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Economic Liberty and the Constitution, Part 9

by Jacob G. Hornberger

The ancient Chinese symbol for “crisis” is made up of two characters, one denoting “danger” and the other “opportunity.” The Great Depression was a perfect example of a crisis: Not only did the economic crisis of the 1930s present danger to the American people, it also presented the perfect opportunity for American socialists, interventionists, and advocates of omnipotent government to prevail in their long struggle against the advocates of economic liberty, free enterprise, and limited, constitutional government.

While President Franklin Roosevelt seized the crisis of the Great Depression to radically transform the nature of American society, the statists were also using the economic crisis to level massive assaults on freedom and the Constitution at the state level. A good example of the kind of battles that were taking place at the state level is the 1935 U.S. Supreme Court case *Home Building & Loan Association v. Blaisdell*, in which the “Four Horsemen” — Supreme Court Justices George Sutherland, James C. McReynolds, Willis Van Devanter, and Pierce Butler — banded together in an unsuccessful attempt to hold back the forces of statism and collectivism.

John and Rosella Blaisdell, citizens of Minnesota, had entered into a standard loan contract for the purchase of their home. The purchase money was secured by a lien on the property. The loan agreement provided that in the event of default on the debtor’s mortgage payments, the bank could foreclose its lien at a foreclosure sale. At the time the contract was entered into, Minnesota law provided that a debtor had a 30-day grace period after the foreclosure sale in which he could redeem the property by paying off the debt.

Once the Federal Reserve System began using its powers to make massive reductions in the money supply in the late 1920s, the Blaisdells, like so many other Americans in the early 1930s, lacked the money to make their mortgage payments. They defaulted and the bank foreclosed, selling the home at the foreclosure sale.

However, prior to the foreclosure sale (and after the loan contract had been entered into), the Minnesota legislature had enacted a law that provided that a debtor could go to court and seek a further extension of time in which to redeem the property (over and above the 30 days provided in the pre-existing law).

The Blaisdells went to state district court and sought the extension, which was granted by the court, provided that the Blaisdells made a monthly payment to the bank, to be applied to the indebtedness.

The Supreme Court of Minnesota upheld the constitutionality of the new redemption law, and the bank appealed to the U.S. Supreme Court.

Police powers versus the Constitution

The first obvious question is: Why would the U.S. Supreme Court have jurisdiction? After all, this involved a state law, not a federal law. Didn't the Constitution limit the power of the federal government, not the state governments?

Not entirely. While the original Constitution was designed to be a way to constrain the power of federal officials, the Founders also included express restrictions on the power of the states. One of those restrictions was "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Did the Minnesota redemption law impair the loan contract between the building and loan association and the Blaisdells? It would seem rather obvious that it did.

But in a 5-4 decision, the Supreme Court held otherwise. How did the majority reconcile the law with the Constitution?

Recall the police-powers doctrine, which held that the states had the traditional powers of a sovereign to provide for the health, safety, and welfare of the people. The Blaisdells argued, and indeed the Minnesota Supreme Court had held, that grave emergencies enabled the state to exercise its police powers in emergency ways. Since the Great Depression was obviously an emergency, the state could enact the redemption law as part of its police powers.

But what happens when an exercise of the police powers contradicts an express prohibition in the Constitution, which is supposed to be the supreme law of the land, trumping both state legislatures and state courts?

That was the issue that confronted the U.S. Supreme Court in *Blaisdell*.

Writing for the majority, Chief Justice Charles Evans Hughes set forth the applicable principles:

“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.”

What Hughes was saying was that when it comes to the powers of government, emergency is irrelevant. The only important inquiry is: Does the power exist or does it not exist? If it doesn't exist, then it can't be exercised, emergency or no emergency.

So, since it's clear that the Constitution prohibited the states from passing laws impairing contracts, how could Chief Justice Hughes and four other justices uphold the constitutionality of the redemption law?

Hughes continued,

“While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. . . .

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

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

“It is manifest from this review of our 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. . . . Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected,

and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

So there you have it. In the old horse-and-buggy era, the individual and his freedom were supreme but now in the new modern era, the collective interests of “society” would have to prevail. And society could no longer be bound by such quaint notions of constitutional limitations on state power, especially not during emergencies and especially not when the “good of all” depends on state action.

Sutherland’s dissent

Now compare the reasoning of the majority with that of the dissent, whose opinion was written by Justice Sutherland, who began by setting forth the significance of the Court’s holding:

“Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.”

Sutherland then stated the obvious with respect to constitutional provisions:

“A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now.”

The dissenters then proceeded to point out that the Founders intended constitutional restraints to remain in effect not only during normal times but also — perhaps especially — during emergencies. For it is during emergencies that public officials are most likely to take away the rights and freedoms of the people and when the people are most likely to willingly comply. Sutherland quoted from the case of *Ex parte Milligan* (1866), which involved President Lincoln’s unconstitutional jailing of Americans during the crisis of the Civil War:

“Those great and good men [the Framers] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism....”

The dissenters in *Blaisdell* then proceeded to explain the rationale behind the contract-impairment clause in the Constitution. They pointed out that after the Revolution and during the period of the Articles of Confederation the American people were suffering tremendous economic hardships. Sutherland described the response to that suffering:

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

That remedy was the dissolution of the Articles of Confederation and the formation of the federal government, a government whose powers would be divided and whose powers, both at the federal and state level, would be restricted and limited. Because of what had happened under the Articles of Confederation, those express constitutional limitations included a prohibition against the impairment of contracts. It was that constitutional restriction that the Supreme Court effectively ruled could be ignored during the “modern era” of grave economic emergencies and when the “good of all” depended on it.

Referring to the Great Depression, Sutherland pointed out,

“The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned, and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.”

Sutherland then skewered the “logic” of the majority opinion:

“The opinion concedes that emergency does not create power, or increase power granted, or remove or diminish restrictions on power granted or reserved. It then proceeds to say, however, that, while emergency does not create power, it may furnish the occasion for the exercise of power. I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion for diminishing it, and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied.”

Nevertheless American statists and collectivists won the *Blaisdell* case, which helped to open the floodgates on laws, rules, and regulations at the state level governing economic activity in America.

In the meantime, their leader, Franklin Roosevelt, was leading their charge on a national level. The battle there, when it reached the Supreme Court, had much more far-reaching consequences for the American people.

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