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NOTES

Legal Interpretation and a Constitutional Case: *Home Building & Loan Association v. Blaisdell*

Charles A. Bieneman

In *Home Building & Loan Assn. v. Blaisdell*,¹ the United States Supreme Court upheld the Minnesota Mortgage Moratorium Act.² This was a striking result.³ Under the Act, mortgagors who found themselves unable to make their mortgage payments could turn to the state courts for an alteration of their payment schedule.⁴ The law was passed in response to a wave of farm foreclosures brought on by the Great Depression.⁵ The law was also passed in the face of the U.S. Constitution, which provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts”⁶ The Minnesota law impaired the obligation of mortgage contracts.⁷

The basic premise underlying Chief Justice Hughes’ opinion for the Court was that a constitutional provision should be interpreted both in the context of the entire Constitution and in the context of the social situation confronting the Court.⁸ A major corollary to this premise is that a constitutional provision may mandate different results in similar cases arising at different points in history.⁹ Hughes believed that the words of a constitutional provision have little meaning in the abstract. A provision’s framing does not fix its meaning for all time; instead, a provision’s meaning is fixed when a specific case arises requiring its application. Justice Sutherland, on the other hand, claimed in dissent that the meaning and application of a constitutional provision are distinct concepts.¹⁰ Thus, he thought that the framing of

1. 290 U.S. 398 (1934).

2. 1933 Minn. Laws 339.

3. The result is all the more striking because it occurred before the Court’s fabled “switch in time.” See GERALD GUNTHER, *CONSTITUTIONAL LAW* 130 n.2 (11th ed. 1985) (describing the Court’s abandonment of its *Lochner*-era judicial activism in favor of a more permissive attitude toward state regulation).

4. For an explanation and history of mortgage moratoria, see Charles Bunn, *The Impairment of Contracts: Mortgage and Insurance Moratoria*, 1 U. CHI. L. REV. 249 (1933).

5. See *infra* notes 185-90 and accompanying text.

6. U.S. CONST., art. I, § 10, cl. 1.

7. See *infra* section II.A. Both parties and every judge who considered the case agreed that the Minnesota law impaired the obligation of contracts. See *infra* note 65.

8. See *Blaisdell*, 290 U.S. at 425. Hughes’ opinion is outlined in detail *infra* section I.A.

9. See *Blaisdell*, 290 U.S. at 442.

10. *Blaisdell*, 290 U.S. at 449 (Sutherland, J., dissenting).

the Constitution fixed the meaning of the Contracts Clause for all cases arising across time.¹¹ Accordingly, Sutherland viewed the clause as a strict prohibition against mortgage moratoria, which no circumstance could alleviate.

The approaches of Hughes and Sutherland are but two extremes in constitutional interpretation. Though only two results were possible in the case — either the Act was constitutional or it was not — there are more than two methods by which an interpreter could reach those results. This Note explores possible ways of deciding *Blaisdell*, using the case as a vehicle for delimiting the boundaries of a positive constitutional command. As a sort of empirical investigation of legal philosophy, the Note examines how various interpretive theories affect an interpreter's approach to the case, and the results these theories might mandate. The Note's thesis is that *Blaisdell* was wrongly decided under any theory of interpretation.¹²

After summarizing the Hughes and Sutherland opinions in Part I, the Note proceeds in Part II to discuss the application of three interpretive methods to *Blaisdell*: textualism, originalism, and contextualism. Part II concludes that all three methods mandate striking down the Minnesota law. Part III examines two schools of legal philosophy — positivism and natural law — to see how the case would be resolved under their respective conceptions of law. This Part questions whether either legal theory can justify the Court's result. Finally, Part IV uses legal realism to account for the *Blaisdell* decision. This Part argues that though realism accurately describes the *Blaisdell* decision, the theory normatively justifies the Court's opinion only if one agrees that the interpreter should be wholly unconstrained by positive law. Thus, the Note concludes that *Blaisdell* is an example of cases in which a court, striving to reach a desired result, ignored the law.¹³

11. 290 U.S. at 449; see Edward S. Corwin, *Moratorium Over Minnesota*, 82 U. PA. L. REV. 311, 316 (1934) (Sutherland "treats the Minnesota statute as if it had been enacted contemporaneously with the Constitution, while [Hughes] treats the Constitution as contemporary with the Minnesota statute, that is, with today.").

12. Though modern commentators have had little to say about *Blaisdell*, those who have mentioned the case have not done so favorably. See, e.g., Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735 (1984) (*Blaisdell* "contains some of the most misguided thinking on constitutional interpretation imaginable."); Robert C. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 672 (1987) ("The opinion, in short, has no integrity."). But see Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1062 (1981) (praising *Blaisdell*).

13. The effect of the *Blaisdell* decision was to obliterate the force of the Contracts Clause. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1437 (1986) ("After *Blaisdell*, . . . the contracts clause prohibit[ed] . . . very little."); Epstein, *supra* note 12, at 738. In recent years the Supreme Court has begun to revitalize the Contracts Clause. See, e.g., *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978) (Contracts Clause violated when the State of Minnesota retroactively interfered with private pension plan).

I. A WALK THROUGH THE COURT'S OPINION

This Part offers a sketch of both the Court's and the dissent's reasoning in *Blaisdell*.¹⁴ Section I.A mirrors Hughes' opinion, discussing the police power doctrine, original intent, Contracts Clause precedent, and principles of construction. Section I.B discusses Justice Sutherland's dissent. This Part also points out in passing several features of the two opinions which are significant to the investigation of interpretive methods and the legal philosophies underlying them.

A. Hughes' Opinion for the Court

1. Police Power and the Factor of Emergency

At the outset of his opinion, Chief Justice Hughes stressed that the police power of the states¹⁵ is intrinsic to our federal structure and constitutional framework. The economic emergency, Hughes thought, could not serve to justify the existence of the police power: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."¹⁶ The opinion continued, however, by stating that emergency may justify the *use*, even if not the *existence*, of the police power.¹⁷

Thus comes the first hint that the principle used to decide the case accommodates the social and political setting in which it arose; the existence of the Great Depression clearly overshadows Hughes' opinion.¹⁸ As he put it, "[t]he Constitutional question presented in light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."¹⁹ In other words, different social settings require different interpretations of the Constitution.²⁰ The Depression, presenting extremes in social conditions, justified extremes in interpretations of the law.

14. Chief Justice Hughes' majority opinion was joined by Justices Brandeis, Stone, Roberts, and Cardozo. Justice Sutherland wrote a dissenting opinion which was joined by the other "Four Horsemen": Justices McReynolds, Van Devanter, and Butler.

15. Police power consists of "the residual prerogatives of sovereignty which the states had not surrendered to the federal government." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-3, at 405 (2d ed. 1988).

16. *Blaisdell*, 290 U.S. at 425.

17. 290 U.S. at 426 ("While emergency does not create power, emergency may furnish the occasion for the exercise of power.").

18. See 290 U.S. at 425; 1933 Minn. Laws 339 at 514-15 (preamble); *infra* notes 84-91 and accompanying text.

19. 290 U.S. at 426.

20. See Corwin, *supra* note 11, at 313 ("[T]he emergency met by the Minnesota statute is *not* the same type of emergency which the Convention of 1787 had in mind, and for the simple but irresistible reason that the *social environment has essentially changed since then*.").

2. Original Understanding of the Contracts Clause

Hughes freely conceded the point to which Justice Sutherland's dissent devoted considerable effort:²¹ the Minnesota Mortgage Moratorium is the kind of law the Contracts Clause was meant to prevent.²² The Framers were responding to a potential crisis caused by the passage of debtor-relief laws during the economic turmoil of the period following the Revolutionary War.²³ After acknowledging these facts, Hughes stated that the scope of the Contracts Clause might be narrower than indicated by the Framers' intent: "full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. . . . [T]he prohibition [against state laws impairing contractual obligation] is not an absolute one and is not to be read with literal exactness like a mathematical formula."²⁴ Hughes thought that some degree of impairment of contractual obligations is constitutionally permissible — regardless of the Framers' original understanding of the Contracts Clause.

3. Precedent

Early Contracts Clause precedent consisted of cases in which the Court struck down laws similar to the Minnesota Mortgage Moratorium.²⁵ In considering the applicability of these cases to *Blaisdell*, Hughes argued that "[n]one of these cases . . . is directly applicable to the question now before [the Court] in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser"²⁶ Hughes had already stated that the Constitution must be read differently under different conditions. Because social conditions were different when earlier cases were decided, earlier reasoning might not be applicable to the current case.²⁷ This

21. See 290 U.S. at 449-65 (Sutherland, J., dissenting).

22. 290 U.S. at 428-29. The Framers' intent regarding the Contracts Clause is discussed in detail *infra* section II.B.

23. 290 U.S. at 427-28.

24. 290 U.S. at 428.

25. See 290 U.S. at 429-34; BENJAMIN WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 68-76 (1938); Palmer, *supra* note 12, at 663-72. The Court first interpreted the Contracts Clause in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), holding that the clause prohibited the repeal of a land grant. In *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) the Court struck down New York's bankruptcy act because it applied retroactively to creditor-debtor contracts. Shortly after *Sturges*, the Court invoked the Contracts Clause to prevent New Hampshire from altering a college charter. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The *Sturges* holding was limited in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), when the Court upheld a bankruptcy law enacted *before* a contract was made. The "classic case," WRIGHT, *supra*, at 69, on debtor relief laws is *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843), in which the Court struck down an Illinois law, enacted in response to the Panic of 1837, that allowed mortgagors to repurchase property sold at foreclosure sales by paying the sale amount plus 10% interest.

26. 290 U.S. at 434.

27. 290 U.S. at 434.

raises the question of what precedent, if any, applies to *Blaisdell*.

Hughes thought that the Court should look to cases holding that "the State . . . continues to possess authority to safeguard the vital interests of its people."²⁸ In this vein, he cited cases holding that contracts are subject to a variety of state interests.²⁹ "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."³⁰ The Contracts Clause does not, in this light, prohibit *all* impairment of contractual obligation.³¹ Hughes concluded that "[i]t is manifest from this review of [the Court's] decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."³²

Questions of precedent and construction thus seem to have had a special relationship for Hughes. When he cited *McCulloch v. Maryland*,³³ for example, perhaps he demonstrated obeisance to the Court's precedent, but to precedent subsisting in a realm beyond the confines of the Contracts Clause. Hughes used *McCulloch* as precedent not for a narrow and specific legal proposition, but rather to justify a mode of approaching and reasoning about constitutional cases. His method employs *McCulloch* as precedent of a special kind, using the case not for a rule of law that can be applied to the facts in *Blaisdell*, but rather for a principle of interpreting the Constitution.³⁴ As the next section explains, Hughes thought this principle could be legitimately applied in *Blaisdell*.³⁵

4. Principles of Construction

Hughes justified his open-ended construction of the Contracts Clause by stating that "where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true

28. 290 U.S. at 434.

29. 290 U.S. at 440-42. The most prominent among these are the *Rent Cases*, in which the Court upheld rent control and housing statutes enacted in the wake of a post-World War I housing shortage. See *Block v. Hirsh*, 256 U.S. 135 (1921), *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921), and *Edgar A. Levy Leasing Co. v. Siegal*, 258 U.S. 242 (1922). Justice Holmes, author of these opinions, later confessed that they went "to the verge of the law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1923).

30. 290 U.S. at 437.

31. *Cf.* *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (interpreting the Sherman Act's seemingly absolute restriction against combinations in restraint of trade to mandate a rule of reason prohibiting only unreasonable restraints of trade).

32. 290 U.S. at 442.

33. 17 U.S. (4 Wheat.) 316 (1819).

34. See *infra* section II.C for an explanation of contextualism, the interpretive method suggested by *McCulloch*.

35. *But see infra* section II.C.

of the contract clause.”³⁶ In other words, the Contracts Clause does not in and of itself answer the question of whether or not states could pass laws such as the Minnesota Mortgage Moratorium. Hughes’ claim implies that sometimes the Contracts Clause allows what it explicitly forbids: the impairment of contractual obligation. Hughes claimed not that the clause’s meaning is unclear, but rather that its meaning cannot be made clear, cannot be understood, until the time comes when the Court needs to apply it.

Hughes explicitly rejected the originalist position “that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time.”³⁷ Here Hughes quotes *McCulloch v. Maryland*: “We must never forget that it is *a constitution* we are expounding.”³⁸ In the course of discussing principles of construction Hughes took issue with Justice Sutherland’s argument that the “*meaning* [of constitutional provisions] is changeless; it is only their *application* which is extensible.”³⁹ It is not, the Chief Justice claimed, “helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application.”⁴⁰ For Hughes, an interpreter could not fully understand what the provision means until confronted with a specific case, and until the interpreter has considered the social and political background which the case presents. That is, a constitutional provision is not entirely meaningful until the time of its application. If the Court is not constrained by any abstract preconceptions of a provision’s meaning, one must wonder what constraints the Court does endure.⁴¹

B. Justice Sutherland’s Dissent

In his dissent, Justice Sutherland concentrated on the Framers’ condemnation of debtor-relief laws. Sutherland had this to say about the Minnesota law’s constitutionality:

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the[re is] . . . 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*.⁴²

Sutherland’s argument is precisely opposite the one made by Hughes,

36. 290 U.S. at 426.

37. 290 U.S. at 442.

38. 290 U.S. at 443 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407).

39. 290 U.S. at 451.

40. 290 U.S. at 443.

41. For the argument that the Court expressed this view with an eye toward freeing itself from the constraints of the Contracts Clause, see *infra* Part IV.

42. 290 U.S. at 465 (Sutherland, J., dissenting).

that emergency conditions justify a flexible reading of the Contracts Clause. Sutherland's core position was this: what the Contracts Clause meant "when framed and adopted," it should mean for all time.⁴³ This originalist approach to the Contracts Clause⁴⁴ invites a broad investigation of attitude and inclination, since there is no one clear indication of the Framers' intent to prevent debtor-relief bills.⁴⁵

Accordingly, Sutherland ranged far afield in his effort to establish that the Framers would have thought the Minnesota Mortgage Moratorium unconstitutional. He examined in detail the historical setting in which the Constitution, and specifically the Contracts Clause, was framed. He discussed not only the intent of the Framers of the Constitution, but the attitudes and feelings of the day toward legislative interference with private agreements.⁴⁶ To this end, the dissent addressed the attitude of the participants at the state ratifying conventions toward the Contracts Clause.⁴⁷ Moreover, Sutherland exhaustively detailed the dire economic conditions which existed after the Revolutionary War,⁴⁸ and also discussed some of the ills caused by debtor-relief laws.⁴⁹ While he could not make clear the Framers' specific attitude toward debtor relief, Sutherland concluded that the Framers would have thought the Minnesota Mortgage Moratorium unconstitutional. As section II.B will explain, he was probably right.⁵⁰

II. THREE METHODS OF INTERPRETATION

This Part analyzes *Blaisdell* under three common methods of constitutional interpretation. Section II.A explores textualism, explaining why, under a textual analysis, the Minnesota Mortgage Moratorium would be unconstitutional. Textualism is a threshold analysis; sometimes the meaning of a law's words when applied to a given set of facts is so clear that the mandate in that meaning must be followed if the law is to retain any force. In such cases — and this Note argues that

43. 290 U.S. at 449 (Sutherland, J., dissenting). Professor Brest cites this position as an example of a form of originalism he calls "strict intentionalism." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

44. Discussed in detail *infra* section II.B.

45. Justice Sutherland did cite a Luther Martin speech to the Maryland House of Delegates, which alone among recorded debate refers specifically to debtor relief. 290 U.S. at 461-62 (Sutherland, J., dissenting); see also *infra* note 78.

46. See, e.g., 290 U.S. at 464 (Sutherland, J., dissenting).

47. 290 U.S. at 461-62 (Sutherland, J., dissenting); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985) ("To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers.").

48. 290 U.S. at 454-57 (Sutherland, J., dissenting).

49. 290 U.S. at 458 (Sutherland, J., dissenting).

50. See *infra* section II.B.

Blaisdell is one — the interpreter ought not surmount the textual threshold and pursue other methods of interpretation. Nonetheless, an interpreter might move beyond the text of the Contracts Clause to decide *Blaisdell*. Section II.B discusses one method in which the interpreter considers a limited array of factors external to the text, namely originalism. Section II.C examines contextualism, a method in which the interpreter considers a wider array of external factors, weighing a case's impact on the federal and constitutional structure. Sections II.B and II.C conclude that even when an interpreter considers factors beyond the text of the Contracts Clause, the Minnesota Mortgage Moratorium was unconstitutional.

A. *Textualism*

*No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, Law impairing the Obligation of Contracts, or grant any Title of Nobility.*⁵¹

Textualism posits that, at least in some cases, a provision's text offers a resource sufficient for the interpretation of the law, and resolution of the case.⁵² In such cases, an interpreter need look no further than that text; only when the interpreter has confronted and surmounted the threshold of ambiguous textual meaning should he seek interpretive guidance outside the provision's text. This section summarizes arguments that text should be a controlling interpretive referent, and then subjects the Contracts Clause to a textual analysis, concluding that it does indeed prohibit mortgage moratoria. To borrow a phrase from Professor Frederick Schauer, *Blaisdell* is an "easy case."⁵³

As Schauer explains, in juxtaposition to Professor Ronald Dworkin's attempt to explain how hard cases should be resolved,⁵⁴ not all constitutional provisions require a complex method of interpretation.⁵⁵ Schauer argues that "the nature of the language is an important factor in separating the hard cases from the easy cases."⁵⁶ That

51. U.S. CONST., art. I, § 10, cl. 1 (emphasis added).

52. See Frederick F. Schauer, *An Essay On Constitutional Language*, 29 UCLA L. REV. 797 (1982) [hereinafter Schauer, *Essay*]; Frederick F. Schauer, *Formalism*, 97 YALE L.J. 509, 546-48 (1988) [hereinafter Schauer, *Formalism*] (discussing a theory of "presumptive formalism").

53. Frederick F. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); see also *infra* notes 194-202 and accompanying text.

54. Ronald M. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1978); see also *infra* section III.C.

55. See Schauer, *supra* note 53, at 406-07 (explaining why some constitutional provisions are rarely, if ever, litigated).

56. *Id.* at 406.

is, the "general intelligibility of language enables us to understand immediately the mandate of numerous constitutional provisions without recourse to precedent, original intent, or any of the other standard interpretive supplements."⁵⁷ If the Contracts Clause is such a provision, it is possible that an interpreter can tell what the provision means just by reading it, a possibility which Chief Justice Hughes denied.

In a vein similar to Professor Schauer's, Justice Antonin Scalia argues that though no general principle contained in a constitutional or statutory provision can perfectly resolve all possible fact situations, even vague provisions can often be interpreted in furtherance of their underlying principles.⁵⁸ Where a constitutional command is more or less clear and categorical, one can, to a fairly great extent, articulate general rules based on it.⁵⁹ Moreover, where a judge is able to articulate such rules, he or she should do so; the alternative is for judges to "act[] more as fact-finders than as expositors of the law."⁶⁰ Thus, if the Contracts Clause is clear and categorical, the *Blaisdell* Court should have articulated and followed the cognizable and coherent command flowing from the provision. That is, were it easy to determine when a state law impaired contractual obligation, then the Court's analysis should have proceeded no further.

The search for the Contracts Clause's meaning is fairly simple; as the following textual analysis reveals, the Contracts Clause is a provision of the clear and categorical variety. The obligation of a contract is the legal right or duty incurred by a party entering into a contractual agreement.⁶¹ In the case of a mortgage, the mortgagor (the borrower) has the duty to make loan payments, and the mortgagee (the lender) has the right to collect them. To impair something means to make it worse, or to "diminish [the thing] in quantity, value, excellence, or strength."⁶² To impair the obligation of a mortgage contract, then, would be to relieve the borrower of the duty to make payments, and to take from the lender the right to collect them.⁶³

The *Blaisdell* Court might have taken an easy way out of its quandary by claiming that the Minnesota law affected not the obligation of a contractual agreement, but the remedy for the breach of one. Contract remedies generally allow the victim of the breach to recover his

57. *Id.* at 418.

58. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

59. *Id.* at 1183-85.

60. *Id.* at 1187; see also *infra* Part IV.

61. ARTHUR CORBIN, CORBIN ON CONTRACTS § 2, at 3 (one vol. ed. 1952).

62. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (3d ed. 1986).

63. See Bunn, *supra* note 4, at 251-52 ("Whether the impairment violates the Constitution may depend on other factors, but a substantial change in fact, by any form of law, of the real status of a party under an existing contract constitutes impairment.").

or her expectation, reliance, or restitution interest in the contract.⁶⁴ That the Court did not discuss this option speaks to how plain it was that the Minnesota Mortgage Moratorium impaired the obligation of contracts.⁶⁵ The Act did not merely forbid the mortgagee to sue for breach of contract, but rather provided for the mortgagor's alteration of the mortgage note's payment terms. Had the Act affected only the mortgagee's remedy (rather than the contractual obligation due it) the law would not have provided for the disassembling of the mortgage's terms, but instead would only have rendered it unenforceable.⁶⁶

Indeed, to impair the obligation — rather than the remedy — of a contract is to allow one party to breach, or partly breach, the agreement. This is precisely what the Minnesota law did. In fact, under the moratorium it was the *breaching* party who was to go to the courts for relief.⁶⁷ Repayment terms were established to satisfy the breaching party, not the victim of the breach.⁶⁸ The trial court simply told the obligee (the financial institution/mortgagee), in effect, that its right to collect mortgage payments had been abrogated.⁶⁹ Thus, the Minnesota Mortgage Moratorium interfered with a privately created set of rights and duties — contractual obligations. The text of the Contracts Clause prohibits such interference.⁷⁰

In summary, the Contracts Clause is unambiguous in its textual mandate, and the consequences of that mandate on the constitutionality of mortgage moratoria are also unambiguous: the Constitution forbids them. The Court could only reach its *Blaisdell* result in spite of

64. E. ALLAN FARNSWORTH, CONTRACTS § 12.1, at 812-14 (1982).

65. Like the U.S. Supreme Court, the Minnesota Supreme Court noted that “[a]ppellants [the mortgagor] concede, as they must, that chapter 339, Laws 1933, impairs the obligations of the mortgage contract.” *Blaisdell v. Home Bldg. & Loan Assn.*, 249 N.W. 334, 335 (Minn. 1933), *aff'd.*, 290 U.S. 398 (1934). Moreover, the trial court in which the *Blaisdells* had applied for relief actually denied their claim, holding the law unconstitutional in light of the Contracts Clause. 249 N.W. at 335.

It is also significant that the mortgagor did not raise, and no court considered, contract defenses such as mutual mistake and impossibility. See FARNSWORTH, *supra* note 64, § 8.19, at 624-26. There are several possible reasons for this. One is that the mortgagor — the party who would have raised the defenses — was the plaintiff at trial. See *Blaisdell*, 249 N.W. at 335. More importantly, however, is the fact that neither party was arguing that the contract at issue should be found unenforceable or void, or that any party should not have to fulfill its obligations under the contract. Rather, the debate was whether contract terms could be retroactively modified by the state, since that was what the statute provided for.

66. See *supra* note 65. One could argue that such a law would not impair the contract's obligation, but such was not the Minnesota law, and thus this argument is beyond the scope of this Note.

67. 1933 Minn. Laws 339, pt. 2, § 2.

68. 1933 Minn. Laws 339, pt. 2, § 2; see also William L. Prosser, *The Minnesota Mortgage Moratorium Act*, 7 S. CAL. L. REV. 353, 370 nn.99-100 (1934).

69. 1933 Minn. Laws 339, pt. 2, § 2. The mortgagor was still required to make some payments, usually reflecting the value of the mortgaged property, rather than the value of the mortgage.

70. See Schauer, *Formalism*, *supra* note 52, at 538 (arguing that no matter how it is formulated, a rule's meaning is still clear; otherwise, rules could not exist).

the textual mandate of the Contracts Clause. Only interpretive methods which either disregard, or pay very little heed to, a provision's text could sanction this result. The next two sections discuss analyses that, under this Note's view of textual meaning as a threshold inquiry, should not come into play in *Blaisdell* because of the overriding clarity of the Contracts Clause. Nonetheless, both Justice Sutherland and Chief Justice Hughes sought to make their respective uses of these two interpretive methods, originalism and contextualism.

B. Originalism

Originalism rests on the theory that the Constitution's legal mandate is informed by authority beyond its text: the Framers' intent.⁷¹ Originalism assumes that the Constitution has a static meaning, and that that meaning is fixed by the intention of those who framed and adopted the document.⁷² The originalist thinks that legal texts are not by themselves dispositive of what the law is, looking also to the Framers' intent to fill those gaps in the law.⁷³ This section attempts to determine what the Framers intended with respect to the Contracts Clause.

The Constitution's Framers did not extensively debate the Contracts Clause. In fact, there is no evidence that either the Framers or the Anti-Federalists paid much attention to the clause.⁷⁴ As a consequence, though the originalist analysis of the Contracts Clause is not disabled by competing visions of the clause offered by different Framers, the lack of much concrete evidence about the Framers' intentions regarding the clause hinders the originalist analysis. Indeed, most commentators have had to engage in some amount of speculation to conclude that the Contracts Clause was intended to prevent debtor-relief laws.⁷⁵

71. Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 449 (1984) (originalists conflate authority with objectivity). An originalist would deny that original intent is something external to the law, claiming that original intent is part of what the law is. See *Blaisdell*, 290 U.S. at 453 (Sutherland, J., dissenting) (whole aim of construction is to discover Framers' intent); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 6-7, 143-53 (1990) (discussing the neutrality of originalism); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

72. BORK, *supra* note 71, at 149 (stating that originalism involves "find[ing] the meaning of a text" and thus implying that meaning is static and contained in the law from the moment of its conception); Monaghan, *supra* note 71, at 374-81. Justice Sutherland adopts this approach in his dissent. See 290 U.S. at 453. Sutherland articulated a view more extreme than that held by some modern commentators. Brest, *supra* note 43, at 204.

73. See, e.g., BORK, *supra* note 71, at 143-60; Monaghan, *supra* note 71, at 374-81. But see Powell, *supra* note 47, at 888 (Framers intended structural interpretation of Constitution).

74. WRIGHT, *supra* note 25, at 5.

75. E.g., A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1067 (1933) ("There can be no doubt of the accuracy of the classic theory that the insertion of the [Contracts Clause in] the Constitution was a victory of the creditor class over their debtors.").

The Contracts Clause was first offered to the Constitutional Convention by Rufus King of Massachusetts, presumably because the Federalists feared that state-enacted debtor-relief bills, many of which were aimed only at out-of-state creditors, would cripple the national economy.⁷⁶ Indeed, "one of the principal causes for the dissatisfaction with the prevailing state of affairs under the Confederation among the well-to-do classes was the mass of legislation in the states which was highly unwelcome to creditors as it was popular with debtors."⁷⁷ This dissatisfaction was not expressed on record at the Philadelphia Convention, however; delegates there made no mention of debtor-relief laws.⁷⁸

The Federalist hardly clarifies the Framers' intent regarding the Contracts Clause. Although Justice Sutherland claimed that the clause "was strongly defended in *The Federalist*,"⁷⁹ in fact it was only mentioned twice, and then almost in passing. Alexander Hamilton, in *The Federalist Number 7*, discussed the clause in the context of national unity: citizens of various states ought to be able to contract in other states without fear that legislative action will interfere with contractual rights.⁸⁰ James Madison, in *The Federalist Number 44*, included the Contracts Clause in an even more general discussion. Madison stated that, along with the ex post facto clause and the clause prohibiting bills of attainder, the Contracts Clause prevents retroactive legislative interference with items of "personal security and private rights."⁸¹ This might suggest that the Contracts Clause, like the provisions it accompanies in Article 1, Section 10, should be read narrowly. Still, *The Federalist*, while consistent with the originalist position that the Contracts Clause was aimed at debtor-relief bills, does not support the specific proposition that the Minnesota Mortgage Moratorium is precisely the kind of law the Contracts Clause is meant to prevent.

One aim of the Constitutional Convention was almost certainly to prevent legislative interference with private property.⁸² Furthermore, the Framers were concerned with retroactive regulation of private conduct;⁸³ this is the purpose of the ex post facto clause, and it is no accident that the Contracts Clause appears with it and the prohibition

76. WRIGHT, *supra* note 25, at 8-9.

77. *Id.* at 4; Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-55 (1827) (Marshall, C.J.).

78. Wright, *supra* note 25, at 8; see also *id.* at 13 (quoting one of the few such specific statements outside the Convention, a speech by Luther Martin to the Maryland House of Delegates).

79. *Blaisdell*, 290 U.S. at 463 (Sutherland, J., dissenting).

80. See THE FEDERALIST No. 7, at 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81. THE FEDERALIST, *supra* note 80, No. 44 (James Madison), at 282.

82. Epstein, *supra* note 12, at 707; Robert L. Hale, *The Supreme Court and the Contracts Clause*, 57 HARV. L. REV. 512, 512 (1944).

83. See 290 U.S. at 464 (Sutherland, J., dissenting) (quoting THE FEDERALIST, *supra* note 81, at 283).

against bills of attainder.⁸⁴ All of these provisions prevent the state from retroactively interfering with private rights and duties. Unfortunately, these general positions are easier to establish, but less useful, than the specific proposition that the Contracts Clause was meant to prevent debtor-relief laws.

The Convention did not accept the Contracts Clause when it was first proposed.⁸⁵ Gouverneur Morris of Pennsylvania, among others, opposed it, "argu[ing] that such a provision would interfere with the passage of necessary legislation relating to the bringing of actions, laws thereby affecting contracts."⁸⁶ A similar reason given for opposing the Contracts Clause was 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."⁸⁷ In the end, however, these arguments did not prevail.

When the Committee on Style produced its final draft of the Constitution, the Contracts Clause had been inserted in Section 10 of article I. The clause "was now accepted by the convention without question,"⁸⁸ although no one has ever adequately explained why the clause was ultimately inserted in the Constitution after having been first rejected. One writer attributes the presence of the clause entirely to the committee's main draftsman, Gouverneur Morris, previous opponent of the Contracts Clause, claiming that "he audaciously inserted" the provision after it "had been explicitly rejected by the convention."⁸⁹ By this argument Morris inserted the clause merely for the purpose of giving "the Bank of North America the subtle protection it sought, by preventing the legislature of Pennsylvania from again revoking its corporate charter — which was legally a contract."⁹⁰

In short, the immediate reason for the insertion of the Contracts Clause in the Constitution is unclear. Nonetheless, even if the Contracts Clause is in the Constitution due to Morris' personal whim, commentators agree that most Framers intended it to prevent legisla-

84. See THE FEDERALIST, *supra* note 81; WRIGHT, *supra* note 25, at 9-10 (Contracts Clause is in the Constitution because *ex post facto* clause was determined by the Framers not to apply to civil matters.).

85. WRIGHT, *supra* note 25, at 9-10.

86. *Id.* at 8. Ironically, Morris may have been ultimately responsible for inserting the clause in the Constitution. See text accompanying *infra* notes 89-90.

87. *Blaisdell*, 290 U.S. at 461. *But see* Feller, *supra* note 75, at 1067 ("[T]here is little evidence to indicate whether the authors of the clause were aware of the extent of the restriction imposed.").

88. MAX FARRAND, THE FRAMING OF THE CONSTITUTION 188 (1913); see also WRIGHT, *supra* note 25, at 9.

89. FORREST McDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790, at 186-87 (1965).

90. *Id.* at 187.

tive interference in private business.⁹¹ This general attitude might be sufficient to uphold the originalist position.⁹² This is particularly true if the analysis is confined to the question: How would the Framers have decided *Blaisdell*?

Chief Justice Hughes and Justice Sutherland agreed that the Framers would have thought the Minnesota Mortgage Moratorium unconstitutional.⁹³ And surely Madison's language condemning retroactive legislation speaks in negative terms about debtor relief. Madison, however, also spoke of hazards to the national unity caused by state laws interfering with the contractual rights of out-of-state parties.⁹⁴ Parties affected by the Minnesota law would almost all be Minnesotans. Thus, though it is much more likely than not that the Framers would have found the Minnesota law unconstitutional,⁹⁵ the claim that this is precisely the sort of law they envisioned the Contracts Clause as prohibiting remains a little uncertain.

C. Contextualism

This section investigates the contextual approach to constitutional interpretation, pursuing two related issues: first, whether the contextual method was what Chief Justice Hughes used in *Blaisdell*, and second, what result the contextual method mandates when applied to the problem of mortgage moratoria. Essentially, the contextual approach takes *McCulloch v. Maryland*⁹⁶ as controlling precedent for constitutional problems unresolved by a specific textual provision, and resolves them based on inference about the requirements of the federal structures and relations established by the Constitution.⁹⁷ In *McCulloch*, for example, the Court reasoned that it must be unconstitutional for a

91. *E.g.*, WRIGHT, *supra* note 25, at 16.

92. See BORK, *supra* note 71, at 163-65. For a deduction about the Framers' general attitude toward the Contracts Clause, see Epstein, *supra* note 12:

There is very little reason to think that the framers had any theory about the contract clause, or pondered its implication to cases to which it could be applied. . . . [However,] this is not to say they would have rejected the implications once they were laid bare, . . . [since they shared a] powerful conviction that trade and commerce were a social good, best fostered by institutions that restrained the use of force and stood behind private commercial arrangements.

Id. at 707.

93. See *Blaisdell*, 290 U.S. at 427-28 (Hughes, C.J.); 290 U.S. at 453-54 (Sutherland, J., dissenting).

94. THE FEDERALIST, *supra* note 81.

95. Note that the Framers' intent discerned in this section is narrow, applying only to a specific kind of state regulation. That the Framers meant to prohibit retroactive regulation of contracts does not mean they meant to prohibit all, or even most, state regulation of the economic sphere. For example, it does not follow from the argument that the Contracts Clause makes the Minnesota Mortgage Moratorium unconstitutional that the Court was right to engage in the sort of judicial activism embodied in *Lochner v. New York*, 198 U.S. 45 (1905) (striking down Bakeshop Act which regulated working hours and conditions in bakeries).

96. 17 U.S. (4 Wheat.) 316 (1819).

97. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL

state to tax a national bank, because this would give a state the power to destroy the bank. To allow a state this power, and hence power over sister states as well as the national government, would be contrary to the federal structure established by the Constitution.⁹⁸ *McCulloch* serves as a special kind of precedent for constitutional cases such as *Blaisdell*; it offers not a proposition of law, but rather a model for interpretation.⁹⁹

To say, as did Chief Justice Hughes, that the prohibition of the Contracts Clause "is not an absolute one"¹⁰⁰ immediately raises extratextual considerations; from a textual perspective, the prohibition is an absolute one.¹⁰¹ Hughes' idea suggests the possibility that textualism removes the clause from its place in the meaning of the Constitution taken as a whole. Perhaps in *Blaisdell* this means looking to the federal scheme established by the Constitution, to the Contracts Clause's place in the Constitution, and to conditions in the society which the Constitution protects. Such an inquiry into the context of the Contracts Clause necessitates balancing a state's exercise of police power¹⁰² against the Contracts Clause.

This balancing¹⁰³ would focus on whether the state is reasonably exercising its police power, whether emergency conditions exist, and whether the state has carefully tailored its use of the police power to those emergency conditions. If the state's exercise of police power is reasonable, and does not violate the federal constitutional structure, then even a law which seems to violate the Constitution on its face could be upheld. Laws which impermissibly exceed the bounds of police power would be struck down. In theory, an interpreter who followed Hughes' method would not be able to use contextualism as an unprincipled catch-all for justifying results.¹⁰⁴

LAW 13-15 (1969); Powell, *supra* note 47, at 888 (Framers may have intended structural interpretation of the Constitution.).

98. *McCulloch*, 17 U.S. (4 Wheat.), at 427-32; see also BLACK, *supra* note 97, at 15.

99. See *supra* section I.A.3.

100. *Blaisdell*, 290 U.S. at 428.

101. See *supra* section II.A.

102. This inquiry is made all the more interesting by a consideration outside the scope of this Note: the police power is itself something that has arisen as an atextual concept within the framework of the Constitution. See TRIBE, *supra* note 15, § 6-3, at 405-06 (discussing the origins of the police power doctrine). The police power doctrine originally arose from structural considerations; the Court needed something to balance against a given constitutional provision. Otherwise, a given state practice — which seemed in itself worthwhile and harmless to the constitutional structure — would have to be disallowed. See *id.*; see also *supra* note 15.

103. For a discussion of what constitutional balancing entails, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

104. Compare *Blaisdell*, 290 U.S. at 445 ("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.") with *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934) (striking down Alabama law similar in some respects to the Minnesota law on grounds that it was too broad and not adequately tailored to the emergency at

If *Blaisdell* is indeed an exemplar of the method, then an interpreter could use contextualism to justify conflicting results. Perhaps Chief Justice Marshall endorsed this phenomenon when he stated in *McCulloch* that the constitution he was expounding was “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”¹⁰⁵ This would also explain how the contextualist could reach a result contrary to the Framers’ intent; a court cannot know what the law is until the time comes when it must be applied. Implicit in the *Blaisdell* opinion is that, one hundred years earlier, the case might have come out differently.¹⁰⁶ Conditions then may not have justified the use of police power, or, more likely, the Court simply read the Contracts Clause differently in past eras.¹⁰⁷

That Hughes cited *McCulloch* and that he sought to justify his reasoning in an atextual, nonoriginalist way does not, however, necessarily mean that his was the contextualist method. In fact, the *Blaisdell* Court’s reasoning departs from the contextual method of *McCulloch* in several important ways. First, in *McCulloch*, the Court’s decision was not based on any particular Constitutional provision. Moreover, the decision does not run counter to the facial meaning of any part of the Constitution’s text. Finally, and perhaps most subtle, is the fact that the Court’s reasoning in *McCulloch* was of a rigid, almost formalistic character, and could only be used to reach one result.¹⁰⁸

When Chief Justice Marshall noted that the power to tax was the power to destroy, and that Maryland had thus appropriated a power over the federal government by taxing the Bank of the United States, it followed that Maryland’s law (that the Bank was subject to a state tax) was antithetical to the federal structure and therefore unconstitutional.¹⁰⁹ In contrast to Hughes’ analysis of the Minnesota law, Marshall engaged in no consideration of the Maryland law’s value, nor did he weigh that value against the law’s contrariness to the federal structure; *McCulloch*’s contextualism does not entail balancing.¹¹⁰ More-

hand; among other things, the Alabama law had no end date). *But see* Schauer, *Formalism*, *supra* note 52, at 530 (noting the danger that judges will fail to heed rules and instead follow their “rule-independent judgment”).

105. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

106. *See Blaisdell*, 290 U.S. at 442; *see also supra* note 20 and accompanying text.

107. *See Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843) (striking down the Illinois mortgage moratorium enacted in response to the Panic of 1837); Sandalow, *supra* note 12, at 1062 (stating that *Blaisdell* represents “an evolutionary interpretation of the Contracts Clause” and suggesting that there is no “inviolable core of constitutional meaning”).

108. *See* BLACK, *supra* note 97, at 29-32 (to suggest contextualist approach is not to suggest “that precision be supplanted by wide-open speculation”). *But see* Schauer, *Formalism*, *supra* note 52, at 535 (“A rule’s acontextual rigidity is what makes it a rule.”).

109. *McCulloch*, 17 U.S. at 407.

110. *See* Aleinikoff, *supra* note 103, at 986 (balancing involves a fact-specific weighing of various interests).

over, unlike the *Blaisdell* Court, the *McCulloch* Court was not bound to analyze a state's ability to tax the Bank of the United States under a specific constitutional provision.

The contextualism of *McCulloch*, then, is not atextualism, but is in fact a complement, or supplement, to textualism, to a reading of the Constitution's words. Although *McCulloch* may sanction interpretations of the Constitution that are not strictly based on the document's text, the case does not sanction interpretations of the Constitution that are plainly contrary to its text. Thus, Hughes overextended *McCulloch*'s contextualism by using the case to justify opening the Contracts Clause to the sort of balancing analysis in which the *Blaisdell* Court engaged.¹¹¹

III. BLAISDELL AND TWO THEORIES OF LAW

One cannot interpret a particular law without acceding, whether implicitly or explicitly, to some general theory of what law is. Nonetheless, many interpretive problems are similarly resolved by different theories. To use a well-known example,¹¹² if a law says "No vehicles in the park," both an interpreter who looks to the law's purpose and one who looks exclusively at its text will agree that automobile drivers are prohibited from using the park as a thoroughfare. These interpreters may disagree, however, over more subtle problems, such as whether a group of citizens may place a statue containing a jeep in the park, or whether a groundskeeper can bring a truck into the park to plant a tree.

This Part offers an analysis of two theories, positivism and natural law, which could justify three methods of interpreting a constitution: textualism, originalism, and contextualism.¹¹³ This Part applies the two opposing theories of law to these methods, and examines how these theories would work to resolve the *Blaisdell* problem. Section III.A gives a brief introduction to positivism and natural law theories, and explains their relevance to *Blaisdell*. Sections III.B and III.C focus on positivism and natural law respectively, and examine how adherence to those theories might affect a judge's view of *Blaisdell*. This Part concludes that interpreters hewing to either theory would likely conclude that the Minnesota law was unconstitutional.

A. Two Theories of Law

As Part I demonstrated, Chief Justice Hughes and Justice Sutherland reached their opposite results via two very different approaches to

111. See *id.* at 995.

112. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

113. See *supra* Part II.

constitutional interpretation. If the law contained in the Contracts Clause is merely the text of the provision and perhaps also the meaning ascribed to it by its framers, then one could read the Contracts Clause as a simple prohibition of the impairment of contracts. If, however, one thinks that not just the provision's language and the Framers' intent express the law that is the Contracts Clause, then one could think there is something more to the law than its words or framers' intent. The former view asserts that law can be given meaning before it is applied, and the latter that to give law meaning it must be put in context.

The basic dichotomy in the approaches offered by Hughes and Sutherland in *Blaisdell* is loosely captured in a fundamental debate over the relation of law and morality between Professors H.L.A. Hart and Lon L. Fuller, identified with positivism and natural law theory respectively.¹¹⁴ Professor Fuller was concerned with the place of morality in law, arguing that one cannot tell what a law *is* (or means) until one has considered its moral content. Professor Hart claimed that law, though shaped by views of morality, itself has no moral content. Where Fuller would consider a wide range of factors in legal interpretation, Hart, though positing occasions on which these factors are legitimate fodder for the legal interpreter, would say that they have nothing to do with what the law *is*.

The debate about whether law is separate from morality is important to *Blaisdell* because the case raises this question: does an effort to interpret a law require any reference to moral (i.e., external), natural law concerns, or must it pay heed only to the positive command contained in the law?¹¹⁵ Further, if reference to external concerns is legitimate, then how heavily should the interpreter weigh these external factors?

At first blush, the Contracts Clause may seem to present few, if any, moral concerns. When Professors Hart and Fuller touch on the question of obedience to law under the regime in Nazi Germany,¹¹⁶ it is not difficult to see that this question presents a moral problem. The Contracts Clause does not present a problem on this scale, but both positivists and natural law theorists would see a moral character to the Contracts Clause, as with every legal provision.¹¹⁷

114. The debate originated in well-known articles published in the *Harvard Law Review* in 1958. See Hart, *supra* note 112; Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 631 (1958).

115. Hart stresses that external factors often need to be considered in interpreting law, even though they are not part of the law. See H.L.A. HART, *THE CONCEPT OF LAW*, 199-200 (1961).

116. Hart, *supra* note 112, at 616-21; Fuller, *supra* note 114, at 648-57.

117. Natural law theorists identify morality in, or as part of, law. See Fuller, *supra* note 114, at 644-48. The positivist would deny that there is a moral element in the law *per se*, but would agree that there is often a moral element in the action commanded or forbidden. See Hart, *supra* note 112, at 610-15.

The Contracts Clause has the moral aspect that *all* laws possess: the clause contributes to the ordering of the polity.¹¹⁸ It renders predictable and smooth the machinations of commerce, and guarantees for our society orderly and reliable transactions. But the Contracts Clause also has a more specific moral aspect insofar as it protects expectations of the parties to contract. In this aspect, the Contracts Clause rests on the moral maxim that parties should be entitled to rely on promises made to them. A central problem with the Minnesota law was that lenders relied on the sanctity of their mortgage contracts, but the law violated their trust. Another problem, however, was that which the law confronted. Economic conditions beyond farmers' control had deprived them of the ability to repay their mortgages. One can well sympathize with a mandate granting them some relief. Whether and how these moral concerns should affect an interpreter's legal judgment is a separate question, taken up in the next two sections.

B. *Hart and Positivism*

Sensitive to charges that positivism was nothing more than rigid formalism,¹¹⁹ Hart stressed that interpreters must often look beyond a law (i.e., its text) to know how to decide particular cases.¹²⁰ He drew a distinction between "core" and "penumbra[...]" legal problems.¹²¹ Where there is a core of settled meaning, a law may easily and unambiguously be applied to a set of facts. No interpretive resource beyond the law's text is necessary. The logical deduction of textualism, however, cannot solve all interpretive problems. Penumbral problems "arise outside the hard core of standard instances or settled meaning" — they arise, that is, when the interpreter is unable to determine what the particular words of the provision mean, i.e., when interpretation is not possible.¹²² Hart suggests that judges should decide penumbral cases by openly legislating — by looking to the appropriate social, moral, and political factors and deciding how the case should come out.¹²³

118. See Epstein, *supra* note 12, at 717 ("Although the economic desirability of private contracts may at first glance appear far removed from the concerns of governance, the protection of private contracts against government regulation is inseparably entwined with two elements of a distinctly political cast: individual freedom, of which freedom to contract is but one illustration, and the need to prevent legislative misbehavior, itself a concern of any constitutional arrangement.").

119. *But see* Schauer, *Essay, supra* note 52, at 812 (to say that text is authoritarian is not necessarily to adopt rigid formalism).

120. HART, *supra* note 115, at 121-33; Hart, *supra* note 112, at 608-14.

121. Hart, *supra* note 112, at 607.

122. *Id.*

123. See *id.* at 611-13. Hart's view is comparable to the legal realist's view that a judge should legislate when he or she encounters gaps in the law. See *infra* notes 171-80 and accompanying text.

Suppose for a moment that *Blaisdell* is a penumbral case. Hart would posit that the Supreme Court possesses what amounts to legislative power to decide whether or not it should strike down the Minnesota Mortgage Moratorium. In this event, the interpreter can find no one right answer to the question of whether the Moratorium violates the Contracts Clause, because the provision is no longer in issue. The problem cannot be resolved with reference to it, and the case, being penumbral, could reasonably come out either way. The Court could explicitly approve of the mortgage moratorium as a desirable public policy in light of the Depression (as Hughes must have done), or the Court could decide for some reason that the Minnesota law was socially (that is, legislatively) undesirable, and reject it.

Actually, an interpreter could characterize *Blaisdell* as a penumbral case only with extreme difficulty. As section II.A argued, the Minnesota Mortgage Moratorium represents a fairly standard and clear violation of the Contracts Clause.¹²⁴ Further, as a general rule, penumbral cases arise only when the situation giving rise to the case was unanticipated by the provision at issue (that is, by its authors).¹²⁵ The Framers of the Constitution probably anticipated *Blaisdell*.¹²⁶ To say that the severity of the Depression distinguished *Blaisdell* from standard instances, necessitating a penumbral approach, would stretch the argument. Social conditions are irrelevant in core cases, because extant law suffices to decide them; they can only be considered when a case enters the penumbral zone, where social policy considerations can fill a void in the law.

Because *Blaisdell* is a core case, a judge deciding it cannot legitimately appropriate any legislative leeway. In core cases, by definition, it is always clear what the law is. Here, the Minnesota Mortgage Moratorium is plainly unconstitutional because it is clear on the face of the Contracts Clause that the provision forbids mortgage moratoria.¹²⁷ *Blaisdell* is like most cases in that it is a case in which an interpreter can honestly reach only one possible result after applying the law to the facts of the case.¹²⁸

Hart describes the relation of morality to law like this: an individual may decide to obey or not to obey a given law for moral reasons, but the law itself is devoid of moral content.¹²⁹ A judge is bound to apply the law that *is*, not the law that *ought* to be.¹³⁰ In core cases, the

124. See Palmer, *supra* note 12.

125. Cf. "No vehicles in the park," discussed by Hart, *supra* note 112, at 607.

126. See *supra* section II.B.

127. See *supra* section II.A.

128. See HART, *supra* note 115, at 138-42 (discussing the risk that an interpreter will ignore the law and consider external factors when such a consideration is unwarranted).

129. See *id.*

130. Note that Hart's positivism perceives the duty of judges to follow the law not as an

judge has no option: it is clear what the law is. As long as he or she is bound by the law,¹³¹ a judge is bound to the textual approach; this is the approach under which mortgage moratoria are most plainly unconstitutional. The Contracts Clause would therefore constrain the positivist to decide *Blaisdell* in a certain way — reaching the same outcome as Justice Sutherland, even if not for the same reasons (in a core case a positivist would not care about original intent).

In sum, a positivist would find it difficult to claim that *Blaisdell* was correctly decided. Still, other legal theorists might decide the case differently. *Blaisdell* demonstrates what might be positivism's disadvantage: it forces unjust (or at least undesirable) outcomes as the price of rigid constraints on decisionmaking. The Minnesota Mortgage Moratorium may well have been desirable social policy, but the positivist analysis of *Blaisdell* does not reach that policy.

C. Fuller, Dworkin, and Natural Law

1. Fuller

In contrast to Professor Hart, Professor Fuller thought that a law's purpose was a part of its content. Accordingly, Fuller emphasized "the notion of order [which] itself contains what may be called a moral element."¹³² In this vein, Fuller discusses the "fabric of thought" necessary "to make the [law] a coherent, workable whole."¹³³ His basic argument was that one cannot interpret and understand a provision of law such as the Contracts Clause, no matter how clear it seems when one first reads it, unless one pays attention to this "fabric of thought,"¹³⁴ which consists of what Fuller called "purpose and structure."¹³⁵ He added that "[f]idelity to law *can* become impossible if we do not accept the broader responsibilities (themselves purposive, as all responsibilities are and must be) that go with a purposive interpretation of law."¹³⁶

Fuller's argument gains clarity when one considers his response to Hart's delineation of the core and the penumbra.¹³⁷ Fuller found the distinction meaningless. He disputed the assumption "that problems of interpretation typically turn on the meaning of individual

abstract moral duty but simply as the judge's duty under the law, as what is requisite if a legal system is going to be maintained and adhered to. *See id.*

131. For example, a judge in Nazi Germany might not have been so bound. The problem of when or whether judges are ever not obligated by the law is beyond the scope of this Note, which assumes in all its discussions that judges intend to act within and according to the law.

132. Fuller, *supra* note 114, at 644.

133. *Id.* at 667 (discussing statutes); *see also* LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1964) (listing "eight distinct routes to disaster" in the making of law).

134. Fuller, *supra* note 114, at 667.

135. *Id.*; *cf.* BLACK, *supra* note 97, at 7.

136. Fuller, *supra* note 114, at 670.

137. *See id.* at 661-69.

words.”¹³⁸ His argument was this: there is no core. All cases are penumbral. The concept of standard instances is meaningless because every instance to which words in a legal provision are applied occurs in a different context than every other instance. A word in a provision, taken out of context, “is almost as devoid of meaning as the symbol ‘X.’”¹³⁹

This argument puts the Contracts Clause in a new light. It lends credence to Chief Justice Hughes’ claim that one cannot know what the clause means until presented with a specific interpretive problem.¹⁴⁰ Under Hart’s view, the Contracts Clause, being narrowly drawn, would engender mostly core cases. And *Blaisdell* would almost certainly be one of these.¹⁴¹ Yet if Fuller is correct that cases typically do not turn on the meaning of individual words, then it is possible that a court deciding *Blaisdell* cannot help but take a broader look at the case.

Fuller acknowledged the possibility that interpreters could abuse this open interpretive method, twisting a law in a way conflicting not only with its text, but with its purpose:

One can imagine a course of reasoning that might run as follows: The statute says absinthe shall not be sold. What is its purpose? To promote health. Now, as everyone knows, absinthe is a sound, wholesome, and beneficial beverage.¹⁴² Therefore, interpreting the statute in light of its purpose, I construe it to direct a general sale and consumption of that most healthful of beverages, absinthe.¹⁴³

Obviously, as Fuller says, this sort of interpretation, which his purposive method risks, ought to be avoided.¹⁴⁴

Perhaps the Court’s reasoning in *Blaisdell* contains the abuse of interpretive discretion demonstrated by Fuller’s absinthe example. Consider this argument: the Contracts Clause prohibits the impairment of the obligation of contracts, but it does so because the Framers wished to promote social order and economic stability. The Minnesota Mortgage Moratorium was enacted for these same reasons. Therefore it must be constitutional. If this syllogism really does represent the reasoning of the *Blaisdell* Court, then even under Fuller’s open-ended method the Court’s opinion may be flawed.

Fuller, wondering how to resolve the difficulty demonstrated by his absinthe example, is unable to give a precise method for determining

138. *Id.* at 662.

139. *Id.* at 665.

140. *Blaisdell*, 290 U.S. at 442-43.

141. *See supra* notes 124-27 and accompanying text.

142. Note that absinthe is not really a healthful beverage.

143. Fuller, *supra* note 114, at 670.

144. *See id.*

when the purposive method departs from the acceptable contextual meaning of a law. He says that

the answer lies in the concept of *structure*. A statute or a rule of common law [and, presumably, a constitution] has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity. This is what we have in mind when we speak of "the intent of the statute," though we know it is men who have intentions and not words on paper. Within the limits of that structure, fidelity to law not only permits but demands a creative role from the judge, but beyond that structure it does not permit him to go.¹⁴⁵

Fuller freely admits that his "purposive" search for the "structural integrity" of law amounts to a "common-sense" approach to interpretation.¹⁴⁶ One wonders why such an approach could not have prevailed in *Blaisdell*. Even more than the absinthe statute, the Contracts Clause wears its purpose on its sleeve; common sense leaves no doubt about its facial purpose with respect to mortgage moratoria.¹⁴⁷

2. Dworkin

Fuller's use of the word "integrity" is prominently echoed by Professor Ronald Dworkin in *Law's Empire*.¹⁴⁸ Dworkin's general view of law is of "law as integrity."¹⁴⁹ Dworkin's ideal judge, adjudicating a constitutional controversy, would look beyond the text to "a variety of considerations of fairness and integrity."¹⁵⁰ Dworkin is fond of saying that it is the duty of a judge to make the law "the best it can be."¹⁵¹ To find "the best available interpretation [of the] American Constitution" and, presumably, provisions in it such as the Contracts Clause, Dworkin would consider "American constitutional text and practice as a whole," adding that the "judgment about which interpretation is best is sensitive to the great complexity of political virtues bearing on that issue."¹⁵² Thus, Dworkin would seek a maximized combination of substantive interpretation and "fit" into the American constitutional fabric.¹⁵³

145. *Id.* Fuller echoed this argument — and justified its application in constitutional law — in *The Morality of Law*. See FULLER, *supra* note 133, at 102 (stating that "interpretation can often depart widely from the explicit words of the Constitution and yet rest secure in the conviction that it is faithful to an intention implicit in the whole structure of our government"); see also *id.* at 103 (approving use of the Contracts Clause to strike down laws that *enhance* the obligations of contracts).

146. Fuller, *supra* note 114, at 670.

147. Moreover, originalist analysis is consistent with this conclusion. See *supra* section II.B.

148. RONALD M. DWORKIN, *LAW'S EMPIRE* (1986).

149. See generally *id.* at 176-275 (chs. 6-7).

150. *Id.* at 380.

151. *E.g., id.* at 53.

152. *Id.* at 398; see also DWORKIN, *supra* note 54, at 107 (urging a theory of constitutional interpretation which "refer[s] alternately to political philosophy and institutional detail").

153. See DWORKIN, *supra* note 148, at 230-31.

In many cases Dworkin's theory suffers from the same shortfall as does Fuller's. One could use it to justify different results; even though Dworkin claims that right answers exist, he also acknowledges that different judges may decide like cases differently.¹⁵⁴ This implies that either result might be the correct one, and that there are no "right" and "wrong" outcomes. Of course, there are cases in which, clearly, a judge could plausibly justify but one result.¹⁵⁵

In *Blaisdell*, however, overriding concerns of "fit" weigh against the Minnesota Mortgage Moratorium's constitutionality. Hughes may have been right that upholding the Minnesota law is consistent with the "growing appreciation of public needs and . . . the necessity of finding ground for a rational compromise between individual rights and public welfare."¹⁵⁶ Nonetheless, striking the law down would have been consistent with previous Supreme Court Contracts Clause jurisprudence,¹⁵⁷ (and Dworkin does give precedent significant weight¹⁵⁸), the Framers' intent,¹⁵⁹ as well as society's expectations. Moreover, striking down the law would have been consistent with the provision's text. While in Dworkin's analysis text may be just one coequal factor of several that are to be weighed, here it would have to be weighed heavily because of the clarity of the Contracts Clause's mandate on debtor relief.

The natural law approach, then, must either identify the correct result when contrary ones can be justified, or it must demonstrate that a method capable of reaching contrary results is valid nonetheless. Dworkin responds to the criticism:

Law as integrity . . . not only permits but fosters different forms of substantive conflict or tension within the overall best interpretation of law. . . . We accept integrity as a distinct political ideal, and we accept the adjudicative principle of integrity as sovereign over law, because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation. . . . [The ideal judge] is prevented from achieving integrity viewed from the standpoint of justice alone — coherence in the substantive principles of justice that flow throughout his account of what the law now is — because he has been

154. See, e.g., *id.* at 397 ("reasonable judges might disagree" as to the proper outcome of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). This is not to bely Dworkin's rights thesis, which states that there are right answers in hard cases. See DWORKIN, *supra* note 148, at 393-94; Dworkin, *supra* note 54, at 1058-60.

155. See DWORKIN, *supra* note 148, at 389 (In deciding *Brown v. Board of Educ.*, 349 U.S. 294 (1955), "[e]verything conspires toward the same decision.").

156. *Blaisdell*, 290 U.S. at 442.

157. See *Blaisdell*, 290 U.S. at 465 (Sutherland, J., dissenting) (stating that "proof [that debtor-relief bills always violate the Contracts Clause] will be found in the previous decisions of this court" and then discussing Contracts Clause precedent); *supra* note 25 (collecting important Contracts Clause precedent).

158. DWORKIN, *supra* note 148, at 240-50.

159. *Id.* at 227 (discussing the role of history in law as integrity).

seeking a wider integrity that gives effect to principles of fairness and procedural due process as well.¹⁶⁰

Dworkin argues that there is a level of integrity in law beyond substantive coherence; this “different, more abstract calculation” he calls “pure integrity.”¹⁶¹ Dworkin has presented an abstract concept indeed, but it clearly displays one crucial aspect: like Fuller, a major factor in Dworkin’s calculus is justice, “the right outcome of the political system.”¹⁶²

Assuming that such a thing as “pure integrity” exists, Hughes’ *Blaisdell* opinion arguably fails to meet the standard. Given that the result reached in the case could not have “fit” less easily into either the legal landscape preceding it¹⁶³ or conventional readings of the provision,¹⁶⁴ one must question whether *any* substantive outcome — no matter how desirable — could justify the *Blaisdell* result. Some may have felt in 1934 that the Supreme Court controlled the fate of the Republic, and some certainly felt that the Minnesota law was urgently necessitated by social unrest.¹⁶⁵ Nonetheless, a court could achieve the *Blaisdell* result only through a practical abeyance of the Constitution. Natural law theory justifies the Court’s opinion only if one ignores the fact that, as Part II demonstrated, the Hughes opinion does not fit into the fabric of American law.

IV. *BLAISDELL*: EXEMPLAR OF REALISM

The language of the law, wrote Jerome Frank, is the language of “rationalization,” which is “the normal human way of avoiding recognition of . . . conflict.”¹⁶⁶ This Part argues that such was the language of Chief Justice Hughes’ opinion in *Blaisdell*. While the Constitution mandated overturning the mortgage moratorium, political pressures and social need pushed the Court to uphold it. Section IV.A provides a sketch of legal realism, and section IV.B explains how realism accounts for the Court’s opinion in *Blaisdell*. This Part concludes that the Chief Justice wrote an opinion that, seeming to reconcile the warring demands of law and society, in reality only offered a false resolution of the conflict.

A. *A Thumbnail Sketch of Realism*

Like all academic trends, legal realism was a somewhat amorphous school of thought. Nonetheless, certain basic notions may be collected

160. *Id.* at 404.

161. *Id.* at 405 (emphasis omitted).

162. *Id.* at 404.

163. *See supra* note 25.

164. *See supra* section II.A.

165. *See infra* notes 187-93 and accompanying text.

166. JEROME FRANK, *LAW AND THE MODERN MIND* 30 (1930).

under the heading *realism*.¹⁶⁷ The theory had both descriptive and normative components. The cornerstone of its descriptive component was the notion that “law is . . . what law *does*.”¹⁶⁸ This character of law is hidden because lawyers and judges frame their legal analyses as if they mirrored deductive logic;¹⁶⁹ yet in reality the law possesses “fluidity and pliancy.”¹⁷⁰ In a given case judges possess leeway to mold the law to produce a result to their liking.

The consequence of law’s inherent malleability, the realists thought, was that “[a] judicial decision is a social event.”¹⁷¹ Jerome Frank proclaimed that “judicial legislation . . . cannot be avoided,”¹⁷² and called the Supreme Court “a peculiar kind of political agency.”¹⁷³ Karl Llewellyn went so far as to say that whatever “officials of the law . . . do about disputes . . . is the law itself.”¹⁷⁴ The realists thought that judicial decisionmaking filled the inherent gaps in the law.¹⁷⁵ In sum, what judges do when they decide cases transcends *interpretation* of the law; inherent in the practice of jurisprudential reasoning is *legislative decisionmaking*.

Furthermore, some realists thought judges *should* use leeway to make social judgments — policy choices — when confronted with the inherent ambiguity of legal language. Felix Cohen articulated the impetus for realism’s normative component when he expressed his frustration over the fact that lawyers and judges use legal concepts to obscure practical questions, and “forget the social forces which mold the law and the social ideals by which the law is to be judged.”¹⁷⁶ As Frank put it, “[m]uch of the uncertainty of law is not an unfortunate accident: it is of immense social value.”¹⁷⁷ If legal decisionmaking

167. See Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1229-33, 1233-34 (1931) (realism is not a school, but rather is “a movement in thought and work about law”) and 1236-37 (listing realists’ common points of departure).

168. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 91 (1951); see also Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 839 (1935); Llewellyn, *supra* note 167, at 1236.

169. See generally WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

170. FRANK, *supra* note 166, at 6; LLEWELLYN, *supra* note 168, at 72 (“Of a truth the logic of law, however indebted it may be to formal logic for method, however nice it may be in its middle reaches, loses all sharp precision, all firm footing” when law is applied in practice.).

171. Cohen, *supra* note 168, at 843. For the origins of the notion that law is rooted in social realities, see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

172. JEROME FRANK, *COURTS ON TRIAL* 315 (1949).

173. *Id.* at 311.

174. LLEWELLYN, *supra* note 168, at 12 (emphasis omitted); Cohen, *supra* note 168, at 840.

175. More recent scholars have used a similar theory to justify some parts of constitutional law. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

176. Cohen, *supra* note 168, at 812.

177. FRANK, *supra* note 166, at 7 (emphasis omitted); see also Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 461 (1930) (discussing the “recurrent emergence” from law and society “of some wholeness, some sense of responsibility which out-

really were an exercise in formal, deductive logic, where results ineluctably followed from predicate propositions, then judges would be unable to shape the law to best serve the social good; law could not adequately respond to society's needs.¹⁷⁸

Though the realists lauded law's malleability, they did not necessarily think this pliancy unlimited. In an appendix to *Law and the Modern Mind* entitled "Rule-Fetichism and Realism," Frank wrote that "[t]he will of the judge is to be directed to the just and reasonable results *within the limits of the positive rule of law*."¹⁷⁹ Similarly, Llewellyn wrote that realism urged "not the elimination of rules, but the setting of words and paper in perspective."¹⁸⁰ That is, the abandonment of a rule fetish is not necessarily tantamount to the abandonment of rules; even for the realists, the positive law imposed constraints on legal decisionmaking.

Thus, though worlds apart in most aspects, realists and textualists¹⁸¹ suddenly seem to share loosely one fundamental notion about the limits of legal interpretation. Like textualists, realists thought written law imposes some constraint on legal decisionmaking, even if the two camps would differ over the degree of the constraint. Moreover, Hart and Fuller both expressed similar views, agreeing that in most cases the law allows only one result.¹⁸² And all of the commonly used interpretive methods presented in Part II take as axiomatic that rules exist and should be, in varying ways, followed.¹⁸³ What is significant is that the realists were not nihilists; they merely described how judges do and should work within the law, and did not advocate that judges work outside it. Thus, as the next section explains, while realism can explain the result in *Blaisdell*, it may not condone that result.

B. Blaisdell, Realism, and the Constitution

Finding the realist explanation for *Blaisdell* is all the easier because Chief Justice Hughes himself gave a realist account of the Court's decision when he claimed that the Contracts Clause was the sort of open-

runs enlightened self-interest, and results in action apparently headed (often purposefully) for the common good").

178. Interestingly, one proponent of this view was Professor Lon L. Fuller. See Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 436-37 (1934) (book review) (overemphasis on technical factors in legal decisionmaking stigmatizes nontechnical considerations and actually makes legal decisions less rational and responsive to litigants than they would otherwise be).

179. FRANK, *supra* note 166, at 281 (emphasis added). In a footnote, Frank summarized the similar views of other "free judicial decision proponents." See *id.* at 280 & n*.

180. Llewellyn, *supra* note 177, at 453.

181. Textualists urge adherence to rules though conceding that all rules leave some gaps in their mandate. See *supra* notes 51-60 and accompanying text.

182. See, e.g., FULLER, *supra* note 133, at 102; HART, *supra* note 115, at 127.

183. See *supra* section II.A (textualism); section II.B (originalism); section II.C (contextualism).

ended provision that left gaps which a court could fill according to its discretion in individual cases.¹⁸⁴ Having made this claim, Hughes explicitly referred to the dire emergency presented by the Great Depression as a justification for the Court's decision.¹⁸⁵ That the Court responded to the currents of social need is even more clear when one considers Hughes' statement that the Contracts Clause would not always permit mortgage moratoria.¹⁸⁶

Strong social pressures to uphold the Minnesota Mortgage Moratorium undeniably existed. The law was one of many pieces of moratory legislation enacted with the onslaught of the Depression.¹⁸⁷ It was passed after "a general outcry for relief" which included instances of mob violence and a march on St. Paul.¹⁸⁸ This outcry had been prompted by a farm crisis resulting in "a constantly mounting wave of foreclosures and forced sales."¹⁸⁹ Lenders were able to take advantage of farmers at foreclosure sales, paying paltry sums for what ordinarily would have been valuable property.¹⁹⁰

In short, were there ever a time and place in which debtor relief was justified, Minnesota in the early 1930s would have been it.¹⁹¹ The Minnesota legislature enacted the mortgage moratorium for legitimate reasons and with a nondiscriminatory intent. Unlike post-Revolutionary War debtor-relief laws, with which states intended to protect their citizens against out-of-state creditors, the Minnesota law only regulated mortgages in the state of Minnesota. Arguably the law was not intended to protect debtors at the expense of creditors, but rather to preserve and protect Minnesota's farm economy. That is, the law was intended to accomplish a legitimate policy goal. Moreover, the law was drawn so as to give creditors what the mortgagors could pay; it did not wholly abrogate (even if it did impair) the mortgagor's obligation on the contract.¹⁹² The mortgage moratorium was, in sum, justifiable from a policy perspective.

Given that *Blaisdell's* result was politically desirable, the question crucial to resolution of this Note's thesis is whether the relevant law,

184. 290 U.S. at 426; see *supra* section I.A.

185. 290 U.S. at 421, 425, 426.

186. 290 U.S. at 425.

187. See Bunn, *supra* note 4, at 263-65 (summarizing state moratorium laws).

188. Prosser, *supra* note 68, at 355; see also *Blaisdell*, 290 U.S. at 422-24 & n.4 (detailing the conditions endured by farmers during the Depression).

189. Prosser, *supra* note 68, at 354.

190. *Id.* at 354-55.

191. Interestingly, the Blaisdells apparently did not argue that the mortgage contract should be unenforceable on grounds of public policy. See FARNSWORTH, *supra* note 64, at § 5.1. That debate shifted to whether the statute was justified by public need.

192. Professor Prosser claimed that the law worked reasonably well — courts allowed payment plans that farmers could afford and that allowed lenders to recoup a reasonable part of the loan. Prosser, *supra* note 68, at 370 & nn.99-100.

the Contracts Clause, left room for the Court to engage in a policy analysis. Was there a void in the interstices of the law relevant to the resolution of *Blaisdell*? This question drives toward the problem of whether or not the Court's decision in *Blaisdell* exceeded the boundaries delimited by the Contracts Clause, a positive constitutional command. These are questions almost any legal theorist would ask, understanding the word "positive" in a loose sense, denoting the common understanding among legal theorists that there are always some limits to the possible ways in which one may interpret a law.¹⁹³

Blaisdell's contravention of positive law may be demonstrated by comparing the case to the ever-familiar *Brown v. Board of Education*.¹⁹⁴ *Brown*¹⁹⁵ and *Blaisdell*¹⁹⁶ were both controversial when they were decided. While most commentators now support the *Brown* result,¹⁹⁷ modern scholarship has not been kind to *Blaisdell*.¹⁹⁸ The cases are similar in that each case called upon the Court to make — and it accordingly made — a judgment about a particular social policy. The cases differ, however, in that only in *Brown* did ambiguity in the relevant constitutional provision leave room for the Court to abandon neutrality in favor of a social policy. *Brown* is *Blaisdell*'s extreme opposite in that, though both may be easy cases, *Brown* is an easy case because of textual vagueness, not textual clarity.¹⁹⁹

Admittedly, *Brown* was not regarded as an easy case when first decided; it flew in the face of decades of entrenched precedent.²⁰⁰ And *Brown* is not an easy case in the way Professor Schauer uses the term, because the text of the Fourteenth Amendment does not dictate one clear, unimpeachable result.²⁰¹ Nonetheless, *Brown* is an easy case for two reasons. First, because the relevant law (the Fourteenth Amendment) is open-ended, from the standpoint of legal interpretation, it is easy to justify *whatever* result the Court chose to reach. Second, be-

193. See generally *supra* Parts II and III. But see, e.g., ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1-2 (1983); ROBERTO M. UNGER, *LAW IN MODERN SOCIETY* 241-42 (1976).

194. 347 U.S. 483 (1954).

195. GUNTHER, *supra* note 3, at 639 n.2; STONE ET AL., *supra* note 13, at 470-71.

196. See Prosser, *supra* note 68, at 353.

197. See, e.g., BORK, *supra* note 71, at 75.

198. See *supra* note 12.

199. This Note contrasts *Brown* with *Blaisdell* for the very reason that it is such a clear case. Harder cases that could still be contrasted with *Blaisdell* because of the ambiguity of the provisions they interpret include *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping is not a search or seizure within the meaning of the Fourth Amendment), *overruled by Katz v. United States*, 389 U.S. 347 (1967) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (state's regulation of coal mining was a taking under the Fifth Amendment); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (application of New York's Landmarks Preservation Law was a taking under the Fifth Amendment).

200. E.g., *Plessy v. Ferguson*, 163 U.S. 357 (1896).

201. See Schauer, *supra* note 53, at 408. But see *id.* at 406 ("Even if language were not a significant factor, other factors might yet serve to produce constitutionally easy cases.").

cause the Court was free to import moral and social considerations into its analysis, the case is easy to resolve given that racial discrimination is indisputably immoral.

Brown is arguably faithful to, and certainly does not contravene, the text of the Fourteenth Amendment.²⁰² People may have thought that the Fourteenth Amendment either permitted or forbade the segregation of schools, but they could not have thought this because of what the text of the document said on its face; the Fourteenth Amendment does not mention school (de)segregation at all, whereas the Contracts Clause explicitly governs state impairment of contractual obligations.²⁰³ As in *Blaisdell*, political need informed the Court's opinion in *Brown*. Chief Justice Warren declared that "[s]eparate educational facilities are inherently unequal" only after reviewing the social data concerning the education of the different races.²⁰⁴ Just as the Depression justified mortgage moratoria, the negative effects of segregation on black school children justified desegregation.

The crucial difference between *Brown* and *Blaisdell*, however, lies in the fact that the Fourteenth Amendment on its face does not mandate segregated schools. Rather, the expectation (and fact) of segregated schools existed because of the way in which the Supreme Court had *interpreted* the Fourteenth Amendment.²⁰⁵ Furthermore, the *Brown* Court made no attempt to reconcile its decision with conflicting precedent, but instead simply overruled it.²⁰⁶

Restated, then, the ultimate, crucial difference between *Brown* and *Blaisdell* is that in *Brown* there was an interstitial void in the relevant law, i.e., the Fourteenth Amendment, that the nine justices of the Supreme Court, acting as judicial policy makers, could fill without rendering a result inconsistent with that law. In *Blaisdell* the Court had no such gap in the law at its disposal. As this Note has demonstrated, from almost every perspective, the Contracts Clause condemns mortgage moratoria. This condemnation arises because every analysis confronts the clause's unavoidable stricture against the impairment of contractual obligation. Were the clause vague or ambiguous, a Court might find gaps allowing it interpretive leeway. But the

202. BORK, *supra* note 71, at 76-77 (arguing that the result in *Brown* comports with not only the text but also the original understanding of the Fourteenth Amendment); TRIBE, *supra* note 15, § 16-15, at 1477 (*Brown* was rightly decided because our *conception* of equal protection has changed, not because the *meaning* of the Fourteenth Amendment is different now than it was in 1868 or 1896).

203. Compare U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . .") with U.S. CONST. amend. 14 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

204. *Brown*, 347 U.S. at 495.

205. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

206. *Brown*, 347 U.S. at 495.

clause is clear, and no legitimate method of interpretation provides the leeway needed to support the Court's result in *Blaisdell*.

CONCLUSION

To argue that *Blaisdell* was wrongly decided is not necessarily to make a claim that is broad in scope. Put another way, recourse to only the textualist method is not necessarily always, nor even frequently, the only appropriate means to achieving right results. In cases where the law does offer a clear textual command, however, if that command is not followed then neither is the law. Inconsistent interpretations of text may, as Dworkin argues, retain coherence in a broad sense.²⁰⁷ And not all legal interpretations must be rigidly consistent; however, inconsistent interpretations cannot maintain a coherent legal system where only one interpretation is plausible.

One might think, then, that Chief Justice Hughes was right to say that the Contracts Clause (and all constitutional provisions) should be read differently at different times. Indeed, one reading of *Blaisdell* is that the Court's opinion was wise, farseeing, and appropriate for its time. In Parts II and III, however, this Note employed a manifold of interpretive perspectives to demonstrate that *Blaisdell's* interpretation of the Contracts Clause is legally baseless not merely because it is inconsistent with other substantive interpretations of the clause, but because the essence of the Hughes Court's opinion was to ignore the law. In *Blaisdell*, only one interpretation of the Contracts Clause was plausible. Part IV augmented this conclusion by showing how the Court's holding would have been appropriate only if the Contracts Clause had left gaps for judicial legislation. Since the application of the clause to mortgage moratoria is clear, *Blaisdell* was rightly decided only if an interpreter may legitimately pay no heed to positive law.

207. DWORKIN, *supra* note 148, at 404.