The American Response to Farm Crises: Procedural Debtor Relief

by

Robert M. Lawless

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THE AMERICAN RESPONSE TO FARM CRISES: PROCEDURAL DEBTOR RELIEF

I. Introduction

In the United States, a liquidity crunch currently plagues American farmers.[1] Creditors threaten to proceed against the real and personal properties of farmers who cannot repay their loans. In response, some state governments have legislated to hinder or block creditors' collection actions in state court systems.[2]

Hindering creditors' remedies in the state court systems is not a novel response to crises that threaten large numbers of debtors with loss of their property. Such procedural debtor relief measures have generally followed times of economic strife in United States history.[3] Examining previous instances of procedural debtor relief, this note will attempt to predict the effects the current round of procedural relief statutes will have on the United States farm credit market.

First, this note will examine the historical precedents for procedural debtor relief, contrasting previous legislation with today's procedural debtor relief statutes. Second, this note will outline the constitutional considerations that limit the effectiveness of procedural debtor relief stat-

1. Seven hundred seventy-six thousand five hundred fifteen (776,515) farmers had a negative cash flow in 1986. Three hundred twenty-five thousand eight hundred sixty-seven (325,867) farmers face heavy debt problems with debt-to-asset ratios over 40%. ECONOMIC RESEARCH SERV., DEP'T OF AGRIC., AGRIC. INFORMATION BULL. NO. 525, FINANCIAL CHARACTERISTICS OF U.S. FARMS, JANUARY 1, 1987 75 (1987) [hereinafter FINANCIAL CHARACTERISTICS OF U.S. FARMS].

2. Traditionally, commentators envisioned debtor relief as outright moratoria on the foreclosure of real and/or chattel mortgages. However, this is not the typical case. Most debtor relief measures operate more subtly than do outright moratoria. Extension of redemption periods, a stay of court proceedings pending debtor-creditor mediation, and a statutorily granted right to cure outstanding loan defaults are all examples of debtor relief. Statutes such as these, that hinder, block, or delay the efficacy of the creditor's remedies within the judicial system, will be referred to as "procedural debtor relief statutes." *See, e.g.*, Act of June 2, 1933, P.A. 98, 1933 Mich. Pub. Acts 134 (available on Hein Co. microfiche) (allowing continuance of foreclosure proceedings upon mortgagor's payment of fair rental value of the mortgaged property to the mortgagee); Act of Dec. 7, 1861, ch. 7, 1861 Tex. Gen. Laws 5, *as amended by* Act of Dec. 14, 1863, ch. 40, 1863 Tex. Gen. Laws 26 (available on Hein Co. microfiche) (staying collection of all debt collection proceedings until end of Civil War).

In contrast to procedural debtor relief statutes are those statutes that provide some kind of government subsidy to farmers to reduce their outstanding debts or otherwise provide liquidity for operating funds. These statutes will be referred to as "funding-type statutes." *See, e.g.*, ALA. CODE §§ 2-3A-1 to -16 (Supp. 1988) (enabling Alabama Agricultural Development Authority to purchase agricultural mortgages and help farmers service debt).

3. In world history, general mortgage moratoria have been declared in three different types of situations: periods of natural catastrophe, periods of war, and periods of economic depression. *See* R. SKILTON, GOVERNMENT AND THE MORTGAGE DEBTOR 51 (1944). United States legislators have reacted similarly by passing procedural debtor relief statutes in abundance following the revolutionary war, the economics panics of the nineteenth century, the Civil War, and the Great Depression. *See infra* notes 7-45 and accompanying text.

utes. Third, to illustrate the broad range of legislation that can constitute procedural debtor relief, this note will describe many of the state statutes that currently constrain creditors who would otherwise seek judicial relief against debtors or their property. The description of state procedural relief statutes is not exhaustive, but it does illustrate common responses to the current farm crisis.

Finally, after examining farm credit market reactions to the current procedural debtor relief statutes, this note will conclude that these statutes do not have any salutary benefits. In fact, by restricting farmers' ability to obtain credit in the future, procedural relief statutes harm the long-term interests of financially stable farmers. This note will suggest that rather than using procedural relief for farm debtors, state legislatures should concentrate their collective efforts on reducing farmers' outstanding debts. Although budgetary concerns prevent many states from offering outright grants of funds to farmers, legislatures must acknowledge that procedural debtor relief, because it provides no short-term or long-term benefits, is an inadequate alternative. Government-sponsored reduction and restructuring of private farm debt is a more appropriate response to farm crisis.

II. Historical Background

A. Procedural Relief in Antiquity

Procedural relief for farm debtors conforms to long-standing precedent dating as far back as the eighteenth century B.C. For example, the Babylonian Code of Hammurabi contained the following provision:

> If a man owe a debt and Adad [the storm god] inundate his field and carry away the produce, or, through lack of water, grain have not grown in the field, in that year he shall not make any return of grain to the creditor, he shall alter his contract-tablet and he shall not pay the interest for that year.[4]

Ancient Greek law[5] and the Roman Code of Justinian[6] provide additional examples of procedural relief for farmers. Clearly, the latest wave of procedural relief statutes does not revolutionize agricultural law.

B. Procedural Relief After the American Revolution

Like the ancient codes, United States legislatures have also enacted procedural relief statutes to alleviate debtors' economic crises.[7] During

4. Code of Hammurabi § 48 (Harper 2d ed. 1904). This code was once considered the oldest promulgation of laws in human history—prepared by the Babylonian king, circa 1792-1750 B.C. Black's Law Dictionary 644 (5th ed. 1979).

5. *See* R. Skilton, *supra* note 3, at 52-53; Feller, *Moratory Legislation: A Comparative Study*, 46 Harv. L. Rev. 1061, 1062 (1933).

6. R. Skilton, *supra* note 3, at 52-53; Feller, *supra* note 5, at 1062.

7. *See infra* notes 86-234 and accompanying text for a description of current state procedural relief efforts.

the American Revolution and immediately thereafter, the early state legislatures passed many general debtor relief measures, although the legislatures did not specifically target the agricultural sector for relief.[8] By failing to provide debtors with liquid assets to repay their debts,[9] these early statutes illustrate the general procedural bias that has characterized American debtor relief.[10] For example, in 1784, South Carolina banned the enforcement of any debt in the state courts until ten days after the convening of that state's next general assembly.[11] In the same year, Pennsylvania required creditors to allow debtors to repay their debts on the installment basis, regardless of the terms of the underlying contract.[12]

These early attempts at procedural relief worsened the post-revolutionary war financial crisis and prompted the framers of the Constitution to include the contract clause.[13] Despite the distrust of procedural debtor relief statutes that the framers expressed in the Constitution,[14] state legislatures repeatedly enacted such statutes again in the nineteenth century.[15]

C. *Procedural Relief in the Nineteenth Century: The Panic of 1837 and the Civil War*

The re-emergence of procedural relief statutes began in earnest after

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8. Historical commentators give several reasons for these debtor relief measures, including animosity toward Tory creditors and a severe economic depression after the war's end. H. BLACK, CONSTITUTIONAL PROHIBITIONS 5-6 (Rothman & Co. ed. 1980); *see also* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 5 (1938).

9. Some statutes did attempt to redefine the words "liquid asset," making certain properties legal tender in the payment of debts. Act of Nov. 8, 1785, 1785 N.H. Laws 367 (available on Hein Co. microfiche) (forcing the creditor to accept any payment of real or personal property in satisfaction of a debt or accept a one-year moratorium on enforcement of the debt); *see, e.g.*, ch. 4, 1783 N.C. Gen. Ass. Acts 327 (available on Hein Co. microfiche) (allowing payment in specie of debts that the creditor reduced to a judgment, regardless of the specie's degree of depreciation).

10. *See, e.g.*, A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 386, 390, 525, 532, 537, 571 (1927) (outlining debtor relief measures after the revolutionary war).

11. *See* Act of Feb. 26, 1782, ch. 9, 1782 S.C. Gen. Ass. Acts 16 (available on Hein Co. microfiche). The next South Carolina General Assembly convened approximately one year after the effective date of the act.

12. *See* Act of Dec. 20, 1784, ch. 167, Pa. 9th Gen. Ass. Laws 233 (available on Hein Co. microfiche).

13. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 454-61 (1934); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE § 15.8, at 86 (1986); B. WRIGHT, *supra* note 8, at 4.

14. Consider the words of Madison in *The Federalist Papers*:

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights become jobs in the hands of the enterprising and industrious and less informed part of the community. . . . [T]hey very rightly infer, therefore, that some reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

THE FEDERALIST NO. 44, at 301 (J. Madison) (J. Cooke ed. 1961).

15. The Civil War and the panic of 1837 predictably led to procedural debtor relief statutes because procedural relief statutes generally follow times of national crisis. *See* R. SKILTON, *supra* note 3, at 51.

the panic of 1837.[16] For example, in 1841-42, Illinois[17] and Alabama[18] enacted statutory redemption periods[19] that allowed a debtor to recover property sold in judicial foreclosure proceedings by tendering the sale price to the court. Other typical statutes required a purchaser at a judicial foreclosure sale to bid a certain percentage of the appraised value of the property (usually two-thirds) before a sale could occur.[20]

The Civil War led to more widespread procedural relief than had the panic of 1837. The ravages of the war left many debtors without the productive assets necessary to generate an income. With so many borrowers unable to repay their debts, a host of states, especially in the South, relied on procedural debtor relief measures.[21] Post-Civil War statutes typically denied all creditors the right to enforce their claims in state courts until a stated date.[22] However, a contract clause in both the Union and Confederate constitutions[23] constrained legislatures that otherwise would have possessed unlimited authority to pass procedural

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16. See Feller, *supra* note 5, at 1081, for a table of nineteenth century moratory legislation.

17. *See* Act of Feb. 27, 1841, 1841 Ill. Laws 172 (available on Hein Co. microfiche) (the United States Supreme Court declared this law unconstitutional as violative of the contract clause in Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843)).

18. *See* Act of Jan. 1, 1842, 1841 Ala. Laws (Annual Session) 8 (available on Hein Co. microfiche) (the Alabama Supreme Court upheld the statute in Iverson v. Shorter, 9 Ala. 713 (1846)).

19. In general, redemption is "the process of cancelling and annulling a defeasible title to land such as is created by a mortgage or a tax-sale, by paying the debt or fulfilling the other conditions." BLACK'S LAW DICTIONARY 1149 (5th ed. 1979). Under a statutory right of redemption for real property, the debtor has the right to pay to the purchaser the sales price from the judicial sale and receive the property back, free and clear of all encumbrances. G. OSBORNE, MORTGAGES § 8 (2d ed. 1970).

20. *See, e.g.*, Act of Feb. 27, 1841, 1841 Ill. Laws 172 (available on Hein Co. microfiche) (purchaser must bid two-thirds of appraised value); Act of Feb. 21, 1840, ch. 5, 1840 Miss. Laws 25 (available on Hein Co. microfiche) (also requiring purchaser to bid two-thirds of appraised value); Act of July 16, 1842, No. 119, 1842 Pa. Laws 407 (available on Hein Co. microfiche) (purchaser must bid two-thirds of appraised value).

21. Nine out of the eleven states that passed procedural relief statutes during the Civil War era were from the Confederacy. *See* Feller, *supra* note 5, at 1081-89.

22. *See, e.g.*, Act of Dec. 1, 1862, 1862 Ark. Laws 72 (available on Hein Co. microfiche) (suspending all suits until one year after the peace; the Arkansas Supreme Court declared the law unconstitutional under the state constitution in Burt v. Williams, 24 Ark. 91 (1863)); Act of Aug. 5, 1861, ch. 57, 1861 Miss. Laws (July Called Session) 85, *as amended by* Act of Dec. 1, 1865, ch. 84, 1865 Miss. Laws 236 (available on Hein Co. microfiche) (suspending all laws for the collection of debts until 1868; the Mississippi Supreme Court declared the law unconstitutional in Coffman v. Bank of Ky., 40 Miss. 29 (1866)); Act of Dec. 7, 1861, ch. 7, 1861 Tex. Gen. Laws 5, *as amended by* Act of Dec. 16, 1863, ch. 40, Tex. Gen. Laws 26 (available on Hein Co. microfiche) (suspending the collection of debts until one year after the peace; the law was declared unconstitutional in Luter v. Hunter, 30 Tex. 688 (1868)).

23. CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 10, cl. 1, contained language identical to the contract clause of the United States Constitution: "No State shall . . . pass any . . . law impairing the obligation of contract." In addition, CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 8, cl. 4, put a similar restriction on the Confederate Congress: "[B]ut no law of Congress shall discharge any debt contracted before the passage of the same." See JOURNAL OF THE CONGRESS OF CONFEDERATE STATES OF AMERICA, 1861-1865 (Kraus reprint 1968) for the text of the Confederate Constitution. Thus, by restraining the Confederate Congress, the Confederate contract clause reached farther than the Union's contract clause, which only prohibits state impairments of contract. *See infra* note 71.

debtor relief measures. Therefore, creative legislators struggled to enact statutes that would pass constitutional muster by only indirectly interfering with creditors' enforcement efforts. North Carolina, for example, in its postwar constitution, created a homestead exemption that only prevented creditors from seizing debtors' property worth less than specified ceiling amounts.[24] A Georgia law, passed in an apparent attempt to frustrate the Northern carpetbaggers, allowed a debtor to offset any kind of wartime loss, including a mere decline in property value, against a creditor's claim, whether the loss was the fault of the creditor or merely the fortunes of war.[25] Immediately after the Civil War, courts almost uniformly held that all procedural debtor relief measures violated either the Union or the Confederate contract clauses, regardless of the details of these measures.[26]

D. *Procedural Relief During the Depression: Exponential Growth*

After the Civil War and until the Great Depression again created innumerable desperate debtors, the nation's legislatures resisted the salve of procedural debtor relief. But then, during the depression, more than in any other period in United States history, legislators relied upon procedural debtor relief measures to solve the problems of financially strapped debtors.[27]

Unlike some past laws which had operated only indirectly, these procedural relief statutes generally forthrightly refused to allow creditors to enforce debts.[28] For example, under a Michigan statute,[29] by paying into court the fair rental value of mortgaged property, a debtor could obtain an order of continuance that prevented the creditor from proceeding to foreclose a mortgage on the property until 637 days from the effec-

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24. *See* N.C. CONST. of 1868, art. X, §§ 1, 2 (real property worth $1,000 or less and personal property with a value less than $500). The indirect form did not save this debtor relief. The United States Supreme Court struck this constitutional provision as repugnant to the contract clause in Edwards v. Kearzey, 96 U.S. 595 (1877).

25. See Walker v. Whitehead, 83 U.S. 314, 316-17 (1872), for a description of this statute. *Walker* held the Georgia law unconstitutional under the contract clause.

26. *See, e.g.*, Edwards v. Kearzey, 96 U.S. 595 (1877) (striking down provision in North Carolina Constitution); Burt v. Williams, 24 Ark. 91 (1863) (Confederate court striking down Arkansas wartime statute under the Confederate Constitution); State v. Carew, 47 S.C.L. (13 Rich.) 498 (S.C. 1866); Luter v. Hunter, 30 Tex. 689 (1868) (striking down Texas wartime statute).

27. The following states passed moratorium statutes during the depression: Arizona, California, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wyoming. Alston, *Farm Foreclosure Moratorium Legislation: A Lesson From the Past*, 74 AM. ECON. REV. 445, 446 (1986).

28. For a comprehensive compilation of these statutes, see BUREAU OF AGRIC. ECONOMICS, U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMICS BULLETIN NO. 53, STATE MEASURES FOR THE RELIEF OF AGRICULTURAL INDEBTEDNESS IN THE UNITED STATES, 1933 AND 1934 (1934); BUREAU OF AGRIC. ECONOMICS, U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMICS BIBLIOGRAPHY NO. 45, STATE MEASURES FOR THE RELIEF OF AGRICULTURAL INDEBTEDNESS IN THE UNITED STATES, 1932 AND 1933 (1933).

29. *See* Act of June 2, 1933, no. 98, 1933 Mich. Pub. Acts 134 (available on Hein Co. microfiche).

tive date of the act.[30] The act applied immediately to all mortgages, even where the creditor had already initiated foreclosure proceedings[31] or where a foreclosure sale had already occurred, but the redemption period had not yet expired.[32]

To stall creditors from taking possession of a family farm or homestead, some states mandated an extension of the statutory redemption period.[33] Often, a state would also ban or postpone deficiency judgments[34] which allow a creditor to pursue a debtor for any part of the debt not offset by a foreclosure sale.[35] Under other statutes, the executive branch had discretion to determine the length or timing of the procedural relief. As an example, under a Kansas statute, the legislature granted an outright six-month extension to the period of redemption for all redemption periods then running;[36] in addition, the Governor of Kansas could comprehensively extend redemption periods for another six months.[37]

Unlike the procedural debtor relief statutes of the eighteenth and nineteenth centuries, the moratorium statutes of the depression generally applied only to loans secured with real property.[38] And unlike the agricultural debtor relief of the 1980s, the depression-era moratorium statutes generally applied equally to single-family dwellings, commercial lands, and agricultural lands.[39]

In the 1930s, the federal government also entered the morass of procedural debtor relief legislation.[40] Congress passed the Federal Farm Bankruptcy (Frazier-Lemke) Act[41] in an attempt to provide a measure of

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30. *See id.* §§ 2, 5 (637 days from the effective date was March 1, 1935).

31. *See id.* § 1.

32. *See id.* § 5.

33. *See, e.g.*, Act of July 13, 1933, 1933 Ill. Laws 682 (available on Hein Co. microfiche); Act of Feb. 17, 1933, ch. 137, 1933 S.D. Laws 133 (available on Hein Co. microfiche).

34. *See, e.g.*, Act of Mar. 10, 1933, ch. 150, 1933 Idaho Laws 229 (available on Hein Co. microfiche); Act of Feb. 9, 1933, ch. 138, 1933 S.D. Laws 134 (available on Hein Co. microfiche).

35. A "deficiency judgment" is the positive difference between the amount of the debt and the price the purchaser pays at the foreclosure sale. G. Osborne, *supra* note 19, § 333. The term "deficiency judgment" can also mean the imposition of personal liability on the debtor for this difference. Black's Law Dictionary 379 (5th ed. 1979).

36. *See* Act of Mar. 21, 1933, ch. 232, § 1, 1933 Kan. Sess. Laws 357 (available on Hein Co. microfiche).

37. *See id.* § 2.

38. Compare the Georgia statute described in Walker v. Whitehead, 83 U.S. 314, 316-17 (1872) (allowing the debtor to reduce an outstanding debt by either real or personal property losses suffered during the Civil War), and the eighteenth and nineteenth century statutes, described *supra* notes 7-26 and accompanying text, with the depression-era statutes, described *supra* notes 27-34 and accompanying text.

39. Compare the depression-era statutes, described *supra* notes 27-34 and accompanying text, with today's statutes that generally apply only to agricultural real estate, described *infra* notes 86-149, 165-234 and accompanying text.

40. Congress also tried the funding-type statutes, described *supra* note 2, by passing the Emergency Farm Mortgage Act of 1933, Pub. L. No. 73-10, §§ 21-42, 48 Stat. 41. This act provided for the government to issue farm loan bonds up to an amount of $2 billion for the reduction and refinancing of farm mortgages.

41. Pub. L. No. 73-486, ch. 896, 48 Stat. 1289 (1934).

relief for farm debtors in the federal bankruptcy courts. The Frazier-Lemke Act allowed farmers, during a bankruptcy, to repurchase their foreclosed real property by paying the land's appraised value to the bankruptcy trustee over a six-year period.[42] If any of the farmers' secured creditors objected to the repurchase, the court stayed the bankruptcy proceedings for up to five years, during which time the farm debtor remained in possession of the property if the farm debtor paid the creditor the fair rental value of the land.[43] At the end of the five-year stay period, the farm debtor possessed an option to repurchase the land at its appraised value.[44] However, the Supreme Court declared the Frazier-Lemke Act unconstitutional in *Louisville Joint Stock Land Bank v. Radford*.[45]

The American experience with procedural relief statutes has remained the same, regardless of the detailed substantive differences between individual statutes. States have reacted with procedural relief statutes to provide quick relief from economic and other crises that threaten broad classes of debtors with foreclosure and other judicial debt collection devices. In examining the current constitutional and economic effects of procedural relief statutes, these past examples provide important precedents.

III. THE CONSTITUTION AND PROCEDURAL RELIEF

A. The Contract Clause: The Major Constitutional Limitation on Procedural Debtor Relief

1. Constitutional Background

Historically, constitutional concerns have always hampered legislators considering procedural debtor relief statutes. By altering fundamental contractual relations between debtors and their creditors, procedural debtor relief statutes raise serious constitutional questions under the contract clause.[46] Because these contractual relations constitute intangible interests in property, procedural relief statutes can also raise due process and equal protection questions.[47] However, the contract clause remains the major constitutional consideration for such legislation.

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42. *See id.* §§ 1-4.

43. *See id.* § 7.

44. *See id.*

45. 295 U.S. 555 (1935).

46. "No state shall . . . pass any law . . . impairing the obligation of contracts." U.S. CONST. art. I, § 10.

Because of the ever-present contract clause question, most legislatures include a severability clause in procedural debtor relief legislation. *See, e.g.*, Act of Apr. 7, 1986, ch. 9, § 13, 1987 Mont. Laws (Mar. 1986 Special Session) 2121. A severability clause is a "provision in a statute which rescues the balance of the statute from a declaration of unconstitutionality if one or more clauses or parts are invalidated." BLACK'S LAW DICTIONARY 1205 (5th ed. 1979) (definition of "saving clause").

47. *See* 55 AM. JUR. 2D *Mortgages* § 947 (1971); *infra* text accompanying notes 67-85.

In *Home Building & Loan Association v. Blaisdell*,[48] the Supreme Court upheld the Minnesota Moratorium Law of 1933 and broke new ground in contract clause analysis. The law in question extended the Minnesota statutory redemption period for an additional two years and forbade deficiency judgments during the extended redemption period.[49] Despite a tacit recognition that the moratorium did impair the contractual rights of creditors holding mortgages, the Court sustained the law as a valid exercise of the police power to meet the emergency needs of the depression.[50]

In *Blaisdell*, the Court applied a five-part test to determine whether a state, in exercising its police power to handle a present emergency, may enact a statute that might otherwise violate the Constitution.[51] By refining the *Blaisdell* test in later holdings, the Supreme Court has narrowed the five-part test to three parts.[52] First, a court must determine whether the procedural relief statute substantially impairs creditors' contractual rights.[53] Second, a court must determine whether the legislature, in passing the statute, attempted to remedy a broad and general social or economic problem.[54] Third, a court must determine whether the legislature reasonably reacted to the emergency by reasonably preserving creditors'

48. 290 U.S. 398 (1934).

49. *Id.* at 417 n.1, 418.

50. "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.* at 437.

Justice Sutherland's dissent in *Blaisdell* forcefully attacked the majority opinion's emergency exception, believing that the contract clause was inserted in the Constitution especially to prevent debtor relief measures in times of financial distress. *Id.* at 453 (Sutherland, J., dissenting). However, the idea that the contract clause must be read flexibly in times of emergency dates at least back to the beginning of the nineteenth century. *See* Johnson v. Duncan, 3 Mart. 530, 545 (La. 1815) (British invasion of New Orleans justified statute suspending all court proceedings, including those against recalcitrant debtors); Von Baumbach v. Bade, 9 Wis. 510, 534 (Wis. 1859):

> [C]ourts must look behind the statute itself, and take notice of the causes which led to its enactment, for otherwise they would be unable to determine whether its regulations are reasonable or not, or were demanded by the state of the times or the financial situation of the country.

51. The five-part test of *Blaisdell* approved procedural relief if:

   1. An emergency existed;
   2. The legislation was addressed to a legitimate state end and not for the advantage of a particular individual;
   3. The relief afforded was of a character appropriate to the emergency;
   4. The conditions of the relief were reasonable to creditors' rights; and
   5. The legislation was temporary in nature.

Id. at 444-47.

52. *Cf.* 2 R. Rotunda, J. Nowak & J. Young, *supra* note 13, § 15.8 (discussing contract clause analysis in three discrete parts).

53. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). The first part of the contract clause analysis only determines whether an impairment of contractual relations exists, and thus, whether the contract clause analysis is appropriate. Of course, if the legislation in question does not substantially impair contractual relations, there can be no violation of the contract clause.

54. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983) (citations to United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977) and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247, 249 (1978) omitted).

remedies.[55] If a law satisfies the second and third prongs of the test, a court will uphold the law despite an interference with contractual rights under the first prong.

2. *Existence of a Substantial Impairment of Contractual Obligations*

The typical procedural debtor relief statute will nearly always substantially impair contractual obligations. While the contract clause prevents only retroactive impairment of contractual obligations,[56] a procedural debtor relief statute, by altering existing contractual obligations between a creditor and debtor, causes such a retroactive impairment. Also, the contract clause only prevents a state from impairing the reasonable expectations of the contracting parties.[57] Procedural debtor relief statutes usually strike at creditors' most reasonable expectations—the right to enforce debts due and owing. Thus, a substantial impairment of contractual obligations can almost be assumed in the context of procedural debtor relief statutes. With procedural debtor relief statutes, therefore, the contested inquiries are likely to be (a) whether a broad and general social or economic problem exists to justify the relief legislation and (b) whether the legislature treated creditors reasonably in affording the debtor procedural relief.

3. *An Emergency: The Broad and General Social or Economic Problem*

In determining whether an emergency—a broad and general social or economic problem—existed to justify a procedural debtor relief statute, courts will generally defer to the judgment of the enacting legislative body. Throughout United States history, in the typical relief statute, the legislature has recited that a state of emergency necessitated the extraordinary remedy.[58] While judicial deference has not become a per se rule, a court will not disturb a legislative finding of economic emergency unless the legislature clearly erred.[59] Even when a legislature does not explicitly state that an emergency necessitated the procedural relief statute, courts can properly take judicial notice of the existence of an economic emergency.[60] Thus, procedural relief statutes will generally

55. *Energy Reserves Group, Inc.*, 459 U.S. at 412; *Blaisdell*, 290 U.S. at 445.

56. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 13, at 102.

57. *Cf. Energy Reserves Group, Inc.*, 459 U.S. at 411 ("Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S. at 26-27. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. *Id.* at 31.").

58. *See, e.g.*, Act of Mar. 10, 1933, ch. 150, § 1, 1933 Idaho Laws 229 (available on Hein Co. microfiche); Act of Mar. 20, 1933, ch. 232, § 4, 1933 Kan. Laws 357 (available on Hein Co. microfiche); MONT. CODE ANN. § 80-13-101 (1987).

The finding of an emergency calls for legislative decision making. 55 AM. JUR. 2D *Mortgages* § 943 (1971) (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)).

59. East N.Y. Sav. Bank v. Hahn, 293 N.Y. 622, 627, 59 N.E.2d 625, 626 (1944), *aff'd*, 326 U.S. 230 (1945).

60. Brown v. Ferdon, 5 Cal. 2d 226, 229-30, 54 P.2d 712, 713 (1936).

satisfy the requirement that an emergency prompted the legislature to enact the law.

4. *Procedural Relief That Treats Creditors Reasonably*

Under a contract clause analysis, a court lastly considers whether the procedural relief statute in question reasonably reacts to the underlying emergency and to creditors' rights.[61] The courts have struggled to define what procedural relief measures unreasonably impinge on creditors' rights as opposed to those procedural relief measures that reasonably react to economic crises. Because of the vagueness inherent in any reasonableness standard, the resulting rule of law provides no definite guidelines. Therefore, to preserve the constitutionality of statutes, legislatures must carefully draft procedural relief measures to protect creditors' rights.[62]

Without a more objective test, the Court, in ruling on a procedural relief statute's reasonableness, has relied on a fact-specific analysis of the particular statute's effects on the contracting parties. For example, in *Blaisdell* the Court discussed the mechanics of the mortgagor's expanded redemption right under the Minnesota Mortgage Moratorium Law of 1933 and the protection that the mortgagee received in exchange.[63] When passing on the reasonableness of a Kansas utility statute in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*,[64] the Court noted that the statute in question only affected ten percent of the natural gas that the citizens of Kansas consumed, and because of its limited scope, the statute could not be unreasonable.[65] Also, the Kansas utility statute comported with national policy toward gas regulation.[66] These two examples demonstrate the fact-specific nature of the analysis that the Court has used under the reasonableness prong of the contract clause test. Because of the fact-specific nature of the analysis, legislators and commentators work in an uncertain field when predicting whether a particular procedural relief statute will pass constitutional muster.

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61. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445 (1934).

62. *See* Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1640 (1980) (contract clause analysis' reasonableness standard gives no guidance to state legislatures).

63. *Blaisdell*, 290 U.S. at 445-47.

The Court even admitted that it must deal only generally with the effects of the Minnesota Mortgage Moratorium Law:

> It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

Id. at 446.

64. 459 U.S. 400 (1983).

65. *See Energy Reserves Group, Inc.* 459 U.S. at 418.

66. *See id.* at 419-20.

B. Equal Protection and Due Process Challenges to Procedural Relief Statutes[67]

Creditors have also claimed that procedural relief statutes violate their equal protection and due process rights.[68] Because of a similar (but not identical) underlying analysis,[69] a due process challenge to procedural debtor relief shares much the same chance of success as a contract clause challenge. Thus, the due process challenge unnecessarily duplicates the contract clause challenge, except in the rare instance in which the federal government has enacted procedural debtor relief legislation.[70] In contrast, due to the loose "rational basis" standard that the Court applies to economic regulations,[71] equal protection challenges to procedural relief statutes are rarely successful.

1. Due Process and Procedural Debtor Relief

The due process clauses of the fifth and fourteenth amendments to the Constitution protect creditors' contractual rights as property interests.[72] Thus, both state and federal legislation impairing the rights of creditors must meet due process requirements. Because the Supreme Court has imposed less searching standards under due process analysis than under contract clause analysis,[73] state legislation that does not violate the contract clause rarely contravenes due process.[74] Because the due process challenge is not as exacting, the contract clause remains the

67. A statute that places discretion for the implementation of a moratorium in the hands of various branches of a state government may also raise separation-of-powers questions under a state constitution. The constitutional scheme in an individual state must provide the answer to state separation-of-powers questions. State constitutional questions are beyond the scope of this note. *See, e.g.*, Burt v. Williams, 24 Ark. 92 (1863) (Civil War act ordering continuance in all contract actions until end of hostilities was an invalid legislative invasion of judicial powers); IOWA CODE ANN. § 654.15.2 (West Supp. 1988) (giving the governor of Iowa power to declare an economic emergency, thereby, implementing the moratorium); Mortgages: The Iowa Mortgage Foreclosure Moratorium Statute, Opinion of the Iowa Attorney General, No. 83-4-7, at 38, 40 (1983) (Iowa moratorium statute does not constitute an invalid delegation of power to the governor).

68. The equal protection and due process clauses are contained in U.S. CONST. amend. V, § 1, and amend. XIV, § 1, respectively.

69. *See infra* notes 77-80 and accompanying text.

70. The contract clause, by its very terms, applies only to the states. U.S. CONST. art. I, § 10 ("No *State* shall . . . pass any . . . Law impairing the Obligation of Contracts." (emphasis added)); *see also* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 13, § 15.8.

71. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

72. Lynch v. United States, 292 U.S. 571, 579 (1934). For an explanation of the due process challenge to procedural relief statutes, see Laue v. Production Credit Ass'n, 390 N.W.2d 823, 830 (Minn. Ct. App. 1986).

73. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984).

74. "Although state legislation is subject to due process restrictions against retroactive legislation, it is unlikely that state legislation which does not violate the contract clause will violate the fourteenth amendment due process clause." 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 13, § 15.9, at 106 (citations omitted); *see also Pension Benefit Guar. Corp.*, 467 U.S. at 733:

> We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.

primary challenge to state procedural debtor relief statutes. In addition, a constitutional challenge must rely on due process grounds only for a federal procedural relief statute,[75] because the contract clause only applies to the states.[76]

Because of similarity between due process analysis for retroactive legislation and analysis under the contract clause,[77] the three-part contract clause analysis[78]—permitting a significant impairment of contract for a broad societal interest if creditors are treated reasonably—should also be relevant in the due process context. The Supreme Court has stated that outside of the fundamental rights context, the due process clause only prohibits those contractual impairments that lack a rational basis.[79] Still, for legislation that substantially impairs contractual obligations without *justification*, courts should apply, under a due process analysis analogous to the contract clause analysis, some level of heightened scrutiny.[80]

2. *Equal Protection and Procedural Debtor Relief*

A creditor's equal protection objection to procedural relief statutes asserts that procedural relief legislation favors one class of people, debtors, at the expense of another class of people, creditors.[81] To elevate the level of judicial scrutiny beyond the rational basis test, the creditor must show that the statute creates a classification that disadvantages a suspect class or a fundamental right.[82] Because procedural debtor relief statutes

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75. This note primarily concerns state attempts at procedural relief for agricultural debtors. The severity of the current farm debt crisis has been regional in scope. Therefore, unless the problem grows on a more national scale, federal procedural relief legislation, other than the addition of chapter 12 to the Bankruptcy Code, *see infra* notes 253-58 and accompanying text, is unlikely. If Congress passes other procedural debtor relief legislation, then due process questions will arise.

76. *See supra* note 70.

77. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 13, § 15.9; *cf.* National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451, 472 (1984) (discussing fifth amendment due process analysis in terms of the cases and principles of the contract clause decisions).

78. *See supra* notes 52-55 and accompanying text.

79. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) (citations omitted).

80. An old example of federal procedural debtor relief legislation that violated due process was the Frazier-Lemke Farm Bankruptcy Act. *See supra* text accompanying notes 40-45. The Supreme Court struck down the Frazier-Lemke Act in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). The Court found that five basic contract rights had been unconstitutionally taken from farm creditors. *Id.* at 594-95.

81. Ironically, a farm debtor attacked the Iowa Mortgage Moratorium Statute in Koch v. Kostichek, 409 N.W.2d 680 (Iowa 1987), as violating his equal protection rights. There, the Iowa Supreme Court held that the moratorium statute applied to foreclosures of mortgages, but not forfeitures. The farm debtor, a victim of a potential forfeiture, unsuccessfully argued that if the court interpreted the statute to only apply to debtors facing forfeitures, then the statute drew an invalid classification between those facing forfeiture and those facing foreclosure. *Id.* at 683. The court decided that the situations were dissimilar (foreclosure versus forfeiture) and found that a classification did not even exist at all. *Id.* at 683.

82. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

do not disadvantage a suspect class or a fundamental right, courts will not apply an elevated standard of review.[83] Therefore, to be successful, a creditor must demonstrate that the procedural relief legislation creates a completely arbitrary classification.[84] Disparate treatment of debtors and creditors is used to alleviate a basic societal problem—economic crisis. As an economic regulation, procedural debtor relief consistently meets the rational basis test of not creating a wholly arbitrary scheme to respond to this economic problem.[85]

IV. The American Response: Current Statutory Procedural Relief

Most recently, farm debt crisis has threatened United States family farmers.[86] In response, many Great Lakes and Great Plains states have enacted measures that attempt to aid farm debtors.[87] In some instances,

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83. Generally, the rational basis test—the test for constitutional challenges that do not involve fundamental rights—governs such economic regulations. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

84. "[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); *see also* Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96, *on remand sub nom.* Eagerton v. Exchange Oil & Gas Corp., 440 So. 2d 1031 (Ala. 1983) (economic regulation need only have a rational basis to survive equal protection challenge); Hodel v. Indiana, 452 U.S. 314, 332 (1981):

> As the court explained in Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), social and economic legislation is valid unless, "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational."

85. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934) ("Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one."); First Fed. Sav. & Loan Ass'n v. Walker, 91 Ill. 2d 218, 437 N.E.2d 644 (1982) (upheld measure even though it addressed no specific economic crisis, but dealt with general change in mortgage redemption statute); Meier v. Hilton, 257 Ill. 174, 100 N.E. 520 (1913) (also upheld change in general law as to judgment creditors not directed at any specific economic crisis).

86. *See, e.g.*, *Farm Credit Crisis: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 22-26, 61-68 (1986); *Farm Credit Crisis: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 24-32, 157-60, 279-83 (1985); *Farm Bankruptcy: Hearings Before the Subcomms. on Admin. Practice and Procedure and Courts of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 83-100 (1985); Harl, *The Architecture of Public Policy: The Crisis in Agriculture*, 34 U. Kan. L. Rev. 425 (1986); Pauly, *Farming's Barnyard Blues*, Newsweek, Aug. 4, 1986, at 38; Sidey, *Bitter Harvest*, Time, Sept. 8, 1986, at 16.

87. Among the states passing procedural relief legislation or already having such relief in their statutes are: Iowa, Indiana, Kansas, Minnesota, Nebraska, Montana, North Dakota, South Dakota, Wisconsin, and Wyoming. See *infra* text accompanying notes 90-234 for a discussion of the substantive provisions of these statutes.

This note is not an exhaustive survey of every state procedural debtor relief statute. Because the farm debt crisis continues to exist, especially in light of the drought of 1988, the state legislatures continue to pass farm debtor relief legislation. For example, as this note is being written, the 86th Illinois General Assembly, on January 9, 1989, passed H.B. 3083 which would provide for farm debtor-lender mediation. At the time of writing, this bill awaits Governor Thompson's signature.

to allow farmers to reduce their debts, state governments have created state agencies that disburse funds and guarantee loans.[88] Like their predecessors, however, most of the current relief statutes merely impose procedural obstacles before farm creditors.[89]

A. *Stay of Court Proceedings During Pending Mediation*

Eight state mediation programs for farm debtors and creditors are outlined below.[90] In three of these states, a mandatory stay of court proceedings applies during a mediation period.[91] Thus, the length of time the mediation process consumes can constitute a procedural delay for farm creditors.

The federal government promotes the creation of these state mediation programs. On January 6, 1988, President Reagan signed into law the Agricultural Credit Act of 1987.[92] Under part of this statute, the federal government will provide (up to $500,000) one-half of the cost of a state mediation program.[93] To qualify for federal funds, however, a state need not postpone court proceedings during pending mediation. The states will likely enact more mediation programs, but these programs will not necessarily involve court stays.

1. *Indiana: Troubled Farmers May Request Mediation; Both Parties Must Request a Suspension of Court Proceedings*

The Indiana statute singles out financially troubled farmers[94] for relief. A financially troubled farmer may initiate mediation proceedings through an application to the commissioner of agriculture.[95] If the commissioner of agriculture approves the application, the commissioner appoints a mediator and gives notice to all creditors that the farmer identifies.[96] Courts may suspend pending legal actions against the farm debtor only upon agreement of all the parties involved.[97]

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88. *See, e.g.*, ALA. CODE § 2-3A-1 (Supp. 1988) (creating Alabama Agricultural Development Authority); N.D. CENT. CODE § 6-09.10-01 (1987) (creating a state credit review board to negotiate with creditors on behalf of troubled farmers and authorizing the board to buy down interest on one-quarter of a family farm); WYO. STAT. § 11-34-109 (Supp. 1988) (creating Farm Loan Board to provide for purchase of farmlands and machinery and also to liquidate existing indebtedness).

89. See *infra* notes 90-234 and accompanying text for a discussion of the substantive provisions of current procedural relief statutes.

90. *See infra* notes 94-144 and accompanying text.

91. *See infra* notes 98-117, 125-33 (discussing statutes of Iowa, Minnesota, and South Dakota).

92. Pub. L. No. 100-233, 101 Stat. 1568 (1988) (to be codified at 12 U.S.C. §§ 2001-2260).

93. *Id.* § 502, 101 Stat. at 1662-64.

94. A "financially troubled farmer" is a farmer who has a debt-to-asset ratio of greater than 40% and has a negative cash flow or who has exhibited an inability to repay loans to a creditor. Act of Mar. 3, 1988, P.L. 24-1988, sec. 2, § 6, 1988 Ind. Legis. Serv. 468 (West) (to be codified at IND. CODE § 15-7-6).

95. *Id.* sec. 2, § 14.

96. *Id.* sec. 2, § 14.

97. *Id.* sec. 2, § 18.

2. *Iowa: Mandatory Mediation*

In addition to other procedural relief measures,[98] the Iowa legislature requires a creditor to institute mandatory mediation proceedings with the farm debtor as a prerequisite to enforcement of the debt.[99] The act covers all debts of $20,000 or more[100] secured by agricultural real or personal property.[101] Generally, any creditor seeking to enforce any type of a debt in any manner[102] against agricultural property must file a mediation request with the state mediation service and obtain a mediation release before proceeding.[103] During the forty-two day mediation period, the creditor cannot proceed against the farm debtor.[104] If the parties fail to reach an agreement, the mediator, by granting a mediation release, allows the creditor to reinitiate court proceedings.[105] As in other states, during the mediation, the Iowa farmer receives free assistance from a lawyer and a financial analyst.[106]

3. *Minnesota: Farm Lender Mediation Act*

The strict Minnesota law[107] requires the creditor, before enforcing a debt against agricultural property,[108] to notify both the debtor and the Minnesota director of agriculture.[109] To avoid waiving the right to mediation,[110] the debtor then has fourteen days to file a mediation request.[111] Within ten days after receiving the mediation request, the Minnesota director of agriculture schedules a mediation meeting and notifies all af-

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98. *See infra* notes 150-64, 194-99, 205-08 and accompanying text.
99. IOWA CODE ANN. § 654A (West Supp. 1988).
100. *See id.* § 645A.4(1).
101. *See id.* § 654A.1(1).
102. The statute, in pertinent part, reads:

> A creditor . . . desiring to initiate a proceeding against agricultural property which is real estate . . . , to forfeit a contract to purchase agricultural property . . . , or to otherwise garnish, levy on, execute on, seize, or attach agricultural property shall file a request for mediation with the farm mediation service. The creditor may not begin the proceeding . . . until the creditor receives a mediation release, or until the court determines . . . that the time delay required for the mediation would cause the creditor to suffer irreparable harm.

Id. § 654A.6.

Another section forbids a creditor from foreclosing a deed of trust or mortgage on agricultural real estate without first obtaining a mediation release. *See id.* § 654A.2C.

103. *See id.* § 654A.6.
104. *See id.* § 654A.10.
105. *See id.* § 654A.11.
106. *See id.* § 654A.7. Other statutes that provide financial or legal assistance to a farm debtor include S.D. CODIFIED LAWS ANN. § 54-13-8 (Supp. 1988); WYO. STAT. § 11-41-105(e) (1987).
107. *See* Farmer Lender Mediation Act, MINN. STAT. ANN. §§ 583.20-.32 (West 1988). A Minnesota court has upheld the Minnesota Farmer Lender Mediation Act in the face of contract clause and due process challenges. *See* Laue v. Production Credit Ass'n, 390 N.W.2d 823 (Minn. Ct. App. 1986).
108. Among the methods the Minnesota statute lists for enforcing a debt against agricultural property are: terminating a contract for deed on agricultural property or garnishing, levying on, executing on, seizing, or attaching agricultural property. MINN. STAT. ANN. § 583.26(1) (West 1988).
109. *See id.*
110. *See id.* § 583.26(2)(b).
111. *See id.* § 583.26(2)(a).

fected creditors.[112] After the creditors have received the mediation notice, the court stays all proceedings against the debtor for a period of ninety days.[113] Thus, by requesting mediation, the farm debtor can unilaterally force a stay period. As in the Wyoming mediation statute, the Minnesota director of agriculture provides the farm debtor with a farm credit analyst to give expert assistance.[114]

If the state-provided mediator finds that the creditor failed to mediate in good faith, the court must punish the creditor.[115] Upon such a finding, the court must extend the stay period for an additional sixty days. The court has the power to order further extension of the stay period for an additional 180 days if the creditor still fails to mediate in good faith.[116] The Minnesota Farm Lender Mediation Act is automatically repealed, effective July 1, 1989.[117]

The Minnesota law forces the creditor to undergo serious compromise negotiations with the farm debtor or to face an extended period of restrictions on proceedings against the farm debtor. During this period of delay, the debtor could seriously impair the value of the creditor's collateral by hiding or rapidly wasting the assets. Mandatory mediation between a farm debtor and creditor will rarely produce a compromise agreement. A farm creditor usually will be willing to accept a fair compromise to avoid initiating court proceedings. Court proceedings against farm collateral generally give the farm creditor undervalued farm assets that are insufficient to pay the underlying debt. If compromise will cut the creditor's losses, the creditor will compromise without compulsory mediation.

4. *Montana: Voluntary Mediation Without Stay of Court Proceedings*

Montana has enacted a farmer-creditor mediation law[118] that requires the consent of both parties to mediate. The Montana legislature did not intend the statute to have any effect on pending court actions against a debtor; rather, the purpose of the law was merely to provide economically distressed farmers a forum for negotiation and financial planning assistance and counseling.[119]

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112. *See id.* § 583.26(4)(a).

113. *See id.* § 583.26(5)(a).

114. *Compare* MINN. STAT. ANN. § 583.26(3) (West 1988) (providing for a farm credit analyst) *with* WYO. STAT. § 11-41-105(e) (Supp. 1988) (providing farmer with assistance from University of Wyoming).

115. *See* MINN. STAT. ANN. § 583.27(3) (1988). The mediator may also find that the farm debtor is not negotiating in good faith, in which case the stay period is immediately lifted, and creditors may immediately proceed with their remedies. *Id.* § 583.27(4)(b).

116. *See id.* § 583.27(3).

117. *See* Law of May 28, 1987, ch. 292, § 27, 1987 Minn. Sess. Law Serv. 529 (West).

118. *See* MONT. CODE ANN. § 80-13-101 (1987).

119. *See id.* § 80-13-102.

5. *Nebraska: Farm Creditors Must Give Notice of Mediation*

Under the Nebraska statute, a creditor initiating proceedings to enforce an agricultural debt must give thirty days notice to the debtor.[120] The notice must inform the debtor of the availability of mediation services.[121] The farm debtor may then request mediation services from the state.[122] The Nebraska statute has no effect on any legal proceedings.[123] Of course, the Nebraska statute does interpose a thirty-day notice period before a farm creditor may initiate proceedings to collect the farm debt. But judicial determination that the thirty-day notice period will irreparably harm a farm creditor exempts that creditor from the thirty-day notice requirement.[124]

6. *South Dakota: Mandatory Mediation but the Parties Do Not Have to Attend*

South Dakota requires all creditors seeking to enforce a debt against agricultural land or personal property to first obtain a mediation release.[125] A court may provide a creditor an exemption from obtaining the mediation release if, after notice and a hearing, the court finds the creditor will be irreparably harmed unless allowed to proceed immediately to enforce the farm debt.[126] As the first step in obtaining the mediation release, the creditor must request mediation with the state mediation board.[127] After receiving the creditor's request, and unless the farm debtor waives the right to mediation, the state mediation board must schedule an initial mediation meeting, to be held within twenty-one days of the creditor's request.[128] The board must send notice of the mediation meeting to the farm debtor and all other creditors of the farm debtor.[129]

The mailing of notice for the mediation begins a forty-two-day mediation period.[130] Curiously, during this period, neither the creditor nor farm debtor is required to attend any mediation meetings.[131] Thus, while the South Dakota statute contemplates mediation, it does not require it. The real relief for the farm debtor is that the South Dakota mediation statute effectively postpones a farm creditor's ability to enforce debts against agricultural property. Absent a waiver by the farm debtor, a

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120. *See* Farm Mediation Act, L.B. 664, § 7(1), 1988 Neb. Laws 560, 562.

121. *See id.*

122. *See id.* § 8, 1988 Neb. Laws at 562.

123. *See id.* § 14, 1988 Neb. Laws at 563-64.

124. *See id.* § 7(3), 1988 Neb. Laws at 562.

125. S.D. CODIFIED LAWS ANN. § 54-13-10 (Supp. 1988). The entire South Dakota farm debt mediation provisions are set forth at *id.* §§ 54-13-1 to -19.

126. *See id.* § 54-13-10.

127. *See id.*

128. *See id.* § 54-13-11.

129. *See id.*

130. *See id.* § 54-13-12. The parties may agree to extend the length of the mediation period. *See id.* § 54-13-15.

131. *See id.* § 54-13-13. Failure to attend mediation meetings does not prejudice the rights of either the farm debtor or creditor. *See id.*

creditor may not obtain a mediation release until the end of the mediation period.[132] Thus, before South Dakota creditors may enforce farm debts, they must wait out a twenty-one-day notice period and a forty-two-day mediation period. The South Dakota legislature repealed the farm debt mediation statute, effective December 31, 1990.[133]

7. *Wisconsin: Mediation and Arbitration by Agreement*

Wisconsin has enacted a combined mediation and arbitration scheme that operates only with the consent of both farm debtor and creditor.[134] Farmers can only participate in a mediation process through a joint request with their creditor.[135] Before the statute's amendment,[136] as part of their request for mediation, both farmer and creditor had to agree to a sixty-day period of restraint from bringing legal actions against the other.[137] The statute no longer contains a requirement that the farmer and creditor agree to a sixty-day suspension of legal proceedings and, thus, effectively operates as a voluntary mediation program. The farm debtor and creditor can also jointly request binding arbitration to settle their disputes.[138] The Wisconsin legislature had repealed its farm mediation program effective July 1, 1989.[139]

8. *Wyoming: Mediation and Stay by Agreement of All Parties*

The Wyoming legislature has created a mediation board to oversee the mediation process[140] and to enable the state university to aid the farmer in preparing for mediation.[141] In any legal proceeding and during the pendency of mediation, upon the written stipulation of all parties involved, the appropriate trial court may stay all enforcement actions.[142] Thus, only creditors can grant their debtors procedural relief under the Wyoming statute. The statute burdens creditors only by a requiring that

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132. *See id.* §§ 54-13-15 to -16.

133. *See* Act of Mar. 2, 1988, ch. 384, § 20, 1988 S.D. Laws 601, 605.

134. *See* WIS. STAT. ANN. § 93.50 (West Supp. 1988).

135. *See id.* § 93.50(3)(b). Not only must there be joint agreement to participate in the mediation process, but any agreement reached must be the result of a voluntary agreement by the parties; the mediator has no power to compel a settlement. *Id.* § 93.50(3)(f).

136. *See* Act of Nov. 26, 1987, 1987 Wis. Act No. 80, sec. 3, 1987 Wis. Legis. Serv. 33, 33 (West No. 4) (repealing WIS. STAT. ANN. § 93.50(3)(d) (West Supp. 1988)).

137. *See* Act of Mar. 31, 1986, 1985 Wis. Act. No. 153, sec. 17, § 93.50(3)(d), 1986 Wis. Legis. Serv. 31, 36 (West No. 7).

138. *See* WIS. STAT. ANN. § 93.50(4) (West Supp. 1988).

139. Act of July 31, 1987, 1987 Wis. Act No. 27, secs. 1683ag, 3204, 1987 Wis. Legis. Serv. 41, 340, 507 (West No. 2).

140. WYO. STAT. §§ 11-41-103 to -104 (Supp. 1988). The entire Wyoming farm debt mediation statute is contained in the Agricultural Mediation Service Act of 1987, WYO. STAT. §§ 11-41-101 to -110 (Supp. 1988).

141. WYO. STAT. § 11-41-105(e) (Supp. 1988). This type of provision is fairly common. By giving the farmer access to expert help, it puts the farmer and the presumably more resourceful creditor on a more equal footing in the mediation proceedings.

142. *Id.* § 11-41-107(a).

they give notice to debtors of the availability of mediation services.[143] The trial court uses its discretion to set the length of the stay, based on the amount of time necessary for the mediation process.[144] Although silent on the point, the statute implies that if the mediation process fails to produce a binding compromise, any court action continues or can be commenced upon the expiration of the stay period.

B. Stay of Court Proceedings Without Mediation

While many statutes use a pending mediation to mask an underlying stay of court proceedings against a farm debtor,[145] other statutes have been more direct. Several state legislatures have passed outright moratoriums on the enforcement of farm debt in their state court systems.[146] Due to the contract clause requirement that procedural relief measures treat creditors reasonably,[147] these moratoriums also require the farm debtor to continue making payments to the creditor[148] or allow the creditor relief from the moratorium in hardship cases.[149]

1. Iowa: Resurrection of a Remnant from the Depression

The depression-era Iowa moratorium statute remains in force.[150] However, the Iowa legislature substantially revised the Iowa moratorium law in 1985 to meet the realities of the current farm crisis.[151] The amended version of the moratorium statute has survived contract clause, due process, and equal protection challenges before the Iowa Supreme Court.[152]

Under the first part of the statute, a debtor in a pending action may file for protection from the court if certain "acts of God" have affected the farmer's property and have primarily caused the debtor's inability to pay.[153] In the case of an "act of God" causing an inability to pay, the court may order a stay of court proceedings, which must last at least one

143. *Id.* § 11-41-108(a). While the statute prescribes no time limit in which the creditor must give notice, presumably, for the notice requirement to be effective, the creditor must give some kind of adequate notice. By giving the debtor notice of impending proceedings to enforce a debt, the notice requirement potentially poses a serious threat to the creditor. By hiding collateral, an unscrupulous debtor could jeopardize the creditor's interest in the property.

144. *Id.* § 11-41-107(b).

145. *See supra* notes 98-117, 125-33 and accompanying text.

146. *See infra* notes 150-92 and accompanying text.

147. *See supra* notes 61-66 and accompanying text.

148. *See infra* notes 161-64, 171-75, 189 and accompanying text.

149. *See infra* notes 178-80 and accompanying text.

150. *See* Act of Apr. 26, 1939, ch. 245, 1939 Iowa Acts 353 (available on Hein Co. microfiche) (codified as amended at IOWA CODE ANN. § 654.15 (West Supp. 1988)).

151. *See* Act of May 31, 1985, ch. 250, §§ 1, 2, 1985 Iowa Acts 520 (codified at IOWA CODE ANN. § 654.15 (West Supp. 1988)).

152. *See* Koch v. Kostichek, 409 N.W.2d 680 (Iowa 1987).

153. IOWA CODE ANN. § 654.15(1) (West Supp. 1988). While the terms of the statute could theoretically apply to even nonfarm debtors, the statute speaks in terms of "drought, flood, heat, hail, storm, . . . climatic conditions or . . . infestation of pests," conditions that especially affect the state's farmers.

year.[154] A court may give a second continuance only upon a showing of extraordinary circumstances.[155]

The second part of the statute allows the governor to declare an economic emergency[156] and to identify particular types of properties that the economic emergency has depreciated.[157] By filing within one year of the governor's declaration, owners of statutorily covered properties can move to continue a pending debt enforcement action.[158] The continuance period is two years in the case of agricultural real property and one year in the case of all other real property.[159] A court may terminate a continuance due to an economic emergency if (1) the creditor has made good faith efforts to restructure the debt; (2) the creditor has made good faith efforts to help the debtor use federal and state programs for debtor relief; and (3) the debtor has failed to pay interest on the note during the continuance.[160] Thus, the creditor avoids the order of continuance if the debtor abuses the available relief that the moratorium statute provides.

For either an "act-of-God" or economic emergency moratorium, the court appoints a receiver, who may be the owner of the property, for the remainder of the continuance period.[161] The receiver collects all rents and incomes from the property and pays the following amounts in their respective orders of priority: (1) costs of receivership, (2) taxes, (3) insurance, and (4) any remainder to the creditor.[162] Thus, under the Iowa statute, the creditor receives three basic protections. First, the debtor must continue to pay interest on the underlying obligation.[163] Second, the debtor pays over to the creditor any amounts not necessary to preserve the property. Third, by requiring the receiver to pay preservation costs, the statute also prevents waste of the property.[164]

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154. *See id.* § 654.15(1)(a)-(b). The stay order lasts until March 1 of the next year if the debtor's default occurred before March 1 of the present year. Alternatively, the stay order lasts until March 1 of the second succeeding year if the default occurred after March 1 of the present year, but during the present crop year. *Id.*

155. *See id.* § 654.15(1)(c).

156. Governor Branstad declared such an emergency on October 1, 1985. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit*, 71 IOWA L. REV. 1, 55 (1985) (citing Des Moines Register, Oct. 2, 1985, at 1A, col. 6). A legislative act extended the moratorium to March 30, 1988. *See* Act of May 1, 1987, ch. 81, § 1, 1987 Iowa Acts 102.

157. IOWA CODE ANN. § 654.15(2) (West Supp. 1988).

158. *See id.* § 654.15(2).

159. *See id.* § 654.15(2)(a).

160. *See id.* § 654.15(2)(d).

161. *See id.* § 654.15(1)(d), (2)(c). Under the moratorium statute, the receiver may be the owner. *Id.* In fact, the Iowa statute requires that the court appoint the owner of agricultural land as receiver, without bond, if none of the parties object. *See id.* § 654.14.

162. *See id.* § 654.15(1)(d), (2)(c).

163. *See id.* § 654.15(2)(d).

164. *See id.* § 654.15(1)(d), (2)(c). As with the Kansas statute, *see infra* notes 165-80 and accompanying text, the Iowa legislature apparently perceived the need to satisfy the reasonableness prong of the contract clause analysis, *see supra* notes 61-66 and accompanying text. The requirement that the debtor continue paying the creditor is likely a reaction to this need.

2. *Kansas: Family Farm Rehabilitation Act*

In enacting the Kansas Family Farm Rehabilitation Act,[165] the state legislature created an elaborate scheme to afford farmers procedural relief, while still attempting to preserve creditors' interests. In *Federal Land Bank v. Bott*,[166] the Kansas Supreme Court found this law unconstitutional under the federal contract clause. But the Kansas law illustrates the current type of legislation that states have passed to give relief to troubled farmers.

Instead of instituting a system of mandatory mediation, the Family Farm Rehabilitation Act authorized the court to issue an "order of protection," which could provide a potential stay period for up to three years and one month.[167] To receive the procedural relief, the debtor moved for an order of protection from a creditor's enforcement efforts and then served notice on the creditor of the motion, along with a schedule of assets and liabilities. The court then made four findings: (1) the current fair market value of the debtor's agricultural land and personal property, (2) the value, individually, of each piece of the debtor's personal property, (3) whether the defendant-owner was "insolvent,"[168] and (4) whether the provisions of the act were applicable (i.e., whether the debtor was in fact a farmer).[169]After determining these four facts, the court could stay the creditor's collection proceedings for a period of thirty days.[170]

The farm debtor's most substantial relief was in the ability to postpone further proceedings for an additional three years. A Kansas court gave the farmer a one-year extension of the stay period if the farmer paid the creditor the following amounts within the initial thirty-day stay period:[171] (1) interest[172] for one year on the fair market value of the real property[173] and (2) interest plus depreciation for one year on the personal property.[174] The debtor could obtain two additional one-year stays upon the payment of like amounts in subsequent years.[175]

In addition to affording troubled farmers substantial relief through

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165. Act of May 8, 1986, ch. 4, 1986 Kan. Sess. Laws 7 (codified at KAN. STAT. ANN. §§ 2-3401 to -3413 (Supp. 1987)).

166. 240 Kan. 624, 732 P.2d 710 (1987).

167. Only three proceedings were appropriate for an order of protection: (1) foreclosure of a mortgage, (2) cancellation of a contract for deed, and (3) repossession or collection of personal property. *See* KAN. STAT. ANN. § 2-3403 (Supp. 1987).

168. KAN. STAT. ANN. § 2-3402(e) (Supp. 1987) defined an "insolvent" as a farmer who had no property other than exempt property and insufficient liquid assets to run the farm for a period greater than six months.

169. *See id.* § 2-3405(a)-(d).

170. *See id.* § 2-3406(a).

171. *See id.* § 2-3406(a). Payments were made in three installments throughout the year. *See id.*

172. The statutory rate of interest was the average rate on 52-week T-bills plus two percentage points. *See id.* § 2-3406(c).

173. *See id.* § 2-3406(b)(1).

174. *See id.* § 2-3406(b)(2).

175. *See id.* § 2-3406(b).

the stay provisions, the Kansas legislature also enlarged the capability of these same farmers to redeem their real property. Another section of the act gave a separate statutory right of redemption to farmers who paid into court the fair market value of their land (measured at the time of the stay order or the time of redemption, whichever was greater) plus costs, taxes, and other charges.[176] The Kansas Supreme Court found the redemption provision particularly repugnant to the contract clause.[177]

As a reasonable quid pro quo to Kansas farm creditors, the legislature allowed a court to extinguish the stay order if the debtor failed to provide the creditor adequate protection.[178] The statute defined a lack of adequate protection as lack of insurance on the property, waste, inadequate maintenance of personal property, or inability of the creditor to inspect collateral.[179] However, the Kansas Supreme Court found the supposed adequate protection most inadequate to protect creditors' rights.[180]

3. *Minnesota: Making the Farm Debtor a Tenant During a Moratorium*

The Minnesota moratorium statute[181] effectively converts the farm debtor into a tenant of the creditor.[182] On foreclosures of first mortgages,[183] for both agricultural and residential homesteads,[184] the court must enter an immediate stay of judicial proceedings to determine the merits of a further moratorium on foreclosure proceedings.[185] Within fifteen days after the notice of foreclosure,[186] the court must hold a hearing to consider (1) the economic peril of the debtor and (2) the debtor's ability to pay. Based on these two criteria, the court may order a stay of the foreclosure proceedings lasting six months for residential real estate[187] and twelve months for agricultural real estate.[188]

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176. *See id.* § 2-3407.

177. *See* Federal Land Bank v. Bott, 240 Kan. 624, 635, 732 P.2d 710, 716 (1987).

178. *See* KAN. STAT. ANN. § 2-3408 (Supp. 1987). In the context of the Family Farm Rehabilitation Act, the Kansas legislature attempted to provide adequate protection to farm creditors. The reasonableness prong of the contract clause requires that a legislature provide some quid pro quo to creditors. *See supra* text accompanying notes 61-66. The adequate protection provisions in the Family Farm Rehabilitation Act were most likely a reaction to this constitutional requirement of the contract clause.

179. *See* KAN. STAT. ANN. § 2-3402(f) (Supp. 1987).

180. *See Federal Land Bank*, 240 Kan. at 637, 732 P.2d at 718.

181. MINN. STAT. ANN. §§ 583.01-.12 (West 1988). The legislature provided for repeal of this statute, effective July 1, 1989. *See* Law of May 28, 1987, ch. 292, § 36, 1987 Minn. Sess. Law Serv. 560 (West).

182. *See infra* notes 189-90 and accompanying text.

183. MINN. STAT. ANN. § 583.03 (West 1988). To fall under the moratorium act, the mortgage must have been made prior to May 24, 1983, the effective date of the act. *See id.* § 583.03(2).

184. *See id.* § 583.02.

185. *See id.* § 583.04.

186. *See id.* § 583.10.

187. *See id.* § 583.04.

188. *See id.*

By requiring the debtor to make fair rental value[189] payments to the creditor during the stay period, the statute effectively converts the debtor into a tenant.[190] The creditor must apply the rental payments against taxes, insurance, and the outstanding principal and interest.[191] In a further attempt to be reasonable to the creditor, the Minnesota statute requires the court to shorten the length of the redemption period by an amount of time equal to the length of the stay.[192]

C. *Right to Cure Loan Defaults*

In contrast to the statutes that stay pending court proceedings,[193] some statutes attempt to prevent court proceedings. These statutes give a farm debtor the right to cure outstanding loan defaults. By allowing the farm debtor to regain good standing under the loan contract through an effective statutory cure, the statute stops the creditor from proceeding against the debtor or property.

1. *Iowa: Right to Cure Does Not Equal the Ability to Cure*

Iowa has given its farmers a statutory right to cure defaults on outstanding loans.[194] A creditor seeking to enforce a debt against agricultural property must send the farm debtor a notice of default and of the available right to cure.[195] Under the statute, a farm debtor accomplishes a proper cure by paying the lower of two amounts: (1) the amount stated in the default notice[196] or (2) the amount of delinquent installments plus a statutory penalty of five percent annual interest.[197] In either case, a proper cure restores all of the farm debtor's rights.[198] The statutory right to cure is not available to a farm debtor who has received two previous notices of default in any time period or one notice of default on the property in the past twelve months.[199]

2. *Nebraska: Cure By Payment of the Amount Due*

Nebraska gives its farmers a similar statutory right to cure an existing mortgage default.[200] The statute requires the foreclosing creditor to serve the debtor a notice with the following information: (1) identifi-

189. The court determines what constitutes "fair rental value." *See id.* § 583.08.
190. *See id.* § 583.04.
191. *See id.* § 583.08.
192. *See id.* § 583.07.
193. *See supra* notes 146-92 and accompanying text.
194. *See* IOWA CODE ANN. § 654.2A (West Supp. 1988).
195. *See id.* § 654.2A(2).
196. Absent an acceleration clause, the amount in the default notice should be equal to the amount of the delinquent installments. However, the creditor has the option of including in the default notice an amount, less than the total amount of delinquent installments, that the creditor would consider an effective cure.
197. *See* IOWA CODE ANN. § 654.2A(4) (West Supp. 1988).
198. *Id.* § 654.2A(5).
199. *See id.* § 654.2A(3).
200. *See* Farm Homestead Protection Act, NEB. REV. STAT. § 76-1903 (Supp. 1988).

cation of the mortgage instrument and a reference to the book and page where the mortgagee recorded the mortgage; (2) a statement that the debtor has breached the mortgage agreement; (3) the nature of the breach; (4) a statement that the farm debtor has a right to cure the breach within two months of the date upon which the creditor sent the notice; (5) the amount of the unpaid principal sum secured by the mortgage and the amount of interest accrued to the date of the notice; and (6) a statement of the amount of unpaid principal that would have been due had no default occurred.[201] As stated in the notice, the debtor has two months after it was sent to effect a cure.[202] By tendering to the creditor the entire amount due on the mortgage, including costs and expenses to enforce the mortgage, the farm debtor makes an effective cure.[203] A court must dismiss an action for foreclosure of the mortgage if the farm debtor has made an effective statutory cure.[204]

D. Postponement of Deficiency Judgments in Iowa

Even if Iowa farmers cannot avoid a mortgage foreclosure through the preforeclosure procedural relief available in that state,[205] still more procedural relief exists. If the foreclosed property was farmland and the mortgagor was a farmer, Iowa postpones, until July 1, 1991, the enforcement of deficiency judgments on the underlying debt.[206] Therefore, Iowa law protects the farmer by a right to cure and mandatory mediation from the beginning of financial trouble,[207] a moratorium through foreclosure proceedings,[208] and even postponement of deficiency judgments after foreclosure proceedings.

E. Expanding the Right to Redeem

Through redemption, a debtor can cancel and annul the defeasible title to land that the purchaser at a judicial sale receives.[209] Normally, by paying into court the amount that the purchaser bid at the judicial sale for the entire foreclosed property, a debtor can accomplish a statutory redemption.[210] Some states now allow a farm debtor to redeem only the farm homestead, instead of the entire farm.[211] By allowing a separate redemption of the farm homestead, these states have expanded the ability

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201. *See id.* § 76-1903(2).
202. *See id.* § 76-1903(4).
203. *See id.* § 76-1903(2)(b). The creditor can include attorney's fees, not to exceed one and one-half percent of the total unpaid mortgage balance, as part of the costs and expenses of enforcing the mortgage. *Id.*
204. *See id.* § 76-1903.
205. *See supra* notes 98-106, 150-64, 194-99 and accompanying text.
206. *See* IOWA CODE ANN. § 654.6 (West Supp. 1988).
207. *See id.* §§ 654A, 654-2A (West Supp. 1988).
208. *Id.* § 654.15 (West Supp. 1987).
209. *See supra* note 19.
210. G. OSBORNE, *supra* note 19, § 308.
211. *See infra* notes 212-23 and accompanying text.

of a farm debtor to retain possession of at least part of a foreclosed farm. When the debtor separately redeems the farm homestead before any foreclosure sale, a farm creditor loses part of the collateral that had secured the loan. Thus, rather than hindering a farm creditor before or during a judicial action to enforce a debt, an expanded right to redeem hinders a farm creditor who attempts, at a judicial sale, to recover the underlying debt. Moreover, because the only bidder at foreclosure sales is usually the foreclosing creditor, who bids the amount of the underlying debt, the expanded right of redemption deprives the purchasing creditor of any subsequent appreciation in the value of the separately redeemed homestead.

1. Minnesota: Separate Redemption of the "Homestead"

Like Nebraska, Minnesota has enacted a law that allows separate redemption of the family farm homestead.[212] The statute requires the creditor, before foreclosing on agricultural property containing a homestead, to notify the farm debtor of the right to separate the farm homestead at the judicial sale.[213] As long as they conform to local zoning laws, farm debtors may designate any amount of the property as the homestead so long as the designation does not unreasonably affect the value of the remaining property.[214] After receiving notice of a homestead designation, the sheriff must offer the homestead for sale separately.[215] The mortgagor-farmer is the only party able to redeem the homestead as a separate property.[216]

By ambiguously defining the amount of property that a farm debtor may redeem separately,[217] the Minnesota legislature has virtually ensured future litigation. In contrast, a Nebraska farm debtor clearly has the opportunity to separately redeem up to 160 acres—enough to carry on a farming operation.[218] Without a clear delineation, the Minnesota legislature has left to the courts to determine whether a farm debtor may redeem enough property separately, as the "homestead," to continue a viable farming operation.

2. Nebraska: Separate Redemption of the Homestead and 160 Acres

In addition to providing a statutory right to cure,[219] the Nebraska legislature has also provided for partial redemption, which a farmer accomplishes by paying into court the appraised value of an agricultural

212. *See* MINN. STAT. ANN. § 582.041 (West 1988).
213. *See id.* § 582.041(2).
214. *See id.* § 582.041(3).
215. *See id.* § 582.041(4).
216. *See id.* § 582.041(5).
217. *See id.* § 582.041(3) (allowing separation of homestead that does not unreasonably affect the value of the remaining land).
218. *See infra* note 221 and accompanying text.
219. *See supra* notes 200-04 and accompanying text.

homestead.[220] The statute defines "homestead" as the parcel of land that includes the dwelling house and any additional real estate, not to exceed 160 acres in toto.[221] Further, if the outstanding liens do not exceed eighty-five percent of the total value of the encumbered property, the debtor applies the equity in the homestead portion against the redemption price.[222] However, the farm debtor does not have an absolute right to redeem separately a farm homestead. By showing that the partial redemption will have an unreasonable effect on the value of the remaining encumbered property, the creditor can avoid the separate redemption of the homestead.[223]

F. Giving the Farmer a Right of First Refusal Is Not a Harmless Option

Once foreclosure has occurred and the statutory redemption period has expired, a purchasing farm creditor should normally have fee simple title to the foreclosed farmland. However, by granting first refusal rights to the previous farm debtor, some states have encumbered foreclosed farmland in the hands of the purchasing creditor.[224] In the context of agricultural procedural debtor relief, a right of first refusal gives a farm debtor the right to meet an offer from a third party to purchase or lease foreclosed farmland in the hands of a creditor.[225]

1. Minnesota

Minnesota further encumbers agricultural lands with a right of first refusal by the farm mortgagor.[226] On the first occasion that a state or federal agency or corporation (the "holder") holding farm lands or a farm homestead, usually as a purchasing foreclosure creditor, seeks to sell or lease that land, the holder must give the immediately preceding owner a right of first refusal to lease or to buy.[227] The immediately preceding owner has ten days to exercise an option to lease and sixty days to exercise an option to buy.[228] The Minnesota statute encumbers the farmlands with the one-time right of first refusal for a period of five years.[229]

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220. *See* Farm Homestead Protection Act, NEB. REV. STAT. §§ 76-1904 to -1913 (Supp. 1988).

221. *See id.* §§ 40-101, 76-1902(3) (the Farm Homestead Protection Act uses the general Nebraska definition of "homestead").

222. *See id.* § 76-1909(2).

223. *See id.* § 76-1908(3).

224. *See infra* notes 226-34 and accompanying text.

225. A "right of first refusal" is the "[r]ight to have first opportunity to purchase real estate when such becomes available, or right to meet any other offer." BLACK'S LAW DICTIONARY 1191 (5th ed. 1979). Modern procedural relief statutes also give a first refusal right to the farm debtor to meet any offer to lease the land from the creditor.

226. *See* MINN. STAT. ANN. § 500.24(6) (West Supp. 1988).

227. *See id.* Typically, the immediately preceding owner of agricultural land now in the hand of a "state or federal agency or a corporation" will be a foreclosed farm mortgagor.

228. *See id.*

229. *See id.*

2. *Montana*

Montana implicitly recognizes an important social policy in maintaining the family farm unit, even if the family must farm the land as tenants. Montana requires the holder of foreclosed agricultural real property (usually a purchasing creditor) to give a right of first refusal, either to lease or to buy, to the immediately preceding holder of the land.[230] A holder must give an offer to lease only if the preceding owner has the "farm management skills and experience to assure a reasonable prospect of success in the proposed farming operations."[231] In contrast, when a holder sells newly foreclosed land, the debtor has an absolute right of first refusal to buy.[232] The preceding owner has fifteen days to exercise a right to lease and sixty days to exercise a right to purchase.[233] These added first refusal rights further encumber the marketability of already unsalable agricultural land. Now, the creditor holding these properties must not only find a willing buyer, but a willing buyer who will wait out the former owner's first refusal rights. The act automatically repeals itself on June 30, 1996.[234]

V. ECONOMIC UNREALITIES: PROCEDURAL DEBTOR RELIEF

While procedural debtor relief statutes may appear, on the surface, to give short-term relief to the embattled farmer, traditional economic theory raises questions as to the statutes' overall effectiveness. Procedural relief statutes can upset market equilibrium between farm debtors and creditors, creating unforseen economic consequences. As history demonstrates, procedural debtor relief statutes do not effectively aid farmers in the short term and actually hurt the interests of farmers in the long term. Procedural debtor relief statutes do not provide effective aid to United States farmers because these types of statutes fail to address the root problem of the farm debt crisis: high debt-to-asset ratios causing negative cash flows.

A. *Negative Cash Flow: The Farmer's Real Problem*

It seems a tautology that the farmer who cannot meet obligations as they become due lacks liquidity. However, when legislatures react to the

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230. *See* MONT. CODE ANN. §§ 25-13-901, 902 (1987).

231. *Id.* § 25-13-902(1). Without judicial interpretation, the application of the minimal skill requirement will remain unknown. The immediately preceding holder of a foreclosed piece of farmland is likely to have been a financial failure. However, most financial institutions should extend the offer of first refusal to an experienced farmer, rather than risk a later court finding that they proceeded wrongfully under the act. Therefore, this condition is unlikely to limit the number of farm debtors that receive a right of first refusal to lease their previously foreclosed farmland.

232. *See id.* § 25-13-902(2). Many farmers who have just lost their farms through foreclosure proceedings will be insolvent and not able to raise the necessary capital to repurchase them.

233. *See id.* § 25-13-904(2). To be eligible for the right of first refusal to buy or lease, the immediately preceding owner must give notice of a current name and address to the holder of the foreclosed farmland. *Id.* § 25-13-904(1).

234. *See* Act of Apr. 15, 1987, ch. 473, § 6, 1987 Mont. Laws 1146, 1148.

farm debt crisis by providing relief to the farmer in the courtroom instead of the pocketbook, the legislatures forget this simple business fact. With heavy, albeit declining, debt, the American farmer faces a liquidity crunch.[235] The enormous shortfall of liquid assets has placed many farmers into financial situations where the sheer size of the farm debt has overwhelmed the ability of the farmers to continue servicing their debts. Because procedural relief statutes do not increase farm liquidity by restructuring or reducing farmers' massive debts, these statutes fail to provide an effective solution to the farm debt problem. Giving farmers more time only adds interest to their debt if they do not have the capacity to repay.

B. *Procedural Debtor Relief: The Short-Term Impact*

A farmer facing an imminent action to enforce a debt against farming assets may welcome a relief statute that stalls the creditor for a few months[236] or a few years.[237] Because these statutes tend to raise interest rates and tighten credit markets, farmers, as a whole, will come to regret these legislative efforts designed to help the farmer. A statistical regression analysis of the effect of mortgage moratorium statutes during the Great Depression suggested that procedural relief statutes tend to raise interest rates and tend to tighten the supply of agricultural credit.[238] The regression analysis showed that private creditors in states that passed moratoria raised interest rates in the long term.[239] In addition, the statistics demonstrated that the depression-era statutes effected a rapid short-term redistribution of credit from the farm sector to other business sectors: an immediate tightening of agricultural credit caused by creditors simply not granting loans to farmers.[240] The private creditor's desire to avoid increased ill will among an already hostile farm sector could also account for the short-term tightening of credit.[241]

The mere possibility of a procedural relief statute can also have short-term effects. Often, a flurry of foreclosure activity will occur before the effective date of a moratorium law.[242] In a rush to beat the effective date of a procedural relief statute, a creditor may sweep a borderline debtor, in technical default, into an early foreclosure when the creditor

235. As of January 1, 1987, 325,867 American farms face a heavy debt problem with debt-to-asset ratios over 40%. FINANCIAL CHARACTERISTICS OF U.S. FARMS, *supra* note 1, at 75.

236. Consider the delays of the mandatory mediation statutes: up to 204 days in Minnesota under the Farmer-Lender Mediation Act, MINN. STAT. ANN. § 583.20-.32 (West 1988), or the 42 day mediation period under IOWA CODE ANN. § 654A (West Supp. 1988).

237. The Kansas Family Farm Rehabilitation Act allowed the farmer to postpone a foreclosure for three years. *See* KAN. STAT. ANN. §§ 2-3401 to -3413 (Supp. 1987).

238. *See* Alston, *supra* note 27, at 451.

239. *See id.* at 455.

240. *Id.*

241. *Id.* at 451.

242. *See Farm Foreclosure Moratoria and the Contract Clause: An Economic Analysis*, 3 CONSTITUTIONAL COMMENTARY 331, 334 (1986) [hereinafter *Farm Foreclosure Moratoria*].

would normally allow the debtor more time to cure. Thus, a procedural relief statute may cost some farm debtors their farms.

C. *Long-Term Effects of Procedural Relief on Debtors and Creditors*

The long-term effects of procedural debtor relief statutes can be even more marked than the short-term effects. In the long term, as a reaction to adverse legislation, the private farm creditor will turn to different credit markets such as commercial lending and consumer lending.[243] Congressmen, during the floor debates for the Frazier-Lemke Farm Bankruptcy Act of 1934, expressly recognized the tendency of creditors to move away from financial markets that have experienced adverse legislation.[244] Thus, in the long term, financially healthy farmers will find farm credit more difficult to obtain.

The procedural relief statutes also fail to address the root financial problem of the American family farm: negative cash flow. In 1986, over half of American farms, of all sizes, had a negative cash flow after payment of interest and principal on outstanding loans.[245] A procedural relief statute does not address a negative cash flow situation. Although these statutes may delay foreclosure for a given length of time, when the procedural postponement expires, the farmer probably still faces a negative cash flow situation.

Only one positive benefit of procedural relief statutes may exist: by passing procedural relief statutes in sufficient numbers, the state legislatures send a message to Congress of the perceived seriousness of the farm debt problem.[246] Given the negative economic consequences of procedural debtor relief, this benefit, which can be accomplished in other ways, cannot justify procedural relief statutes.

VI. States Must Prioritize the Farm Crisis in Their Budgets

As procedural relief does not answer the farm debt problem, the state legislatures should provide state government funds and agencies to

243. The short-term supply for credit may also react to market disequilibrium by tightening credit availability. *See* Alston, *supra* note 27, at 455. The long-term effects on the supply of credit are likely to be even more marked.

244. Senator Bankhead stated, "I do not want to support a measure that will put the farmers of the country in position where they cannot hereafter secure credit as they have done in the past." 78 Cong. Rec. 12,075 (1934). Senator Fess similarly commented, "It does not seem to me that we might destroy the credit which [Mr. Bankhead] insists the farmers have, because everyone realizes that by the passage of the bill we may be making it impossible for the farmer in the future to borrow money." 78 Cong. Rec. 12,075 (1934), *quoted in* Louisville Joint Stock Land Bank v. Radfurd, 295 U.S. 555, 595 n.28 (1935). Perhaps the most succinct comment was made by Representative Peyser, "I believe in the enactment of this law and the scaling down of values you are going to take away the possibility of help that may be needed by these farmers in the future." 78 Cong. Rec. 12,137, *quoted in Louisville Joint Stock Land Bank*, 295 U.S. 555, 595 n.28 (1935).

245. The exact percentage was 51.53%. Financial Characteristics of U.S. Farms, *supra* note 1, at 75.

246. *Farm Foreclosure Moratoria*, *supra* note 242, at 332.

create liquidity for farmers. North Dakota has provided an excellent example of a proper funding-type statute.[247] Their statute creates a state credit review board[248] with power to negotiate for farmers[249] and buy down interest on outstanding farm loans.[250] By restructuring and reducing farm loans, North Dakota gives the farmer the type of relief truly necessary for long-term survival. One commentator suggested that state governments should create "pools of liquidity"[251] that farmers could utilize to meet cash flow problems. In addition to helping financially shaky farmers, funding-type statutes benefit the interests of creditors and the long-term interests of financially healthy farmers. Providing cash to farmers enables them to repay their outstanding loans, which induces farm creditors to make more capital available for agricultural lending.[252]

By adding chapter 12 to the Bankruptcy Code,[253] Congress has also recognized that the restructuring of loans and the reduction of debt provides a fighting chance for American farmers to keep their land.[254] Chapter 12, a special chapter in the Bankruptcy Code for family farmers,[255] allows family farmers to remain in control of their farming operations and utilize bankruptcy, at the same time, to reduce their outstanding debts.[256] Thus, because both restructure a farmer's debts, chapter 12 reaches much the same result as the funding-type statutes.[257] However, chapter 12 is much more desirable than the procedural relief statutes because chapter 12 benefits the farmer whereas the procedural relief statutes benefit the farmer very little, if at all.[258]

If state governments cannot make outright grants to troubled farmers, legislators can still help farm debtors by replacing privately held debt

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247. *See* N.D. CENT. CODE §§ 6-09.10-01 to -09 (1987); *see also supra* note 2 (defining "funding-type statutes").

248. *See* N.D. CENT. CODE § 6-09.10-02 (1987).

249. *See id.* § 6-09.10-4(2).

250. *See id.* § 6-09.10-5.

251. Baker, *Structural Issues in U.S. Agriculture and Farm Debt Perspectives*, 34 U. KAN. L. REV. 457, 465 (1986).

252. The creditor with a bad loan secured by deflated agricultural real or personal property has an idle capital investment. Thus, a bad loan subjects the creditor to an opportunity cost in the form of foregone income from reinvesting that capital. *See Farm Foreclosure Moratoria*, *supra* note 242, at 339. When the creditor is able to liquidate the bad loan, the formerly tied-up capital is now available for reinvestment, presumably, in the agricultural sector.

253. *See* 11 U.S.C. §§ 1201-1231 (Supp. IV 1986).

254. "Accordingly, this subtitle creates a new chapter of the [Bankruptcy] Code—Chapter 12—to be used only by family farmers. It is designed to give family farmers a fighting chance to reorganize their debts and keep their land." H.R. REP. No. 958, 99th Cong., 2d Sess. 48 (1986).

255. A "family farmer" is defined as an individual, corporation or partnership who's aggregate debts do not exceed $1,500,000 (at least 80% of which arose out of a farming operation). 11 U.S.C. § 101(17) (Supp. IV 1986).

256. 11 U.S.C. § 1225 (Supp. IV 1986) basically allows a bankrupt farmer to write down outstanding secured debt to the value of the farm assets securing it.

257. Of course, the states cannot enact statutes similar to chapter 12, because the states lack the bankruptcy power that the United States Constitution gives to the federal government. *See* U.S. CONST. art. I, § 8, cl. 4.

258. *See supra* notes 235-46 and accompanying text (discussing negative effects of procedural relief statutes).

with governmentally held debt. When a state government takes the place of a private farm creditor, the private creditor receives full payment of the outstanding farm loan with all of the attendant societal benefits.[259] The farmer then becomes a debtor to a public creditor. Because the state should have the interests of society in mind and not a corporate bottom line, a government creditor should be more lenient to a farm debtor.[260]

Thus, liquidity from state governments provides the effective long-term solution to an individual farmer's debt problems. Without governmentally provided liquidity or government-sponsored reduction and restructuring of farm debt, farmers facing massive debt problems lack the cash flow necessary to service their debts. Procedural relief statutes fail to provide liquidity, and thus, fail to provide an answer.

VII. Conclusion

Procedural debtor relief does not solve the farm debt problem. Although its political appeal as a quick and governmentally inexpensive short-term solution to perceived problems dates back to ancient civilizations, modern legislatures must find the wherewithal to resist passage of these statutes. Constitutional considerations pose serious threats to the effectiveness of these statutes. Under the Constitution, the states must reserve many remedies to the creditor when passing procedural relief statutes. Economic wisdom also dictates against passage of procedural relief statutes.

Budget-crunched state governments must face hard realities. By making farmers more liquid, government funding provides the effective remedy for the farm debt problem at the state level. If state governments cannot afford to restructure farm debts, procedural relief statutes do not provide a good alternative. Inaction is preferable to procedural relief, because procedural relief statutes harm the long-term interests of farmers as a whole and provide little help to the short-term interests of the currently debt-ridden farmer.

Robert M. Lawless

259. *See supra* note 252 and accompanying text.

260. During the depression, states were less likely to pass mortgage moratorium statutes as the percentage of governmentally held debt in the state rose. *See* Alston, *supra* note 27, at 448. This provides at least circumstantial evidence that governmental creditors are less harsh on debtors than private creditors. Also, in the Agricultural Credit Act of 1987, Congress stated that it was the sense of Congress that the secretary of agriculture should issue guarantees for loans to "the maximum extent possible." Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 625, 101 Stat. 1568, 1685 (1988) (to be codified at 7 U.S.C. § 1989 note). Also, Congress stated that the efforts of "various State and local public agencies, citizens' groups, church and civic organizations, and individuals" to focus attention on the farm debt problem were worthy of "the recognition, encouragement, and support of Congress and the American people." *Id.* § 626, 101 Stat. at 1685. Thus, even when the government acts in the role of creditor, it still looks to the best interests of all society