reason, the exercise of eminent domain and other essential attributes of sovereignty did not impair the obligation of contracts, but rather marked the fulfillment of contract conditions. Indeed, the Court adopted this rationale in sustaining Vermont's use of eminent domain to implement the replacement of a private toll bridge with a public highway.

To the extent that the theory of state reserved powers protected some aspects of local authority from Contract Clause prohibition, it remained consistent with the observations of Justice Johnson and others about the distinction between rights vested under a contract and the powers of the state to prescribe their enforcement. The doctrine also made clear what had been merely implicated in earlier decisions: government existed to maintain the collective security of private rights. However, the limited application of the theory to public contracts and the eventual widespread adoption of general incorporation laws somewhat diminished its practical utility by the second half of the nineteenth century. Nevertheless, it spawned the emergence of other theories that created further inroads upon the Contract Clause and expanded the scope of state power to regulate private and public economic affairs.

113 Id. at 531. Whereas Charles River Bridge did not go so far as to resolve the potential conflict between eminent domain and the Contract Clause, this case suggested that a state's power of eminent domain was "paramount to all private rights vested under the government, and these . . . are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise." Id. at 532. Justice McLean perceived no conflict between eminent domain and the Contract Clause, noting that the former involved the power of the state "to take private property for public use," while the latter primarily involved contracts. Id. at 536 (McLean, J., concurring).

114 Id. at 533-35.

115 In 1795, the Vermont legislature chartered a corporation to build and operate a toll bridge over the West River, giving it an exclusive franchise for one hundred years. An 1839 act authorized Vermont courts to exercise the power of eminent domain over private property to facilitate the laying out of public highways. Under this act, courts would assess the value of private property and compensate the owners. Three years later, a petition to a local court requested the court to convert the plaintiffs-appellants' toll bridge to a free one as part of a new public road. The Supreme Court heard this case on a writ of error from the Vermont Supreme Court.

116 General incorporation laws supplanted special legislative grants as the principal means of creating corporations. As a result, after the 1830s, a wide variety of people formed corporations. In part, these laws simplified the process of incorporation and de-emphasized the nexus between political access and corporate privilege. See Friedman, supra note 96, at 194-96; Hall et al., supra note 96, at 141.
C. The Doctrine of Inalienable Police Powers

Within the reservation doctrine lay the core of a more pervasive limitation upon the reach of the Contract Clause. Insofar as the Taney Court strictly construed the scope of vested rights under public contracts and subjected them to the reserved regulatory authority of the state, it also advanced the burgeoning concept of a police power limitation upon the clause. For in sustaining the authority of states to regulate public contract rights affecting the course of internal improvements, the Court implicitly upheld the exercise of state power to make laws for the public good. In part, it invoked the reservation doctrine to preserve the fundamental ability of states to govern and rejected an interpretation of the Contract Clause that did not recognize local control over eminent domain and internal improvements. This broad recognition of state power within the federal system over contracts eventually spawned the theory of inalienable police powers.

Unlike its predecessor, the principle of inalienable police powers operated directly upon the contract rights of private companies, who received through state grants and charters the right to engage in enterprising activities with considerable effects upon the public. It did not derive its authority from language within the public grant or charter reserving the power of amendment or revocation to the state. Instead, it presupposed the paramount existence of certain attributes of sovereign power to which all contracts became subject regardless of whether they contained reservation clauses. This characteristic ultimately made possible through judicial interpretation the abridgment of contract rights otherwise expressly created by charters and grants. In contrast, under the reservation doctrine the terms of these agreements often limited the scope of state

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117 In *Ogden*, Justice Washington referred to a general concept of state police powers when he explained why broad construction of the term contract obligation would restrict the authority of local government to prescribe rules involving the public welfare. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 258-59 (1827) (Washington, J., seriatim opinion). Other Supreme Court antecedents include *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855) (dicta recognizing the nascent concept of state police powers) and *Phalen v. Virginia*, 49 U.S. (8 How.) 163 (1850) (upholding under the reservation theory a state revocation of a lottery company charter while acknowledging the state’s police power to promote the public welfare). Moreover, state courts had recognized the concept of police powers from the late 1820s. *See Wright*, supra note 7, at 196-99; Siegel, supra note 96, at 43 n.211.


119 Siegel, supra note 96, at 41.
regulation, as judges declined to uphold the exercise of local power that either contradicted the express provisions of a contract or exceeded the reserve powers of the state.\textsuperscript{120} Moreover, the concept of inalienable police powers permitted the states some measure of control over those aspects of private contractual obligations that affected the public health, morals, and safety.

The theory of inalienable police powers rested upon two fundamental premises, each of which reflected the view that the sovereign authority of the state resided in its people, who through their legislative agents made laws to protect the security of private rights and to promote the public welfare.\textsuperscript{121} First, government existed to preserve personal interests within the guise of a collective security. Thus, to the extent individuals enjoyed the rights of property, contract, and personal freedom, they did so in a relative sense rather than in an absolute manner. Proponents of inalienable police powers therefore used the theory to implement what they considered the first postulate of governmental authority: "the preservation of the public health and the public morals, and the protection of public and private rights."\textsuperscript{122}

A second basic premise of the theory viewed state government as a sovereign trust in which citizens delegated much of their political authority to legislative agents entrusted to make laws for the protec-

\textsuperscript{120} See, e.g., Charles River Bridge, 36 U.S. (11 Pet.) 420. For early twentieth-century examples see Coombes v. Getz, 285 U.S. 434 (1932) (prohibiting California from repealing a state constitutional provision making corporate directors personally liable to corporate creditors for misappropriation of corporate funds) and City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913) (invalidating a municipal ordinance that repealed a telephone company's prior grant to erect telephone poles and wire near city streets).


\textsuperscript{122} Stone, 101 U.S. at 820. Chief Justice Waite, who wrote the majority opinion, recognized the difficulty of defining police powers. He remarked:

It is always easier to determine whether a particular case comes [from] within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals.

\textit{Id.} at 818. Similarly, in Beer Co. v. Massachusetts, 97 U.S. 25 (1877), Justice Bradley noted that the police power "does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." \textit{Id.} at 33; see also Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 750-51 (1884) (sustaining New Orleans's regulation of butchers as a legitimate exercise of inalienable police powers).
tion of private rights and the benefit of the public. Consequently, contractual agreements between the state and private parties that relinquished public control over matters deemed within the essential attributes of governmental authority and political sovereignty violated this public trust. Therein lay the theoretical basis of inalienability, and since the last quarter of the nineteenth century, conflict over its parameters has underscored an underlying tension within the federal system about the exercise of state authority over vested contract rights.

By the end of the 1870s, a series of Contract Clause disputes arose wherein the private recipients of public grants for businesses such as distilleries, lotteries, and fertilizer plants argued state regulations retroactively impaired the obligation of contracts. In each case the state enacted measures to protect public health or morals that either restricted the value of the grantee's rights under its contract with the state or altogether prohibited the grantee from operating its business. At first, the Court resolved these constitutional challenges through the reservation doctrine, narrowly construing the scope of the grantees' contract rights, while observing in dictum that a state could not relinquish through a contract its authority to prescribe regulations for the public health, morals, and welfare.

However, in Stone v. Mississippi, the Court unequivocally used inalienable police powers as the principal basis of its decision to sustain a state constitutional provision that prohibited lotteries in contravention of a previous state charter to operate such a company. In so doing, the Court emphasized that the Contract Clause permitted individual states the latitude to regulate their civil institutions

123 Stone, 101 U.S. at 820; Siegel, supra note 96, at 43-44.
124 See Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667, 670 (1878) (narrowly interpreting the preexisting charter of a fertilizer company as a license so as to hold a municipal regulation enacted pursuant to local police powers did not impair a contract obligation); Beer Co., 97 U.S. at 32-33 (holding that a Massachusetts liquor company's grant to manufacture and sell liquor was subject to the state's reserved police powers); Boyd v. Alabama, 94 U.S. 645, 650 (1876) (upholding Alabama's police powers prohibition of a lottery).
125 101 U.S. 814 (1880).
126 Id. at 820. Chief Justice Waite distinguished between contracts that conferred property rights and ones that merely authorized private individuals to engage in entrepreneurial activities (bridges, highways, lotteries) for the public's benefit. The Contract Clause protected the former, but not the latter. Thus, it did not prevent the state from making illegal the operation of a lottery it previously authorized. The grant of a lottery to private individuals was subject to the paramount police powers of the state to regulate public morals. The Court held that the lottery's continued existence threatened to "disturb the checks and balances of a well-ordered community." Id. at 821.
insofar as they affected the health and moral interests of the community.

While often upheld to preserve state control over the manufacture and distribution of liquor, lottery tickets, and public health, controversy existed over whether the concept of inalienable police powers comprised less consensual matters of public welfare such as taxation, public convenience, and economic prosperity. Unlike legislation for the preservation of health and moral welfare, most of which fit within a traditional notion of governmental responsibility, laws that sought to alter the allocation of economic resources, or otherwise subject vested contract rights to the exigencies of economic change, raised critical questions about the permissible scope of state regulation under the Contract Clause.

In large part, this debate emanated from tensions within the federal system regarding the allocation of power to the states to regulate private and public economic affairs. Advances in technology facilitated the course of internal improvements and helped produce a complex economy that affected the disparate elements of a highly interdependent society in unequal and sometimes unpredictable ways. The Civil War and the ensuing period of Reconstruction,

127 See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887) (holding that Kansas's prohibition of the manufacture and sale of liquor did not violate Fourteenth Amendment due process); Beer Co., 97 U.S. at 32-33 (dictum that beer franchise is subject to the state's reserved police powers).

128 See, e.g., Douglas v. Kentucky, 168 U.S. 488 (1897) (holding that a lottery franchise was merely a license subject to restriction by state police powers); Stone v. Mississippi, 101 U.S. 814; Boyd, 94 U.S. at 650. Contra City of New Orleans v. Houston, 119 U.S. 265 (1886) (holding unconstitutional a municipal repeal of a lottery monopoly).

129 See, e.g., Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667, 670 (1878) (dictum that the rights of a licensee were subject to the reserved police powers of the state over public health and welfare).

130 For example, some members of the United States Supreme Court believed public inconvenience was an invalid reason "to justify the revocation of express charter provisions." Siegel, supra note 96, at 52 & n.261 (referring to New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 668-72 (1885)).

131 See generally Horwitz, supra note 96, at xvi, 63-139 (describing the legal system's support of economic growth and the complex pattern of socio-economic competition between 1780 and 1860). In a subsequent study of the post-Civil War era, Horwitz commented:

The emergence of industrial society thus meant not only that redistributive motives would inevitably be activated by the reality of an increasingly unequal society. It also meant that the relatively fixed common law categories of which police power doctrines had been erected would fall apart, as any categorical distinction between the health of a worker and the conditions of industrial life became ever more difficult to maintain . . . . But once the problems generated by industrial society undermined the ability of courts to continue to
in many respects, altered the perceived role of states in the federal union as changes in the structure of the federal and state constitutions both strengthened the theoretical constraints upon the states and highlighted the necessity for state action in areas beyond the practical scope of federal influence.\textsuperscript{132} Insofar as these developments may have provided the rationale for upholding some state modifications of contract rights, they also presented anew the recurring problem of exercising state powers to promote the public welfare in ways that did not diminish the value and integrity of contract performance.

Even before it applied inalienability to preserve state regulation of contracts in the interests of public health and morals, the Court manifested some reluctance to uphold legislation whose prime objective was to relieve parties from the adverse economic consequences of their contracts.\textsuperscript{133} Toward the end of the Taney era, the Court reexamined the authority of states to repeal tax exemptions contained within corporate charters and, by a narrow margin, held

\begin{itemize}
\item offer traditional definitions of the category of health, safety and morals, the inherently redistributive potential of the police power emerged with a vengeance.
\item Throughout the last half of the nineteenth century railroads and public utilities occupied preeminent roles in economic development. They also spawned considerable litigation over local police powers, contract rights, and substantive due process. For a general discussion, see MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 165-67 (1977) (briefly describing the subsidization of railroads by local governments); id. at 289 (referring to the enormous magnitude of industrial growth and its disproportionate social effects); id. at 340-42 (discussing the regulation of public utilities). \textit{See also} C. JOSEPH PUSATERI, A HISTORY OF AMERICAN BUSINESS 199-226 (2d ed. 1988).
\item Kermit Hall, among others, asserts that the Civil War and Reconstruction precipitated fundamental shifts in perception about the relationship between governmental authority on the national and state levels and individual rights. The addition to the federal constitution of the Thirteenth, Fourteenth, and Fifteenth Amendments reflected this ideological change, as did similar amendments to state constitutions prohibiting governmental interference with individual civil rights. HALL et al., \textit{supra} note 96, at 188. This period also underscored the importance of increased governmental regulation to implement economic and social progress. \textit{Id.} at 353-56. Consequently, the burgeoning administrative and regulatory atmosphere produced legal and constitutional issues involving state police powers, contract rights, and substantive due process. \textit{Id.} at 367-68. For early examples of these conflicts before the Supreme Court, see Munn v. Illinois, 94 U.S. 113 (1877) (upholding state regulation of grain elevator rates under the controversial "affected with a public interest" doctrine); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (upholding the creation of a New Orleans butchers' monopoly as a permissible police power regulation).
\item See Sterk, \textit{supra} note 9, at 679-83.
\end{itemize}
that states could not tax the recipients of such public grants under a theory of reserved powers without impairing the value of vested contract rights. Similarly, the Court refused to invoke either the reservation doctrine or the inalienable police power doctrine in cases involving state repudiation of financial obligations incurred during the Civil War and Reconstruction. It also rejected use of the police powers principle as a rationale for state modification of mortgage agreements between private parties.

In contrast, by the turn of the century, the Court recognized the theory of inalienable police powers as the principal means by which states could regulate aspects of corporate activity that affected the public in primarily noneconomic ways. In part, changes in social attitudes about the public utility of lotteries, breweries, and nuisances may have influenced judicial willingness to uphold state laws that sought to maintain the collective good of society by controlling the production of its vices. Nevertheless, the Court did not per se view the creation of business monopolies as so inimical to the public welfare that their creation by public grant alone justified the exercise of residual police powers. However, the distinction between permissible legislation enacted for public health and morals and unconstitutional legislation that subjected the rates of utility companies, public carriers, insurance companies, and banks to state control at times became blurred. Moreover, several state laws regulated the economic effects of certain businesses through the guise of legislation enacted for the preservation of public health and morals.

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134 See, e.g., Washington Univ. v. Rouse, 75 U.S. (8 Wall.) 439 (1869); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 415 (1853); Piqua Branch Bank v. Knoop, 57 U.S. (16 How.) 369 (1853). In these cases a majority of the Court ruled that local taxation of corporations previously granted tax exemptions impaired contract obligations. But see Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) (refusing to presume a tax exemption in absence of express language in charter). The dissents of Justices Catron, Miller, and Daniel in the tax cases between 1853 and 1869 supported the concept of inalienable tax powers. See Siegel, supra note 96, at 44, 49-50.

135 Sterk, supra note 9, at 679-83.

136 Edwards v. Kearzy, 96 U.S. 595 (1877) (ruling that North Carolina's one thousand dollar homestead exemption from an execution sale impaired the obligation of a preexisting contract).

137 See Keller, supra note 131, at 129-30; Sterk, supra note 9, at 678.

138 See, e.g., New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885); see also Wright, supra note 7, at 203-10; Siegel, supra note 96, at 52-53; Sterk, supra note 9, at 677 & nn.106-07.

139 See, e.g., Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884). In Butchers' Union, the Court sustained a New Orleans ordinance that prescribed competition among butchers as a legitimate police measure to maintain municipal health and
Such conflicts in precedent demonstrate the sometimes Byzantine treatment of state police powers under the Contract Clause in the late nineteenth and early twentieth centuries. Members of the Court disagreed over the extent to which states could promote the public welfare. Some justices denied the states much latitude to regulate contracts under the auspices of a general police power, while others viewed the distinction between permissible and impermissible laws as one of degree, dependent in part upon the nature of the business and the prevailing needs of society.\textsuperscript{140}

During the first two decades of the twentieth century the concept of inalienable police powers broadened as Court personnel changed and some of the more progressive justices included economic prosperity and progress as objectives within the sphere of public welfare.\textsuperscript{141} They expanded the basis upon which states could modify contract rights and advanced an interpretation of the Contract Clause that stressed judicial deference to local legislation enacted for the protection of the economic and social interests of all segments of society.\textsuperscript{142} Thus, the Court often balanced the contract rights of private parties against the collective needs of the public and emphasized the limitations that states could exercise over cer-

\textsuperscript{140} Compare, for example, Justice Miller's majority opinion in \textsl{Butchers' Union} with the concurrences of Justices Bradley and Field. See Siegel, \textit{supra} note 96, at 52-54 & n.260.

\textsuperscript{141} See, \textit{e.g.}, \textsl{Chicago, B. & Q.R.R. v. Illinois Drainage Comm'r's}, 200 U.S. 561 (1906) (recognizing economic prosperity and convenience within the concept of inalienable police powers); see also \textsl{Illinois Cent. R.R. v. Illinois}, 146 U.S. 387 (1892). Though Justice Steven Field, writing for the majority, did not invoke the doctrine of inalienable police powers, he narrowly construed Illinois's grant to a railway of land submerged under Lake Michigan. Field concluded that the state did not impair the grant when it subsequently revoked it to promote regional economic prosperity. See Charles W. McCurdy, \textsl{Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897}, in \textsl{American Law and the Constitutional Order: Historical Perspectives} 246, 258-59 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

\textsuperscript{142} See \textsl{Block v. Hirsh}, 256 U.S. 135, 154-55 (1921); \textsl{Union Dry Goods Co. v. Georgia Pub. Serv. Corp.}, 248 U.S. 372, 377 (1919); \textsl{Noble State Bank v. Haskell}, 219 U.S. 104, 113 (1911); \textsl{Manigault v. Springs}, 199 U.S. 473, 480-81 (1905). For the limits of judicial deference, see \textsl{Chastleton Corp. v. Sinclair}, 264 U.S. 543, 547 (1924) (court will not defer to legislative declaration of emergency if the facts no longer indicate the existence of an emergency).
tain kinds of agreements.\textsuperscript{143}

In particular, cases involving the imposition of safety standards on public carriers presented a prime opportunity for expanding the purview of inalienable police powers. While technological developments had vastly improved the quality of transportation and kept it responsive to the myriad needs of the flourishing post-Civil War economy, the proliferation of accidents and the magnitude of harm necessitated increased local control over its means of operation. Within this context, states and municipalities placed on rail companies a continuing duty to repair tracks and maintain facilities in ways inconsistent with previous legislative requirements incorporated within the provisions of their state charters. While not directly enacted for reasons of public health or morals, the regulations did promote the maintenance of safety; they also altered the contract rights of grantees by changing their legal duties of performance.

Rather than view such measures as unconstitutional impairments of contract obligations, the Supreme Court placed the concepts of public safety and convenience within the scope of inalienable police powers. From this broad perspective of public welfare, the Court upheld laws that regulated the operation of trains,\textsuperscript{144} required railways to change roadbed grading\textsuperscript{145} and the direction of a drainage ditch,\textsuperscript{146} and increased the financial responsibilities of carriers for viaduct repairs.\textsuperscript{147} As Justice Pitney observed, states within the federal system maintained the right to enact legislation that bore a reasonable relationship to legitimate governmental objectives in securing the public good.\textsuperscript{148} Thus stated, the principle of inalienable police powers became a test of reasonableness by which the Court sustained laws which abridged vested contract rights by nonarbitrary means.


\textsuperscript{144} \textit{Goldsboro}, 232 U.S. 548.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Tranbarger}, 238 U.S. 67.


\textsuperscript{148} \textit{Tranbarger}, 238 U.S. at 76-77.
The Court also recognized the maintenance of economic prosperity as an essential attribute of state regulatory authority, and in *Noble State Bank v. Haskell* 149 ruled that Oklahoma did not violate the Contract Clause when it required local banks to contribute to a fund protecting their depositors' money. 150 Writing for the majority, Justice Holmes acknowledged the difficulty of ascertaining appropriate constitutional limitations upon state police powers, 151 but proclaimed such authority "extend[ed] to all the great public needs." 152 Passed in response to the Panic of 1907, the state laws represented reasonable attempts to prevent widespread financial chaos. Given these circumstances, Holmes believed the Court should defer to the state legislature and sustain the measure notwithstanding its incidental interference with private rights created by the bank's public charter. 153

While *Haskell* did not involve a private contract, its rationale derived from the notion that private rights must yield occasionally to public exigencies. Moreover, it reflected the even more significant contemporaneous application of inalienable police powers to contracts between private parties. In *Manigault v. Springs,* 154 for example, a South Carolina law required an adjoining riparian owner to construct a dam obstructing the flow of a navigable waterway to the detriment of a neighbor and in conflict with a preexisting private agreement. Unpersuaded that the measure impaired a private contractual obligation, the Court noted that the paramount public interest in improving swampland legitimized the act on police power grounds, notwithstanding its incidental effects on private vested contract rights. 155 For similar reasons laws that prohibited

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150 Id. at 112-13.
151 Id. at 110. Holmes primarily analyzed the case in terms of Fourteenth Amendment due process. Nevertheless, his observation about state police powers also applied to Contract Clause analysis. Moreover, his opinion illustrates the Court's willingness to include the maintenance of economic prosperity within inalienable state police powers.
152 Id. at 111. Holmes seemingly tried to qualify his statement upon reargument of the case: "The analysis of the police power . . . was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power." Noble State Bank v. Haskell, 219 U.S. 575, 580 (1911).
154 199 U.S. 473 (1905).
155 Id. at 480-81, 485-86. The Court defined police power as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people." Id. at 480. This was the first decision that expressly held that the exercise of inalienable police powers did not impair the obligation of a private contract.
transportation of water across state lines\textsuperscript{156} and increased electricity rates did not violate the Contract Clause even though they altered substantially the terms of preexisting private contracts.\textsuperscript{157}

In addition, a majority of the Court adopted this dynamic theory of police powers\textsuperscript{158} to uphold temporary legislation in New York and the District of Columbia that permitted tenants to remain in possession of rental apartments upon the expiration of their leases.\textsuperscript{159} Enacted to alleviate a critical housing shortage created by the return of World War I veterans, the laws effectively deprived landlords of immediate possession of their rental units so long as the holdover tenants paid a reasonable monthly rent. For the dissenters, this legislation marked an intolerable local encroachment upon private contract values;\textsuperscript{160} the slim majority found the acts reasonable attempts to alleviate a bona fide emergency.\textsuperscript{161} Insofar as the Rent Cases presented a relatively modern problem of contract impairment, they underscored a recurrent theme in Contract Clause jurisprudence that would resurface in \textit{Blaisdell}: the extent to which states could regulate vested contract rights in the public interest.

In retrospect, the Supreme Court's expansive interpretation of inalienable police powers anticipated Hughes's creative majority opinion in \textit{Blaisdell}.\textsuperscript{162} Long recognized as the case that articulated a reasonable police power restriction upon the scope of the Contract Clause prohibition, \textit{Blaisdell} actually applied the rationale of the

\textsuperscript{156} Hudson Water Co. v. McCarter, 209 U.S. 349, 355-57 (1908) (upholding New Jersey's quasi-sovereign interest in preserving natural resources as paramount to private contract rights).

\textsuperscript{157} Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372, 374-75 (1919) (holding that a private contract establishing rates between an electric company and its consumers was subject to state police powers).

\textsuperscript{158} Judge Roscoe Pound used this term in People ex rel. Durham Realty Co. v. La Fetra, 130 N.E. 601, 605 (N.Y.), writ of error dismissed sub nom. New York ex rel. Brixton Operating Corp. v. La Fetra, 257 U.S. 665 (1921).

\textsuperscript{159} Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921).

\textsuperscript{160} Chief Justice Taft and Associate Justices McKenna, McReynolds and Van Devanter dissented in \textit{Levy, Feldman, and Block} on the grounds these laws diminished the value of private property by impairing its use. They invoked both the Due Process and Contract Clauses as limitations upon local authorities' regulation of the use and value of private property and contract rights. They also urged adherence to these restrictions to preserve the sanctity of private rights during changing economic conditions. See, e.g., \textit{Block}, 256 U.S. at 160, 165. McReynolds and Van Devanter later joined in Sutherland's dissent in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934). By 1934, Taft and McKenna had left the Court.

\textsuperscript{161} See \textit{Feldman}, 256 U.S. at 198; \textit{Block}, 256 U.S. at 154-56.

foregoing police power decisions to a more complex and pervasive problem of a subsequent era in ways that emphasized both the jurisprudential tenets of Charles Evans Hughes and the dynamics of federalism.

III

CHARLES EVANS HUGHES: THE PRACTICAL JURISPRUDENCE OF PROGRESSIVE FEDERALISM

To assess the Contract Clause jurisprudence of Charles Evans Hughes, one must first understand his conceptions of government, federalism, and the Constitution. Hughes's Supreme Court opinions on contracts and state police powers invariably reflected his abiding interest in the practical problems of federalism and revealed his concern with social and economic progress. Over many years Hughes devised a pragmatic jurisprudence that sought to maximize the exercise of state authority in the federal system and strove to balance the property and contract rights of individuals with the public welfare. Although a detailed study of his theories exceeds the scope of this Article, an introduction to them provides an essential perspective from which to examine his opinion in Blaisdell.

A. Hughes's Conception of Governmental Authority

Throughout his public career Charles Evans Hughes developed a conception of government based on a shrewd understanding of its technical aspects and a keen perception of its underlying purpose and limitations. He viewed governmental authority as a dynamic agency derived from fundamental principles of social and political behavior. As an attorney, politician, governor, and jurist, Hughes attained intimate familiarity with both the problems and triumphs of government. Not surprisingly, he formed a theory of govern-

163 Charles Evans Hughes's public career spanned nearly 40 years. As an attorney, he had a prominent role in governmental investigations of the coal, gas, and insurance industries at the turn of the century. After Hughes served as New York's governor from 1907 to 1910, he was appointed to the United States Supreme Court. He served as an Associate Justice until 1916, when he ran unsuccessfully as the Republican candidate for President. He was Secretary of State from 1921 to 1925 and then returned to private practice, during which he was President of the American Bar Association and a justice on the Permanent Court of International Justice. In 1930, he replaced William Howard Taft as Chief Justice of the United States Supreme Court and remained in that position until his resignation in 1941. For a comprehensive biographical discussion of Hughes, see Merlo J. Pusey, Charles Evans Hughes (1951). See also Betty Glad, Charles Evans Hughes and the Illusions of Innocence, A Study in Ameri-
ment imbued with his own notions of liberty, order, and fairness. Yet, he also retained the perspective of a somewhat detached observer cognizant of the strife and conflict with which government must contend from time to time.

He recognized that government reflected an implicit tension between personal liberty and collective security. Instead of thinking in absolute terms, Hughes preferred to articulate a conception of government based on the idea of an ordered liberty by which individual citizens retained a large measure of freedom consistent with, and at times subsumed by, the paramount objectives of the social order. Without order, Hughes feared that personal freedom would become illusory and chaos would ensue. Relatively early in public life he stressed the "preservation of law and the maintenance of order": "once you abandon . . . the desire to accord your neighbor [with] the right that you demand for yourself, you enter . . . a path that leads straight to anarchy."165

Hughes valued the law as a safeguard of liberty and a guideline for effective government. As President of the American Bar Association he proclaimed: "Liberty and law—one and inseparable! The noblest endeavor of democracy to safeguard the one by the intelligence in the other! . . . Let us . . . mak[e] secure the authority of law as the servant of liberty wisely conceived . . . "166 In the same address, Hughes explained the legal basis for democratic government: "[T]he supreme aim and justification of . . . lawmaking . . . should ever be found . . . in the purpose to secure the freedom of the individual—an ordered freedom, but still freedom—subject only to such restraints as a sound and tolerant judgment determines to be essential to the mutuality of liberty."167 This comment demonstrates his view of law as an implement to protect and administer the variants of liberty secured by a democratic society of free individuals. However, his philosophy did not shield him from reality,
and throughout his public career Hughes sought to reconcile the problems of governmental authority with his democratic ideals.

His own perception of government reflected less idealism than pragmatism. In an early lecture at Yale University, then Governor Hughes explained that "government is not something apart from us, or above us, that it is we ourselves organized in a grand co-operative effort to protect mutual rights to secure common opportunity and improvement." Hughes's emphasis on the correlative relationship between private rights and the public interest contributed heavily to his understanding of government. He perceived the fundamental paradox in the concept of an ordered liberty: "How to protect the individual in his personal rights and at the same time safeguard the community, is a problem not solved by forms of words, even in written constitutions." This question did not have an easy answer, as Hughes himself learned during his tenure on the Supreme Court when cases involving the Contract Clause, substantive due process and state police powers highlighted the parameters of the conflict between personal liberty and public interest. Nevertheless, he recognized this tension well before his years on the high court and grappled with its nuances from the dual perspectives of lawyer and governor.

Early in public life, Hughes acknowledged the implicit limitations the public welfare placed upon the exercise of private rights. As Governor of New York he made the following observation in an address at the University of Michigan:

But side by side with the tradition that we have of individualism, side by side with the firm belief that we have in the importance of maintaining opportunities for individual attainment, . . . is the keener recognition that we have public rights with reference to which every individual right must be exercised.

Thus viewed, the relationship between private and public rights functioned as a basic postulate of the social order. Unbridled individualism would imperil personal liberty and destroy society.  

168 Charles Evans Hughes, Conditions of Progress in Democratic Government 8 (1910) (1908 Yale lectures) [hereinafter Hughes, Conditions of Progress].

169 Charles Evans Hughes, Address at Harvard Law School 6 (Nov. 1, 1926) (transcript available in Hughes Papers at Library of Congress) [hereinafter Harvard Address].

170 Charles Evans Hughes, Washington's Birthday Address at the University of Michigan Law School (Feb. 22, 1907), in 7 Mich. Alumnus 283 (1907) [hereinafter Washington's Birthday Address].

171 Id. at 285.
The continued enjoyment of liberty, therefore, depended upon the tacit acceptance by all that personal rights existed in relation to the collective interests and needs of society and must, on occasion, yield to them.\(^{172}\)

Hughes assumed local government existed to meet the burgeoning needs of a complex and diverse society. To this extent, it served as an arbiter of social, political, and economic tensions that periodically threatened to upset the order by which citizens secured their liberty. In his second inaugural address as New York Governor he characterized government as "an organ of the community to secure a basis of peace and order essential to individual liberties and opportunity, and . . . to maintain the collective rights which cannot otherwise be safeguarded."\(^{173}\) Moreover, he reposed considerable trust and faith in the potential of local government institutions to resolve the problems created by changes in demography, industry, and social expectations.

As governor, Hughes manifested his enthusiasm for effective and responsible government. In particular, his support of the Public Services Commissions Act of 1907\(^{174}\) demonstrated his conviction that local government could help resolve the political and economic tensions of an interdependent body politic. Enacted in response to allegations of industrial corruption, the Act established a series of commissions to prescribe, among other things, rate and safety regu-

\(^{172}\)See Charles Evans Hughes, Address Before the Republican Club of the City of New York 8 (Jan. 31, 1908) (transcript available in Hughes Papers at Library of Congress) [hereinafter Republican Club Address]; ABA Address, supra note 164, at 8-9; Address at Faneuil Hall, supra note 164; see also Hughes, Conditions of Progress, supra note 168, at 13, 20 (praising the supremacy of public rights over private ones to preserve collective security). Similarly, Hughes recognized the importance of "secur[ing] the benefits of collective effort while wisely safeguarding individual opportunity and initiative." Id. at 20.

\(^{173}\)Charles Evans Hughes, Second Gubernatorial Inaugural Address (Jan. 1, 1909) (transcript available in Hughes Papers at Library of Congress). He made a similar appeal in his first inaugural address. See Charles Evans Hughes, The Autobiographical Notes of Charles Evans Hughes 134-35 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter Hughes, Autobiographical Notes]; Hughes, Conditions of Progress, supra note 171, at 17-20 (in which Hughes discusses the importance of "protective measures" to alleviate social and economic problems such as public health, education, housing, utility companies, insurance, and the excesses of quasi-public entities); Republican Club Address, supra note 172, at 8 (wherein he described local government as "the organ of the popular will" ready to intervene "with necessary restrictions and regulations not to curtail the liberty of the people, but to protect it").

\(^{174}\)Ch. 429, 1907 N.Y. Laws. For general discussion of this law and its political context, see Wesser, supra note 163, at 146-81.
lations for public service corporations. While Hughes and other reformers endorsed it as a way to restore public trust and preserve economic opportunities, large utility companies and other corporations operating under broad legislative grants objected to such regulation as "incompatible with the maintenance of the freedom of management . . . incident to . . . property rights." The controversy over this Act merits attention because it underscored an implicit tension between governmental regulatory authority and the enjoyment of private property and contract rights comparable to the problem presented by the Blaisdell case in 1934. Hughes’s defense of this Act emanated from his instrumental view of government as the principal means of attaining social and economic reform. Review of business practices by government commissions would help maintain the delicate balance between the freedom inherent in the ownership and control of private property and the public interest in collective security and maximum opportunity. From this perspective, Hughes considered the Act a legitimate exercise of state power to promote the public welfare. It was also from this vantage point that his gubernatorial administration prompted reform legislation in public education, the securities industry, gambling and the political process. Under his direction the state legislature even passed two workers’ compensation laws, each of which bore his concern with balancing private opportunity and the public interest.

In essence, Hughes expected government to provide the necessary conditions for social and economic progress. Insofar as progress was its underlying objective, it also served as the keystone of its

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175 See Charles Evans Hughes, Speech at the Banquet of the Utica Chamber of Commerce (Apr. 1, 1907) (transcript available in Hughes Papers at Library of Congress) [hereinafter Utica Chamber of Commerce Speech] (asserting public service commissions helped maintain guarantees of equality before the law). For commentary on this speech, see Jacob Schurman, Governor Hughes, 1908 THE INDEPENDENT 1525, 1529-30 (available in Hughes Papers at Library of Congress). Schurman, President of Cornell University, taught law with Hughes at Cornell from 1891 to 1893.

176 Utica Chamber of Commerce Speech, supra note 175.

177 See 1 PUSEY, supra note 163, at 200-17; WESSER, supra note 163, at 124-82, 252-340; S.P. Morris, Justice Hughes, BOSTON HERALD, Apr. 27, 1910, microformed on The Papers of Charles Evans Hughes, Reel 129 (Library of Congress) (praising Hughes as a reformer whose legislative and administrative programs exemplified the application of democratic ideals "to new industrial and commercial conditions").

178 One law provided for an elective system and another mandated compensation for certain dangerous occupations. The compulsory scheme was ruled an unconstitutional violation of due process under the New York constitution in Ives v. South Buffalo Ry., 94 N.E. 431 (N.Y. 1911). Hughes obviously disagreed with this decision. See HUGHES, AUTOBIOGRAPHICAL NOTES, supra note 173, at 153.
After all, if government existed to preserve an ordered liberty among the disparate individual components of society, it must become susceptible to change or risk outlasting its utility. Moreover, the absence of progress threatened to undermine the stability of society, for in Hughes's own words: "Human society cannot be stable unless it is progressive. That is because growth and progress are the law of our nature." Nevertheless, Hughes advocated careful and deliberate change "for the remedy of some definite evil . . . and not extended to unoffending members [of society] or healthy functions." Otherwise, abrupt disruption of the social, economic and political order would result and thus endanger the essential equipoise between private rights and public welfare.

Attention to the nature of progress and to its role in the exercise of governmental authority marked the public career of Charles Evans Hughes. He appreciated progressive government but realized that ill-conceived change and inefficiency could undermine its objectives. While lauding its merits, he warned that "the best plans of progress will be shattered if administration is faulty" and noted that inefficiency prevents progress. Hughes associated efficiency with thrift, intelligence, and reason—attributes upon which he placed much reliance in his conception of government and its role in a complex society. He viewed efficient government as the linchpin of a society based upon the fair administration of laws and the orderly progression of change. Inefficient government would succumb eventually to the anarchy of self-interest produced by individuals acting alone or in disruptive factions. From this perspec-

179 See Schurman, supra note 175, at 1529.
181 Schurman, supra note 175, at 1529. Moreover, Hughes remarked: "[T]he course of progress lies between the fanciful schemes of those who ignore the actual components of society and its mixed qualities, and the let-alone policy supported alike by the indifferent, the cynical, and those who despair of improvement." HUGHES, CONDITIONS OF PROGRESS, supra note 168, at 106; see also Charles Evans Hughes, Some Aspects of the Development of American Law, Address before the New York State Bar Association 17-18 (Jan. 14, 1916) (available in Hughes Papers at Library of Congress) [hereinafter New York Bar Association Address].
182 HUGHES, CONDITIONS OF PROGRESS, supra note 168, at 40-41.
183 Id. at 39.
184 Washington's Birthday Address, supra note 170, at 287; HUGHES, AUTOBIOGRAPHICAL NOTES, supra note 173, at 134-35.
185 See HUGHES, CONDITIONS OF PROGRESS, supra note 168, at 40 (asserting that inefficiency breeds waste of financial and social resources and creates disorder that disrupts social progress). Hughes generally did not tolerate wastefulness among public officials or private citizens. Id.
tive Hughes analyzed the problems of government, and so created a theoretical framework from which he would assess constitutional questions of state authority over social and economic affairs while on the Supreme Court.

B. Hughes's Conception of Federalism

A passionate advocate of state governmental authority in matters of local concern, Hughes displayed equal fervor in maintaining the federal system and its inherent limitations on state power. Through the guise of a stable federal system, Hughes perceived a prime means of attaining two fundamental objectives of governmental authority: "conserv[ation] of the interests of an ordered freedom" and "the security and expansion of American enterprise." Throughout his public career Hughes witnessed vast growth in the country's population and improvements in its technology, factors that increased the tension between individual interest and collective security. While economic and social diversity created new opportunities, it also produced disparities in wealth and other complex problems that affected the maintenance of the ordered liberty he so cherished. Within this context, Hughes considered a strong federal system essential in preserving the critical balance between private rights and public needs.

186 ABA Address, supra note 164, at 8-9.
187 Charles Evans Hughes, Speech at Metropolitan Opera House 10 (Nov. 1, 1924) (transcript available in Hughes Papers at Library of Congress) [hereinafter Metropolitan Opera House Speech].
188 ABA Address, supra note 164, at 7.
189 See CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 236-37 (Garden City Publishing 1936) (1928) (publication of six lectures Hughes delivered at Columbia University in 1927) [hereinafter HUGHES, THE SUPREME COURT] (discussing the Supreme Court and the balance of public and private rights); Address at Faneuil Hall, supra note 164; Metropolitan Opera House Speech, supra note 187, at 10 (asserting that a stable federal system underlies "the security and expansion of American enterprise"); Washington's Birthday Address, supra note 170, at 283-87; Charles Evans Hughes, Middlesex Club Lincoln Memorial Speech 2-4 (Feb. 12, 1907) (transcript available in Hughes Papers at Library of Congress) [hereinafter Middlesex Club Speech].
Federalism intrigued Hughes because it featured the practical allocation of authority between the federal and state governments. He once explained that "[o]ur system of government is a practical adjustment to make possible the full exercise of national power to meet national needs without sacrificing proper local authority to meet local needs." Hughes thought a federal system created "neither a confederation of States, nor a single centralized government, but a Nation—and yet a Union of States each autonomous in its local concerns." Alternatively, he described our country as "a grand experiment . . . [a] nation with a constitutional system suited to local government—adapted to national needs."

He believed that the distribution of governmental authority among the national and state governments was essential for several reasons. First, the interests of each mandated some division of power. Otherwise, a single governmental unit with exclusive authority in all national and local affairs would become inept, as its unwieldy central bureaucracy slowed to a halt the effective administration of laws and policies. Hughes feared that a central government without local branches might impede social progress by making civic participation less critical. In a speech before the American Bar Association he cautioned:

The intricacies of our interrelations which demand action in the national sphere, as national concerns multiply, make attention to the requirements of local self-government all the more important, so that the individual may have as direct a part as possible in the government of his life, a part of which shall not be rendered relatively inconsequential by the centralization of power.

In addition, local government could best handle affairs not within the purview of national authority. Throughout his public career Hughes stressed "the obvious importance of localizing administration so far as possible . . . in light of the enormous burdens of centralized administration." To this extent, he believed that state governments could more effectively exercise authority in areas of

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190 Address at Faneuil Hall, supra note 164.
191 New York Bar Association Address, supra note 181, at 10.
193 ABA Address, supra note 164, at 8-9. For Hughes's views on administrative efficiency in government, see HUGHES, CONDITIONS OF PROGRESS, supra note 168, at 38-45.
194 ABA Address, supra note 164, at 8.
195 Washington's Birthday Address, supra note 170, at 287.
local concern and thus enable the federal government to resolve national problems such as interstate commerce and foreign policy.\textsuperscript{196}

For Hughes, federalism signified a dual system of government whereby "[f]ederal powers and [s]tate powers are exercised in different spheres."\textsuperscript{197} The Constitution defined in general terms the authority of each and prescribed their limitations.\textsuperscript{198} In his view, federalism did not signify competition for power between the state and federal governments.\textsuperscript{199} Rather, it fostered a partnership between the two borne of their complementary characteristics.\textsuperscript{200} Preeminent within their respective spheres of influence, constitutional limitations marked the boundaries of state and federal authority.\textsuperscript{201} Where state power stopped, federal authority began. As Merlo Pu-sey observed in his biography of Hughes, the existence of a gulf between state and federal power signified a paralysis of government inimical to progress and the maintenance of an ordered freedom.\textsuperscript{202} For this reason, Hughes often warned: "Federal control should not obscure . . . the power and the correlative duty of the state govern-

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\textsuperscript{196} Hughes explained that the allocation of power between the federal government and individual states will result from considerations of paramount public advantage. If it should appear that the powers of the States are inadequate to deal with a subject hitherto retained in their keeping, and that the interests of the people as a whole imperatively demand the assumption of a power by the Federal Government, the people will provide the assumption of that power. Charles Evans Hughes speech (published in \textit{New York Sun}, Feb. 13, 1907), quoted in 1 Pusey, \textit{supra} note 163, at 215.

\textsuperscript{197} Utica Chamber of Commerce Speech, \textit{supra} note 175.

\textsuperscript{198} See Charles Evans Hughes, Coolidge Presidential Campaign Speech at Buffalo, N.Y. 21 (Oct. 29, 1924) (transcript available in Hughes Papers at Library of Congress). Hughes made this remark in response to Senator Robert LaFollette's proposal of a congressional veto of United States Supreme Court opinions that declared unconstitutional laws of Congress. Hughes believed this veto authority would enable Congress to usurp the power of individual states. He noted:

The distinctive feature of our system of government is that it is a Union of States. The maintenance of State Governments depends upon our constitutional limitations and their enforcement. What is the protection of New York, of Ohio, of Minnesota, of Kansas, of Iowa, for example, against the unconstitutional exercise of federal power to the . . . reserved power of the States?

\textit{Id.}; see also Metropolitan Opera House Speech, \textit{supra} note 187.

\textsuperscript{199} Washington's Birthday Address, \textit{supra} note 170, at 286.

\textsuperscript{200} Id. at 283-87.

\textsuperscript{201} See Samuel P. Hendel, \textit{Charles Evans Hughes and the Supreme Court} 9 (1951); see also Hughes, \textit{The Supreme Court, supra} note 189, at 95-96 (discussing judicial review and federalism).

\textsuperscript{202} Id Pusey, \textit{supra} note 163, at 308. Pusey actually uses the term "vacuum of power." Hughes himself referred to "ordered freedom" in his ABA Address, \textit{supra} note 164, at 8-9.
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Hughes’s sensitivity to questions of interstate commerce and state police powers revealed his conception of federalism. Early in public life, he articulated a functional approach to the allocation of governmental authority in these areas. Recognition of the practical limitations upon both state and federal authority augmented his perception about the importance of fashioning rules consistent with the actual needs of a highly complex and varied economy.

While he emphasized the exclusive power of Congress over interstate commerce, he acknowledged that individual states retained primary authority to prescribe rules for “local or domestic commerce” over some matters within their special interest and expertise that did not conflict with the overriding objectives of the federal government. Essentially, Hughes reasoned that local government occupied a better position to regulate certain aspects of intrastate commerce that incidentally affected interstate commerce. Later, as a justice on the United States Supreme Court, he used this principle in several Commerce Clause cases.

C. State Police Powers and Constitutional Interpretation

Similarly, Hughes expressed a willingness to afford individual states wide latitude in the exercise of their police powers. Though his tenure on the Supreme Court spanned two different eras, a variety of cases under both the Due Process and Contract Clauses allowed him ample opportunities to examine closely the constitutional limitations upon the authority of states to make regulations for the public welfare. In implicit agreement with Justice Holmes that states could assert their police powers over all essential public needs, Hughes even asserted several years before Blaisdell that changing economic and social conditions might warrant the

203 Middlesex Club Speech, supra note 189, at 4.
204 HUGHES, THE SUPREME COURT, supra note 189, at 142 (discussing the Commerce Clause); New York Bar Association Address, supra note 181, at 7 (discussing the Commerce Clause and federalism); Republican Club Address, supra note 172, at 10.
205 Middlesex Club Speech, supra note 189, at 2-4.
207 HUGHES, THE SUPREME COURT, supra note 189, at 155 (citing with approval Noble State Bank v. Haskell, 219 U.S. 104 (1911)).
states' "novel exercise . . . to care for both social and individual interests."²⁰⁸

His was the perspective of a pragmatic and progressive proponent of governmental authority employed within constitutional limitations. Cautious by nature, and ever mindful of precedent, Hughes analyzed the exercise of state police powers by balancing private rights with the public interest.²⁰⁹ Rather than rely on abstruse theoretical doctrines, he viewed problems of state regulation as dilemmas in the allocation of power within the federal system. Of necessity, this approach emphasized factual distinctions between seemingly alike cases, as Hughes steadfastly applied a test of reasonableness in assessing state police powers.²¹⁰

During his first stint on the Court he consistently upheld the power of individual states and municipalities to limit the public contract rights of utility and rail companies.²¹¹ The scope of reserved state authority over such grants raised the issue of contract impairment under the Contract Clause in some of these cases; in others, grantees challenged the laws on substantive due process grounds. In either scenario, the Court employed a test of reasonableness. If a particular measure bore a reasonable relationship to a legitimate state objective, it usually withstood scrutiny under either the Contract Clause or substantive due process.²¹² To the extent Hughes dissented from Court decisions invalidating local regulations, he considered them reasonable methods of promoting the public welfare.²¹³ Like Justices Holmes and Pitney, he interpreted the con-

²⁰⁸ Id. at 195.
²⁰⁹ See id. at 53 ("Stability in judicial opinions is of no little importance in maintaining respect for the Court's work."); see also HENDEL, supra note 201, at 6, 65; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 213 (1976).
²¹⁰ See HENDEL, supra note 201, at 6; WHITE, supra note 209, at 213-14.
²¹³ Hughes dissented with no opinion in Grand Trunk W. Ry. v. City of South Bend,
cept of public welfare broadly to include notions of public convenience and economic prosperity.\footnote{227} In contrast, legislation was unconstitutional if it imposed unreasonable restrictions upon public grantees or exceeded the states’ reserved regulatory powers.\footnote{215}

Hughes’s most cogent analysis of state police powers arose in the context of disputes over the extent to which the Due Process Clause of the Fourteenth Amendment insulated private contracts from the reach of state regulation to promote the public welfare. In response to changes in technology, demography, and urbanization, states and municipalities enacted laws that regulated the conditions of private employment in various industries. Many of these measures reflected the reform impulse of the Progressive movement in the first decades of the twentieth century. Private employers argued that these laws violated their due process rights under the Fourteenth Amendment because they restricted the liberty of contract, a notion implicit in substantive due process since the late nineteenth century.\footnote{216} They contended that a private employment agreement arose from the freely given consent of both the employee and the employer to the conditions of employment. In essence, this argument presupposed a fictional equality in the bargaining positions of

\footnote{227} U.S. 544 (1913). In this case, the Court ruled that the repeal of a municipal ordinance under which a rail company laid double tracks impaired the obligation of contracts. The public grant created an irrevocable contract right. \textit{Id.} at 555. Further, the city unreasonably asserted its police power to prevent inconvenience to pedestrians. \textit{Id.} at 554. Similarly, Hughes, together with Justices McKenna and Pitney, joined in Justice Day’s written dissent in \textit{City of Owensboro v. Cumberland Tel. & Tel. Co.}, 230 U.S. 58 (1913). In \textit{Owensboro}, the Court invalidated a city’s repeal of a prior grant to a telephone company to erect poles and wires. The dissent invoked the reservation doctrine and noted the city’s authority over its streets. \textit{Id.} at 83.


\footnote{216} See, e.g., \textit{Lochner v. New York}, 198 U.S. 45 (1905) (voiding, on substantive due process grounds, a statute that prescribed a maximum sixty hour work week for bakers). In \textit{Lochner}, the Court reasoned that bakers could make their own contracts with private employers without the benign intervention of the state. \textit{Id.} at 57. In part, this rationale explains the Court’s reluctance to sustain the New York law as a reasonable health regulation pursuant to local police powers. \textit{See also Allgeyer v. Louisiana}, 165 U.S. 578 (1897) (recognizing a New York insurer’s freedom to make marine insurance contracts in Louisiana).
the parties. It also reflected traditional laissez-faire conceptions prevalent in the post-Civil War market economy.

Hughes wrote several opinions in support of state laws that regulated the conditions of private employment. Aware of the social and economic importance of such legislation, he subjected freedom of contract to an expansive notion of state police powers. Invariably, his resolution of the tension between private contract rights and public welfare reflected his views on constitutional interpretation and the role of the Supreme Court in assessing the validity of police power measures. Ultimately, he applied this constitutional jurisprudence to the dilemma presented in *Blaisdell* over the scope of the Contract Clause.

Hughes perceived that the controversy over freedom of contract actually involved a more basic question of state power within the federal system. The Constitution, with its limitations of state authority and protection of individual liberties, created a balance between the exercise of state power and personal freedom. He thought the Court should preserve this equipoise without infringing upon either the sanctity of private rights or the public interest. Differential to legislative determinations of policy, Hughes limited his inquiry to "the limits of legislative power" because a distinction existed "between questions of mere wisdom or policy and those of power." Further, he believed judges should never substitute their personal notions of economic policy or social welfare for an objective analysis of constitutional limitations and the exercise of governmental power.

In *Chicago, Burlington & Quincy Railroad v. McGuire,* Hughes flexibly interpreted the Due Process Clause of the Fourteenth Amendment to sustain an Iowa law that prohibited contracts by which railway companies limited their liability for injuries sustained by their employees. The railroad argued that the law infringed upon its freedom of contract, a contention discarded by a majority of the Court, which considered the legislation a reasonable manifes-

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217 2 PUSEY, supra note 163, at 703.
219 HUGHES, THE SUPREME COURT, supra note 189, at 37.
220 Id. at 38.
221 Fourth Circuit Address, supra note 218; HUGHES, THE SUPREME COURT, supra note 189, at 37-38.
222 219 U.S. 549 (1911).
tation of Iowa's authority to promote the health, safety, and welfare of its citizens. Indeed, Hughes's majority opinion emphasized the inherent limitations of contractual freedom: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."\textsuperscript{223}

Rather than assess the wisdom of Iowa's policy, Hughes focused upon the question of state power. Judicial review of legislative policy, he reasoned, made no sense given the intimate familiarity of the local legislature with conditions in Iowa.\textsuperscript{224} Thus, he accorded the state wide discretion in implementing regulations pursuant to its police powers so long as it did not interfere with private rights in an arbitrary and unreasonable manner.\textsuperscript{225} Significantly, he observed that this broad regulatory authority was not limited "to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement."\textsuperscript{226} In this respect, he foreshadowed his conclusion years later in \textit{Blaisdell} that under certain conditions the reasonable exercise of state police powers may circumscribe the literal terms of contractual performance.

Hughes understood the fundamental conflict between the constitutional protection of private rights and their restriction by governmental authority. Like others, he invoked a test of reasonableness in assessing the parameters of state power over private interests. He thus sought to maximize the potential for governmental action and to minimize the risk of its paralysis within the federal system. Absolute liberty neither existed nor was possible in a complex society with myriad economic, social, and political tensions. Increased interdependency among individuals sometimes required the intercession of local government to preserve not only the collective interests of society, but also the relative value of personal rights in property and contracts.\textsuperscript{227} From this perspective, Hughes readily subjected liberty of contract to the reasonable exercise of state police powers

\textsuperscript{223} \textit{Id.} at 567; \textit{see also HUGHES, THE SUPREME COURT, supra} note 189, at 205-07 (asserting that liberty of contract is not an absolute right but rather a right subject to the reasonable exercise of state police powers).

\textsuperscript{224} \textit{McGuire}, 219 U.S. at 569.

\textsuperscript{225} \textit{Id.} at 570.

\textsuperscript{226} \textit{Id.} at 571.

\textsuperscript{227} HUGHES, \textit{CONDITIONS OF PROGRESS, supra} note 168, at 13 (arguing that individual liberty may, at times, be restrained "by the demands of the common welfare"). Hughes also advocated the importance of state police power measures to alleviate some of the more pervasive social and economic problems of the early twentieth century. \textit{Id.} at 17-20; \textit{see also ABA Address, supra} note 164, at 7; Washington's Birthday Address,
and upheld laws that prescribed maximum hours of employment for women,\(^{228}\) prohibited child labor,\(^{229}\) and prevented discrimination by employers against members of unions.\(^{230}\) He also found similar legislation constitutional in the minimum wage cases of the 1930s.\(^{231}\)

In essence, Hughes construed substantive due process in ways that permitted the reasonable exercise of state police powers to meet important public social and economic needs. While he recognized substantive due process as a limitation on state authority, he applied its constraints sparingly, as he preferred to invoke it in cases where local government acted arbitrarily or unreasonably.\(^{232}\) Yet, he did not equate unreasonable legislation with that which was merely unwise or unfeasible.\(^{233}\) The latter only signified an unsuccessful foray in the public interest; the former meant an unnecessary breach of

\(^{228}\) See, e.g., Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding a California law setting an eight hour maximum work day for nurses); Miller v. Wilson, 236 U.S. 373 (1915) (California law prohibiting employment of women in hotels and other businesses for more than eight hours a day or 48 hours a week bore a reasonable relationship to the state's interest in protecting the health and welfare of women). Hughes also voted in conference to sustain the constitutionality of Oregon's minimum wage act after the first oral argument of Stettler v. O'Hara. \(\text{HUGHES, AUTOBIOGRAPHICAL NOTES, supra note 173, at 134.}\)


\(^{230}\) Coppage v. Kansas, 236 U.S. 1 (1915). In \textit{Coppage}, Hughes joined in dissent with Justice Day to oppose the Court's invalidation of a Kansas law prohibiting the exclusion of union members and the discouragement of union activity in the workplace. \textit{See also HUGHES, THE SUPREME COURT, supra note 189, at 206 ("[L]iberty to contract is subject to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the well-being of those subject to its jurisdiction, that is, in the exercise of what we call the police power.").}


\(^{232}\) See, e.g., Sterling v. Constantin, 287 U.S. 378 (1932) (invalidating, on due process grounds, the use of martial law by the Texas governor to suppress the overproduction of oil in East Texas and to quell the concomitant popular unrest). For discussion of this case, see \textit{HENDEL, supra note 201, at 121-22; 2 PUSEY, supra note 163, at 723.}

\(^{233}\) See, e.g., Sproles v. Binford, 286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.").
individual freedom. "[T]he legislature is not bound to provide an ideal system. Changing social conditions require new remedies, the novel exercise of the police power, to care for both social and individual interests." Consequently, the Constitution did not "make improvement or rational experimentation [by the states] impossible." Consequently, the Constitution did not "make improvement or rational experimentation [by the states] impossible."

For example, in Sproles v. Binford, he criticized a mechanical interpretation of substantive due process that diminished local authority to implement the public good. Thus, a Texas law that restricted the net loads of trucks on Texas highways was "within the broad range of legislative discretion" and did not infringe unduly upon the private interests of truck owners. Given this pragmatic conception of due process, economic and social conditions comprised matters over which states retained considerable primary authority. Thus, for Hughes the Constitution did not prescribe a federal system wherein the essential attributes of state governmental authority yielded to the absolute sanctity of private rights. Instead,

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234 HUGHES, THE SUPREME COURT, supra note 189, at 195.
235 New York Bar Association Address, supra note 181, at 16 (discussing the Fourteenth Amendment). But see New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (wherein Hughes joined in the Court's decision to invalidate, on due process grounds, an Oklahoma law regulating the manufacture and distribution of ice). Hughes thought the case a close one. 2 PUSEY, supra note 163, at 698. In dissent, Justice Brandeis praised the legislation as an example of experimental democracy. He believed the law represented a reasonable exercise of police powers. Liebmann, 285 U.S. at 311. Two years later, Hughes adopted Brandeis's rationale in Blaisdell.

236 286 U.S. 374 (1932).
237 Id. at 388.
238 For other pre-Blaisdell cases in which Hughes wrote opinions in support of state police powers, see Abie State Bank v. Bryan, 282 U.S. 765 (1931) (upholding an Oklahoma law guaranteeing bank deposits); Cincinnati v. Vester, 281 U.S. 439 (1930); Oklahoma Corp. Comm'n v. Lowe, 281 U.S. 431 (1930) (upholding Oklahoma's cooperative licensing law); Staten Island Rapid Transit Ry. v. Phoenix Indemnity Co., 281 U.S. 98 (1930) (upholding New York's workers' compensation statute); Ohio ex rel. Wadsworth v. Zangerle, 281 U.S. 74 (1930) (upholding an Ohio law validating state legislation if more than one Ohio Supreme Court justice dissents from an opinion invalidating it); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Savage v. Jones, 225 U.S. 501 (1912) (sustaining Indiana law regulating food for livestock). Additionally, Hughes joined in Justice McKenna's majority opinion in German Alliance Ins. Co. v. Lewis, 233 U.S. 388 (1914) (upholding a Kansas law regulating fire insurance rates). Perhaps, the most important state police powers case in which Hughes joined in the majority after Blaisdell was Nebbia v. New York, 291 U.S. 502 (1934) (sustaining the New York minimum milk price statute). The most important post-Blaisdell state police powers case in which Hughes wrote the majority opinion in support of state police powers was West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining Washington State's minimum wage law for women).
within the limits set forth by the Constitution, states maintained the power to preserve the collective security of individual interests.

IV

CHARLES EVANS HUGHES AND THE BLAISDELL DECISION: FEDERALISM AND PRAGMATIC JURISPRUDENCE

In Home Building & Loan Ass'n v. Blaisdell, several longstanding theoretical limitations upon the scope of the Contract Clause converged, as the United States Supreme Court examined the authority of a state to alter the performance of a private mortgage agreement during the Depression. No one theory explains fully the Court's rationale for sustaining the Minnesota Mortgage Moratorium Act as a reasonable exercise of police powers during an emergency. For several years the Court had, by various techniques, created significant inroads upon the constitutional prohibition of state power to modify contracts. Each arose in response to a recurrent and fundamental problem within the federal system: the reconciliation of governmental control over contracts with the sanctity of private rights.

The economic effects of the Depression intensified this conflict and underscored the tension between the constitutional protection of vested contract rights and their regulation by states in the public interest. Ultimately, this afforded the Court a prime opportunity to reconsider the philosophical and practical tenets of its Contract Clause jurisprudence. To understand the meaning of Blaisdell, one must therefore realize it presented a classical problem in federalism to which the respective authors of the majority and dissenting opinions, Chief Justice Charles Evans Hughes and Justice George Sutherland, responded in terms of their divergent perspectives of federalism, governmental authority, and the Constitution.

239 290 U.S. 398 (1934).
240 Ch. 339, 1933 Minn. Laws 514.
241 Blaisdell, 290 U.S. at 415-48 (Hughes, C.J., majority opinion). Hughes drew upon 1) the rights/remedies distinction, 2) the doctrines of state reserved and inalienable police powers, 3) the due process test of reasonableness, and 4) just compensation as limitations upon the Contract Clause prohibition of state power to modify contract rights.
242 See supra notes 35-162 and accompanying text for a discussion of these techniques.
A. Blaisdell as a Problem in Federalism: Context and Controversy

On April 18, 1933, the Minnesota legislature unanimously passed a mortgage moratorium law in response to the widespread foreclosure sale of farms and other real estate during the Depression.\textsuperscript{243} Approximately half of the state's population owned realty subject to mortgages held by banks, savings and loan associations and insurance companies.\textsuperscript{244} The land itself secured this indebtedness, as debtors mortgaged their property to the creditors who loaned them money. The precipitous fall in agricultural and industrial prices made it difficult, if not impossible, for citizens to make their periodic mortgage payments.\textsuperscript{245} Pursuant to these private contracts, debtor-mortgagors incurred enormous indebtedness to creditor-mortgagees, who often obtained the real property upon the inability of the mortgagors to retire their mortgage debts. Most mortgage agreements contained a power of sale provision that enabled the mortgagee to foreclose the property and sell it at a public auction. Often the mortgagor had a limited period in which to pay off the outstanding indebtedness and so redeem the property after its sale.\textsuperscript{246}

In times of relative economic prosperity, foreclosure rates remained relatively stable. Mortgagees sold foreclosed property for market value and applied the proceeds to the outstanding indebted-


\textsuperscript{244} Prosser, supra note 243, at 353-54. Prosser, using 1930 figures compiled in 1932, noted that "53.8% of the owner-operated farms in Minnesota were mortgaged." Id. at 354 n.10. For additional statistical discussion of Depression era mortgages on farms throughout the country, see id. at 353-54 & nn.9-15; Comment, Recent Legislation for the Relief of Mortgage Debtors, 42 YALE L.J. 1236, 1237 n.1 (1933).

\textsuperscript{245} Prosser, supra note 243, at 354.

\textsuperscript{246} When the parties in Blaisdell executed their mortgage in 1928, section 9602 of the Minnesota Statutes created a one year redemption period. Usually, the mortgagee would be the purchaser at a foreclosure sale. Prosser, supra note 243, at 355. At the end of the redemption period, the purchaser would then receive title to the property in fee simple absolute and thus obtain complete ownership of the land.

Essentially, redemption enables the mortgagor "to preserve his equity in the property." Roland C. Amundson & Lewis J. Rotman, Depression Jurisprudence Revisited: Minnesota's Moratorium on Mortgage Foreclosure, 10 WM. MITCHELL L. REV. 805, 815 (1984). There are two types of redemption, equitable and statutory. Equitable redemption arises once the mortgagor has defaulted and prior to a foreclosure sale. Statutory redemption occurs after the foreclosure sale and "provides the defaulting mortgagor with a second opportunity to redeem the property." Id. at 816. Blaisdell involved statutory redemption.
ness. The Depression, however, with its high inflation and large discrepancy between income and debt, produced an exponential increase in the number of foreclosure sales. Consequently, the value of foreclosed realty depreciated considerably as mortgagees sold foreclosed property for prices much lower than the amounts of indebtedness in order to recover portions of their loan investments. By 1933, most property mortgaged in Minnesota was worth only one quarter of its value before the advent of the Depression.

Comparable conditions existed throughout the Midwest. In Minnesota and adjoining regions, mortgagors, many of whom were farmers, rioted in protest of the foreclosure proliferation. In some instances, mortgagors even used physical force to prevent sheriffs from executing foreclosure sales. From 1930 to 1933 several states enacted debtor relief laws to alleviate the harsh consequences of foreclosure. Oklahoma even vested in its judiciary discretion to extend redemption periods during the Depression. Similarly, Wisconsin recognized the equitable powers of its judiciary to modify the liabilities of mortgage debtors faced with post-foreclosure deficiency judgments.

The constitutionality of this legislation remained unclear and often depended upon the length of the delay in foreclosure or the period of extension where redemption was in issue. Moreover, a

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247 Hynning, supra note 33, at 182; Prosser, supra note 243, at 354 & n.15; Comment, supra note 244, at 1236.
248 Hynning, supra note 33, at 182; Prosser, supra note 243, at 354-55; Comment, supra note 244, at 1236-37.
249 Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 339 (Minn. 1933) (Olsen, J., concurring).
251 Prosser, supra note 243, at 355.
252 For example, Wisconsin extended its one year redemption period to two years on the condition the mortgagor pay all post-foreclosure taxes and insurance. No extension could exceed January 1, 1936. Ch. 9, sec. 7, 1931-1932 Wis. Laws Spec. Sess. For discussion of this and other laws, see Hynning, supra note 33, at 183-84 & nn.4-14; Note, Constitutionality of Mortgage Relief Legislation: Home Bldg. & Loan Ass'n. v. Blaisdell, 47 Harv. L. Rev. 660, 664-67; Comment, supra note 244, at 1238-39 & nn.7-17, 1243-44 & nn.40-43.
253 The Oklahoma Supreme Court sustained this measure in Oklahoma ex rel. Roth v. Waterfield, 29 P.2d 24 (Okla. 1933). In November 1932, a Nebraska court proclaimed "a partial moratorium on farm mortgages." Feller, supra note 250, at 1065 n.32 (quoting Harvey Wienke, A Mortgage Foreclosure Moratorium, 27 Ill. L. Rev. 799 n.2 (1933)).
254 Suring State Bank v. Giese, 246 N.W. 556 (Wis. 1933).
255 In general, mortgagor relief laws that indefinitely stayed remedies otherwise avail-
critical question arose over the extent to which the laws deprived mortgagees of their contractual remedies. Where they effectively made worthless the remedy of foreclosure or otherwise infringed upon mortgagees’ rights without compensation, most courts ruled that the measures unconstitutionally impaired the obligation of contracts. Conversely, a few cases sustained moratoria upon foreclosure sales and other creditors’ remedies during times of emergency. Though the United States Supreme Court had consistently invalidated retroactive mortgagor relief legislation under the Contract Clause, it had yet to assess the constitutionality of a

able to mortgagees during the foreclosure process rarely withstood judicial scrutiny. Similarly, courts often invalidated unlimited extension of postforeclosure statutory redemption periods. Feller, supra note 250, at 1070-71, app. 1 at 1081-85; Hynning, supra note 33, at 205-09; Note, supra note 252, at 661-65, 667; Comment, supra note 244, at 1239.

256 Feller, supra note 250, at 1069-70, app. 1 at 1081-85; Hynning, supra note 33, at 205-09; Perlman, supra note 33, at 802-03; Prosser, supra note 243, at 358-59; Comment, supra note 244, at 1239-41.

257 For a general discussion of valid examples of state moratory laws, see Feller, supra note 250, at 1072-73, app. 1 at 1081-85; Hynning, supra note 33, at 208 & nn.96-97; Note, supra note 252, at 665-67 & nn.38-40; Comment, supra note 244, at 1240 & nn.26-29.

In the years preceding Blaisdell two state supreme court decisions upheld, at least partially, Depression era mortgage moratoria. See State ex rel. Lichtscheidl v. Moeller, 249 N.W. 330 (Minn. 1933) (sustaining a Minnesota law delaying foreclosure sales); Oklahoma ex rel. Roth v. Waterfield, 29 P.2d 24 (Okla. 1933) (both sustaining discretionary judicial extension of redemption periods and invalidating a nine-month stay for a mortgagor to file an answer in a foreclosure action).

Examples of nineteenth century cases that upheld the validity of various debtor relief moratoria include: Breitenbach v. Bush, 44 Pa. 313 (1863) (upholding a Pennsylvania stay law during a three-year Civil War enlistment period); Heyward v. Judd, 4 Minn. 483 (1863) (finding that a three-year redemption period did not impair the obligation of contracts); Holloway v. Sherman, 12 Iowa 282 (1861) (holding an Iowa law permitting a nine-month stay of mortgage foreclosures permissible remedial legislation); Stone v. Bassett, 4 Minn. 298 (1860) (sustaining a one-year redemption period subsequent to foreclosure); Von Baumbach v. Bade, 9 Wis. 559 (1859) (holding that a six-month stay of mortgage foreclosures and execution sales only affected the remedies and not the obligation of contracts); Iverson v. Shorter, 9 Ala. 713 (1846) (sustaining a two-year redemption of judicial foreclosure sales); Chadwick v. Moore, 8 Watts & Serg. 49 (Pa. 1844) (sustaining a one-year stay of a sheriff’s sale of foreclosed realty for bids less than two-thirds of the realty’s appraisal value).

258 See Bradley v. Lightcap, 195 U.S. 1 (1904) (holding unconstitutional an Illinois law that prescribes a minimum foreclosure bid); Barnitz v. Beverly, 163 U.S. 118 (1896) (holding that Kansas’s eighteen-month redemption period unconstitutionally impaired the obligation of contracts); Daniels v. Tearney, 102 U.S. 415 (1880) (invalidating a Virginia stay of unlimited duration); Edwards v. Kearzey, 96 U.S. 595 (1877) (ruling that a North Carolina one thousand dollar homestead exemption from an execution sale impaired the obligation of a preexisting contract); Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1872) (holding unconstitutional a Georgia law requiring a creditor to file an affidavit of tax payment as a prerequisite to bringing suit for collection of a
moratorium law enacted during the Depression.

As social and economic tensions mounted, the Minnesota governor issued an executive order restraining sheriffs from foreclosing mortgages during the pendency of a moratorium law.\textsuperscript{259} The Minnesota Mortgage Moratorium Act of 1933\textsuperscript{260} reflected the rationale of the 1920s Rent Cases in which both the United States Supreme Court and the New York Court of Appeals invoked the concept that, in times of emergency, local government can interpose its police powers into private contractual relationships that affect the public interest.\textsuperscript{261} Thus, municipal ordinances that extended tenancy periods did not violate either the Due Process or Contract Clauses even though they temporarily deprived landlords of immediate possession and control of their rental premises.\textsuperscript{262} While these cases did not go so far as to explicitly rule the reasonable exercise of police powers during an emergency sanctioned the impairment of...

\textsuperscript{259} Prosser, supra note 243, at 355; see also Amundson & Rotman, supra note 246, at 823-24 & nn.101-03.

\textsuperscript{260} Ch. 339, 1933 Minn. Laws 514.

\textsuperscript{261} Prosser, supra note 243, at 360; see also Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921); Guttag v. Shatkin, 130 N.E. 929 (N.Y. 1921); People ex rel. Durham Realty Co. v. La Fetra, 130 N.E. 601 (N.Y.), writ of error dismissed sub nom. New York ex rel. Brixton Operating Corp. v. La Fetra, 257 U.S. 665 (1921).

\textsuperscript{262} The laws in question were: The Emergency Housing Laws of New York, ch. 942, 1920 N.Y. Laws 2477; District of Columbia Rents Act, ch. 80, 41 Stat. 297 (1919).
contract obligations, they did advance the legal fiction that otherwise private rental agreements were subject to modification by state and local government attempts to promote the public welfare.\textsuperscript{263}

In particular, the preamble of the Minnesota Act expressed this idea when it declared that the severity and duration of the economic depression created an emergency that justified "legislation for the extension of the time of redemption from mortgage foreclosure and execution sales."\textsuperscript{264} Pursuant to the Act, mortgagors could apply to a district court for an extension of time in which to redeem their foreclosed real properties after the properties were sold at a public auction.\textsuperscript{265} Under preexisting law, the redemption period lasted no longer than a year;\textsuperscript{266} however, the new law extended this stay for up to two years, until May 1, 1935.\textsuperscript{267}

The law vested in the district court equitable discretion to grant the extension provided that the mortgagor pay the mortgagee the reasonable rental value of the property during the redemption pe-

\textsuperscript{263} Siegel, 258 U.S. at 245-49; Feldman, 256 U.S. at 198-99; Hirsh, 256 U.S. at 156; La Fetra, 130 N.E. at 605-06.

\textsuperscript{264} Ch. 339, pmbl., 1933 Minn. Laws 514, 515. The Act expressly declared the existence of an emergency. \textit{Id.} pt. 1, sec. 1, at 516.

\textsuperscript{265} Part 1, section 4 provided in relevant part:

Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at times and in such manner as to the court shall, under all the circumstances, appear just and equitable.

\textsuperscript{266} MINN. STAT. § 9608 (Mason 1927).

\textsuperscript{267} Ch. 339, pt. 1, sec. 4, 1933 Minn. Laws 514, 518.
Payment would be applied toward the outstanding indebtedness, insurance, taxes, and interest. Moreover, the law authorized the court to retain jurisdiction over the matter and to make periodic adjustments warranted by changing economic conditions and the financial wherewithal of the parties. No postponements or delays could occur during the temporary emergency if they "would substantially diminish or impair the value of the contract or obligation of the person against whom relief is sought, without reasonable allowance to justify the exercise of the police power."

Once the legislature enacted this law, mortgagors John and Rosella Blaisdell petitioned the Hennepin County District Court to extend their redemption period after a foreclosure sale. In August 1928, the Blaisdells had mortgaged residential real property in Minneapolis to Home Building and Loan Association as security for a $3800 loan. The mortgage contained a standard provision that permitted the mortgagee to foreclose on the property and sell it at a public auction upon the default of the mortgagors. When the parties executed the mortgage agreement, Minnesota law provided a one-year period for the mortgagors to redeem their property after a foreclosure sale. In 1932, the Blaisdells defaulted on their mortgage; on May 2, 1932, Home Building and Loan itself purchased the foreclosed real property, for approximately $3700, the amount of outstanding indebtedness including interest and taxes. Without an extension the redemption period would have lapsed, and the mortgagee would have received full title to the property on May 2, 1932.

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268 Id.
269 Id.
270 Id. pt. 1, sec. 5, at 519.
271 Id. pt. 2, sec. 5, at 521.
272 The mortgagors petitioned the district court for relief between April 18, 1933, the date the legislature passed the act with the governor's approval, and April 28, 1933. Appellees' Brief at 1, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (No. 370).
273 On August 1, 1928 the Blaisdells delivered a written mortgage on a fourteen room boarding house together with a garage and the underlying land in Minneapolis to Home Building & Loan as security for a $3800 loan. Transcript of Record at 45, 47, Blaisdell (No. 370). The Blaisdells lived in three of the rooms and rented the other eleven to boarders. Id. at 47.
274 This provision was a power of sale by advertisement. Appellant's Brief at 3, Blaisdell (No. 370).
275 MINN. STAT. § 9608 (Mason 1927).
276 The actual amount was $3700.98. Transcript of Record at 46, Blaisdell (No. 370). In July 1933, the Hennepin County District Court found the market value of the premises to be $6000. Id. at 47.
The Blaisdells invoked the Act and petitioned the district court to extend the redemption period.\footnote{See Minn. Stat. § 9608.} \footnote{Ch. 339, pt. 1, sec. 4, Minn. Laws 514, 518-19.}

At first, the district court dismissed the petition on the grounds that the relevant provisions of the law violated both the Due Process Clause of the Fourteenth Amendment and the Contract Clause.\footnote{Transcript of Record at 7, Blaisdell (No. 370). In addition, the district court ruled that the 1933 mortgage moratorium statute violated the Contract Clause of the Minnesota Constitution, article 1, section 2. \textit{Id.}} \footnote{Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 337 (Minn. 1933).} \footnote{Id. at 338.} 

The Blaisdells appealed to the Minnesota Supreme Court, which sustained the mortgage moratorium as a reasonable exercise of police powers during an economic emergency.\footnote{Transcript of Record at 49-50, Blaisdell (No. 370).} \footnote{Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 893, 894 (Minn. 1933) (per curiam).} 

The court reasoned that the state could impair temporarily the obligations of a private contract in a manner "no more than reasonably necessary" because of the grave public crisis created by the Depression.\footnote{Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 337 (Minn. 1933) (per curiam).} Accordingly, it reversed the initial determination and remanded the case to the lower court. After determining the reasonable rental value of the property and the amount of the debt, the district court extended the redemption period two years, until May 1, 1935, on the condition that the Blaisdells pay $40 per month rent to the mortgagee during this span.\footnote{Id. at 338.} On appeal, the Minnesota Supreme Court affirmed. Home Building and Loan then appealed to the United States Supreme Court, which granted certiorari to decide the constitutionality of the statute.

The arguments before the Supreme Court underscored the conflict implicit in governmental regulation of vested contract rights. In existence since the inception of the Contract Clause and reflected in the ensuing pattern of jurisprudence, the conflict emanated from a larger one inherent in the federal system concerning the constitutional limits of state power. To the extent counsel debated the permissible scope of Minnesota's police authority over private agreements during an economic emergency, they drew upon traditional contrasting conceptions of contract rights and local police powers. Therein lies the complexity of \textit{Blaisdell} and its attraction for any student of federalism.\footnote{In addition, the mortgagees claimed that the Minnesota law violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Both parties com-}
While both parties agreed that the case involved the extent a state could regulate a private mortgage agreement in the public interest, sharp disagreement arose over whether an economic depression comprised an appropriate emergency to justify the exercise of Minnesota’s police powers in a manner disruptive to the literal provisions of the mortgage. As mortgagee, Home Building and Loan argued that the Contract Clause protected the sanctity of vested contract rights and that the economic depression represented a cyclical event of limited duration. Essentially, the mortgagee narrowly confined the concept of emergency to natural disasters and construed public welfare in ways that excluded notions of public convenience and economic prosperity. Thus, the statute unreasonably and arbitrarily changed the terms of contract performance when it extended the redemption period and delayed the mortgagee’s complete control over realty purchased at the foreclosure sale the previous year. Further, the moratorium law circumvented the remedy of foreclosure sale by advertisement that the parties had agreed upon in the original mortgage. This, the mortgagee believed, made the remedy worthless and rendered the performance of the contract entirely dependent upon a “court’s conception of the respective stations of the parties.”

In contrast, the mortgagors claimed that rampant foreclosure sales caused substantial depreciation in real estate values that combined their Due Process and Contract Clause arguments because of their “close connection.” Appellant’s Brief at 23, Blaisdell (No. 370); Appellees’ Brief at 4, Blaisdell (No. 370). The Equal Protection issue comprised a relatively insignificant part of the case and is beyond the scope of this Article.

285 Appellant’s Brief explains how the statute prevented title to the foreclosed property from absolutely vesting in the mortgagee on May 2, 1933, as contemplated by the terms of the mortgage. Appellant’s Brief at 26-27, Blaisdell (No. 370).

286 Id. at 28-29. The reference to the cyclical characteristics of the Depression actually comes from Justice Olsen of the Minnesota Supreme Court. Olsen stated that the mortgagee claimed that “financial and business crises are recurring events and to be anticipated” in contrast with a true emergency “arising from some extraordinary and unexpected catastrophe, such as floods, earthquakes, and other disturbances in nature.” Blaisdell, 249 N.W. at 340 (Olsen, J., concurring).

287 Appellant’s Brief at 7, 11-18, 26-27, Blaisdell (No. 370). The mortgagee-appellant argued before the United States Supreme Court that the statute prevented it from receiving title to the property in fee simple absolute on May 2, 1933. Instead, the mortgagee received “merely a defeasible title, subject to redemption at any time during the additional two-year period by the mortgagors.” Blaisdell, 290 U.S. at 404. Moreover, the statute delayed any suits for deficiency judgments. Appellant’s Brief at 15, Blaisdell (No. 370).

288 The appellant-mortgagee included this remedy within the underlying contract obligation. Appellant’s Brief at 26, Blaisdell (No. 370).

289 Id. at 14.
longed the financial depression and produced civil unrest. An economic and social emergency existed that authorized the state to suspend the literal performance of mortgage agreements. While the mortgagors conceded that the moratorium would violate the Contract Clause in normal times, they argued that the parties executed the mortgage subject to an implied condition that Minnesota could impair its obligation through the reasonable exercise of local police powers during an emergency. Extension of the redemption period was neither arbitrary nor unreasonable because it allowed the mortgagors to remain in possession of the realty until the economy improved and the market value of the property increased. From this perspective, the mortgagors advanced a broad conception of public welfare that permitted the state to use its police powers to maintain "the general distribution . . . of a fair proportion of the wealth." Consequently, their argument drew upon the line of Contract Clause cases that included promotion of public comfort, convenience, and economic prosperity within the ambit of inalienable state police powers.

B. The Blaisdell Decision

To best understand Blaisdell one should examine the decision in light of its three component parts. At the core of Hughes's opinion lay recognition of the close connection between the concepts of emergency and constitutional limitations. From this level, he proceeded to articulate the notion of a public interest in private contracts. Consequently, he explained the rationale for permitting a state to enact its police powers to alleviate the effects of an economic emergency. However, Hughes did not intend to craft a radical decision that seemingly jeopardized the sanctity of contract obligations. Therefore, he limited the more bold implications of the case by invoking a test of reasonableness that compromised between contrasting theories of Contract Clause jurisprudence. Ultimately, this third component highlighted the inherent contradictions of Hughes's opinion. Yet, in retrospect it reveals the importance of assessing questions of Contract Clause interpretation.

290 Appellees' Brief at 5-8, 25 Blaisdell (No. 370).
291 Id. at 4, 11, 36.
292 Id. at 3, 8. The mortgagors-appellees claimed that the statute benefitted both the mortgagors and the mortgagee.
293 Id. at 24.
294 See supra notes 144-59 and accompanying text.
295 See Maidment, supra note 162, at 324-25.
within a larger context. Indeed, tensions within the federal system over the appropriate boundaries of state regulation of contract performance invariably emerge in Contract Clause problems.

1. Emergency and Constitutional Interpretation

By the margin of a single vote, the United States Supreme Court sustained the Minnesota Mortgage Moratorium Act as a reasonable exercise of police powers in an emergency. Unlike the court below, the Justices who comprised the majority, did not expressly rule that the Act impaired the obligation of a mortgage contract. Instead, they held that the parties executed their agreement subject to Minnesota's reserved police powers to promote the public welfare during an economic emergency. For this reason, the moratorium law did not violate the Contract Clause. Hughes infused the majority opinion with his own notions of governmental authority, federalism, and constitutional interpretation. However, Justices Stone and Cardozo made significant contributions; their criticisms of earlier drafts honed the final product's Contract Clause analysis and clarified its assertions about the public interest in private contracts. In contrast, Justice Sutherland's dissent focused on the nature of constitutional limitations and the obligation of contracts.

For Hughes the dispute really involved the extent to which states could exercise their police powers in an emergency. While the Constitution did not address the concept of emergency, the Supreme Court had, on occasion, recognized the authority of local governments to employ their police powers during periods of crisis in ways that would otherwise exceed their constitutional limitations. For example, in the Rent Cases, a divided Court upheld municipal regul-

296 Ch. 339, 1933 Minn. Laws 514.
297 Blaisdell, 290 U.S. at 444-48. The five justices in the majority were: Chief Justice Hughes, Louis D. Brandeis, Benjamin Cardozo, Owen J. Roberts, and Harlan F. Stone. In dissent were Pierce Butler, William McReynolds, George Sutherland, and Willis VanDevanter.
298 See Blaisdell, 249 N.W. at 335, 338.
299 Blaisdell, 290 U.S. at 444.
300 Id. at 448-83 (Sutherland, J., dissenting).
301 Perlman, supra note 33, at 780-81. The mortgage cases of the nineteenth century did not discuss this point. Id. at 780.
302 A few years before Blaisdell, Hughes wrote:
The Supreme Court has recognized that the legislature may meet public emergencies by action that ordinarily would go beyond its constitutional authority. This principle is not limited to military exigencies in the theater of war, or to the extraordinary requirements of some great public calamity. Less grave, but unusual and urgent conditions, may justify temporary expedients.
lations that sought to alleviate the short term effects of housing shortages by modifying the terms of residential apartment leases. The majority sustained these laws as constitutional because landlords and tenants executed their rental agreements subject to the reserved police powers of local governments during times of emergency. In essence, crisis temporarily suspended the restrictions of the Due Process and Contract Clauses upon local authority to promote the public welfare.

Hughes endorsed this approach in *Blaisdell* and quickly concluded that widespread mortgage foreclosures and the depreciation of real estate values comprised an emergency that compelled the state to act on behalf of the public interest. The Minnesota law did not conflict with the Contract Clause prohibition because it represented the exercise of reasonable police powers during an economic emergency. As Hughes understood the Rent Cases, the situation in Minnesota permitted local authorities considerable latitude under the Constitution. Once the crisis passed, the state could no longer abridge private vested contract rights.

Hughes, The Supreme Court, supra note 189, at 222-23.

Before the Rent Cases, the United States Supreme Court discussed the concept of emergency peripherally: "It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified." Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851). Later, in the Legal Tender Cases, the Court stated: "If . . . Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts . . . the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable . . . ." The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 529 (1870).


In fact, Hughes insisted that the Depression constituted the type of public calamity that mandated the reasonable exercise of local police powers to alleviate its consequences. Under these circumstances no conflict existed between the Contract Clause and state action. Id. at 439.

Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1923) (ruling that a court can always inquire about the continued existence of an emergency); Wilson v. New, 243 U.S. 332, 348 (1917) (holding that Congress may establish temporary wage regulations in the wake of a nationwide rail strike).

Blaisdell, 290 U.S. at 425.

Blaisdell, 290 U.S. at 426. Compare with the statement of Judge Roscoe Pound in the New York rent law case, People ex rel. Durham Realty Co. v. La Fetra, 130 N.E. 601, 606 (N.Y.) ("[A]n emergency may afford a reason for putting forth a latent govern-
Such statements manifest Hughes's primary concern of maintaining a balance between private contract rights and state authority to advance the public interest.\(^{308}\) While he realized constitutional limitations existed to protect private contract and property rights, he also acknowledged the importance of local government in making those same rights worthwhile and secure.\(^{309}\) Thus, the Contract Clause did not necessarily prohibit all state action. In fact, Hughes perceived the potential to reconcile state police powers with the overriding objectives of a constitutional system that allocated governmental authority.\(^{310}\) Indeed, many of his earlier Due Process opinions recognized the coexistence of local police powers and constitutional restrictions.\(^{311}\) Not surprisingly, his conception of emergency reflected his conviction that the federal system encouraged responsible activity by local governments within the parameters of state and local constitutions.\(^{312}\) All of the justices in the \textit{Blaisdell} majority interpreted the Constitution in a flexible and pragmatic manner. In particular, the opinion bore the influence of Hughes's constitutional views. Insofar as he sustained Minnesota's authority to enact emergency relief for its mortgagors, he construed the Contract Clause prohibition narrowly and refused to ascribe meaning to its text in ways inconsistent with the practical tenets of federalism.\(^{313}\)

\(^{308}\) \textit{Blaisdell}, 290 U.S. at 439. Hughes commented:

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other.

For a discussion of Hughes's attempts to balance private rights and the public interest, see \textit{Hendel}, supra note 201, at 6, 65; \textit{White}, supra note 209, at 208.

\(^{309}\) \textit{Blaisdell}, 290 U.S. at 435 ("The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society."); see also \textit{Hughes, The Supreme Court}, supra note 189, at 206.

\(^{310}\) \textit{Pusey}, supra note 163, at 308, 312; 2 \textit{Pusey}, supra note 163, at 703.

\(^{311}\) See, e.g., \textit{Chicago, B. & Q.R.R. v. McGuire}, 219 U.S. 549, 567 (1911) (sustaining an Iowa law that prohibited contracts between railway companies and their employees limiting the liability of the railways for injuries sustained in the course of workers' employment).

\(^{312}\) See \textit{Address at Faneuil Hall}, supra note 164; \textit{Washington's Birthday Address}, supra note 170, at 286-87; 1 \textit{Pusey}, supra note 163, at 308.

\(^{313}\) Ostensibly, Hughes sought to analyze the issues in this case from a neutral perspective, focusing only upon questions of power and not the particular wisdom of the
Eighteen months before he wrote the majority opinion, Hughes spoke about judicial review to members of the federal judiciary in Asheville, North Carolina. In this speech he cautioned jurists about the dangers of assessing constitutional provisions “in a narrow, technical spirit” devoid of “recognition of appropriate State power as well as Federal power.”

Hughes believed the federal system allowed states the freedom “to meet local needs” and made possible “opportunities for experimentation and progress.” Constitutional limitations curtailed the exercise of “arbitrary power” and helped preserve the series of balances extant between state and local governments and between the public interest and private rights.

Accordingly, Hughes implored the judges to assess constitutional issues in a manner consistent with the objectives of the federal system:

We should be faithless to our supreme obligation if we interpreted the great generalities of the Constitution so as to forbid flexibility in making adaptations to meet new conditions, and to prevent the correction of new abuses incident to the complexity of our life, or as crystallizing our own notions of policy, our personal views of economics and our theories of moral or social improvement.

Critical of rigid and sterile interpretation, he nevertheless urged his audience to heed the fundamental purpose of constitutional limitations. In essence, he saw the Constitution as a dynamic instrument that established guidelines for the structure of government and the exercise of power. Extreme construction of its provisions, while consistent with the political, economic, and social beliefs of the interpreter, jeopardized the fragile balance between private rights and community interests that characterized the nature of the Constitution. Instead, the jurist’s principal task lay in dispassionate, objective application of constitutional principles to the myriad problems of an evolving and complex society.

Minnesota law. Blaisdell, 290 U.S. at 425, 447-48. Hughes often articulated the view that judges should interpret neither legal issues nor constitutional provisions in ways that advanced their personal notions of economic and social policy. Fourth Circuit Address, supra note 218. Yet, he admitted the difficulty of this task. Id. An argument exists that he went too far in this case. Epstein, supra note 7, at 736-38.

314 Fourth Circuit Address, supra note 218.
315 Id.
316 Id.
317 Id.
318 Id.; cf. Harvard Address, supra note 169, at 6 (“How to protect the individual in his personal rights and at the same time safeguard the community, is a problem not solved by forms of words, even in written constitutions.”).
Insofar as Hughes’s Asheville comments foreshadowed his constitutional methodology in *Blaisdell*, they paralleled his notions of statutory construction. Deferential to the legislative process, he characterized it as evolutionary and noted its gradual exclusion of some ideas and incorporation of others in keeping with the changing needs of the body politic.\(^{319}\) Judicial review thus meant appraisal limited to questions of legislative power exclusive of considerations concerning the wisdom or propriety of legislative policy.\(^{320}\) Moreover, courts erred when they interpreted statutory provisions “in a technical spirit . . . [that] . . . sacrifice[d] the growing substance of the law to a lifeless formalism.”\(^{321}\)

Consequently, Hughes thought the Minnesota mortgage moratorium did not necessarily violate the Contract Clause. Though he noted that the clause specifically prevented states from coining money, emitting credit, or passing ex post facto laws, he construed its prohibition of state laws that impaired the obligation of contracts differently. This provision, he insisted, must be viewed in the context of “constitutional grants and limitations of power . . . set forth in general clauses.”\(^{322}\) As such, the Contract Clause only prescribed a general limitation of state power over private agreements and not “an absolute one . . . to be read with literal exactness like a mathematical formula.”\(^{323}\)

While entirely consistent with his own views and those of the other justices in the majority, this mode of constitutional analysis appalled the dissenters, all of whom believed in the sanctity of vested contract rights and the immutability of constitutional limitations. Justice Sutherland opposed any “inroads” upon the scope of the Contract Clause for fear that they signified “gradual but ever-advancing encroachments upon the sanctity of private and public contracts.”\(^{324}\) Moreover, he noted the historical circumstances that prompted the creation of a constitutional prohibition of state impairment of contract obligations: the proliferation of debtor relief laws that jeopardized the nation’s political, economic, and social


\(^{321}\) New York Bar Association Address, *supra* note 181, at 19.

\(^{322}\) *Blaisdell*, 290 U.S. at 426.

\(^{323}\) *Id.* at 428.

\(^{324}\) *Id.* at 448 (Sutherland, J., dissenting).
stability after the Revolution. Reluctant to acknowledge the potential of local government to regulate private rights in the public interest, Sutherland insisted that the security of contract obligations emanated from constitutional limitations on state power. From this perspective he perceived the mortgage moratorium as a threat to individual freedom and detrimental to vested contract rights. He admonished that notwithstanding the severity of the Depression, the Contract Clause could “not mean one thing at one time and an entirely different thing at another.” Such disparate interpretations would diminish the value of contracts and imperil the federal system.

Though Sutherland, like Hughes, refrained from assessing the wisdom of the Minnesota law, he found no reason to uphold it as a reasonable exercise of state police powers during an emergency. Its extension of the mortgagors’ redemption period impaired the underlying mortgage obligation. Neither the variants of public opinion nor the vicissitudes of the economy sanctioned the lessening of limitations upon local government in wielding its authority over private contract rights.

Had *Blaisdell* come before the Court of William Howard Taft, Hughes’s predecessor as Chief Justice, a majority of the Court would probably have accepted Sutherland’s ideas about original intent and constitutional limitations. But during the 1930s the com-


326 *Blaisdell*, 290 U.S. at 449 (wherein Sutherland stressed that it was precisely because of the similarity between the Depression and the historical circumstances surrounding the creation of the Contract Clause that the Court should not modify the scope of its intended prohibition); see also *id.* at 483 (“If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”).

327 *Id.* at 449, 452-53. To this extent, Sutherland quoted Thomas Cooley’s treatise: “The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.” *Id.* at 452-53 (quoting THOMAS COOLEY & WALTER CARRINGTON, 1 CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927)). Cooley had been Chief Justice of the Michigan Supreme Court in the latter half of the nineteenth century. He also taught Sutherland law at the University of Michigan. His constitutional philosophy influenced Sutherland and other conservative jurists. See ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 362 (1956) (arguing that Sutherland viewed the Constitution as a set of limitations and not as a grant of state powers); JOEL F. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 16-20 (1951) (discussing Sutherland’s constitutional philosophy and Cooley’s influence upon its development); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 Wis. L. Rev. 1431, 1502-10 (discussing Cooley’s constitutional jurisprudence).
position of the bench gradually changed as Hughes, Owen Roberts and Benjamin Cardozo replaced some of the more conservative jurists. Of the newcomers, Roberts had the least influential constitutional views; however, both Hughes and Cardozo often applied the meaning of constitutional provisions in ways consistent with progressive notions of government. Together with Justices Stone and Brandeis, and to a lesser extent, Roberts, Hughes and Cardozo implicitly rejected an interpretation of the Contract Clause based upon the natural law assumptions of its draftsmen.

In reviewing Hughes's draft of the Blaisdell majority opinion, Stone in particular, emphasized the pitfalls of analyzing the clause solely from the perspective of the constitutional framers, many of whom he noted were men of considerable property who probably sympathized with the plight of creditors during the post-Revolutionary era. Thus, the framers created a provision that curtailed

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328 Hughes replaced Taft as Chief Justice on February 1, 1930. Roberts replaced Edward T. Sanford that same year. Cardozo replaced Oliver Wendell Holmes in 1932. By 1934, Hughes, Roberts, and Cardozo formed a fairly solid voting block with the more progressive holdover members of the Taft Court, Harlan F. Stone and Louis D. Brandeis. The substitution of the energetic Cardozo for the ninety-one year old Holmes helped shift the balance within the Court toward the more progressive jurisprudence of Stone and Brandeis and away from the conservative philosophes of Taft holdovers such as Sutherland and McReynolds. Though not liberal per se, the Court of the early 1930s exhibited more tolerance than it had under Taft toward state economic regulation and local police powers. One historian characterized the Court from 1930 to 1937 as an "uneasy compromise between the laissez-faire and the social welfare conceptions of the state." HENDEL, supra note 201, at 136.

329 Notes of Justice Harlan F. Stone on Blaisdell, para. 4 (1933) (available in Stone Papers at Library of Congress). Paragraph 4 of the notes states, in part:

The framers of the Constitution undoubtedly had legislation of this type in mind. But the framers represented a class, and the Constitution itself was submitted only to conventions which were chosen by an electorate limited by heavy property qualifications. Our ideas of interests worthy of protection, and of the voice in government which various interests are to have, have undergone much change since 1789. It would be reducing the Constitution to the state of a penal law or an ordinary statute to hold that the intent of a handful of aristocrats in 1789 should be binding upon the society found in Minnesota today.

See also Memorandum from Justice Harlan F. Stone to Chief Justice Charles Evans Hughes 3 (Dec. 13, 1933) (available in Stone Papers at Library of Congress); cf. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73-151 (Free Press 1986) (1913) (arguing that the constitutional framers comprised the creditor class and thus sought to create a governmental system that protected their interests in property and contracts). A Columbia University history professor, Beard was a former colleague of Stone when the latter taught at Columbia Law School twenty years before Blaisdell. While on the Court, Stone occasionally corresponded with Beard about points of constitutional history. MASON, supra note 327, at 410-11. Nevertheless, there is no evidence Stone conferred with Beard about this case.
the opportunities for states to abridge contract rights. Hughes omitted this rationale from the final version of the majority opinion, in all probability because of its radical overtones and his distaste for controversy. Yet, it appears he agreed with Stone given the opinion's emphasis upon governmental authority to promote the public welfare during an emergency.

In Hughes's view, the critical question before the Court involved the constitutional limitations placed upon a state's ability to preserve the prosperity and security of its citizens during a period of acute financial, economic, and social crisis. Previous Supreme Court decisions upheld governmental interference with contracts that affected local health, morals, and safety on the basis that states possessed inalienable police powers to promote the public welfare. A few cases extended this concept of welfare to include notions of comfort, convenience, and economic prosperity, although considerable disagreement arose over the legitimacy of these latter objectives. Often, the debate reflected much larger concerns over despite the striking similarity of their ideas. In any event, it would appear Beard's conclusions about the constitutional framers influenced Stone.

Before the Court issued its decision in Blaisdell, Stone reviewed a draft of Hughes's opinion with dismay. Critical of its structure and concerned that the Chief Justice inadequately explained the economic and constitutional dimensions of the mortgage problem, Stone wrote a memorandum to Hughes summarizing his perceptions of the opinion's weaknesses and suggesting additional points to include. Apparently in preparation for this memorandum, and perhaps with the intention of writing a concurring opinion, Stone with the assistance of his law clerk, Howard C. Westwood, compiled some notes that discussed in more depth than Hughes's initial opinion the following: 1) the economic basis of mortgage moratoria; 2) the fallacy of relying solely upon the original intent of the constitutional framers to ascertain the meaning of the Contract Clause and its application to the Depression; 3) the nature of legislation and; 4) the growing importance of local police powers in the federal system. Notes of Justice Stone, supra. For a general discussion of these notes and of Stone's misgivings about even the final draft of Hughes's opinion, see MASON, supra note 327, at 365.

See WHITE, supra note 209, at 213. Hughes may also have seen the notes upon which Stone relied in preparing his memorandum. However, it is also possible that Stone raised this point in the Justices' conference about the case.


Justice Stone thought Blaisdell did not represent a fundamental departure from the Rent Cases in its recognition of the reasonable exercise of state police powers as a limitation upon the scope of the Contract Clause. See Memorandum of Gertrude Jenkins, Secretary to Justice Stone, regarding Blaisdell (1933) (available in Stone Papers at Library of Congress); Memorandum from Stone to Hughes, supra note 329, at 3; Notes of
the appropriate role of state governments within the federal system and the extent to which the Constitution protected rights of property and contracts from local regulation in the public interest.

2. *The Public Interest in Private Contracts*

In *Blaisdell*, Hughes asserted: "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding the interference with contracts." Moreover, he flatly refused to invoke the Contract Clause as an instrument to "throttle the capacity" of Minnesota to protect its fundamental interests. Consequently, his opinion recognized economic prosperity as an integral part of public welfare and that its protection lay within the fundamental attributes of Minnesota's sovereign powers. Additionally, Hughes emphasized that within private contracts inhered a significant public interest in the maintenance of optimal conditions for individual opportunity and the collective good. In this respect, the opinion revealed his longstanding beliefs about government and the federal system.

However, the Chief Justice remained concerned about the sanctity of contract obligations. Insofar as his opinion construed the Contract Clause "in harmony with the essential reserved power of the States to protect the security of their peoples," it also showed his willingness to balance private rights and the public interest. One cannot understand the rationale for upholding the constitutionality of the mortgage moratorium without reference to his conviction that "[t]he policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which con-


333 *Blaisdell*, 290 U.S. at 437.

334 *Id.* at 444.

335 *Id.* In fact, Hughes commented that "the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." *Id.* at 442. In addition, Hughes asserted: "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." *Id.* at 435; see also *id.* at 439.

Before *Blaisdell*, other progressive legal thinkers had stated their belief that a public interest exists in private contracts. See, e.g., MORRIS COHEN, LAW AND THE SOCIAL ORDER 78 (1933); Feller, *supra* note 250, at 1061 ("The complicated credit economy of our day is built on a foundation of public confidence, the cement of which is the system of legal rules relating to private rights.").

336 *Blaisdell*, 290 U.S. at 443; see also *id.* at 435.
tractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society.”\footnote{Id. at 435.}

Essentially, Hughes believed that without the occasional intercession of governmental authority, one person’s rights would become susceptible to encroachment by others, who by virtue of their absolute freedom might exercise their private interests in ways detrimental to some individuals and to the public at large. In a speech before the American Bar Association nearly a decade earlier he remarked:

> There is the greater danger as the complexities of society increasingly demand that the range of personal volition be limited by law in the interest of liberty itself. We are compelled to lay stress on restraints in the view that the liberty which permits freedom of action would be a barren privilege if it did not also connote freedom from injurious action by others...\footnote{ABA Address, supra note 164, at 7.}

Through the exercise of police powers, state and municipal governments could enhance the collective security of private rights and help maintain the concept of ordered liberty essential to “safeguard individual opportunity and initiative.”\footnote{HUGHES, CONDITIONS OF PROGRESS, supra note 168, at 20.} To the extent regulations existed, therefore, they did so “to prevent the liberty of some from accomplishing the enthralldom of all.”\footnote{Id. at 13. But see The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553-54 (1871) (upholding the validity of Legal Tender Acts that authorized paper money during the Civil War and overruling Hepburn v. Griswold, 75 U.S. (Wall.) 603 (1870)). In relevant part, the concurrence remarked: Is it worse for the creditor to lose a little by depreciation than everything by the bankruptcy of his debtor? ... All property and all rights, even those of liberty and life, are held subject to the fundamental condition of being liable to be impaired by providential calamities and national vicissitudes. ... There are times when the exigencies of the state rightly absorb all subordinate considerations of private interest, convenience, or feeling. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed. Id. at 564-65 (Bradley, J., concurring). This remark anticipated Hughes’s own observations about the public interest in private contracts. Id. at 564-65 (Bradley, J., concurring). This remark anticipated Hughes’s own observations about the public interest in private contracts.} 

Hughes understood the creative potential of local authority to resolve the intricate social and economic problems of a diverse, interdependent society. The federal system, with its limitations upon state power, did not necessarily restrict “the right of each community to be its own master” in the affairs which primarily affected it.\footnote{Address at Faneuil Hall, supra note 164. For the most part, Hughes believed that} Instead, it provided the opportunity for local action that
would benefit the interests of all. In Minnesota, the national government had done relatively little to alleviate the severe financial burdens placed upon mortgagors during the Depression, leaving only the state and its municipalities as the logical authorities to resolve matters. Statutory extension of the Blaisdells’ period in which to redeem their property from the permanent possession of their creditor, therefore, represented the responsible action of local government over the interests of all its citizens.

Unlike Sutherland, Hughes implicitly trusted local government to protect the property and contract rights of individuals. Increasingly complex tensions within an interdependent modern society periodically necessitated the use of public authority to alleviate economic and social problems that threatened to disrupt the fragile balance between personal freedom and collective security. The moratorium only suspended the operation of a mortgage provision that transferred ownership of foreclosed realty involuntarily sold. It did not discharge the underlying mortgage obligation. Further, it protected the interests of both the mortgagor and mortgagee in a depressed economy and helped maintain a semblance of order within Minnesota.342

Months before the Blaisdell decision, Harvard law professor A.H. Feller wrote an influential law review article in which he suggested the basis for holding mortgage moratoria legislation constitutional. One reason he gave was primarily historical: since ancient Greece, governments had used moratoria to stay debts during periods of economic crisis and thus prevent the social and economic unrest produced by strict performance of contract obligations.343

the Constitution created a federal system that accorded “ample power . . . for the national and for state governments to carry out their functions in a changing world, with no stultifying vacuum between them.” 1 PUSEY, supra note 163, at 308. Indeed, on at least one occasion Hughes dissented from a Court decision that he believed hindered the ability of states to act for the public welfare in the absence of congressional action. See Morehead v. New York, 298 U.S. 587, 618-31 (1936) (Hughes, C.J., dissenting) (arguing that New York’s minimum wage law for women should override freedom of contract as it represented the legitimate police power objectives of the state to promote fair wages for women). One historian contends that Hughes dissented because he thought the Court’s decision invalidating this law “created a dangerous power vacuum” that prohibited New York from acting to alleviate a serious economic problem that the federal government had not yet addressed. 2 PUSEY, supra note 163, at 701.

342 Blaisdell, 290 U.S. at 425, 444; see HENDEL, supra note 201, at 181 (referring to Hughes’s concern with the social chaos that precipitated the Minnesota law).

343 Feller, supra note 250, at 1061-65. Indeed, “[t]he purpose of a moratorium is not to destroy rights altogether, but rather to postpone their enforcement until after the emergency.” Id. at 1070.
By analogy, a similar situation occurred in Minnesota, where months before the passage of the Mortgage Moratorium Act, mortgagors rioted and prevented county sheriffs from conducting foreclosure sales. Strict adherence to the foreclosure provisions of mortgages threatened to hasten the collapse of the local economy, much of which depended upon the availability of credit.\textsuperscript{344} Hughes could have used this rationale to explain more clearly that the Minnesota statute helped preserve the long term value of the mortgagor’s contract rights and thus comprised a legitimate exercise of the state’s police powers to promote the public welfare.\textsuperscript{345}

At the time of the Contract Clause’s creation, the concept of governmental police powers remained inchoate.\textsuperscript{346} Luther Martin’s initial criticism of the clause suggested that its breadth might infringe upon some residuum of state power.\textsuperscript{347} Later, this idea became the basis for the theoretical distinction between contract rights and remedies used by the Marshall Court in assessing questions of contract impairment. While somewhat illusory in application, this theory made clear that both the obligations and the remedies of contracts emanated primarily from local law and not from the will of the parties alone.\textsuperscript{348} Thereafter, the doctrines of reserved and inalienable state police powers created significant additional inroads

\begin{footnotesize}\textsuperscript{344} Id. at 1061, 1074. In fact, Feller suggested several months before \textit{Blaisdell} that moratorium legislation of finite duration might provide flexibility and preserve the basic economic structure during the Depression. \textit{Id.} at 1074.

\textsuperscript{345} See \textit{Blaisdell}, 290 U.S. at 444-46 & n.16; see also Memorandum from Stone to Hughes, \textit{supra} note 329, at 2-4. Stone realized more clearly than Hughes that most mortgagees were wealthy, retired farmers primarily interested in a return on their investments. They did not want to repossess foreclosed property. Therefore, to the extent the statute delayed their rights of repossession, it actually forced them to wait until the market improved to regain possession of foreclosed realty. Hence, both mortgagors and mortgagees benefitted, as the mortgagors received extended opportunities to retire their debts while the mortgagees averted selling realty in a depressed market. At worst, the mortgagees received in two years property more close in value to the amount of their original investments. \textit{See} Notes of Justice Stone, \textit{supra} note 329, at paras. 1, 3, 7 (containing the agricultural department figures and other information upon which Hughes apparently relied for his assertion about the characteristics of mortgagees in Minnesota).

\textsuperscript{346} Perlman, \textit{supra} note 33, at 780-82.

\textsuperscript{347} Hynning, \textit{supra} note 33, at 190. \textit{See} \textit{supra} notes 30, 33-34 and accompanying text.

\textsuperscript{348} \textit{See}, e.g., \textit{Ogden v. Saunders}, 25 U.S. (12 Wheat.) 213, 282-83 (1827) (Johnson, J., seriatim opinion). In \textit{W.B. Worthen Co. v. Kavanaugh}, 295 U.S. 56, 60 (1934), Justice Cardozo characterized the rights/remedies distinction as obscure. Similarly, Stone believed the distinction “confusing and, to some extent obscures the point with which we have to deal in the present case.” Memorandum from Stone to Hughes, \textit{supra} note 329, at 2.\end{footnotesize}
upon the scope of the Contract Clause prohibition, as the Court recognized the pervasive influence of local government upon the formation and enforcement of contracts. In part, this emphasis upon the public interest in contracts arose in response to the social and economic changes produced by a diverse, interdependent economy. Had Hughes more carefully analyzed the Minnesota legislation from this constitutional context, he could have probably clarified the ambiguities of his more sweeping statements about the police powers.

The opinion's most bold points may actually have reflected the views of other members of the majority besides the Chief Justice. For example, in two different places Hughes referred to "a growing recognition of public needs" in his discussion of the relationship between the public interest and private contracts. While this observation was certainly consistent with his own notions of government, it also was the phrase used by Justice Cardozo in his draft concurring opinion, which Cardozo did not publish when Hughes adopted his points about constitutional interpretation and the public interest in private contracts.

More outspoken than either Hughes or Cardozo was Justice Harlan Stone, whose personal notes emphasized the reasons for in-

349 See Blaisdell, 290 U.S. at 442-44.
350 Id. at 442-43. Cardozo also anticipated Hughes's discussion of public interest when he remarked nearly a dozen years earlier about the Court's growing appreciation of public needs. See BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 82 (1921); Robert B. Shapiro, Recent Case, 1 U. CHI. L. REV. 639, 642 (1934); see also Benjamin Cardozo, Draft of Blaisdell Concurring Opinion at 3 (1933) (available in Cardozo Papers at Library of Congress).

It is possible Hughes's discussion of state police powers may have been partially influenced by Brandeis's dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 302-04 (1932) (Brandeis, J., dissenting). See F. H. Weitzel, Note, Mortgage Moratorium Statute Sustained by Supreme Court, 2 GEO. WASH. L. REV. 486 (1934). In Liebmann, Brandeis urged deference to Oklahoma legislation regulating the production and distribution of ice because of the state's broad police powers in matters pertaining to the public interest. He also noted the state interest in preserving the availability of ice in drought conditions. Stone joined in this dissent. Hughes, however, was part of the majority, which, per Justice Sutherland, stressed the due process right to operate an ordinary private business free from governmental restriction the objective of which was to implement experimental social and economic policies. Liebmann, 285 U.S. at 286. "Hughes himself thought the case was near the border line." 2 PUSEY, supra note 163, at 698. While generally supportive of local police powers and state economic regulation, Hughes was more moderate in his views than Brandeis, Cardozo and Stone. See Robert H. Jackson, The Judicial Career of Chief Justice Hughes, 27 A.B.A. J. 408 (July 1941); F.D.G. Ribble, The Constitutional Doctrines of Chief Justice Hughes, 41 COLUM. L. REV. 1190, 1206 (1941). Unlike Liebmann, Blaisdell presented a more urgent need to sanction state police powers.
increased local governmental regulation of private agreements. In particular, he wrote: "the welfare of masses of individuals are subject to the economic control of fewer and fewer individuals through the medium of contract . . . the interest of the State in that medium must necessarily be far greater than in days when that medium had no such far reaching consequences." 

Hughes incorporated this rationale into his own theory of police powers:

The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity.

Thus, it would appear that much of the tone of Hughes's opinion, and perhaps some of its substance, derived from the collaborative efforts of the justices in the majority.

In retrospect, this is not surprising, given Hughes's penchant for creating consensus on important constitutional questions, though even he must have known that Sutherland and the other apostles of strict constitutional limitation would dissent from any ruling that seemingly constrained the reach of the Contract Clause prohibition. This left the Chief Justice with Stone, Brandeis, Cardozo, and Roberts to support his general views of the case. In return for their support, he fashioned an opinion that melded their ideas with his own.

3. The Limitation of Reasonableness

Despite its broad implications, the Blaisdell decision was actually quite narrow. It limited in two significant ways the extent to which state police powers could modify the terms of private agreements. First, the Court explicitly restricted its expansive interpretation of state police powers to emergency situations, and so did not proclaim a general assault upon the Contract Clause protection of vested contract rights. Second, the Court imposed a standard of reasonableness upon state interference with the terms of private contracts.

Notwithstanding the existence of a bona fide emergency, the state could only abridge vested contract rights through the reasonable exercise of its police powers. Unreasonable assertions of local governmental authority impaired the performance of contracts within

\[351\] Notes of Justice Stone, supra note 329, at para. 5.

\[352\] Blaisdell, 290 U.S. at 442.
the meaning of the Contract Clause and signified the type of arbitrary power detrimental to the security of individuals and society alike.\textsuperscript{353} In part, this limitation reflected the pragmatic jurisprudence of Hughes, who crafted an opinion that sought to balance private contract interests with those of the public in maintaining a viable economic and social structure. However, it also derived from the rationale of early Contract Clause cases that applied a test of reasonableness in distinguishing between permissible state interference with contract remedies and impermissible abridgement of contract rights.\textsuperscript{354} Later cases also assessed the scope of state police powers from a similar perspective, as the Court expanded the scope of public welfare in disputes involving both the Due Process and Contract Clauses.

Though neither Justices William Johnson nor John McLean, early proponents of the rights/remedies distinction, expressly designated their approach as one of reasonableness, their recognition of the close relationship between local governmental power and the nature of contract obligations made possible a mode of Contract Clause interpretation that balanced the public and private rights in contracts. Once the Court adopted a functional analysis of questions of impairment,\textsuperscript{355} it began to examine both the quality and quantity of state interference with the performance of contracts. Thus, the rights/remedies distinction necessitated inquiry into the nature and duration of such impairment. Where state laws modified the terms of public and private agreements for periods of infinite duration or in an arbitrary manner, the Court invariably characterized the interference as one with contract rights in contravention of the Contract Clause. On the other hand, less intrusive alterations of contract terms often withstood constitutional scrutiny as mere changes in contract remedies.\textsuperscript{356}

By the 1930s a series of decisions on state police powers addressed the relationship between legislative means and objectives. The Court avoided direct inquiry into the wisdom of laws enacted for the public welfare that affected contract provisions. Instead, it

\textsuperscript{353} See id. at 445-47.

\textsuperscript{354} See, e.g., Antoni v. Greenhow, 107 U.S. 769, 775 (1882) ("In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge.").

\textsuperscript{355} For a general discussion of the mechanics of Supreme Court Contract Clause analysis, see Epstein, supra note 7; Note, A Process-Oriented Approach to the Contract Clause, 89 YALE L.J. 1623 (1980).

\textsuperscript{356} See supra notes 95, 258 and accompanying text.
examined the manner of local interference with vested contract rights as it considered the nexus between public purpose and legislative methods. Hughes appreciated this subtle distinction and remarked in *Blaisdell* that "[t]he question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."  

Given his views of the federal system and state police powers, the Chief Justice concluded that a mortgage moratorium comprised a reasonable means for the state to preserve the economic security of all parties to a mortgage agreement. By implicitly recognizing the inherent public interest in private contracts, Hughes could not assess the provisions of the Minnesota law without reference to the circumstances that prompted its passage. For this reason he refused to construe the contract rights of the mortgagee in the abstract. The Minnesota law attempted to alleviate the harsh consequences of real estate foreclosure in a depressed market. Strict compliance with the terms of mortgage contracts would certainly harm mortgage debtors and jeopardize the stability of land values. Alternatively, legislation that merely delayed the mortgagees' remedies and enabled mortgagors to redeem their debts would probably inure to the benefit of all. Essentially, the Minnesota law was reasonable because it protected the interests of both mortgagors and mortgagees during an economic crisis for a limited period of time.

Unlike the court below, Hughes insisted that the mortgage moratorium law did not impair the obligation of a private contract because it did not discharge the Blaisdells' underlying mortgage debt. Under the act, the Blaisdells petitioned a state circuit court for equitable relief prior to the expiration of the redemption period provided in their mortgage agreement. The court only extended their redemption period upon the condition that the Blaisdells pay the mortgagee the reasonable rental value of the premises throughout the duration of the extension. According to Hughes, this helped

357 *Blaisdell*, 290 U.S. at 438.
358 *Id.* at 445-47. *But see* Epstein, *supra* note 7, at 737 (arguing no evidence exists to demonstrate the mortgage moratoria of the Depression "neutralized the effects of . . . deflation, restoring the parties to the position . . . they would have enjoyed without the deflation"). Epstein suggests, in part, that the federal government's contraction of the money supply actually produced the deflation that made it difficult for farmers who sought to make mortgage payments during the Depression. *Id.*
359 *Blaisdell*, 290 U.S. at 425, 445.
preserve the integrity and value of the mortgagee's contract rights without subjecting the mortgagors to immediate financial ruin. It also compensated the mortgagee, who received money to defray tax and insurance costs of the premises while it remained in possession of the mortgagors. If the mortgagors failed to comply with the conditions established by the court, the mortgagees would then obtain immediate possession of the realty. In any event, the statute limited its operation to two years, or until May 1, 1935.

Hughes distinguished the Minnesota mortgage moratorium from previous debtor relief legislation that altered private agreements for indefinite periods of time or otherwise infringed upon the contract rights of one party without compensation. Unlike the Minnesota statute, these laws were unreasonable because they did not set forth limitations upon the scope of local police powers. Subsequent decisions underscored the emphasis Hughes and the other members of the majority placed upon the reasonable control of local government over the enforcement of contracts. For example, in *W.B. Worthen Co. v. Thomas*, Hughes, once again writing for the majority, invalidated an Arkansas law that exempted life insurance proceeds from seizure by judicial process for payment of debts. This retroactive measure violated the Contract Clause because it enabled debtors to enjoy unlimited exemptions for an indefinite period of time regardless of the continued existence of an economic emergency. These characteristics made the law unreasonable as it subjected the contract rights of creditors to uncertainty and rendered their remedies worthless.

Similarly, a unanimous Court struck down other Arkansas laws that prevented mortgagees from securing their contract rights to benefit assessments on municipal bonds for nearly seven years. Notwithstanding the legislature's declaration of an emergency, the actions provided mortgage debtors with unconditional relief at the expense of their creditors, who received neither installment payments upon the principal of outstanding loans nor rental payments.

360 Id. at 445.
361 Id. at 431-34. In contrast with the economic crises which precipitated nineteenth century debtor-relief legislation invalidated by the Supreme Court, the Depression lasted for several years. The financial panics that occurred in 1819, 1837, 1857, 1873, and 1893 did not last very long. For example, the principal effects of the 1837 "crisis" diminished considerably by the time the Court decided Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843). See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 376 (1922); Perlman, supra note 33, at 780.
362 292 U.S. 426 (1934).
363 Id. at 432-34.
during the stay of their contract remedies. 364

As a whole, these cases demonstrate the perception of the Chief Justice and other members of the Blaisdell majority about the limitations of their decision. 365 Hughes, in particular, did not intend to eviscerate the constitutional protection of vested contract rights. 366 Rather, he interpreted the Contract Clause pragmatically, contending that its prohibition did not impede the exercise of local control over those aspects of contract enforcement which affected the public interest in collective security and economic stability. 367 To this extent, he invoked a test of reasonableness upon the operation of state

365 Indeed, a brief survey of post-Blaisdell cases involving debtor relief laws demonstrates the Court's moderation. See Wright v. Vinton Branch Bank, 300 U.S. 440 (1937) (upholding a revised Frazier-Lemke Act provision that limited the foreclosure stay of real property of a bankrupt mortgagor to three years on the condition that the mortgagors who remained in possession continued to pay taxes, maintenance fees, and rent on the premises and the mortgagee retained a bankruptcy lien); Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124 (1937) (ruling that a North Carolina statutory defense in a deficiency action did not impair the obligation of contracts when it allowed the mortgagor to assert that the bid of a mortgagee-purchaser at a foreclosure sale was less than the actual property value or equal to the approximate value of the debt); Triegle v. Acme Homestead Ass'n, 297 U.S. 189 (1936) (invalidating under the Contract and Due Process Clauses a Louisiana law giving building and loan directors sole discretion to determine the payments allocated to shareholders who withdraw their deposits); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (holding that paragraph 7 of the Frazier-Lemke Bankruptcy Act of 1934 violated the Fifth Amendment due process rights of a mortgagee when it gave a bankrupt mortgagor continued possession of realty for five years unencumbered by a lien and without any required compensation to the mortgagee regardless of the existence of an emergency).
Moreover, in Perry v. United States, 294 U.S. 330 (1935), Nortz v. United States, 294 U.S. 317 (1935), and Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935), (the Gold Clause Cases), a slim majority of the Court sustained the exclusive authority of Congress to make and regulate currency notwithstanding the provisions in private contracts mandating payment of debts in currency prescribed by the gold standard. In Perry, the Court ruled that the United States could not alter its obligation to redeem war bonds in gold, yet because the bondholder failed to show actual damages, no liability accrued. Nevertheless, the Court held that Congress could not interfere with the preexisting debt obligations of the federal government by redeeming bonds in legal tender rather than in gold. Perry, 294 U.S. at 350-51. In Norman, the Court held that the 1933 Joint Resolution of Congress invalidating gold clauses did not impair private contract rights for redemption of railroad bonds. Norman, 294 U.S. at 297-311. In Nortz, the Court rejected the Fifth Amendment due process claim of one who upon redemption of gold certificates issued by the United States government received payment in currency other than gold coins. Nortz, 294 U.S. at 326-30.
366 See Maidment, supra note 162, at 324-25.
367 Blaisdell, 290 U.S. at 439 ("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.").
police powers. However, questions arise whether Hughes's approach in *Blaisdell* created more problems of application than it resolved. His emphasis upon the compensatory facets of the mortgage moratorium law belied his assertion that the Act's extension of the Blaisdells' redemption period did not impair the contract rights of the mortgagee. Much of his opinion characterized the statute as a legitimate use of Minnesota's police powers to alleviate the long-term effects of a widespread economic crisis. Once Hughes established this point, he diminished its importance by trying to make a fine line distinction between legislative interference with contract rights and remedies. Hesitant to overturn precedent or even to make significant departures from it, he relied upon this traditional dichotomy to explain the reasonableness of the state's interference with a private mortgage agreement. Classifying the changes as within the remedies of the contract seemingly enabled Hughes to interpret the Contract Clause in a flexible manner; it actually may have highlighted the weakest points in the opinion.

In dissent, Justice Sutherland contended that the Minnesota statute severely curtailed the efficacy of the mortgagee's remedies and abridged its rights under the mortgage. But for the revised statutory redemption provision, the mortgagee would have received absolute possession of the mortgaged premises upon the expiration of the original one-year redemption period. Under the Minnesota law

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368 Hughes wrote approximately 350 opinions as Chief Justice, 39 of which involved questions of state powers. He upheld the exercise of state powers 32 times, and most of these cases involved police powers. *Pusey*, supra note 163, at 696, 703. Of the post-*Blaisdell* cases, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390-400 (1937), illustrates more clearly Hughes's recognition of the paramount importance of state police powers in matters of public interest.

369 See Memorandum from Stone to Hughes, *supra* note 329, at 2. *Perlman*, supra note 33, at 793, contends that Hughes weakened the notion of reasonable exercise of police powers during an emergency with his additional point that the Minnesota law compensated the mortgagee. Once the state exercises its police powers in a legitimate, nonarbitrary manner, "there is no 'taking' of property for public use without just compensation, contrary to the Fourteenth Amendment, and the state is not required to compensate anyone." *Id.* at 793-94 (footnote omitted).

However, the principle of compensation has been recognized as a limitation upon the scope of the Contract Clause. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Epstein*, *supra* note 7, at 740-47; *Siegel*, *supra* note 96, at 76-108. In any event, Hughes's emphasis on compensation made little sense, given his more farreaching observations about the public interest in private contracts and the nature of constitutional interpretation.

370 See *White*, *supra* note 209, at 213.

371 *Blaisdell*, 290 U.S. at 478-82.
the mortgagee obtained instead a defeasible interest subject to divestment in two years once the Blaisdells redeemed the mortgage debt. More than simply changing the mortgagee's remedies upon the Blaisdells' default, the mortgage moratorium essentially impaired the obligation of a private contract when it altered the redemption provision against the will of the mortgagee. This comprised an arbitrary and unreasonable exercise of state power over the performance of a private mortgage agreement. Further, monthly rental payments did not compensate the mortgagee because the act deprived it of the opportunity to sell the premises or otherwise exercise complete dominion and control over the realty.\textsuperscript{372}

Though technically correct that the Minnesota law affected both the rights and the remedies of a private contract, Sutherland incorrectly interpreted the terms of the mortgage in a rigid, technical fashion. Had the mortgagee received immediate and absolute possession of the premises upon the expiration of the initial one-year redemption period, it appears unlikely the mortgagee would have been able to sell the property for the amount of the outstanding indebtedness in an already depressed real estate market. The mortgagee probably would not have recovered a deficiency judgment for some time against the Blaisdells because of the continued duration of the economic and financial crisis. Moreover, the mortgagee was a financial institution whose investors were only interested in receiving at the very least a return on their capital investments and not ownership of devalued property.\textsuperscript{373}

Conversely, the Blaisdells retained a keen interest in maintaining possession of their boarding house. Extension of the redemption period would enable them to control the premises while they tried to extinguish their debt. While this delayed the mortgagee's remedy, it may have actually preserved its underlying contract rights in the long run. After all, the mortgagee primarily sought recovery of the money it loaned the Blaisdells.\textsuperscript{374} Strict enforcement of the

\textsuperscript{372}Id. at 480-81. Moreover, fair rental value does not necessarily equal fair compensation. The Minnesota statute placed the mortgagee in a potentially untenable position, for if land values decreased even more, the mortgagee might have eventually become stuck with the property. Conversely, if the mortgagor redeemed the property while land values increased, the mortgagee would lose the opportunity to sell the land in a strong market. See Shapiro, \textit{supra} note 350, at 642.

\textsuperscript{373}\textit{Blaisdell}, 290 U.S. at 445-46; Memorandum from Stone to Hughes, \textit{supra} note 329, at 2-3; Notes of Justice Stone, \textit{supra} note 329, at paras. 1, 3, 7.

\textsuperscript{374}Memorandum from Stone to Hughes, \textit{supra} note 329, at 2-3; Notes of Justice Stone, \textit{supra} note 329, at paras. 1, 3, 7.
mortgage's foreclosure by sale provision would have vested the mortgagee in 1933 with absolute title to a boarding house it neither wanted to operate nor could sell for an amount equal to the Blaisdells' outstanding indebtedness. In contrast, the two-year mortgage moratorium minimized the potential for property waste and, in fact, encouraged the Blaisdells to make the maximum profitable use of their land in order to retire their debt. If successful, they could pay off their loan together with any interest they owed the mortgagee. Given the economic and financial circumstances under which the mortgagee foreclosed the realty in 1932, the mortgagee could not realistically expect to otherwise recover its loan within less time. On the other hand, if the Blaisdells failed to either make their monthly rental payments or to redeem the property within the extended period, the mortgagee would obtain complete control of the premises at perhaps a more advantageous time for selling it in satisfaction of the underlying debt.

Insofar as Hughes emphasized the public interest in private contracts in applying a standard of reasonableness to the Minnesota mortgage moratorium, his opinion may have blurred the fine line between enlightened jurisprudence and subjective decisionmaking. Sutherland's dissent implied this with its doleful observation that the majority's decision to sustain the Minnesota law weakened the Contract Clause as a limitation of state power to modify vested contract rights. Years later, others criticized the decision as a conscious attempt to distort the original meaning of the Contract Clause from an absolute prohibition upon state authority. The Chief Justice erred in his broad construction of local police powers; together with the other members of the Blaisdell majority he manipulated precedent to sanction legislation the principal objective of which was the involuntary redistribution of resources among par-

375 For example, by invoking a reasonableness standard, Hughes essentially sanctioned prospective Contract Clause analysis on a case by case basis. His opinion also created the potential for imposition of judicial values in determinations of the limits of legislative power. See Hendel, supra note 201, at 181-82 (suggesting that reasonableness might lead to judicial subjectivity); Note, supra note 355, at 1643. As a practical matter, it is almost impossible to divorce the judicial function from policy questions in this area. After all, the Court must examine conceptions of governmental authority and federalism and thus decide the appropriate limits of state regulation of contract rights. In essence, the process involves a series of choices as demonstrated by the contrasting opinions of Hughes and Sutherland and their divergent perspectives of history, economics, and public welfare.

376 Blaisdell, 290 U.S. at 448, 483.
377 See generally Palmer, supra note 9.
ties to a private agreement. From this perspective, these critics argue that *Blaisdell* signified a conscious retreat from certainty in the enforcement of contract obligations. Instead, it marked the ascendance of an untoward judicial activism that substituted the primacy of law and constitutional limitations with an admixture of rules of convenience and public policy.

Much of this criticism misconstrues the course of Contract Clause interpretation prior to *Blaisdell*. It fails to consider the extent to which divergent perspectives of federalism created inroads upon the constitutional limitation of state authority to regulate the public interest in a variety of contractual arrangements. From the outset, Supreme Court justices employed a wide range of judicial sensibilities to problems of local interference with contracts which, to one degree or another, reflected their particular notions of public policy. Chief Justice Marshall viewed the Contract Clause as a means of restricting state power; others such as William Johnson, then later John McLean, William Daniel and, for the most part, Chief Justice Roger Taney, displayed keen sensitivity toward the importance of maintaining state regulatory power over the subject matter of contracts. Subsequent recognition of inalienable police powers resulted from increased judicial appreciation of the public interest in private contracts; ultimately, it formed the context through which a narrow majority of the Court sustained the reasonable exercise of state police powers in times of emergency. It is within this tradition that *Blaisdell* fits, a product of both the confluence of previous inroads upon the Contract Clause and the jurisprudential tenets of the Chief Justice who deftly molded his views with

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378 See Epstein, supra note 7, at 717 ("The contract clause is an explicit limitation upon the power of the state to trench upon individual rights; rent-seeking by factions is a persistent feature of our institutional life that in turn justifies the broad construction of the basic provision."); Kmiec & McGinnis, supra note 9, at 541-43; Sterk, supra note 9, at 683-85 (arguing that *Blaisdell* marked a departure from previous police powers cases).

379 See Epstein, supra note 7, at 735-38; Kmiec & McGinnis, supra note 9, at 541-43.

380 See generally WHITE, supra note 7, at 595-673; Bruchey, supra note 12, at 1145; Lynch, supra note 38, at 18-20.

381 See West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848); Bronson v. Kinzie, 42 U.S. (1 How.) 311, 327-31 (1843) (McLean, J., dissenting) (distinguishing contract remedies from obligations affords states latitude in enforcing contracts, setting land values, and in regulating economic affairs); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); see also Hale, supra note 70, at 880 (asserting that Hughes's emphasis in *Blaisdell* on public policy and his flexible interpretation of the Contract Clause reflected William Johnson's approach a century earlier).
those of Stone, Cardozo, Brandeis, and Roberts to form a powerful majority.

Hughes did not change the meaning of the Contract Clause; he subjected its application to the grim reality of an unprecedented financial depression whose duration and widespread effects seemingly threatened the continued stability and economic structure of society. He perceived that rigid enforcement of contract obligations would, quite possibly, undermine the long-term security of these same contract rights and the effectiveness of the constitutional limitations set forth by Justice Sutherland’s passionate dissent. In essence, his opinion forged a compromise between two fundamentally different conceptions of the Contract Clause, each of which emanated from divergent responses to an inherent tension within the federal system between private contract rights and their control by local government. Like any compromise, it contained problems, but it sought to preserve a semblance of the status quo while adapting the substance of contract relations to the complex changes of the twentieth-century economy. In large part, Hughes succeeded in attaining this objective and thus made clear the importance of governmental authority in the continued security of contract rights.

**Conclusion**

Within the federal system exists a fundamental tension between the exercise of local governmental authority and the freedom of private rights. The Contract Clause of the United States Constitution implicitly recognizes this conflict with its express prohibition of state laws that impair the obligation of contracts. Despite this seemingly unequivocal limitation of state power, two distinct strands of Contract Clause jurisprudence developed in the near century and a half that preceded Blaisdell. In large part, each reflected different perspectives of the appropriate role of states in the federal system. One view, first expressed by Chief Justice John Marshall and later endorsed by Justice George Sutherland, emphasized the paramount importance of constitutional protection of vested contract rights. It also contended the obligation of contracts emanated primarily from the will of the parties and not from the authority of local government. In contrast was a less abstract and more functional approach toward contractual obligations that recognized the public interest in private agreements and stressed the positive role of local government in maintaining the relative worth of contract relations.
As the economy grew more diversified and interdependent, technological and financial changes created a series of complex problems that invariably affected judicial perceptions of the value of contract performance. Adherents to the absolute sanctity of contract obligations invoked the Contract Clause as a limitation of state power essential to the preservation of contract rights. Conversely, proponents of local governmental authority as the primary source of contract obligations endorsed a liberal attitude towards state police power measures enacted for the ostensible purpose of securing the collective good. By the 1930s the Supreme Court, albeit by a slim majority, recognized the authority of states to adopt reasonable methods for regulating the subject matter and performance of contracts that affected the public interest. It was within this tradition that the Hughes Court decided Blaisdell.

Though somewhat controversial and occasionally misunderstood, Blaisdell did not constitute an abrupt departure from the course of previous Contract Clause jurisprudence. Instead, it marked the confluence of several longstanding inroads upon the scope of the constitutional prohibition of state authority to regulate contracts. The majority's explicit recognition of the Depression as an economic emergency for which the state of Minnesota could enact a temporary mortgage moratorium derived its rationale from earlier Court decisions sustaining both the reserved and inalienable police powers of states to promote the public welfare. Moreover, the Court restricted the exercise of such police powers to a standard of reasonableness comparable to that used in earlier disputes over the authority of local governments to regulate conditions of employment, the conduct of businesses and other general economic affairs that affected the public. In short, Blaisdell was neither the first nor the only Supreme Court case to require the exercise of reasonable police powers.

In many respects the majority opinion reflected the pragmatic jurisprudence of its principal author, Chief Justice Charles Evans Hughes, who inherently perceived the Minnesota mortgage moratorium as presenting the Court with a classic problem in federalism over the limitations of state government. Together with Justices Harlan Stone and Benjamin Cardozo he crafted an opinion imbued with progressive notions of governmental authority and constitutional interpretation that essentially balanced the interests of individuals with the paramount objectives of the state in maintaining its economic structure. Hughes understood that the relative value of
contract obligations derived from the ability of local government to exercise its sovereign powers in a reasonable manner during times of economic emergency. Though his opinion narrowly construed the Contract Clause, it neither jeopardized the constitutional protection of contract rights nor sanctioned the widespread redistribution of private resources. Instead, it recognized the inherent public interest in private contracts and realized the potential within the federal system for local government to regulate the terms of such agreements.