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EDITORS' PREFACE

No case in our common law system is ever truly forgotten. Some are negative reference points, like *Plessy* and *Dred Scott*, reminding us of past injustice, while others are iconic landmarks of decency and principle, like *Brown*. *Home Building and Loan Association v. Blaisdell*, a.k.a. the Minnesota mortgage moratorium case, is one not commonly recognized for what it is: the most important property law case of its time, and now of our own. For the question at the heart of the case was the legality of a state-imposed moratorium on the repayment of home loans. In effect, Minnesota was preventing lienholders, usually the first to be paid the debts of an estate in default, from exercising their power to collect on their investments. In the depths of the Depression, when city folk and farm families were losing their households to foreclosure, a progressive majority in the legislature stepped in to give mortgagors extra time to remedy the default. While equity of redemption was an old English legal concept, the Minnesota statute, and the judicial rulings that upheld it, caused a widespread outcry among conservative legal theorists, as well as banking and certain other moneyed interests. It still does.

No one has told this story as well as Fliter and Hoff. Combining the skills of the political scientist and the historian, these two Kansas State University scholars have dug deeply into the records. They have recovered the intimate details of the lives of the parties, brought the politics of the time to life again, and tracked the convoluted tale from the legislature and the governor's office through the state courts to the United States Supreme Court. The early-Depression Supreme Court has often been regarded as a defender of property interests and the enemy of New Deal state and federal economic policy, but in this case the Court found the statute constitutional.

Fliter and Hoff analyze the opinions on a sharply divided Court, making sense of complex legal issues. They do not hide their own views, but so ably do they disentangle the issues, and so well do they root the case in its particular circumstances, that a fair-minded reader will likely find their exposition persuasive. That is true as well of their concluding pages, in which they trace the impact of the case, and the logic of the Court's majority, out into the world. While some scholars and jurists continue to inveigh against the case as a betrayal of the Constitution and private property, here human needs trumped abstract theory. In these days of massive foreclosures and bankruptcies, no case is more relevant than *Blaisdell* and no account more vital reading than this.

ACKNOWLEDGMENTS

This project began a few years ago, during the early months of what is now known as the Great Recession. As the worst mortgage crisis since the Great Depression unfolded, we observed a very different set of politics, economic ideas, and policy responses than those engendered by the 1930s crisis, during which several states passed bold measures along the lines of Minnesota's 1933 foreclosure moratorium. We thought it would be useful to examine these Depression-era state moratorium laws for their own sake, and we were also quite surprised that no full-length study existed of *Home Building and Loan Association v. Blaisdell*, the landmark Supreme Court decision that upheld them. Soon after delving into our research, we realized that we had very rich social, economic, and constitutional stories to tell, and we are grateful to the University Press of Kansas and its Landmark Law Cases and American Society series for an opportunity to share them. We thank University Press of Kansas editor-in-chief Michael Briggs for his enthusiasm and support of the project from the start. We also thank series editor Peter Charles Hoffer for his detailed and insightful comments on the manuscript; the additional reviewer, who identified several flaws and pointed us toward solutions; our production editor, Larisa Martin; and our marketing manager, Susan Schott. Carol Kennedy skillfully transformed a cowritten draft that uneasily incorporated two sets of style conventions—neither of which included correct number and capitalization usage!—into a coherent manuscript.

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Coauthoring a book, we discovered, takes more than half the time of writing one alone – time spent away from home and family. John thanks his wife, Leah, and their sons, Eric and David, for their unwavering patience and support. In his enthusiasm to share the Blaisdell story with his family, John sometimes had to be reminded by David to just "give us the short version." That was sound advice to us as writers, to remember our audience. Derek thanks Leah for letting him take over her dining room but takes no blame for John's crazy work hours! Most of all, Derek thanks his wife, Jeanine, for her unyielding patience and encouragement and for putting up with the worst work year of his life. He would be lost without her.

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Introduction

In the 2005 film *Sweetland*, a young German woman named Inge arrives in southern Minnesota in 1920 to marry Olaf, a farmer she has never met but comes to love. The movie's plot centers on the anti-German bigotry and bureaucratic incompetence that prevent the couple from marrying, but the severe post–World War I downturn in American agriculture provides an important backdrop. Olaf's friend Frandsen is way behind on his mortgage, in part because he over-invested in a fancy new tractor, and Olaf must intervene dramatically to save Frandsen's farm. The stoic Olaf is no socialist, but on several occasions he caustically remarks, "Farming and business don't mix."

Olaf's observation was prescient. After a prosperous period just before and during World War I, the American farmer suffered through the 1920s. The Great Depression, beginning after the stock market crash of October 1929, merely downgraded the agricultural economy from perilous to hopeless. Between 1922 and 1932, farmland values decreased by two-thirds, crop prices plummeted to less than half of pre–World War I levels, the percentage of farms run by tenants rather than owners rose, and mortgages secured during better times became nearly impossible to pay. The Farm Credit Administration later reported that, in 1933, "almost one-half of the mortgaged farms in the United States were potentially subject to foreclosures because of inability of their owners to meet interest and tax payments." The mortgage crisis in America's cities was nearly as dire: by January 1934, about one-half of all urban mortgages were delinquent.

As students of American history know well, Franklin D. Roosevelt's New Deal provided immediate emergency aid to millions of desperate Americans, created numerous job programs, greatly expanded the American welfare state, and launched several regulatory programs designed to tame the vagaries of industrial capitalism and promote stable economic growth. To address the mortgage crisis, Congress created the Home Owners' Loan Corporation (HOLC) during FDR's famous first "Hundred Days" of frenetic policymaking. Over the next three years, the HOLC purchased and refinanced over a million delinquent home loans, but it hardly dented the surface of the crisis, especially on the nation's farms. Over 100,000 farms entered foreclosure every year from 1926 to 1940. Throughout the Depression, farmers and their political allies clamored for direct aid to farmers at both the state and federal levels.

Initially, New Dealers tried to "plan" portions of the economy and stimulate recovery by sanctioning cartels in various industries (through the National Recovery Administration) and stabilizing agricultural prices through production controls (through the Agricultural Adjustment Administration). The Supreme Court initially rejected much of the legislation comprising the New Deal, and specifically struck down the NRA in 1935 and the AAA in 1936, but then, after 1937, sanctioned a much greater role for the state in economic policy making and regulation. Ironically, this legal transformation occurred just as the New Deal, and American liberalism more broadly, were moving toward a strategy of primarily promoting economic growth by bolstering purchasing power and encouraging mass consumption rather than intervening on the production side or directly challenging capitalist arrangements. The New Deal also built a liberal coalition that dominated American politics until the 1980s.

Given the seminal economic, political, and constitutional legacies of the New Deal, most studies of this critical period understandably focus on federal policy making. But state governments did not sit idly by as the nation descended into depression. They responded to public pressure for economic assistance and expanded regulation by enacting untried and wide-reaching reforms, many of which, including moratoriums on mortgages, served as experiments for subsequent federal policy making. This book tells the story of one of those moratorium laws—the Minnesota Mortgage Moratorium Act of 1933—and its subsequent place in the remaking of constitutional law in the United States.

Thanks to novelists, a rich photographic record, and Hollywood, the phrase "Great Depression" tends to conjure images of "Hoovervilles" and "Okie" farmers fleeing the Dust Bowl in dilapidated trucks. Behind these images lurked the tragedy of millions of foreclosures. Indeed, as miserable as unemployment, meager food, and limited access to health care were, many Americans feared losing the family home above all. In the early 1930s, slightly more than half of Minnesotans lived on family-run farms. But between 50 and 60 percent of those farms were mortgaged, and crop prices had fallen so dramatically that few farmers could earn enough to pay their taxes and mortgages. In urban areas, skyrocketing unemployment led to a surge of mortgage defaults as well. In Minneapolis, the homeless overwhelmed several missions and the Salvation Army's Industrial Home.

Between February 1933 and July 1934, as banks and credit loan associations foreclosed on both rural and urban properties in record numbers, twenty-seven states passed mortgage-moratorium laws intended to increase homeowners' chances of saving their homes and to arrest the downward spiral of economic activity. As might be expected, banks and other financial institutions opposed mortgage-grace-period measures, arguing that they violated the Contract Clause of the U.S. Constitution, which states, "No state shall . . . pass any . . . Law impairing the Obligation of Contracts" (Article I, Section 10). State moratorium laws directly challenged the central principles underlying the Contract Clause: that private property is a natural right and that governments should not interfere with contractual obligations, even during economic emergencies. Initially, state courts overturned many mortgage-relief laws. The constitutional conflict between the need to protect the validity of contracts on the one hand and efforts to protect homeowners and prevent economic collapse on the other—and more immediate conflicts between lenders and borrowers—were resolved in the landmark 1934 United States Supreme Court case of *Home Building and Loan Association v. Blaisdell*, which upheld Minnesota's mortgage-moratorium law.

The story of *Blaisdell* begins with the 1920s farm crisis. After World War I inflated crop prices and land values, midwestern farmers borrowed heavily to expand their operations. When crop prices fell below prewar values, farmers struggled to pay off their debt. Many survived by taking out new loans, including some issued directly by a handful of new state-run lending agencies, including the Minnesota Rural Credit Bureau, but these agencies ran into serious financial problems during the late 1920s. Farm organizations also lobbied for direct federal relief to the farmer during the 1920s, especially price supports that would guarantee the grower a break-even or "cost of production" price. Yet only modest federal programs—loans to rural banks and programs to help sell the nation's agricultural surplus—emerged. After the October 1929 stock market crash, prices for nearly all agricultural commodities plummeted "faster and further than any period in the history of American agriculture," concluded a leading historian of 1930s rural protest. Large crops in the early 1930s only exacerbated the trend. From 1929 to 1932, annual per capita farm income dropped from $945 to $304. President Herbert Hoover's administration was reluctant to intervene in agricultural markets directly, and the congressional farm caucus, not yet the unified juggernaut that it would become by the mid-1930s, lacked the power to secure relief legislation.

Farmers everywhere were desperate, frustrated, and angry, and many turned to direct economic action. Iowa and Minnesota were particular hotbeds of farm protest. In May 1932, several thousand farmers met at the Des Moines, Iowa, fairgrounds and formed the Farmers' Holiday Association. They selected as their president Milo Reno, a radical leader in the National Farmers Union, a well-established organization. During the next year, thousands of midwestern farmers engaged in sporadic "holidays"—collective refusals to bring crops to market. These boycotts did not seriously threaten urban food supplies or raise prices to the cost of production, but farmers had more success stopping foreclosure sales by intimidating sheriffs and lenders. Violence was uncommon, but the threat of it was very powerful.

The ongoing farm foreclosure crisis reached a breaking point in 1933, when prices hit rock bottom. Citizens and policy makers across the political spectrum supported some form of relief for farmers. Iowa became the first state to enact a strong mortgage-moratorium law, in early February. Within a month, six other states had moved to halt or to slow down farm foreclosures, by either executive order or legislative action.

Events in Minnesota climaxed in early 1933, as well. In 1930, Minnesotans had elected Floyd B. Olson their first governor from the Farmer-Labor Party, a left-leaning third party that rose to prominence just after World War I. After the elections of 1932, the Farmer-Labor

Party enjoyed a working majority of the Minnesota Senate and House. In late January 1933, the Farmers' Holiday Association organized a surge of foreclosure stoppages, with more than a thousand farmers participating in some of them. Concerned about potential violence, but also sympathetic to the farmers who elected him, Governor Olson issued an executive order on February 24 imposing a moratorium on mortgage foreclosures until May 1. A week later, the Minnesota legislature passed a temporary measure legalizing Olson's postponement of foreclosures. These stopgap measures, however, did not stem the tide of protests. On March 22, 1933, as many as 3,000 farmers converged on the state capitol building in St. Paul demanding relief and threatening bloodshed in its absence.

As these protests took place, the Minnesota legislature considered several mortgage-relief bills, and the Minnesota Mortgage Moratorium Act passed by a unanimous vote in both chambers on April 18, the last day of the legislative session. The law permitted real property owners, whether farm or residential, urban or rural, to petition a local court for an extension of time in order to meet their obligations. If granted an extension, the petitioner did not pay the contracted mortgage payment but instead paid a fee to the mortgage holder commensurate with his or her budget. The provisions of the law applied to all mortgages, including those entered into prior to enactment of the law. The moratorium was designed to prevent all homeowners from losing their property when they could not meet their mortgage payments. However, pressure from farmers primarily spurred passage of the legislation, and the debate surrounding it focused on providing mortgage assistance to distressed farm families.

John and Rosella Blaisdell, however, did not fit the profile of the rural homeowners the law primarily targeted. They owned a two-story, fourteen-room house not far from downtown Minneapolis, mortgaged to the Home Building and Loan Association, a nonprofit loan cooperative. In early May 1932 (ironically just as the Farmers' Holiday Association was formed), the Home Building and Loan Association foreclosed on the house. Under existing Minnesota law, the Blaisdells had one year to redeem their property by paying the full amount owed. In the interim, Minnesota enacted the moratorium, and the Blaisdells petitioned for an extension under its terms. A Hennepin County district judge denied the request and declared the law unconstitutional. The Minnesota Supreme Court reversed. When the case returned to the district court, the judge granted the Blaisdells a two-year moratorium on mortgage payments, although during this period they were obligated to pay a monthly fee to the Home Building and Loan Association to be applied to taxes, insurance, interest, and the mortgage principal.

The Home Building and Loan Association opposed the extension and appealed on the grounds that the law impaired contracts in violation of the Contract Clause of the U.S. Constitution. After the Minnesota Supreme Court upheld the law in the summer of 1933, the *Blaisdell* case became the first involving economic recovery legislation, state or federal, to reach the U.S. Supreme Court during the Depression. On January 8, 1934, the Supreme Court upheld the Minnesota Mortgage Moratorium Act by a 5–4 decision, finding that it did not violate the Contract Clause.

Chief Justice Charles Evans Hughes wrote the majority opinion. He stressed the temporary, reasonable, and limited nature of the law and the unusual severity of the emergency, concluding that the law was within the reserved "police powers" of the states to protect the security and fundamental interests of the people. Traceable to medieval British common law, the police powers doctrine maintains that democratic governments possess the right and indeed the obligation to intervene in private market transactions when necessary to protect the public's safety, health, and welfare. In a strongly worded dissenting opinion, Justice George Sutherland and the Court's three other conservatives, including one who hailed from Minnesota, argued for a consistent interpretation of the Constitution regardless of economic exigency.

Today, *Home Building and Loan Association v. Blaisdell* remains vitally important to debates concerning the evolution of American constitutional thought, jurisprudence, and the Supreme Court, as well as those concerning the economic and social effects of state regulation. Since 1934, liberal theorists have employed *Blaisdell* and subsequent New Deal precedents to justify increased state intervention in the economy. Conservatives see in *Blaisdell* nothing less than the Magna Carta of a runaway paternalistic state. For instance, constitutional theorist and NYU law professor Richard Epstein recently argued, "*Blaisdell* trumpeted a false liberation from the constitutional text that has paved the way for massive government intervention that undermines the security of private transactions. Today the police power exception has come to eviscerate the contracts clause."

"Eviscerate" may be an overly strong word, but by greatly expanding the legal grounds for state intervention in contracts, *Blaisdell* indeed marked a critical point in the history of Contract Clause jurisprudence. In addition, the *Blaisdell* decision was – and remains – a crucial moment in the debate between those who believe in the doctrine of a malleable or "living" Constitution that rightly evolves in tandem with shifting economic and social conditions and those who stress judicial reliance upon the often-difficult-to-detect "intent" of the framers.

A close study of *Blaisdell*, finally, sheds light on an important historical debate about the existence and timing of a legal "revolution" by which the Supreme Court came to accept the New Deal's economic interventions. According to the traditional interpretation, the Supreme Court in 1935 and 1936 had rebuffed Roosevelt's programs, which sparked FDR's proposal to increase the number of Supreme Court justices, a failed reform derided as his "court-packing plan." Then, in 1937, in a "switch in time that saves nine," centrist Justice Owen Roberts joined the four liberal-leaning justices in *West Coast Hotel v. Parrish*, which upheld Washington State's minimum-wage law, and *NLRB v. Jones and Laughlin Steel*, which allowed Congress to regulate local labor conditions under its Commerce Clause power. (The Constitution stipulates that Congress may regulate "commerce between the states," more commonly referred to as interstate commerce.) As legal scholar Morton Horwitz put it, for example, these decisions constituted a decisive break with "a structure of legal thought that had crystallized over more than a century since the American Revolution." According to the traditionalists, the Revolution of 1937 was complete after subsequent deaths and retirements allowed FDR to appoint several justices sympathetic to the New Deal.

Although we do not downplay the significance of the 1937 decisions, we do join a growing group of scholars who believe that the Supreme Court lit the fires of revolution well before 1937. Along with another key 1934 decision that followed close on *Blaisdell*'s heels – *Nebbia v. New York*, which upheld a New York State law fixing the price of milk – *Blaisdell* revealed an increasing willingness to uphold state efforts to respond to the Great Depression and augured the Court's complete acceptance of the New Deal in 1937.

This is not to say that *Blaisdell* was intended to be open-ended, to allow the states carte blanche powers over the economy. Chief Justice Hughes upheld the Minnesota Mortgage Moratorium Act because it responded to an economic emergency, was temporary, and left many aspects of the mortgage contract intact. The Hughes Court in fact struck down several debtor-relief laws after *Blaisdell*. Still, these later decisions do not diminish the significance of *Blaisdell*—they simply show that Chief Justice Hughes viewed *Blaisdell* as maintaining some restrictions on state action. By 1941, deference to legislative authority had become the norm on the Court, which, in the context of the states' efforts to combat the Depression, supported economic regulation and weakened the Contract Clause. Thereafter and until the present, notwithstanding a brief revival of Contract Clause jurisprudence in the 1970s, conservative efforts to overturn or limit *Blaisdell* have been unsuccessful.

We hope that this book sheds light on the 1930s agricultural crisis, the evolution of the Contract Clause, and perhaps even the history of Minnesota's fascinating politics. After all, this is the state that elected pro wrestler Jesse "The Body" Ventura governor in 1998 and currently sends to Washington a congressional delegation that includes Keith Ellison, the first Muslim member in the history of the House of Representatives, and Tea Party favorite Michele Bachmann. Above all, we hope to contribute to America's never-ending debate about the appropriate roles that federal and state governments should play in regulating the economy and providing relief to distressed citizens. Several years into the worst housing crisis in the United States since the Great Depression, this debate remains more salient than ever.