

Judicial Decision Making in Times of Financial Crises

State Supreme Courts and Mortgage Moratorium Laws in the Great Depression

by **Udi Sommer, Lecturer** and **Quan Li, Assistant Professor**

Introduction

Ever since the bankruptcy of Lehman Brothers on September 15, 2008, which is widely viewed as a watershed event in the current financial crisis, the U.S. housing market still faces considerable destabilizing pressures. Foreclosure filings reached a historical high in July 2009, registering a year-over-year increase of more than thirty percent. Most recently, sales of foreclosed homes accounted for twenty-five percent of all residential sales in the third quarter of 2010.¹ It appears that the scope and severity of the current crisis in housing could only be matched by what happened during the Great Depression when nearly 50 percent of urban homeowners became delinquent by January 1934.²

In the current recession, governments at various levels have rushed to prevent the worsening of the housing market. The measures adopted vary. Many states put in place temporary mortgage moratoria through state laws. Likewise, the Housing and Economic Recovery Act of 2008 increased loan guarantees of the Federal Housing Administration by \$300 billion in order to encourage lenders to refinance delinquent home mortgages.³ In this article, we focus on one branch of government, the judiciary, and study how it responds to housing crises by examining the case of the 1930s and 1940s. The financial environments for foreclosures were different in the 1930s and today. Yet, a closer examination of the role of courts in the housing crisis during the Great Depression should improve our

understanding of the operation of courts in times of crisis in general⁴ and particularly in times of financial crisis.⁵ In addition, by focusing on state Supreme Court decision-making, this article enhances our understanding of how state courts operate within their unique institutional, structural and legal settings, and specifically the role those courts assume during crises. Finally, while recognizing certain differences between the 1930s and the current crisis, the findings of our study offer some valuable historical lessons.

Foreclosures and the Judiciary

The role of state judiciary in preventing foreclosures was enhanced during the 1930s.⁶ By foreclosure, we refer to both residential and commercial foreclosures. Depending on the amount of judicial discretion granted by their state legislature, state courts' dealings with the foreclosure procedure varied. In states where mortgage relief legislation was adopted, the courts in some instances were empowered to intervene on behalf of debtors in at least two major ways. First, creditors were prevented from obtaining title to a property for a specified period of time, which was usually set by the courts and at the courts' discretion. Secondly, the courts could discretionarily set a rental price that was usually below the free market rental for debtors to pay during a grace period.⁷ In states where legislative inertia prevented the adoption of relief measures, state courts sometimes took the initiative and responded directly to the demand of relief. In other instances

when state courts refused to offer any special relief for debtors, it was the state legislature that managed to use legislative solutions to help mortgagors. Notably, however, when states tried to renew their temporary mortgage moratorium laws, the courts oftentimes declared them unconstitutional.⁸

While the literature reveals an interesting picture of the role of the judiciary in the housing market during the Great Depression, it leaves some important questions unanswered. Following the Supreme Court's landmark decision in *Home Building & Loan Assn. v. Blaisdell*,⁹ legal scholars conducted lengthy debates concerning the jurisprudence of mortgage moratorium laws.¹⁰ These laws, as they were passed by the states in the early 1930s, faced at least two potential constitutional challenges.¹¹ First, these statutes might violate the Fourteenth Amendment of the Federal Constitution and the corresponding sections of the state constitutions, which protected creditors' property rights under due process of law. Second, there could be violations of Article I, Section 10 of the federal Constitution that prohibits states from impairing the obligation of contract. Although legal analysis may suggest that these moratorium laws could pass constitutional muster on those two counts, we think this is hardly sufficient to fully appreciate the role of courts in this type of crises.

Indeed, the links between the judiciary on the one hand and economic conditions and political institutions on the other are well established in the literature. Studies, for instance, have shown that judicial independence is correlated with economic development.¹² Rather than their ramifications, in this article, however, we are interested in the *causes* of judicial decisions pertaining to economic conditions, an issue that is only partly addressed in the literature. Scholars have compared judicial foreclosure procedures to non-judicial procedures and concluded that judicial procedures were more costly, time-consuming, and

contributed to more depreciation of sale prices of foreclosed houses.¹³ Most of these studies have focused on the political and economic impact of the judiciary. Conversely, we focus on variables that account for the way judicial decision makers decide. Our investigation of the variables influencing judicial decision making is important in its own right and is also sure to contribute to our understanding of the judiciary's political and economic influences.

This article is certainly not the first to study judicial decision-making during times of crisis and war. For example, scholars have examined federal judges' decision-making in civil rights and civil liberties cases in all three tiers of the judiciary, with mixed findings. Collins et al.'s study of district court judges, for example, did not find a universal effect of war on judges.¹⁴ Clark, however, finds that "the courts of appeals are far more likely to affirm a criminal conviction during a time of war" (398).¹⁵ At the Supreme Court level, justices are more likely to curtail civil rights and liberties during times of war especially in those cases that are not directly related to war.¹⁶ Like war, economic crises also affect judicial decision making.¹⁷ The likelihood of a vote against the federal government, for instance, is influenced by the economic conditions of the time. This study adds to our knowledge of judicial decision-making in times of economic crises, and particularly at the state level, where institutional and structural conditions vary.

Our review of the courts' role during the 1930s reveals that some of them were given judicial discretion to battle the foreclosure problem. Obviously, whether or not judicial discretion was permitted and how the courts exercised their discretion was not just a legal matter but also an integral part of the politics of the states at the time. In order to explain state Supreme Court decisions in the 1930s, there are a variety of political, economic and institutional differences between states which should be accounted for. State judiciaries vary greatly in terms of their

structure, for instance as reflected in their appointment process. Likewise, relationships between courts and state legislatures differ between the states. Along the same lines, economic hardships hit different states dissimilarly. We therefore offer here an analysis that considers the effect of the law side by side with the effects of judicial attitudes, political institutions and economic conditions. This type of analysis, we argue, is key to fully understanding the role courts may take in times of financial crises.

In order to study judicial decision-making of state supreme courts on mortgage moratorium cases during the 1930s, we build on Hall and Brace's neo-institutional approach to develop our theoretical framework. The institutional makeup of those courts and the institutional setting in which they operate are key to our analysis. According to Hall and Brace, judges pursue multiple goals, some of which are institutionally dependent. When pursuing those institutionally dependent goals, judges act "strategically in response to context and to institutional arrangements that link the two".¹⁸ Accordingly, we focus on the degree of judicial discretion permitted by mortgage moratorium statutes passed in the legislatures. Given the variety in the structures of state judiciaries, such a comparative context allows us to build a more comprehensive theory of a particular aspect of judicial behavior—judicial decision-making during times of crises in the housing market.

In our theoretical framework, institutional and contextual variables would have an increased effect on judicial decision-making in times of crisis. Three levels of variables affect judicial decision-making: attitudinal variables at the judge level,¹⁹ institutional variables at the court level²⁰ and contextual variables²¹ measuring the political and economic context within which the court interacts with the other political institutions and the citizenry. Notably, while we follow the conventional wisdom and assume that judges are policy maximizers motivated by their individual

policy preferences, the theoretical focus of our model hinges on the influence of both contextual and institutional factors on judicial decision-making, with a special emphasis on the impact of judicial discretion.

Explaining State Supreme Court Decisions on Mortgage Moratorium Laws

In order to explore state Supreme Court decisions concerning mortgage moratorium laws using the theoretical framework proposed, our key predictor is the amount of discretion statutorily given to judges in mortgage moratorium cases. All the states in our sample (California, New York, Oklahoma, and Minnesota) passed their mortgage moratorium laws starting in 1933.²² One critical distinction among these laws, however, is whether they permitted judicial discretion, defined as a legal variable, since it broadly determines the legal environment within which judges operate.²³ If judicial discretion is granted, courts can decide when and in what manner to permit a mortgage moratorium. Among the four states studied here, mortgage laws in California and Oklahoma granted such discretion.

When judges are given discretion, the justification for their behavior is offered by the statutory prescriptions. Under the leadership of the Supreme Court of the United States, the predominant ideology in the judiciary during the 1930s favored property rights, and opposed governmental intrusion into business. Under the Substantive Due Process doctrine the Court established in landmark decisions such as *Lochner v. New York*,²⁴ a constitutional liberty of contract should be protected from governmental infringement. We therefore expect discretion to result in rulings in favor of creditors; courts in states with statutorily mandated judicial discretion should produce more conservative holdings.

The Oklahoma law, for instance, stipulates that

"... for a period of two years from and after the approval of this Act, the District Judge, or the Judge of the

Superior Court of the County in which any real estate mortgage foreclosure of a deed of trust, or other instrument, the security of which is real estate, is hereby *vested with the jurisdiction and discretion* of granting a continuance of said cause, upon his own motion, or upon application of the owner of said property, in person, or by his attorney, and upon such terms and for such time as said *Judge may deem best*" (emphases added; p. 43).

With such discretion, judges were empowered to decide issues such as whether interest and taxes on the property should be paid. Along the same lines, it was to the judges' discretion to determine what constituted a reasonable rental that debtors were obligated to pay during moratorium.

A preliminary examination of the cases decided by the two State Supreme Courts where discretion was mandated confirms that judges tended to decide in favor of the creditors. In *Manerva D. Bennett v. California Trust Company*,²⁵ for example, the petitioner asked the California Supreme Court to overturn a lower court decision by arguing that the lower court had abused its discretion in refusing to grant the petitioner (the debtor) a postponement of the sale of the real property. The California Supreme Court, however, affirmed the lower court decision in favor of the creditor using the judicial discretion granted by the state's moratorium law.

The Oklahoma Supreme Court, traversing even further, not only declared the state's mortgage moratorium law invalid and unconstitutional but also tossed the issue back to the legislature entirely. In *Aldridge Hotel Co. v. Mainard* decided in April 1935 where the debtor appealed a state district court decision that had confirmed the foreclosure sale of the property as requested by the creditor,²⁶ the Oklahoma Supreme Court held that "Section 1 of Session Laws 1933, ch. 16, p. 42, commonly termed 'The Mortgage Moratorium Act,' is invalid and unconstitutional, in that it delayed mortgage foreclosure actions without adequate compensation to the mortgagee, and

without any provision for the protection of the mortgage during the period of the delay." Six months later, in *Local Building & Loan Ass'n v. Marts et al.* where the confirmation of foreclosure sale was again the issue²⁷, the court directed lower state courts to focus simply on the proceedings of the sale. If "the sale was conducted in conformity with the law, the trial court had a duty to confirm the sale." In responding to the debtor's argument that the dire economic conditions justified relief to indebted homeowners, the court wrote: "however sympathetic we might be with that numerous class of persons who, in recent years, have suffered foreclosure of their properties or homes, it is not the function of the court or the trial courts of the state to attempt to establish such a public policy. The right to do so is legislative, non-judicial."

Such decisions are drastically different from those of the other two state courts studied here, where mortgage moratorium laws did not grant any judicial discretion. Those laws either imposed a state-wide blanket moratorium (New York) or authorized institutions other than the judiciary to handle moratorium applications (e.g., the Rural Credit Bureau in Minnesota). In New York's case, in *City Bank Farmer Trust Co. v. Adrlea Incorporation et al.*,²⁸ the lender company (City Bank Farmers Trust Co.) brought action against the defendant and other collateral bond makers in order to foreclose on a real property. The court of Appeals of New York confirmed the decision of the lower court, which ruled in favor of the debtors by adopting an expansive interpretation of the state's moratorium law. Using the state legislature's original intent, the New York Supreme Court expanded the application of the law and offered more protection to debtors. The following analysis of the universe of mortgage moratorium cases from those four states indicates that this effect of discretion was not limited to the cases discussed here. Indeed, discretion had a systematic effect, increasing the

likelihood of a conservative ruling.

As the cases discussed above indicate, statutorily mandated judicial discretion, along with other factors such as judicial ideology, played an important role in judicial decision-making. Therefore, an additional element of our theory is an interaction effect between discretion and judges' individual ideology. Discretion granted by state legislatures offers more leeway to judges in their decision making process. United States Supreme Court justices operate in an institutional environment that allows them to vote their preferences; they set their own agenda, serve in the court of last resort and typically have no reason to act strategically as their position on the Court is their highest career aspiration. Conversely, judges on lower courts would vote their preference only if institutional conditions permit. Those judges operate in an environment with a variety of institutional and statutory constraints (e.g., their decisions are potentially reviewed by a higher court). Therefore, when the law provides them with discretion (even if only to a certain degree), they are more likely to vote their preference. Accordingly, liberal (conservative) judges should be more likely to vote in a liberal (conservative) fashion when granted discretion. In our model, this is tested with an interaction effect.

Control Variables—our first control variable is the judicial selection methods in the different states. None of the four states in our sample had an appointment procedure in place during the 1930s. They either held partisan elections (New York and Oklahoma) or non-partisan elections (California and Minnesota). More accountability may be expected on judges' part in states with partisan elections and more judicial independence in states with non-partisan elections. Yet, Hall indicates that the respective effect of partisan versus non-partisan elections may have been overstated.²⁹ Since the direction of the effect is not clear, we expect the type of judicial

elections held in the state (partisan or non-partisan) to influence judicial outcomes with no clear direction for this hypothesized influence.

We also control for what happens within the judicial hierarchy, which is known to influence judicial decision-making at the appellate level. For instance, the high court would consider the ideological position of the lower court.³⁰ Likewise, the nature of the decision on the lower court influences how appellate judges make decisions. For example, a dissenting opinion on the lower court may function as a fire alarm for judges at the appellate level. Disagreement on the lower court attracts judicial attention. Such controversy is likely to influence judicial decision-making. Thus, to examine the judicial hierarchy within the state, we included two lower court variables, the first reflecting whether the decision on the lower court was conservative or not. In addition, we examined whether there was disagreement among lower court judges.

The tendency of the Supreme Court of the United States to reverse lower court decisions (to correct erroneous legal decisions and to establish its own doctrine) would result in lower court decisions being more frequently overruled than upheld when appealed. This tendency, however, is mostly a function of the United States Supreme Court's discretionary docket. When an institutional mechanism such as certiorari is not at their disposal, judges at the appellate level would examine two types of indicators for inconsistency within the judicial hierarchy. First is the ideology of the decision on the lower court. Given the generally conservative doctrine dominating the judiciary, a liberal decision on the lower court should more often result in a conservative decision by the judges on the Supreme Court. The second type of indicator would come in the form of signals from a lower court that the doctrine prescribed by the higher court was not followed. A fire alarm in the form of a dissenting opinion on the lower court indicates to the

Supreme Court that the doctrine it established is not being followed.³¹ To induce compliance on the lower court, *ceteris paribus*, judges on state Supreme Courts in the 1930s should be more likely to decide in a conservative fashion when a judge on the lower court pulls the fire alarm and registers a dissenting opinion. We expect dissents that have nothing to do with following legal doctrine (e.g., jurisdictional dissents) to be distributed randomly and therefore not be particularly correlated with either conservative or liberal upshots.

Apart from political institutions, we also control for the effect of economic conditions. To account for the economic context, we included two measures of the economic environment both at state and national levels. The economic environment has an impact on judicial decision making and on public policy moods, which in turn directly affects justices' votes.³² We expect state judges to be subject to similar influences. At the state level, we control for average foreclosure cost. This variable measures the cost of foreclosure within each state.³³ Since foreclosure cost has been found to be associated with depreciation of sale prices of foreclosed houses,³⁴ which jeopardize creditors' interest, we expect judges to be more likely to decide in favor of creditors when the cost of foreclosure goes up. At the national level, we control for the nationwide inflation in the housing market.³⁵ Since inflation in general favors debtors, as this figure goes up, judges should be less likely to decide in favor of debtors in terms of relieving their contractual obligation because this would severely hurt the interest of creditors.

We also control for attitudinal effects and for possible influences of the system of separation of powers at the state level. As mentioned above, at lower levels of the judicial hierarchy we do not expect to find judicial decision making free of constraints on judges who engage in strategic behavior vis-à-vis the legislature.³⁶ Yet, since the courts we

study are the highest courts in their respective jurisdictions (not counting the Supreme Court of the United States), to be able to control for potential influences of the system of separation of powers, we used the ruling ideology in the legislature.

Data and Methods

To test our model we collected original data on State Supreme Court decisions on mortgage moratorium laws. To get at geographical representation, institutional and legal variance and a range of economic conditions, data were collected for the following four states: California, Minnesota, New York and Oklahoma. Those states represent different parts of the country (East and West Coasts, South and Midwest). In addition, to adequately test our theory, we were interested in cases where change in economic conditions was substantial. Most of the states in our sample were hit hard by the financial crisis between 1929 and 1940 and suffered substantial loss of per capita personal income within this period of time. Except for Minnesota and Oklahoma, all other states suffered triple digit drops in per capita personal income measured in dollars (California, -\$160; New York, -\$293). That said, Oklahoma suffered the greatest drop among Southern states (-\$88). Minnesota represents the Midwest United States.³⁷

The cases are the universe of State Supreme Court decisions that pertain to mortgage moratorium laws from 1933 to 1945 from those states. In order to circumvent debates concerning the exact date in which the Great Depression was over, we collected data until the end of the Second World War. By that point in time, the United States was well on its way to economic recovery. If anything, including court rulings from a slightly longer period of time means a more stringent test for our theory, as we include in our sample periods of time in which the hypothesized behavior should be salient, as well as those in which it should not be as salient (since the economy improved). That said, less

than 10% of our observations are from the period 1943-1945. Furthermore, when we restrict the period studied to before 1943, all results reported below remain intact apart from the dissenting opinion prediction (the coefficient for dissenting opinions fails then to meet standard levels of statistical significance). This also serves as an additional test for the robustness of our findings. A Lexis search was conducted for cases from the respective states, with search words "Mortgage (s)" and "Moratorium (a)". The outcome of those cases was the dependent variable, *Judicial Votes*, which measures whether the court had ruled in favor of debtors.³⁸ It was common across all states and for all judges to refer to the so-called "moratorium law" in their opinion. Thus, the search criterion used on LexisNexis is neither over-inclusive nor under-inclusive and it provided us with the universe of such cases from the specified states and for the respective years.

Our first independent variable was *Judicial Discretion*, which indicates whether judicial discretion was granted to the court. The source for this variable was the text of each state's moratorium law.³⁹ *Judicial Selection* is an institutional variable, which measures the different judicial selection methods in terms of non-partisan versus partisan elections⁴⁰. As Table 1 demonstrates, there was substantial variation between the states in terms of institutional conditions. This robust variation in the independent variables, and in particular in judicial discretion, which is our key predictor theoretically, facilitates our analysis. To control for effects within the judicial hierarchy, two lower court variables were also included. The first, *Direction of the Decision on the Lower Court*, measures the lower court decision as either liberal or conservative. The source of this variable was the opinion of the lower court. We coded as liberal cases where the court ruled in favor of the debtor in order to protect the rights of the debtor against the creditor. Cases were coded as conservative where judges ruled in favor of

the creditor in order to protect the rights of the creditor⁴¹. The second lower court variable, *Disagreement on the Lower Court*, measures whether there was disagreement among lower court judges. Disagreement was determined by browsing the lower court's decision in LexisNexis. Such disagreement was limited to cases where one or more judges registered an official dissent.

To control for economic conditions, at the national level, *CPI Housing* controls for the nationwide inflation in the housing market. Data were taken from the Bicentennial Edition of Historical statistics of the United States (Series E 135-166). At the state level we control for *Average Foreclosure Cost*. This variable measures the cost of foreclosure within each state as reported in the Seventh Annual Report of Federal Home Loan Bank Board, Exhibit 51. Judges' ideology is based on their party ID. A Democratic judge is coded as 0 and a Republican judge is coded as 1. When judges' own party ID was not available in states with appointment, we used the appointing governor's party ID as a proxy. A legislature controlled by Democrats was coded as 0 and 1 if controlled by Republicans.⁴²

Results

What influenced judges' votes in state Supreme Court decisions on mortgage moratorium laws in the 1930s and 1940s? Our model performs extremely well and lends strong support to our key hypothesis.⁴³ The model predicts 80 percent of the cases correctly, and it eliminates more than half of the error generated by simply guessing the judges' votes based on the modal category. Our key hypothesis is that *judicial discretion increases the likelihood of a conservative decision*. Since we have an interaction term in our analysis that includes the discretion predictor, to interpret the constituent variables correctly⁴⁴, we examine their marginal effect, variance and covariance.⁴⁵ The influence of discretion for conservative justices is highly significant and in the anticipated

direction. The influence of discretion for liberal judges is significant and in the anticipated direction.⁴⁶ In all, therefore, discretion increases the likelihood of a conservative decision notwithstanding the judges' ideology. Judicial discretion has, depending on the judge's ideology, a significant or highly significant influence on the type of judicial decisions we are interested in. Greater statutorily mandated discretion for judges under state law results in more conservative decisions, which is consistent with our theoretical expectation. Our second hypothesis states that *judges would be more likely to vote their preference when such discretion is granted*. When judicial discretion is not granted, the effect of ideology is not statistically significant. However, even when discretion is granted, while the effect of ideology is more pronounced, it fails to meet standard levels of statistical significance.⁴⁷ We, therefore, fail to find support for the second hypothesis—the effect of ideology contingent on discretion is not supported.

As for our control variables, we expected the type of judicial elections in the state to influence the decisions rendered by judges on the Supreme Court. The results strongly corroborate this notion. Judicial Selection is highly significant. When judges in the State Supreme Court are elected in partisan elections, they are much more likely to decide cases pertaining to mortgage moratorium laws in a conservative fashion. Partisan elections strengthen the ideological predilections of judges. Along the lines of the argument put forth by Hall,⁴⁸ this is an interesting finding concerning judicial elections and their political ramifications.

What happens in the judicial hierarchy also influences decision making in state Supreme Courts in times of financial crises. When judges on the lower court disagree, they send an important signal to their colleagues on the high court. Indeed, a dissenting opinion registered on the lower court systematically and significantly influences the decision making process in state

Supreme Courts on mortgage moratorium laws. Disagreement on the lower court results in more conservative decisions higher in the judicial hierarchy, which is again consistent with our theoretical expectation. Along the same lines, direction of the decision on the lower court also systematically influences the decisions of judges on the state Supreme Court.

Apart from institutional variables and the effects of the judicial hierarchy, we also control for economic conditions. Specifically, we expected economic conditions on the local and national levels to influence the decisions made in state Supreme Courts. Indeed, the results lend strong support to our hypotheses. As inflation in the housing market goes up nationwide, justices would be less likely to decide in favor of debtors. The coefficient on CPI Housing indicates that as inflation in the housing market goes up nationwide, judges are influenced. Under such circumstances, they are less likely to decide in favor of debtors. Their decisions, thus, will tend to be more conservative when economic fortunes in the nation are down. Economic conditions in the state also influence judicial decision making at the state Supreme Court level. As the average foreclosure cost in the state increases, justices should be more likely to decide against creditors. The variable, *Average Foreclosure Cost*, is highly significant and in the anticipated direction. As the average foreclosure cost increases, justices should be more likely to decide in a liberal fashion. Creditors are less likely to carry the day in court under such circumstances.

Since the coefficients from logistic regressions cannot be directly interpreted in a meaningful way, to fully appreciate the effects of the coefficients in the model, we studied the substantive effects of the explanatory variables on the predicted probabilities of the courts' voting. We first computed the baseline predicted probability, which is calculated by holding all continuous variables at their mean values while holding

all discrete variables at their modal values.⁴⁹ The baseline probability for our model is .92. According to our calculations, when state Supreme Court judges are given discretion (when calculating the baseline probability, no discretion was granted), the likelihood of a liberal decision drops to .65, which is a decrease of 30% in the likelihood of an outcome in favor of the mortgagor. This is a substantial effect for our key predictor of interest.

As for the control variables, a dissenting opinion on the lower court decreases by 33% the likelihood of a liberal decision on state Supreme Court with statutorily mandated discretion. When the measure of CPI housing shifts from its mean to its maximum, the likelihood of a liberal decision on a state Supreme Court that is granted discretion plummets by 76%. In sum, the predicted probabilities indicate that the effects of discretion, the hierarchical variables and the variables pertaining to economic conditions are substantial and along the lines of our theoretical expectations.

Discussion and Conclusions

In this article, we propose a tripartite theory to explain the role of the judiciary in crises in general and in the housing market in particular. Law, institutions and economic conditions combine to affect how judges make decisions in mortgage cases. More specifically, based on Hall and Brace, we expected judicial discretion to have a key influence. In addition, we controlled for the method of judicial selection, judicial attitudes, the judicial hierarchy, system of separation of powers and economic conditions at the state and national levels. Using original data for state Supreme Court decisions on mortgage moratorium laws, from four state Supreme Courts, which are representative of the four major regions in the country (East and West Coast, South and Midwest), we find strong support for the hypothesis concerning judicial discretion. Based on this sample of decisions from four states, we find that judicial

discretion mandated by law increases the likelihood of a conservative vote. At the level of state Supreme Courts, in the 1930s and 1940s judges are more likely to vote conservative when given discretion by the legislature. Partisan elections result in more ideological voting on the part of judges. In addition, the judicial hierarchy influences judicial decisions in mortgage cases. Judges on the high court pay heed to signals that their doctrine is not followed, and if necessary would act to reverse divergent lower court decisions. Lastly, economic conditions such as inflation and average foreclosure cost affect judges, considerably at times.

This study offers insight into the variables that influence judicial decision-making in times of financial crisis at the state Supreme Court level. As such, it makes a unique contribution to the literature on judicial decision making in times of crisis, financial and otherwise. What is more, the focus on the state level allows a more profound understanding of the effects of variance in institutional and structural conditions on the votes cast by judicial decision makers. On top of contextual constraints that may influence justices at the Supreme Court level, judges on lower courts operate in an environment with more complex controls, checks and limits. Yet, as the case from the 1930s and 1940s indicate, their influence on how the crisis unfolds may be critical. Therefore, correctly analyzing their behavior is important.

The findings in this study offer some valuable lessons for the current crisis as well. Our study suggests that when decision power over housing questions is delegated to the judiciary, the scope of judicial discretion determined by the legislature is consequential. In fact, to a considerable extent it would determine the degree of ideological alignment between the decisions rendered by the court and legislative political preferences. This is so since more discretion for a court dominated by judges who are for the most part in agreement with legislators would mean that the

court serves legislative preferences. For example, a state legislature dominated by conservatives can easily grant discretion to a state Supreme Court dominated by likeminded judges, with the expectation that the court would use this discretion to advance an agenda the legislature would anyhow support. The same is true for a liberal state legislature and the discretion it may grant to a liberal state Supreme Court. In other words, the level of judicial discretion granted by the legislature affects the extent to which the legislature can achieve its intended objectives. The importance of this type of behavior on the part of the legislature is particularly underscored by the consistent finding that court decisions are not affected by the system of separation of powers; the ideology of the legislature has no statistically significant direct effect on judicial decision making on mortgage moratorium in times of crisis. Therefore, if the ideologies of the legislature and the judiciary were aligned, delegating power to the court by writing judicial discretion into law would create a win-win situation for both branches of government. For instance, a conservative legislature could protect creditors through the court. The court could achieve the same objective thanks to its statutorily mandated discretion. What is more, both sides could withstand potential backlash from debtors (and interest groups working on their behalf) by claiming that responsibility should rest with the other branch. In such a case, then, not delegating judicial discretion would be suboptimal for the legislature.

On the other hand, if the two branches were not aligned ideologically, stacking the deck would be the optimal solution for the legislature. Restricting the level of judicial discretion would expose the court to external pressure and force judges to make decisions, which would not be in line with the preferences of judges. Since our findings indicate that the legislature would not be able to influence the court directly, such external pressures are of particular

importance. Indeed, granting judicial discretion in this case could be disastrous for the legislature. Legislators will be blamed for both passing inadequate legislation as well as being responsible for outcomes they did not support in the first place. Just like judicial discretion, the other predictors that proved to influence judicial decisions concerning the housing crisis systematically are important for our understanding of the crisis of the 1930s as well as the current one. Finally, both the executive and the legislative arms of government at the state and federal levels may benefit from our conclusions in designing the role of the judiciary in dealing with this type of crisis. ❧

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24. 198 U.S. 45 (1905)

25. 6 Cal. 2d 381

26. 171 Okla. 422

27. 174 Okla. 130

28. 267 N.Y. 224

29. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 *American Political Science Review* 315-330 (2001).

30. C. M. Cameron, J. Segal, and D. R. Songer, 2000. *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*. 94 *American Political Science Review* 101-116 (2000).

31. A dissenting opinion may also indicate that the lower court judge wanted to argue that it was wrong for the majority to follow a legal doctrine established by the Supreme Court. In this case, however, the Supreme Court can (and most probably will) affirm the lower court decision, which would also result in a conservative ruling.

32. Roy Flemming and B. Dan Wood, *the Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods* 41 *American Journal of Political Science* 468-498 (1997).

33. Seventh Annual Report of Federal Home Loan Bank Board, Exhibit 51.

34. *Supra* note 19

35. Bicentennial Edition of Historical Statistics of the United States, series E 135-166.

36. William N. Eskridge, Jr. *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale Law Journal* 331-455 (1991)

37. In addition, the decisions of the highest court in this state are of interest since the ruling of the Supreme Court of the United States in *Home Building & Loan Assn. v. Blaisdell* was in a case that originated in Minnesota.

38. Given that most of the debtors were individual home owners while the creditors were financial institutions, we consider the ruling in favor of debtors as a liberal decision.

39. California: CAL. Gen. Laws Act 1500; Illinois: Laws Ill. p 649; New York: Laws N.Y. 1933 c. 793; Minnesota: Laws Minn. p.682; Oklahoma : Sess. Laws 1933 c. 16

40. Information for this variable was taken from websites such as the following:

Supreme Court Brochure. <http://www.oscn.net/oscn/schome/fullbrochure.htm>

History of the California Supreme Court. http://cschs.org/02_history/02_a.html

There shall be a Court of Appeals. http://www.courts.state.ny.us/history/pdf/Library/Courts/There_Shall_Be.pdf

Minnesota Supreme Court <http://www.mncourts.gov/?page=550> (under the "About the Court" section click on the "Supreme Court PDF" link).

41. We also coded as conservative outcomes that were conservative; i.e., favoring the creditor, even in the absence of a conservative interpretation of the law. For example, we would code as conservative a ruling in favor of the creditor because the debtor failed to comply with the provisions of the moratorium statute. The rationale behind these rules was to increase inter-rater reliability on a potentially subjective variable.

42. Ideology of judges and of state legislatures was coded according to: Charles Liebman, *Directory of American Judges: with a table of the Federal and State courts* (Chicago, Ill.: American Directories 1995).

43. Technical details of the empirical results are available upon request from the authors.

44. See Brambor, Thomas, Clark, William and Matt, Golder. 2006. "Understanding Interaction Models: Improving Empirical Analyses." *Political Analysis*, 14: 63-82

45. Standard errors and marginal effects are given in the regression table in the appendix. Using the `estat vce` command on STATA, the covariance matrix of coefficients of the model indicates that the covariance of the coefficients of judicial discretion and the interaction term is -.06 and the covariance of the coefficients of ideology and the interaction term is -.09.

46. The Z-value for the effect of discretion for liberal justices is -2.21.

47. With a Z-value of .78, the effect of ideology when discretion is granted is slightly stronger than for cases where there is no statutorily mandated discretion (the Z-value then is only .3). Yet, this value is still a far cry from the benchmark for a statistically significant effect of 1.96.

48. *Supra* note 35.

49. The baseline probability is calculated with the following variables equal to zero: Judicial Discretion, Direction of the Lower Court, Dissent on the Lower Court, and legislative ideology. Ballot was equal to one. The Average Foreclosure Cost and the Inflation variables were at their mean.

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**Table 1. Legal and Institutional Variation
between the States in the Sample**

States	Partisan Election	Mandatory Judicial Discretion
California	No	Yes
Minnesota	No	No
New York	Yes	No
Oklahoma	Yes	Yes

Appendix

The dependent variable, *Judicial Votes*, is coded 1 if the judge voted in favor of debtors and 0 otherwise. By convention, cases that handed victory to debtors are regarded as liberal decisions¹. Conversely, judicial votes are coded as conservative if the vote was in favor of the creditors. Therefore, *Judicial Vote* equals 1 if the vote cast by the individual judge in the case was liberal (i.e., in favor of the debtor) and 0 otherwise. As the dependent variable is a dichotomous variable, a logitistic regression model was estimated.

Our first independent variable was *Judicial Discretion*, which indicates whether judicial discretion was granted to the court. The source for this variable was the text of each state's moratorium law.² *Judicial Selection* is an institutional variable which measures the different judicial selection methods in terms of non-partisan versus partisan elections³. As Table 1 demonstrates, there was substantial variation between the states in terms of institutional conditions. This robust variation in the predictors facilitates our analysis. To control for effects within the judicial hierarchy, two lower court variables were also included. The first, *Direction of the Decision on the Lower Court*, measures the lower court decision as either liberal or conservative. The source of this variable was the opinion of the lower court. We coded as liberal cases where the court ruled in favor of the debtor in order to protect the rights of the debtor against the creditor. Cases were coded as conservative where judges ruled in favor of the creditor in order to protect the rights of the creditor⁴. The second variable, *Disagreement on the Lower Court*, measures whether there was disagreement among lower court judges. Disagreement was determined by browsing the lower court's decision in LexisNexis. Such disagreement was limited to cases where one or more judges registered an official dissent. To control for economic conditions, at the national level, *CPI Housing* controls for the nationwide inflation in the housing market. Data were taken from the Bicentennial Edition of Historical statistics of the United States (Series E 135-166). At the state level we control for *Average Foreclosure Cost*. This variable measures the cost of foreclosure within each state as reported in the Seventh Annual Report of Federal Home Loan Bank Board, Exhibit 51. Judges' ideology is based on their party ID. A Democratic judge is coded as 0 and a Republican judge is coded as 1. A legislature controlled by Democrats was coded as 0 and 1 if controlled by Republicans.⁵

1. According to Schubert, "the economic liberal would support the claims of the economically underprivileged, while the conservative would stand pat and resist economic change that would benefit the have-nots. Hence the economic liberal would uphold the fiscal claims of injured workers (or their widows); he would support unions, who could be assumed to function (in general) as the agents of workingmen to improve their economic status; he would support government regulation of business, in order to maintain competition and protect consumers; and he would uphold state taxation, both because state tax laws often have the direct function of regulating enterprise, and also because an adequate program of state financing is a precondition to an effective state program of economic controls and services" (128) Glendon Schubert, 1965. *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963*. (Evanston, IL: Northwestern University Press 1965).

2. California: CAL. Gen. Laws Act 1500; Illinois: Laws Ill. p 649; New York: Laws N.Y. 1933 c. 793; Minnesota: Laws Minn. p.682; Oklahoma : Sess. Laws 1933 c. 16

3. Information for this variable was taken from the following websites:

Supreme Court Brochure. <http://www.oscn.net/oscn/schome/fullbrochure.htm>

History of the California Supreme Court. http://cschs.org/02_history/02_a.html

There shall be a Court of Appeals. http://www.courts.state.ny.us/history/pdf/Library/Courts/There_Shall_Be.pdf

Minnesota Supreme Court <http://www.mncourts.gov/?page=550> (under the "About the Court" section click on the "Supreme Court PDF" link).

4. We also coded as conservative outcomes that were conservative; i.e., favoring the creditor, even in the absence of a conservative interpretation of the law. for example, we would code as conservative a ruling in favor of the creditor because the debtor failed to comply with the provisions of the moratorium statute. The rationale behind these rules were to increase inter-rater reliability on a potentially subjective variable.

5. Ideology of judges and of state legislatures was coded according to: Charles Liebman, Directory of American Judges: with a table of the Federal and State courts (Chicago, Ill.: American Directories 1995).

Table 2. Predicting the Votes of State Supreme Court Judges in Mortgage Moratorium Cases in the 1930s and 1940s

Variables	Estimate (SEs clustered on the judge)
Legal Variable	
Judicial Discretion	-2.9*** (.42)
Institutional Variables	
Judicial Selection	5.7*** (1.3)
Direction of the Decision on the Lower Court	0.5** (.18)
Disagreement on the Lower Court	-0.65*** (.16)
Economic Variables	
CPI Housing	-0.25*** (.049)
Average Foreclosure Cost	0.053*** (.008)
Ideological Variables	
Judges' Ideology	-0.4 (.3)
State Legislature's Ideology	-0.4 (.7)
Judges' Ideology * Judicial Discretion	0.93* (.5)

N = 396; Wald c2 = 134.25; Prob > c2 = .000; % Correctly Predicted = 80; % Reduction in Error = 55 %
 ***p<.001 **p<.01 *p<.05, one-tailed tests where directionality hypothesized.
 Clustering on the state, or using robust standard errors, yielded substantively identical results.

Table 3. Descriptive Statistics

Variable	Mean	SD	Min	Max
Judicial Discretion	.26	.44	0	1
Judicial Selection	1.6	.49	0	1
Lower Court Direction	.48	.5	0	1
Disagreement on Lower Court	.22	1.3	0	1
CPI Housing	50.3	3.9	38.8	59.1
Average Foreclosure Rate	165.5	79	96.8	349.6
Ideology Judge	.35	.62	0	1
Ideology Legislature	1.2	.74	0	1