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CONSTITUTIONALITY OF MORATORY LEGISLATION*

Clifford C. Hynning

MORATORY legislation of some type or other has been passed during, or after, most economic depressions from the time of the Romans to the present day. It is but natural that some efforts should be taken for the relief of hard-pressed debtors who, without outside aid and protection, would fare ill in the apparently inevitable process of forced liquidation of debts. The consequent scarcity of funds during such times leads to increasing numbers of foreclosures and forced sales of mortgaged property. Market values of property are thereby further depressed, and the defaulting debtor not only loses the security which he has pledged but also finds himself saddled with a deficiency judgment. This situation may be aggravated when it is accompanied, as it was from 1929 to 1933, by an increase in the relative value, or purchasing power, of the dollar with which the debtor is obligated to pay back his debt. "And so long as this process of liquidation continues uncontrolled and unregulated, the more depressed the market for real estate must become, followed in turn by still more foreclosures and still further depressed prices. Both courts and legislatures have, in these circumstances, been alert to discover means of relieving mortgage debtors." 

* The writer's initial interest in this problem was stimulated by a seminar on "Constitutional Problems of the Depression," given by Mr. Charles Bunn in the University of Chicago during the summer quarter of 1933. See his article on "The Impairment of Contracts," 1 University of Chicago Law Review 249 (1933).

The writer should further indicate his indebtedness to Andrew C. McLaughlin, professor emeritus of American history in the University of Chicago, for advice and suggestions.

1 Alumnus of Chicago-Kent College of Law.


3 "Recent Legislation for the Relief of Mortgage Debtors," 42 Yale L. Jour. 1236.
At least twenty-five state legislatures have responded to the needs of the past few years by enacting moratory laws which extend periods of redemption, provide for

4 Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin. This list may not be exclusive.

Cases discussing constitutionality of these statutes:

**Arkansas:** Provision abolishing deficiency judgments held unconstitutional in *Adams v. Spillyards*, 61 S. W. (2d) 686 (1933); while provision extending time for answers in foreclosure suits from 20 days to three months held constitutional in *Reiman v. Rawls*, 68 S. W. (2d) 470 (Ark. 1934).

**Michigan:** Provision extending period of redemption with compensation held constitutional in *Russell v. Battle Creek Lumber Co.*, 252 N. W. 561 (Mich., 1934).

**Minnesota:** Home Building & Loan Assn. v. Blaisdell, 54 S. Ct. 231 (1934).

**New Jersey:** Provision substituting fair market value for proceeds of foreclosure sale held unconstitutional in *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, 169 Atl. 177 (1933).

**New York:** Provision extending redemption period with compensation held constitutional in *Sherwin v. Jonas*, 267 N. Y. S. 759 (1933); and provision forbidding foreclosure solely for nonpayment of principal held constitutional in *McCarty v. Prudence Bonds Corp.*, 266 N. Y. S. 629 (1933).

**North Dakota:** Provision extending redemption period without compensation held inapplicable (unconstitutional) to existing mortgages in *State ex rel. Cleveringa v. Klein*, 249 N. W. 118 (1933).

**Oklahoma:** Provision staying foreclosure actions held unconstitutional (under state constitution) in *Osage County Sav. & Loan Bank v. Worten*, 29 Pac. (2d) 1 (1933); but in an unreported decision, Oklahoma ex rel. Roth v. Waterfield, U. S. Law Week, Oct. 24, 1933, at p. 8, the provision extending redemption with compensation was upheld by the Supreme Court of Oklahoma.

**South Dakota:** Provision restricting sale by advertisement held constitutional in *Northwest Mut. Life Ins. Co. v. Circuit Court*, 249 N. W. 631 (1933).

**Texas:** Provision extending redemption period with compensation held unconstitutional in *Virginia v. Sanders*, 62 S. W. (2d) 348, (El Paso, 1933) and in *Murphy v. Phillips*, 63 S. W. (2d) 404, (San Antonio, 1933); but same provision held constitutional in *Lingo Lumber Co. v. Hayes*, 64 S. W. (2d) 835 (Dallas, 1933), Beaumont Petroleum Syndicate v. *Broussard*, 64 S. W. (2d) 993 (Beaumont, 1933), and in *Anthony v. North Am. Bldg. & Loan Assn.*, 68 S. W. (2d) 581 (Dallas, 1934). These are all decisions by coordinate branches of the Texas Court of Civil Appeals.

In *State ex rel. Lichtscheidl v. Moeller*, Minn., 249 N. W. 330 (1933), sheriff's adjournment of mortgage foreclosure sales under invalid executive order of governor held validated by curative provision of statute authorizing such adjournment for not exceeding ninety days. But in *Alliance Trust Co. v. Hall*, 5 F. Supp. 285 (1933), proclamations of governor of Idaho suspending foreclosures for sixty-day period, issued by virtue of act empowering governor to declare legal holidays, in emergencies, during which enforcement of judicial process is restricted.

5 Blanket extension: Kansas (c. 232); North Dakota (c. 157); and South Dakota (c. 137).

Discretionary extension: Minnesota (c. 339, Pt. I, §4); Iowa (c. 179); New Hampshire (c. 161, §§9-11); and Vermont (no. 30, §3).
dilatory pleadings, restrain or suspend proceedings, order continuances, delay trial or judgment, postpone sales, direct courts to fix upset prices in advance of sale or to refuse confirmation where a fair price was not bid, deduct the fair value of mortgaged property from the deficiency judgment, and curtail or abolish deficiency judgments. These statutes vary widely within each of the nine groups. Their ultimate constitutionality will depend upon a nice weighing of the factors involved in the changed relations of creditor and debtor: Have they been altered in a reasonable exercise of the state’s police power? That is the test laid down in Home Building and Loan Association v. Blaisdell.

In that case the plaintiffs owned real estate in Minneapolis mortgaged to the defendant, which had been foreclosed and purchased at the sheriff’s sale by the defendant. The reasonable value of the property was alleged to be greatly in excess of the amount of the mortgage

6 Arkansas (c. 29); Oklahoma (c. 56, §1); and North Dakota (c. 99, §1). Such provisions have been sustained in Holloway v. Sherman, 12 Iowa 282 (1861) and in Von Baumbach v. Bade, 9 Wis. 559 (1859).
7 Restraining proceedings: Montana (c. 116) and Ohio (227—8). Suspending proceedings: Illinois (649-50) and New York (c. 793).
8 Arizona (c. 29); Iowa (c. 182); Michigan (no. 98); Oklahoma (c. 56, §§2 & 3); and Texas (c. 102).
9 North Dakota (c. 99) and Oklahoma (c. 56, § 1).
10 Blanket postponement: California (cc. 30, 263, 1057) and Texas (cc. 17, 59, 105).
   Discretionary postponement: Arkansas (no. 21, §3); Minnesota (c. 339, Pt. I, §2); Nebraska (c. 65); New Hampshire (c. 161, §§3-8); North Carolina (c. 275, §1); Ohio (227-8); Pennsylvania (no. 137); and Wisconsin (cc. II, 125).
11 Kansas (c. 218); Michigan (c. 229); North Carolina (c. 275, §2); West Virginia (c. 34); and Wisconsin (c. 13).
12 Arkansas (no. 21, §4; no. 57, §§3-4); Kansas (c. 218); Minnesota (c. 339, Pt. I, §3); Nebraska (c. 45); New York (c. 275, §§1-2); and West Virginia (c. 34).
13 California (cc. 642, 793); Idaho (c. 150); Kansas (c. 218); Nebraska (c. 45); New Jersey (c. 82); New York (c. 794); North Carolina (c. 275, §3); South Carolina (no. 264); and Texas (c. 92).
14 Curtailing deficiency judgments: Arizona (c. 88); California (c. 790); North Carolina (c. 529); New Jersey (c. 82); and Texas (c. 92). Abolishing deficiency judgments: Arkansas (no. 57, §§ 1-2); Nebraska (c. 41); North Dakota (c. 155).
debt. Because of the economic depression, the plaintiffs had been unable to obtain a new loan or redeem and, they asserted, unless the period of redemption was extended, the property would be irretrievably lost. A judgment was entered extending the period of redemption to May 1, 1935, (approximately two years), subject to the payment of forty dollars a month throughout the period by the plaintiffs, as authorized by the recently enacted Minnesota Mortgage Moratorium Law. The judgment was affirmed by the state supreme court. An appeal was taken to the United States Supreme Court, contesting the validity of the statute on the basis of the contract, due process, and equal protection clauses of the Federal Constitution.

Chief Justice Hughes, who rendered the opinion for the court (with Sutherland delivering a dissenting opinion in which Van Devanter, McReynolds, and Butler concurred), concluded:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community.

2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction.

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16 Granting of motion to dismiss reversed in Blaisdell v. Home Building & Loan Ass'n, 189 Minn. 422, 249 N. W. 334, 86 A. L. R. 1507 (1933).
17 Ch. 339, Laws of 1933, p. 514.
18 189 Minn. 448, 249 N. W. 893 (1933).
5. The legislation is temporary in operation.\textsuperscript{20}

The decision in the Blaisdell case did not sustain the Minnesota Mortgage Moratorium Law in its entirety, for the provisions\textsuperscript{21} abolishing foreclosure by advertisement and deficiency judgments were not involved in the facts of the decision. It merely settled the constitutionality of the provision authorizing the extension of the period of redemption on reasonable conditions, including payment of the fair rental value.\textsuperscript{22} It does not validate any type of moratory legislation but rather indicates the tests to which such legislation will be subjected if it is to pass the scrutiny of the Supreme Court.\textsuperscript{23} It can confidently be asserted that many provisions of the statutes listed fall far short of this test, as will be pointed out later.

The language of the contract clause of the Federal Constitution reads absolute in form: "No State shall... pass any... law impairing the obligation of contracts."\textsuperscript{24} Perhaps it was so intended in fact by the framers of the Constitution: that, at least, has been one of the common suppositions of constitutional law until recently. The historical background upon which the prohibition was written was rather summarily dismissed by the Chief Justice in the Blaisdell case. While approving the famous passage from \textit{Ogden v. Saunders},\textsuperscript{25} which discusses the occasion and purpose of the contract clause, he forcefully insisted that

\textsuperscript{20}Ibid., 54 S. Ct. 242-3.
\textsuperscript{21}Ch. 339, Pt. I, §§2-3, 5.
\textsuperscript{22}"The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security." 54 S. Ct. 243.
\textsuperscript{23}See comprehensive note in 18 Minn. L. Rev. 319, 340-41 (1934).
\textsuperscript{24}United States Constitution, Article I, section 10. The full section reads, "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."
\textsuperscript{25}12 Wheat. 213 (1827).
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It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579, 601)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."26

A fundamentally different approach is revealed in Mr. Justice Sutherland's dissent, for to him 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. . . . 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.27

Although Mr. Justice Sutherland may admit that the provisions of the constitution are pliable "in a sense," yet "their meaning is changeless; it is only their application that is extensible."28

The meaning of the contract clause may be clarified by a consideration of the conditions out of which the constitutional document sprang. It was John Fiske, abler as a fascinating writer than as a cautious and accurate historian, who left the permanent characterization of the period preceding the adoption of the Federal Constitu-

26 54 S. Ct. 242.
27 54 S. Ct. 245-46, 252.
28 54 S. Ct. 243.
tion—"The Critical Period in American History." And that is the picture which the other great writers have conventionally drawn—Marshall, Fisher Ames, Bancroft, McMaster, Curtis—all, it must be noted, of a definitely Federalist turn in politics. Flaringly conspicuous to their historical eye stand Shay's Rebellion, wild-cat paper currency, jealous interferences with the normal course of trade and commerce and stay laws. Marshall's forceful language in Ogden v. Saunders,\(^2\) described the situation.

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to, every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, 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 community, and was one of the important benefits expected from a reform of the government.

One of the great objectives in calling the constitutional convention in 1787 was to place various types of restraints on state governments in the furtherance of the common cause of national solidarity. The document that resulted, indicating the decided reaction from the "excesses of democracy" of the revolutionary period, can be clearly contrasted with the Declaration of Independence of a decade earlier: "Property" had been substituted for "happiness," as the guarantee which was the primary objective of government.

The Connecticut Plan, urged by Sherman and Ellsworth, which aided materially in breaking the great deadlock between the large and small states over state

\(^2\) 12 Wheat. 213 (1827). The famous passage is from pp. 354-55.
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Representation in the national legislature, contained a provision forbidding the state legislatures "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." 30

Contemporaneously with the discussions in Philadelphia, the Congress in New York passed the famous Northwest Ordinance, on July 13, which, in the concluding section of Article II, provided that "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." 31 About a month later, on August 28, Rufus King, of the Massachusetts delegation, moved in the convention that this provision from the Northwest Ordinance be inserted into the Federal Constitution. 32 Colonel Mason, who had drafted the Virginia State Constitution and was a member of the delegation from that state, vigorously opposed it; for he thought that cases would happen that could not be foreseen where some kind of interference would be "proper and essential." 33 Gouverneur Morris, Pennsylvania, and Luther Martin, Maryland, who was a vigorous dissenter from the Constitution as finally adopted, likewise opposed it. 34 Morris, however, significantly said, "The judicial power of the United States will be protection of cases within their jurisdiction," thus implying that such legislation would be invalid even without an express restriction in the Constitution. But as Warren in his Making of the Constitution concludes, "There was also a genuine belief by some

33 Farrand, ibid., II, 440.
34 Warren, ibid., p. 554.
delegates that, under some circumstances and in financial crises, such stay and tender laws might be necessary to avert calamitous loss to debtors.'" Luther Martin, for instance, wrote in his letter to the Maryland legislature that he considered that there might be times of such great public calamity and distress and of such extreme scarcity of specie, as should render it the duty of a Government for the preservation of even the most valuable part of its citizens, in some measures to interfere in their favor, by passing laws totally or practically stopping Courts of Justice or authorizing the debtor to pay by installment or by delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind 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.38

Randolph, head of the Virginia delegation, on the other hand, considered this provision essential when he spoke in the Virginia state convention, because it must be promotive of virtue and justice and preventive of injustice and fraud. If we take a review of the calamities which have befallen our reputations as a people, we shall find they have been produced by frequent interferences of the State Legislatures with private contracts. If you inspect the great cornerstones of republicanism, you will find it to be justice and honor.37

Rufus King's motion on August 28 was lost, however. The convention, by a vote of seven against three states,38 adopted the motion of Rutledge, of South Carolina, that the states be forbidden to pass "ex post facto laws," according to the *Journal*, or "retrospective laws," ac-

35 p. 554.
36 Elliot, Debates, I, 376.
37 Ibid., III, 478-79.
38 Connecticut, Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, and Virginia (Randolph's argument did not sway the Virginia delegation), against Georgia, North, and South Carolina.
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According to Madison's Notes. It would seem on this conflict of sources that the Journal is correct, for on the following day John Dickinson, Delaware, "mentioned to the House that, on examining Blackstone's Commentaries he found that the term ex post facto related to criminal cases only; that they would not consequently restrain the states from retrospective laws in civil cases; and that some further provision for the purpose would be requisite."

When the Committee on Style, of which Rufus King was a member, reported its draft to the convention on September 12, it had added a prohibition against "laws altering or impairing the obligation of contracts." On September 14, the wording of this section was redrafted to omit the word "altering," and to confine the clause to "impairing the obligation of contracts." This was during the last days of the convention, and the report of the committee — with the indicated change — was accepted without question, although King's motion in open convention had previously been rejected. Thus it is seen that the records of the convention do not clearly show that the contract clause was adopted after deliberate consideration. From this, one obtains the impression that the Committee on Style played a much more active part than its directions warranted it in doing.

Probably the first state statute attacked under the contract clause was the one held unconstitutional in June, 1792, in the unreported case of Alexander Champion and Thomas Dickason v. Silas Casey.

The statute involved was an Act of the Rhode Island General Assembly passed in February, 1791, in response to a petition of a debtor for an extension of three years' time in which to settle his accounts with his creditors and for an exemption from all arrests and attachments for such term of three years. The de-

41 Farrand, The Records of the Federal Convention, II, 566-97, 610. See also Farrand, The Framing of the Constitution, p. 188.
cision was as follows: "The Court also determined in the case of Champion and Dickason against Silas Casey that the Legislature of a state has no right to make a law to exempt an individual from arrests and his estate from attachments for his private debts, for any term of time, it being clearly a law impairing the obligation of contracts, and therefore contrary to the Constitution of the United States." Another newspaper stated that: "The defendant’s counsel pleaded a resolution of the state in bar of the action, by which he was allowed three years to pay his debts and during which he was to be free from arrests on the account. The Judges were unanimously of the opinion that, as by the Constitution of the United States, the individual states are prohibited from making laws which shall impair the obligation of contracts, and as the resolution in question, if operative, would impair the obligation of the contract in question, therefore it could not be admitted to bar the action.42

A distinction was early taken between a statute changing the remedy and one changing substantial rights under the contract—the obligation. The one was sustained and the other was stricken down as running afoul of the constitutional prohibition by Chief Justice Marshall in the famous case of Sturges v. Crowinshield,43 where he said: The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

While this dictum of the celebrated Chief Justice has been followed in a number of cases,44 it is clear that the legislature cannot, under the guise of altering the remedy, effectually change the relative positions of the parties to the contract and thus affect substantial rights.

42 Warren, The Supreme Court in United States History, I, 66-68.
43 4 Wheat. 122 (1819). The passage is from p. 200.
44 Penniman’s Case, 103 U. S. 714 (1880), where abolition of imprisonment for debt was held not to impair the obligation; Antoni v. Greenhow, 107 U. S. 769 (1882); Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51 (1882); Waggoner v. Flack, 188 U. S. 595 (1903); Funkhouser v. J. B. Preston Co., 78 L. Ed. 125 (1933); and cases cited in note 13 of Hughes’ opinion, 54 S. Ct. 238.
The courts realize that the concepts of right, or obligation, and remedy are not in two distinct categories but are functionally dependent. It is impossible to conceive of a legal right without a corresponding legal remedy available for the enforcement of such a legal right. A right without a corresponding remedy is by definition excluded from legal theory. This point was clearly discussed in the case of von Hoffman v. City of Quincy, from which the following excerpts are quoted:

It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. . . . It is competent for the states to change the form of the remedy, or to modify otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.

Bronson v. Kinzie at the time of its decision was without question the leading case on the constitutionality of a redemption statute applicable to mortgages. In 1841, following the depression of the late thirties, Illinois passed a statute providing that the equitable estate of the mortgagor should not be extinguished until twelve months after sale and that no sale should be confirmed unless two-thirds of the amount at which the property had been valued by appraisers was bid. Taney, in invalidating the statute, said:

45 4 Wall. 535, 550 (1866).
46 4 Wall. 550-54.
47 1 How. 311 (1843).
But it is manifest that the obligation of the contract, and the rights of the party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.

The decision in *Bronson v. Kinzie* came coincidentally with the repeal of the national bankruptcy laws, aroused the greatest degree of antagonism in the Middle West, occasioned riots, and caused the State's representative in the United States Senate to introduce a resolution proposing a constitutional amendment prohibiting judicial review.\(^4^8\)

Shortly after the Bronson decision, Illinois passed, for the relief of poor debtors, another statute providing that no sale should be made of property levied on under execution unless it would bring in two-thirds of its valuation as determined by the opinions of three householders. But this statute fell before the constitutional prohibition in *McCracken v. Hayward*,\(^4^9\) where the court reviewed in detail the preceding case and confirmed the views announced therein.

If any subsequent law affect to diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

These views were confirmed, with not any significant variation, in *Howard v. Bugbee*,\(^5^0\) *Walker v. Whitehead*,\(^5^1\) and *Barnitz v. Beverley*.\(^5^2\)

\(^{4^8}\) Warren, The Supreme Court in United States History, II, 376-78.

\(^{4^9}\) 2 How. 608, 612 (1844). See also Gentley v. Ewing, 3 How. 707 (1845).

\(^{5^0}\) 24 How. 461 (1860).

\(^{5^1}\) 16 Wall. 314 (1872).

\(^{5^2}\) 163 U. S. 118 (1896). Note that the Kansas Supreme Court was "packed."
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Daniels v. Tearney\(^{53}\) seems the only decision in which the United States Supreme Court has actually passed on the validity of a stay law, although dicta invalidating such legislation are numerous.\(^{54}\) In 1861, the Virginia Convention in declaring its secession passed an ordinance staying all executions "until otherwise provided by law," and authorizing the issuance of bonds in their stead. The constitutionality of this legislation was raised in that case through the plea of the defendant to the suit on such a bond. The court held the bond wholly void as predicated upon the statute but sustained the action on the theory of estoppel. The value of this case as a precedent is thus somewhat diminished and, further so, when one recognizes how strongly colored the decision was by the theory of the rebellion, for the ordinance was in furtherance of the secession.

Statutes applying new exemptions to existing obligations have likewise fared ill in the United States Supreme Court. In Edwards v. Kearzey,\(^{55}\) a homestead exemption contained in the North Carolina Constitution was construed inapplicable (i.e., unconstitutional) to existing types of indebtedness. The same view was announced in Bank of Minden v. Clement,\(^{56}\) where a Louisiana statute exempting proceeds of life insurance policies from the claims of creditors was invalidated, although such an exemption had become an almost universal type. It might be noted that this latter decision was announced just one week before the famous rent cases and is contained in the same volume of the reports. The Edwards case is of particular interest today for a very vigorous defense was

\(^{53}\) 102 U. S. 415 (1880). Stay laws were held unconstitutional by state courts in Phinney v. Phinney, 8; Me. 450, 17 Atl. 405 (1889); Barnes v. Barnes, 8 Jones 280 (N. C., 1861); Taylor v. Stearns, 18 Gratt. 244 (Va., 1868); Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489 (1897). But stay laws were sustained in ex parte Pollard, 40 Ala. 77 (1866); and Chadwick v. Moore, 8 W. & S. 49 (Penn., 1844).


\(^{55}\) 96 U. S. 595 (1877).

\(^{56}\) 256 U. S. 126 (1921).
there attempted on the ground of what could be called the police power. But this approach to problems of constitutional law was subjected to a thorough-going denunciation.

No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice... “Policy and humanity” 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.57 (Mr. Justice Sutherland, quoting the foregoing passage in his dissent in the Blaisdell case, took such comfort in this quotation that he added the italics here indicated.)

The same point of view was stated in *Ex parte Milligan*,58 where the court laid down the dictum that

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.

Like most general utterances, this statement is neither wholly true nor even a solemn decision of the court. *Ex parte Milligan* did not decide that a government in time of war could not proceed by military commissions; it merely decided that such a military commission could not sentence a man to death without a jury trial where, for all that appeared, the ordinary courts of justice were functioning satisfactorily (namely, in Indiana). But that has been steadily forgotten to the favor of the preceding quotation. This absolutist spirit, while it may issue in some satisfaction through an imaginative solution of the ceaseless “quest for certainty,” crumbles completely to

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58 4 Wall. 2, 120 (1866).
the ground when applied to the facts of reality. As Holmes has so clearly seen:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.69

The doctrine of the police power of the state is not a recent development in constitutional law. It was exercised extensively during the time of the Tudors in England. Patrick Henry, rebellious patriot who with the mellowing of the years turned conservative, spoke repeatedly on the "internal police." And Chief Justice Marshall frequently had occasion to use the very term, "police power." 60 But it is since the turn of the century—although in Munro v. Illinois 61 in 1876 it had been stated in its essence—that police power has become a very real concept.

It is a familiar dictum that the state cannot bargain away the police power. By making a contract about the given subject-matter the state has not in any way incapacitated itself from regulating what otherwise would be within its admitted power. 62 Justice Pitney summed up the decision in 1915 thus:

60 In Hudson County Water Co. v. McCarter, 209 U. S. 349, 355 (1907). At page 357 of the same opinion Holmes said, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."
61 Brown v. Maryland, 12 Wheat. 419 (1827).
62 This does not seem to be true in cases of tax exemptions. New Jersey v. Wilson, 7 Cranch 164 (1812); Home of the Friendless v. Rouse, 8 Wall. 430 (1869). Nor in some cases of public utility rates. Los Angeles v. Los Angeles City Water Co., 177 U. S. 558 (1900). But see the cases cited in footnote 66, infra.
It is established by repeated decisions of this court that neither of these provisions [contract and due process clauses] of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Liquor prohibition laws, although nullifying brewing contracts, have repeatedly been sustained. Anti-lottery laws have been sustained even over the objection of a corporation specially chartered to carry on such lotteries only a short time before the passage of the law. In Fertilizing Company v. Hyde Park, an ordinance forbidding the transportation of dead animals within the village limits was sustained, although its enforcement spelled the complete cessation of the fertilizing plant specially chartered to carry on that type of business in the very locality concerned.

In Manigault v. Springs, the court sustained a South Carolina statute authorizing Springs to erect a dam across a creek where the parties had previously contracted that the creek should run free of any obstruction. Mr. Justice Brown, in rendering the opinion of the court, made a statement pregnant with implications:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the

65 Stone v. Mississippi, 101 U. S. 814 (1879). But just what does "lotteries disturb the checks and balances of a well-ordered community" mean?
66 97 U. S. 659 (1878).
67 For other cases in the field of public utility law see Knoxville Water Co. v. Knoxville, 189 U. S. 434 (1903) where a municipal ordinance reducing water rates was sustained as not impairing contracts between the water company and private consumers. In Hudson County Water Co. v. McCarter, 209 U. S. 349 (1907) a New Jersey law was sustained which forbade the transportation of water outside the state, although it may have affected contracts to furnish water to persons outside the state. But cf. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1 (1899), and Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 368 (1902).
68 199 U. S. 473 (1905). The passage is quoted from p. 480.
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state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

It was in the wartime rent cases, however, that the police power triumphed over the contract clause to the extent of "the verge of the law," as it then existed. With the rapidly growing complexity and numbers of governmental agencies necessitated by war conditions, the housing situation in the Capital became so acute that Congress passed a special act setting up a rent commission to fix reasonable rentals and to authorize, upon the payment thereof, tenants to hold over upon the expiration of their leases, although the contract of letting contained the universal clause of surrender. The District of Columbia Act was sustained against an attack on the ground of the Fifth Amendment in Block v. Hirsch as an emergency measure, for, as Justice Holmes said, "a limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." A similar statute was enacted in New York where housing conditions in the metropolis were equally acute. When it was promptly attacked under the due process and contract clauses, it was sustained in Marcus Brown Holding Company v. Feldman in a very short opinion by Justice Holmes, who thought that

The chief objections to these acts have been dealt with in Block v. Hirsch. . . . In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession, and of the new lease, which was to

69 256 U. S. 135 (1921). In Chasleton Corp. v. Sinclair, 264 U. S. 543 (1924) the District of Columbia Act was held inoperative after the emergency had ceased, ignoring a declaration of Congress to the contrary. "If about all that remains of war conditions is the increased cost of living, that is not in itself a justification of the act." Holmes, J., at p. 546.

70 256 U. S. 170, 198 (1921).
have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.

The same New York statute was reconsidered in *Levy Leasing Company v. Siegel*,\(^{71}\) and the view taken in the Marcus Brown case was confirmed. Mr. Justice Clarke, delivering the opinion for the court, said:

That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it, cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

The value of these cases as precedents was somewhat disparaged when the Justice who gave the opinion in both the District of Columbia and the New York rent cases specifically referred to them as "going to the verge of the law," refusing to apply them in *Pennsylvania Coal Company v. Mahon*.\(^{72}\)

Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. . . .

The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general proposi-

\(^{71}\) 258 U. S. 242, 245 (1922).

\(^{72}\) 260 U. S. 393, 413, 415-16 (1922).
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The relation of crises or emergencies to the exercise of governmental power had been discussed by the Supreme Court a few years earlier in sustaining the Adamson Act in Wilson v. New, where Chief Justice White, whose opinions had usually tended toward a conservative interpretation, reasoned:

Nor is it an answer . . . to suggest that the situation was one of emergency, and that emergency cannot be made the source of power [citing Ex parte Milligan.] The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

Chief Justice White sustained the temporary fixing of hours of work and rates of wages for interstate railway employees, matters which had run afoul of constitutional prohibitions in numerous cases. And this same reasoning was adopted by Chief Justice Hughes in the Blaisdell case.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency . . . .

While emergency does not create power, emergency may furnish the occasion for the exercise of power [citing Wilson v.

73 243 U. S. 332, 348 (1917).
74 Adair v. United States, 208 U. S. 161 (1908), and Adkins v. Children's Hospital, 261 U. S. 525 (1923); Lochner v. New York, 198 U. S. 45 (1905).
New]. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. But the opinion ends, "The judgment of the Supreme Court of Minnesota is affirmed," although one is left with the distinct impression that but for this emergency, it would have been "reversed." Justice Sutherland has just grounds for complaining that "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." 

Emergency was urged in constitutional argument in a series of early cases, not easily accessible today, dealing with similar problems which arose from strained foreign relations during the Napoleonic wars in Europe. None of these cases reached the United States Supreme Court, which, it should be noted, had less prestige than some of the state courts; but those decided by the state courts determined the immediate case, either giving the debtor relief in some very interesting opinions or denying it with a pretended shock of conscience.

During the Jeffersonian embargo of 1807, several of the southern states, notably Virginia and Georgia, adopted various types of stay laws. They were designed to ameliorate some of the devastating effects of a rigorous enforcement of the embargo by postponing executions on judgments until six months after its repeal. The validity of the Virginia statute was contested in the Federal circuit court before Chief Justice Marshall, who, without directly passing on the constitutionality of the Virginia law, neutralized its effect in aiding the embargo by holding it not controlling of processes issuing out of the Federal courts.

54 S. Ct. 235.
54 S. Ct. 252.
Warren, The Supreme Court in United States History, I, introductory chapters.
Ibid., I, pp. 353-55.
To the southern states, whose income so largely depended upon the export trade, the emergency created by the embargo was very real. This is apparent in two decisions of the Georgia Superior Court. In *Ex parte Paul Grimball,* a debtor filed a bill in equity stating that executions had been taken out against his property, a levy and sale menaced, and that "if a sale is made by the sheriff, at this time, when the pecuniary embarrassments occasioned by the embargo acts are so general and distressing, it will involve him in ruin, as no price, or no fair price, can be obtained for his property, and that he has no other means of paying his debts." Judge Charlton in issuing an injunction said:

I shall not bottom a decision, or as a particular case, involving such features of hardships and oppression, as render necessary the interposition of this branch of the Court. On the contrary, I shall view this as a case in which all our citizens are interested, and as calculated to establish a precedent for the general benefit. I ask the question; is it not against equity and conscience? is it not in the highest degree oppressive, to compel the sheriff to obey the mandate of a writ of execution, when the facts are before the whole public, that the sale of produce, in its usual course of traffic is suspended, or bought up by monied men, from the necessitous planter for a song?

It has been, and is at this hour, a subject of sufficient magnitude, to require one of the extraordinary meetings of the legislature which the constitution authorizes. But, until a legislative suspension of sales is given to the people, cannot relief be afforded by this court? . . . A lord chancellor of *Great Britain* is almost as omnipotent as parliament. Give him but a strong hold on an equitable principle, and he will be sure to substitute the intention of an act of parliament for its letter; he will push aside precedent for abstract honesty. . . . I shall, therefore, bottom my decision upon the abstract grounds; that cases of this description involve hardship and oppression; that they are against equity and conscience; that they are promotive of injury to the pub-

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79 Hall's American Law Journal, I, 183 (1808). See also the American Daily Advertiser, for June 18, 1808.
lie; that they enable monied men to accumulated usurious wealth; and that they tend to convert a just and salutary measure of the Government into an engine of political disaffection, through the medium of distressed and persecuted debtors.

In *Grimball v. Ross*, Judge Charlton sustained Georgia's legislative enactment, of limited duration, which declared that "neither of the aforesaid courts shall issue out any civil process or try any civil case, except for the trial of the right of property, real and personal." He dismissed the argument on the contract clause by stating:

This act therefore, as it does not innovate upon the obligation of contracts, either by a partial rescindment, by destroying any of the properties of contracts, or by diverting the usual operation of the lien, cannot be said to impair the obligation of contracts. The usual periods at which contracts were heretofore enforced by action are protracted: the facilities of recovery have been suspended. But does this impair the obligation of contracts? Certainly not. Their obligation remains entire, and a bond or covenant is as valuable, and on the score of obligation, is as operative now, as before the passing of the act.

On the other hand, a North Carolina stay law passed during the War of 1812 was held unconstitutional in *Crittenden v. Jones*, where Chief Justice Taylor, quoting extensively from the experience of South Carolina with such laws during the period of the Confederation, said:

The law in question is unconstitutional, and cannot be executed by the judicial department without violating the paramount duty of their oaths to maintain the Constitution of the United States.

This conclusion we derive, first. From the plain and natural import of the words of the Constitution of the United States.

Second. From a consideration of the previously existing mischiefs, which it was the design of that valuable instrument to suppress and remedy.

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80 Hall's American Law Journal, I, 93 (1809).
81 Hall's American Law Journal, V, 520 (1814).
But, in Louisiana, there was sustained a stay of all court processes for four months during the British invasion of 1814-15, in *Johnson v. Demean*[^82] where the court strongly stressed the purpose of the law to "prevent the ill administration of justice." Similar to this case is that of *Newkirk v. Chapron*,[^83] where the Illinois Supreme Court sustained a stay of forty-two days in which to transfer to the circuit and superior courts the records of the old Chicago Municipal Court, created in 1837 to help take care of the many creditors rushing to the courts to reduce their debts to judgment, when that court was abolished in response to public protests.[^84] It was attacked as impairing the obligation of contracts, but the court said, "It is not true . . . that there must be, ever, and continually in being, officially, a person, with power to issue process, and to execute it."

Several provisions of the current moratory laws have already been held unconstitutional by the state courts, either as violative of the Federal Constitution or of some peculiar provisions of the state constitutions.[^85] But, on some provisions the courts have as yet not spoken, and on others their decisions have been reported only by non-official sources.[^86] Most state decisions preceding *Home Building and Loan Assn. v. Blaisdell* tended to hold the current legislation unconstitutional and relied heavily on the precedents, already surveyed in this article, in which similar legislative relief had failed. However, it is but natural that the change of view of the United States Supreme Court should have had repercussions in the state decisions. For instance, the ultra-conservative Michigan Supreme Court in *Thompson v.*

[^82]: 3 Mart. (O. S.) 530, 6 Am. Dec. 675 (La., 1815).
[^83]: 17 Ill. 344, 348-9 (1856).
[^85]: See Oklahoma ex rel. Osage County Sav. & Loan Assn. v. Worten, 29 Pac. (2d) 1 (1933).
[^86]: See Oklahoma ex rel. Roth v. Waterfield (Oklahoma Supreme Court), U. S. Law Week, for October 24, 1933, at p. 8.
Auditor General gave an opinion which thoroughly surveyed the historical background of the contract clause and invalidated an indirect moratorium on tax sales. The statute, which directed the auditor-general not to publish descriptions of tax-delinquent properties in the newspapers—a requisite condition of tax sale, was held to impair the obligation of the contract with the newspaper to print such descriptions. Although the language of the court was absolutist in spirit, and the formal opinion granted the issuing of the desired writ of mandamus, a note of the reporter indicates that “under subsequent order of court, the writ of mandamus was not issued, in view of the existing emergency, and its being a discretionary writ.” In a *per curiam* decision in *Russell v. Battle Creek Lumber Company,* the court which had so flayed the doctrine of emergency sustained the Michigan emergency moratorium statute extending the periods of redemption as controlled by the Blaisdell case.

Perhaps more striking than the Michigan cases is the complete about-face of the New Jersey Court of Appeals. In *Vanderbilt v. Brunton Piano Company,* a unanimous bench held unconstitutional the substitution of the fair market value of property, as determined in an action on the mortgage bond, for the proceeds of a foreclosure sale as the credit to be allowed the debtor. That was in November of 1933. In February of 1934, the same court in *Lurie v. J. J. Hockenjos Company,* in a very short discussion citing very few cases, affirmed an order directing the mortgagee, who purchased the mortgaged premises at the foreclosure sale for an unconscionable price because of economic conditions, to credit the fair value of the mortgaged premises on the deficiency claim, as a condition of the prosecution of an action for deficiency. In other words, the New Jersey court first held the statute unconstitutional and then sustained a judge in

88 247 N. W. 362.
90 111 N. J. L. 596, 169 Atl. 177 (1933).
91 115 N. J. Eq. 304, 170 Atl. 593 (1934).
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... doing substantially what the unconstitutional statute had directed him to do!

The constitutionality of the various types of moratory legislation will ultimately depend, as was stated before, upon a nice weighing of the factors involved in the changed relations of creditor and debtor; that is, have they been altered in a reasonable exercise of the state’s police power? Such is the test laid down in the Blaisdell case.

Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people . . . the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of 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. . . .

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . .

And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.92

Obviously, the "public need," of which the Chief Justice spoke, includes not merely the debtor; it must also include the creditor. In being fair and just to the debtor, the legislation must not operate unfairly and unjustly on the creditor. One of the essential conditions of fairness, to which such legislation should be subjected, is that the creditor be compensated during the period of extended redemption. It has been estimated, for example,

that if the statute extends the redemption period for one year during which the mortgagor is allowed to retain possession,

it will cost the mortgagee at least 10 percent of the sum loaned, plus any intervening depreciation of the property. If redemption is ultimately made he gets his money back, but redemptions have been very scarce, in western states, these last ten years. What the new time really means is a new option in the mortgagor, plus a new year's possession, at the mortgagee's expense.\(^9\)

It was probably the absence of a provision for compensation that led the North Dakota Supreme Court to invalidate its moratorium law in *State ex rel. Cleveringa v. Klein*.\(^{94}\) Such a provision is also notably lacking in the Kansas and South Dakota laws,\(^{95}\) whose consequent validity may be seriously questioned. On the other hand, the New York\(^{96}\) and Texas\(^{97}\) laws, which have been sustained, secure to the mortgagee the fair rental value of the property for the purpose of taking care of taxes, insurance, and possible interest payments. Statutes phrased in terms of the traditional powers of chancery courts and vesting the trial court with discretionary power of administering relief\(^{98}\) have good chances of

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94 63 N. D. 514, 249 N. W. 118 (1933).

95 Kansas (c. 232) and South Dakota (c. 137).


97 See Lingo Lumber Co. v. Hayes, 64 S. W. (2d) 835 (Dallas, Oct., 1933); Beaumont Petroleum Syndicate v. Broussard, 64 S. W. (2d) 993 (Beaumont, Nov., 1933); and Anthony v. North American Bldg. & Loan Assn., 68 S. W. (2d) 581 (Dallas, Jan., 1934) holding the moratorium law constitutional. But cf. Virginia Life Ins. Co. v. Sanders, 62 S. W. (2d) 348 (El Paso, July, 1933) and Murphy v. Phillips, 63 S. W. (2d) 404 (San Antonio, Oct., 1933) holding the same law unconstitutional. These are all decisions by coordinate branches of the Texas Civil Court of Appeals; so the matter has not been definitely settled by the state courts. If one dares to predict, it should be in favor of its constitutionality.

98 Compare the Wisconsin mediation board (c. 15). For decisions independently of statutes see Suring State Bank v. Giese, 246 N. W. 556 (Wis. 1933), where chancery court fixed upset price; and Lurie v. Hockenjos Co., 170 Atl. 593 (N. J. 1934).
survival. A total abolition of deficiency judgments, on the other hand, is very hard to justify, for that seems to change the essential nature of the mortgage indebtedness. All of the decisions sustaining moratoria have laid heavy weight on the temporary character of the legislation; it must have a limited duration. And without question, statutes limited in their application to mortgages on farms and homes, and perhaps property used in one’s business, have better claims to the “vital interests,” of which the Chief Justice spoke, than statutes without any such limitation.

It is believed that the ultimate significance of Home Building and Loan Assn. v. Blaisdell lies not in the mere upholding of a temporary state statute in relief of hard-pressed debtors, but in the fundamentally different type of approach to the discussion and solution of constitutional problems. The older type of approach was perhaps well illustrated by Justice Sutherland’s comment that “If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.” for to him moratory legislation was the very thing historically prohibited by the contract clause. One of the canons of constitutional interpretations seems to have been that when the history was clear, the interpretation of the Constitution should be governed by its history. If not, what seems the value of constitutional limitations on the powers of government? Dissents from this orthodox point of view have been evidenced in state

99 Kansas (c. 218) as “declaratory of equity powers now existent;” New Hampshire (c. 161); Vermont (no. 30, §3); and Wisconsin (c. 15).

100 See Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, holding such a provision unconstitutional.

101 See Sliosberg v. New York Life Ins. Co., 244 N. Y. 482, 155 N. E. 749 (1927) where a law staying actions growing out of insurance contracts payable in Russian roubles until 30 days after recognition de jure was held unconstitutional as too indefinite. But note that Charles Hughes, as counsel, argued its constitutionality.

The Nebraska (c. 41) and Texas (c. 92) deficiency judgments relief statutes have no such time limitation. Query, as to validity on this count.

102 California (c. 30), Illinois (649-50), Minnesota (c. 339), North Dakota (c. 99), Pennsylvania (no. 137), and Wisconsin (c. 11).

103 54 S. Ct. 256.
decisions. But in the Blaisdell case we find the Supreme Court of the United States speaking through a 5-to-4 majority about

... a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. 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. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and 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.

"When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes. "Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation." Per Winslow, C. J., upholding workmen's compensation act embodying "elective" insurance plan, in Borgnis v. Falk Co., 147 Wis. 327, 350, 133 N. W. 209, 216 (1911).

105 54 S. Ct. 241. Cf. Nebbia v. People of the State of New York, 78 L. Ed. 563, 54 S. Ct. 505, 510-11, 514, 516-17 (1934) where, in sustaining the New York Milk Control Act, Mr. Justice Roberts said: "These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by secureing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that
Justice Hughes concluded his opinion with a complete refutation of the historical approach to the settlement of constitutional problems when such an interpretation runs counter to the "public needs":

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.106

With this decision, it has been definitely determined that the contract prohibition is no longer absolute in effect; its exercise has been made subject to the police power of the state which is limited only by the "force of reason" in the light of contemporary circumstances.

the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relative facts. . . .

"The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells; and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago. . . .

"The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

106 54 S. Ct. 242.