Blaisdell v. *Home Building & Loan Association*
Mortgages in Name Only

Readers may recall that among my "Worst" decisions of the Supreme Court of the United States is *Blaisdell* v. *Home Building & Loan Association*.

At the conclusion of my lengthy essay I wrote, in summary, that in his opinion for the majority of the Court—upholding Minnesota's depression-era suspension of mortgage payments—"[w]hat Chief Justice Hughes was saying couldn't be clearer. Postulating an ever-increasingly complicated social environment in which 'the good of all' was the standard of value, Hughes held that 'public needs,' 'public welfare' and 'fundamental interests of the state' trumped, and had to be protected from, something perniciously antithetical: 'individual rights.'"

There was another voice, however, in that decision, the eloquent Associate Justice Arthur Sutherland. With my bracketed explanatory and other comments and more modern paragraphing (the latter to enhance clarity for today's readers) I present Justice Sutherland's very lengthy dissent below. For those who love the Constitution and its attempt to safeguard the sanctity of contracts, it is important, indeed essential, reading. (I have made no substantive changes in the thrust of Justice Sutherland's opinion).

Justice Sutherland's dissent

Few questions of greater moment than that just decided [by this Court] have been submitted for judicial inquiry during this generation.

He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts.

The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view. [The "Contract Clause" of the Constitution's Article I, Section 10—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . —is in grave danger, because the majority decision legitimizes violation of a private contract (the mortgage) and, more broadly, limitations expressly embodied in the Constitution are even more threatened.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time

and an entirely different thing at another time. [Justice Brennan and his band of "Living Constitutionalists" notwithstanding.]

If the contract impairment clause, when framed and adopted [by the Founders], meant that the terms of a contract for the payment of money could not be altered in invitum ["against an unwilling party; against one not assenting"] by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. [A wonderful "Originalist" statement.]

This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court.

The true rule was forcefully declared in Ex parte Milligan, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist to-day. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. 'Those great and good men,' the Court said, 'foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.' And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the 'supreme law of the land,' binding equally upon governments and governed at all times and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

> 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. ...'

Chief Justice Taney, in Dred Scott v. Sandford [among the most reprehensible decisions of all time in its principal holding] said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of

its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.' And in South Carolina v. United States, in an opinion by Mr. Justice Brewer, this court quoted these words with approval and said:

> 'The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. ... Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.' The words of Judge Campbell, speaking for the Supreme Court of Michigan . . . are peculiarly apposite. 'But it may easily happen,' he said, 'that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. '... Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. ... But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions.'

The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. [This footnote and all others have been omitted.] But, their meaning is changeless; it is only their application which is extensible. Constitutional grants of power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. These doctrines, upon the principles of the common law itself, modify or abrogate themselves whenever they are or whenever they become plainly unsuited to different or changed conditions. Funk v. United States. The distinction is clearly pointed out by Judge Cooley, 1 Constitutional Limitations (8th Ed.) 124:

> 'A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in

> their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. ... What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. 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.'

The whole aim of construction [attributing meaning], as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result.

The history of the times, the state of things existing when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy.

As nearly as possible we should place ourselves in the condition of those who framed and adopted it. And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted.

An application of these principles to the question under review [Minnesota's suspension of mortgage payments because of the depression] removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness.

A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress. Indeed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying

state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case.

Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances they incurred indebtedness in the purchase of imported goods and otherwise far beyond their capacity to pay.

From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted.

On the other hand, it was insisted that the case of the debtor should be viewed with tenderness; and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc.

There followed, as there must always follow from such a course, a long trail of ills; one of the direct consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent. Real property could be sold only at a ruinous loss. Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and in some instances threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and in many instances the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultuous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy.

That this brief outline of the situation is entirely accurate is borne out by all contemporaneous history, as well as by writers of distinction of a later period. The appended note might be extended for many pages by the addition of similar

quotations from the same and other writers, but enough appears to establish beyond all question the extreme gravity of the emergency, the great difficulty and frequent impossibility which confronted debtors generally in any effort to discharge their obligations. In an attempt to meet the situation, recourse was had to the Legislatures of the several states under the [pre-Constitution] Confederation; and these bodies passed, among other acts, the following: Laws providing for the emission of bills of credit and making them legal tender for the payment of debts, and providing also for such payment by the delivery of specific property at a fixed valuation; installment laws, authorizing payment of overdue obligations at future intervals of time; stay laws and laws temporarily closing access to the courts; and laws discriminating against British creditors, I have selected, out of a vast number, a few historical comments upon the character and effect of these legislative devices.

In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defects of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution.

Shortly prior to the meeting of the Convention, [James] Madison had assailed a bill pending in the Virginia Assembly, proposing the payment of private debts in three annual installments, on the ground that 'no legislative principle could vindicate such an interposition of the law in private contracts.' The bill was lost by a single vote. Pelatiah Webster had likewise assailed similar laws as altering the value of contracts; and William Paterson, of New Jersey, had insisted that 'the legislature should leave the parties to the law under which they contracted.'

In the plan of government especially urged by Sherman and Ellsworth there was an article proposing that the Legislatures of the individual states ought not to possess a right to emit bills of credit, etc., 'or in any manner to obstruct or impede the recovery of debts, whereby the interests of foreigners or the citizens of any other state may be affected.' And on July 13, 1787, Congress in New York, acutely conscious of the evils engendered by state laws interfering with existing contracts, passed the Northwest Territory Ordinance, which contained the clause: '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.'

It is not surprising, therefore, that, after the Convention had adopted the clauses, no state shall 'emit bills of credit,' or 'make any thing but gold and silver coin a tender in payment of debts,' Mr. King moved to add a 'prohibition on the states to interfere in private contracts.' This was opposed by Gouverneur Morris and Colonel Mason. Colonel Mason thought that this would be carrying the restraint too far; that cases would happen that could not be foreseen where some kind of

interference would be essential. This was on August 28. But Mason's view did not prevail, for, on September 14 following, the first clause of article 1, 10, was altered so as to include the provision: 'No state shall ... pass any ... law impairing the obligation of contracts,' and in that form it was adopted.

Luther Martin, in an address to the Maryland House of Delegates, declared his reasons for voting against the provision. He said that he considered there might be times of such great public calamity and distress as should render it the duty of a government in some measure to interfere by passing laws totally or partially stopping courts of justice, or authorizing the debtor to pay by installments; that such regulations had been found necessary in most or all of the states 'to prevent the wealthy creditor and the moneyed man from totally destroying the poor, though industrious debtor. Such times may again arrive.' And he was apprehensive of any proposal which took from the respective states the power to give their debtor citizens 'a moment's indulgence, however necessary it might be, and however desirous to grant them aid.'

On the other hand, Sherman and Ellsworth defended the provision in a letter to the Governor of Connecticut. In the course of the Virginia debates, Randolph declared that the prohibition would be promotive of virtue and justice, and preventive of injustice and fraud; and he pointed out that the reputation of the people had suffered because of frequent interferences by the state Legislatures with private contracts.

In the North Carolina debates, Mr. Davie declared that the prohibition against impairing the obligation of contracts and other restrictions ought to supersede the laws of particular states. He thought the constitutional provisions were founded on the strongest principles of justice.

Pinckney, in the South Carolina debates, said that he considered the section including the clause in question as 'the soul of the Constitution,' teaching the states 'to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness.'

The provision was strongly defended in The Federalist, both by Hamilton in No. 7 and Madison in No. 44. Madison concluded his defense of the clause by saying: '... One legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.'

Contemporaneous history is replete with evidence of the sharp conflict of opinion with respect to the advisability of adopting the clause. Dr. Ramsay (The History of South-Carolina (1809), vol. 2, pp. 431- 433), already referred to, writing of the action of South Carolina and especially referring to the contract impairment

clause, says that this Constitution was accepted and ratified on behalf of the state, and speaks of it as an act of great self-denial:

> 'The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years; for in them she had passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future legislatures so as to deprive them of a power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used.'

There is an old case, Glaze v. Drayton, decided in 1784 [three years before the Constitution was promulgated], where the South Carolina court of chancery entered a decree for the specific performance of a contract for the purchase of land, but providing for the payment of the balance due under the contract 'by installments, at the times mentioned in the acts of assembly respecting the recovery of old debts.' [The court rewrote the contract.] In reporting that case soon after the adoption of the Constitution, Chancellor De Saussure added the following explanatory and illuminating note:

> 'The legislature, in consideration of the distressed state of the country, after the war, had passed an act, preventing the immediate recovery of debts, and fixing certain periods for the payment of debts, far beyond the periods fixed by the contract of the parties. These interferences with private contracts, became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent, that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty, and adopting an efficient national government, than these abuses of power by the state legislatures.'

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency.

And, if further proof be required to strengthen what already is inexpugnable, such proof will be found in the previous decisions of this court. There are many such decisions; but it is necessary to refer to a few only which bear directly upon the question, namely [Sutherland cited nine cases].

Bronson v. Kinzie was decided at the January term [of the Supreme Court], 1843. The case involved an Illinois statute, extending the period of redemption for a period of twelve months after a sale under a decree in chancery, and another statute preventing a sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. This Court held both statutes invalid, when applied to an existing mortgage, as infringing the contract impairment clause. No more need now be said as to the points decided. The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter. And, in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the Court.

The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so.

Mr. Warren, in his book, 'The Supreme Court in United States History,' vol. 2, pp. 376-379, gives a vivid picture of the situation. After referring to Bronson v. Kinzie and the statute extending the period of redemption therein dealt with, he points to the prevailing state of business and finance which had called the statute into existence; to the bank failures, state debt repudiations, scarcity of hard money, the inability to pay debts except by disposing of property at ruinous prices; to the enactment of statutes for the relief of debtors, stay laws postponing collection of debts, etc., which had been passed by state after state; and to the action of this court in striking down the state statute in the face of these conditions.

> 'Unquestionably,' he continues, 'the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts; and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however, entirely natural; and while, ultimately, these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve and to increase the financial distress, fraud and extortion, temporarily, debtors have always believed such laws to be their salvation and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the Bronson Case aroused great antagonism in the Western States. In Illinois, a mass meeting was held which resolved that the decision ought not to be heeded. ... Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring

> void 'any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States. ..."

[The] McMaster [case] is to the same effect. McCracken v. Hayward, decided at the January term, 1844, dealt with the same Illinois statute; but involved a sale on execution after judgment, whereas Bronson v. Kinzie involved a mortgage. The decision simply followed the Bronson Case. What has been said in respect of the background and setting of that case is equally applicable and need not be repeated.

Gantly's Lessee v. Ewing was decided at the January term, 1845. It held unconstitutional, as applied to a pre-existing mortgage, an act of Indiana providing that no real property should be sold on execution for less than half its appraised value. The statute, like those of Illinois, was enacted for the benefit of hard-pressed debtors as a result of the same emergency. It is referred to by McMaster as one of the 'marks on the statute books' which the 'evil times through which the people were passing' had left.

Howard v. Bugbee, decided at the December term, 1860, dealt with an Alabama statute authorizing a redemption of mortgaged property in two years after the sale under a decree. The statute was declared unconstitutional principally upon the authority of Bronson v. Kinzie. The opinion is very short, and does not refer to the question of emergency. The statute was passed, however, in 1842 (the mortgage having been executed prior thereto), and was therefore one of the emergency statutes of that period. The Alabama Supreme Court, whose decision was under review here, so treated it, and justified the statute upon that ground.

It is worthy of note that, after the decision of this court in the Bugbee Case, Judge Walker, who delivered the opinion therein for the Alabama court, filed a dissenting opinion in Ex parte Pollard (Ex parte Woods), in the course of which he said that his former opinion had been overruled by this court, and he could no longer perceive any ground upon which the convictions of a Legislature as to the welfare of the people could enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts. The basis of the legislation was, and is shown by the decision of the Alabama Supreme Court sustaining it to be, the existence of the great emergency beginning in 1837; and that question, since the Alabama decision was reviewed, was quite plainly before this court for consideration.

Walker v. Whitehead, decided at the December term, 1872, held unconstitutional a Georgia statute requiring the plaintiff, suing on a debt or contract, to prove as a condition precedent to the entry of judgment in his favor that all legal taxes chargeable by law thereon had been duly paid for each year since the making of the debt or contract. The Georgia Supreme Court had sustained the act as a measure made necessary by the desperate financial and economic conditions in that state due to the Civil War. This court, making no response to the somewhat fervid presentation of this view of the matter by the state court, simply said that

the degree of impairment was immaterial; that any impairment of the obligation of a contract is within the prohibition of the Constitution; that 'a clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur.'

Edwards v. Kearzey, decided at the October term, 1877, held invalid, as applied to a preexisting debt, the provision of the North Carolina Constitution of 1868 increasing the exemptions to which a debtor was entitled. The North Carolina Supreme Court, in a series of decisions, had sustained the state constitutional provision, principally upon the ground that it was adopted at a time when 'probably one-half of the debtor class are owing more old debts than they can pay'; and that, 'if under our circumstances our people are to be left without any exemptions, the policy of Christian civilization is lost sight of. ...' In the brief of [a party] in this court the view was strongly urged that the provision was not so much for the benefit of the debtor as for that of the state to prevent the evils of almost universal pauperism. Attention was called to the desperate condition of the people of the state following the Civil War, and it was said that one-third of the whole population were paupers, all their property except lands having disappeared; that one-half of the people did not own and enough to afford burial for that proportion of the population; and against those who did own land the pre-war debts were piled mountain high. It was submitted that the state, on being rehabilitated, was not bound to allow the creditor to strip the few self-supporting landowners of their means of existence and thereby add them to the vast army of the impoverished; but that it had the right to defer a portion of the creditor's claim until the prostrated community had opportunity to recoup some of its losses.

This court, in response, reviewed the history of the adoption of the contract impairment clause and held the state constitutional provision invalid. "Policy and humanity," it said, 'are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.'

Barnitz v. Beverly was decided May 18, 1896. A law of Kansas extended the period of redemption from a sale under a mortgage for a period of eighteen months, during which time the mortgagor was to remain in possession and receive rents and profits, except as necessary for repairs. The act was passed in 1893 in the midst of another panic, the severity of which, still within the memory of the members of this court, is a matter of common knowledge. The effects of that panic extended into every form of industry; bank failures were on an unprecedented scale; more than half the railroads of the country were in the hands of receivers; securities fell to 50 per cent., often to 25 per cent., of their former value; commercial failures and unemployment became general; heavy inroads were made upon public and private resources in caring for the hungry and destitute; great bodies of idle men-the so-called 'industrial armies'-marched

toward Washington, feeding like locusts upon the country through which they passed.

These conditions were brought to the attention of this court. In addition, the Supreme Court of Kansas had relied upon them as a justification for the legislation, and had inquired why the state Legislature in a time of general depression could not 'extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice?'

In response to all of which, this court, after reviewing its former decisions, held the statute invalid as applied to a sale under a mortgage executed before its passage.

The present exigency is nothing new.

From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this Court. That defense should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.

The lower court, and counsel for the [debtor Blaisdells] in their argument here, frankly admitted that the statute does constitute a material impairment of the contract, but contended that such legislation is brought within the state power by the present emergency. If I understand the opinion just delivered, this court is not wholly in accord with that view. The opinion concedes that emergency does not create power, or increase granted power, or remove or diminish restrictions upon power granted or reserved. It then proceeds to say, however, that, while emergency does not create power, it may furnish the occasion for the exercise of power.

I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion

for diminishing it; and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied. It is quite true that an emergency may supply the occasion for the exercise of power, dependent upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion.

The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence.

But we are here dealing, not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence the question is, not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

The Minnesota statute either impairs the obligation of contracts or it does not [My emphasis].

If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were nonexistent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: *Does the Minnesota statute constitute an impairment of the obligation of the contract now under review?* [My emphasis.]

* * *

We come . . . to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions.

It is necessary, first of all, to describe the exact situation. [Mr. and Mrs. Blaisdell] obtained from [the bank] a loan of $3,800; and, to secure its payment, executed a mortgage upon real property consisting of land and a fourteen-room house and garage. The mortgage contained the conventional Minnesota provision for foreclosure by advertisement. The mortgagors agreed to pay the debt, together with interest and the taxes and insurance on the property. They defaulted; and, in strict accordance with the bargain, [the bank] foreclosed the mortgage by advertisement and caused the premises to be sold.

[The bank] itself bought the property at the sale for a sum equal to the amount of the mortgage debt. The period of redemption from that sale was due to expire on May 2, 1933; and, assuming no redemption at the end of that day, under the law in force when the contract was made and when the property was sold and in accordance with the terms of the mortgage, [the bank] would at once have become the owner [of the property] and entitled to the immediate possession of the property.

The statute here under attack was passed on April 18, 1933. It first recited and declared that an economic emergency existed. As applied to the present case, it arbitrarily extended the period of redemption expiring on May 2, 1933, to May 18, 1933—a period of sixteen days; and provided that the [Blaisdells] might apply for a further extension to the district court of the county. That court was authorized to extend the period to a date not later than May 1, 1935, on the condition that the [the Blaisdells] should pay to the creditor all or a reasonable part of the income or rental value, as to the court might appear just and equitable, toward the payment of taxes, insurance, interest and principal mortgage indebtedness, and at such times and in such manner as should be fixed by the court. The court to whom the application in this case was made extended the time until May 1, 1935, upon the condition that payment by the mortgagor of the rental value, $40 per month, should be made.

It will be observed that, whether the statute operated directly upon the contract or indirectly by modifying the remedy [foreclosure], its effect was to extend the period of redemption absolutely for a period of sixteen days, and conditionally for a period of two years.

That this brought about a substantial change in the terms of the contract reasonably cannot be denied. If the statute was meant to operate only upon the remedy, it nevertheless, as applied, had the effect of destroying for two years the right of the creditor to enjoy the ownership of the property, and consequently the correlative power, for that period, to occupy, sell, or otherwise dispose of it as might seem fit.

This postponement, if it had been unconditional, undoubtedly would have constituted an unconstitutional impairment of the obligation. This Court so decided in Bronson v. Kinzie, where the period of redemption was extended for a period of only twelve months after a sale under a decree; in Howard v. Bugbee,

where the extension was for two years; and in Barnitz v. Beverly, where the period was extended for eighteen months. Those cases, we may assume, still embody the law, since they are not overruled [by the majority in this case].

The only substantial difference between those cases and the present one is that here the extension of the period of redemption and postponement of the creditor's ownership is accompanied by the condition that the rental value of the property shall, in the meantime, be paid.

Assuming, for the moment, that a statute extending the period of redemption may be upheld if something of commensurate value be given the creditor by way of compensation, a conclusion that payment of the rental value during the two-year period of postponement is even the approximate equivalent of immediate ownership and possession is purely gratuitous. How can such payment be regarded, in any sense, as compensation for the postponement of the contract right? The ownership of the property to which petitioner was entitled carried with it, not only the right to occupy or sell it, but, ownership being retained, the right to the rental value as well. So that in the last analysis [the bank] simply is allowed to retain a part of what is its own as compensation for surrendering the remainder.

Moreover, it cannot be foreseen what will happen to the property during that long period of time. The buildings may deteriorate in quality; the value of the property may fall to a sum far below the purchase price; the financial needs of [the bank] may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring.

However these or other supposable contingencies may be, the statute denies [the bank] for a period of two years the ownership and possession of the property—an asset which, in any event, is of substantial character, and which possibly may turn out to be of great value.

The statute, therefore, is not merely a modification of the remedy; it effects a material and injurious change in the obligation. The legally enforceable right of the creditor when the statute was passed was, at once upon default of redemption, to become the [outright] owner of the property. Extension of the time for redemption for two years, whatever compensation be given in its place, destroys that specific right and the correlative obligation, and does so none the less though it assume to create in invitum another and different right and obligation of equal value.

Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however much it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional [Contract Clause] restriction.

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, all remedy so far as the enforcement of that right is concerned. The phrase 'obligation of a contract' in the constitutional sense imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear.

As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. According to one Latin proverb, 'He who gives quickly, gives twice,' and according to another, 'He who pays too late, pays less.' 'Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.'

I am not able to see any real distinction between a statute which in substantive terms alters the obligation of a debtor-creditor contract so as to extend the time of its performance for a period of two years and a statute which, though in terms acting upon the remedy, is aimed at the obligation . . . and which does in fact withhold from the creditor, for the same period of time, the stipulated fruits of his contract.

I quite agree with the opinion of the Court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction.

If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned [My emphasis]. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

I am authorized to say that Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER concur in this opinion.

[Justice Sutherland's dissent in *Blaisdell* is virtually unknown today even, or especially, among the professoriate. It is a devastating rebuttal to Hughes's majority opinion, a resounding paean to Originalism, and the prescient canary in the coal mine for what could happen to the sanctity of contract at the hands of

state legislatures and the Supreme Court. Sadly, the 5-4 majority decision in *Blaisdell* has, in all subsequent Contract Clause cases, killed the canary.]