Rethinking *Blaisdell*:
Foregrounding Debtors’ Movements and Deemphasizing Doctrine

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**ABSTRACT**

In the landmark case *Home Building and Loan Association v. Blaisdell* (1934), the Supreme Court upheld a state-level debt-relief statute that was quite similar to those it had long deemed to violate the Contracts Clause. The dissent even argued that the Contracts Clause was written precisely to prohibit this type of state legislation. Rather than seeking to understand or characterize this doctrinal shift, as most work on *Blaisdell* has done, this article argues that, whatever its effect on doctrine, this Supreme Court ruling changed very little on the ground. The article both highlights and explains the extraordinarily longstanding mismatch between Contracts Clause doctrine and state legislative practice that preceded this ruling, and argues that the majority opinion in *Blaisdell* recapitulated debtors’ very old arguments about states’ authority in economic emergencies. Whatever *Blaisdell* meant as a matter of doctrine, therefore, we should also understand this case as evidence of a remarkably durable, state-level commitment to protecting debtors from the potentially ruinous consequences of private economic bargains.
On February 23rd of 1933, Minnesota’s governor, Floyd B. Olson addressed thousands of angry farmers from the steps of the state capitol. Citing the economic emergency and the mounting threat of armed resistance to foreclosure sales, Olson announced a moratorium on mortgage foreclosures until May 1st of that year. He declared: “if the legislature... does not make ample provision for the sufferers in this State... I shall invoke the powers that I hold. I shall declare martial law.”¹ This executive proclamation, coupled with increasing pressure from the farmers that supported it, prompted the legislature to pass a law validating all postponements made in compliance with the governor’s moratorium and authorizing sheriffs to adjourn foreclosure sales until May 1st. It allowed local courts to extend the time available to borrowers to repay their mortgage debts, though borrowers who received this relief were required to pay a reasonable part of the rental value of the property while they remained in possession. The constitutionality of this mortgage moratorium would become the subject of the 1934 Supreme Court case, *Home Building & Loan Association v. Blaisdell.*²

The Court upheld Minnesota’s relief law, and its opinion hinged on the meaning of the Contracts clause of the Constitution, which prevents states from “impairing the obligations of contract.” By the Great Depression, it was already clear that states possessed the constitutional authority to regulate in ways that would affect contracting. Beginning in 1827, the Supreme Court determined that the Constitution did allow states to regulate the terms on which people could forge private contracts. In fact, it asserted that the states would never have ratified the Constitution if they had understood it to deprive them of this power. When they entered the constitutional compact, in other

¹ Quoted in (Prosser 1933, 355).
² *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934)
words, states must have reserved the power to regulate in ways that affected private contracting. In the decades that followed this declaration, the Supreme Court affirmed that the states possessed at least some authority to regulate private contracts if those contracts affected public order and welfare, and it formalized this understanding by classifying all such legitimate regulatory powers as “states’ reserved police powers” (Olken 1993, 543).

Blaisdell is generally treated as a landmark case, one that signaled a dramatic transformation in law. In deciding that Minnesota was allowed to intervene in existing debt contracts, Blaisdell dispensed with a well-established doctrinal constraint on state governments (Mason and Stephenson 2015, 304-5). Although the Supreme Court had

3 “Let anyone turn his eye back to the time when this grant was made and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state, so universally sustained in its reasonable exercise by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt and urged to enterprise by the activity of mind that is generated by revolutions and free governments. I will with confidence affirm that the Constitution had never been adopted had it then been imagined that this question would ever have been made or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that Constitution was about to give existence.” Ogden v. Saunders, 25 U.S. 213 (1827), 276.

4 Although this paper does not weigh in on this question, there is some debate about Blaisdell’s doctrinal significance. Many observers have followed in Southerland’s footsteps, emphasized the doctrinal change that the majority decision brought about (Kahan 2004, Sunstein 1987). Some have even argued that Blaisdell de-toothed the Contracts Clause, rendering it largely irrelevant. Richard Epstein, for instance, claims that “Blaisdell trumpeted a false liberation from the constitutional text that has paved the way for massive government intervention” (Epstein 1984, 738). Others have questioned Blaisdell’s doctrinal significance. David Forte, for instance, argues that “Chief Justice Hughes and his majority did not kill or even mortally wound the Contract Clause in Blaisdell” (Forte 2018). Forte points to a string of rulings following Blaisdell to argue that after this case, the New-Deal Court immediately and dramatically limited its scope. These include: W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); W.B. Worthen v. Kavanaugh 295 U.S. 56 (1935); A.L.A. Schechter Poultry Corp. v. United States 295 U.S. 495 (1935); Treigle v. Acme Homestead Ass’n 297 U.S. 189 (1936). Samuel Olken has argued that Blaisdell was not a major turning point by emphasizing the doctrinal inroads into the Contracts Clause that existed long before Blaisdell (Olken 1993).
allowed for a great deal of state regulation of contracts well before *Blaisdell* (Olken 1993), the kind of emergency debt relief law that Minnesota passed (often known as a “stay law”) had long been the paradigmatic example of a Contracts-clause violation. Justice Sutherland’s dissent in *Blaisdell* emphasized the majority’s departure from this settled meaning of the Contracts Clause as it applied to debt relief laws. In his dissent, he accused the majority of turning its back on the long-accepted meaning of the Contracts Clause: “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.”

This paper argues that no matter what effect it had on the federal doctrine or on federal constitutional interpretation in general, *Blaisdell* changed very little about state law. Even in the face of the judicial nullifications that preceded *Blaisdell*, the state-level practice of passing debt-relief laws had proved quite durable. Indeed, states’ legal protection of debtors had been a standard feature of nineteenth-century politics. Mobilized debtors consistently demanded legislative relief during economic crises, and state legislatures so frequently complied with these demands, that the federal doctrine invalidating states’ emergency relief laws had never managed to stamp out states’ practice of passing them. From this vantage, the Court’s acceptance of Minnesota’s statute in *Blaisdell* comes to seem both like a turning point in doctrine and a judicial acquiescence to the way states had always behaved.

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5 Southerland reiterated that the Constitution’s drafters had intended the Contracts clause to ban states’ emergency relief legislation. “A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress.” *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), 453.
Perhaps one of the reasons that federal doctrine has received so more emphasis than states’ legislative practices is that the politics of sub-national debt relief are difficult study, especially over long time periods. State codes that were compiled somewhat sporadically throughout the nineteenth century, and states’ relief legislation was typically designed to be temporary, and often didn’t appear in the. Since neither the U.S. Supreme Court nor state high courts maintain separate records of their exercise of judicial review, it is also difficult to track the fate of these laws as they were subjected to constitutional scrutiny (Whittington 2015). Using state session laws for every existing state, I created an original dataset of states’ emergency-relief legislation passed between 1819 and 1934 as well as an original dataset of state high court cases reviewing these state statutes.

Drawing on this original dataset, along with local newspapers from this period, this article focuses on the existence of an extraordinarily longstanding mismatch between Contracts Clause doctrine and state legislative practice. It argues that the regional politics of debt made it particularly easy for debtors to convince their state legislatures to enact relief laws, while at the same time, the delays associated with judicial review muted the threat of judicial nullification. The combination left state legislatures relatively undeterred from passing relief legislation, though legislatures did strive to pass laws that would stand a chance of surviving judicial review. As a result of these dynamics, debtors were able to secure protection from their state governments, despite the fact that, until Blaisdell was decided in 1934, those protections stood on very shaky constitutional ground.

Blaisdell is generally, and quite correctly, discussed as part of the larger New-Deal transformation in constitutional meanings, during which New Dealers famously
struggled to accommodate the constraints of the U.S. Constitution to the economic realities of the twentieth century’s Great Depression (Levinson 2005, White 2000). Much of the scholarship on Blaisdell, therefore, emphasizes the courts’ long history of invalidating emergency relief statutes before this ruling. In their comprehensive and valuable monograph on Blaisdell, for instance, As John A. Fliter and Derek Hoff note that “Every remedy proposed by the Minnesota Legislature in 1933…had at one point been held unconstitutional by state or federal courts,” and that “All of these precedents assumed a forceful Contract Clause” (Fliter and Hoff 2012, 36).

By emphasizing the Court’s vigorous defense of the Contracts Clause before Blaisdell, the scholarly literature can create the impression that the Supreme Court and the Constitution actually governed states’ intervention in contracts between debtors and creditors. For instance, Fliter and Hoff offer a rich history of the political and constitutional controversies surrounding Blaisdell, and certainly note the long history of state-level debt relief. Yet even they approvingly cite a 1934 study of Blaisdell, asserting that, the “wreckage of legislative ‘relief’” in the courts attested to the fact that “heretofore, at least, the contracts clause had withstood the attack” from the states (Prosser 1933, 358 / cited in Fliter, 2012 ). This emphasis on a forceful Contracts Clause,

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6 For example, Douglas W. Kmiec and John O. McGinnis report that “the history of the Contract Clause in the Supreme Court can be divided into four periods. In the first period, which lasted through the late 1880’s, the Supreme Court vigorously applied the Clause to strike down state legislation that retrospectively impaired or altered contractual rights… In the third period, which began in 1934 with the Court's decision in Home Building & Loan Association v. Blaisdell, … the Contract Clause was rendered a virtual nullity” (Kmiec and John O. McGinnis 1987, 534).

7 This is especially true of those who argue that Blaisdell eviscerated a once-powerful Contracts Clause. Richard Epstein, for instance, declares that “Blaisdell trumpeted a false liberation from the constitutional text that has paved the way for massive government intervention that undermines the security of private transactions” (Epstein 1984, 538).
vigorously defended from the states by a string of Supreme Court precedents, tends to obscure the fact that debtors and state legislatures had, long before Blaisdell, mounted a successful resistance to federal Contracts-Clause doctrine.

This article offers a new perspective on Blaisdell by foregrounding the remarkable success of debtors’ movements in securing emergency relief laws throughout the nineteenth and early twentieth centuries, even in the face of judicial hostility. Rather than investigating Blaisdell as a doctrinal event, this article emphasizes how little debtors or their state legislatures were cowed by the judiciary’s long-running reproach. On this view, it was really the state practice of intervening in private contracts that “withstood attack” from Contracts Clause, not the other way around. If we shift our focus from jurisprudence to legislative history, then, we can see that, as a matter of actual practice, states’ ability to modify existing contracts between debtor and creditor that survived the Contracts Clause. Even as the federal doctrine developed to protect private contracts, states developed a tradition of intervening in these bargains. Most studies of Blaisdell ask why the Court relaxed its accustomed opposition to emergency debt relief in this case. However, a focus on the long-term success of debtors’ demands, suggests a different question: why, before this famous ruling, were debtors able to secure so many constitutionally suspect relief laws?

The first section of this article describes the longstanding mismatch between federal Contracts Clause doctrine and states’ debt-relief practices, highlighting the persistent and widespread state practice of passing relief laws of questionable constitutionality. The second section of this article highlights several sources of debtors’ legislative clout, explaining why debtors (i.e. insolvent people) were able to shape the
law in their favor despite federal doctrine that was largely at odds with their aims. The final section of the article argues that the majority opinion in *Blaisdell* recapitulated debtors’ very old arguments about states’ authority in economic emergencies. Whatever *Blaisdell* meant as a matter of doctrine, therefore, we should also understand this case as evidence of a remarkably durable, state-level commitment to protecting debtors from the potentially ruinous consequences of private economic bargains.

Section 1: THE MISMATCH BETWEEN DOCTRINE AND PRACTICE

The U.S. Constitution’s Contracts Clause was, at least in part, a response to the framers’ fear that debtors would use state legislatures to deprive creditors of their property—an elite attempt to stop state legislatures from intervening in existing contracts on debtors’ behalf. Many of the Federalists, those who favored the creation of a new constitution and strong central government, feared that the states’ already-frequent interventions between debtor and creditor would inhibit the growth of national markets. The specter of revolutionary-era debtors’ movements figured prominently in the Constitutional convention (Beaumont 2014, 74-85). Advocates of the new Constitution pointed to Shays’ Rebellion (a violent opposition to debt collection in Western Massachusetts), warning that each state had “its Shays, who either with their pens—or tongues—or offices—[were] endeavoring to effect what Shays attempted in vain with his sword” (Alexander 1990, 180). Under the new federal Constitution, the national government would take on responsibility for debtor-creditor relations and states would cease to intervene in existing debt contracts. Thus, the Contracts Clause delineated a clear
boundary between the authority of these two layers of government, and established a new constraint on state legislatures (Ely 2016a, 14).

From the outset, courts interpreted this new Constitutional provision as a constraint on the regulatory powers of state governments. As James Ely notes in his comprehensive history of the Contracts Clause, this provision “rapidly became a primary vehicle for federal review of state legislation. . .[and was] one of the most litigated provisions of the Constitution throughout the nineteenth century”(Ely 2016a, 1). As early as 1819, the Supreme Court declared that the Contracts Clause was a ban on state governments’ provision of emergency debt relief (Table 1). This opinion in Sturges v. Crowninshield (1819), cited the constitutional framers’ animosity toward states’ retrospective debt relief measures, and noted that one Federalist aim in designing this constitutional provision had almost certainly been to limit the state practice of relieving debtors by modifying contracts into which debtors and creditors had already entered. By the late nineteenth century, the Supreme Court began to allow more state regulation of private economic activities, including contracts. Yet, the Court reiterated the constitutional prohibition on retrospective forms of debt relief even into the twentieth century. Because emergency relief was designed to assist debtors suffering under existing contracts, it was typically backward-looking, or retrospective, operation, and it was this retrospective operation that rendered these emergency relief measures constitutionally suspect.

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8 Sturges v. Crowninshield, 17 U.S. 4 Wheat. 122 (1819), 205-6
Doctrinally speaking, the Contracts Clause had clearly curtailed states’ authority to carry out retrospective debt relief, but this constraint did little to eliminate the state practice of intervening between debtors and creditors. State legislatures regularly acquiesced to debtors’ demands for emergency relief, passing retrospective relief laws with remarkable frequency. Between *Sturges* (1819) and *Blaisdell* (1934), state legislatures either passed or renewed such laws 184 distinct times (Table 1). Debtors frequently pointed to the passage of previous debt relief laws to argue that legislatures should enact new ones. For instance, one Minnesota stay-law advocate in 1878 asked: “Would it not be just and expedient for the State Legislature to enact a stay-law? This was done a few years ago when the times were not nearly so hard as they are now, and that legislation worked most beneficially for all concerned.”

Several decades later, a Texas newspaper made the same observation, and asked the same question “A stay law in many states is humanely enacted in times of stringency and distress like these,” and asked “Why not have such in Texas?” These laws were, in other words, a standard feature of nineteenth-century state governance.

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Table 1: Retrospective Relief Laws Enacted by State Legislatures

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Laws enacted/renewed</th>
<th>States that Passed Relief Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>1819-1850</td>
<td>54</td>
<td>AL, FL, GA, IL, IN, KY, LA, MD, MI, MS, MO, NC, OH, PA, RI, TN, VT, VA</td>
</tr>
<tr>
<td>1850-1875</td>
<td>85</td>
<td>AL, CA, FL, GA, IL, IA, KY, LA, MD, MN, MS, MO, MT, NE, NC, OH, PA, SC, TN, TX, VA, WV, WI</td>
</tr>
<tr>
<td>1875-1900</td>
<td>14</td>
<td>ID, KS, KY, MA, MN, NV, NJ, NY, PA, VA, WI, WY</td>
</tr>
<tr>
<td>1900-1925</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>1925-1934</td>
<td>29</td>
<td>AZ, AR, CA, DE, ID, IL, IA, KS, MI, MN, MT, NE, NH, NJ, NY, NC, ND, OH, OK, OR, PA, SC, SD, TX, VT, WI</td>
</tr>
</tbody>
</table>

These relief measures took the form of “stay laws”, staying the execution of judgments against debtors (or particular classes of debtors); installment laws, extending the period of time over which debts could be repaid; appraisal laws, requiring appraisals of debtor’s property and forbidding its sale at too great a discount from their former or true value; and laws requiring creditors to accept payment in depreciated currency or other commodities. State legislatures also passed “redemption laws,” extending the period available to debtors to buy back their mortgaged property once it had entered foreclosure, laws that abrogated the gold clauses in private contracts, and some even

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12 All of the confederate states (except TN, which passed its stay law right before seceding) passed at least one retrospective relief law during this period. Although the Constitution of the Confederate States had its own Contracts Clause, worded identically to the Clause in the U.S. Constitution, it is important to note that Confederate States did not feel themselves bound by the U.S. Constitution at this point, and that the stay laws they passed in this period are not, therefore, evidence of the same kind of gap between federal doctrine and state practice. I have nonetheless included these laws here to demonstrate how widespread, and even routine, the practice of passing retrospective relief laws really was. As Table 1 demonstrates, Southern states passed emergency relief laws not only in rebellion, but also before and after the Civil War.

13 Only includes states that passed a relief statute before Blaisdell was decided (January, 1934).
closed their courts temporarily to prevent them from issuing judgments against debtors. States combined these types of protections in different ways, returning to them in successive economic crises (Coleman 1999). Forty-two of the 48 states that existed by the end of this period had passed some form of retrospective debt relief law at least once before Blaisdell.¹⁴

What can we make of this enduring state practice of passing retrospective relief laws of dubious constitutionality? On one account, frequently offered by the opponents of such statutes, these relief measures represented lawlessness, the mob’s triumph over the Constitution.¹⁵ Indeed, the indebted farmers who so often demanded these laws sometimes resorted to violence as a means of resisting debt collection, even as they also pursued protective legislation to ameliorate the effects of crises. When the leader of a local chapter of the Kansas Farmers’ Alliance was unable to pay his mortgage and

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¹⁴ Using Hein Online’s Session Laws Library, a research assistant and I examined the session laws of every existing state legislature after national economic crises in the years: 1819, 1837, 1857, 1859, 1873, 1893, 1907, 1930. For each state in existence at the time of each crisis, we searched for retrospective relief measures during the first year of the crisis and for two subsequent years. We also performed Google searches in the form of “State Name + Economic Crisis + ‘Stay Law’” and “State Name + Economic Crisis + ‘Debt Relief’” for each state during each crisis. This method allowed us to locate debt relief laws in both primary and secondary sources that were not included in the session laws we examined. As a final check, we searched the phrase “stay law” in the Newspapers.com database for all years between 1819-1934.

¹⁵ For instance, one Philadelphia paper reported on the passage of stay law this way: “The closing days of the legislature were so conspicuously clouded by the disregard of law by the lawmakers themselves…” (“The stay law” The Times, Philadelphia, Pennsylvania, Mar 29, 1877, Page 30). During the Great Depression, the Chicago Daily Tribune leveled a similar accusation at state legislatures that were passing relief laws: “The mistakes which are being made now by violating the constitution were being made [at the Founding], and the constitution was to establish the supremacy of just law and to protect the individual in his right to own property, to have contracts respected, to establish the nation’s credit, to guarantee essential liberties as unassailable, and…put government under law and beyond the reach of the usurper or the mob.” (“Why the American Constitution Was Written” Chicago Daily Tribune, Aug 19, 1934, pg. 14).
consequently lost his farm, for instance, local farmers gathered at the farm, forcibly removed the new tenant, and placed the original owner back in possession. Some members of the Farmers’ Alliance also resisted foreclosure by physically disrupting foreclosure sales, and some Alliance members promised to resist the sale of mortgaged property by force until the legislature passed such a law. Some of the relief law’s advocates even explicitly advocated the passage of a law whether or not it could withstand judicial review. As one pro-debtor newspaper in Kansas urged “Enact this stay law. . .if in the opinion of the supreme court is should prove unconstitutional, no harm will have been done. Why is there so much fear of an enactment that might prove unconstitutional? Legislatures have passed unconstitutional laws before.”

Despite the explicit rejection of constitutional constraints that surfaced in some campaigns for debt relief, the advocates of emergency relief did not generally announce that they planned to ignore the Contracts Clause or the Supreme Court’s interpretation of it. On the contrary, they claimed that they could pass retrospective relief laws that would not violate the Constitution. This hope was grounded in a doctrinal ambiguity. Although the Supreme Court’s consistently nullified the retrospective relief statutes it reviewed over the course of the nineteenth century, it did develop a somewhat enigmatic doctrine permitting states to make certain kinds of adjustments to the laws of debt collection. Beginning with its 1819 ruling in *Sturges v. Crowninshield*, the Court distinguished

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16 “Bitter Feeling Against Ingalls,” *St. Louis Post-Dispatch*, St. Louis, Missouri. Dec 21, 1890. Page 9
between impairing the obligations of a contract (which was clearly unconstitutional) and merely affecting the remedies available to enforce it (which was constitutionally acceptable).

Though courts’ determinations about the constitutionality of retrospective relief hinged on the distinction between obligations and remedies, they continued to struggle in identifying the difference between them. As James Ely explains in his constitutional history of the Contracts Clause “Courts continued to wrestle with the baffling inquiry of what the ‘obligation of contract’ was and how the obligation differed from the remedy for nonperformance. Both courts and commentators expressed frustration with this inquiry” (Ely 2016a, 62). Because this doctrinal distinction proved particularly ambiguous and indeterminate, the proponents of relief laws often declared that it was possible to craft a retrospective statute that courts would deem to be a permissible alteration of creditors’ remedies, rather than an unconstitutional impairment of contractual obligations, and many state legislatures seem to have tried to maximize the chances that their debt relief laws would fall on the right side of the rights/remedies distinction. For instance, after the judiciary committee of the 1890 Kansas House of Representatives determined that a stay law would likely be declared unconstitutional, debtors began to urge the passage of a redemption law instead, arguing that a redemption was more likely than a stay law to pass constitutional muster. One advocate of this redemption law explained “In passing any bill the one that will stand the test of the courts the best should be passed.”

Indeed, some state high courts did uphold debt relief statutes on the grounds that these laws were merely adjustments to the remedies available to creditors. State high

courts were twice as likely strike down as they were to uphold relief laws, (and even elected judges seemed quite willing to strike down these popular statutes), but that did mean that about one-third of the state high court cases reviewing retrospective debt relief (13 of the 25 cases) survived judicial review by their state judiciary (See Table 2). Two more cases (not included in Table 2) held the laws constitutional in part and unconstitutional in part. Even as it demonstrates a pronounced judicial skepticism of retrospective debt relief, this record demonstrates that there was reason to hope relief laws might survive review in state court.

Table 2: State High Court Rulings by Judiciary Type (1819-1934)

<table>
<thead>
<tr>
<th></th>
<th>Elected High Court</th>
<th>Appointed High Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relief Laws Nullified</td>
<td>15</td>
<td>10</td>
<td>25</td>
</tr>
<tr>
<td>Relief Laws Upheld</td>
<td>6</td>
<td>7</td>
<td>13</td>
</tr>
</tbody>
</table>

Proponents of relief looked to other states’ high courts to determine what kinds of laws might be considered constitutional by their own, and sometimes expressed the hope that in light of these promising examples, their courts would be more sympathetic to these statutes than they had proven in past cases. In 1873, one advocate of a Missouri stay

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20 This table excludes two cases: *Ex parte Pollard*, 40 Ala. 77 (1866) and *State ex rel. Roth, v. Waterfield*, 167 Okla. 209 (1933). Both cases held that a retrospective debt relief law was part constitutional and part unconstitutional. Both states had elected judiciaries at the time of these decisions.

21 This dataset of state high court cases was compiled using the set of retrospective debt relief laws described in Table 1, and searching LexisNexis for a high court ruling on each law. These searches were restricted to cases in relevant state for the year in which the law was passed and five years afterwards, for a total of six years, using the following keyword search term: “‘obligation of contract’ OR ‘obligation of contracts’ OR ‘obligation of the contract’ OR ‘obligation of the contracts’ OR ‘obligation of a contract’ AND debt.” From these results, it was possible to identify cases reviewing emergency debt relief laws. If secondary sources mentioned cases not identified through the LexisNexis search, they were added to the dataset.
law reasoned that, since other state courts had upheld relief legislation, Missouri’s court might reverse itself with reference to that state’s new stay law. He explained, “A former Supreme Court of this State held that ‘a stay of execution law’ was in conflict with the Constitution, but we believe that the present Supreme Court would review and reverse that ruling.”

Of course, state legislatures not only looked to other state courts in their attempts to draft laws that would pass constitutional muster, but relied on their own courts’ guidance in their attempts to draft statutes that would survive judicial scrutiny. Minnesota provides an excellent example. In 1862, the state legislature enacted a stay law, which suspended debt-collection suits, actions, and judicial proceedings “during the continuance of the rebellion” for the use or benefit of all persons supporting the Confederacy. Later that year, the state high court struck down the stay law as a violation Contracts Clause, and explained that “suspending of the right for so indefinite a period…is equivalent to denying it altogether.”

In 1877, Minnesota passed another retrospective debt relief law, but this law allowed only for a stay of six months. During the Great Depression, the Minnesota legislature passed another stay law (this one would become the subject of Blaisdell), and this time architects of the law worked with the state’s Attorney General to maximize the chances that the law they drafted would survive judicial review. They added features to protect the financial interests of creditors, establishing that they law would expire in 1935, and requiring that debtors who took advantage of the redemption law to stay in their homes nonetheless pay a fair market rent to their creditors. When the Court upheld Minnesota’s twentieth-century relief law, it did not give rise to

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23 *Davis v. Pierse et al.*, 7 Minn. 13 (1862).
unprecedented state intervention in debt contracts. In fact, “by the time of the courts' decision twenty-two of the twenty-five farm foreclosure moratoria had been enacted” (Alston 1984, 446). Yet, this ruling did convince several Depression-era legislatures to model their relief laws this Minnesota statute (Skilton 1943, 67).

Each time a state legislature either ignored doctrine altogether or passed a law of dubious, but possible, constitutionality, it was pushing up against its constitutional constraints. Even though state legislatures modified their statutes in response to doctrine, it is critical they never simply stopped passing provocative retrospective relief laws. Instead, they continued to put pressure on Supreme Court doctrine by passing laws that might squeak through judicial review, but that searched for the outer boundaries of their constitutional authority, time and again risking the determination that they had overstepped. This relationship between constitutional courts and legislatures is certainly familiar from other policy domains. However, the long duration of debtors’ state-level pressure on federal constitutional doctrine is remarkable.

For well over a century, debtors continued to demand that state governments protect them from the consequences of contracts that would ruin them, and state legislatures continued to comply, despite fairly clear indications that they were erecting these laws on shaky constitutional ground. As one political scientist commented in 1933:

The imposing number of the remedial measures enacted and introduced in legislatures convened during the present year indicates unmistakably that a concerted effort has again been made to relieve the large number of citizens who, by reason of a depression, have involuntarily become members of the debtor class. Such movements are not new to the United
States… But what is even more impressive than the recurrence of such a movement is the fact that the legislative devices now being employed to relieve our debtors are substantially identical with those invented and utilized in previous economic emergencies. (Small 1933)

This was not an isolated flurry of resistance to a particular ruling, nor a recalcitrant region of the country that could not be brought into line with the others, but a routine, widespread state response to economic emergencies—one that predated (and arguably necessitated) the Contracts Clause itself. The result was a sizable and enduring tension between federal doctrine and state legislative practice.

In *Blaisdell* the Court formally endorsed an authority to protect indebted citizens that states had long claimed for themselves and had repeatedly exercised. Even when relief measures did not stand a strong chance of withstanding a constitutional challenge, states had still enacted them. Long before *Blaisdell*, then, the states’ habitual passage of emergency debt relief laws had established their practical ability (if not their constitutional authority) to intervene between debtors and creditors.

Section 2: SOURCES OF DEBTORS’ LEGISLATIVE CLOUT

It is somewhat surprising that debtors possessed the political influence to secure so many relief laws, especially since they stood such a strong chance of being overturned in court. Affluence and influence tend to be tightly linked in American politics (Gilens 2012), and insolvent debtors (by definition) have few monetary resources to devote to politics. Indeed, debtors’ movements often emphasized their modest means, their small homes, and their humble farms.
The United States’ federal structure offers one explanation for debtors’ success in their state legislatures: their creditors were often located in other states. Especially, as the nineteenth century wore on, private debt was strongly associated with farming and therefore with agrarian states. To be sure, Northeastern states, even those containing large financial centers (like Boston, New York, and Philadelphia) did sometimes pass retrospective relief laws. New York passed an emergency relief law in 1877 and another in 1933, and Pennsylvania, with its large and influential agrarian sector, passed eleven. In 1878, Massachusetts passed a rather unusual “stay law” that allowed the boards of commissioners of savings banks to limit payments to depositors if they judged such an action necessary to protect the depositors’ “security and welfare.” Yet, for some periods of American history, emergency relief laws were a largely sectional phenomenon.

At the end of the nineteenth century, in particular, it was widely understood that eastern banks and private citizens of eastern states held the mortgages on western farms. One Kansas newspaper very colorfully explained:

*The west is the debtor—the east the creditor.* . . the west is trying to pay off its debt. But while it wrestles in the very throes of a life and death struggle, the placid east seems quietly to be tightening the rope about our necks. . . the young giant of the west struggles bravely on. . . only to be met at every glance by the unrelenting unpitying, and contemptuous glance of the gold worshippers of the east.” [emphasis mine] 24

Given this political economy, it is easy to understand why western state legislatures were inclined to pass laws that redistributed money from creditors to debtors. In fact, in the last

decade of the nineteenth century, only Western state legislatures debated, passed, or renewed these laws (see Figure 1).

A similar pattern occurred during the Civil War and its immediate aftermath, when debtors of Southern states typically owed money to creditors in the North. In these years, emergency relief legislation was largely restricted to the South and West (See Figure 2).
Southern state legislatures passed retrospective debt relief laws both during and immediately after the Civil War (Figure 2). These laws were generally designed to protect the state’s debtors from out-of-state creditors, and in this way, were quite similar to relief laws passed in the wake of the Revolutionary War (Ely 2016b). For instance, one article, originally published in the *New Orleans Star*, and reprinted in a Missouri newspaper, was quite explicit in its explanation that Southern stay laws were aimed at Northern creditors: “A stay law will be avoided as long as possible; it would be avoided entirely if Northern creditors would use the same wise forbearance that home creditors are now manifesting.”  

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national arena, but where (and when) major creditors lived in different states from debtors, debtors were able to exert significant power in their state legislatures. Of course, this was exactly the problem that the Federalists had anticipated when they drafted the Contracts Clause of the U.S. Constitution. Yet, the practice of passing emergency relief laws proved impossible to eradicate.

Not only did the federal structure of the U.S. facilitate the enactment of relief laws, but the institutional capacities of courts and legislatures also rendered this practice durable. Emergency debt-relief laws were typically designed to be fast-acting and temporary, and the speed with which they appeared and operated proved too much for the relatively slow process of judicial review to counter. Appeal to federal courts could be a time-consuming prospect. Relief laws’ advocates emphasized that debtors needed only temporary protection from their creditors, and that once the existing emergency had abated, farmers would again be able to function normally with respect to their contracts.26 As a result, the fact that courts were likely to nullify these laws a year or two after their passage was of relatively little consequence to the debtors who demanded them. As one critic of these relief laws complained (even as early as 1829), “Until these statutes have been declared unconstitutional by some competent tribunal, their operation is the same as if their validity were unimpeachable. . . . And new statutes can be passed much faster than the old ones can be declared unconstitutional.”27

26 As one Missouri newspaper explained in 1873, for instance, “All we ask is that a short breathing spell be allowed the people, until the financial tempest shall have passed, and until farmers, and others, shall have a reasonable chance to move their surplus to reasonable markets.” The Sedalia Democrat, Sedalia Missouri. November 17, 1873. Page 2.

Some advocates of these laws were even explicit about the fact that state legislatures could exploit the delays inherent in judicial proceedings; they urged legislatures to pass stay laws so that they could operate in the period before courts struck them down. The turn of the nineteenth-century, Kansas witnessed a particularly heated controversy over debt relief legislation. The constitutionality of this legislation figured prominently in the debate. Legal experts generally expressed skepticism about whether a retrospective relief law could be constitutional, but some advocates noted that even an unconstitutional law could still offer relief. For instance, one explained that even, “If [the law] be unconstitutional the time required in testing it is sufficient to prevent the creditor class from ruining the debtor class and then themselves by the same means.”28 Another hoped that the economic emergency would end before the courts could quash the law’s operation: “It is not sure that even that [relief law] would stand the test of the courts but possibly the hard times might be over before a decision was rendered.”29 Yet another argued for the moral need to passing a law that would operate until the court struck it down: “Such a law then … should be operative until reversed by the Supreme Court. The debtor has generally been distressed by a combination of circumstances beyond his control. The Constitution assumes to protect the interests of all classes…”30

Not only were courts institutionally ill-equipped to quash legislatures’ provision of emergency debt relief, but relief statutes also required very little capacity for state legislatures to enact and implement. In fact, emergency debt relief policies were a rare

instance in which political intervention to protect vulnerable citizens required less, rather than more, governmental activity. The emergency relief policies that debtors demanded required neither money nor administrative state-building from their legislators, merely votes. These laws were, after all, generally changes in the rules governing debt repayment, and were often simply suspensions of the legal processes for collection. Debtors even tended to oppose the creation of new judgeships on the grounds that any expansion in the state’s judicial capacity would speed, rather than slow, the issuance of judgments against them. Because they did not require the creation of a new infrastructure or state capacities, these stoppages could be established relatively quickly, even in the midst of a crisis. This kind of protective policy was therefore not only particularly challenging for courts to eliminate, but also especially easy for state legislatures to put into effect.

In addition to the importance of federalism and the judicial incapacity to deal with temporary laws, the politics surrounding emergency debt relief were, to be sure, shaped by economic emergencies themselves. Emergencies consistently mobilized debtors to demand protection from the state in organized movements. The (long) nineteenth-century economy was characterized by periods of deep and potentially ruinous deflation, during which debtors clamored for relief from the terms of their contracts. America’s normal debt relief practices were built and institutionalized through this series of emergencies. Retrospective debt relief laws became a normal response to these crises, not an

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This exploitation of the lag between a law’s enactment and a court’s constitutional review was not unique to state-level politics. Ronen Shamir has demonstrated that it also characterized the approach of the New Dealers (generally elite lawyers) who drafted, administered, and defended the National Industrial Recovery Act. Like state-level debtors’ advocates, they knew that their policy did not fit easily within existing doctrinal frameworks, so they tried to delay judicial review of the statute (Shamir 1995, 32-3).
exceptional reaction to an unprecedented situation. It is important to remember that
nineteenth-century economic emergencies were not rare exceptions to normal politics. As
Kim Scheppele has argued, terms like emergency, panic, and crisis are often associated
with unprecedented, exceptional, or temporary situations, but emergency situations are
not departures from America’s normal constitutional practices. Instead, emergencies have
actually served as the building blocks of American constitutional practices (Scheppele
2005). Nowhere is this more true than in the area of debtor protections.

America’s economic panics created ideal conditions under which political
scientists would expect to find groups mobilized to secure legislative policies, by
concentrating the impact of these policies in both time and space. It is particularly easy to
generate support for a policy that will have a large and direct or “early-order” impact on
groups of citizens concentrated in a geographic area (Arnold 1990, 29), and these debt
crises were generally so severe that, within the geographic areas they affected, they
created large and mobilized constituencies for immediate relief. Scholars of Gilded-Age
economics, for instance, have demonstrated that foreclosures tended to be geographically
concentrated, and that even when foreclosure rates were relatively low, indebted farmers
would have been made aware of the danger of foreclosure through the experience of their
foreclosed-upon neighbors (Stock 1984, 95-6). Table 3 shows how widespread the
practice of passing these laws was in the wake of national economic crises, and how
enduring this state response to economic crises proved to be.32

32 It is important to note here that the way these data were collected limit the kinds of
inferences we can make from them. Because relief laws were identified primarily by
searching state session laws in the three-year window following national economic
emergencies (see note 14), we cannot use these data to gauge the effect of emergencies
on the probability of a relief law’s passage. The argument of this section is merely that
Table 3: Retrospective Relief laws passed in the wake of national economic crises

<table>
<thead>
<tr>
<th>Economic Crisis</th>
<th>Number of States that Passed at Least One Law</th>
<th>Percent of Existing States that Passed at Least One Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panic of 1819</td>
<td>10</td>
<td>41.7</td>
</tr>
<tr>
<td>Panic of 1837</td>
<td>3</td>
<td>11.5</td>
</tr>
<tr>
<td>Panic of 1857</td>
<td>7</td>
<td>21.2</td>
</tr>
<tr>
<td>Civil War</td>
<td>18</td>
<td>48.7</td>
</tr>
<tr>
<td>Panic of 1873</td>
<td>8</td>
<td>21.1</td>
</tr>
<tr>
<td>Panic of 1893</td>
<td>4</td>
<td>9.1</td>
</tr>
<tr>
<td>Panic of 1907</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Great Depression</td>
<td>28</td>
<td>58.3</td>
</tr>
</tbody>
</table>

After the panic of 1819, as ten (of the twenty-four existing) states passed debt-relief laws (Bolton and Rosenthal 2002, 1107-8). In his autobiography, a former U.S. Senator described the situation this way: “Stop laws, property laws, replevin laws, stay laws, loan office laws, the intervention of the Legislature between the creditor and the debtor – this was the business of the Legislatures in three-fourths of the states of the Union… DISTRESS, the universal cry of the people: RELIEF, the universal demand thundered at the doors of all legislatures, state and federal”(Benton 1854, 5-6). In Kentucky, which was particularly hard hit by the economic downturn, one member of the press predicted that the controversy over debt relief would escalate into violent conflict or civil war (Thies 2009).

Following the panic of 1837, Alabama and Illinois passed stay laws, and much as Kentucky had done in in the preceding decade, Virginia forced creditors to choose between repayment with depreciated bank notes or a delay in repayment. Ohio, Indiana,
Michigan, Mississippi and Illinois passed appraisal laws, barring the forced sale of property at prices too far below its appraised value (Rezneck 1953). State legislatures also extended the time available for redemption of mortgages (Warren 1935, 87-8).

The economic downturn of 1857 and the devastation of the Civil War again created mobilized constituencies of debtors devoted to securing relief legislation. Both during and after the war, states passed a slew of emergency relief laws. Some state legislatures even postponed the sessions of state courts, thereby preventing courts from issuing judgments against debtors (Thompson 2004, 17). Just as in earlier crises, local newspapers attested to the presence of concentrated groups of debtors who would benefit from an immediate stay of judicial proceedings against them. The *Brownlow’s Knoxville Whig*, for example, reported in 1865 that a stay law would “afford relief to the debtor class of the people, a class largely in the majority. Even one-half of the lands in Davidson County are at this day under levy of execution.” The paper warned that “Very soon, as the courts progress, the dockets of the courts in all the counties will exhibit the same sad condition of affairs.”

Economic emergencies remained a consistent feature of life throughout the rest of the nineteenth century, and these crises continued to galvanize debtor protest. In the 1870s, state-level campaigns for stay laws often linked their demands for state-level relief from the deflationary crises to their complaints about the gold standard. In fact, Populist politicians and newspapers argued that national deflationary policy necessitated state-level stay laws. In an article entitled “Silver and Gold and a Stay Law,” The *Austin Weekly Statesman* explained that if the national government persisted “in its policy of

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contraction and in this mad sacrifice of popular interests . . . it only remains for Texas to prevent the absolute ruin of the people by suspending the operation of laws for the collection of debts or to enact a law scaling debts.”

In the last quarter of the century, mortgage foreclosures became a particularly important issue for influential Populist organizations, like the Grange and the Farmers’ Alliance, particularly in the plains states. State chapters of these groups organized a great deal of their political action around economic emergencies and the foreclosures they caused. For instance, in response to two successive years of crop failures, the Kansas chapter of Farmers’ Alliance called on the governor to convene a special session of the legislature so that it might enact one, and made the enactment of a stay law a central plank of its 1890 platform. When that didn’t work, the Farmers’ Alliance elected its own slate of representatives to the state legislature, promising that one of its first legislative goals would be the passage of a relief statute, finally securing several relief laws in 1893.

The Great Depression generated another wave of debtor protest and of legislative response (See Table 4). These twentieth-century movements looked much like their predecessors, not only in their high degrees of organization and in the particulars of their legislative demands, but also in their threats of violent action. In Iowa, indebted farmers formed an organized network to disseminate news about foreclosure sales and, when necessary, to assemble to stop them. On several occasions, this group employed physical intimidation, suggesting at one point that they were willing to retaliate against judges

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who issued foreclosure decrees (Prescott 1933). The political backdrop to Minnesota’s mortgage foreclosure moratorium (the stay law that the Court would review in Blaisdell) also included widespread unrest, and fears of violent upheaval (Fliter and Hoff 2012, 49). These twentieth-century demands for relief were part of a very old tradition of debtor activism in times of economic emergency. The mobilizing effects of periodic emergencies, the regional politics created by federalism, and the relative slowness of litigation all help to explain the enduring success of debtors’ demands for legislation of questionable constitutionality.

SECTION 3: DEBTORS’ OLD IDEAS AND NEW-DEAL DOCTRINE

Not only had the state practice of passing emergency relief laws survived for over a century before the Supreme Court officially condoned it in Blaisdell, but the majority’s justification for these laws had also been in circulation in the states well before the New Deal. In fact, even before the U.S. Constitution and its Contracts Clause went into effect, the proponents of emergency debt relief had been arguing that emergencies justified state interventions between debtors and creditors, even those that would not normally have been considered lawful. For instance, in 1787, one proponent of a South Carolina debt-relief law declared:

"There is no general principle or maxim that may not admit of relaxation and exception under extraordinary circumstances. The ends and purposes of government implicitly give … a right to modify and supercede [sic] such contracts when the good of the community requires… the right of
individuals, though inviolable according to the ordinary language of the law, must in such cases yield” (cited in Becker 1979, 74).

Throughout the nineteenth century and into the twentieth, Debtors’ advocates echoed this claim that economic emergencies justified the state’s intervention in private contracts in order to secure the public good. The states’ responsibility to protect the public welfare by protecting debtors, they argued, even superseded individual rights, otherwise “inviolable according to the ordinary language of the law.”

After the Contracts Clause went into effect, the proponents of relief legislation continued to insist that states were obligated to respond to economic crises, and now argued that emergencies necessitated a reading of the Contracts Clause that took impoverished debtors’ situation into account. For instance, the Arkansas Gazette reported favorably on Mississippi’s relief statute, reporting that the state legislature had “showed herself animated by a proper sense of what was due the people in the extraordinary crisis in which they were placed by the events of war.”36 The Louisville Daily Courier noted that “Under other circumstances we should oppose. . .a ‘stay law’.” However, the paper went on to explain that the economic emergency and the suffering it threatened justified the type of governmental intervention it would not normally endorse: “at this time the great mass of the people cannot raise money to pay their debts, and if their property be sold to satisfy them, they will be deprived of the means of making a scanty support, and their families consequently brought to beggary and starvation.”37

Public justifications for relief laws emphasized that states could either worsen or ameliorate debtors’ suffering, and that, by enforcing contracts in times of economic disaster, governments would be choosing the former over the latter course. An 1890 issue of the *Hutchinson News*, for instance, explained that regardless of the Constitution’s commitment to the sanctity of contracts, debtors must have the right to the state’s protection:

It is not sufficient to say that the man who makes a contract should stand by its provisions. He should do this if the terms of that contract and workings of the law under which it was made are fair and reasonably just. But where the contract becomes a robbery, and the state through unwise legislation . . . is made a party to such robbery, then the people have a right to demand protection.

The article went on to argue that the need to affirm the equal rights of debtors ought to trump the restrictions of the Constitution’s Contracts Clause: “The Constitution may be unbending in its provisions concerning repudiation of contracts. But it is even more uncompromising in its guarantee of justice and equal rights to all people.”

The advocates of legislative relief for debtors insisted that the function of a state government was not merely to enforce contracts, but to balance that role against its responsibility to protect the vulnerable. As one Iowa newspaper, *the Mills County Journal*, asserted in arguing for debt relief legislation at the end of the nineteenth century: “When a mortgage can be paid off at once without undue hardship and sacrifice it should be done. But beyond this the rights of home and family and the safety, prosperity, and

wellbeing in the state come into consideration.” The economic ruin that would result from the approaching foreclosures, the column declared “must be met by the power of the state which is the very purpose of its organization to protect rather than destroy its own citizens.”

Although they rarely used the phrase “police powers,” before the twentieth century, debtors’ advocates had long made arguments that used a very similar logic. The state “police” power to regulate on behalf of public welfare and order was widely understood to be reserved to the states when they entered the union. As William Novak has demonstrated, nineteenth-century state and local governments employed this reserved power to enact a host of regulations, on subjects such as fire prevention, health inspections, public morals, sanitation, and professional licensing (Novak 1996).

Advocates of debt relief laws frequently argued that economic crises also posed genuine threats to public order, health, and safety, and described the state’s obligation to regulate on behalf of the public good. As one Kentucky advocate of a stay law explained:

“It is in the power of our legislature to prevent these crises from coming so suddenly upon our people and also at the same time to give the people time to extricate themselves from their deplorable condition. And it would appear to be the plain duty of our legislatures to exercise that power…the dictates of conscience, the feelings of humanity, a wise public policy and the common good demand something must be done in the matter.”

In 1874, A Mississipi advocate for a stay law wrote to his local newspaper saying “I am no prophet, but mark what I say to you, if this relief is not extended, such ruin, such

distress and suffering [will arrive as] were never experienced by any people in this country.”\textsuperscript{41} It was not only debtors’ suffering that figured in the public justifications for relief laws, but also the threat of violent unrest. For instance, in an open letter asking the governor of Oregon in 1893 to call the legislature into session so that it could pass a say law, one farmer wrote that if creditors attempted to collect on their debts, “anarchy, riot, and murder will follow.”\textsuperscript{42} Even absent threats of violence, however, the idea of economic crises as threats to public order, safety, and welfare suggested a constitutionally legitimate state role in modifying existing contracts.

Not only did nineteenth-century arguments for relief legislation closely resemble an account of reserved police powers, they even invoked the metaphor of natural disaster to emphasize the public threats posed by economic crises. Michele Dauber has demonstrated that the architects of the New Deal analogized the Great Depression to a natural disaster in order to overcome constitutional objections to the New-Deal expansion of the federal welfare state (Dauber 2013). However, the idea that economic recessions were like natural disasters long pre-dated the Great Depression. As Jonathan Levy has explained, the relationship between economic and natural disasters was not always merely figurative (Levy 2012). Farmers were often unable to repay their debts as a result of natural disasters, including droughts, crop diseases, and insect plagues. For indebted farmers, there was little difference between a storm ruining their crop and a financial crisis devastating the market for that crop; both placed large groups farmers in dire economic straits.

Long before the New Deal, the advocates of state debtor relief had been emphasizing this comparison between natural and economic disasters. One Kentucky Legislator, for instance, declared in 1822 that the people of the state could not extricate themselves from the “misfortune and approaching ruin, which had been cast upon them by a train of events beyond their power or control.” As a result, he argued that “people had a right to expect relief; and to effect which, they commenced a system of economy and retrenchment; but this alone was too slow for those who were already struggling with the storm.”43 Similarly a public official explained in Montana in 1893, the movement to demand that the state legislature be called into session so that it could pass a redemption law was “simply asking to be put on an equal footing with other states to meet the financial pressure of storm that is not yet passed, but still lingering with dark and threatening clouds, and if prompt action is not taken it will be too late.”44

The majority’s argument in *Blaisdell* echoed these longstanding state-level arguments that debt crises were akin to natural disasters and that private contracts should be subject to state regulation when these disasters threatened the public’s welfare. One of the most famous passages of the majority opinion states:

> It cannot be maintained that the constitutional prohibition [i.e. the Contracts Clause] should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake… And if state power exists to give temporary relief from the

enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.\textsuperscript{45}

Here, Justice Hughes reasoned that because the Constitution clearly permitted states to intervene in private contracts in response to natural disasters, and because the Great Depression was akin to a natural disaster, the state must have the legitimate authority to intervene in private contracts to respond to the Great Depression. This view of the government’s role during emergencies did not emerge in the twentieth century; it had been marshaled in defense of debt relief throughout the nineteenth century.

Of course debtors’ longstanding arguments cannot explain why the Court changed course in 1934. Since debtors had behaved more or less consistently for decades, the timing of the Supreme Court’s shift must be understood with reference to \textit{Blaisdell}'s particular political and ideational context. The early twentieth century was marked by intense debate, often centered on industrial practices and demands for labor and consumer protections, about the appropriate role for government in economic affairs. By the time the Court decided \textit{Blaisdell}, it had been grappling with questions about which state regulations were permissible exercises of states’ reserved police powers for several decades (Gillman 1993). This period is generally known for cases like \textit{Lochner v. New York} (1905), in which the Court enforced a constitutional liberty of contract that prevented states from regulating economic bargains. However, the Court also expanded its police powers doctrine in the first decades of the twentieth century, allowing states to

alter the terms of private contracts in emergency situations.\textsuperscript{46} The \textit{Blaisdell} majority opinion was the culmination of a series twentieth-century Contracts Clause cases in which the Supreme Court attempted to balance private property rights against public necessity (Scheiber 2003).

Scholars of the New-Deal Court were once accustomed to describing its jurisprudential shift as a response to external, political pressures, but more recent scholarship has emphasized the internal development of legal ideas among the justices who brought about the New-Deal revolution in constitutional doctrine (Cushman 1998). In fact, in an unpublished concurrence, Justice Cardozo noted that “the Court in its interpretation of the contract clause [had] been feeling its way toward a rational compromise between private rights and public welfare” for quite some time (Brest et al. 2006, 508). The opinion in \textit{Blaisdell} clearly reflects this twentieth-century search for compromise, along with the New Dealers’ conviction that constitutional jurisprudence should respond to changing social needs (Olken 1993).

Regardless of how we explain the causes of the New-Deal transformation, \textit{Blaisdell} was one of the cases that made up this larger jurisprudential shift. Characterized by the expansion of governments’ regulatory authority at the expense of individual economic rights, this constitutional change is often said to have occurred in 1937, yet several cases like this, including \textit{Blaisdell}, were decided several years before (Fliter and Hoff 2012). In \textit{Nebbia v. New York} (1934), for instance, the Court declared “Under our

\textsuperscript{46} “The general welfare of society is involved in the security and registry of titles to real estate, and those subjects are within the police power of the state.” \textit{American Land Co. v. Zeiss}, 219 U.S. 47 (1911). See also \textit{Kirkman v. Bird}, 22 Utah 100, 61 P. 338 (1900); \textit{Noble State Bank v. Haskell}, 219 U.S. 104 (1911); \textit{People v. LaFetra}, 230 N. Y. 429 (1921)
form of government, the use of property and the making of contracts are normally matters of private, and not of public, concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute.”

The Blaisdell majority likewise declared: “The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.” This idea of the state’s protective power as “dominant” even over existing contracts marks Blaisdell as part of the larger jurisprudential move to loosen the Constitution’s constraints on government’s intervention in economic life.

Though the New-Deal Court was working out the relationship between private economic rights and public authority in many policy domains unrelated to debt, when it turned its attention to debt relief, it did not invent new ways of looking at economic emergencies or the government’s responsibilities to protect debtors. Instead, it endorsed the claims that debtors and their advocates had always made about the state’s responsibility to protect them, even at the cost of private rights of contract. The argument here is certainly not that debtors brought about the New Deal constitutional order, or even that they were primarily responsible for the ruling in Blaisdell. It is simply that debtors movements had endured constitutional rebuke for over a century when the New-Deal Court finally endorsed their views. By accepting Minnesota’s defense of its relief law, the Supreme Court was incorporated very old arguments about state responsibilities to debtors into federal constitutional doctrine.

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CONCLUSION

This state-level history of debtors’ successful movements for legislative relief highlights a dramatic difference between state and federal constitutional practices. Federalism, in other words, not only figured into Contracts-Clause doctrine (as the Supreme Court sought to identify the Constitutional limits on states’ reserved powers) but federalism also shaped the way that doctrine worked on the ground. State legislatures attended to Supreme Court doctrine as they attempted to draft laws that might arguably conform to it, but they also pushed against its constraints. Throughout the nineteenth and early twentieth centuries, therefore, the very old state-level practice of protecting debtors by intervening in private economic bargains persisted alongside a federal jurisprudence that, far more often than not, characterized these interventions as unconstitutional. When the Supreme Court upheld Minnesota’s mortgage moratorium in 1934, therefore, it was transforming federal Contracts Clause doctrine, but in a way that acquiesced in existing, institutionalized state norms.

Clearly, neither state relief laws nor their proponents’ arguments were sufficient to shift the Supreme Court’s reading of the Contracts Clause, but they were certainly necessary in enabling that shift. At the most basic level, the Supreme Court would not have been able to review these laws unless states had first passed them. In addition, had states not continued to push against a generally unfavorable judicial climate, the idea that states had reserved the power to relieve debtors when they entered the Union would surely have seemed implausible. Charles Evans Hughes’s majority opinion in Blaisdell famously declared, “Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living
power already enjoyed.” Although it is hard to know exactly what Hughes meant by this phrase, the states’ persistent passage of relief laws certainly enabled the New-Deal court to find that states already enjoyed the power to relieve their debtors. Since state legislatures had been exercising this power for more than a century, the ability to pass retrospective debt relief laws was, as a matter of practice, “a living power already enjoyed” by state legislatures.

The federal structure of America’s government clearly mattered here. Debtors did not need to attempt to shape federal constitutional understandings by changing the minds of federal government officials. Instead, they used state governments to put pressure on federal doctrine. This federal dynamic is, in many ways, consistent with others’ accounts of American Political Development. Political scientists have long recognized that many of the federal government’s New-Deal programs grew out of state policies and relied on states’ existing administrative capacities (Johnson 2007, Mettler 1998). In fact, Susan Sterett has demonstrated that nineteenth-century, state-level battles about the constitutionality of public pensions, and the meaning of work, dependency, and public purposes created an ideational foundation upon which the New Deal Court would eventually build defenses of the national welfare programs (Sterett 2003). The history of states’ emergency stay laws reveals a similar phenomenon with respect to constitutional development in that national understandings were built upon state-level norms.

In other ways, however, this story of debtors’ movements is quite different from standard accounts of states’ role in the New Deal. In this case, the state legislatures did not craft precursor policies that would later be adopted by the federal government, nor were states developing institutional capacity that the New-Deal federal government
would later exploit to administer federal programs. Instead, each layer of a U.S. government reflected a different history and set of concerns, and each developed in its own direction (Broschek 2011, 543). Because the federal Constitution was erected atop an already-crowded landscape of states’ legislative and constitutional activities, (at least) two conflicting legal orders came to govern the contracts between creditors and debtors—one based around the centralizing Contracts Clause of the U.S. Constitution and one rooted in states’ traditional legislative practices. As states repeatedly intervened in private contracts to protect debtors, they developed a robust legal tradition in tension the U.S. Constitution. Even as federal doctrine had offered a consistent defense of creditors’ contractual rights that was grounded in federal constitutional text, state law continued to embody an older tradition of intervention and regulation on debtors’ behalf.

State laws embodied protective commitments that stood in direct opposition to those announced in federal Contracts Clause doctrine, and this opposition endured until the federal doctrine gave way. As Jessica Bulman-Pozen has argued, states can “instantiate competing views of national politics,” (Bulman-Pozen 2014, 1946) serving as vehicles through which the critics of existing national policies can “[align] themselves with certain federal actors to oppose others” (Bulman-Pozen 2014, 1920). She urges scholars to understand contemporary federalism not through questions about the degree of autonomy states possess or the nature of states’ distinctive interests, but as a system in which states serve as additional sites of national political action. The politics of debt relief demonstrate that states have long served this function, reshaping national norms, as those who opposed federal constitutional readings used the machinery of state government to realize and sustain their political visions.


Ely, James W. 2016a. "The contract clause a constitutional history." In. Lawrence, Kansas: University Press of Kansas,


New York: Princeton University Press ;

Russell Sage Foundation.


