

A CONSTITUTIONAL HISTORY OF DEBTORS' PRISONS

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ABSTRACT

In 1776, only two states offered constitutional protections against imprisoning people for debt. Today, forty-one states do. This Article traces that history. It begins by examining how debtors' prisons operated in early America, and then divides analysis between three phases of state constitutional activity. In so doing, it looks at the arguments that won over states to protect debtors, the state constitutional conventions that enacted protections, and the failure of the federal government to address the issue. The Article concludes by noting that despite the success of adopting constitutional protections, courts have allowed debtors' prisons to resurge in modern times.

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INTRODUCTION

Debt has always been part of American life. As one delegate at a state constitutional convention said in 1877, "I recognize that this is a debt-ridden land . . ."¹ Among the early settlers, a fifth were indentured servants who agreed to work to repay their debt upon arrival.² In the beginning, debts tended to be relatively small and owed locally, acting as a sort of social glue.³ Refined gentlemen earned most of their income through loans, not labor.⁴ Even the military was impacted. The 1776 Articles of War had a provision governing how a soldier's debts would be

1. SAMUEL L. SMALL, A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN ATLANTA, GEORGIA, 1877, at 468 (Atlanta, Const. Pub'g Co. 1877) [hereinafter *GEORGIA CONSTITUTIONAL CONVENTION OF 1877*].

2. THOMAS P. SLAUGHTER, *INDEPENDENCE: THE TANGLED ROOTS OF THE AMERICAN REVOLUTION* 10 (2014).

3. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED* 68 (1992).

4. See THOMAS M. WOODS, *DEBT AND SOCIETY IN COLONIAL SOUTH CAROLINA, 1670-1776*, at 7 (1996).

resolved if they died while in service.⁵ The 1878 Articles of War provided that no soldier could be arrested for debt unless it was contracted before enlistment and was for a certain amount.⁶ To this day, military courts-martials can prosecute a servicemember for a “dishonorable” failure to pay a debt.⁷

Debtors’ prisons, too, have always been part of America. As the name implies, these were jails used to punish the financially misfortunate. At the time of the American Revolution, only two states offered any constitutional protections to debtors.⁸ Today, forty-one states have constitutional provisions explicitly banning imprisonment for debt in whole or in part.⁹ This Article seeks to connect those dots, tracing the issue of imprisonment for debt through the constitutions of the states.

This Article proceeds in four Parts. Part I provides an overview of debtors’ prisons in early America. The American system of debt imprisonment is modeled off of the English system. The common law allowed creditors to bring suits for debts that resulted in imprisonment before any court adjudicated the matter. Thousands were imprisoned in debtors’ prisons in early America and living conditions for prisoners were abysmal. Because the federal government took a hands-off approach to this problem, progress on the issue was up to the states.

Part II looks at constitutional developments during the Revolutionary Era through the Era of Good Feelings (1776 through 1825). Among the original thirteen states, only two states offered any protections for debtors facing imprisonment in their founding charters—or less than one-sixth. By 1825,

5. 1776 ARTICLES OF WAR, § 15, art. 1.

6. 1878 ARTICLES OF WAR, art. 127.

7. MANUAL FOR COURTS-MARTIAL IV-135, IV-140 (2019) (describing violations of Articles 133—conduct unbecoming an officer and a gentleman—and 134—conduct prejudicial to good order and discipline).

8. Pennsylvania and North Carolina offered modest protections. See PA. CONST. of 1776, § 28; N.C. CONST. of 1776, § 36.

9. Note, *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1035 (2016) [hereinafter *State Bans Note*].

there were twenty-four states and thirteen of them offered constitutional protections for debtors—or more than one-half. But because of loopholes in the law and resistance by courts, imprisonment for debt continued. At the same time, popular outrage against debtors' prisons increased. The primary arguments against it were (1) poor conditions for inmates, (2) debtors' prisons were primitive, (3) the lack of due process for defendants, (4) debtors' prisons were ineffective at recovering debts, and (5) incarceration destroyed good men and ruined their families.

Part III is about the Jacksonian Era through the readmission of the defeated Southern states after the Civil War (1825 through 1870). This was the most rapid expansion of constitutional protections for debtors. By the late 1860s, there were thirty-six state constitutions, and twenty-eight of these had protections for debtors—or over three-quarters. At these conventions, many delegates channeled many of the same arguments that debtors' prisons abolitionists had been making for decades, and the conventions struggled with how to treat fraudulent debtors. Federal progress on protecting debtors continued to be modest, but state legislatures often passed laws in addition to or in place of constitutional provisions.

Part IV examines Reconstruction through modern times (1870 onward). Relatively few states joined during this period, but every single one of them entered the Union with a constitution that protected debtors in some way from imprisonment. That, coupled with the fact that several states amended their constitutions to add protections, means that as of 2021, forty-one states have protections for debtors—more than four-fifths. Around the middle of the twentieth century, constitutional framers appeared to believe that debtors' prisons had been eradicated, and U.S. territories that created constitutions neglected to include protections. But debtors' prisons live on in the form of pre-trial confinement, incarceration for court fees and fines, and excluding various forms of debt—such as alimony, divorce, child support, and taxes—from constitutional

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protection. The Article ends with a closing summary of the constitutional history of debtors' prisons.

To help contextualize some of the numbers in this Article, the following table is provided.¹⁰

Table 1
POPULATION AND INFLATION GROWTH

Year	U.S. population	New York City population	Philadelphia population	Value of \$10 in 1800 dollars, inflation adjusted
1800	5.3 million	60 thousand	81 thousand	\$10
1810	7.2 million	96 thousand	111 thousand	\$9.21
1820	9.6 million	123 thousand	137 thousand	\$8.22
1830	12.8 million	202 thousand	188 thousand	\$6.27
1840	17.0 million	312 thousand	258 thousand	\$5.87
2019	328 million	8.3 million	1.5 million	\$152.19

10. RICHARD L. FORSTALL, *POPULATION OF STATES AND COUNTIES OF THE UNITED STATES 1790–1990*, at 4, 113, 137 (1996) (providing population figures for 1800 to 1840); *see also QuickFacts New York City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045219#> (last visited Aug. 8, 2021) (providing modern population numbers for New York City); *2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing*, U.S. CENSUS BUREAU (Dec. 30, 2019), <https://www.census.gov/newsroom/press-releases/2019/popest-nation.html> (providing modern population for the U.S.); *QuickFacts Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/philadelphiacountypennsylvania> (last visited Aug. 8, 2021) (providing population numbers for the city of Philadelphia).

I. DEBTORS' PRISONS IN EARLY AMERICA

A. *Legal Structure of Debtors' Prisons*

Debtors' prisons can be seen throughout the history of Western civilization in some form or another. The Twelve Tables, the oldest codification of Roman law we have, permitted its usage in 451 B.C. and is the first known codification of debt imprisonment.¹¹ Roman debtors could be imprisoned after thirty days of failure to pay their debts, and further punished with death or being sold into slavery.¹² If a debtor was delinquent with multiple creditors, the creditors could dissect his body and split it up amongst them.¹³ This continued until a creditor savagely beat the son of an imprisoned debtor after the son refused the sexual advances of the creditor.¹⁴ This caused such a public outcry that the Roman Senate felt compelled to end debt imprisonment altogether in 326 B.C., as well as release all confined debtors.¹⁵ Ancient Greece, as well, permitted debt slavery, until Solon of Athens forbade it.¹⁶

In the sixteenth century, New Spain's landholding aristocracy enslaved native peoples, but by the seventeenth century, the Spanish Crown renounced slavery.¹⁷ So the aristocrats shifted

11. Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 358 (2006).

12. ANDREW STEPHENSON, *A HISTORY OF ROMAN LAW: WITH A COMMENTARY ON THE INSTITUTES OF GAIUS AND JUSTINIAN* 128, 323 (1912).

13. *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543, 543–44 (1976).

14. Becky A. Vogt, *State v. Allison: Imprisonment for Debt in South Dakota*, 46 SAN DIEGO L. REV. 334, 338, 339 n.46 (2001).

15. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 495 (2016).

16. *The Spirit of Laws*, in 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU 264 (T. Evans & W. Davis eds., 1777), http://oll-resources.s3.amazonaws.com/titles/837/0171-01_Bk.pdf.

17. William S. Kiser, *A "Charming Name for a Species of Slavery": Political Debate on Debt Peonage in the Southwest, 1840s–1860s*, 45 W. HIST. Q. 169, 171 (2014).

to debt peonage to extract forced labor from indigenous populations.¹⁸ France allowed debtors' prisons for centuries: American James Swan—a Son of Liberty who partook in the Boston Tea Party—spent twenty years rotting in a French debtors' prison for it.¹⁹

American debtors' prisons trace their origins most directly to British common law of the Middle Ages.²⁰ England employed debt slavery until the Norman Conquest of 1066.²¹ The Normans hated the practice because it had been used so frequently against them, and they were determined to stamp it out in their new domain.²² However, within a couple of centuries, anti-debtor laws returned. At the behest of merchants and nobles, Parliament passed several debt imprisonment laws in the latter half of the 1200s.²³

The system that emerged allowed private creditors to imprison debtors to collect before or after trial.²⁴ These incarcerated debtors could be held until they repaid or the creditor decided to let them go.²⁵ Although creditors could not actually seize property, they could condemn debtors to languish for years in a cell over trifling amounts.²⁶ Debtors' prisons operated for a profit, and inmates were charged admission and release fees, as well as for room, board, beverages, and food.²⁷ By the late eighteenth and nineteenth

18. *Id.*

19. *To Thomas Jefferson from James Swan, 31 January 1788*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-12-02-0578>.

20. Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 242 (2017).

21. Vogt, *supra* note 14, at 338, 340.

22. *Body Attachment and Body Execution: Forgotten but Not Gone*, *supra* note 13, at 545.

23. *Id.* at 545–46.

24. Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 15 (2016).

25. *Body Attachment and Body Execution: Forgotten but Not Gone*, *supra* note 13, at 547.

26. Ressler, *supra* note 11, at 360.

27. Sobol, *supra* note 15, at 495.

centuries, “approximately 10,000 Englishmen were imprisoned for debt annually under horrid conditions.”²⁸

American colonies largely carried over this system.²⁹ As described by a contemporaneous treatise, “the law permits an arrest on mesne process, in a civil action for a mere debt, in order to afford security to the creditor for the defendant’s forthcoming, in case judgment shall be given against him.”³⁰ This “mesne,” or intermediate, process meant that a person could be imprisoned before a court passed judgment.³¹ Creditors could also seek a *capias ad satisfaciendum*, sometimes abbreviated *ca. sa.*, which was a post-judgment writ commanding the sheriff to imprison the defendant until the judgment for debt was satisfied.³² In the words of Montesquieu, “GREAT is the superiority which one fellow-subject has already over another, by lending him money.”³³

At first, Americans were wary of imprisonment for debt.³⁴ But colonists began to gain more wealth and credit, so harsher laws were passed,³⁵ and by the eighteenth century debtors’ prisons were common in America.³⁶ What is more, as debtors started taking out loans from non-local creditors, the risk of lending went up. A faraway lender would have to contend with imperfect information about their debtors, slow moving communications, and a legal system that gave repayment priority to whichever creditor could file legal process first—

28. Conor McDonough, *Mezei’s Day in Court: Debtors’ Prisons, Substance Abuse, and the Permissiveness of Civil Detention in American Immigration Law*, 114 Nw. U. L. Rev. 1631, 1654 (2020).

29. For example, a 1682 Pennsylvania law said, “[A]nyone who was in debt and had been arrested would be kept in prison,” and a Massachusetts Court of the same era said, “[A]nyone who failed to pay a private debt could be kept in jail at his own expense until the debt was paid.” Jerjian, *supra* note 20, at 242–43.

30. JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 14 (1819).

31. *Id.*

32. *Body Attachment and Body Execution: Forgotten but Not Gone*, *supra* note 13, at 543 n.2.

33. 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU, *supra* note 16, at 263.

34. Ressler, *supra* note 11, at 362.

35. Vogt, *supra* note 14, at 338, 343.

36. Sobol, *supra* note 15, at 496.

which usually meant the closest one.³⁷ Given this higher risk, lower intimacy breed of lending, imprisonment for debt must have seemed more attractive to creditors.

B. *The Scope of Debtors' Prisons*

Concrete figures for how many people were imprisoned for debt are scarce. But some sources give insight into what those figures might have looked like. For example, Monmouth County, New Jersey, has documented over two thousand cases of insolvent debtors it processed between 1755 and 1898, with most of them occurring between 1800 and 1850.³⁸ An 1810 article in the *Hartford Courant* claimed that 2,500 people were incarcerated for debt in New York annually.³⁹ That article cited a virulent critic of debtors' prisons by the name of Howard.⁴⁰ Yet, a separate article by Howard that same year claimed the figure was 2,000 per year.⁴¹ Regardless of the accuracy of these contemporary media accounts, they still give an idea of what the public and policymakers would have believed the incarceration level to be.

Annual censuses of incarcerated debtors and other institutionalized populations in New York City give different figures. Its estimates are in the hundreds, not thousands, but shows an increase in the number of prisoners over the course of the 1820s.⁴² Taking note that there are some slight variations in how numbers were reported, which may result in some minor

37. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 48 (2003).

38. *Insolvent Debtors Collection, 1755-1898*, MONMOUTH CNTY. CLERK, <https://www.monmouthcountyclerk.com/archives/record-groups/county-clerk-records/insolvent-debtors-collection-1755-1898> (last visited Nov. 12, 2021); *Hartford November 28*, HARTFORD COURANT, Nov. 28, 1810, at 3, <https://www.newspapers.com/image/233782069/>.

39. Untitled, HARTFORD COURANT, Nov. 28, 1810, at 3, <https://www.newspapers.com/newspage/233782069/>.

40. *Id.*

41. See Howard, No. III., WKLY. RALEIGH REG., Oct. 25, 1810, at 4, <https://www.newspapers.com/image/58222835/>.

42. See *infra* Table 2.

fluctuations, the annual censuses show the following progression of debtors' prison population.

Table 2
INCARCERATED DEBTORS IN NEW YORK CITY

Year	Debtors' prison population	Non-debtor incarcerated population	Almshouse population
1821 ⁴³	216	1,038	1,604
1822 ⁴⁴	120	1,047	1,717
1823 ⁴⁵	205	1,032	1,732
1824 ⁴⁶	300	1,146	1,634
1825 ⁴⁷	178	952	1,702
1826 ⁴⁸	390	676	1,472
1827 ⁴⁹	340	1,076	1,685
1828 ⁵⁰	228	855	2,129

43. *Annual Census*, NAT'L GAZETTE (Phila.), Jan. 11, 1822, at 3, <https://www.newspapers.com/image/346666643/>.

44. *New York*, NILES NAT'L REG. (St. Louis), Feb. 22, 1823, at 2, <https://www.newspapers.com/image/572059068/>.

45. *Annual Census*, EVENING POST (N.Y.C.), Jan. 8, 1824, at 2, <https://www.newspapers.com/image/38045960/>.

46. *Annual Census*, GETTYSBURG COMPILER, Jan. 26, 1825, at 3, <https://www.newspapers.com/image/73842024/>.

47. *Criminal Institutions*, HARTFORD COURANT, Jan. 31, 1826, at 3, <https://www.newspapers.com/image/233663135/>.

48. Editorial, PITTSFIELD SUN, Feb. 1, 1827, at 3, <https://www.newspapers.com/image/531893119/>.

49. John Stanford, *Annual Census*, EVENING POST (N.Y.C.), Jan. 15, 1828, at 3, <https://www.newspapers.com/image/38175193/>.

50. *New York*, NILES NAT'L REG. (St. Louis), Jan. 31, 1829, at 6, <https://www.newspapers.com/image/572063469/>.

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1829 ⁵¹	431	608	1,839	
1830 ⁵²	323	634	1,888	

All of these figures are lower than other sources. For example, the *Vermont Gazette* reported that there were 1,085 people in debtors' prison in New York City during 1828, with debts totaling \$25,409.⁵³ Another source asserts that New York City had 913 debtors in prison in 1830.⁵⁴ The Boston Prison Discipline Society said there were 1,027 debtors imprisoned in New York City in 1829.⁵⁵

But the census data we have at least makes clear that in any given year in New York, hundreds of people were being imprisoned for debt. Given that the population of New York was around 200,000 in 1830, the debtor-incarceration rate was between 50 and 200 per 100,000 residents—not counting the significantly larger criminal population behind bars or the much higher estimates of debtor-inmates.

Those in prison tended to be poor, judging by the piddling amounts they were locked up for. The Prison Discipline Society in Boston said that 75,000 people were imprisoned for debts each year, half of whom owed under twenty dollars, and that there were 1,027 debtors imprisoned in New York City in 1829.⁵⁶ It was reported to Congress that 959 citizens were imprisoned for debt in Maryland in 1831, with the majority for under ten

51. John Stanford, *Annual Census*, EVENING POST (N.Y.C.), Jan. 14, 1830, at 2, <https://www.newspapers.com/image/39626077/>.

52. Editorial, CHARLESTON MERCURY, Jan. 26, 1831, at 2, <https://www.newspapers.com/image/605333705>.

53. See *N.Y. Courier*, VT. GAZETTE, Mar. 30, 1830, at 3, <https://www.newspapers.com/image/518516427>.

54. *Imprisonment for Debt*, EVENING POST (N.Y.C.), Feb. 2, 1831, at 2, <https://www.newspapers.com/image/40603967/>.

55. *Imprisonment for Debt*, LONG-ISLAND STAR (Brooklyn), Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/>.

56. *Id.* For comparison, in England, it was reported that there were eight thousand debtors in prison, and another sixteen thousand fugitives from debt in 1790. See *London (Friday) February 26*, DERBY MERCURY, Feb. 25, 1790, at 1, <https://www.newspapers.com/image/394408712/>.

dollars of debt and fifty-three of them in for one dollar or less.⁵⁷ A citizens' group claimed that between 1826 and 1830 in Philadelphia, there were 3,001 debtors imprisoned.⁵⁸ Of this, 1,082 were in for less than five dollars, 723 were in for between five and ten dollars, and 456 were in for between ten and twenty dollars.⁵⁹ The *United States Gazette* reported that over the course of 1809, New York confined 326 people for debts between fifteen and twenty-five dollars, 235 people for debts between ten and fifteen dollars, and 591 people for debts under ten dollars.⁶⁰ This was a total of 1,152 people confined for twenty-five dollars or less.⁶¹ The year before, over 1,300 people were imprisoned for those amounts.⁶² General John Crawford remembered that people would be imprisoned for debts as small as twenty-five cents.⁶³

Most debtor-inmates were men, but not all.⁶⁴ A widow who owed sixty-eight cents was jailed in Rhode Island.⁶⁵ Hannah Crispy was imprisoned in Boston with her infant child in 1820 for a debt of twelve dollars.⁶⁶ The mother and child languished for twenty days before the authorities took the infant, and it died away from its mother.⁶⁷ The incarceration of women for debts was apparently common enough that an 1800 bankruptcy law included the use of the female pronoun.⁶⁸ Congress also

57. See 9 REG. DEB. 97–98 (1832).

58. Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/>.

59. *Id.*

60. *Imprisonment for Debt*, U.S. GAZETTE (Phila.), Jan. 11, 1810, at 3, <https://www.newspapers.com/image/604834934/>.

61. *Id.*

62. *Id.*

63. *The Convention of 1846*, in 27 PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 342 (Milo M. Quaife ed., 1919) [hereinafter *Wisconsin Convention of 1846*].

64. Jeff Mangum, *Women & Bankruptcy*, J. NEWS (White Plains), Oct. 27, 1998, at 25, <https://www.newspapers.com/image/164598017/>.

65. *Id.*

66. Sobol, *supra* note 15, at 488.

67. *Id.*

68. See Mangum, *supra* note 64.

banned the use of intermediate process to imprison women in 1843,⁶⁹ similar to reforms that states already had.⁷⁰

C. Poor Treatment of Incarcerated Debtors

Prevalent as debtors were, they were not held in high regard. Many saw debt as a moral failing, not merely an economic one.⁷¹ One preacher linked debts with sinfulness directly, insisting on a moral obligation to repay, and labeling God the “great creditor,” a view not too far off from the mainstream.⁷² Delinquent debtors could not make a will, as their property would be forfeited upon death.⁷³ A 1785 Pennsylvania law allowed people who went bankrupt to be flogged and have an ear nailed to a pillory.⁷⁴

Debtors were often held in the same prison as criminals, albeit in different sections. Newark, New Jersey’s old jailhouse was a two-story building where debtors were kept on the second floor while the “more desperate criminals” were in the basement dungeon.⁷⁵ Blackstone said that debtors may be kept in whatever place the sheriff pleased.⁷⁶ One observer noted “the situation of the debtor is far less comfortable than that of the criminal.”⁷⁷ Although sustenance was provided for criminals, debtors were not so lucky.⁷⁸ Criminal laws also tended to give

69. Act of Mar. 3, 1843, Pub. L. No. 27-98, § 3, 5 Stat. 629.

70. See, e.g., *Imprisonment for Debt*, KY. REP., Feb. 10, 1830, at 2, <https://www.newspapers.com/image/592673568/> (noting that Kentucky forbade imprisoning women for judgments in tort cases).

71. MANN, *supra* note 37, at 59.

72. See *id.* at 38–39.

73. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, at *499.

74. Joseph Pomykala, *Bankruptcy Reform: Principles and Guidelines*, 20 REGUL. 41, 41 (1997).

75. 1 FRANK J. URQUHART, A HISTORY OF THE CITY OF NEWARK, NEW JERSEY 275 (2017).

76. BLACKSTONE, *supra* note 73, at *342 n.7.

77. *Mechanics’ Convention*, NILES NAT’L REG. (St. Louis), Sept. 20, 1834, at 15, <https://www.newspapers.com/image/572065358/>.

78. See John E. Matejkovic & Keith Rucinski, *Bankruptcy “Reform”: The 21st Century’s Debtors’ Prison*, 12 AM. BANKR. INST. L. REV. 473, 476 (2004).

set sentences of imprisonment, whereas debtors had no such certainty.⁷⁹

In some ways, the system was more egalitarian than today's debtors' prisons. Rich and poor alike could face imprisonment for unpaid debts. An 1830 survey of New York's debtors' prison found that out of 900 inmates, about one-third were in for debts under forty dollars, but there were a few more in for much more.⁸⁰

Sometimes, even the extraordinarily wealthy were at risk. Robert Morris, a financier who helped fund the American Revolution and claimed the title of the richest man in the country, was imprisoned for debt.⁸¹ Blair McClenachan, a wealthy banker who rivaled Morris as the largest importer in Philadelphia and a member of Congress to boot, also spent time in a debtors' prison.⁸² Richard Platt, a prominent financier and land speculator in New York City ended up in debtors' prison in 1800,⁸³ as did Henry Echlin, an Irish baronet and heir to his family's fortune.⁸⁴ Complicating the picture for wealthy debtors was that humble debtors could take a "poor man's oath" to be released in many jurisdictions.⁸⁵ This option was not available to the wealthy.⁸⁶

Positions of privilege and power were not enough to stay out of debtors' prisons either. A sitting Justice of the United States Supreme Court, James Wilson, who signed the Declaration of

79. *Id.*

80. *Imprisonment for Debt*, EVENING POST (N.Y.C.), Feb. 2, 1831, at 2, <https://www.newspapers.com/image/40603967/> (noting one debtor owed \$120,000).

81. Hampson, *supra* note 24, at 16–17.

82. *To Thomas Jefferson from Blair McClenachan, 6 January 1802*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-36-02-0181>.

83. *General Orders, 12 August 1776*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-05-02-0511>.

84. *To Benjamin Franklin from Thomas Digges, 6 September 1779*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-30-02-0239>; *see also* ADAMS SENTINEL (Gettysburg), Mar. 25, 1829, at 6, <https://www.newspapers.com/image/36538570/> (noting that Rowland Stephenson, a British baking executive, was held in a debtor's prison).

85. Hampson, *supra* note 24, at 16.

86. *See id.* Rhode Island still uses such a "poor debtor's oath." *See* 10 R.I. GEN. LAWS § 10-13-1 (2021).

Independence and the Constitution, was imprisoned for his debt.⁸⁷ Light-Horse Harry Lee, a Revolutionary War hero, Virginia Governor, and father of Robert E. Lee, spent time in a debtors' prison.⁸⁸ William Paulding, who was the chairman of the New York Committee of Safety (a wartime government for New York during the Revolution), personally backed the debts he incurred to raise militia to fight in the Revolutionary War.⁸⁹ The Continental Congress later refused to reimburse him, and he ended up in debtors' prison.⁹⁰ Thomas Rodney was a Revolutionary War officer, member of the Continental Congress, Justice of the Delaware Supreme Court, and for a fourteen-month spell, a debtor-inmate.⁹¹ Friends of presidents were not safe.⁹² Graduates of Harvard,⁹³ Yale,⁹⁴ and Princeton⁹⁵

87. See *Signers of the Declaration of Independence: James Wilson*, UShistory.org, <https://www.ushistory.org/declaration/signers/wilson.html> (last visited Sept. 15, 2021).

88. See Colin Edward Woodward, *Lee, Henry (1756–1818)*, ENCYCLOPEDIA VA. (Feb. 12, 2021), https://www.encyclopediavirginia.org/Lee_Henry_1756-1818#start_entry.

89. See *To George Washington from the New York Committee of Safety, 18 April 1776*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0065>.

90. See *id.*

91. Matejkovic & Rucinski, *supra* note 78, at 475.

92. See [*Diary Entry: 16 April 1770*], NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/01-02-02-0005-0009-0016>; *To George Washington from Abraham Lott, 7 August 1789*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-03-02-0235>; *To George Washington from James Walton, 29 March 1790*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-05-02-0187>; *To Thomas Jefferson from James Currie, 7 April 1791*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-20-02-0028>.

93. See *To Thomas Jefferson from Amos Windship, 2 May 1801*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-34-02-0012> (noting that Amos Windship, a physician and former student at Harvard (kicked out for theft), was in a debtors' prison).

94. See *To Thomas Jefferson from William Keteltas, 4 July 1801*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-34-02-0395> (noting William Keteltas was a Yale-educated clergyman who was in a debtors' prison for several months, where he edited the DP abolitionist newspaper *Forlorn Hope*).

95. See RUTGERS UNIVERSITY PRESS ENCYCLOPEDIA OF NEW JERSEY 599–600 (Maxine N. Lurie & Marc Mappen eds., 2004). Aaron Ogden was a governor, senator, graduate of Princeton, veteran of the Battle of Yorktown, and steamboat manufacturer who, in 1811, built the *Sea Horse*—the fastest steamboat the world had ever seen. *Id.* at 600. He was also a party to the famous Supreme Court case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Unfortunately for

graced the halls of debtors' prisons. James Madison had to bail his stepson out of a debtors' prison.⁹⁶ Even some delegates at state constitutional conventions had personal experience with debtors' prisons.⁹⁷ Thus, great power and social and political privilege could not guarantee protection from incarceration for the failure to repay a debt.

But just like today, money still mattered. A working debtor would probably have their wealth tied up in things like farm equipment or workmen's tools—things that could be easily seized.⁹⁸ Rich people would have cash, stocks, or bonds, which could be more easily hidden.⁹⁹ On top of this, at common law, a person could not be served process in their home.¹⁰⁰ This meant that rich people with larger homes could lock themselves away from the reach of process servers.¹⁰¹ Robert Morris spent months in his home playing a “game of cat and mouse” to try to stay out of debtor's prison, assiduously dodging all visitors, lest they be process servers in disguise.¹⁰² Once caught, rich people could rent roomier cells and furnish them.¹⁰³ Wealthy debtors might

him, he not only lost the case but went bankrupt from the cost of litigation and ended up in a debtors' prison as a result. *Id.*

96. *James Madison and His Stepson*, John Payne Todd, Editorial Note, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0659>.

97. 1 J. WOODRUFF, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, HELD AT CHARLESTON, S.C., BEGINNING JANUARY 14TH AND ENDING MARCH 17TH, 1868, at 521–23 (1868) [hereinafter SOUTH CAROLINA CONVENTION OF 1868]; R. W. INGALS, REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, 1850, at 661 (1850) [hereinafter MICHIGAN CONSTITUTIONAL CONVENTION OF 1850].

98. See GEORGIA CONSTITUTIONAL CONVENTION OF 1877, *supra* note 1, at 90.

99. *Id.*

100. See 2 THE COMPLETE WORKS OF M. DE MONTESQUIEU 345 (T. Evans & W. Davis eds. 1777) (“A summons was a violent action, and a kind of warrant for seizing the body; hence it was no more allowed to summon a person in his own house, than it is now allowed to arrest a person in his own house for debt.”).

101. See *Extracts of John Baynes's Journal*, 27 August–15 September 1783, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-40-02-0333> (citing Benjamin Franklin as claiming that nobody in America who possessed a freehold could be arrested for debt); *To Benjamin Franklin from James Parker*, 4 January 1766, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-13-02-0005> (noting that Hugh Hughes stayed in his home to avoid service by the sheriff for debtors' prison).

102. Hampson, *supra* note 24, at 17 n.101.

103. See *id.* at 17.

enjoy “good food and well-appointed living quarters, as well as books and other amusements, including on occasion manicurists and prostitutes.”¹⁰⁴ James Swan, the American stuck in a French debtors’ prison, could maintain a relatively comfortable life behind bars.¹⁰⁵

A poor person’s cell, on the other hand, could be deplorable. Philadelphia’s debtors’ prisons were called an “unhappy mansion,” a “human slaughter house,” a “dismal cage,” and a “loathsome storehouse.”¹⁰⁶ Inmates could have their clothes stripped and sold for liquor, guards readily accepted bribes, fighting was common, and prostitutes would seek imprisonment to gain access to a new client base.¹⁰⁷ At the time, the *National Gazette* described them as “perfect hells, in which deeds of the most revolting nature are of ordinary occurrence.”¹⁰⁸

Going to prison could also be expensive. The vast majority of prisoners were held for petty debts and lacked food, water, and heat.¹⁰⁹ Sometimes, the jailer would provide vital supplies on credit, meaning the debtor was racking up even more debt.¹¹⁰ In order to satisfy this new debt and escape from prison, debtors might have to liquidate their assets, a process that could cost them “many times the amount demanded on the execution.”¹¹¹

The miscellaneous costs associated with being sent to debtors’ prison could rival or surpass the value of the debt. Daniel Carroll Brent, in response to a question from President Thomas Jefferson, estimated that it cost almost three dollars to imprison

104. Sobol, *supra* note 15, at 497.

105. *To Thomas Jefferson from Hepzibah Clarke Swan, 20 May 1801*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-34-02-0118>.

106. MANN, *supra* note 37, at 87.

107. *Id.* at 90.

108. Editorial, NAT’L GAZETTE (Phila.), Aug. 29, 1829, at 2, <https://www.newspapers.com/image/346667369/>.

109. Sobol, *supra* note 15, at 497.

110. See William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 161 (1997).

111. Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, <https://www.newspapers.com/image/605059614/>.

a man for a one-dollar debt, and cost another twenty cents each day to confine him.¹¹² In a collection of 161 debt cases he was involved with, on average, the debtor owed six dollars, and it would cost twelve dollars to imprison each one.¹¹³

If a prisoner was fortunate, their friends and family might be able to scrounge up enough money to bail them out.¹¹⁴ But sometimes, there was no assistance available. Harrison Lane, a debtor-inmate in Maryland, complained bitterly that his “pretended Friends have not complied with their kind Offers, and my Creditors have taken all the Advantages they possibly could to run me to Expenses.”¹¹⁵ In these cases, it would be up to the community to step in.¹¹⁶ The Mount Vernon Theatre in New York, for instance, launched a public fundraising campaign to get one man out of debtors’ prison, dedicating the profits from the night’s performance to his aid.¹¹⁷ It described him as “labour[ing] under the most afflicting misery, in being deprived by sickness, of power or hope to support life himself, or preserve existence to an amicable Wife.”¹¹⁸ Hotels sometimes donated meals to debtor-inmates.¹¹⁹ One benefactor even gave a fifty-eight-pound hog to the grateful population of a New York debtors’ prison.¹²⁰

112. *To Thomas Jefferson from Daniel Carroll Brent, 30 March 1802*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-37-02-0112>.

113. *Id.*

114. See MANN, *supra* note 37, at 79.

115. Harrison Lane, Letter to the Editor, MD. GAZETTE, Nov. 9, 1769, at 3, <https://www.newspapers.com/image/41040787/>.

116. E.g., Editorial, LONG-ISLAND STAR (Brooklyn), Apr. 10, 1828, at 1, <https://www.newspapers.com/image/117455352> (showing an example of a fundraiser for poor debtors in prison).

117. *Mount Vernon Theatre*, EVENING POST (N.Y.C.), Aug. 25, 1802, <https://www.newspapers.com/image/32118109/>.

118. *Id.*

119. Editorial, U.S. GAZETTE (Phila.), Jan. 6, 1826, at 4, <https://www.newspapers.com/image/605130443/>.

120. Editorial, J. TIMES (Bennington), Jan. 23, 1829, at 2, <https://www.newspapers.com/image/355608946>; cf. *Petitions and Original Communications*, EVENING POST (N.Y.C.), Feb. 8, 1831, at 2, <https://www.newspapers.com/image/40603987/> (discussing a donation of wood).

People recognized that the laws fell more heavily on the poor. A legislator speaking in favor of abolishing debtors' prisons said, "None but the poor and destitute can expect to derive any benefit from the provisions of this bill," since rich people could get out of confinement by paying bail.¹²¹ Another legislator said the laws were "a confirmation of power in the few against the many; the fortunate against the unfortunate; the Patrician against the Plebian."¹²² And a third said debtors were being "marched off to prison and confined in the same apartment with felons, for no other crime than *poverty*."¹²³ At one of Delaware's constitutional conventions, the system was called "a great evil to the poorer classes of society."¹²⁴ A Philadelphia citizens' group asserted that imprisonment "operates chiefly upon the poor . . . so as to produce a degree of suffering and misery."¹²⁵ This shows that policymakers knew that debtors' prisons operated as a means to criminalize poverty, and used this as a chief argument in favor of abolition.

D. Federal Action on Debtor Imprisonment

While many state constitutions reference debtors' prisons, the federal Constitution is entirely silent.¹²⁶ Matters of debt showed just how inadequate pre-constitutional government was.¹²⁷

121. *Imprisonment for Debt*, VT. WATCHMAN & STATE J., Nov. 30, 1830, at 2, <https://www.newspapers.com/image/491184133>; see also COMMONWEALTH OF PENNSYLVANIA, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION: COMMENCED AT HARRISBURG, ON THE SECOND DAY OF MAY, 1837, 526 (1837) [hereinafter PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837] ("Those who are rich, as well as those who were in middling circumstances, have the power to protect themselves in all their rights.").

122. 8 REG. DEB. 94 (1832) (statement of Rep. R.M. Johnson).

123. *Imprisonment for Debt*, VT. WATCHMAN & STATE J., Nov. 30, 1830, at 2, <https://www.newspapers.com/image/491184133>.

124. WILLIAM M. GOUGE, DEBATES OF THE DELAWARE CONVENTION, FOR REVISING THE CONSTITUTION OF THE STATE, OR ADOPTING A NEW ONE; HELD AT DOVER, NOVEMBER 1831, at 191 (1831).

125. Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/>.

126. See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 597–98 (1993).

127. *Id.* at 597.

After the Revolutionary War, many farmers faced ruinous debts leading to foreclosures and evictions which, in turn, inspired popular uprisings.¹²⁸ Federalists realized the then-existing government could not respond to these insurrections.¹²⁹ The states, too, had war debts they tried to pay off through an import tax, but Rhode Island vetoed it, as was its prerogative under the Articles of Confederation that required unanimity.¹³⁰ No doubt these experiences weighed heavily on the minds of framers at Independence Hall, who were largely pro-creditor.¹³¹

Debt figured heavily in the debates over the adoption of the Constitution.¹³² Paper currency was severely devalued during the war, so many people had to borrow money at high interest to get by, leading to debts they could not repay.¹³³ The federal court system's diversity jurisdiction ensured that foreign creditors could sue in federal court, and hundreds of creditors did just that.¹³⁴ Juries had a track record of refusing to enforce harsh debt collection rules, but without any guarantee for civil juries in the unamended Constitution, it looked like judges might be the ones deciding.¹³⁵ Antifederalists railed courts that did nothing other than tack on costs to poor debtors who were already insolvent,¹³⁶ and had no confidence that elitist judges—as opposed to juries—would give debtors a fair shake.¹³⁷ On top

128. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 18 (2014); see also Landsman, *supra* note 126, at 597.

129. *THE WORLD OF THE AMERICAN REVOLUTION, POLITICS AND WARFARE TO SCIENCE AND TECHNOLOGY* 539 (Merril D. Smith ed., 2015). Even after the Constitution was adopted, rebellions flared up in response to the whiskey tax, which was passed to retire war debts. *Id.* at 549.

130. WALDMAN, *supra* note 128, at 18.

131. See Landsman, *supra* note 126, at 579 (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 744–45 (1973)).

132. See RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 37 (2003).

133. *Id.*

134. WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 186–87 (2007).

135. Landsman, *supra* note 126, at 594; see also JONAKAIT, *supra* note 132.

136. BRUTUS, *ANTIFEDERALIST* NO. 82.

137. Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 152 (1991); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 34 (1990).

of this, due to the lack of any guarantee that trials would be held locally, debtors faced the prospect of going to court in an unfamiliar setting¹³⁸—another feature of the Constitution that Antifederalists attacked.¹³⁹

In spite of this fervor, Congress would not pass a permanent bankruptcy law until 1898.¹⁴⁰ Until then, it dealt with the matter of insolvent debtors in a thoroughly piecemeal fashion. In 1792, it passed a law granting federal inmates imprisoned for debt any privileges they would be entitled under the state law where they were held.¹⁴¹ The law sunset after two years, and Congress refused to do anything more than extend it for another two years.¹⁴² In 1798, Congress enacted a law that allowed debtor-inmates who owed public debts to petition the Treasury Secretary for release, though the Secretary could only do so if the provisions of the law were met.¹⁴³ An 1803 act allowed debtors imprisoned in the District of Columbia to petition the circuit court for release in exchange for offering up most of his property to his creditors.¹⁴⁴ To the extent that Congress empowered the President to provide relief to debtors, the Attorney General issued legal opinions interpreting these powers narrowly.¹⁴⁵

Enacting private laws was another disjointed method Congress used to deal with imprisonment for debt. We mostly

138. See JONAKAIT, *supra* note 132.

139. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 675–76 (1973).

140. Matejkovic & Rucinski, *supra* note 78, at 480.

141. Act of May 5, 1792, Pub. L. No. 2-29, 1 Stat. 265.

142. Act of May 30, 1794, Pub. L. No. 3-34, 1 Stat. 370.

143. Act of June 6, 1798, Pub. L. No. 5-49, 1 Stat. 561; *see also* Act of Mar. 2, 1831, Pub. L. No. 21-62, 2 Stat. 467; Act of July 14, 1832, Pub. L. No. 22-230, 1 Stat. 595; Act of June 7, 1834, Pub. L. No. 23-45, 1 Stat. 676; Act of May 27, 1840, Pub. L. No. 26-26, 1 Stat. 381.

144. Act of Mar. 3, 1803, ch. 48, 7 Stat. 237.

145. 1 Op. Att’y Gen. 231 (Sept. 8, 1818) (opining that the power of the president to discharge debtors from imprisonment was “expressly limited to cases in which the person is imprisoned upon execution,” meaning the power was “not applicable to the case of a debtor against whom there has been yet no judgment, and who is imprisoned, not upon execution, but upon mesne process”); 2 Op. Att’y Gen. 285 (Oct. 26, 1829) (opining that the president could not discharge a debtor to the United States imprisoned on a warrant issued from the Treasury Department, and the debtor would have to have a court judgment issued against them first).

know Congress for its public laws—which include everything from health care to the tax code. As the name implies, these laws apply generally and are supposed to be for the benefit of the public. But Congress may also pass private laws. These exist to benefit an individual, family, or small group of people. Often they are passed when a government policy falls unfairly upon a person, or at the request of the aggrieved party.

Debt was a running theme of these private laws. Rather than simply ban debtors' prisons, Congress passed private laws to individually release unfortunate debtor-inmates, provided they took an oath pledging that they were not hiding their assets.¹⁴⁶ Apart from the fact that these laws failed to tackle the issue systematically, they favored those with enough connections to get the ear of those in power.

Presidents were peppered with letters from debtor-inmates begging for release.¹⁴⁷ For example, debtors Nathaniel G. Ingraham, Alexander Phoenix, William Nexsen, and John Redfield, all merchants, wrote to President Thomas Jefferson to inform him of their plight in February 1812.¹⁴⁸ They told him they were “overwhelmed by the calamities of the times” and “incarcerated by the government of their County for—debt,” hundreds of thousands of dollars in debt, to be precise.¹⁴⁹ “We implore your aid with the Government & your friends in Congress to effect our deliverance from this monument,” they

146. See, e.g., Act of Feb. 3, 1802, Pub. L. No. 7-3, 6 Stat. 45 (discharging Lawrence Erb, a tax collector from Pennsylvania); Act of Mar. 2, 1805, Pub. L. No. 8-12, 6 Stat. 57 (discharging John York, a tax collector from New York); Act of Mar. 3, 1807, Pub. L. No. 9-42, 6 Stat. 66 (discharging Gilbert Drake, a tax collector from New York); Act of May 7, 1822, Pub. L. No. 7-85, 6 Stat. 272 (exempting John Post and Farly Fuller, from New York, from debtors' prison); Act of Mar. 3, 1823, Pub. L. No. 7-94, 6 Stat. 287 (granting relief to Abraham Snyder).

147. E.g., *To Thomas Jefferson from Thomas Quarrier, 13 February 1802*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-36-02-0380>; *To James Madison from Moses Hoyt, 28 September 1810 (Abstract)*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/03-02-02-0698>.

148. *Nathaniel G. Ingraham, Alexander Phoenix, William Nexsen, and John Redfield to Thomas Jefferson, 13 February 1812*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/03-04-02-0379>.

149. *Id.*

concluded.¹⁵⁰ Though it took a year, Congress passed private acts releasing the quartet.¹⁵¹ Plenty of other debtors tried too, though they were not necessarily successful.¹⁵²

Given the large numbers of people languishing in debtors' prisons, many of whom lacked wealth or political connections, federal efforts were far from adequate. Real progress on the issue was left to the states.

II. REVOLUTIONARY ERA THROUGH THE ERA OF GOOD FEELINGS

A. *Constitutional Protections for Debtors: First Steps*

In 1776, coinciding with the Declaration of Independence, most of the original colonies passed their own state constitutions.¹⁵³ Like the federal government, the states largely neglected to provide constitutional protections to debtors, or were outrightly hostile towards them. South Carolina, for example, barred debtors from public office in its first constitution—a disability the state would hold onto for nearly 100 years.¹⁵⁴ Though the states hewed to the federal constitution in many respects—three branches of government, bicameral legislatures, bills of rights, and so forth—imprisonment for debt is one area in which the states would eventually chart their own path.

With the Revolution, every state except Connecticut and Rhode Island adopted constitutions—rather than continuing to

150. *Id.*

151. Act of Feb. 24, 1813, Pub. L. No. 12-25, 2 Stat. 117 (granting relief to John Redfield); Act of Mar. 3, 1813, ch. 62, 6 Stat. 119 (granting relief to Nathaniel G. Ingraham, Alexander Phoenix, and William Nexsen).

152. *E.g.*, H. JOURNAL, 11th Cong., 2d Sess. 289–90 (1810); H. JOURNAL, 6th Cong., 1st Sess. 684–85 (1800).

153. See William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 201–02 (1893).

154. S.C. CONST. of 1776, art. XI; S.C. CONST. of 1778, art. V; S.C. CONST. of 1790, art. I, §§ 2, 6, 8; S.C. CONST. of 1861, art. I, § 15; S.C. Const. of 1865, art. I, §§ 13–14. The disqualifier for debtors finally went away in the 1865 constitution.

rely on royal charters.¹⁵⁵ Both Pennsylvania¹⁵⁶ and North Carolina¹⁵⁷ adopted declarations of rights with language against debtors' prisons. Pennsylvania's was ratified first, on September 28, 1776. Section 28 of the Pennsylvania's first Constitution read:

The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering Up, bona fide, all his estate real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law. All prisoners shall beailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.¹⁵⁸

Two parts of this constitutional provision bear note—as they crop up again and again around the country. First, there is an exception for fraud. Debtors who hid property, “gave away” property to friends and family, or else acted dishonestly, could still find themselves behind bars. Second, the debtor had to “deliver up,” or surrender, all of their real and personal property to their creditor to stay out of jail. This serves to streamline the collection process for the creditor by still holding out the threat of imprisonment for obstinate or slow-footed debtors. Notwithstanding these deficiencies, it was still a huge step forward in a society where incarcerating debtors was the norm.

Before Pennsylvania adopted this provision, it dealt with debtor-inmates through “frequent interpositions of the legislature in behalf of particular persons,” which were “too often dependent upon favor or prejudice” of the people seeking

155. JAMES Q. DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914*, at 25 (Ginn and Co. eds., 1915).

156. PA. CONST. of 1776, § 28.

157. N.C. CONST. of 1776, § 39.

158. PA. CONST. of 1776, § 28.

mercy.¹⁵⁹ By placing rules in the constitution, the state hoped to provide “general regulations by a general law, which may be known before the contracts be made.”¹⁶⁰

North Carolina’s constitutional provision, ratified a few months later, was identical.¹⁶¹ But North Carolina would not be the last state to borrow from Pennsylvania. In 1790, Pennsylvania amended its constitutional provision by dropping the second sentence relating to bail. It thus read in full: “That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.”¹⁶² The Keystone State’s language was highly influential, becoming the inspiration for state limits on imprisonment for debt for decades to come.

By the end of the 18th century, a few more states would extend a hand of mercy to debtors. Georgia was originally conceived as a haven for imprisoned debtors from England to be given a new lease on life (and relieve the British prison system from the cost of incarcerating them),¹⁶³ so it should come as no surprise that it was quick to act on debtors’ prisons. Despite being a haven for imprisoned debtors, the state’s first four charters made no mention of the practice.¹⁶⁴ But in 1798, it adopted a constitutional provision banning imprisonment if the debtor gave up all of their property to their creditor, and it contained a fraud exception.¹⁶⁵ It thus copied the 1790 Pennsylvania Constitution.

159. JOHN S. WIESTLING & FRANCIS R. SHUNK, THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FOUNDED THE PRESENT CONSTITUTION OF PENNSYLVANIA TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS 109 (Harrisburg 1825).

160. *Id.*

161. N.C. CONST. of 1776, § 39.

162. PA. CONST. of 1790, art. IX, § 16.

163. *Debtors in Georgia*, U.S. HIST., <https://www.ushistory.org/us/5d.asp> (last visited Oct. 24, 2021).

164. See GA. CHARTER of 1732; GA. CONST. of 1777; GA. CONST. of 1789.

165. GA. CONST. of 1798, art. IV, § 7.

Delaware's 1792 constitution did not explicitly mention debtors' prisons, but did provide that "at any time pending an action for debt," the debtor could "bring into court a sum of money for discharging the same,"¹⁶⁶ which at least gives a clear procedure to stave off incarceration.

After the original thirteen colonies, every state that entered the Union in the eighteenth century included language on debtors' prisons in their inaugural constitutions. Though not yet a state, Vermont adopted a constitution in 1777 that used the same verbiage as Pennsylvania.¹⁶⁷ Still not a state in 1786, Vermont nevertheless passed a new constitution that only slightly tweaked Pennsylvania's language on debt imprisonment.¹⁶⁸ After finally becoming a state, Vermont adopted its 1793 constitution with unchanged language on debtors' prisons.¹⁶⁹

Kentucky entered the Union in 1792 with language that largely mirrored Georgia's. Like those before it, it only allowed non-fraudulent debtors to avoid jail if they offered up their property to their creditors.¹⁷⁰ A few years later, Tennessee copied Kentucky's language when it joined the country.¹⁷¹

Ohio was the first state to join the Union in the nineteenth century.¹⁷² Its constitution also banned imprisonment for debt if the debtors gave their estate to their creditor and did not commit fraud.¹⁷³ In so doing, it replicated the language of Kentucky and Tennessee, which means Ohio's provision can

166. DEL. CONST. of 1792, art. VI, § 10.

167. VT. CONST. of 1777, ch. 2, § 25 (providing that "[t]he person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up bona fide, all his estate, real and personal, in possession, reversion or remainder, for the use of his creditors, in such manner as shall be hereafter regulated by law.").

168. VT. CONST. of 1793, ch. 2, § 33.

169. KY. CONST. of 1792, art. XII, § 17.

170. TENN. CONST. of 1796, art. 16, § 18.

171. TENN. CONST. of 1796, art. 11, § 18.

172. Samuel Shipley, *List of U.S. States by Date of Admission to the Union*, ENCYC. BRITANNICA <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026> (last visited Sept. 2, 2021).

173. OHIO CONST. of 1802, art. VIII, § 15.

also indirectly be traced back to Pennsylvania's 1790 constitution. Conversely, Louisiana entered in 1812 without any constitutional protections, making it the first state to pass an inaugural constitution without protections for debtors since New York's in 1777.

After the Pelican State joined the Union, debtors' prison abolitionists racked up a string of victories. Indiana became a state in 1816, boasting a constitutional provision that mimicked Ohio's.¹⁷⁴ Mississippi,¹⁷⁵ Illinois,¹⁷⁶ and Alabama¹⁷⁷ followed suit in each of the next three years, respectively, and included a similar provision in their constitutions, with only slight differences in word choice.

Finally, in 1820, Missouri broke new ground by adopting the first state constitution to eliminate the fraud exception, though it still required debtors to turn over all their property to creditors to avoid imprisonment.¹⁷⁸ That same year, Maine broke the winning streak, as it did not have any protections when it joined the Union.¹⁷⁹ Relatedly, Connecticut finally adopted a constitution in 1818—it had been relying on its colonial charter of 1639 up to this point—without any protections for debtors.¹⁸⁰ And although many states lacking constitutional provisions had statutes protecting debtors,¹⁸¹ most significantly, Kentucky became the first state to abolish imprisonment for debt in 1821 by statute.¹⁸²

174. See IND. CONST. of 1816, art. I, § 17.

175. MISS. CONST. of 1817, art. I, § 18.

176. ILL. CONST. of 1818, art. VIII, § 15.

177. ALA. CONST. of 1819, art. I, § 18.

178. MO. CONST. of 1820, art. XIII, § 17.

179. See generally ME. CONST. of 1820.

180. See generally CONN. CONST. of 1818.

181. See, e.g., *White v. Canfield*, 7 Johns. 117 (N.Y. Sup. Ct. 1810); *James v. Allen*, 1 U.S. (1 Dall.) 188 (Pa. 1786); *Mason v. Haile*, 25 U.S. (12 Wheat.) 370, 376 (1827).

182. Sobol, *supra* note 15, at 497.

B. Imprisonment for Debt Continues

Important as they may have been symbolically, these early constitutional provisions ended up being “parchment barriers,” in the words of James Madison.¹⁸³ Widespread imprisonment for debt still reigned in these states, as in places that had no constitutional protections at all. Court dockets of the era were clogged with cases involving debtors facing or experiencing imprisonment.¹⁸⁴ As noted in Section II.A of this Article, imprisonment for debt was common around the country for several decades and into the nineteenth century—most notably in Pennsylvania,¹⁸⁵ which had a partial constitutional ban against debtors’ prisons from the outset of its statehood. John Clayton complained at a Delaware convention that “scarcely a week passes” without some insolvent debtor being imprisoned in the state.¹⁸⁶

What might explain this? First, until 1845, every state that took constitutional action mandated that debtors deliver up their estates to creditors to avoid imprisonment.¹⁸⁷ Going back to antiquity, some debtors preferred loss of liberty over loss of property, particularly if they had a family on the outside to be concerned about.¹⁸⁸

Second, even if a debtor did wish to surrender their property and get out, there may be procedural hurdles they would have to surmount. Under colonial law in New Jersey, for instance, imprisoned debtors had to prepare an inventory of their estate, list out their creditors and amounts owed to each, and then

183. Sanford Levinson, *America’s “Other Constitutions”: The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 818 (2013).

184. See, e.g., *James*, 1 U.S. (1 Dall.) at 188; *Millar v. Hall*, 1 U.S. 229 (1788); *Banks v. Greenleaf*, 6 Call 271 (Va. 1799); *Hilliard v. Greenleaf*, 2 Yeates 533 (Pa. 1800); *Smith v. Spinolla*, 2 Johns. 198, (N.Y. Sup. Ct. 1807); *White*, 7 Johns. at 117; *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. Sup. Ct. 1811); *Call v. Hagger*, 8 Mass. 423 (1812); *Woodbridge v. Wright*, 3 Conn. 523 (1821).

185. Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/>.

186. GOUGE, *supra* note 124, at 54.

187. See, e.g., *Insolvent Debtors Collection, 1755-1898*, *supra* note 38.

188. Ressler, *supra* note 11, at 360.

petition the court for relief.¹⁸⁹ Before 1755, the only court that had jurisdiction to hear these petitions and release debtors was the state's supreme court.¹⁹⁰ Although the court met but twice a year, a debtor had to file a writ of habeas corpus to appear before it.¹⁹¹ From 1755 until 1795, quarter sessions courts could also release debtors, but as the name implies, they only met four times a year.¹⁹² Early federal law required the judge to travel to the jail to administer oaths to the debtors who wanted to swear they were not hiding assets¹⁹³—an inconvenience that some judges despised.¹⁹⁴ So debtors would be forced to wait around in jail.

This problem was not unique to New Jersey.¹⁹⁵ As a 1786 court observed: “[i]nsolvent laws subsist in every State in the Union, and are probably all different from each other”¹⁹⁶ Just because one state offered a method for discharge from prison does not mean courts in other states would honor it.¹⁹⁷ In Maryland, for example, incarcerated debtors had to individually petition the general assembly to pass an act transferring their property to their creditors in exchange for release.¹⁹⁸ Connecticut also had debtors individually petition

189. *Insolvent Debtors Collection, 1755-1898*, *supra* note 38.

190. *Id.*

191. *Id.*

192. *Id.*

193. Act of May 28, 1796, Pub. L. No. 4–38, 1 Stat. 482.

194. *See Revision of the Act for the Relief of Persons Imprisoned for Debt*, 5th Cong. 2nd Sess., No. 101 (1798) (statement of Richard Peters, United States District Judge), <https://memory.loc.gov/llsp/037/0100/01700162.tif>.

195. *See* GOUGE, *supra* note 124, at 156.

196. *James v. Allen*, 1 U.S. (1 Dall.) 188, 191 (Pa. 1786).

197. *See id.* at 192.

198. *See, e.g.*, Harrison Lane, Letter to the Editor, MD. GAZETTE, Nov. 9, 1769, at 3, <https://www.newspapers.com/image/41040787/>; Joseph Gill, Letter to the Editor, MD. GAZETTE, Nov. 9, 1769, <https://www.newspapers.com/image/41040787/>; George Henry, Letter to the Editor, MD. GAZETTE, June 29, 1786, at 4, <https://www.newspapers.com/image/41047542/>; Daniel Merrick, Letter to the Editor, MD. GAZETTE, Aug. 13, 1767, at 2, <https://www.newspapers.com/image/41039899/>.

the legislature for their salvation.¹⁹⁹ Some states required personal notice be given to creditors.²⁰⁰

Third, many courts actively resisted reforms to help debtors. After Massachusetts passed a law that stated “[i]mprisonment for debt is hereby forever abolished in Massachusetts,” the state’s high court interpreted the law to allow imprisonment for failure to pay taxes despite the law’s “pointed and emphatic” language.²⁰¹ The United States Supreme Court declared that states could pass their own bankruptcy laws—provided they did not conflict with federal law—but struck down a New York law because it impaired the obligations of contracts for debt.²⁰² The Supreme Court also acknowledged the legitimacy of debtors’ prisons, saying “[c]onfinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it.”²⁰³ Further, Michigan allowed imprisonment based on a civil judgment for damages.²⁰⁴

Finally, a few people may have even stayed in jail out of principle. James Swan chose to stay in prison for twenty-two years rather than pay a debt he regarded as unjust.²⁰⁵ All of these reasons show that passing a constitutional amendment, as impressive as that might sound, is not enough on its own.

C. Criticism of Debtors’ Prisons Mounts

The frequency and ferocity of attacks on the system of debtors’ prisons grew in the beginning of the nineteenth

199. See, e.g., Elisha Bigelow, Letter to the Editor, HARTFORD COURANT, Apr. 27, 1789, at 4, <https://www.newspapers.com/image/233656004/>; Joshua Higley, Letter to the Editor, HARTFORD COURANT, July 19, 1790, at 2, <https://www.newspapers.com/image/233677104/>.

200. *James*, 1 U.S. (1 Dall.) at 191.

201. *Appleton v. Hopkins*, 71 Mass. (5 Gray) 530, 532, 534 (1855).

202. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196, 208 (1819).

203. *Id.* at 208.

204. See *Fuller v. Bowker*, 11 Mich. 204, 209 (1863). Some courts were admittedly more pro-debtor; see, e.g., *Sommers v. Johnson*, 4 Vt. 278, 279 (1832); *Millar v. Hall*, 1 U.S. (1 Dall.) 229, 232 (Pa. 1788).

205. *To Thomas Jefferson from James Swan*, 31 January 1788, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-12-02-0578>.

century.²⁰⁶ This can be seen in newspaper articles published throughout the country. A present-day search for “imprisonment for debt” among U.S. newspapers found 134 results between 1770 and 1817.²⁰⁷ But in the five-year span between 1818 and 1823, there were 1,087 results²⁰⁸ growing to 2,663 results between 1836 and 1841.²⁰⁹

Opposition was galvanized by the public, and high-profile abuses detailed in those news articles. The Hannah Crispy case²¹⁰—where a newborn infant died in a debtors’ prison—spurred nationwide calls for reform.²¹¹ James Swan’s twenty-two years spent in a Parisian debtors’ prison was a story that was widely carried by newspapers.²¹² Even an 82-year-old man, Thomas Knowles, died in a debtors’ prison following a debt collection suit brought by a woman, whose gender an 1826 newspaper seemed to suggest made it all the more egregious.²¹³ Andrew Graham was committed to a debtors’ prison for the small sum of eight dollars.²¹⁴ One state constitutional convention delegate relayed the story of a merciless creditor

206. See, e.g., Search Results, “Imprisonment for Debt” from 1770-1817 in United States, NEWSPAPERS.COM, https://www.newspapers.com/search/#query=%22imprisonment+for+debt%22&p_country=us&dr_year=1770-1817 (last visited Sept. 12, 2021).

207. See *id.*

208. See Search Results, “Imprisonment for Debt” from 1818-1823 in United States, NEWSPAPERS.COM, https://www.newspapers.com/search/#query=%22imprisonment+for+debt%22&p_country=us&dr_year=1818-1823 (last visited Sept. 12, 2021).

209. See Search Results, “Imprisonment for Debt” from 1836-1841 in United States, NEWSPAPERS.COM, https://www.newspapers.com/search/#query=%22imprisonment+for+debt%22&p_country=us&dr_year=1836-1841 (last visited Sept. 12, 2021).

210. Sobol, *supra* note 15, at 488–89.

211. *Id.*

212. E.g., *Items*, U.S. GAZETTE (Phila.), Oct. 5, 1830, at 2, <https://www.newspapers.com/image/605066870/>; *Various Matters*, PITT. WKLY. GAZETTE, Oct. 15, 1830, at 3, <https://www.newspapers.com/image/96012584/>; Editorial, VT. ADVOC. & STATE PAPER, Oct. 25, 1830, at 3, <https://www.newspapers.com/image/489849123/>.

213. Editorial, U.S. GAZETTE, Jan. 6, 1826, at 4, <https://www.newspapers.com/image/605130443/>.

214. Editorial, AURORA GEN. ADVERTISER (Phila.), July 27, 1807, at 2, <https://www.newspapers.com/image/586581278/>.

who had told him: “I don’t care how hard you struggle to get through, I don’t care if you work yourself to death to try to make a crop to repay your investments, I must have forthwith and immediately my pound of flesh,” and then brought a suit for imprisonment.²¹⁵ In Virginia, a wooden debtors’ prison caught fire and the jailor broke the lock trying to undo it.²¹⁶ The prisoner, seeing this, took off his clothes—his only worldly possessions remaining—and gave them to the jailor with instruction to pass them on to his family, and then “retired to a corner of the prison, laid down, and perished in the flames.”²¹⁷ While these horrifying stories spurred the attack on the debtors’ prison system and illustrated the issues associated with it, most of the arguments against debtors’ prisons can be grouped into one of several categories, explored below.

1. *Bad conditions for debtor-inmates*

The awful conditions of debtors’ prisons were a frequent argument for their abolition.²¹⁸ For one thing, they were terribly overcrowded with as many as sixteen people stuffed into a twelve-foot square cell.²¹⁹ *The Mississippian* exhorted its readers to go a debtors’ prison to “witness the sad and wretched condition of the poor inmates of this comfortless abode. There they stand, twenty or more, shivering over the stove, and looking the picture of woe.”²²⁰ A Cincinnati paper reported “[a]ll [are] promiscuously confined in a single apartment, and without even the comfort of a bench to sit upon. Here is to be seen the disgusting—the heart rending—spectacle of men and women, whites and blacks, murderers and debtors, all in one undistinguished group.”²²¹

215. SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 522.

216. PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 105.

217. *Id.*

218. Matejkovic & Rucinski, *supra* note 78, at 476.

219. *Id.*

220. *The Debtor’s Prison*, MISSISSIPPIAN, Feb. 6, 1832, at 3, <https://www.newspapers.com/image/223191213/>

221. Matejkovic & Rucinski, *supra* note 78, at 476 (alteration in original).

For another thing, cells were filthy. New York's *Evening Post* decried how the "garret floor of the debtors Prison is in supportably filthy. The whole of the house requires active regulations for the preservation of the health of its inhabitants," and cleaning was left up to the inmates themselves, much to their displeasure.²²² In 1803, while New York City was gripped by a deadly bout of Yellow Fever, debtor-inmate Martin Wright grew ill, causing other prisoners to become "extremely riotous, declaring that they would not remain there to suffer this malady, but would force their way out if not removed."²²³ It was said that even dogs were not treated as poorly as debtors in prison.²²⁴

A newspaper describing a D.C. debtors' prison said "a filthier spot surely never was known, or seen, for a debtor."²²⁵ Prisoners were not given chairs or beds unless a friend sent one.²²⁶ The tins for soup and coffee were "so dirty . . . that a dog would not drink out of them" and the coffee was "nothing more than crusts of bread grated over warm water, sweetened, and colored with milk."²²⁷ A New York paper said debtors were housed in a "close, unhealthy, and breathing a poisoned atmosphere."²²⁸ Another article from the paper spoke of inmates as "many a half-starved elf, pining away a miserable existence, pierced by cold and gnawed by hunger."²²⁹

222. Editorial, *EVENING POST* (N.Y.C.), June 14, 1804, at 3, <https://www.newspapers.com/image/33513082>; see also *Disasters New York City (NYC) Yellow Fever Epidemic – 1795 to 1804*, NYCDATA: CUNY: BARUCH COLL., https://www.baruch.cuny.edu/nycdata/disasters/yellow_fever.html (last visited Sept. 5, 2021).

223. Editorial, *EVENING POST* (N.Y.C.), Sept. 26, 1803, at 3, <https://www.newspapers.com/image/41055173/>.

224. *Imprisonment for Debt*, *LONG-ISLAND STAR* (Brooklyn), Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/>.

225. *Debtor's Prison*, *ARGUS W. AM.* (Frankfort, Ky.), June 4, 1823, at 3, <https://www.newspapers.com/image/584952315/>.

226. *Id.*

227. *Id.*

228. *Debtors' Apartments*, *EVENING POST* (N.Y.C.), Aug. 6, 1819, at 2, <https://www.newspapers.com/image/40478859>.

229. Philanthropos, Letter to the Editor, *EVENING POST* (N.Y.C.), Nov. 10, 1819, at 2, <https://www.newspapers.com/image/40479183/>.

Given the squalid conditions, it is little wonder that cities did not spend very much on incarceration. Between 1824 and 1826, Philadelphia spent around \$1,500 per year on debtors' prison, a tiny fraction of the city's overall budget.²³⁰ From June 1829 to February 1830, 817 people in Philadelphia were imprisoned for debt.²³¹ Philadelphia's bond policy allowed debtors to pay a bond to stay out of jail.²³² As a result of this bond policy, Philadelphia claimed that only between twenty to thirty people were incarcerated for debt in a given year during the 1820s.²³³ Even with this low prison population, it appears the city was only spending around sixty dollars annually per debtor-inmate—at a time when the average daily wage for a worker hovered around a dollar per day.²³⁴

A common rhetorical device invoked against debtors' prison is that it amounted to "slavery." As the *United States Gazette* editorialized, debtor-inmates "were in actual slavery, and often treated more harshly than slaves themselves."²³⁵ A debtor "shall be deprived of his personal liberty, even in a greater degree than a negro slave . . ." said another paper.²³⁶

For black people, a prison sentence, including those in prison for debt, really could be slavery. In the Jim Crow Era, white

230. *To the Judges of the Court of Common Pleas of the County of Philadelphia*, NAT'L GAZETTE (Phila.), Mar. 12, 1825, at 4, <https://www.newspapers.com/image/346902881/>; *To the Judges of the Court of Common Pleas of the County of Philadelphia*, NAT'L GAZETTE (Phila.), Feb. 27, 1826, at 4, <https://www.newspapers.com/image/346351036/>; *To the Judges of the Court of Common Pleas of the County of Philadelphia*, NAT'L GAZETTE (Phila.), Mar. 2, 1827, at 4, <https://www.newspapers.com/image/346706248/>.

231. *Imprisonment for Debt*, U.S. GAZETTE (Phila.), Nov. 9, 1830, at 1, <https://www.newspapers.com/image/605067130/>.

232. Editorial, VT. STATESMAN, Sept. 12, 1827, at 3, <https://www.newspapers.com/image/490813721/>.

233. *Id.*

234. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., HISTORY OF WAGES IN THE UNITED STATES FROM COLONIAL TIMES TO 1928, at 58 (1934).

235. *Imprisonment for Debt*, U.S. GAZETTE (Phila.), Nov. 9, 1830, at 1, <https://www.newspapers.com/image/605067130/> (quoting ALEXANDER ADAM, ROMAN ANTIQUITIES: OR AN ACCOUNT OF MANNER AND CUSTOMS OF THE ROMANS 34 (J.B. Lippincott & Co. 1872)).

236. *Imprisonment for Debt*, BUFFALO BULL., Aug. 14, 1830, at 1, <https://www.newspapers.com/image/494210201/>.

farmers could also lend money to black tenants and then get criminal warrants against them if they could not repay.²³⁷ Southern states allowed companies and landlords to “lease” black convicts to work for them in exchange for paying off criminal debts.²³⁸ This started as judges and sheriffs ordering black convicts to work on farms or repair bridges and roads to pay off civil debt or as punishment for misdemeanors.²³⁹ The practice grew once private companies could do the same.²⁴⁰ Sheriffs then leased off black workers to the highest bidder.²⁴¹ The practice was so lucrative that counties began charging felonies as misdemeanors so that black labor could be exploited for free.²⁴²

2. Debtors' prisons were primitive and uncivilized

Critics often emphasized that imprisonment was an outdated tactic. An Arkansas paper called debtors' prisons a thing of “a Gothic age.”²⁴³ The *Sentinel & Democrat* hoped that “the time is not far distant when this remnant of Barbarism will be expunged from our code of laws.”²⁴⁴ A legislator called the practice “this old relick of barbarism.”²⁴⁵ A citizens' group in Philadelphia sent a petition to the state legislature condemning debtors' prisons as “a discreditable remnant of barbarism, descended to us from the dark ages of antiquity, which ought long since to have vanished on the advance of civilian and the

237. Jerjian, *supra* note 20, at 243.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Sketches of Inhumanity, or, What I Have Seen*, ARK. TIMES & ADVOC., July 20, 1831, at 1, <https://www.newspapers.com/image/287727071/>.

244. *Imprisonment for Debt*, SENTINEL & DEMOCRAT (Burlington), Mar. 12, 1830, at 3, <https://www.newspapers.com/image/364984263>.

245. *Legislative*, VT. PATRIOT & STATE GAZETTE, Nov. 15, 1830, at 1, <https://www.newspapers.com/image/490535867/>.

light of knowledge.”²⁴⁶ New Yorkers called it “that relic of the rubbish of exploded British laws.”²⁴⁷

To drive home how awful debtors’ prisons were, commentators compared America’s practice unfavorably with other parts of the world. An anti-debtors’ prison crusader writing under the pseudonym Howard, said, “Talk no more, Americans, of the cruelties of Spain to the prisoners of Miranda! Cease to invoke the God of Justice to pour curses on the heads of the Algerine tormentors [I]n [America], unfortunate, innocent prisoners, suffer infinitely more than all our citizens abroad.”²⁴⁸ At a time when France was being criticized for imprisoning an American for his debt, one commentator noted that American laws were even harsher.²⁴⁹ One group said, “Neither Goths, Vandals, or Hottentots, ever had a law to imprison debtors, for not doing exactly what they could not do,” and added, “Unenlightened and *uncivilized* savages never thought of shutting a man up in prison, and depriving him of the ability to earn subsistence for himself or family.”²⁵⁰

A widely reprinted anecdote describes an anonymous, first-person encounter with Turkish Muslims abroad. When asked what he thought about imprisonment for debt, the Turkish man replies, “Christian dog! . . . do you suppose we are so debased as to copy the Nazarine policy?”²⁵¹ Muslims, he says, would

246. Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/>; see also Nelson, *Abolishing Imprisonment for Debt*, 16th Cong, 2nd Sess. No. 504, 2 ANNALS OF CONG. 504, 750 (1821) (arguing that imprisonment for debt “had its origin in an age of barbarism”).

247. *Imprisonment for Debt*, LONG-ISLAND STAR (Brooklyn), Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/>; cf. *Early Laws Had No Respect of Individuals*, DAYTON HERALD, Dec. 26, 1906, at 10, <https://www.newspapers.com/image/392783078/> (describing how primitive colonial-era laws were—debtors’ prisons were mentioned alongside outright torture and mutilation).

248. *Howard, No. II.*, WKLY. RALEIGH REG., Oct. 11, 1810, at 1, <https://www.newspapers.com/image/58222817/>.

249. Editorial, EVENING POST (N.Y.C.), Nov. 15, 1830, at 2, <https://www.newspapers.com/image/39628449/>.

250. *Imprisonment for Debt*, LONG-ISLAND STAR (Brooklyn), Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/>.

251. *Turkish Anecdote*, WKLY RALEIGH REG., Sept. 27, 1810, at 4, <https://www.newspapers.com/image/58222806/>.

take an insolvent debtor's property, but the "believers in our prophet are above shutting up their fellow men in cages in order to starve, persecute, and torment them."²⁵² He finishes by saying, "I have been to several of the Nazarine (Christian) cities, and never looked at a debtors' prison without horror, as a place where a man is degenerated to the condition of a rat!"²⁵³ This story continued to circulate many years.²⁵⁴ Presumably, the purpose is to show that allowing debtors' prisons reflected poorly upon America, and even Christianity.²⁵⁵

3. Lack of due process

Through the use of mesne process, a debtor could be confined before there was any adjudication over the validity of the debt, much less the debtor's responsibility for it.²⁵⁶ Imprisonment became more a tactic to coerce payment rather than a reasoned punishment for any wrong done.²⁵⁷ As far back as 1772, there are newspaper articles in London criticizing the sheriff for throwing debtors in jail before a jury had a chance to weigh in on the matter.²⁵⁸ A Philadelphia writer under the name Minerva said that creditors should not have unilateral power to lock up debtors, that cases of fraud "should be proved to a court of justice, and the length of imprisonment should be defined by

252. *Id.*

253. *Id.*

254. *E.g.*, Editorial, DEL. J., May 22, 1827, at 1, <https://www.newspapers.com/image/616668799/>. Colorful as it may be, there is some reason to question its veracity. There is evidence around the same time that Turkey was throwing Greek citizens in debtors' prisons. *See, e.g., Turks, Russians, and Greeks*, U.S. GAZETTE (Phila.), Sept. 10, 1824, at 4, <https://www.newspapers.com/image/605059271/>.

255. Many explicitly said it was un-Christian to imprison for debt. *Imprisonment for Debt*, NAT'L GAZETTE (Phila.), Dec. 4, 1830, at 1, <https://www.newspapers.com/image/346634890/>; *Public Opinion*, LIBERATOR (Bos.), Feb. 5, 1831, at 3, <https://www.newspapers.com/image/35026642/>; PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 105, 107.

256. Matejkovic & Rucinski, *supra* note 78, at 475.

257. *Id.*

258. *James Stephen, To John Wilkes, Esquire*, PUB. ADVERTISER (London), Jan. 25, 1772, at 2, <https://www.newspapers.com/image/34422452/>.

law—or fixed by the discretion of the court.”²⁵⁹ This was in keeping with the English system, where London alone accounted for 11,000 people confined before “any trial or proof that they owed a farthing” over a thirty-five-year period.²⁶⁰

As a result of the lack of due process, whenever a person signed a contract to repay a debt, “he in effect gives a bill of sale of his body and personal liberty to the creditor as security, subject only to certain humiliating conditions.”²⁶¹ By the debtor imprisonment laws, “a creditor could put his debtor in prison and keep him there, until he starved to death or paid the debt, and that without any regard to the merits or demerits of the prisoner.”²⁶² Creditors could even prevent the debtor from voting by locking them away.²⁶³ Thus, the creditor held immense influence over debtors.

4. Debtors' prisons were ineffective

A debtors' prison might seem brutal, but at least one might think they were brutally effective. This is what their supporters argued, at least.²⁶⁴ However, this was not the case. As critics hastened to point out, it was impossible to recover a debt from a bankrupt debtor if they could not earn a wage.²⁶⁵ A Philadelphia citizens' group claimed that, in 2,682 out of 3,001 cases between 1826 and 1830, imprisonment for debt failed to

259. Minerva, Opinion, PHILA. INQUIRER, Sept. 27, 1797, at 2, <https://www.newspapers.com/image/467054885/>.

260. Editorial, NAT'L GAZETTE (Phila.), Aug. 29, 1829, at 2, <https://www.newspapers.com/image/346667369/>. A “farthing” was an extremely small unit of currency.

261. *Imprisonment for Debt*, SENTINEL & DEMOCRAT (Burlington), Mar. 12, 1830, at 3, <https://www.newspapers.com/image/364984263>.

262. *Imprisonment for Debt*, BUFFALO BULL., Aug. 7, 1830, at 1, <https://www.newspapers.com/image/494210112/>.

263. *Legislative*, VT. PATRIOT & STATE GAZETTE, Nov. 15, 1830, at 1, <https://www.newspapers.com/image/490535867/>. These sorts of problems could stick around. Rhode Island's legislature did not pass a law requiring creditors to submit their claims to the judicial scrutiny until 1961. See *Martin v. Estrella*, 292 A.2d 884, 886 (R.I. 1972).

264. GOUGE, *supra* note 124, at 186 (statement of Judge Hall).

265. See, e.g., Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/>.

secure repayment of the debt in question, and imprisonment had a failure rate of about 90%.²⁶⁶ Critics declared, “[l]arge sums are daily wasted in vain attempt to screw from the poorer classes, small debts.”²⁶⁷ Imprisonment only served to “increase the debtor’s inability to pay, and hence his imprisonment is useless to his creditor, and injurious to both.”²⁶⁸ What is more, creditors lent money because they believed the debtor would repay them, not because they could imprison an unfortunate debtor.²⁶⁹

Poor rates of recovery were also a feature of the English system. An 1813 law created a Court for the Relief of Insolvent Debtors, which in six years of operation, freed fifteen thousand debtors owing eleven million pounds.²⁷⁰ From this class, the debtor imprisonment system had only wrung out sixty thousand pounds—about 0.5% of the amount owed.²⁷¹ An 1840 report to Parliament found that there was no recovery in 95% of cases of imprisonment for debt.²⁷²

5. Debtors’ prisons were degrading to their inhabitants

In addition to being unable to earn a wage behind bars, being unable to *work*, in and of itself, was offensive to many commentators. Not being able to work was a ghastly fate in a world that despised sloth—so much so that refusal to work by able-bodied men was a crime.²⁷³ James Stephen took to the Public Advertiser in London to call debtor imprisonment “a

266. *Id.*

267. *Imprisonment for Debt*, SENTINEL & DEMOCRAT (Burlington), Mar. 12, 1830, at 3, <https://www.newspapers.com/image/364984263>.

268. *Imprisonment for Debt*, LONG-ISLAND STAR (Brooklyn), Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/>.

269. Editorial, U.S. GAZETTE (Phila.), Jan. 6, 1826, at 4, <https://www.newspapers.com/image/605130443/>.

270. Ressler, *supra* note 11, at 360.

271. *Id.*

272. *Id.*

273. Quigley, *supra* note 110, at 164. This may have been inspired by Scripture. See 2 *Thessalonians* 3:10 (“In fact, when we were with you, we instructed you that if anyone was unwilling to work, neither should that one eat.”).

corrupt Practice, which as long deprived the State of Thousands of [its] Inhabitants, who idly waste their Hours away in Gaols [prisons].”²⁷⁴ An English paper attacked debt imprisonment as leaving “the nation bereft of [debtors’] advantage as subjects.”²⁷⁵

Debtors’ prisons could also demean their inhabitants. In a world that saw men as the breadwinners of families, debtors’ prisons shattered this perception. According to the *Sentinel & Democrat*, imprisonment “degrades the character of the debtor and destroys his ambition.”²⁷⁶ “The debtor, being deprived of his personal liberty, is restrained in the means of maintaining himself,” wrote the *Buffalo Bulletin*.²⁷⁷ Inmates had to rely upon “the continual exercise of the benevolence of friends, the philanthropy of strangers, and the interposition of public charity” to survive.²⁷⁸ Not only could a man imprisoned for debt not take care of himself, he could not take care of his family while imprisoned. In early America, imprisonment left men “useless to themselves and [their] families.”²⁷⁹ Locked in a cell for days, weeks, or months, a debtor would be “tormented with the heart-galling reflection, that his affectionate wife and innocent children are suffering the keenest sorrow for his and their own misfortunes.”²⁸⁰

Others feared that debtors’ prisons were a breeding ground for villainy. In the memorable phrase of one paper, debtor’s prisons were “seminaries of fraud . . . [that] keep[] alive

274. James Stephen, *To John Wilkes, Esquire*, PUB. ADVERTISER (London), Jan. 25, 1772, at 2, <https://www.newspapers.com/image/34422452/>.

275. *London, (Friday) February 26*, DERBY MERCURY, Feb. 25, 1790, at 1, <https://www.newspapers.com/image/394408712/>.

276. *Imprisonment for Debt*, SENTINEL & DEMOCRAT (Burlington), Mar. 12, 1830, at 3, <https://www.newspapers.com/image/364984263>.

277. *Imprisonment for Debt*, BUFFALO BULL., Aug. 7, 1830, at 1, <https://www.newspapers.com/image/494210112/>.

278. *Id.*

279. *London, (Friday) February 26*, DERBY MERCURY, Feb. 25, 1790, at 1, <https://www.newspapers.com/image/394408712/>.

280. *Imprisonment for Debt*, BUFFALO BULL., Aug. 14, 1830, at 1, <https://www.newspapers.com/image/494210201>.

dishonesty in every shape.”²⁸¹ In its estimation, “[t]here has not been a gang of swindlers of any notoriety for years, whose schemes have not been concocted in, and may not be traced home to one or more of our debtor prisons.”²⁸² Another paper said, “Crime and misfortune share the same fate and are brought into the most cruel and degrading fellowship.”²⁸³ Prisoners, finding themselves with “more leisure to brood over [their] misfortunes,” would “contract those vices which idleness and bad company seldom fail to produce in debtors’ prisons.”²⁸⁴

* * * * *

Arguments in favor of debtors’ prisons are rather hard to come by. Ben Franklin speculated that supporters believed it helped grease the wheels of credit and commerce.²⁸⁵ Thomas Jefferson said the practice was a necessary evil “introduced by Commerce and credit,” though its sharpened edges needed to be smoothed down.²⁸⁶ John Adams too worried that totally abolishing debtors’ prisons “would produce such a convulsion in society, and would affect all its various interests through all their ramifications.”²⁸⁷ Indeed, after New York passed a law

281. Editorial, U.S. GAZETTE (Phila.), Apr. 21, 1829, at 1, <https://www.newspapers.com/image/605060393/>.

282. *Id.*

283. Editorial, NAT’L GAZETTE (Phila.), Aug. 29, 1829, at 2, <https://www.newspapers.com/image/346667369/>.

284. *Imprisonment for Debt*, BUFFALO BULL., Aug. 14, 1830, at 1, <https://www.newspapers.com/image/494210201>.

285. *Extracts of John Baynes’s Journal, 27 August–15 September 1783*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-40-02-0333>. Franklin partially agreed with this critique, but he did not see an economy less dependent on credit as a bad thing. *Id.*

286. *From Thomas Jefferson to George Hammond, 29 May 1792*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-23-02-0506>.

287. *From John Adams to Thomas Herttell, 7 February 1823*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-7764>. Not everyone thought these sorts of convulsions were a bad thing. A Texas constitutional convention delegate said that if credit was tighter, it would force lenders to be more careful about who they lent money to. DEBATES OF THE TEXAS CONVENTION 305 (Houston, J.W. Cruger 1846), https://tarltonapps.law.utexas.edu/constitutions/files/debates1845/1845_07_30_dbt.pdf [hereinafter TEXAS CONVENTION OF 1845]; see also SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 51.

halting imprisonment for debt, law professors “rang the alarm bells from one end of the country to the other, proclaiming that the country was ruined,”²⁸⁸ and other legal scholars commented that it was an unconstitutional impairment of contracts.²⁸⁹

Occasionally, supporters of debtors’ prison also argued counterintuitively that the practice actually supported poorer members of society.²⁹⁰ At a Pennsylvania convention, Mr. Thomas Earle said that every law passed for the benefit of the poor had proved “extremely oppressive and injurious to them,” and curtailing jail for debt was no exception.²⁹¹ He said that after small debt imprisonment was banned, landlords started seizing goods or raised rents by 25% due to the increased difficulty of collecting debt.²⁹² And after states started banning imprisonment for debt, dissenters claimed it led to a flood of litigation.²⁹³

III. THE JACKSONIAN ERA THROUGH READMISSION OF SOUTHERN STATES

By the middle of the nineteenth century, “[t]he philanthropists of the age [had] been endeavoring for twenty-five years to bring about” an end to jailing people over debt.²⁹⁴ General John Crawford said that “our laws are growing more liberal every year.”²⁹⁵ The *United States Gazette* called the period the “season of anxious enquiry as to the best mode of prison discipline, and of associating the tenants of jails,”²⁹⁶ and the

288. *Wisconsin Convention of 1846*, *supra* note 63, at 346.

289. *Id.* at 379–80.

290. See PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 106.

291. *Id.*

292. *Id.*

293. S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 457–58, 892 (Albany, Albany Argus 1846), <https://nysl.ptfs.com/data/Library1/Library1/pdf/2339508.pdf> [hereinafter NEW YORK CONSTITUTIONAL CONVENTION OF 1846].

294. TEXAS CONVENTION OF 1845, *supra* note 288, at 304.

295. *Wisconsin Convention of 1846*, *supra* note 63, at 341, 344.

296. Editorial, U.S. GAZETTE (Phila.), Apr. 21, 1829, at 1, <https://www.newspapers.com/image/605060393/>.

“liberal spirit” animating Kentucky to abolish debtors’ prisons was spreading throughout the country.²⁹⁷ The *Arkansas Times & Advocate* rejoiced that “the time is coming—nay, is already come—when poor debtors will be no longer immured in that charnel house.”²⁹⁸ Albany’s mayor won plaudits for paying off the debts for all of the prisoners in the city, allowing them to go free.²⁹⁹ Reverend Pierpont filled Faneuil Hall in Boston with a thunderous sermon on the evils of debtors’ prisons that drew applause from the audience.³⁰⁰

A. Constitutional Developments: Exponential Growth

As this Section will illustrate, the debtors’ prison abolition movement took off in the middle of the nineteenth century. Not only did more states join the Union with protections for debtors in their constitutions, but states also started adding stronger protections, and states that had previously shunned debtors changed course. The progress was aided by the readmission of southern states after the Civil War, whose post-war constitutions were drafted by a much more diverse coalition of voices, which resulted in more help for debtors, among other things.³⁰¹

1. The Jacksonian Era

In this period, there was a flurry of constitution-making, much of it protecting debtors. During the Jacksonian Era (1825–1849), many state constitutional conventions were called, often

297. *From the Globe*, FRANKFORT ARGUS, Mar. 16, 1831, at 2, <https://www.newspapers.com/image/584925355/>.

298. *Sketches of Inhumanity, or, What I Have Seen*, ARK. TIMES & ADVOC., July 20, 1831, at 1, <https://www.newspapers.com/image/287727071/>.

299. *A Munificent Act*, NAT’L GAZETTE (Phila.), Jan. 8, 1831, at 2, <https://www.newspapers.com/image/346635378>.

300. Public Opinion, LIBERATOR (Boston), Feb. 5, 1831, at 23, <https://www.newspapers.com/image/35026642/>.

301. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 9–10 (4th ed. 2006); see *infra* notes 332–40 and accompanying text.

in response to public debt crises over the years.³⁰² Fittingly, many of these conventions also responded to the private debt crisis of using incarceration to punish insolvency.³⁰³

After Missouri joined the Union in 1821, the United States entered the longest drought of new membership up to that point in its history: fifteen years.³⁰⁴ Arkansas ended the fifteen years of stagnation with an 1836 constitution that barred imprisonment for non-fraudulent debtors who offered up their estates to creditors.³⁰⁵ In this way, it reflected the same scope of protection as the fairly recent constitutions of Alabama, Illinois, Mississippi, and Indiana, as well as the 1790 Pennsylvania Constitution.³⁰⁶ It would also kick off a nearly thirty-year chain of states joining the Union with constitutional protections for debtors.

Rhode Island, which for seventy years after seceding from Great Britain was still relying on its 1663 Royal Charter,³⁰⁷ created a bona fide constitution in 1843.³⁰⁸ The document used unique language but was substantively the same as the 1790 Pennsylvania Constitution: both required debtors to give their property to their creditors and contained an exception for fraud.³⁰⁹

At the same time, New Jersey overhauled its constitution in 1844 and included a ban on debtors' prisons, except where fraud was involved.³¹⁰ It actually went further by forbidding imprisonment for "any judgment upon contract," not just

302. See DINAN, *supra* note 302, at 9.

303. See *infra* notes 349–59 and accompanying text.

304. This record would endure for a century, not to be broken until the forty-seven-year gap between Arizona in 1912 and Alaska in 1959. See Shipley, *supra* note 172.

305. ARK. CONST. of 1836, art. VII, § 11.

306. See ALA. CONST. of 1819, art. I, § 18; ILL. CONST. of 1818, art. VIII, § 15; MISS. CONST. of 1817, art. I, § 18; IND. CONST. of 1816, art. I, § 17; PA. CONST. of 1790, art. IX, § 16.

307. *Charter of Rhode Island and Providence Plantations – July 15, 1663*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR.: THE AVALON PROJECT, https://avalon.law.yale.edu/17th_century/ri04.asp (last visited Nov. 9, 2021).

308. R.I. CONST. of 1843.

309. *Id.*, art. I, § 11; PA. CONST. of 1790, art. IX, § 16.

310. N.J. CONST. of 1844, art. I, § 17.

debt.³¹¹ What is more, New Jersey became the first state to drop the requirement that debtors surrender their estate to creditors in order to stay out of prison.³¹² Creditors thus lost a powerful tool to coerce collection. That same year, but a few months later, Iowa also adopted a constitution that forbade imprisonment for debt in any civil action and had no surrender requirement.³¹³

The next year, Texas made history as the first state to institute an outright ban of imprisonment for debt without qualification.³¹⁴ When it was still an independent nation, the Republic of Texas's constitution provided that "[n]o person shall be imprisoned for debt in consequence of inability to pay."³¹⁵ The drafters of Texas's first state constitution intended the ban on debtors' prison to be stronger still.³¹⁶ Its 1845 constitutional provision reads in full: "No person shall ever be imprisoned for debt."³¹⁷ Gone was any exception for fraud or legal fines, limitation to civil or contract cases, or requirement that debtors surrender their property. Notably, Texas was also the first state to drop the requirement that debtors surrender their estates to creditors to avoid imprisonment.³¹⁸ It was as strong a provision as reformers could ever hope for, and one convention delegate praised Texas for going "farther than that of any State in the Union."³¹⁹

In 1848, Wisconsin came close to banning imprisonment for debt in all contract cases without exception, but inferentially permitted imprisonment for debt in tort, criminal, or contempt cases.³²⁰ Further, when California became a state in 1849, it created a constitution that banned imprisonment for debts in

311. *Id.*

312. *See id.*

313. IOWA CONST. of 1844, art. II, § 18.

314. TEX. CONST. of 1845, art. I, § 15.

315. REPUBLIC OF TEX. CONST. of 1836, Declaration of Rights, § 12.

316. *See* TEXAS CONVENTION OF 1845, *supra* note 288, at 303–07.

317. TEX. CONST. of 1845, art. I, § 15.

318. TEXAS CONVENTION OF 1845, *supra* note 288, at 304.

319. *Id.*

320. WIS. CONST. of 1848, art. I, § 16 ("No person shall be imprisoned for debt arising out of, or founded on a contract, express or implied.").

any civil action, except for cases involving fraud.³²¹ Michigan too, after failing to protect debtors in its first constitution,³²² adopted a new constitution in 1850 that banned imprisonment for contractual debts, “except in cases of fraud or breach of trust.”³²³ Uniquely, the Great Lakes State also barred imprisonment for debts arising out of “moneys collected by public officers, or in any professional employment.”³²⁴

By the mid-1850s, most states were modifying their debtors’ prison rules. In 1851, Maryland and Ohio both adopted flat prohibitions against imprisonment for debt,³²⁵ and Indiana not only maintained its ban on imprisonment for non-fraudulent debtors, but upgraded its constitution to exempt some property from seizure as part of a debt collection process.³²⁶ Minnesota and Oregon joined the Union in 1857 with a ban on non-fraudulent debtor imprisonment,³²⁷ followed by Kansas a year later.³²⁸ Amid the Civil War, Nevada became a state in 1864 and banned imprisonment except for fraud, libel, or slander.³²⁹ West Virginia also joined during the war, becoming a state in 1863, but did not provide any protections for debtors.³³⁰ This made it the final state to join the Union without protections for debtors.

2. *The Civil War and readmission*

The Civil War was responsible for another wave of state constitution-making. Many Confederate states adopted new constitutions in 1861 after they seceded from the Union.³³¹ Perhaps unsurprisingly, given that their goal was to preserve

321. CAL. CONST. of 1849, art. I, § 15.

322. See MICH. CONST. of 1835.

323. MICH. CONST. of 1850, art. VI, § 33.

324. *Id.*

325. MD. CONST. of 1851, art. III, § 44; OHIO CONST. of 1851, art. I, § 15.

326. IND. CONST. art. I, § 22.

327. MINN. CONST. art. I, § 12; OR. CONST. art. I, § 19.

328. KAN. CONST. Bill of Rights, § 16.

329. NEV. CONST. art. I, § 14.

330. See W. VA. CONST. of 1863.

331. See, e.g., GA. CONST. of 1861; S.C. CONST. of 1861.

slavery, none of these constitutions strengthened protections for debtors. After losing the Civil War, many of these Confederate states slapped together new constitutions,³³² done to set up provisional governments to shepherd them back to full statehood.³³³ Like their immediate predecessors, these documents made few strides towards the cause of ending imprisonment for debt,³³⁴ with a few exceptions.³³⁵

Radical Republicans in Congress, however, found these hastily-assembled constitutions insufficiently protective, passing a Reconstruction act in 1867 that required the vanquished Southern states to pass constitutions “in conformity with the Constitution of the United States in all respects.”³³⁶ Crucially, the law mandated that the states hold constitutional conventions open to all adult males “of whatever race, color, or previous condition,” but exempted all those who participated in the rebellion.³³⁷ By 1870, all of the treasonous states had been readmitted.³³⁸

By allowing freedmen to participate, but excluding slave-mongers, Congress ensured that the constitutions produced would be singularly progressive. Indeed, they were often stronger than the federal Constitution and included rights that would not become mainstream for a century.³³⁹ For example, Louisiana’s 1868 constitution barred racial discrimination in all

332. See DINAN, *supra* note 302, at 9–10; see, e.g., FLA. CONST. of 1865; ALA. CONST. of 1865.

333. See DINAN, *supra* note 302, at 9–10.

334. *Id.*

335. Missouri ended imprisonment for debt in private cases but allowed imprisonment for debts owed on fines or penalties imposed by law. MO. CONST. of 1865, art. I, § 29. Arkansas abandoned the requirement from its first constitution that debtors surrender all of their property to avoid imprisonment. See ARK. CONST. of 1864, art. VIII, § 11.

336. Act of Mar. 2, 1867, Pub. L. No. 39-153, § 5, 14 Stat. 428, 429.

337. *Id.* At North Carolina’s 1868 convention, for example, 107 of the 120 total delegates were Republicans and “includ[ed] 18 men of northern birth (known as ‘carpetbaggers’) and fifteen black [men].” Ronnie W. Faulkner, *Convention of 1868*, NCPEDIA (Jan. 1, 2006), <https://www.ncpedia.org/government/convention-1868>.

338. See Andrew Glass, *Georgia Readmitted to Union, July 15, 1870*, POLITICO (July 15, 2014, 5:05 AM), <https://www.politico.com/story/2014/07/georgia-civil-war-108886>.

339. See, e.g., LA. CONST. of 1868, tit. I, art. XIII.

public accommodations and businesses,³⁴⁰ something federal law would not emulate until the Civil Rights Act of 1964.³⁴¹

This progressivism is evident in how they protected insolvent debtors. Alabama got rid of its exception for fraud and flatly outlawed imprisonment for debt in 1868³⁴²—as did Mississippi the same year.³⁴³ Similarly, Georgia abandoned its requirement that debtors deliver up their property to their creditors, and ended imprisonment for debt in 1868.³⁴⁴ Florida and South Carolina's 1868 constitutions forbade debtors' prisons, except for fraud, for the first time in either state's history.³⁴⁵ North Carolina dropped its language requiring debtors to deliver their estates up to their creditors in order to avoid prison in 1868.³⁴⁶ Tennessee upgraded its constitution in 1870 to forbid imprisonment for debt in all civil cases.³⁴⁷

B. *State Constitutional Conventions*

1. *Enthusiastic support for debtors' prison abolition*

Judged purely by constitutional texts, the debtors' prison abolition movement could boast of great success. At the dawn of the Jacksonian Era, there were twenty-four states, and thirteen of them offered some sort of constitutional protection against debtors' prisons.³⁴⁸ By the time the Southern states

340. *Id.*

341. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, 78 Stat. 241, 243–46.

342. ALA. CONST. of 1868, art. I, § 22.

343. MISS. CONST. of 1868, art. I, § 11.

344. GA. CONST. of 1868, art. I, § 18.

345. FLA. CONST. of 1868, art. I, § 15; S.C. CONST. of 1868, art. I, § 20.

346. N.C. CONST. of 1868, art. I, § 28.

347. TENN. CONST. of 1870, art. I, § 18.

348. These thirteen states were Delaware, Pennsylvania, Georgia, North Carolina, Vermont, Kentucky, Tennessee, Ohio, Indiana, Mississippi, Illinois, Alabama, and Missouri. *See* DEL. CONST. of 1792, art. VI, § 10; PA. CONST. of 1790, art. IX, § 16; GA. CONST. of 1798, art. IV, § 7; N.C. CONST. of 1776, § 39; VT. CONST. of 1793, ch. 2, § 33; KY. CONST. of 1792, art. XII, § 17; TENN. CONST. of 1796, art. 11, § 18; OHIO CONST. of 1802, art. VIII, § 15; IND. CONST. of 1816, art. I, § 17; MISS. CONST. of 1817, art. I, § 18; ILL. CONST. of 1818, art. VIII, § 15; ALA. CONST. of 1819, art. I, § 18; MO. CONST. of 1820, art. XIII, § 17.

reentered the Union, there were thirty-seven states. Of the thirteen new states, eleven had constitutional protections for debtors,³⁴⁹ and four preexisting states had upgraded their constitutions to include the same.³⁵⁰ This meant that twenty-eight out of thirty-seven states had constitutional protections, or about three-quarters of the Union.

The extent of success that abolitionists had can further be observed by looking at policy debates at the time. Transcripts of state constitutional conventions before the 1830s are difficult to come by, but the few we have access to show that ending debtor imprisonment was either ignored or opposed.³⁵¹ For example, the Massachusetts 1821 convention had competing resolutions regarding imprisonment for debt, with those opposing a ban arguing that such a move would be “inexpedient”—the latter passed overwhelmingly.³⁵² New York’s convention that year also saw a proposal to limit imprisonment for debt, but it went nowhere.³⁵³ The abolition movement, plainly, had not yet picked up steam.

By the middle of the nineteenth century, debtor protections became a popular topic at conventions.³⁵⁴ Many delegates were

349. Arkansas, Michigan, Florida, Texas, Iowa, Wisconsin, California, Minnesota, Oregon, Kansas, and Nevada all had constitutional protections. Note that Michigan and Florida entered the Union without protections, but both had them by 1868. ARK. CONST. of 1874, art. II, § 16; MICH. CONST. of 1850, art. VI, § 33; FLA. CONST. of 1868, DEC. OF RIGHTS, § 15; TEX. CONST. of 1845, art. I, § 15; IOWA CONST. of 1857, art. I, § 19; WIS. CONST. of 1846, art. I, § 16; CAL. CONST. of 1849, art. I, § 15; MINN. CONST. of 1857, art. I, § 12; OR. CONST. of 1857, art. I, § 19; KAN. CONST. of 1859, art. I, § 16; NEV. CONST. of 1864, art. I, § 14.

350. These were New Jersey, Maryland, South Carolina, and Rhode Island. See N.J. CONST. of 1844, art. I, § 17; MD. CONST. of 1851, art. III, § 44; S.C. CONST. of 1868, art. I, § 20; R.I. CONST. of 1843, art. I, § 11.

351. See JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 73, 220 (Boston Daily Advertiser 1821).

352. *Id.*

353. See NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW-YORK 295 (Albany, E. & E. Hosford 1821), <https://nysl.ptfs.com/data/Library1/118311.pdf>.

354. See, e.g., AUSTIN H. BROWN, JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA, TO AMEND THE CONSTITUTION 137 (Indianapolis, Austin H. Brown 1851),

clear that their actions were influenced by other states.³⁵⁵ Oftentimes, these provisions were openly copied from other states. At the Wyoming Constitutional Convention, a delegate proposed an amendment to track the language of the Nebraska Constitution; it passed without debate.³⁵⁶ When questioned about the meaning of a term in a proposal to curb imprisonment for debt, a Michigan delegate confessed he did not know; he was simply copying it from Wisconsin.³⁵⁷ Arguing in support of an exception for fraud, a Minnesota delegate noted that “nearly all the States have made provision for imprisonment in case of fraud” before rattling them off.³⁵⁸

Because delegates hewed so closely to their sister states, almost all of the state constitutions ended up with qualified language against imprisonment for debt.³⁵⁹ By 1870, only eight states provided essentially unqualified bans on imprisonment

<https://catalog.hathitrust.org/Record/001749780> [hereinafter INDIANA CONSTITUTIONAL CONVENTION OF 1850] (noting that the body received “sundry resolutions and memorials on the subject of imprisonment for debt”); HARVEY FOWLER, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 114 (Boston, White & Potter 1853), <https://catalog.hathitrust.org/Record/001143757> (noting that the citizens of Boston petitioned the convention to abolish imprisonment for debt).

355. See, e.g., GOUGE, *supra* note 124, at 191 (citing the Illinois Constitution); E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 265 (Sacramento, J.D. Young 1880), <https://catalog.hathitrust.org/Record/100564115> (citing the Georgia Constitution).

356. See JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING: BEGUN AT THE CITY OF CHEYENNE ON SEPTEMBER 2, 1889, AND CONCLUDED SEPTEMBER 30, 1889, at 725 (Cheyenne, The Daily Sun, Book & Job Printing 1893), <https://archive.org/details/journaldebatesof00wyomrich/page/n5/mode/2up>.

357. See MICHIGAN CONSTITUTIONAL CONVENTION OF 1850, *supra* note 97, at 76.

358. FRANCIS H. SMITH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION INCLUDING THE ORGANIC ACT OF THE TERRITORY 363–64 (Saint Paul, Earle S. Goodrich 1857) [hereinafter MINNESOTA CONSTITUTIONAL CONVENTION OF 1857]; see also PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 423–24 (New Jersey Writers’ Project of the Work Projects Administration 1942), <https://babel.hathitrust.org/cgi/pt?id=uc1.b4506453> [hereinafter NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844] (arguing that the convention would be safe in using language from other states).

359. See *State Bans on Debtors’ Prisons and Criminal Justice Debt – Appendix*, 129 HARV. L. REV. F. 153 (2016) [hereinafter *State Bans Appendix*].

for debt, and most of these were southern states that had their constitutions forcibly rewritten.³⁶⁰

However, the fact that so few constitutions contained unqualified bans on debtors' prisons was not for lack of trying. Many constitutional provisions that partially protected debtors came after stronger proposals were watered down. Illinois' 1870 convention had a plan to flatly ban imprisonment for debt.³⁶¹ The original plan during Indiana's 1851 convention was to abolish debt imprisonment altogether, but it resulted in a fraud exception.³⁶² Iowa debated removing the fraud exception from its constitution,³⁶³ but ultimately kept it.³⁶⁴ Unsuccessful proposals to flatly prohibit imprisonment for debt were also introduced at constitutional conventions in Michigan (in both 1835³⁶⁵ and 1850³⁶⁶), Minnesota,³⁶⁷ New York,³⁶⁸ Ohio,³⁶⁹ and Pennsylvania.³⁷⁰

Delegates tripped over themselves to demonstrate their fealty to the glorious cause. A Minnesota delegate claimed, "I don't think there is any member of this Convention who would for a

360. See GA. CONST. of 1868, art. I, § 18; MD. CONST. of 1867, art. III, § 38; TENN. CONST. of 1870, art. I, § 18; MISS. CONST. of 1868, art. I, § 11; ALA. CONST. of 1865, art. I, § 22; FLA. CONST. of 1868, art. I, § 16; TEX. CONST. of 1869, art. I, § 15; WIS. CONST. of 1848, art. I, § 16. Note that Texas did have its constitution revised upon readmission, but its qualified ban on debtors' prison predates its secession. TEX. CONST. of 1845, art. I, § 15.

361. See ELY, BURNHAM & BARTLETT, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, CONVENEED AT THE CITY OF SPRINGFIELD, TUESDAY, DECEMBER 13, 1869, at 334 (Springfield, E. L. Merritt & Brother 1870), <https://catalog.hathitrust.org/Record/007470469>.

362. INDIANA CONSTITUTIONAL CONVENTION OF 1850, *supra* note 355, at 200.

363. W. BLAIR LORD, THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY, MONDAY, JANUARY 19, 1857, at 129 (Davenport, Luse, Lane & Co. 1857), http://publications.iowa.gov/7313/1/The_Debates_of_the_Constitutional_Convention_Vol%231.pdf [hereinafter IOWA CONSTITUTIONAL CONVENTION OF 1857].

364. IOWA CONST. of 1857, art. I, § 19.

365. See DAILY JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION 51–52 (1835).

366. See MICHIGAN CONSTITUTIONAL CONVENTION OF 1850, *supra* note 97, at 76.

367. See MINNESOTA CONSTITUTIONAL CONVENTION OF 1857, *supra* note 359, at 343–45.

368. See NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 294, at 68.

369. See J. V. SMITH, OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS OF THE OHIO STATE CONVENTION, CALLED TO ALTER, REVISE OR AMEND THE CONSTITUTION OF THE STATE 87 (Columbus, Scott & Bascom 1851), <https://catalog.hathitrust.org/Record/011985429>.

370. See PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 526.

moment [support throwing honest debtors in jail].”³⁷¹ Another said, “I am as much opposed to imprisonment for debt as any man on this floor.”³⁷² A third assured his colleagues that every man present was opposed to imprisonment for debt.³⁷³ In the midst of debate at a Michigan convention, one delegate accused another of wanting to “go back to those days of honesty when men could be imprisoned for debt,” a charge that the other delegate denied.³⁷⁴ Indiana’s convention passed a resolution praising R.M. Johnson for “his zealous efforts in favor of abolishing imprisonment for debt.”³⁷⁵ Introducing a flat abolition of imprisonment for debt—still uncommon at the time—in Maryland’s convention, a delegate said, “I do not believe that there is any necessity for a protracted discussion upon it.”³⁷⁶ A South Carolinian delegate bragged that “[i]n this Constitution we have made it a matter of impossibility for the Courts of this State to imprison a man for debt.”³⁷⁷ “There is not an article in the Constitution of which I should feel more proud,” said a Texas delegate after eliminating imprisonment for debt in all cases.³⁷⁸ Mr. Winn of Georgia’s 1877 convention wanted to create an exception for fraud, but assured his colleagues he was against imprisonment for people who could not afford to pay.³⁷⁹

Perhaps reformers were so ardent because they were still confident that the people were on their side. At Texas’s founding convention, where imprisonment for debt was

371. MINNESOTA CONSTITUTIONAL CONVENTION OF 1857, *supra* note 359, at 344.

372. *Id.* at 345.

373. *Id.* at 363.

374. MICHIGAN CONSTITUTIONAL CONVENTION OF 1850, *supra* note 97, at 678–79; *see also* NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844, *supra* note 359, at 418 (recounting that one delegate “said he hardly dared to offer an amendment lest he should be considered as opposed to non-imprisonment for debt”).

375. INDIANA CONSTITUTIONAL CONVENTION OF 1850, *supra* note 355, at 291.

376. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 447 (Annapolis, William M’Neir 1851) [hereinafter MARYLAND CONSTITUTIONAL CONVENTION OF 1851].

377. SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 725.

378. TEXAS CONVENTION OF 1845, *supra* note 288, at 304.

379. GEORGIA CONSTITUTIONAL CONVENTION OF 1877, *supra* note 1, at 86.

abolished, delegates said that “public prejudice” was against debtors’ prisons, and another said that “[p]ublic opinion is against it.”³⁸⁰ A New Jersey delegate said “[t]he sentiment of the people—the spirit of the age is against” imprisonment for debt.³⁸¹ Responding to the argument against a constitutional ban, another pointed out that “the sense and feeling of the public are so opposed to imprisonment for debt,” leading him to wonder why people would “object to incorporate in the fundamental law a provision admitted by all to be right.”³⁸²

In making their case, many delegates echoed the same arguments against debt imprisonment that had been circulating in the public discourse for decades.³⁸³ Debtor reforms were encouraged in Pennsylvania because they would make the state “the model of this western hemisphere,” and give relief to fathers torn from their “helpless wife and children.”³⁸⁴ A Maryland delegate criticized “the barbarity of the existing law” on imprisonment for debt.³⁸⁵ Debtors’ prisons were repeatedly

380. TEXAS CONVENTION OF 1845, *supra* note 288, at 304.

381. NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844, *supra* note 359, at 427.

382. *Id.* at 419; *see also id.* at 420 (“I have met with very many persons, and have corresponded with others, and I maintain that there is no one feature in the Constitution which has met with such general favor.”). *Cf.* 1 WM. BLAIR LORD & DAVID WOLFE BROWN, THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN, CONVENEED AT THE CITY OF LANSING, WEDNESDAY, MAY 15TH, 1867, at 514 (Lansing, John A. Kerr & Co. 1867), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175270> (“[I]t is as certain as anything can be made certain, that this policy [of exempting property of bankrupt debtors from seizure] has been favored by the people of this State.”).

383. *See* PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 104 (calling on the convention to “blot out forever this barbarous stain upon our free institutions”); TEXAS CONVENTION OF 1845, *supra* note 288, at 305 (describing debtors’ prisons as “a relic of barbarous times, and one of the foulest disgraces of the age”); SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 725 (“We have considered imprisonment for debt to be a relic of barbarism.”).

384. PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 104–05; *see also* SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 725 (noting the convention “decided that the poor debtor should have the free use of his limbs in order to support his family”).

385. MARYLAND CONSTITUTIONAL CONVENTION OF 1851, *supra* note 377, at 403; *see also id.* at 607 (expressing support for “striking out that barbarous feature which existed heretofore in our institutions”); MINNESOTA CONSTITUTIONAL CONVENTION OF 1857, *supra* note 359, at 345 (“I think [imprisonment for debt] is a barbarous custom, handed down from the dark ages.”); *id.*

analogized to slavery.³⁸⁶ A Vermont legislator checked off nearly every argument that had circulated in the decades before, calling the practice “a species of slavery,” unfair to honest debtors, pernicious to a person’s spirit and productivity, and harmful to the families of the inmates.³⁸⁷

Conversely, some delegates were upset with just how pro-debtor states became. Dissatisfied with how far the pendulum had swung, one delegate said, “I think we have long enough legislated in favor of the debtor.”³⁸⁸ Another said, “All our laws for thirty years past have been in favor of the debtor . . . [w]e have come to the time when the lender is the slave of the borrower,” and debtors could now “leave the lender to starve.”³⁸⁹

2. *The matter of fraud*

Delegates at many conventions grappled with the matter of fraud.³⁹⁰ Indeed, twenty-three of the forty-one states with constitutional protections exempted fraud from those protections.³⁹¹ Until the Missouri Constitution of 1820, every state constitution contained a fraud exception, but the states

at 344 (“I look upon [imprisonment for debt] as a relic of barbarism which should not be tolerated in this enlightened age.”); SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 727 (“We have . . . abolished the barbarous law of imprisonment for debt . . .”); *Wisconsin Convention of 1846*, *supra* note 63, at 344 (“The tyrannical law above cited, of imprisonment for debt, was followed by the nonimprisonment law in that state and many others, and laws are enacted almost every year in some of the states extending the exemption of property of the poor unfortunate debtor from that barbarous practice, execution.”).

386. TEXAS CONVENTION OF 1845, *supra* note 288, at 306 (characterizing failure to pay a debt as meaning someone could “become a slave”); PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1837, *supra* note 121, at 106 (describing abolition of debtors’ prisons as a “pleasing emancipation from slavery”).

387. *Imprisonment for Debt*, VT. WATCHMAN & STATE J., Nov. 30, 1830, at 2, <https://www.newspapers.com/image/491184133>; see also GOUGE, *supra* note 124, at 185 (expressing doubt for the efficacy of imprisonment for debt and noting the harms of debtors’ imprisonment to families).

388. GEORGIA CONSTITUTIONAL CONVENTION OF 1877, *supra* note 1, at 86.

389. *Id.*

390. See *State Bans Note*, *supra* note 9, at 1036.

391. *State Bans Appendix*, *supra* note 360, at 154–57; see generally *State Bans Note*, *supra* note 9.

were not without reason to be wary of trickery.³⁹² Blackstone laid out a laundry list of options that debtors utilized to elude their creditors, including skipping town, locking themselves in their homes to avoid process, hiding assets, conveying property to a friend with a wink and a nod, procrastination, and even stubbornly going to prison to get out of paying.³⁹³

And so discussions of fraud persisted in constitutional conventions of the mid-nineteenth century. The delegates of Minnesota's 1857 convention implemented a fraud exception in an effort to make it as easy to punish fraud as possible and to allow imprisonment for fraud without a trial.³⁹⁴ A Texas delegate unsuccessfully argued against a fraud exception because he claimed it would be too difficult for the legislature to define fraud in the criminal code,³⁹⁵ and a Michigan delegate worried that corrupt officials who embezzled public funds could not be punished without a fraud exception.³⁹⁶ Even in the twentieth century, Indiana's constitutional convention voted down a proposal to dispose of the state's fraud exception.³⁹⁷

Some who were opposed to the idea of fraud still fretted about creating a constitutional exception for it. William Chapman of the Iowa convention worried that excepting fraud could lead to people being imprisoned for civil allegations of fraud, not simply criminal fraud.³⁹⁸ Others believed that the criminal justice system was the proper place to address it, not civil debt imprisonment.³⁹⁹ "I would have fraudulent debtors

392. See *supra* text accompanying note 178.

393. BLACKSTONE, *supra* note 73, at *478.

394. MINNESOTA CONSTITUTIONAL CONVENTION OF 1857, *supra* note 359, at 343, 345.

395. TEXAS CONVENTION OF 1845, *supra* note 288, at 305–07.

396. MICHIGAN CONSTITUTIONAL CONVENTION OF 1850, *supra* note 97, at 75.

397. 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA: A SOURCE BOOK OF CONSTITUTIONAL DOCUMENTS WITH HISTORICAL INTRODUCTION AND CRITICAL NOTES 300 n.53 (Ind. Hist. Bureau 1971) (1916).

398. FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 160 (Benjamin F. Shambaugh ed. 1900), <https://www.legis.iowa.gov/docs/publications/ICNST/961923.pdf>.

399. See *Imprisonment for Debt*, BUFFALO BULL., Aug. 7, 1830, at 1, <https://newspapers.com/image/494210112/>.

punished,” said one writer, “but it should, as in other criminal cases, be done agreeably to the constitutional laws of the state.”⁴⁰⁰ A Texas delegate noted that even with a flat constitutional ban on imprisonment for debt, the legislature could still pass criminal laws against fraud, so there was no need to create any explicit exception.⁴⁰¹

Even if there was adequate reason to treat fraud differently, some argued that it should be treated as an ordinary crime, complete with normal due process accoutrements; for example, Colonel Richard M. Johnson, a senator from Kentucky, said that a person accused of fraud should be entitled to a jury trial in the state and district where the crime occurred, a punishment determined by a judge and constrained by statute, and the opportunity to seek a pardon from the executive.⁴⁰²

C. Modest Federal Progress

By the latter half of the nineteenth century, people in power were starting to take notice of the movement against debtors’ prisons. Famed Senator Daniel Webster said when it comes to imprisonment for small debts, “I am decidedly against it.”⁴⁰³ The Governor of South Carolina spoke at the state’s 1868 convention to encourage the body to end imprisonment for debt.⁴⁰⁴ The issue became potent enough that President Andrew Jackson felt compelled to voice his support for it in his first State of the Union message to Congress. He called upon the legislature to examine whether the present debtor laws “may not, consistently with the public interest, be extended to the release of the debt where the conduct of the debtor is wholly

400. *Id.*

401. TEXAS CONVENTION OF 1845, *supra* note 288, at 304; *see also* IOWA CONSTITUTIONAL CONVENTION OF 1857, *supra* note 364, at 129.

402. 22 REG. DEB. 93 (1832) (report of Rep. R.M. Johnson).

403. *Imprisonment for Debt*, NAT’L GAZETTE (Phila.), Dec. 4, 1830, at 1, <https://www.newspapers.com/image/346634890/>.

404. SOUTH CAROLINA CONVENTION OF 1868, *supra* note 97, at 49–50.

exempt from the imputation of fraud."⁴⁰⁵ He believed that "[a] more liberal policy than that which now prevails in reference to this unfortunate class of citizens is certainly due to them, and would prove beneficial to the country."⁴⁰⁶ The present system of imprisonment only served "to dispirit the debtor," causing them to "sink[] into a state of apathy, and become[] a useless drone in society or a vicious member of it, if not a feeling witness of the rigor and inhumanity of his country."⁴⁰⁷

Two years later, after Congress passed a weak act,⁴⁰⁸ Jackson renewed his plea in another State of the Union message. He was still making the same complaints as the last time: he said the law had not been adequate to provide "relief to this unfortunate class of our fellow citizens."⁴⁰⁹ He once again insisted that imprisonment should be limited to fraudulent concealment of property, not for people who simply could not afford to pay off their debts.⁴¹⁰

Notwithstanding Jackson's entreaties, the federal government's actions remained tepid on the matter of debtors' prisons. Throughout the nineteenth century, no national party platform in a presidential election mentioned the issue.⁴¹¹

Colonel Johnson did more than perhaps any other to advance the cause of abolishing imprisonment for debt. Speaking of the movement, he expressed a hope in 1830 that "the light of reason,

405. Andrew Jackson, President of the United States, First State of the Union Message to Congress (Dec. 8, 1829) (transcript available at <https://www.presidency.ucsb.edu/documents/first-annual-message-3>).

406. *Id.*

407. *Id.*

408. The law in question only permitted a debtor who owed money to the federal government to request that the Treasury Secretary release them from their obligation, whereupon their finances would be scrutinized and their situation analyzed, and the law would only last for three years. Act of Mar. 2, 1831, Pub. L. No. 21-62, 4 Stat. 467.

409. Andrew Jackson, President of the United States, Third State of the Union Message to Congress (Dec. 6, 1831) (transcript available at <https://www.presidency.ucsb.edu/documents/third-annual-message-3>).

410. *Id.*

411. See generally *Party Platforms*, UC SANTA BARBARA: THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/app-categories/elections-and-transitions/party-platforms> (last visited Nov. 10, 2021).

and love of freedom, will soon dissipate the darkness which shrouds many a fair portion of our otherwise happy country.”⁴¹² Putting his money where his mouth was, he repeatedly introduced legislation in Congress to end the practice.⁴¹³

Congress did pass a series of laws to help insolvent debtors around this time, but none of them were terribly progressive. An 1831 law allowed debtors who owed the federal government, except as a result of a fine or penalty from violating a law, to petition the Treasury Secretary for relief.⁴¹⁴ The following year, Congress authorized the Treasury Secretary to release debtors from prison if they lacked the ability to pay, except for fraud,⁴¹⁵ and in 1839 directed that no federal court would imprison a person for debt in a state that forbade it, but allowed it in circumstances that the state the court was sitting in did.⁴¹⁶ This typified the view that it should be up to the states, not the federal government, to determine whether to end debtors’ prisons.⁴¹⁷ Once again, these sorts of modest protections were further limited by extremely short sunset provisions that had to be renewed every few years.⁴¹⁸

412. R.M. Johnson, *City of Washington, 17th January, 1830*, MO. INTELLIGENCER & BOON’S LICK ADVERTISER, Feb. 19, 1830, at 2, <https://www.newspapers.com/image/249525173/>.

413. S. 1, 17th Cong., 2nd Sess. (Dec. 10, 1822); S. 9, 18th Cong., 1st Sess. (Jan. 9, 1824); S. 2, 19th Cong., 2nd Sess. (Dec. 12, 1826); S. 1, 20th Cong., 1st Sess. (Dec. 5, 1827); *see, e.g.*, 17 ANNALS OF CONG. 25 (1822) (remarks of Mr. Johnson) (noting that before Johnson had introduced legislation, Congress had suffocated numerous previous attempts at reform).

414. Act of Mar. 2, 1831, Pub. L. No. 21-62, 4 Stat. 467.

415. Act of July 14, 1832, Pub. L. No. 22-230, 4 Stat. 595.

416. Act of Feb. 28, 1839, Pub. L. No. 25-35, 5 Stat. 321; *see also* Act of Jan. 14, 1841, Pub. L. No. 26-2, 5 Stat. 410 (reaffirming the principle that federal courts could not issue orders to imprison someone for debt in a state that forbade the practice); Act of Mar. 2, 1867, Pub. L. No. 39-180, 14 Stat. 543 (establishing that any defendant imprisoned by any federal court shall be entitled to the same discharge procedures as the state in which they sat).

417. *See* 4 REG. DEB. 33 (1828) (statement of Sen. Rowan).

418. *See, e.g.*, Act of June 7, 1834, Pub. L. No. 23-45, 4 Stat. 676; Act of Mar. 2, 1837, Pub. L. No. 24-23, 5 Stat. 154; Act of May 27, 1840, Pub. L. No. 26-26, 5 Stat. 381; Act of Jan. 28, 1843, Pub. L. No. 27-20, 5 Stat. 597.

IV. POST-RECONSTRUCTION THROUGH MODERN TIMES

A. *Constitutional Developments: Abolitionists Triumph, then Fade Away*

After the dust settled on the Civil War and Reconstruction sputtered out, not only was the Southern rebellion vanquished, so too was the intellectual case for debtors' prisons. Never again would a state join the Union without constitutional protections for debtors after West Virginia did in 1863.⁴¹⁹

Post-Civil War, the next state to adopt a constitution was Nebraska in 1875.⁴²⁰ It protected debtors except for fraud.⁴²¹ Colorado joined in 1876 and revived the requirement that debtors surrender their property to creditors, a feature no state had in its inaugural constitution since Arkansas in 1836.⁴²²

Following Nebraska and Colorado was the "Class of 1889," when four new states joined at once, which was the most in one year since 1776.⁴²³ The states were North Dakota, South Dakota, Montana, and Washington.⁴²⁴ Each state protected debtors in some form. North Dakota and Montana both excepted fraud and required debtors to surrender their property to creditors⁴²⁵—the last states to retain that colonial-era policy. Washington only allowed imprisonment for absconding debtors,⁴²⁶ a first, and South Dakota banned imprisonment for all contractual debt.⁴²⁷ Closing out the century, Idaho,

419. See *infra* discussion accompanying notes 421–37.

420. NEB. CONST. of 1875. Nebraska was admitted to the Union in 1867 but took several years to pass a constitution. *States in the Senate: Nebraska Timeline*, U.S. SENATE, <https://www.senate.gov/states/NE/timeline.htm> (last visited Nov. 9, 2021).

421. See NEB. CONST. of 1875, art. I, § 20.

422. COLO. CONST. art. II, § 12; see ARK. CONST. of 1836, art. II, § 16.

423. *Territories to Statehood, the Northern West: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-northern-west-territories> (last visited Oct. 24, 2021).

424. All of these states joined within ten days of each other, and North Dakota and South Dakota became the first and only two states to be admitted on the same day. Shipley, *supra* note 172.

425. N.D. CONST. art. I, § 15; MONT. CONST. of 1889, art. III, § 12.

426. WASH. CONST. art. I, § 17.

427. S.D. CONST. art. VI, § 15.

Wyoming, and Utah adopted constitutions in 1889, 1890, and 1896, respectively. Idaho⁴²⁸ and Wyoming⁴²⁹ excepted fraud, and Utah copied Washington and allowed jail for absconding debtors.⁴³⁰

There were only a few states left that would join the Union in the twentieth century, and each of them guarded debtors. Oklahoma's 1907 constitution disallowed imprisonment for debt, but carved out a loophole for non-payment of criminal fines.⁴³¹ New Mexico became a state in 1912 with a constitution that flatly prohibited imprisonment for civil debt.⁴³² Arizona joined that same year, though it allowed imprisonment for debt in cases of fraud.⁴³³ Forty-seven years later, Alaska and Hawaii joined in 1959.⁴³⁴ Alaska only allowed arrest for absconding debtors,⁴³⁵ and Hawaii banned imprisonment altogether.⁴³⁶

Relatively few states revised their constitutions in the twentieth century, though there was some modest progress towards ending imprisonment for debt. Georgia's 1945 constitution got rid of its fraud exception.⁴³⁷ In 1970, Illinois specifically stated that a person could not be imprisoned for failure to pay a criminal fine unless they willfully refused to pay.⁴³⁸ Though they did not overhaul their charters, Vermont, Indiana, California, and Nebraska all amended their language to broaden the prohibition on imprisonment for debt.⁴³⁹

428. IDAHO CONST. art. I, § 15.

429. WYO. CONST. art. I, § 5.

430. UTAH CONST. art. I, § 16.

431. OKLA. CONST. art. II, § 13.

432. N.M. CONST. art. II, § 21.

433. ARIZ. CONST. art. II, § 18.

434. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

435. ALASKA CONST. art. I, § 17.

436. HAW. CONST. art. I, § 19. While Hawaii was a territory, federal law going back to 1900 barred imprisonment for debt on the island. *See* Act of Apr. 30, 1900, Pub. L. No. 505-339, § 11, 31 Stat. 141.

437. GA. CONST. of 1945, art. 1, § 1, ¶ XXI.

438. ILL. CONST. art. I, § 14.

439. VT. CONST. ch. II, § 40(3); IND. CONST. art. I, § 22; CAL. CONST. art. I, § 15; NEB. CONST. art. I, § 20 (amended 1998).

Michigan technically went backwards, slightly, by eliminating the prohibition on imprisonment for money collected by public officers or professionals, although the state claimed it was merely trimming redundant verbal baggage.⁴⁴⁰ Maryland did not hold a constitutional convention in the twentieth century, but it did amend its constitution to explicitly allow imprisonment for failure to pay alimony or child support.⁴⁴¹

On the whole, debtors' prison abolitionists had much to be proud of. Over the course of the century, they had built up an enviable track record of getting their policy preferences written into state constitutions. Of the forty-one states with constitutional protections, thirty-four of them had the protections in their original constitutions—the other seven added them in later.⁴⁴² Further, not a single state took out its constitutional protections altogether after adopting them.

Since the American flag gained its fiftieth star, no new states have been added. But U.S. territories and the District of Columbia have adopted some form of organic law protecting debtors. While Guam does not have a constitution, per se, the 1950 federal law that governs it reads, "No person shall be imprisoned for debt."⁴⁴³ Puerto Rico's 1952 constitution also bans all debtors' prisons,⁴⁴⁴ and American Samoa's 1966 constitution prohibits imprisonment of non-fraudulent debtors.⁴⁴⁵

Yet, sometime around the middle of the twentieth century, constitutional framers seemed to think that debtors' prisons faded away, and no longer needed to be warded against. Neither the Northern Mariana Islands nor the U.S. Virgin

440. WHAT THE PROPOSED NEW STATE CONSTITUTION MEANS TO YOU: A REPORT TO THE PEOPLE OF MICHIGAN BY THEIR ELECTED DELEGATES TO THE CONSTITUTIONAL CONVENTION OF 1961–62, at 16 (1962).

441. MD. CONST. art. III, § 38.

442. These states are Delaware, New Jersey, Georgia, Maryland, South Carolina, Michigan, and Florida. *See supra* Sections II.A, III.A.

443. 48 U.S.C. § 1421b(k) (2021).

444. P.R. CONST. art. II, § 11, para. 6.

445. AM. SAM. CONST. art. I, § 9.

Islands made any mention of them in their 1986 and 2007 constitutions, respectively.⁴⁴⁶ In 2016, the District of Columbia passed a constitution as part of a bid for statehood,⁴⁴⁷ but it did not include any mention of debtors' prisons either.⁴⁴⁸ However, protections are as necessary today as they ever were.

B. Modern Day Debtors' Prisons

Debtors' prisons are still with us, though they are no longer in public view. Although one rarely hears the term "debtors' prisons" in contemporary debates about criminal justice reform, people still get locked up for no other reason than for unpaid obligations.⁴⁴⁹ We have, at least, successfully eliminated debtors' prisons for the rich. One will no longer find members of Congress, titans of industry, governors of states, friends of presidents, or graduates of Ivy League schools going to jail for debts. But one will find the poor, same as always.

Consider the story of Nicole Bolden. She was a single mother of four living in Florissant, Missouri.⁴⁵⁰ One day, she was hit in a car crash after dropping some of her children off at school.⁴⁵¹ When police arrived at the scene and realized that she had outstanding warrants for unpaid traffic tickets, Bolden was arrested and jailed.⁴⁵² She was placed in a cold, cramped, dirty cell and given filthy beddings.⁴⁵³ She was given no shoes or

446. See N. MAR. I. CONST. (1986); V.I. CONST. (2007).

447. D.C. CONST.

448. See *id.* The End of Debtors Prison Act of 2017 was introduced in Congress to prohibit federal funds to state or local governments that collect fees or fines against a person who is on probation solely because they could not afford it, but it never passed. See H.R. 1724, 115th Cong. (Mar. 24, 2017). At the same time, Congress recently passed a bankruptcy law that made it harder to declare bankruptcy, making it more likely people would face imprisonment for civil contempt after they fail to pay court-ordered debt. See Ressler, *supra* note 11, at 356.

449. The United States is not alone in this regard. Mexico has what is essentially a debtors' prison system. See, e.g., Order for Release on Bond Pending Extradition Hearing at 6, *In re Extradition of Huerta*, No. 4:08-mj-00342 (S.D. Tex. June 23, 2008). So does Saudi Arabia. See Opinion and Order at 7, *United States v. Barr*, No. 14-cr-00287 (N.D. Ill. Apr. 12, 2019).

450. Complaint at 14, *Baker v. City of Florissant*, No. 16-cv-1693 (E.D. Mo. Oct. 21, 2016).

451. *Id.*

452. *Id.*

453. *Id.* at 15.

socks, and the prison jumpsuit had to be almost entirely removed for her to use the toilet.⁴⁵⁴ Nor were inmates given toothbrushes, toothpaste, deodorant, or combs.⁴⁵⁵ Water only came from a weak spout connected to the toilet that she had to press her lips up to for a drink. She was held for a total of fifteen days.⁴⁵⁶ A year later, she was again incarcerated for being unable to pay a bond.⁴⁵⁷ At no point did anyone check whether she had the ability to pay.⁴⁵⁸

Bolden's story is not unique, nor even necessarily rare. As part of the War on Drugs, many states became addicted to court-ordered fees, and failure to pay them could result in imprisonment.⁴⁵⁹ Mississippi uses "restitution centers" to confine people until they work off these debts.⁴⁶⁰ Many other states forsake their own constitutions and sentence people to jail for court debts.⁴⁶¹ Hundreds of thousands of people are locked up in pretrial confinement solely because they are too poor to afford bail.⁴⁶²

By one measure, imprisonment for poverty today is no less prevalent than imprisonment for debt was two hundred years ago. Recall that annual censuses of New York City in the 1820s show that, per capita, between fifty and two hundred people were incarcerated for debt for every one hundred thousand residents.⁴⁶³ And those numbers were the low estimates.

454. *Id.*

455. *Id.* at 16.

456. *Id.*

457. *Id.*

458. *Id.* at 17.

459. See Jerjian, *supra* note 20, at 244.

460. Anna Wolfe & Michelle Liu, *Modern Day Debtors Prison? Mississippi Makes People Work to Pay Off Debt*, USA TODAY (Jan. 9, 2020, 12:53 PM), <https://www.usatoday.com/in-depth/news/investigations/2020/01/09/debtors-prison-miss-still-sends-people-jail-unpaid-debt/4418001002/>.

461. See generally ACLU, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf.

462. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> (Feb. 24, 2021).

463. See *supra* Section I.A.

Even using these low-end numbers gives an unflattering comparison to today. In 2016, New York City had 9,614 people in jail.⁴⁶⁴ An estimated 80% of New York's jail population was in jail for pretrial detention, which likely means they simply could not afford cash bail—a modern equivalent to debtors' prisons.⁴⁶⁵ This would mean that around 7,700 New Yorkers are likely in jail because they are poor, not because they are guilty. In turn, this translates into about ninety-three people incarcerated because they are poor per one hundred thousand residents of modern-day New York.⁴⁶⁶ In other words, right around the per capita rate of the 1820s.⁴⁶⁷

Courts have failed to remedy this discriminatory impact. Commentators almost universally condemn the practice of debtors' prisons today,⁴⁶⁸ but that has not seemed to influence courts. Lawsuits challenging modern debtors' prisons tend to be rejected.⁴⁶⁹ In *State v. Huth*, the defendant argued that imprisonment for failure to pay fees and costs from a criminal sentence was effectively imprisonment for debt, in violation of

464. DIV. CRIM. JUST. SERVS., N.Y. STATE, ANNUAL JAIL POPULATION TRENDS 3 (2021), https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf.

465. Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 145–46 (2019).

466. The true number is almost certainly even higher. A third of the country's jail population is incarcerated because of parole violations, which are often predicated on failure to pay fines, fees, or penalties, not misconduct. RONALD P. CORBETT, JR. & KEVIN R. REITZ, ROBINA INST. OF CRIM. L. & CRIM. JUST., PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 3 (2014), <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/robina-report-2015-web.pdf>; see also Ebony Ruhland, *The Impact of Fees and Fines for Individuals on Probation and Parole*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (May 23, 2016), <https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole>.

467. See *supra* Section I.B.

468. Far more commentators condemn the practice. See, e.g., Sarah Morgan, Note, *Indebted to the State: How the Thirteenth Amendment's Promise of Abolition Holds Protections Against the Modern Debtors' Prisons*, 39 W. NEW ENG. L. REV. 327 (2017); Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93 (2015); Eric Balaban, *Shining a Light Into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275 (2014); John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439 (2005).

469. See *Tyler v. Douglas*, No. 12CV239 (D. Neb. July 23, 2012) (memorandum decision).

the state constitution.⁴⁷⁰ But the state supreme court rejected this argument.⁴⁷¹ Many forms of debt have been interpreted to fall outside of constitutional protection, including child support,⁴⁷² alimony,⁴⁷³ divorces,⁴⁷⁴ and taxes.⁴⁷⁵

However, the Vermont Supreme Court did step in to protect corporations who cheat their workers.⁴⁷⁶ A corporation was prosecuted for not paying wages to employees and argued that punishing it violated the state constitutional provision against imprisonment for debt.⁴⁷⁷ The court agreed, although there is not a single piece of evidence that this was the sort of practice the laws were intended to protect.⁴⁷⁸ Consequently, wealthy corporations go free while indigent people still get locked away.

CONCLUSION

As this Article has shown, imprisonment for debt was common in colonial America. After the Declaration of Independence was signed, most states passed constitutions of their own, but only two—Pennsylvania and North Carolina—included any limitations on debtors' prisons.⁴⁷⁹ In 1790, Pennsylvania amended its constitution, using anti-debtors' prison language that other states would imitate for decades.⁴⁸⁰

470. State v. Huth, 334 N.W.2d 485, 489–90 (S.D. 1983).

471. *Id.* at 490; *see also* Sothman v. State, 92 N.W. 303, 307 (Neb. 1902).

472. *See* Brown v. Farley, 2018-Ohio-2543, ¶ 9 (Ohio Ct. App. 2018); Fussell v. State, 166 N.W. 197, 199 (Neb. 1918).

473. *See* State *ex rel.* Cook v. Cook, 64 N.E. 567, 569 (Ohio 1902); Peters v. Peters, 183 N.E.2d 431, 434 (Ohio Ct. App. 1962); Warwick v. Warwick, 438 N.W.2d 673, 680 (Minn. Ct. App. 1989); Adams v. Adams, 83 A. 190, 192 (N.J. 1912).

474. *See* Keith Rosenblum, *Debtor's Prison: Manuel Osete Has Been in Jail for 27 Months, with No Release in Sight. His Crime? He Didn't Commit One.*, TUCSON WKLY. (Mar. 24, 2005), <https://www.tucsonweekly.com/tucson/debtors-prison/Content?oid=1079757>; Sickler v. Sickler, 878 N.W.2d 549, 562 (Neb. 2016); Jensen v. Jensen, 229 N.W. 770, 771 (Neb. 1930).

475. *See* Charleston v. Oliver, 16 S.C. 47, 52–53 (1881); *Ex parte* Flynn, 1920 Ohio Misc. LEXIS 30, at *7 (Ct. Com. Pl. Oct. 7, 1920).

476. State v. Carpenter, 412 A.2d 285, 290 (Vt. 1980).

477. *Id.* at 286–88.

478. *Id.* at 290.

479. PA. CONST. of 1776, § 28; N.C. CONST. of 1776, § 36.

480. PA. CONST. of 1790, art. IX, § 16.

At the end of the eighteenth century, and for the first couple decades of the nineteenth, a decent number of states either created or revised constitutions that protected debtors, but these protections were often highly qualified, such as by excepting fraud or requiring debtors to surrender all of their property.⁴⁸¹ It was not until around the Jacksonian Era that calls for reform reached their apex, and states responded by overwhelmingly opting to protect debtors from imprisonment. Texas became the first state to constitutionally bar imprisonment for debt in all cases in 1845.⁴⁸²

During the Civil War, West Virginia became the last state to enter the Union without a constitutional provision protecting debtors in 1863.⁴⁸³ But after the war, a great many Southern states were forced to hold conventions to liberalize their constitutions, and protections for debtors abounded.⁴⁸⁴

After the Civil War and Reconstruction, every state that joined the Union had protections for debtors, though the pace that new states were added slowed. By the time Hawaii became the last state to join in 1959, forty-one states had some kind of restriction on imprisonment for debt.⁴⁸⁵ Several states changed their language to provide stronger protections for debtors without holding full scale conventions.

United States Territories that passed constitutions around that time also had protections.⁴⁸⁶ But sometime around the middle of the twentieth century, policymakers felt content the scourge of debtors' prisons was banished and stopped including anything on the subject in constitutions. Today, debtors' prisons flourish under assumed names.⁴⁸⁷

481. See, e.g., PA. CONST. of 1790, art. IX, § 16; R.I. CONST. of 1843, art. I, § 11.

482. TEX. CONST. of 1845, art. I, § 15.

483. W. VA. CONST. of 1863.

484. See Act of Mar. 2, 1867, Pub. L. No. 39-153, § 5, 14 Stat. 429.

485. See *State Bans Note*, *supra* note 9.

486. See, e.g., P.R. CONST. art. II, § 11; AM. SAM. CONST. art. I, § 9.

487. The following are modern-day examples of people being imprisoned for failure to pay an obligation. See, e.g., *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001); *In re Marriage of Nussbeck*, 974 P.2d 493 (Colo. 1999); *Al Ghurair v. Zaczac*, 255 So. 3d 485 (Fla. Dist. Ct. App.

Commenting on debtors' prisons in Washington, D.C., an 1823 newspaper said, "[H]umanity and justice [must] unite in making it the duty of all concerned, to remedy so great an evil."⁴⁸⁸ For more than a century, passions ran hot against debtors' prisons. Reformers were remarkably successful at installing limits on imprisonment for debt in over four-fifths of state constitutions—making it arguably the most widespread constitutional right that is totally absent from the federal charter. This herculean effort still proved inadequate to break courts' habit of locking people up because they lack funds. Constitutions may be the highest law we have, but they have not been high enough.

2018); *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009); *In re Marriage of Lenger*, 336 N.W.2d 191 (Iowa 1983).

488. *Debtor's Prison*, ARGUS W. AM. (Frankfort, Ky.), June 4, 1823, at 3, <https://www.newspapers.com/image/584952315/>.