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THE HISTORY OF NEBRASKA LAW

Edited by Alan G. Gless

With a foreword by Hon. John V. Hendry, Chief Justice, Nebraska Supreme Court

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FORECLOSURE MORATORIA AND FARM CREDIT MEDIATION

Nebraska's Legal Response to Two Agricultural Crises

Nebraska and the nation experienced a devastating agricultural economic crisis in the 1920s and 1930s and a difficult agricultural financial crisis in the late 1970s and early 1980s. In responding to the challenges of the Great Depression, lawmakers struggled against the constraints of an often conservative judicial philosophy. That effort to define the proper role of the state resulted in the transformation of American law and government, from a largely common-law system to our modern governmental welfare system administered through state and federal agencies. The existence and widespread acceptance of this social safety net made dealing with the more recent farm financial crisis less traumatic. In its judicial response to the state's Depression-era policy initiatives, the Nebraska Supreme Court lagged behind its state and federal peers. In the more recent farm financial crisis, a more moderate Nebraska Supreme Court played no constraining role whatsoever, reflecting judicial acceptance of a broader government role in dealing with economic crises.

The predominant judicial philosophy regarding the role of government in economic and social affairs prior to the New Deal was the substantive due process doctrine. Under this doctrine, state and federal exercise of the police power would be restrained if legislation interfered too greatly with vested rights. American legal historian Kermit Hall has identified two principal consequences of the substantive due process doctrine. First, it protected the rich from the political demands of the poor by restricting governmental policies, such as minimum wage or maximum workweek legislation, that sought to shift more of the costs associated with industrialization onto business and capital. Second, it invalidated legislation that explicitly favored one group over another, for example, statutes creating occupational monopolies. In this regard, substantive due process often hindered the economically privileged.[1] But on balance, substantive due process did slow state and federal efforts to deal with the economic crisis posed by the Great Depression.

The Great Depression began with the stock market crash of October 1929. Economic conditions were already precarious because of unbridled stock speculation in the United States and the European war reparations financial crisis. The stock market crash, however, set off an economic chain reaction, and the U.S. economy went into a tailspin. The high living of the Roaring Twenties financed by the stock bubble came to an abrupt end when Wall Street crashed, and the United States faced its gravest domestic crisis since the Civil War. At the depth of the Depression, one in four workers was unemployed. Businesses failed, banks collapsed, and people lost their jobs, their savings, their homes, their farms, and ultimately their hope for a better future. People were evicted from their homes and camped in the streets in what were bitterly called "Hoovervilles," shantytowns named for the president on whose watch the economic calamity began. In the chilling words of American legal historian Lawrence Friedman, "hunger and misery stalked the land."[2]

Farmers had been in an agricultural depression since 1920, well before the 1929 stock market crash. When World War I disrupted food production in Europe, American farmers rushed to meet the wartime demand. Farm commodity prices rose during the war, peaking in 1919 at 230 percent of the 1909–14 average. Farmland prices also rose, and new farmland was brought under cultivation to meet European food demand. At the end of the war, however, commodity prices and subsequently farmland prices crashed. In 1920, crop prices fell by two-thirds from their 1919 peak and in the early 1920s, nearly one-quarter of American farmers faced foreclosure or bankruptcy.[3]

The farm depression of the 1920s hit Nebraska hard. Farmers who had taken out mortgages to purchase high-priced land during the World War I farm boom faced falling crop prices and falling mortgage collateral values.

Farm foreclosures rose, and rural banks failed: nearly 100 in 1924, 400 in 1928, and 106 in 1929.[4] The Nebraska Legislature responded in the 1930 special session with a bank guarantee statute funded by levying assessments upon solvent banks for the benefit of the depositors of insolvent banks. The Nebraska Supreme Court showed its conservative mettle by ruling in 1932 that this statute deprived plaintiffs of property without due process of law by creating an invalid classification for the benefit of depositors of failed banks.[5]

The years 1929 through 1932 were some of the worst: Nebraska corn prices fell from sixty-seven cents a bushel in 1929 to thirteen cents in 1932, a decline of more than 80 percent. While federal agricultural programs began to provide much-needed financial relief after 1932, Nebraska farmers suffered a drought of historic proportions that created the Dust Bowl. Between 1931 and 1937, only in one year—1934—did Nebraska farmers receive normal precipitation.[6] "The dry, powdered soil began to blow, as Nebraska and all the plains states experienced a series of heavy dust storms that blotted out the sun and hope."[7] Hard times created a desperation among financially strapped farmers in the Midwest that led to the creation of America's most violent farm organization, the Farmers' Holiday Association.[8]

In response to the wave of farm foreclosures of the 1920s and early 1930s, radical Farmers' Union members began to feel that direct, self-help action was needed. By February 1932, this discontent had coalesced into a proposal for a farm holiday (not unlike President Franklin D. Roosevelt's 1933 bank holiday), during which farmers would neither buy nor sell. Organizers hoped that this withholding action would close food processing plants, empty grocery stores, and lead to federal farm assistance. In May 1932, the Farmers' Holiday Association was organized in Des Moines to implement the farm holiday. In August, member dairy farmers blockaded roads into Sioux City to raise milk prices. The strike quickly spread throughout Iowa and Nebraska, and resulted in bloody clashes between striking farmers and law enforcement officials. But the strike ended in late August, as farmers realized that they could no longer afford to withhold their products from market.[9]

Association leaders urged members to refrain from additional withholding actions until after the November 1932 presidential election, in which they hoped Franklin D. Roosevelt would be elected and would establish federal farm assistance programs. In October 1932, however, the association began its penny auction actions, in which members made bids of less than a dollar on behalf of the farmer-debtor and intimidated other potential bidders.[10] In Pennsylvania, a sheriff's sale of livestock brought bids of only three to six cents per animal and realized a total of $1.18. The livestock was then resold to the original owner for one dollar. In Illinois, a farm encumbered by a $2,750 debt was bought for $4.96 and returned to the original owner.[11] The penny auction was the most visible and widespread of the association's activities.[12]

Penny auction tactics reached Nebraska, as well. On March 14, 1933, a group of Farmers' Holiday Association members prevented a Lancaster County sheriff's sale of a farm by locking the sheriff in his office and disconnecting his telephone so that he was unable to conduct the sale or to call for assistance. The protesters were finally dispersed with tear gas, and the defendants were punished for contempt.[13]

In Nebraska, the farmers' financial distress had significant economic ripple effects,[14] more so than it would today. Farmers who couldn't pay their mortgages also had trouble paying their real estate taxes. In 1935, more than $46 million in real estate taxes were delinquent in Nebraska. In 1934, the total real estate tax levy came to just less than $31 million, so the arrears equaled nearly 150 percent of the annual levy.[15] Urban economic distress existed as well. In a rare but appropriate display of sympathy, the Nebraska Supreme Court in 1936 recognized the seriousness of the plight of destitute Nebraskans in Omaha and Douglas County:

> It is asserted in argument, and the record supports the contention, that an emergency exists unlike any previous situation. The relator is unquestionably in a deplorable situation. Social workers retail a story of poverty, want, and need of cases numerous enough to depress and sadden any one who has any sympathy and concern for his fellow men. Various governmental agencies have spent vast sums of money for the relief of those distressed by the economic conditions. It is said that there were 4,500 families in dire need at the time of the trial. Of course, before granting relief to any, the board of county commissioners is required to satisfy themselves that each comes within the purview of the statute providing for relief. However, it is estimated that it would require at least $130,000 a month to meet the responsibility. This would amount to approximately $ 1,560,000 a year. The emergency, as serious as it appears to be, does not empower the county commissioners to do anything except what they are empowered by law to do.[16]

In this case, Douglas County had exhausted its mill levy authority for poor relief and was petitioning the court for emergency authority to exceed its levy authorization and go into debt, which the court reluctantly, in view of the dire circumstances, nonetheless declined to do. The case graphically illustrated the necessity for federal assistance for the unemployed and destitute.

States sought to deal with the deepening economic crisis by adopting minimum price regulations, relief programs, minimum wage and maximum workweek legislation, and mortgage foreclosure moratoria.[17] These state actions to relieve human suffering associated with the Depression were threatened by the U.S. Supreme Court's substantive due process doctrine. The Court invalidated legislation on maximum hours[18] and minimum wages[19] but ultimately abandoned substantive due process in a 1937 decision approving minimum wage legislation for women.[20] The Court did, however, uphold Minnesota's two-year foreclosure moratorium statute in 1934 in *Blaisdell v. Home Building and Loan Association.*[21] The *Blaisdell* decision was surprising in light of unanimous state court disapproval of previous state moratoria statutes,[22] and it resulted in the survival of Nebraska's own 1933 moratorium statute in at least limited form until its invalidation by the Nebraska Supreme Court in 1938.

In order to understand the 1933 Nebraska foreclosure moratorium statute, one must first briefly review the then-extant Nebraska mortgage foreclosure procedures. The mortgagee filed the foreclosure lawsuit in district court.[23] The court was then authorized to order a sale of the mortgaged property.[24] The court could also grant a deficiency judgment.[25] The debtor could redeem the property by paying all amounts due before the property was sold.[26] If the loan had an acceleration clause, the entire mortgage balance would be due, which would require the debtor to refinance the entire debt, plus interest and unpaid taxes, if any. The debtor could request a nine-month stay before the property was sold.[27]

The 1933 moratorium statute altered this sequence by staying until March 1, 1935, any pending or future mortgage foreclosures upon the request of the debtor, except upon a showing of good cause to the contrary.[28] The debtor had to pay rent, and income from the property was applied against taxes, insurance, maintenance, and upkeep under the court's supervision.[29] The moratorium legislation reflected the economic emergency and particularly the collapse of Nebraska real estate values.[30] In 1935, the legislature extended the stay through March 1, 1937.[31] The 1935 act added a new section 20-21,165, which excepted from the moratorium mortgages executed after March 1, 1934.[32] The moratorium was extended again in 1937 to March 1, 1939.[33]

The 1933 foreclosure moratorium received its initial challenge in 1934, in *Bell v. Niemann.*[34] The mortgagee had foreclosed on plaintiff's two hundred acres of farmland in Seward County in 1932; the nine-month stay had run its course, and the land was sold in 1933. Before the sale could be confirmed, however, the debtors filed for a stay until March 1, 1935. The creditor objected on the grounds that § 20-21,159 impaired the obligation of contracts in violation of Article I, Section 10, of the U.S. Constitution. The Nebraska Supreme Court determined that the federal constitutional issue had been dealt with by the U.S. Supreme Court in *Blaisdell* and so rejected the creditor's argument. The court then made two interesting comments. First, the justices signaled their disagreement with the outcome in *Blaisdell* by stating, "*Whatever may be thought of that decision,* it is binding on the supreme court of Nebraska [regarding the federal contract clause issue]."[35] The court then invited future litigants to raise the impairment of contracts argument under the Nebraska constitution: "Whether the Nebraska moratory act violates the Nebraska Constitution is a question not presented to the district court in this case and consequently it is not determinable in the supreme court on an appeal in the same case, but is left open for future consideration."[36] The court clearly disagreed with *Blaisdell* and wanted to invalidate the foreclosure moratorium under the state constitution.

While it waited for that opportunity, the court significantly narrowed the reach of § 20-21,159 in 1935, ruling in *Clark v. Hass* that a debtor must have an equity interest in the mortgaged property in order to qualify for the statutory stay.[37] Section 20-21,159 required the court to grant the stay "unless . . . good cause is shown to the contrary" but did not define what constituted "good cause." The court found the debtor's lack of equity in the property to be good cause to deny the stay.[38] The court did little to justify its conclusion, although it did cite a concurrence to the Minnesota Supreme Court's decision in *Blaisdell,* which suggested that a mortgagor who had no equity in the property would not be entitled to a stay.[39] Whatever the court's rationale, the effect of its ruling was to extend the life of § 20-21,159, although the court significantly narrowed its scope. If the court had allowed mortgagors like Hass, having little or no equity, to claim the § 20-21,159 stay, creditors like Clark would have been able to raise the state constitutional issue at an earlier date. As it happened, no mortgagor with an equity stake in the mortgaged property came before the court until 1938, allowing § 20-21,159 to remain in effect and perhaps to provide some incidental foreclosure relief along the way.

The court interpretation in *Clark* made it difficult for creditors to respond to the court's invitation in *Bell* to challenge the moratorium's constitutionality under state law. The court had another opportunity to strike down the moratorium law in 1936 but refrained from doing so because it was not necessary to reach the issue of constitutionality in order to decide the case, the debtor having no equity in the mortgaged property.[40] The creditor in that case had argued, inter alia, that § 20-21,159 violated both the state and federal constitutions. The court found that "[t]his [case] provides interesting and attractive questions for consideration. We must, however, brush aside the temptation to indulge in such a discussion because the rule is well established . . . that a statute will not be declared unconstitutional unless necessary for a proper disposition of the pending case."[41]

Finally, in 1938, the court found what it had been waiting for—a mortgagor with an equity interest in the mortgaged property.[42] This meant that the debtor could lawfully claim a § 20-21,159 stay and, therefore, that the creditor could raise the state constitutional issue. In *First Trust Co. v. Smith*, the court found that the emergency originally contemplated in 1933 had run its course and had been replaced by a "continued depression."[43] The court might have been open to the suggestion that some sort of emergency powers might possibly be justified in a short-run emergency but not in a long-term one—an odd distinction at best (one wonders what the *First Trust* court might have done in wartime). The justices seemed to take comfort in the fact that farm debtors by 1938 had more debt relief options available to them than they did in 1933, such as favorable Federal Land Bank loans, a more stable banking industry, and federal farm bankruptcy legislation that included a five-year bankruptcy stay.[44]

These changed circumstances may have allowed the *First Trust* majority the luxury of making what it must have felt to be an otherwise inappropriate decision because it would not have to face the consequences. In any event, the court concluded that debtors had other remedies available to them and that the "temporary emergency" that had formed the factual basis for the state and federal *Blaisdell* decisions was "disapproved" by the court.[45] What exactly was being disapproved was unclear—possibly the court was attempting to distinguish the temporary economic emergency that had faced the *Blaisdell* court in 1933 from the ongoing depression that, in the estimation of the *First Trust* court in 1938, was not temporary. The court did not address the significance of the appellation "temporary," beyond its providing a legalistic basis for distinguishing the two sets of circumstances.

The court then reserved to itself the sole authority to interpret the Nebraska constitution, regardless of how the U.S. Supreme Court had ruled on essentially the same language in the U.S. Constitution.[46] The *First Trust* court ruled that § 20-21,159 did impair mortgage contracts and violated article I, section 16, of the Nebraska constitution.[47] The court further ruled that the meaning of the constitution did not change with changing circumstances and that constitutional rights could not be impaired under any circumstances by an exercise of the police power.[48]

A vigorous dissent by Justice Bayard H. Paine contended that the crisis had not yet passed and that current economic conditions more than adequately justified § 20-21,159. Citing numerous opinions in which similar legislation had been found to be a constitutional exercise of the police power, Justice Paine castigated his colleagues for hiding their heads in the sand.[49] A student note in the *Nebraska Law Bulletin* echoed Justice Paine in concluding that for the majority "not even self-preservation of the government would warrant any legislation which impaired a contract to the slightest degree" and concluded that the court's opinion could not be reconciled with *Blaisdell*.[50]

First Trust was a telling moment for the Nebraska Supreme Court, one in which the court came up short. The *First Trust* court had the choice to cling—as it did—blindly to the fading judicial doctrines of the past or to follow the lead of an admittedly closely divided U.S. Supreme Court into the future with *Blaisdell*. The *First Trust* majority chose to align itself with the *Blaisdell* minority and to look backward.

At the same time, one must bear in mind that the U.S. Supreme Court had split 5 to 4 in the *Blaisdell* decision. Decades passed before the shadow cast over progressive state and federal legislation by substantive due process doctrine would diminish. Decades passed before the U.S. Supreme Court clearly repudiated substantive due process for good. Although the doctrine remained viable in the states, even there its strength diminished over time. So, although the *First Trust* court was hardly in the progressive vanguard, its behavior was not out of the legal mainstream at the time. Nonetheless it is disappointing that only one of seven Nebraska Supreme Court justices seemed able to realize, as late as 1938, that clinging to the legal doctrines of the past was inexcusable in the face of widespread and obvious human suffering—particularly when the U.S. Supreme Court and state supreme courts around the country were trying to accommodate legislative policies and a larger governmental role in economic affairs to deal with a long-term economic depression.

Nebraska, like most other states, was unable to do much for its destitute citizens, on or off the farm, nor would it have been able to do much more even had its supreme court been more supportive of change. In the end, federal programs made the most difference in improving the economic lot of the unemployed and destitute.[51] In 1933, President Franklin Roosevelt and the Congress provided federal loans to help refinance farm debt.[52] Under the Agricultural Adjustment Act (AAA), farmers received federal payments for reducing crop and livestock production, subsidies financed through a tax on agricultural processors.[53] The U.S. Supreme Court invalidated this feature of the AAA in 1936,[54] ruling that the tax was a mere pretext used to regulate agricultural production, something the federal government had no authority to do.[55] The AAA was the second major piece of New Deal legislation to be invalidated by the Court, the National Industrial Recovery Act having been the first in 1935.[56] These were two of the judicial defeats that led FDR to formulate his court-packing plan. Although the plan was not adopted, the Court ultimately did cast off from its conservative moorings.[57] In 1938, Congress enacted a revised AAA, which paid farmers for planting soil-conserving crops on what the original AAA would have designated as set-aside acres. The Supreme Court upheld the constitutionality of the revised AAA in 1942, a complete reversal of its earlier ruling.[58] The revised act became the foundation for the current federal farm aid program.[59]

The federal government attempted to help farm debtors by adding the Frazier-Lemke agricultural bankruptcy option to federal the bankruptcy statutes in 1934.[60] Frazier-Lemke, which included a five-year bankruptcy stay,[61] was unanimously invalidated by the U.S. Supreme Court in 1935 for unduly interfering with the rights of creditors.[62] Congress quickly adopted a revised Frazier-Lemke farm bankruptcy statute in 1935,[63] and the Supreme Court unanimously upheld its constitutionality in 1937.[64] Frazier-Lemke expired in 1949, and permanent farm bankruptcy legislation remained an unresolved issue until the adoption of chapter 12 family farm bankruptcy legislation in 1986.[65] Financially distressed farmers had other options in addition to bankruptcy: the 1933 Farm Credit Act, for example, contained a voluntary farm debt conciliation program, under which committees of local farmers and creditors could propose what we would call today farm workout plans or restructuring plans to avoid foreclosure and bankruptcy.[66] This voluntary debt adjustment program foreshadowed the Nebraska farm credit mediation program adopted in 1986.

Farmers enjoyed generally better prices during World War II, and federal price supports helped prevent a recurrence of the agricultural depression of the 1920s and 1930s.[67] The farm program safety net worked well in Nebraska, where farmers did not face a severe financial crisis until the 1980s.[68] This crisis had its origins in the USSR's major wheat purchase in

1972. Up to this time, a major USSR policy objective had been agricultural self-sufficiency, the ability to feed the population without large foreign agricultural imports. However, inefficient agricultural practices plus several crop failures led to the decision to secretly purchase wheat on the world market. The Soviets were very clever in approaching the market, well understanding that if their interest in purchasing large quantities of wheat were known, wheat prices would rise significantly. The Soviets played the game well and purchased their wheat at the then-prevailing world price.[69] Wheat prices soared, not to return to their original level for several years.[70] High agricultural commodity prices were soon incorporated into higher farmland prices, and domestic inflation served to keep both land and crop prices up.

This train of events came to an abrupt halt after Ronald Reagan became president. Reagan's Federal Reserve Board raised interest rates in an effort to wring inflation out of the economy. Prime lending rates soared to more than 18 percent, rates usually charged only by credit card companies and loan sharks. As interest rates rose, farmland prices dropped. In Nebraska, the land boom that had begun in 1973 came to an end in 1981. The price of Nebraska farmland increased by 92 percent from 1972 to 1981, and fell by 68 percent from 1981 to 1987.[71] As land values fell, farm collateral values fell as well, and farm real estate lenders went from being oversecured to undersecured.[72] This loss of value led to a wave of farm foreclosures and rural bank failures.[73] In the fall of 1977, Congress enacted another farm bill that ensured four more years of crop prices below the farmers' cost of production, leading to the rise of the American Agriculture Movement, which protested the rising numbers of farm foreclosures and looked to Washington for relief.[74] This relief was slow in coming.[75] The 1985 federal farm bill did little to stem the flow of red ink on the balance sheets of highly leveraged farmers.[76] In 1986, Nebraska and federal legislation finally began to provide some legal relief to debt-stressed farmers. The new chapter 12 family farmer bankruptcy statute became law in October 1986,[77] and Nebraska adopted homestead redemption legislation in November of that year. In 1988, Nebraska followed the lead of Iowa and Minnesota by adopting farm credit mediation legislation, which led in 1991 to a more general mediation program.[78]

Chapter 12 was designed in part to allow farmers who had too much debt to qualify for chapter 13 bankruptcy to have at least a chance to reorganize. Farmers often had difficulty meeting the requirements for a successful chapter 11 reorganization,[79] and chapter 12 was largely a response to those difficulties.[80] The chapter 12 automatic stay allowed the farmer to avoid foreclosure and provided time to prepare and submit a bankruptcy reorganization plan, the same sort of breathing space that had been the objective of the 1930s foreclosure moratoria.[81]

In the 1986 regular session, the Nebraska Legislature enacted LB 999, which established a right to cure default on a mortgage or trust deed without acceleration of the loan.[82] Loan agreements typically include an acceleration clause that automatically makes the entire loan balance due upon default. The debtor can prevent the sale of the property only by refinancing the entire balance. If the debtor is unable to find a new loan to pay off the outstanding balance, then he or she loses the collateral—even if sufficient money is available to make the overdue payment and bring the loan current. LB 999 required creditors foreclosing on agricultural land to provide notice of default that identified the delinquent amount prior to acceleration; notice that the debtor had sixty days to pay the delinquent amount to reinstate the loan; and an indication whether the creditor would accept a lesser amount to reinstate the loan.[83] If the debtor complied with the conditions stated in the notice of default within sixty days, the loan would be reinstated.[84] This was a significant benefit, as it was in many cases easier to find new money (from new junior lenders, or—more often—from family) to make up delinquent payments than to refinance the entire loan.[85]

Homestead redemption was also part of LB 999. Family farm advocates, notably Nebraska's Center for Rural Affairs,[86] contended that many farmers facing financial distress wished to remain in farming and to live on the farm, even if they lost the rest of their assets. The notion was that if the family could remain on the farmstead, they had a base from which they might be able to get back into farming (for example, by renting land or by custom farming for others). At a minimum, they might be able to remain in the country, perhaps by finding an off-farm job nearby. LB 999 increased the homestead exemption from $6,500 to $10,000[87] and provided a procedure for redemption.[88] Redemption of up to 160 acres, including the farm homestead, was accomplished by the debtor's paying the appraised value of the property redeemed. If the debtor had sufficient equity in the entire property to redeem the homestead, he or she could obtain an equity homestead redemption if the remaining debt did not exceed 85 percent of the appraised value of the excess property.

LB 999 became part of LB 3, the 1986 special session Farmstead Protection Act.[89] Farm homestead redemption was the major new feature of LB 3.[90] Agricultural lenders took careful note of the LB 999 homestead redemption process and were successful in establishing a process more favorable for lenders in LB 3. The act provides two methods of homestead redemption: one for mortgages or trust deeds recorded on or before LB 3's effective date of November 21, 1986, and another for post-LB 3 mortgages and trust deeds.

Under LB 999, the debtor could redeem the homestead by paying its appraised value or through an equity redemption. This approach is used for post-LB 3 mortgages or trust deeds. However, a two-sale method is used for pre-LB 3 mortgages and trust deeds.[91] The effect of the two-sale method is to require the debtor to pay the current market value of the homestead plus any loan deficiency on the entire tract in order to redeem the homestead. In the first sale, the lender can bid the entire loan amount, which may greatly exceed the tract's current market value. In the second sale, the entire tract less the homestead is sold first, and the homestead is sold separately. If the lender does not bid at the second sale, which is the usual case, the tract minus the homestead is sold at its market value. To redeem the homestead, the debtor must pay the difference between the two sales—in effect, the homestead's market value plus any loan deficiency, if the lender bids the debt at the first sale. The LB 3 homestead waiver provision also gives creditors the opportunity to require debtors, especially low-equity debtors, to give up their homestead redemption rights as a condition of receiving the loan. Thus, it is doubtful that many farm families facing financially stress and foreclosure were able to redeem their homesteads under LB 3. Nonetheless, the statute was a worthy and helpful response to financially distressed farmers, and some have probably benefited from it.

The last important Nebraska statute enacted in response to the 1980s farm financial crisis was LB 664, the Farm Mediation Act, passed in 1988.[92] Several farm states enacted farm credit mediation legislation: Minnesota and Iowa, for example, adopted mandatory farm mediation statutes in 1986.[93] Under mandatory mediation programs, creditor participation in mediation or waiver of mediation by the debtor is a prerequisite to foreclosure.[94] Nebraska, in contrast, chose voluntary farm mediation programs.

Under the Nebraska statute, agricultural creditors must notify debtors of the availability of mediation thirty days before initiating foreclosure proceedings on a farm debt of at least $40,000.[95] Creditors need not delay foreclosure proceedings, however, even if the farmer requests mediation. Farmers involved in mediation are eligible for free financial counseling to assist them in preparing for mediation.[96] If no creditor agrees to mediate, the process stops at that point.[97] If at least one creditor agrees to mediate, the Nebraska Department of Agriculture farm mediation service will arrange the mediation session.[98] If creditor and debtor are able to come to terms, the mediator prepares a draft workout agreement for signature by the parties. The parties then have two weeks to review the draft. If no objection is received within that period, the signed draft agreement becomes final, a binding legal contract.[99] Under the federal Agricultural Credit Act of 1987, federal farm lenders must participate in a USDA-approved state mediation program if the debtor wishes to mediate.[100] Because this federal requirement to mediate applies to the Farm Credit System (formerly the farmer-owned Federal Land Bank Association and Production Credit Association), the USDA Farm Services Agency (FSA, formerly the Farmers Home Administration), and banks with FSA loan guarantees, Nebraska's voluntary mediation program is, in effect, mandatory for most farm creditors.

Although the Nebraska legislature enacted three significant statutes to help ease the plight of debt-stressed farmers, federal legislation provided the most real relief, as was the case in the 1930s. The Nebraska Supreme Court played no significant role in the 1980s farm financial crisis, at least not in terms of deciding the constitutionality of state debtor relief legislation. Perhaps none of the 1980s statutes were as bold as the 1933 foreclosure moratorium. Perhaps the legal sea change that occurred in the 1930s prompted the Nebraska Supreme Court to modify its judicial outlook. Although perhaps 20 to 25 percent of Nebraska farmers faced severe financial distress during the 1980s, a far greater number suffered during the Depression. In addition, the safety net created by the federal farm program largely succeeded in preventing the privation faced in the 1920s and 1930s. The degree of human suffering was much greater in the 1930s than in the 1980s, which is why the later event is usually referred to as a farm *financial* crisis instead of a farm crisis. The state and federal governments faced far greater economic and judicial challenges in the 1930s. State judicial conservatism would have doomed meaningful state response to the financial crisis in the 1930s, but that result was largely mooted by the ultimately more successful federal response.

The more finely tuned debt relief statutes of the 1980s could focus on the particular issues facing financially overextended farmers and probably did so as effectively as such state legislation could. The federal bankruptcy and farm credit legislation went further in providing an opportunity for effective debt restructuring for those farmers able to work their way out of their financial difficulties. The positive experience with farm credit mediation doubtless made the later implementation of a more general state mediation program much easier. And that may be the most important legacy of all.

Notes

1. Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 232. Regarding substantive due process and pre–New Deal economic regulation, see ibid., 231–38; regarding the impact of substantive due process on pre–New Deal labor legislation, see ibid., 238–45; regarding the legal struggle over the proper role of government and the decline of substantive due process during the New Deal, see ibid., 271–85.

2. Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven, Conn.: Yale University Press, 2002), 151.

3. H. C. M. Case, "Farm Debt Adjustment during the Early 1930s," *Agricultural History* 34, no. 4 (1960): 173–81; Alan Brinkley, *American History: A Survey,* 10th ed. (New York: McGraw-Hill, 1999), 848–50; R. Douglas Hurt, *American Agriculture: A Brief History,* rev. ed. (West Lafayette, Ind.: Purdue University Press, 2002), 221–22, 231–35; James C. Olson and Ronald C. Naugle, *History of Nebraska,* 3d ed. (Lincoln: University of Nebraska Press, 1997), 285–87, 305–9.

4. Olson and Naugle, *History of Nebraska,* 308.

5. Hubble Bank v. Bryan, 124 Neb. 51, 245 N.W. 20 (1932); noted, *George Washington Law Review* 1, no. 3 (1933): 402–3.

6. Olson and Naugle, *History of Nebraska,* 309–10.

7. Ibid., 310.

8. Hurt, *American Agriculture,* 264. Regarding earlier farm protests, see ibid., 203–13, 260–66. Regarding Nebraska farm protests, see Olson and Naugle, *History of Nebraska,* 175–80, 216–36.

9. Hurt, *American Agriculture,* 264–65.

10. Ibid., 265.

11. Case, "Farm Debt Adjustment during the Early 1930s," 176. More disturbingly, a Kansas real estate agent was shot and killed along the highway the same day he had handled a farm foreclosure. Ibid.

12. Hurt, *American Agriculture,* 265.

13. Lux v. State, 126 Neb. 133, 252 N.W. 897 (1934).

14. Olson and Naugle, *History of Nebraska,* 312–13.

15. Steinacher v. Swanson, 131 Neb. 439, 456, 268 N.W. 317, 326 (1936) (Paine, J., dissenting). In this case, the court ruled that legislation to allow additional time to pay delinquent property taxes was unconstitutional.

16. State ex rel. Boxberger v. Burns, 132 Neb. 31, 37, 270 N.W. 656, 660 (1937); noted, *Nebraska Law Review* 18, no. 3 (1939): 341–42.

17. Hall, *Magic Mirror,* 272; Friedman, *American Law in the Twentieth Century,* 173–76.

18. Lochner v. New York, 198 U.S. 45 (1905) (5–4 decision).

19. Adkins v. Children's Hospital, 261 U.S. 525 (1923) (5–3 decision).

20. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (5–4 decision).

21. Blaisdell v. Home Bldg. & Loan Ass'n, 290 U.S. 398 (1934) (5–4 decision). See Hall, *Magic Mirror*, 277–85.

22. Note, *George Washington Law Review* 2, no. 4 (1934): 486–94.

23. Neb. Comp. Stat. § 20-2139 (1930).

24. Ibid., §§ 20-2140 through 20-2146. Regarding the sheriff's foreclosure sale process, see ibid., §§ 20-1501 through 20-1552.

25. Ibid., § 20-2141. The deficiency could not be recovered until after the property had been sold. Ibid., § 20-2142.

26. Ibid., §§ 20-1530 through 20-2151.

27. Ibid., § 20-1506.

28. 1933 Laws of Nebraska ch. 65, §1, codified at 1929 Neb. Comp. Stat. § 20-21,159 (Cum. Supp. 1933). Section 20-21,159 applied to real estate mortgages, deeds of trust, land sale contracts, and notes secured thereby. If creditors did not demonstrate good cause why the § 20-21,159 stay should not be granted, the debtor was entitled to the stay. Howarth v. Becker, 128 Neb. 580, 259 N.W. 505 (1935). On remand, the creditor subsequently proved that the debtor had no equity in the mortgaged property and was not entitled to the § 20–21,159 stay. Howarth v. Becker, 131 Neb. 233, 267 N.W. 444 (1936).

29. Neb. Comp. Stat. § 20-21,159 (Cum. Supp. 1933).

30. Ibid., § 20-21,163.

31. Ibid., § 20-21,159 (Cum. Supp. 1935).

32. Accord, Neble v. Marshall, 134 Neb. 280, 278 N.W. 489 (1938).

33. Neb. Comp. Stat. § 20-21,159 (Cum. Supp. 1937).

34. Bell v. Niemann, 127 Neb. 762, 257 N.W. 69 (1934).

35. Ibid., 764, 257 N.W. at 70 (emphasis added).

36. Ibid.

37. Clark v. Hass, 129 Neb. 112, 260 N.W. 792 (1935).

38. Ibid., 114, 260 N.W. at 793.

39. Ibid., 114–15, 260 N.W. at 793, referring to *Blaisdell v. Home Bldg. & Loan Ass'n*, 189 Minn. 422, 434, 249 N.W. 334, 339 (1933). In fact, similar language is found in the majority opinion: "The law is challenged because of its title. Attention is called to the word 'inequitable' therein. The word may be disregarded. It adds nothing except to suggest that perhaps there may be certain foreclosures where no equity whatever remains in the mortgagor, and hence those cannot be said to be inequitable so as to call for the interposition of relief." 189 Minn. at 433, 249 N.W. at 338.

40. First Trust v. Stenger, 130 Neb. 750, 266 N.W. 642 (1936).

41. Ibid., 752, 266 N.W. at 644.

42. First Trust Co. v. Smith, 134 Neb. 84, 277 N.W. 762 (1938); noted, *Nebraska Law Bulletin* 19, no. 1 (1940): 58–62.

43. 134 Neb. at 99, 277 N.W. at 770.

44. Ibid., 98–100, 277 N.W. at 770–71.

45. Ibid., 101, 277 N.W. at 771.

46. Ibid., 102–5, 277 N.W. at 771–73.

47. Ibid., 105–13, 277 N.W. at 773–77.

48. Ibid., 113–16, 277 N.W. at 777–78.

49. Ibid., 116–25, 277 N.W. at 778–82.

50. Note, *Nebraska Law Bulletin* 19, no. 1 (1940): 61.

51. Hall, *Magic Mirror,* 272–85; Friedman, *American Law in the Twentieth Century,* 151–62; Brinkley, *American History,* 875–82; Olson and Naugle, *History of Nebraska,* 317–24; Hurt, *American Agriculture,* 287–95, 300–306, 320–25.

52. Olson and Naugle, *History of Nebraska,* 318; Case, "Farm Debt Adjustment during the Early 1930s," 174–75.

53. Olson and Naugle, *History of Nebraska,* 318–20; Brinkley, *American History,* 876–77; Hurt, *American Agriculture,* 288–91.

54. U.S. v. Butler, 297 U.S. 1 (1936).

55. Friedman, *American Law in the Twentieth Century,* 159; Hall, *Magic Mirror,* 280–81.

56. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

57. Brinkley, *American History,* 892; Friedman, *American Law in the Twentieth Century,* 158–62; Hall, *Magic Mirror,* 281–84.

58. Wickard v. Filburn, 317 U.S. 111 (1942). See Friedman, *American Law in the Twentieth Century,* 161–62, Hall, *Magic Mirror,* 282–83.

59. Hurt, *American Agriculture,* 291.

60. Note, *George Washington Law Review* 3, no. 1 (1934): 86–97; note, *George Washington Law Review* 5, no. 1 (1936): 80–89.

61. 48 Stat. 1289 (1934).

62. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

63. Note, *George Washington Law Review* 4, no. 1 (1935): 105–14; 49 Stat. 942 (1935). See John Hanna, "Adjustment of Farmers' Debts in Bankruptcy," *Nebraska Law Bulletin* 12, no. 3 (1934): 231–46.

64. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937).

65. Ernest Feder, "What Kind of Bankruptcy Legislation for Farmers?" *Nebraska Law Review* 35, no. 1 (1955): 39–75; J. David Aiken, "Chapter 12 Family Farm Bankruptcy," *Nebraska Law Review* 66, no. 4 (1987): 632–94, 663–71.

66. Case, "Farm Debt Adjustment during the Early 1930s," 173–81.

67. Hurt, *American Agriculture,* 320–25, 352–57.

68. Olson and Naugle, *History of Nebraska,* 380–81, 386–87. But regarding farm financial difficulties in the 1960s, see John T. Schlebecker, "The Great Holding Action: The NFO in September, 1962," *Agricultural History* 39 (October 1965): 204–13.

69. Bruce L. Gardner, *American Agriculture in the Twentieth Century* (Cambridge, Mass.: Harvard University Press, 2002): 150–51.

70. Kenneth L. Peoples, David Freshwater, Gregory D. Hanson, Paul T. Prentice, and Eric P. Thor, *Anatomy of an American Agricultural Credit Crisis: Farm Debt in the 1980s* (Lanham, Md.: Rowman and Littlefield, 1992), 6–9, 31–33, 48–67; Steve H. Murdock and F. Larry Leistritz, eds., *The Farm Financial Crisis* (Boulder, Colo.: Westview, 1988), 15–17.

71. Aiken, "Chapter 12 Family Farm Bankruptcy," 634n5.

72. Ibid., 635.

73. Olson and Naugle, *History of Nebraska,* 391–93.

74. William P. Browne and John Dinse, "The Emergence of the American Agricultural Movement, 1977–1979," *Great Plains Quarterly* 5 (Fall 1985): 221–35; Hurt, *American Agriculture,* 369.

75. Neal E. Harl, *The Farm Debt Crisis of the 1980s* (Ames: Iowa State University Press, 1990).

76. Hurt, *American Agriculture,* 356.

77. Aiken, "Chapter 12 Family Farm Bankruptcy," 663–71. Regarding the economic and legal events leading up to the adoption of chapter 12, see ibid., 634–63.

78. Neb. Rev. Stat. §§ 25-2901 through 25-2920 (1995 Supp.).

79. Aiken, "Chapter 12 Family Farm Bankruptcy," 652–59.

80. Ibid., 663–71.

81. Ibid., 679–82.

82. 1986 Laws of Nebraska LB 999; codified at Neb. Rev. Stat. §§ 40-101, 40-110, 76-1008, 76-1012, 76-1518, 76-1519 (1986).

83. Neb. Rev. Stat. § 76-1518(1), (2) (1986); repealed, 1986 Laws of Nebraska, 3d special session, LB 3, § 21. If the default was for nonmonetary reasons, the notice would specify what actions the debtor needed to take to cure the default. Neb. Rev. Stat. § 76-1518(2) (1986); repealed, 1986 Laws of Nebraska, 3d special session, LB 3, § 21.

84. Neb. Rev. Stat. § 76-1518(3) (1986); repealed, 1986 Laws of Nebraska, 3d special session, LB 3, § 21.

85. Of course, if there were a significant deficiency, the farm debtor was better off to allow the foreclosure to proceed, especially if he or she could get a deficiency release from the lender. For many financially stressed farmers, the only hope to work their way out of debt was to have significant debt write-off or write-down. If losing some land to foreclosure meant that the total debt was lowered to a level that the farmer could service, partial liquidation could save the rest of the farm. Finding this solution was the object of voluntary debtor-creditor farm workout agreements.

86. The Center for Rural Affairs has championed many rural and family farm issues in Nebraska and throughout the Midwest, including the Nebraska Initiative 300 corporate farming amendment, the Nebraska Farm Homestead Protection Act, and the Nebraska farm credit mediation statute. The center continues to work on behalf of family farms and rural communities. The center's Web site is http://www.cfra.org/.

87. Neb. Rev. Stat. §§ 40-101, 40-110 (1984 and 1986).

88. Ibid., § 76-1519 (1986); repealed, 1986 Laws of Nebraska, 3d special session, LB 3, § 21.

89. Neb. Rev. Stat. §§ 76-1901 through 76-1916 (1987 Cum. Supp.).

90. LB 3 allows debtors to waive or disclaim their homestead redemption rights in writing. Neb. Rev. Stat. § 76-1904(3) (1987 Cum. Supp.). In cases in which creditors want to be able to foreclose on the homestead, low-equity debtors will have little choice but to waive their homestead redemption rights if they wish to obtain the loan. Debtors may also defer their homestead redemption decision until foreclosure. Ibid., § 76-1904(2).

91. Ibid., §§ 76-1912 and 76-1913.

92. Ibid., §§ 2-4801 to 2-4816 (1997).

93. Minn. Stat. Ann. §§ 583.20 through 583.32 (West 2000 and 2006 Supp.); Iowa Code Ann. §§ 654A.1 through 654A.17 (West 1995 and 2006 Supp.).

94. Minn. Stat. Ann.§§ 583.26 (West 2000); Iowa Code Ann. §§ 654A.6 (West 1995); S.D. Comp. Laws §§ 54-13-10 (2004).

95. Neb. Rev. Stat. § 2-4807 (1997).

96. Ibid., §§ 2-4804 and 2-4805.

97. Ibid., § 2-4808.

98. Ibid., § 2-4809. The farm mediation service's Web site is at http://www.agr.ne.gov/division/med/med.htm.

99. Neb. Rev. Stat. § 2-4811 (1997).

100. 7 U.S.C. §§ 5101 through 5103 (1999 and 2005 Supp.).