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Maintaining Condominiums and Homeowner Associations: How Much of a Priority?

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INTRODUCTION

An estimated twenty percent of the American population—more than sixty million people—live in common interest communities, a term that includes homeowner associations, condominium communities, and cooperatives.[1] That number represents

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1. *See* CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2014, at 1 (2014), https://www.caionline.org/PressReleases/Statistical%20Information/2014%20Stat%20Review.pdf [https://perma.cc/JB4R-GYSY].

an increase from about two million in 1970, under ten million in 1980, and under thirty million in 1990.[2] Homeowner associations account for slightly more than half of community associations; condominiums account for most of the balance.[3]

Community associations serve a dual role, acting both as regulatory authority and as service providers.[4] In their regulatory capacity, associations may restrict leasing of units,[5] impose constraints on architectural style,[6] and regulate parking within the development.[7] As service providers, associations may maintain community areas and common facilities like swimming pools and tennis courts.[8] They may also provide services like trash and snow removal, road maintenance, and security.[9]

Providing services requires funding. A developer who creates a common interest community typically records a "declaration" or "master deed" that establishes the community association, requires that all owners belong to the association, and confers power on the association to levy assessments on owners within the community.[10]

When the association is unable to collect those assessments, the association faces a difficult choice: impose a disproportionate burden on the remaining owners, or forego maintenance of community facilities, which could reduce market values of all units in the community. In light of the 2008 real estate crisis, many associations faced just this choice.[11]

Developers of common interest communities have historically sought to avoid this problem by giving the association a lien against each unit.[12] In times of stable or rising property values, the lien gave the association reasonable assurance that it would ultimately be able to collect the maintenance associated with each unit. That assurance disintegrated when values declined to such a degree that many unit owners

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2. *Id.*

3. *Id.* (noting that 51–55% of community associations are homeowner associations; 42–45% are condominiums).

4. *See* Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 EMORY L.J. 977, 980–83 (1975).

5. *See, e.g.*, Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452 (Fla. 2002).

6. *See, e.g.*, Valenti v. Hopkins, 926 P.2d 813 (Or. 1996).

7. *See, e.g.*, Martino v. Bd. of Managers of Heron Pointe on the Beach Condo., 774 N.Y.S.2d 422 (App. Div. 2004).

8. *See, e.g.*, Nader v. Carlyle Condos., No. 94445, 2010 WL 3596247 (Ohio Ct. App. Sept. 16, 2010) (discussing association liability for maintenance of swimming pool).

9. *See, e.g.*, Goodwin v. Knolls at Stony Brook Homeowners Ass'n, 674 N.Y.S.2d 411 (App. Div. 1998) (dismissing suit by unit owner against condominium for negligence in snow removal).

10. *See generally* STEWART E. STERK, EDUARDO M. PEÑALVER & SARA C. BRONIN, LAND USE REGULATION 658–62 (2d ed. 2016) (describing mechanics of creating common interest community).

11. *See* Casey Perkins, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 NEV. L.J. 561, 568 (2010) (noting strain on associations facing homes in disrepair and increased assessments to make up for budget shortfalls).

12. The practice dates from at least the early twentieth century. The Neponsit Realty Company used the lien device as early as 1917 in creating a beachfront community in New York. *See* Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 794 (N.Y. 1938) (describing lien language in deed created by the developer).

found themselves with "underwater" properties: those on which outstanding mortgages on the unit exceeded the market value of the land.[13] If, in these circumstances, the mortgage lien held by banks enjoyed priority over the association lien, the association might never collect on past due assessments and might be at significant risk with respect to future assessments—especially if, as became increasingly common, banks delayed in foreclosing on their mortgage liens.[14]

The traditional rule, applicable in most states since the advent of condominiums, accords first mortgage liens priority over association assessments due after the bank recorded its mortgage loan.[15] Long before the 2008 recession, a number of states, prompted by the Uniform Condominium Act[16] and the Uniform Common Interest Ownership Act (UCIOA),[17] anticipated the problem by giving associations a limited six-month "super priority" over mortgage liens. This approach, intended as a compromise between the interest of banks and associations, has provided some assistance to associations, especially when combined with recent decisions by a number of high state courts rejecting the banks' construction of statutory super priority.[18] The compromise position, however, has proven inadequate to protect associations when banks, under pressure both by investors and by government officials, inordinately delay foreclosure proceedings. Federal legislation exacerbates the problem by threatening to limit the power of associations to foreclose on liens for unpaid assessments.[19]

The 2008 housing crisis has receded, but the litigation generated in its wake continues to unfold, leaving the law in a state of considerable uncertainty. The crisis and the litigation highlight the need for sweeping reform.

The Uniform Law Commissioners have recommended modest changes that move in a positive direction.[20] Scholars writing before the recent litigation developments have urged a significant rethinking of lien priorities.[21] As a policy matter, the optimal

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13. JOINT EDITORIAL BD. FOR UNIF. REAL PROP. ACTS, THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT 4 (2013) http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf [https://perma.cc/LU3X-VMUU] (noting that many common interest units were underwater).

14. *See id.* (noting delays in completion of foreclosures).

15. The Federal Housing Administration (FHA) established that priority when it developed a model statute in the early 1960s. FED. HOUS. ADMIN, FORM NO. 3825, APARTMENT OWNERSHIP ACT, § 23(a) (1962) [hereinafter FHA MODEL ACT].

16. UNIF. CONDO. ACT § 3-116 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1980).

17. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1982). Subsequent versions of the Act, promulgated in 1994 and 2008, retained and, more recently strengthened, the six-month priority. *See infra* Part III.C.

18. *See infra* Part II.B.2.

19. *See infra* Part II.B.3.

20. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

21. *See* Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53 (2011); Daniel Goldmintz, *Lien Priorities: The Defects of Limiting the "Super Priority" for Common Interest Communities*, 33 CARDOZO L. REV. 267 (2011).

solution is simple: association liens for unpaid assessments should enjoy priority over mortgage liens, period. The solution has advantages both as a matter of efficiency and as a matter of fairness.

The solution has two significant efficiency advantages. First, banks are in a far better position to account for potential economic downturns than are associations, and imposing the cost of downturns on them will lead to more sensible lending policies. Second, giving associations priority over banks solves what is otherwise a difficult collective action problem in situations where multiple banks hold mortgages on different underwater units within a single common interest community. In that situation, it might be in the interest of any individual bank to avoid paying association assessments, while it is in the collective interest of the banks to ensure that assessments are paid and the community is well maintained.

As a matter of fairness, the solution prevents banks from free riding on maintenance expenditures made by nondefaulting unit owners. It ensures that all units bear their fair share of maintenance expenditures.

Implementation, however, will be difficult. The current state of affairs is largely the product of the political power of banks, combined with their reflexive opposition to any reform that appears to threaten their priority—even when a reduction in their own priority may ultimately be in their long-term interest. To be successful, then, reform efforts must focus banks and legislatures on the fact that giving associations priority is ultimately in the interest of banks as well as associations.

This Article starts, in Part I, by exploring existing lien priorities, including state variations. Part II analyzes the impact of the recent foreclosure crisis, surveying the case law that has arisen in response to that crisis. Part III focuses on the normative analysis, explaining why legislatures should accord lien priority to associations. Part IV addresses implementation issues.

I. ASSOCIATION STRUCTURE AND LIEN PRIORITIES

A. Creation of the Association Lien

When a developer creates a condominium or homeowners association, the developer typically records a "declaration" or "master deed" that establishes the community association, requires that all owners belong to the association, and confers power on the association to levy assessments on owners within the community.[22] The obligation to pay assessments constitutes a covenant running with the land, enforceable against successor purchasers of each unit.[23] The declaration will also typically grant the association a lien against each unit to secure payment of assessments.[24]

When a unit owner defaults on its obligation to pay assessments, the association has a choice of remedies. The association can seek to induce compliance without resorting to courts, most commonly by adopting rules imposing fines or withdrawing

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22. *See* STERK ET AL., *supra* note 10, at 658–62.

23. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. a (AM. LAW INST. 2000).

24. *See id.* cmt. d (noting that government documents normally provide that assessment obligation is secured by a lien, but also noting that even if the documents are silent, courts will imply a lien unless a lien provision is expressly excluded).

privileges from defaulting unit owners.[25] If those efforts fail, the association can bring an action against the defaulting owner for unpaid assessments,[26] can foreclose on the lien for common charges,[27] or can wait until the unit owner sells the unit, knowing that prospective purchasers will not buy unless past-due assessments have been paid and the lien has been extinguished.[28] When a unit owner defaults because of insolvency, an action against the unit owner personally is unlikely to be productive for the association. The lien, then, becomes critical if the association is to collect assessments associated with the unit.

B. Lien Priorities Generally

The association's lien for assessments is one of a variety of liens that might be filed against a unit owner. If the owner financed the unit with a mortgage, the mortgagee has a lien against the unit.[29] If the unit owner had work done on the premises and did not pay the contractors, the contractors might have a mechanics' lien against the unit.[30] If the unit owner has failed to pay real estate taxes, the local municipality holds a tax lien.[31] If a judgment has been entered against the unit owner, even on matters unrelated to the unit, the judgment creditor may have obtained a judgment lien against the unit.

Any of these lienholders is entitled to bring an action to foreclose the lien.[32] If a lienholder forecloses, the unit will be sold, and the sale proceeds will be distributed among the lienholders.[33] Whether the lienholder will foreclose depends primarily on two factors: the cost of the foreclosure action and the likelihood that the lienholder will recover if the lienholder forecloses. We will return to the cost issue.[34] When the aggregate amount of the liens outstanding on the unit exceeds the likely sale price at the foreclosure sale, the likelihood that a lienholder will recover depends in considerable measure on the relative priority of the liens.

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25. *See id.* § 6.8; *see also* San Antonio Villa Del Sol Homeowners Ass'n v. Miller, 761 S.W.2d 460 (Tex. App. 1988) (upholding disconnection of water and gas to delinquent unit owner).

26. *See, e.g.*, *In re* Makowka, 754 F.3d 143 (3rd Cir. 2014). *See generally* WARREN FREEDMAN & JONATHAN B. ALTER, THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS 83 (1992).

27. *See, e.g.*, Inwood N. Homeowners' Ass'n v. Harris, 736 S.W.2d 632 (Tex. 1987).

28. The association generally will adopt a consistent policy for collecting delinquent assessments in order to avoid allegations of arbitrariness. *See generally* WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW 305–06 (2d ed. 2008).

29. *See generally* CURTIS J. BERGER, QUINTIN JOHNSTONE & MARSHALL TRACHT, LAND TRANSFER AND FINANCE 163–64 (6th ed. 2011).

30. *See generally* Ann M. Saegert, *Commercial Lending Issues in the United States*, PROB. & PROP., Mar.–Apr. 2001, at 37, 41.

31. *See, e.g.*, CAL. REV. & TAX CODE § 2191.4 (West 1998) (imposing lien for nonpayment of taxes).

32. *See generally* 51 AM. JUR. 2D *Liens* § 84 (2017) (providing that action to enforce a lien is usually in the form of a foreclosure action).

33. *See generally* 53 AM. JUR. 2D *Mechanics' Liens* § 393 (2017) (discussing procedures for foreclosing mechanics' liens, which vary to some extent from state to state).

34. *See infra* text accompanying note 66.

The jurisdiction's real property recording statutes typically determine the priority among liens. Although recording statutes differ from state to state, a common principle generally underlies lien priority in all states: if two liens were filed promptly upon creation, the first lien to be filed enjoys priority over the subsequently filed lien.[35] Filing the lien provides notice to subsequent lenders and other potential purchasers or creditors. The recording system operates on the premise that filing provides notice to a subsequent lender or other creditor that the property is already encumbered, and that if the subsequent party extends credit of one sort or another, the subsequent party does so at its own risk.[36] Conversely, if the prior lender or creditor fails to file, and thereby induces a subsequent party to extend credit, the subsequent party should enjoy priority over the party who failed to record promptly.

The first-to-file priority is subject to important exceptions. Of primary significance, the municipality's lien for unpaid real estate taxes enjoys priority even over earlier recorded liens. The California statute makes the point in sweeping terms:

> Every tax declared in this chapter to be a lien on real property, and every public improvement assessment declared by law to be a lien on real property, have priority over all other liens on the property, regardless of the time of their creation. Any tax or assessment described in the preceding sentence shall be given priority over matters including, but not limited to, any recognizance, deed, judgment, debt, obligation, or responsibility with respect to which the subject real property may become charged or liable.[37]

Other states have similar provisions.[38] As the California statute makes explicit, a mortgagee bank does not obtain priority over a lien for real estate taxes even if the taxes become due long after the bank extended credit and recorded its mortgage.[39] If a bank extends a mortgage loan to property owner in 2010, and the owner fails to pay taxes in 2016, the tax lien enjoys priority over the mortgage lien.

The priority for tax liens has roots in both equity and efficiency. Lien priorities are generally based on notice,[40] and a mortgage lender knows with certainty that the property secured by the mortgage will be subject to real estate taxes. The mortgagee cannot, therefore, contend that it was duped into lending by the municipality's failure

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35. *See generally* Donald J. Kochan, *Dealing with Dirty Deeds: Matching* Nemo dat *Preferences with Property Law Pragmatism*, 64 U. KAN. L. REV. 1, 8–19 (2015) (surveying differences among recording statutes). Kochan notes that even in a notice jurisdiction, if the first grantee records before the conveyance to the subsequent grantee, then the subsequent grantee will not be in a position to invalidate the prior grantee's claim. *Id.* at 14.

36. *Id.* at 18 ("A purchaser who fails to check the records before buying land . . . acts negligently and has no excuse . . . .").

37. REV. & TAX. § 2192.1.

38. *See, e.g.*, 35 ILL. COMP. STAT. ANN. 200/21-75 (West 2006) ("The taxes upon property . . . shall be a prior and first lien on the property, superior to all other liens and encumbrances . . . ."); N.J. STAT. ANN. § 54:5-9 (West 2017) ("Every municipal lien shall be a first lien . . . paramount to all prior or subsequent alienations . . . .").

39. REV. & TAX. § 2192.1

40. *See* Kochan, *supra* note 35, at 19 (noting that notice is the key to recording acts).

to record a prior lien. Moreover, when property is underwater, giving a mortgagee bank priority over the lien for real estate taxes would unfairly burden other property owners with a disproportionate share of the local tax burden while the property subject to the bank's mortgage continues to receive municipal services, including police and fire protection, without paying for those services. From an efficiency perspective, giving the bank priority could induce the bank to make inefficient loans to parties without ability to repay. Finally, mortgagee banks can and do account for future real estate taxes by requiring the mortgagor to pay future taxes into an escrow account, which the bank will use to pay property taxes, reducing the risk of tax default and consequent loss to the bank.[41]

C. Priority of Association Liens

Common interest communities were relatively rare until the second half of the twentieth century. Not until after 1938, when the New York Court of Appeals decided *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*,[42] was it widely established that a covenant binding successor owners to pay assessments would be binding as a covenant running with the land. The real growth of common interest communities began in the 1960s, with the advent of state statutes authorizing condominium ownership.[43] Most early condominium statutes were based on the FHA's Model Condominium Act,[44] which was drafted to set standards for federal insurance of condominium mortgage loans.[45]

The FHA's Model Act, and the statutes based on the Act, authorized developers to use liens as a mechanism to enforce the obligation to pay assessments.[46] The Act also established a priority for the association's lien: the association's lien for delinquent assessments would enjoy priority over all liens, whenever recorded, except liens for unpaid taxes and sums unpaid on first mortgages recorded before the association's lien.[47]

The Model Act and state statutes enacted pursuant to the Model Act reflected a supposed compromise between the interests of the condominium and the interests of institutional lenders.[48] In pursuing this compromise option, the drafters implicitly rejected two other options.

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41. *See* Darien Shanske, *Revitalizing Local Political Economy Through Modernizing the Property Tax*, 68 TAX L. REV. 143, 157–58 (2014) (noting that banks and/or the federal government require borrowers to enroll in tax escrow programs).

42. 15 N.E.2d 793 (N.Y. 1938).

43. *See, e.g.*, N.J. STAT. ANN. §§ 46:8B-1 to :8B-11.

44. FHA MODEL ACT, *supra* note 15.

45. *See* Aaron M. Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1110 n.27 (1969) (noting that "[s]tate legislation was spurred by the provisions of the National Housing Act which authorized FHA insurance for condominium units only where the condominium project had the sanction of state law").

46. FHA MODEL ACT, *supra* note 15, § 9.

47. *Id.* § 23. *See generally* Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1010 (1963).

48. *See* Recent Statute, 77 HARV. L. REV. 777, 780 (1964) (discussing Massachusetts statute).

First, the statute could have treated the condominium lien like a tax lien, and given the lien priority over all mortgages, whenever recorded. That approach would have recognized that the condominium association, like a local government, is a service provider. The ability to assess and collect common charges provides the association with a mechanism to overcome collective action problems that would otherwise make it difficult to fund common services that maintain and increase the value of all units within the association. Just as the priority lien for taxes provides local governments with a reliable revenue source, a priority lien for association common charges would have done the same for condominium associations.

Second, the statute could have treated the condominium declaration, which authorizes the condominium to impose assessments on individual unit owners, as the equivalent of a mortgage lien for future advances.[49] This treatment has parallels in the UCC, which accords priority to the holder of a security interest from the time of filing, even if the holder does not advance funds until after another lender advances funds.[50] The UCC's approach is rooted in notice: once a lender files a financing statement, other lenders are on notice of the security interest, and can discover a complete state of affairs before deciding to lend.[51] The same analysis would apply to the condominium declaration: once it is filed, any lender is in a position to evaluate the obligations a unit owner might owe to the condominium association.

Either of these alternatives would have provided more complete protection to the condominium association, but the Model Act adopted neither.

The Model Condominium Act was designed to apply only to condominiums; neither the Model Act nor the statutes enacted in its wake determined the lien priority for other community associations. As a result, courts were faced with construing basic recording act principles of "first in time, first in right." In a number of cases, however, courts took the same position as the Model Act, rejecting the argument that an association's lien should "relate back" to the date the developer recorded the declaration of covenants, holding instead that the association's lien should date from the time the association filed its lien for delinquent assessments.[52] As a result, mortgages recorded after the declaration, but before the homeowner defaulted on its assessments, enjoyed priority over the association's lien. A few courts held, however, that if the declaration included explicit language subordinating

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49. The Restatement provides that repayment of future advances will be secured against a person who subsequently acquires an interest in the property if the mortgage states that repayment of future advances is secured. The Restatement represented a departure from the common law rule, which gave a senior mortgagee priority with respect to future advances only if the mortgage obligated the mortgagee to make future advances, but not if the mortgage made those advances optional. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 2.1(c) (AM. LAW INST. 1997); *see* Grant S. Nelson & Dale A. Whitman, *Rethinking Future Advance Mortgages: A Brief for the* Restatement *Approach*, 44 DUKE L.J. 657, 668–70 (1995).

50. U.C.C. § 9-322(a)(1), 3 U.L.A. 332 (2010) (providing that conflicting perfected security interests rank according to priority in time of filing).

51. *Id.* § 9-322 cmt. 4 (2010 & Supp. 2017).

52. *See, e.g.*, F.N. Realty Servs., Inc. v. Or. Shores Recreational Club, Inc., 891 P.2d 671 (Or. Ct. App. 1995); First Twinstate Bank v. Hart, 648 A.2d 820 (Vt. 1993).

mortgages to the association's lien, the association's subsequently filed lien would relate back to the date of the declaration.[53]

Against this background, the Uniform Law Commissioners (then known as NCCUSL) promulgated two uniform acts revising traditional lien priority.[54] The Uniform Condominium Act and UCIOA, both designed to establish more general governance principles, addressed the lien priority problem by giving an association's lien a "super priority" for six months of unpaid assessments.[55] The comments to the two statutes acknowledged that the super priority provision represented "[a] significant departure from existing practice" and concluded that it struck "an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders."[56] The comments went on to predict that "secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit."[57]

A minority of state legislatures enacted the Uniform Condominium Act,[58] and fewer still enacted UCIOA.[59] Among the states that did enact the Uniform

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53. *See* Ass'n of Poinciana Vills. v. Avatar Props., Inc., 724 So. 2d 585 (Fla. Dist. Ct. App. 1998); Am. Holidays, Inc. v. Foxtail Owners Ass'n, 821 P.2d 577 (Wyo. 1991). Other courts indicated that explicit language in the declaration might be sufficient to cause the association's lien to relate back to the date of the declaration, but held that the declaration at issue included no such explicit language. *See* Holly Lake Ass'n v. Fed. Nat'l Mortgage Ass'n, 660 So. 2d 266 (Fla. 1995); Westin Hills W. Three Townhome Owners Ass'n v. Fed. Nat'l Mortgage Ass'n, 814 N.W.2d 378 (Neb. 2012).

54. For more extensive discussion of the history of these enactments, see Goldmintz, *supra* note 21, at 273–74.

55. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1982) ("The [association's] lien is also prior to all [first mortgages] . . . to the extent of the common expense assessments based on the periodic budget adopted by the association . . . which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien."). Uniform Condominium Act section 3-116(b) includes identical language. UNIF. CONDO. ACT § 3-116 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1980).

56. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 1; *accord* UNIFORM CONDO. ACT § 3-116, cmt. 2.

57. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 1; *accord* UNIFORM CONDO. ACT § 3-116, cmt. 2.

58. The Uniform Law Commission's website depicts Alabama, Arizona, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island, Texas, Virginia, Washington, and West Virginia as states that have adopted the Act. *Condominum Act*, UNIFORM L. COMMISION, http://www.uniformlaws.org/Act.aspx?title=Condominium%20Act [https://perma.cc/9VSV-MM7A].

59. The Uniform Law Commission's website lists Alaska, Colorado, Connecticut, Minnesota, Nevada, and West Virginia as states that adopted the 1982 version. *Common Interest Ownership Act (1982)*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20%281982%29 [https://perma.cc/9M25-6NTP]. Vermont subsequently enacted the 1994 version of the statute, and Connecticut also enacted the updated version. *Common Interest Ownership Act (1994)*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20%281994%29 [https://perma.cc/SV2J-BMVE].

Condominium Act, several deleted the super priority provision.[60] At the same time, several other states imported the six-month super priority concept into state law without enacting all of the Uniform Condominium Act or UCIOA.[61]

Lien priority, however, is not a creature of statute alone. A lien holder who enjoys statutory priority may nevertheless agree to subordinate its interest by contract.[62] In many cases, developers, in the quest to satisfy mortgage lenders to provide financing, have included provisions in the community's declaration subordinating the association's lien to first mortgage liens.[63] These contract provisions create a problem for associations even in jurisdictions that otherwise provide limited priority for association liens.

D. Lien Priority in Practice: The Traditional Approach

Although foreclosure on an association lien has traditionally been available as a remedy for delinquent assessments,[64] associations have traditionally used foreclosure sales only as a last resort. Foreclosure—especially judicial foreclosure[65]—is typically expensive relative to the size of most delinquent assessments.[66] In most instances, associations have been able to collect by imposing fines or withdrawing privileges from defaulting owners.[67] Moreover, for an owner with equity in her unit, the threat of foreclosure, or the filing of a foreclosure action, was often enough to induce a solvent but delinquent owner to pay past-due assessments, especially when the owner would also become liable for

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60. *See* ARIZ. REV. STAT. ANN. § 33-1256(B) (Supp. 2016); TEX. PROP. CODE ANN. § 82.113 (West 2014).

61. *See, e.g.*, MASS. ANN. LAWS ch. 183A, § 6(c) (LexisNexis 2011); N.J. STAT. ANN. § 46:8B-21 (West 2014). For a more complete survey, see Boyack, *supra* note 21, at 100–01.

62. *See generally* David Gray Carlson, *A Theory of Contractual Debt Subordination and Lien Priority*, 38 VAND. L. REV. 975 (1985); Patrick E. Mears, *Who's on First? Negotiating Debt and Lien Subordination Agreements in Real Estate Transactions*, PROB. & PROP., Jan./Feb. 1999, at 19.

63. *See* James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 370–72 (1992).

64. Even before the recent foreclosure crisis, some states required an association to use alternative dispute resolution processes before instituting foreclosure actions. *See* Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2518–20 (2004).

65. A number of states allow mortgagees to save on costs by foreclosing without judicial intervention. *See* Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How To Fix Them*, 46 CONN. L. REV. 497, 528 (2013) (noting that in light of shattered trust in banks, litigation involving nonjudicial foreclosure "[is] reintroducing the costs that nonjudicial foreclosure was supposed to avoid").

66. *See* Berger, *supra* note 47, at 1011 ("Lien foreclosure, even if effective in stripping the delinquent owner of his estate, is nonetheless a tedious method for recovering the outstanding charges.").

67. *See supra* text accompanying notes 26–29.

the association's expenses in enforcing its lien.[68] Even if the owner did not pay immediately, the association was assured of collecting on its lien when the owner sold the unit. Finally, if the unit owner was in financial difficulty, and had also defaulted on her bank mortgage, the association could piggyback on the bank's foreclosure action. Because banks rarely gave first mortgage loans in amounts equal to 100% of home value, foreclosure sales had the potential to generate a surplus beyond what was necessary to pay off the mortgage. In jurisdictions with traditional lien priority rules, the association might have to be vigilant to ensure bidders at the bank's foreclosure sale, but in jurisdictions that had adopted the six-month super priority for association assessments, even that was unnecessary; the successful bidder at the foreclosure sale would remain liable for six months of assessments.

II. The Impact of the Housing Crisis

The literature on the causes and effects of the 2008 housing crisis is extensive. This Part focuses on the impact of that crisis on community associations, the responses associations took to the crisis, and the resulting litigation.

A. The New Foreclosure Calculus

The housing crisis and the ensuing recession in the years following 2008 significantly altered the calculus for associations. Because banks had been making loans in amounts close to market value, and because market values had plummeted, unit owners no longer had incentives to pay assessments on units that were underwater. If banks did foreclose, there would often be no surplus value at a foreclosure sale. This put associations in jeopardy, particularly in states that had not adopted a super priority for association liens.[69]

Moreover, the foreclosure process slowed down considerably, jeopardizing the interests of associations even in jurisdictions that recognized a six-month super priority. Recall the process. Once a foreclosure sale occurred, the foreclosure sale purchaser would become liable for assessments. But if the mortgagee did not hold a foreclosure sale for several years, when a sale did occur, the association would receive only six months of assessments ahead of the bank's mortgage.[70] The association's only remedy for the remaining assessments would be a personal action against the former owner who, in many cases, would be insolvent.

A variety of factors contributed to the slowdown in the foreclosure process. First, for properties within community associations, it was in the mortgagee bank's interest to delay foreclosure sales in order to avoid triggering an obligation to pay

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68. *See* Giantomasi, *supra* note 64, at 2524 (noting that the threat of foreclosure sometimes "requires owners to pay legal fees that are much greater than any delinquent assessments").

69. *Cf.* Boyak, *supra* note 21, at 78–79 (detailing associations whose operations were significantly impaired by inability to collect delinquent assessments).

70. Even before the 2008 recession, commentators noted that in a jurisdiction without a super priority for association liens, lenders might have little motivation to foreclose until they locate a buyer for the property. Winokur, *supra* note 63, at 379.

assessments. Especially if the bank feared that it might be the only bidder at a foreclosure sale, there would be little reason for the bank to take title because doing so would reinstate the obligation to pay assessments.

Second, securitization of mortgage loans complicated the foreclosure process. In an environment where each mortgage loan was owned by multiple parties, the mortgage servicer, not the "owner" of the mortgage, was authorized to make decisions about when to foreclose.[71] The servicer's interest in collecting fees, which would enjoy first priority at any foreclosure sale, created an incentive for servicers to delay; once a foreclosure sale occurred, no further fees would be due.[72] Moreover, the servicers might feel pressure to delay from owners of junior tranches of a mortgage, because quick foreclosure at depressed prices would wipe out their interests.[73]

Third, both the federal government[74] and a number of state legislatures[75] acted to slow down the foreclosure process in order to protect resident-owners of delinquent properties. Although legislation mandating negotiation between mortgagor and mortgagee was designed to keep people in their homes, it also had the effect of jeopardizing the interests of community associations.[76]

A few states sought to provide some legislative relief to beleaguered associations. Nevada expanded UCIOA's super priority to nine months.[77] Florida enacted a statute making it clear that a purchaser at a foreclosure sale would be liable for twelve months of delinquent assessments, but only if that amount was smaller than one percent of the original mortgage debt.[78] In general, however, efforts to expand protection for associations ran into difficulties. One difficulty was the prospect that federal government entities would not guarantee or insure mortgages unless the super priority

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71. For a general discussion of the agency costs that plague the relationship between mortgage investors and servicers, see Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011).

72. *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 777–78 (2011) (noting that late fees and other default-related fees add to the servicer's bottom line, and the longer a homeowner is in default, the larger those fees can be, but noting that the length of optimal delay also depends on a number of other factors); *see also* Levitin & Twomey, *supra* note 71, at 49.

73. David Dana has noted that services who seek to pursue loan modifications face an inability to coordinate and obtain consent from relevant investors—especially because owners in the most junior tranches have no reason to support loan modification. David A. Dana, *The Foreclosure Crisis and the Antifragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 104 (2010). Those same owners would be wiped out in a foreclosure at depressed prices.

74. The federal government's Home Affordable Modification Program (HAMP) required review of defaulted federally guaranteed or federally owned loans prior to proceeding with foreclosure, and provided incentives for loan modification, both of which were designed in part to slow the pace of foreclosure. *See generally* Jonathan A. Marcantel, *Enforcing the Home Affordable Modification Program*, 70 N.Y.U. ANN. SURV. AM. L. 121 (2014).

75. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 6321-A (West Supp. 2016) (mandating mediation of residential foreclosure disputes); N.Y. C.P.L.R. 3408 (McKinney Supp. 2017) (mandating settlement conferences and good faith negotiation before foreclosure).

76. Boyack, *supra* note 21, at 71–72.

77. NEV. REV. STAT. ANN. § 116.3116(3)(b) (LexisNexis Supp. 2016).

78. FLA. STAT. ANN. § 718.116(1)(b) (West 2015).

of assessment liens was limited to six months of assessments.[79] As a result, legislatures faced the possibility that extending greater protection to associations would cripple the ability of unit purchasers to obtain financing.[80] Compounding that difficulty was the lobbying effort of banks who sought to maintain their lien priority.[81]

The situation left associations with limited options. No longer could they rely on bank foreclosure proceedings as a mechanism for collecting delinquent assessments. Personal actions against delinquent owners were unlikely to be productive because many were not solvent. Faced with these difficulties, a number of associations foreclosed on their own liens, generating a number of legal issues.

B. Foreclosure Litigation

Faced with delays by banks in foreclosing mortgage liens, associations have tried a number of tactics to preserve their ability to collect assessments. Often, these efforts have resulted in litigation. The volume of litigation, and its mixed results, highlight the need for reform—both to protect common interest community residents and to resolve uncertainty that threatens to depress the prices paid at foreclosure sales, a consequence that benefits no one.

Courts have been more attuned to the needs of community associations than have state legislatures, perhaps because courts are somewhat more insulated from the political influence of mortgagee banks. Nevertheless, courts are constrained by statute, and in those states without lien super priority, association strategies have largely (but not entirely) proven unsuccessful.

By contrast, in states that do provide associations with limited super priority, associations have had success by foreclosing their liens. In foreclosing those liens, they tested the meaning of the super priority accorded to their liens by the Uniform

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79. In 2014, the Federal Housing Finance Agency released a statement "alerting . . . state authorities of the agency's concerns with state-level actions that threaten the first-lien status of single-family loans owned or guaranteed by Fannie Mae and Freddie Mac." Fed. Hous. Fin. Agency, Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens (Dec. 22, 2014), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx [https://perma.cc/S652-YJ5F]. The statement took the position that federal law precluded HOAs from taking action that would extinguish a Fannie Mae or Freddie Mac property interest. *Id.*

80. *See, e.g.*, Kenneth R. Harney, *Liens Filed by Community Associations Can Make Lenders Leery About Loans*, WASH. POST (May 13, 2015), https://www.washingtonpost.com/realestate/liens-filed-by-community-associations-can-make-lenders-leery-about-loans/2015/05/12/7d80905a-f7fc-11e4-a13c-193b1241d51a_story.html [https://perma.cc/BU66-CTQA] (noting threat by lenders to reconsider whether to do business in communities affected by association super liens).

81. *See, e.g.*, *Homeowners and Condominium Associations Should Not be Granted "Super Lien" Priority*, MORTGAGE BANKERS ASS'N, https://www.mba.org/issues/residential-issues/hoa-super-lien-priority [https://perma.cc/9FMT-E2F9]; *Statement of Alfred M. Pollard, General Counsel, FHFA, Before the Nevada State Legislature Judiciary Committee*, FED. HOUSING FIN. COMMITTEE (Apr. 7, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Alfred-M-Pollard-General-Counsel-FHFA-before-the-Nevada-State-Legislature-Judiciary-Committee.aspx [https://perma.cc/EME4-QM2G].

Condominium Act and UCIOA. Those statutes were drafted based on the usual assumption that banks, not associations, would foreclose, and that associations would be accommodated by receiving six months of assessments off the top of all foreclosure proceeds.[82] But the statutes did not explicitly address the meaning of split priority—super priority for six months of assessments, together with subordination to first mortgage loans for the rest—when the association, not the bank, forecloses.[83] Association foreclosure has generated litigation in a number of states, and most have held that the statutes provide associations with true lien priority, rejecting mortgagee arguments that the statutes conferred only "payment priority" on the associations.

At the same time, a federal sword looms over the successes associations have had in state courts. Federal constitutional and statutory challenges threaten to undermine the ability of associations to collect assessments through foreclosure.

1. Litigation in States Without Super Priority

a. When Does the Association's Lien Arise?

In states without any express provision for super priority, associations have argued that the association's lien priority should be based on the date the declaration was recorded, effectively giving the association a lien senior to those of mortgages executed after the common interest community was established. In some situations, statutes or express language in the declaration made this argument unavailable to associations. For instance, if the declaration itself subordinated the assessment lien to first mortgages, the association could not argue that the association's lien was senior to the first mortgage lien. Similarly, the "relation back" argument was not available with respect to first mortgages on condominiums in states that had adopted a variant of the FHA's Model Condominium Act, because the statute explicitly subordinated association liens to first mortgage liens.[84] The Model Act, however, did not apply to community associations other than condominiums, leaving courts to construe general recording statutes.

Over the last several years, courts have generally rejected the argument that association liens date from the moment the declaration was recorded.[85] For instance, in *Westin Hills West Three Townhome Owners Ass'n v. Federal National Mortgage Ass'n*[86] the Nebraska Supreme Court held that a bank's deed of trust was senior in priority to an association's lien, even though the association's declaration was

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82. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014) (noting that UCIOA's original provision "was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, *the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessments*") (emphasis added).

83. *See id.* (noting that the statute's language "has also prompted a number of interpretive disputes").

84. FHA MODEL ACT, *supra* note 15, § 23(b).

85. *But see* BAC Home Loans Servicing, LP v. Fulbright, 328 P.3d 895 (Wash. 2014), *discussed infra* Part II.B.2.

86. 814 N.W.2d 378 (Neb. 2012) (per curiam).

recorded before the deed of trust. In *Westin Hills*, the bank foreclosed on the deed of trust after the unit owner became delinquent on both her association assessment and her deed of trust.[87] At the trustee's sale, the bank submitted the winning bid and assigned the bid to FNMA, which promptly recorded the trustee's deed.[88] The association then brought an action to collect assessments that had come due before the trustee's sale.[89] In rejecting the association's argument that its lien was first in time under the state's race-notice recording statute, the court concluded that "a lien cannot exist in the absence of the debt, the payment of which it secures."[90] Because no debt arose until the unit owner defaulted on her assessment, no lien was in existence at the time the bank recorded its deed of trust. As a result, the trustee's sale wiped out any obligation to pay assessments due before the date of the sale.[91]

In *Settlers Walk Home Owners Ass'n v. Phoenix Settlers Walk, Inc.*[92] an Ohio appellate court reached the same conclusion about lien priority as the court in *Westin Hills*, but in doing so, it confronted and rejected the association's analogy to liens for future advances.[93] Unlike *Westin Hills,* the dispute in *Settlers Walk* did not involve a first mortgage. The condominium declaration provided expressly that the association's lien was subordinate to first mortgage liens,[94] and the association did not challenge the first mortgagee's priority.[95] The association did contend, however, that its lien was superior to junior mortgages recorded after the declaration.[96] The trial court had held that the declaration created a lien for future assessments,[97] in the same way a recorded mortgage contemplating future advances creates a lien for those future advances. A lien covering future advances is superior to other liens recorded after the mortgage was executed and before the future advances are made.[98] The appellate court rejected the analogy, explaining only that "this is not a case about future advances from a mortgagee, but rather, yearly assessments against the subject property levied by a homeowners association for common and neighborhood expenses."[99]

Unlike the court in *Settlers Walk*, the Florida courts have suggested that an association's lien would relate back to the date of the declaration if the declaration itself includes specific language providing that the lien relates back or otherwise takes priority over intervening mortgages.[100] But the typical declaration does not include that

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87. *Id.* at 381.
88. *Id.*
89. *Id.*
90. *Id.* at 384.
91. *Id.* at 386–87.
92. 2015 WL 7430296 (Ohio Ct. App. Nov. 23, 2015).
93. *Id.* at *7.
94. *Id.* at *1.
95. *Id.* at *4 (noting that the parties had stipulated that the association's lien was inferior to the first mortgage lien).
96. *Id.* at *1.
97. *Id.* at *7.
98. *Id.*
99. *Id.*
100. The principle was articulated by the Florida Supreme Court in *Holly Lake Ass'n v. Federal National Mortgage Ass'n*, 660 So. 2d 266 (Fla. 1995).

specific language, leading the Florida courts to hold that the association's lien does not relate back to the declaration.[101]

b. Remedies Against the Mortgagee for Dilatory Tactics

In another Florida case, the association tried, unsuccessfully, to argue that mortgagee banks should forfeit their lien priority when they unduly delay foreclosure proceedings. In *U.S. Bank National Ass'n v. Farhood*,[102] the bank brought a foreclosure action, naming the condominium association as a defendant based on the association's lien for unpaid assessments. The association counterclaimed for foreclosure on its lien, and the litigation dragged on. Nearly five years after the bank filed its complaint, the trial court found that the bank's failure to pursue the litigation had been "willful, deliberate, and/or contumacious,"[103] and purported to exercise its equitable power to give the association first lien priority, superior to the claims of the bank. On appeal, the court reversed, holding that the trial court's "declaration of lien priority as a sanction impermissibly overlooks the common law and encroaches on the Legislature's codification of well-established property rights."[104]

In *Farhood*, the court rejected the association's effort to alter lien priority. In *Palms & Sands Owners Ass'n v. Bank of America, N.A.*,[105] the association sought instead to hold the bank liable, on theories of unjust enrichment and implied contract, for assessments the association could not collect as a result of the bank's delay in foreclosing. This tactic proved equally unavailing. The unit owner had defaulted both on his bank loan and on his monthly assessments, and then died.[106] His unit was valued at less than $60,000, while its encumbrances exceeded $200,000.[107] The association contended that the bank had strategically delayed foreclosing to allow market conditions to improve, and that the bank enjoyed the benefits the association provided in maintaining the unit, while avoiding paying the monthly assessments the bank would incur if the bank were to acquire title by foreclosure.[108] In dismissing the association's claim, the court first noted that the association had identified no contract with the bank, and then held that the association had identified no unjust enrichment because even if the bank's foreclosure would extinguish the association's lien for past assessments, the deceased unit owner and his (presumably insolvent) estate would remain personally liable for the assessments.[109]

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101. *See* U.S. Bank Nat'l Ass'n v. Grant, 180 So. 3d 1092 (Fla. Dist. Ct. App. 2015) (declining to give the association's lien priority because the declaration did not include the specific language required by *Holly Lake)*. The court declined to apply a subsequently enacted Florida statute because the mortgage and note were enacted before the effective date of the statute.

102. 153 So. 3d 955 (Fla. Dist. Ct. App. 2014).

103. *Id.* at 957.

104. *Id.* at 958.

105. 2015 WL 9273022 (Cal. Ct. App. Dec. 18, 2015).

106. *Id.* at *2.

107. *Id.*

108. *Id.*

109. *Id.* at *4. The court also noted that the defendant bank in this case held a second deed

c. What Rights Survive a Mortgagee's Foreclosure Sale?

If a mortgage enjoys priority over the association's lien, it is clear that the proceeds of the mortgagee's foreclosure sale will be applied first to satisfy the mortgage. If the sale price is insufficient to satisfy the mortgage, the association takes nothing. But can the association recover back assessments from the foreclosure sale purchaser? Logically, the answer should be no.[110] If the purchaser is obligated to pay back assessments, the purchaser will bid less at the foreclosure sale, in effect giving the association's lien priority over the mortgage.

Nevertheless, in *First State Bank v. Metro District Condominiums. Property Owners' Ass'n*,[111] the Arkansas Supreme Court, relying on statutory language, held that the association's right to unpaid assessments survives the foreclosure sale. The statute provided that upon sale of a unit, "the purchaser . . . shall be jointly and severally liable with the seller for the amounts owing by the latter . . . up to the time of the conveyance."[112] The court noted that nothing in the statute excepted foreclosure sales from the statute's command, rejecting the mortgagee's argument that the statute only makes the purchaser liable for amounts owed by the mortgagee—which in this case, according to the mortgagee, was nothing.[113] The case illustrates a court's willingness to distort the clear intent of the statutory scheme to reach a result that is sensible as a matter of policy.

The Wisconsin Supreme Court was not willing to go so far in *Walworth State Bank v. Abbey Springs Condominium Ass'n*.[114] In *Walworth*, after the mortgage foreclosure sale, the association attempted to enforce a policy precluding a foreclosure sale purchaser from using the association's recreational facilities unless the purchaser paid assessments that had accumulated before the foreclosure sale.[115] When a foreclosing bank challenged the policy, the court held first that the Wisconsin statute—which explicitly made purchasers through a "voluntary grant" liable for past-due assessments—did not apply to foreclosure sale purchasers.[116] The court then held that because the purchasers' liability for past-due assessments would be extinguished as a result of foreclosure, the association could not prohibit access to facilities as a consequence of failure to pay those assessments.[117] Justice Shirley Abrahamson dissented. As a matter of policy, she emphasized the fact that if an association cannot recover delinquent assessments from a unit owner or its successor, the cost will be

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of trust, and that it was not clear the bank benefited from the association's upkeep of the premises, because any sale proceeds from the underwater property would likely be distributed to the holder of the first deed of trust—a nonparty to the action. *Id.* at *5.

110. For a decision reaching this conclusion, see *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.*, 30 So. 3d 579 (Fla. Dist. Ct. App. 2010).

111. 432 S.W.3d 1 (Ark. 2014).

112. *Id.* at 5.

113. *Id.*

114. 878 N.W.2d 170 (Wis. 2016).

115. Mortgagee bank purchased at the foreclosure sale and then arranged a sale to new buyers. *Id.* at 174. When the buyers learned of the policy and the amount of outstanding assessments, the buyers refused to close. *Id.*

116. *Id.* at 175–76.

117. *Id.* at 179.

passed on to other owners.[118] As a matter of logic, she argued that if the association could not enforce its policy against recreational use against a foreclosed property, it was not apparent why other restrictions on use (such as no-rental restrictions) would survive foreclosure.[119]

First State Bank and *Walworth* illustrate the confusion about the effect of foreclosure even when the statute makes it clear that the mortgagee bank enjoys lien priority. Part of the confusion is no doubt due to judicial recognition that the statutory lien priority makes for bad policy, but the resulting uncertainty underscores the need for reform.

d. What Counts as a Mortgage with Priority over the Association's Liens?

Recall that in states that have adopted a variant of the FHA's Model Condominium Act, a condominium's lien is subordinate to a first mortgage, but is superior to most other mortgage liens.[120] Missouri had adopted a variant on the FHA's Act that gave the association's lien priority over all mortgages except "a mortgage . . . for the purchase of a unit."[121] In *Ventana Owners Ass'n v. Ventana KC, LLC*,[122] the association prevailed on its claim that its lien for delinquent assessments was superior to the lien of a construction mortgage that made no reference to "purchase money."[123] The mortgagee acquired title to fifty-five units through foreclosure of its "construction mortgage."[124] After the mortgagee's foreclosure, the association foreclosed on its lien for assessments due for a period before the transfer to the mortgagee through foreclosure.[125] The mortgagee sought summary judgment, contending that the foreclosure cut off its obligation for pre-foreclosure assessments.[126] Although the trial court granted the motion, the Missouri Court of Appeals reversed, concluding that the construction mortgage lien did not fall within any of the statutory exceptions to the association's lien priority.[127]

Ventana establishes that in those states that give association liens express priority over some but not all mortgages, the association may be able to characterize the particular mortgage as falling outside the scope of those prioritized by the statute.[128]

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118. *Id.* at 183 (Abrahamson, J., dissenting).

119. *Id.* at 185–86.

120. *See supra* text accompanying note 15.

121. MO. ANN. STAT. § 448.3-116(2)(3) (2014) (current version at § 448.3-116.(2)(2) (West Supp. 2017). In 2014, the Missouri legislature amended the statute, primarily to give associations a super priority for six months of assessments. *Id.* The court concluded that the prior statute applied to the facts in the case.

122. 481 S.W.3d 75 (Mo. Ct. App. 2015).

123. *Id.* at 80.

124. *Id.* at 76.

125. *Id.*

126. *Id.* The mortgagee also relied on a provision in the association bylaws. *Id.*

127. *Id.* at 77–80.

128. New York associations tried a similar approach, without success, in *Plotch v. Citibank, N.A.*, 54 N.E.3d 66 (N.Y. 2016). New York imposes a tax on the amount of any recorded mortgage loan. N.Y. TAX LAW § 253 (McKinney Supp. 2017). When a mortgagor seeks to refinance a mortgage to obtain additional money, the parties seek to avoid the tax by having the mortgagor take out a second mortgage, which is then consolidated into a single

Ventana, however, provides little comfort to associations other than condominiums covered by a variant of the FHA Model Act.

2. Litigation in States Recognizing Super Priority for Association Liens

UCIOA's six-month super priority was designed to increase the protection available to associations. If a mortgagee bank were to foreclose on a defaulting unit owner—the typical situation until recently—the foreclosure would leave six months of assessments intact, but the remainder of the association's lien would be subordinate to the mortgagee's lien.[129] This split priority provides the foreclosing bank with an incentive to find a bidder who is willing to pay, in total, the outstanding amount of the loan plus six months of assessments; if the bank cannot find such a bidder, the bank will not be able to collect the full outstanding balance of the loan. By contrast, if the association enjoyed no priority, the bank would be content to find a bidder who would pay a price equal to the outstanding mortgage debt.

Suppose, however, as has happened in the years since 2007, the mortgagee delayed foreclosing[130] or did not foreclose at all. What consequences would flow from the association's foreclosure of its own lien? That issue has been the focus of considerable litigation over the last five years, with courts typically giving a broad construction to association super priority.

a. Super Priority or Payment Priority?

Until recently, courts had not considered the meaning of split priority when the association, not the bank, brings the foreclosure action.[131] Does the bidder at the association's foreclosure sale buy the unit entirely free of the bank's mortgage lien, or does the bidder buy subject to the bank's mortgage?

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mortgage. *See, e.g.*, City of New York v. N.Y. State Tax Appeals Tribunal, 660 N.Y.S.2d 753 (N.Y. App. Div. 1997). In that way, the mortgagor pays tax only on the additional amount, rather than paying tax on the entire mortgage amount. *See id.* New York also provides that condominium association liens enjoy priority over junior mortgages, but not first mortgages. N.Y. REAL PROP. § 339-z (McKinney 2015). In *Plotch*, when the condominium foreclosed on a lien for unpaid common charges, the foreclosure sale purchaser sought a judgment contending that he took free of the portion of the consolidated mortgage that was originally a "second" mortgage. 54 N.E.3d at 67. The Court of Appeals rejected the argument, concluding that the entire consolidated mortgage qualified as a "first mortgage" within the meaning of the statute. *Id.* at 69.

129. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014) (noting that the six-month priority "constituted a significant departure from pre-existing practice" and was premised on the assumption that mortgage lenders would foreclose on defaulting owners and pay unpaid expenses up to six months' worth to the association to satisfy its limited priority lien).

130. For discussions on incentives that have led mortgagees to delay foreclosure during the recent mortgage crisis, see Thompson, *supra* note 72, at 777–80.

131. Indeed, one commentator assumed, as recently as 2011, that the super priority lien "does not have a true priority status under UCIOA since this six-month assessment lien cannot be foreclosed as senior to a mortgage lien." Boyack, *supra* note 21, at 99.

In a series of recent cases, courts have consistently held that the association's super priority enables the association to sell a delinquent unit free of all mortgage liens. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*,[132] decided by the Nevada Supreme Court in late 2014, is illustrative. The Nevada legislature modeled its statute after UCIOA, but provided associations with a super priority for nine months of unpaid dues rather than six.[133] In *SFR*, unit owners defaulted on both their association dues and on their deed of trust.[134] The association and the bank brought separate foreclosure proceedings.[135] At the association's sale, SFR Investments purchased and received a trustee's deed.[136] SFR then filed an action to quiet title against the bank, to quiet title to the property, and to enjoin the bank's scheduled foreclosure sale.[137]

In holding that the trial court had erred in denying injunctive relief to the association, the Nevada Supreme Court rejected the bank's argument that the statute created only a "payment priority" for nine months of assessments rather than a "true priority."[138] The bank had argued that the association's lien did not acquire super priority status until the holder of a security interest forecloses on that interest, at which point the foreclosure sale purchaser would have to pay off the association's lien in order to obtain clear title.[139] The court acknowledged that two federal district courts in Nevada had previously indicated that foreclosure of an association lien does not extinguish a security interest, but concluded that both the statutory text and the official comments to UCIOA established that the statute creates a true priority lien.[140] As a policy matter, the court emphasized the importance of allowing the association to foreclose in order "[t]o avoid having the community subsidize first security holders who delay foreclosure, whether strategically or for some other reason."[141]

Finally, the court rejected the bank's argument that it would be unfair to allow a lien for nine months of association dues to extinguish a security interest securing hundreds of thousands of dollars of debt. The court noted that the bank had alternative means to protect its security interest: paying off the association lien or establishing an escrow to avoid using its own funds to pay delinquent dues.[142]

The *SFR* decision is particularly important because Nevada was especially hard hit by the housing recession, leading to default on many association assessments. But other courts have reached the same conclusion: the statutory super priority confers on associations the power to foreclose and does not limit them to mere payment priority in a foreclosure action brought by a mortgagee bank.[143]

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132. 334 P.3d 408 (Nev. 2014).

133. NEV. REV. STAT. ANN. § 116.3116(2) (LexisNexis Supp. 2016).

134. *SFR Invs.*, 334 P.3d at 409.

135. *Id.*

136. *Id.*

137. *Id.* at 410.

138. *Id.* at 413–14.

139. *Id.* at 412.

140. *Id.* at 412–13. The court also noted that several previous Nevada state and federal courts had reached the same conclusion. *Id.*

141. *Id.* at 414.

142. *Id.*

143. *E.g.*, Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A., 98 A.3d 166 (D.C. 2014); Twenty Eleven, LLC v. Botelho, 127 A.3d 897 (R.I. 2015); BAC Home Loans

b. Redemption Rights

What recourse does a mortgagee bank have when the association conducts a foreclosure sale? Of course, the bank can bid at the association's sale, paying off the association's lien in order to protect its interest. But can the bank redeem its interest *after* the sale by paying off the foreclosure sale purchaser? That issue, which depends entirely on the content of state redemption law, reached the Washington Supreme Court in *BAC Home Loans Servicing, LP v. Fulbright*.[144] Washington statutes entitled a creditor having a lien "subsequent in time" to a foreclosing lien to "redeem" property from a foreclosure sale purchaser by reimbursing the purchaser for the amount of the bid and all other sums paid by the purchaser for taxes and assessments up to the time of redemption.[145] In *BAC Servicing*, the prior owner had purchased a condominium with a $277,000 mortgage loan.[146] When she defaulted on her condominium assessments in 2008, the condominium foreclosed.[147] At the foreclosure sale, Fulbright bought for $15,000.[148] The bank sought to redeem its interest, and Fulbright's answer and counterclaim sought to quiet title to the unit in her favor.

The Washington courts took it for granted that the association's super priority lien extinguished the bank's security interest.[149] But the trial court and the Washington Court of Appeals held that the bank was not entitled to redeem because its lien was not "subsequent in time" to the association's lien. The association's lien, the court of appeals reasoned, did not arise until the assessments became delinquent.[150] As a result, the bank's interest could not be "subsequent in time" to the association's lien, and the bank was therefore not entitled to redeem. The Washington Supreme Court reversed, holding that the association's lien arose when the condominium recorded its declaration, not when the assessments became delinquent.[151] In so holding, the court analogized the association's lien to a lien for future advances[152]—the analogy rejected, in a different context, by the Ohio court in the *Settlers Walk* case. In the meantime, however, the Washington legislature had amended its redemption statute to permit redemption by the holder of a lien "subsequent in priority" rather than "subsequent in time"—making the *BAC Home Loans* holding irrelevant for future cases.

Servicing, LP v. Fulbright, 328 P.3d 895 (Wash. 2014).

144. 328 P.3d 895.

145. WASH. REV. CODE ANN. § 6.23.020(2) (West 2016) (providing the mechanics of redemption); *id.* § 6.23.010 (amended 2013) (according redemption rights to persons having a lien "subsequent in time").

146. *BAC Home Loans Servicing*, 328 P.3d at 896.

147. *Id.*

148. *Id.*

149. The Washington Supreme Court concluded that the association's lien dated from the time the declaration was recorded, analogizing to a lien for future advances. *Id.* at 899. Note that this analogy is the one explicitly rejected by the Nebraska court in the *Westin Hills* case, *see supra* notes 86–91 and accompanying text.

150. BAC Home Loans Servicing, LP v. Fulbright, 298 P.3d 779, 782 (Wash. Ct. App. 2013).

151. *BAC Home Loans Servicing*, 328 P.3d at 899.

152. *Id.*

States like Washington that provide a redemption right for junior lienors invariably place a time limit on exercise of that right. When the mortgagee does not redeem within the time period, the mortgagee forfeits its opportunity to protect its security interest. *Twenty Eleven, LLC v. Botelho*[153] involved facts similar to those in *SFR Investments,* but the Rhode Island Supreme Court emphasized the mortgagee's failure to exercise its statutory redemption rights in holding that the purchaser at the association's foreclosure sale was entitled to enjoin mortgagee from foreclosing on its first mortgage.[154] Prior owner defaulted both on his $114,400 mortgage loan and on his condominium assessments.[155] The condominium association foreclosed and executed a deed to the purchaser for $21,000.[156] In holding that the purchaser was entitled to enjoin the bank's proposed foreclosure sale, the court emphasized that in 2008, the state legislature had amended its statute governing foreclosure of a condominium lien to provide explicitly that a first mortgagee would have a thirty-day right of redemption.[157] The court reasoned that there would have been no reason to provide such a right of redemption if the first mortgagee's lien was superior to that of the association.[158] The court concluded that the redemption right was designed to protect mortgagees from "the harsh reality that foreclosure on a condominium assessment super-priority lien could wipe out their security interests."[159] Because the lender in *Twenty Eleven* did not avail itself of the redemption right, the lender was not entitled to dismissal of the foreclosure sale purchaser's complaint.

c. Inadequacy of Foreclosure Sale Price

In some jurisdictions, a junior lienor may be entitled to set aside a foreclosure sale for inadequacy of price, although the standard for proving inadequacy will typically be quite high in light of the general understanding that foreclosure sales typically bring less than market price. The same rules apply when an association forecloses on its lien. For instance, in *Chase Plaza Condominium Ass'n v. JPMorgan Chase Bank, N.A.*,[160] the District of Columbia Court of Appeals, after holding that the an association's foreclosure sale could extinguish the interest of a mortgagee bank, remanded for further proceedings, indicating that on remand, one of the issues to be addressed was the claim that "the foreclosure sale should be invalidated because the purchase price was unconscionably low."[161]

153. 127 A.3d 897 (R.I. 2015).
154. *Id.* at 905–06.
155. *Id.* at 899.
156. *Id.*
157. *Id.* at 905.
158. *Id.*
159. *Id.* at 906.
160. 98 A.3d 166 (D.C. 2014).
161. *Id.* at 178 n.8.

d. Multiple Six-Month Priorities

Many jurisdictions authorize relatively quick non-judicial foreclosures of association liens (and mortgage liens). Other jurisdictions, however, require judicial foreclosure proceedings, which are often time-consuming, especially during an era of rampant defaults and foreclosures. If an association seeks to enforce a lien for six months of unpaid assessments, and the unit owner defaults on additional assessments before the association obtains an adjudication with respect to its first enforcement action, can the association tack multiple six-month periods together to obtain priority for additional assessments?

In *Drummer Boy Homes Ass'n v. Britton*,[162] decided in March 2016, the Supreme Judicial Court of Massachusetts held that the association could tack six-month periods together.[163] The decision rested in large measure on the language of the Massachusetts statute (which was not derived from any of the uniform acts), but the policy concerns expressed by the court might lead other states to take the same approach. *Drummer Boy Homes* was not the product of the foreclosure crisis. Well before 2008, unit owners began withholding their assessments because of a dispute over the association's parking rules and fines.[164] In August 2007, the association brought an action to recover unpaid assessments and to enforce a priority lien that would be superior to the first mortgage executed by unit owners.[165] Six months later, in February 2008, the association filed a second action to enforce a lien for common expenses that had accrued since the association filed the first action.[166] In October 2008, the association repeated the process and, on the association's motion, the court consolidated the three actions.[167] Subsequently, the trial court entered judgment in the association's favor on its claim for more than $22,000, but concluded that the association was only entitled to a super priority lien for the six-month period preceding commencement of the first action.[168]

Although the Appellate Division affirmed the trial court's determination, the Supreme Judicial Court reversed, holding that the association's priority lien extended to the three successive periods.[169] The court relied on a statute (enacted in 1998) that precluded an association from enforcing its "priority liens" if the first mortgagee agreed in writing to pay six months of delinquent assessments plus all future common expenses until the date the "mortgagee's mortgage is foreclosed or otherwise no longer encumbers the unit."[170] The court emphasized first, that the statute referred to priority *liens* in the plural, and second, that there would be no reason for the mortgagee to avail itself of the statutory procedure if the association could never obtain more than six months of priority.[171] But the court also emphasized the basic reason

162. 47 N.E.3d 400 (Mass. 2016).
163. *Id.* at 406.
164. *Id.* at 402.
165. *Id.* at 402–03.
166. *Id.* at 403.
167. *Id.*
168. *Id.* at 403–04.
169. *Id.* at 409–10.
170. *Id.* at 408.
171. *Id.* at 409.

for the super priority: the need to avoid having condominium buildings fall into disrepair when unit owners ceased making payments for common expenses.[172]

If *Drummer Boy* were generalized to other super priority jurisdictions, it would solve many of the problems for associations created by delay in the mortgage foreclosure process. By foreclosing on its lien for assessments, the association could force a mortgagee bank to pay off the lien to avoid the result in cases like *SFR Investments*, *Twenty Eleven*, and *Chase Plaza.* The association could then repeat the process until the bank completed its foreclosure proceedings, thus ensuring payment of all assessments.

Neither UCIOA nor the Uniform Condominium Act includes language as favorable to associations as the language in the Massachusetts statute. Mortgagee banks would undoubtedly argue that the *Drummer Boy* result in effect gives associations complete lien priority, rather than the six-month split priority intended by the statute. How courts respond to that cogent argument—and to the competing policy concern highlighted by the court in *Drummer Boy*—remains to be seen.

3. The Federal Role

Lien priorities have traditionally been a bailiwick of state law. To the extent state legislatures and courts have extended priority to association liens, banks and federal agencies have challenged association priority in federal court. Due process challenges, even if successful in the short term, are unlikely to hamper association collection efforts in the long term. By contrast, the federal statutory challenges, if ultimately upheld by courts, could cripple association efforts to collect defaulting assessments in times of declining property values. To date, much of the litigation over these issues has been centered in the Nevada federal courts—largely in response to the *SFR Investments* decision.

a. Procedural Due Process Challenges

If a valid association foreclosure sale can extinguish a first mortgage—as courts have held in states with statutes creating super priority—one would expect mortgagee banks to challenge the validity of foreclosure sales. Especially where, as in Nevada, state statutes authorize nonjudicial foreclosure sales, those sales are open to challenge for procedural irregularities, and particularly for inadequacy of notice. And, in fact, mortgagee banks have had success in federal court in challenging those sales.

Nevada's nonjudicial foreclosure statute required a foreclosing association to provide notice by certified or registered mail to the property's owner, but required mail notice to holders of security interests only if they had affirmatively notified the association of the existence of its security interest.[173] After the Nevada Supreme Court decided, in *SFR Investments*, that an association's foreclosure of its valid lien would extinguish the interest of a mortgagee, banks challenged the constitutionality of the Nevada statute as inconsistent with the Due Process Clause's notice requirements.

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172. *Id.* at 407.
173. SFR Investments Pool 1 v. U.S. Bank, N.A., 334 P.3d 408, 411 (Nev. 2014).

Although one Nevada federal district court concluded that nonjudicial foreclosure was not state action, and therefore not subject to due process constraints,[174] the Ninth Circuit ultimately held that the statute's opt-in provision unconstitutional.[175]

The Nevada legislature rendered the notice issue moot, at least for future foreclosures, by amending the statute to require the association to provide notice to holders of recorded security interests.[176] Other states have avoided the problem by adopting UCIOA's recommendation that the association provide "reasonable notice . . . to all lien holders . . . whose interest would be affected."[177] Procedural due process, then, should provide minimal interference with state lien priorities.

b. Substantive Due Process Challenges

Mortgagee banks also challenged association foreclosure sales on the ground that applying the *SFR Investments* decision retroactively would violate their substantive due process rights. They argued that the "Nevada Supreme Court's interpretation of [its statute] contrary to how a reasonable lender would have understood it when giving his loan, deprives [the lender] and others of their fundamental right to property."[178] One federal district court resolved the issue by bypassing the substantive due process issue and concluding that the Nevada Supreme Court would not apply the *SFR Investments* decision retroactively.[179] Other federal district courts have certified the retroactivity question to the Nevada Supreme Court, deferring the substantive due process issue until after the Nevada Supreme Court resolves the retroactivity question as a matter of state law.[180]

Ultimately, the substantive due process argument is a weak one. In Nevada, the super priority statute was on the books before the mortgagee banks extended credit. UCIOA, on which the Nevada statute was based, includes in its comment the statement that "[a]s a practical matter, secured lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit."[181] In light of that background, the argument that mortgagee banks were unfairly surprised by the *SFR Investments* decision is not plausible.

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174. Thunder Props., Inc. v. Treadway, No. 3:15-cv-00141-MMD-VPC, 2016 WL 1298112 (D. Nev. Mar. 31, 2016).

175. Bourne Valley Court Tr. v. Wells Fargo Bank, NA, 832 F.3d 1154 (9th Cir. 2016).

176. NEV. REV. STAT. ANN. § 116.31163 (as amended by Act of June 1, 2015, 2015 Nev. Stat. 1504, ch. 304, §1 (effective Oct. 1, 2015)).

177. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116(k)(4) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014). For states adopting this provision, see, for example, DEL. CODE ANN. tit. 25, § 81-316(j)(4) (2009); VT. STAT. ANN. tit. 27A, § 3-116(j) (Supp. 2016).

178. Christina Trust v. K & P Homes, No. 2:15-cv-01534-RCJ-VCF, 2015 WL 6962860, at *3 (D. Nev. Nov. 9, 2015).

179. *Id.*

180. *See* Las Vegas Dev. Grp., LLC v. 2014-3 IH Equity Owner, LP, No. 2:15-cv-0917-GMN-NJK, 2016 WL 3584633 (D. Nev. July 1, 2016); Eagle Inv'rs v. Bank of Am., N.A., No. 2:14-cv-0123-GMN-NJK, 2016 WL 3584628 (D. Nev. June 30, 2016).

181. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994); *id.* § 3-116 cmt. 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1982).

Moreover, even if the substantive due process challenges were to succeed with respect to mortgages in existence at the time *SFR Investments* was decided, associations would be protected going forward. No bank extending a mortgage today—in Nevada or any other state with a super priority statute—could claim that it was not on notice that foreclosure of the association's lien might extinguish the mortgage.

c. The Federal Statutory Claim: The Housing and Economic Recovery Act of 2008

Ultimately, a federal statute presents the most serious federal threat to enforcement of association liens. The Housing and Economic Recovery Act of 2008 (HERA) created the Federal Housing Finance Agency,[182] gave the Agency supervisory authority over "regulated entities" including Fannie Mae and Freddie Mac,[183] required the Agency to act as receiver for regulated entities if the entity became insolvent for a period of time,[184] and provided—critically for our purposes—that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency."[185] Mortgagee banks have argued that the federal statute preempts state law, and that associations may not foreclose any liens against mortgages held by Fannie Mae and Freddie Mac. A series of Nevada federal district courts and at least one Nevada state court have agreed and have held that association foreclosures would extinguish interests held by the FHFA.[186] Those holdings in turn trigger factual inquiries into whether the FHFA held an interest in the property at the time of the foreclosure sale.[187]

By way of background, Congress created Fannie Mae and Freddie Mac as government-sponsored agencies designed to provide a source of funding for residential mortgages.[188] They operated by purchasing mortgages from banks, pooling them into

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182. 12 U.S.C. § 4511(a) (2012).

183. *Id.* § 4511(b).

184. *Id.* § 4617(a)(4)(A) ("The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that – (i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others . . . .").

185. *Id.* § 4617(j)(3).

186. The federal court cases include LN Mgmt. LLC Series 2543 Citrus Garden v. Gelgotas, No. 2:15-cv-00112-MMD-CWH, 2016 WL 1071005 (D. Nev. Mar. 16, 2016); Kielty v. Fed. Home Loan Mortg. Corp., No. 2:15-cv-00230-RCJ-GWF, 2016 WL 1030054 (D. Nev. Mar. 9, 2016); Skylights LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015); Berezovsky v. Moniz, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15, 2015). A Nevada state court reached the same conclusion in *Fort Apache Homes, Inc. v. JPMorgan Chase Bank*, No. A-13-691166-C, 2016 WL 3082397 (Nev. Dist. Ct. Apr. 14, 2016).

187. *See* Fed. Hous. Fin. Agency v. SFR Invs. Pool 1, LLC, No. 2:15-cv-01338-GMN-CWH, 2016 WL 2350121, at *4 (D. Nev. May 2, 2016) (declining to certify a class because of the "highly individualized factual inquiry" into whether FHFA had an interest in the foreclosed property), *appeal filed sub nom.* FHLMC/Freddie Mac v. SFR Investments Pool 1, LLC, No. 16-15962 (9th Cir. May 27, 2016).

188. For more extensive background, see Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 378–79 (2015).

loans, and selling them to investors with a guarantee against losses from default on the mortgages.[189] Fannie Mae and Freddie Mac also bought mortgages to hold in their own portfolios.[190] When the housing crisis of 2008 brought the solvency of the agencies into question, Congress, as part of the Housing and Economic Recovery Act, authorized an infusion of funds to enable the agencies to provide funds to the mortgage market.[191] As a result, by 2009, the two agencies owned or guaranteed roughly half of all outstanding mortgages in the United States.[192]

Because of the pervasive presence of federal agencies in the mortgage market, super priority statutes will largely become ineffective if they cannot be applied to mortgages held by federal agencies. Professors Freyermuth and Whitman have argued that the federal statute should not be read to preempt state law.[193] In part, they argue that a broad reading of the statute would constitute a deprivation of state-created property rights without due process of law.[194] Whether their view prevails in an appellate court remains to be seen. Whatever the merits of the preemption claim as a matter of statutory construction, a rule precluding association foreclosure would be destructive as a matter of policy—the issue that serves as the focus of the next Part.

III. Reforming the System

The current treatment of association liens is not the product of coherent design, but rather an artifact of history. Before the advent of condominiums in the 1960s, the number of common interest communities was small and the assessments imposed by community associations were relatively low. Banks engaged in conservative lending practices,[195] and in the post-war era, housing prices boomed.[196] In that environment, the relative priority of mortgage liens and association assessments was not terribly important; so long as association assessment liens were binding on successors-in-interest, the primary risk facing associations was delay in collection, not inability to collect.

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189. Cong. Budget Office, Fannie Mae, Freddie Mac, and the Federal Role in the Secondary Mortgage Market, at viii (2010).

190. *Id.*

191. *Id.*

192. *Id.*

193. R. Wilson Freyermuth & Dale A. Whitman, *Can Associations Have Priority over Fannie or Freddie?*, Prob. & Prop., July/Aug. 2015, at 27, 28 ("[N]umerous important contextual differences merit judicial rejection of the FHFA's effort to use 12 USC § 4617(j)(3) as a legal ground to invalidate association lien foreclosure sales . . . ."); *see also* Christian J. Bromley, *Supremacy and Superiority: The Constitution's Effect on State Lien Priority Statutes*, 44 Real Est. L.J. 442 (2016) (discussing preemption argument).

194. Freyermuth & Whitman, *supra* note 193, at 29–30.

195. Historically, banks required a loan-to-value ratio no greater than eighty percent for conforming mortgages, largely because that was the highest ratio federal agencies would insure. *See* Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 Am. U. L. Rev. 1489, 1500–01, 1501 n.46 (2011).

196. The median value of single-family homes in the United States nearly quadrupled between 1940 and 2000, even after adjusting for inflation. *Historical Census of Housing Tables: Home Values*, U.S. Census Bureau, https://www.census.gov/hhes/www/housing/census/historic/values.html (last updated June 6, 2012) [https://perma.cc/BQ2U-PYEX].

The advent of condominiums generated the first statutory attention to the priority of association liens. The success of the condominium model depended on making the condominium attractive to lenders.[197] The FHA Model Act included lien priority provisions that encouraged banks to provide financing for this novel form of housing.[198] The Uniform Condominium Act and UCIOA embraced the six-month super lien not as an optimal solution to the priority problem, but as a compromise.[199]

Common interest communities are now firmly in the mainstream. Despite the 2008 recession, traditional conservative mortgage lending practices are a thing of the past.[200] Housing prices do not always rise. The current environment calls for rethinking of community association lien priorities.

A. The Free Rider Problem

Many of the services provided by the typical community association benefit all members of the common interest community. Consider, for instance, landscaping services, trash removal, and sewer maintenance. All owners of units within the community benefit from attractive surroundings, freedom from trash, and adequate sewer maintenance whether or not they pay for those benefits. In economic terms, these goods are non-excludable. A central problem for the association is eliminating free riders—owners who would benefit from these services without paying for them.

Free riding raises both equity and efficiency concerns. As a matter of equity, the costs of services that benefit all members of the community should not be borne by a subset of community members. As a matter of efficiency, free riding leads to suboptimal production of non-excludable goods and services. Suppose, for instance, that pruning of shrubbery in a community benefits each of 100 unit owners by an average of $10 per month. If pruning costs $800 per month, the benefits exceed the costs. But if individual unit owners can opt not to pay, and more than 20% take that option, the rest of the unit owners will have to pay more than $10 per month to obtain $10 in benefits—leading unit owners to the inefficient decision to forego pruning.[201]

Long ago, property law tackled this problem by holding that community association assessments should be treated as covenants running with the land, binding

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197. *See* Berger, *supra* note 47, at 997–98.

198. *See* FHA MODEL ACT, *supra* note 15, § 23 (giving association lien with priority over all liens except tax liens and first mortgage liens).

199. *See* UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014) (noting that the six-month super lien was designed to create an "equitable balance").

200. Traditional practices developed when mortgage lenders held the mortgages they originated. Local lenders had no way to diversify the risks associated with home prices in their local markets, leading to high loan-to-value ratios. Diversification made possible by securitization allows lenders to mitigate those risks, and makes higher loan-to-value ratios rational, although lenders cannot diversify the risks associated with nationwide real estate price declines. *See generally* Erik F. Gerding, *Bank Regulation and Securitization: How the Law Improved Transmission Lines Between Real Estate and Banking Crises*, 50 GA. L. REV. 89, 96 (2015).

201. *See* Boyack, *supra* note 21, at 83–84 (citing poll indicating that a significant percentage of associations had delayed capital expenditures in response to delinquent assessments).

against successors in interest.[202] Moreover, even foreclosure of a mortgage interest would not extinguish the covenant. That is, the purchaser at a foreclosure sale would not take "free" of the obligation to pay assessments to the association; that obligation continued to run with the land (much like the obligation to pay real estate taxes).[203]

Conceptually, it is difficult to see why the obligation to pay the association's past assessments should be extinguished by a bank foreclosure while the obligation to pay future assessments survives. From the standpoint of notice, the two are equivalent. Neither the mortgagee bank nor a future purchaser knows precisely how much the assessments will be, but a search of recorded documents will reveal that the association has power to levy assessments, and an interested purchaser or mortgagee can then determine what process the association uses for settling on the amount of any assessment.[204] If a recorded declaration binds subsequent purchasers to pay future assessments, the same logic would suggest that a subsequent mortgagee's interest should be subordinate to the obligation to pay delinquent assessments out of the first proceeds of any foreclosure sale.

Conceptual issues aside, according priority to the association's lien reduces the risk of free riding. If the mortgagee bank enjoys priority over the association's lien, the bank reaps the benefit of association maintenance expenditures without having to pay for them. Those expenditures make for a more attractive community, which in turn increases the value of units at any foreclosure sale—value reaped entirely by the bank when the sale price is smaller than the amount of the outstanding mortgage. Moreover, if enough units cease paying assessments, the result is likely to be less maintenance—which has the potential to reduce the value of all units.

B. Cost Avoidance

In addition to reducing the risk of free riding, a rule giving association liens priority over mortgage liens places the risk of default on the party best able to avoid the losses associated with that default. Consider first the traditional rule which gives priority to the mortgagee bank.[205] A community association cannot easily control how much a mortgagee bank lends to a unit owner, and is therefore at risk whenever a bank extends a mortgage with a high loan-to-value ratio.

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202. *See* Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938). *See generally* 2 AMERICAN LAW OF PROPERTY § 9.16 (1952).

203. The FHA Model Condominium Act made it clear that a foreclosure sale purchaser "shall not be liable for the share of the common expenses or assessments by the Association of Apartment Owners chargeable to such apartment which became due *prior to the acquisition of title* to such apartment by such acquirer." FHA MODEL ACT, *supra* note 15, § 23(b) (emphasis added). By necessary implication, the purchaser would remain liable for assessments due *after* acquisition of title.

204. UCIOA, for instance, provides that a common interest community may be created "only by recording a declaration executed in the same manner as a deed." UNIF. COMMON INTEREST OWNERSHIP ACT § 2-101(a). Recordation provides constructive notice to all subsequent mortgagees and purchasers.

205. The FHA established that priority when it developed a model statute in the early 1960s. FHA MODEL ACT, *supra* note 15, § 23(a).

If that risk eventuates and the unit owner defaults on assessments, the association's options are limited. It can impose fines and bring an action against the defaulting owner, but if the owner is insolvent that option has little value. The association can exclude the defaulting owner from common facilities like gyms and swimming pools, both as a means of preventing free riding and of incentivizing the owner to pay assessments.[206] This option, however, is of limited value to the association if most of the assessment goes to pay for general maintenance that all owners will enjoy even if they fail to pay. Even if maintenance of recreational facilities is a significant expense item, the costs are likely to be scaled for use (and payment) by all members of the community; if a percentage doesn't use the swimming pool, maintenance costs do not decrease. The association could maintain an escrow account and require each unit owner to make payments into that account to insure against future defaults, but that solution would present several practical problems. First, because the association is not in a position to know how long a mortgagee bank will delay foreclosure, the association cannot easily determine how much of a reserve will provide adequate protection against default on assessments. Second, unless mortgagee banks are willing to finance the reserve—an issue beyond the association's control—requiring the reserve will make units in the community less marketable to marginal buyers.

By contrast, mortgagee banks are in a stronger position to assess the risk of default and to guard against attendant losses. First, in making loan decisions, banks already assess the borrower's ability to pay the mortgage and the unit's carrying costs.[207] They also require appraisal of the unit that serves as security for the mortgage loan.[208] If they determine that the borrower presents a high risk of default, the bank can require more of a down payment (reducing the risk that the security will be inadequate), can increase the interest rate (to provide compensation for a higher default risk), or can decline to make the loan. In addition, the mortgagee can require the borrower to maintain an escrow account for association dues in the same way banks often require escrow accounts for taxes. Moreover, because the bank is in the best position to estimate how long it will wait before foreclosing for nonpayment, the bank is in the optimal position to determine how large the escrow account should be. Finally, because the bank does have significant control over the pace of foreclosure proceedings, the bank is in the best position to bear the risks associated with foreclosure delay.

Banks cannot account precisely for one significant item: the amount of the assessments imposed by the association. Two related factors, however, make it unlikely that the unit owner will become subject to arbitrary assessments. First, the declaration will provide a formula for allocation of assessments among unit owners, ensuring that all assessments will be shared by owners across the board.[209] Second, democratic

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206. Whether the association can use other strong-arm extralegal tactics, like cutting off water and gas to the unit, is a subject of some controversy. *See* FREEDMAN & ALTER, *supra* note 26, at 88.

207. Federal statute now requires lenders to make a reasonable and good faith determination that the mortgagor has the ability to repay a residential mortgage loan. 15 U.S.C.A. § 1639c(a)(1) (West 2015).

208. Federal law now requires written appraisals for "higher-risk" mortgages. 15 U.S.C. § 1639h(a) (2012).

209. *See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 2-107 (providing for allocation

governance of the association protects all unit owners against excessive assessments; unit owners elect a board to represent their interests, and that board is unlikely to increase assessments unless the assessments generate value (or avoid diminution in value) for the association's unit owners.[210] Banks routinely account for the possibility that real estate taxes will increase, even though real estate taxing authorities may be less responsive to the interests of property owners than are community associations.

Only during a period of developer control of the association might mortgagee banks have a realistic worry about abusive assessments: the developer might attempt to impose on unit owners costs that should be borne by the developer itself. UCIOA and other statutes impose constraints on developers to avoid such abuses.[211] In any event, in case of abuse, the mortgagee would have the same remedy as other unit owners—a breach of fiduciary duty action against the developer who misuses its control of the association.[212] The limited instance of potential developer abuse should not be the tail that wags the dog.

C. UCIOA's Six-Month Super Priority

As originally enacted, UCIOA's six-month super priority for association liens was designed to reduce the risk to associations.[213] The drafters assumed that banks would typically pay off six months of assessments rather than risk foreclosure by the association,[214] and that banks would establish escrow accounts to cover the six months of assessments.[215] The statute's protections might have been sufficient in cases where a unit owner defaulted on assessments, but not the mortgage. The protections might even have been sufficient in cases where the unit owner defaulted on both obligations, and the bank promptly foreclosed on the unit. For the circumstances that unfolded in the aftermath of 2008, UCIOA's approach was inadequate[216]—as the spate of litigation illustrates.

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of allocated interests).

210. *See generally* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 340 (1997) (noting that institutional constraints make it unlikely that unit owners in a community association would take steps that would make them all worse off).

211. For instance, UCIOA limits the period during which the developer can control the executive board of the association. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-103(d).

212. For instance, UCIOA § 3-103(a) provides that "officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty to the association required of a trustee."

213. The provision was based on the assumption that the mortgagee would promptly foreclose and that sale would be completed within six months, "thus minimizing the period during which unpaid assessments would accrue for which the association would not have first priority." UNIF. COMMON INTEREST OWNERSHIP ACT § 3-116 cmt. 2.

214. *Id.* § 3-116 cmt. 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1982).

215. *Id.*

216. As the drafters of recent amendments to UCIOA observed,

> The real estate market facing common interest communities post-2007 is substantially different from the one contemplated by the drafters of the original UCIOA. Many units are "underwater," with values below the outstanding first

In 2014, UCIOA's drafters sought to remedy these defects by extending the super priority to six months *per year* throughout the period of any delay by a foreclosing lender.[217] The amendments reframe the compromise to provide associations with better protection against foreclosure delays. But the amendments remain a compromise without a justification. Certainly associations are better off in a jurisdiction that adopts the amended version of UCIOA, but the drafters provide no reason for avoiding the more obvious alternative: give associations absolute priority over all first mortgages.

D. The Role of Lender Misperception

The major obstacle to sensible reform is the unstated premise that lender opposition will preclude reform proposals that subordinate mortgage liens to association liens. The Federal Housing Finance Agency's position on federal preemption exacerbates the problem. This Part argues that lenders' reflexive quest for lien priority not only conflicts with good policy, but is also inconsistent with the long-term interests of the lenders themselves.

1. The Ex Post Perspective

Consider the mortgagee's interest at the time of foreclosure sale. At that moment, the lender is clearly best off if the mortgage enjoys absolute priority over the association's lien for unpaid assessments. If the mortgagee has foreclosed, the proceeds of the sale will be paid first to satisfy the mortgage, and only if there is anything left over will the association be paid. Similarly, if the association forecloses, the purchaser at the foreclosure sale will take subject to the mortgage. If the unit is underwater, no one will bid at the association's foreclosure sale. The mortgagee will remain free to foreclose on its own schedule, without the obligation to pay association assessments in the interim. By contrast, if the association's lien enjoys priority, the amount the mortgagee recovers at any foreclosure sale will be reduced by the amount of the association's lien.

The UCIOA regime, under which the association holds a super priority for six months of assessment per year, leaves the lender better off than a system that gives the association absolute priority, but not as well off as a system in which the mortgage enjoys absolute priority.

> mortgage balance. More significantly, long delays have developed in the completion of foreclosures. In states permitting only judicial foreclosures, these delays were often beyond lender control. In many situations, however, mortgage lenders strategically delayed the institution or completion of foreclosure proceedings on units affected by common interest assessments.

Id. § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

217. *Id.* § 3-116(c)(1) & cmt. 2. The amendments also made it clear that the association's super lien should be treated as a true lien priority, not a payment priority as the banks had contended in litigation. *Id.* § 3-116(a) ("Any priority accorded to the association's lien under this section is a priority in right and not merely a priority in payment from the proceeds of the sale of the unit by a competing lienholder or encumbrancer.").

Given this *ex post* perspective, lender opposition to any sort of reform is understandable. And this appears to be the perspective lenders take. But this perspective ignores the impact lien priority might have on the value of units in the community, and hence the price at any foreclosure sale.

2. Ex Ante Perspectives

A more comprehensive evaluation of mortgage lender interests would focus on perspectives from at least two earlier points in time: the time the unit owner defaults on an assessment and the even earlier time the lender makes the initial loan.

a. Perspective from the Time of Default

The lender's interests at the time of unit owner default on an assessment may depend on whether the default is an isolated default by the unit owner or part of a wider pattern of defaults of the sort many associations experienced during the recent recession. In the case of isolated default, the mortgage lender is best off with absolute priority over the association's lien. Nondefaulting unit owners are likely to make up any assessment deficiencies in order to maintain their own property values and quality of life, so the single isolated default is unlikely to have any impact on the perceived quality of the association or the unit. As a result, the default is unlikely to have any impact on the price of a unit at a foreclosure sale.

The analysis changes, however, when market forces lead to widespread default on association assessments. Now, the pattern of default creates increased risk that nondefaulting unit owners will vote to reduce maintenance, because they will bear all of the cost of maintenance expenses while reaping only a fraction of the benefit.[218] That, in turn, would reduce the value of the unit on which the mortgagee bank holds a mortgage, thus impairing the bank's security. If only a single mortgagee had financed the purchase of all or most of the units in the community, the mortgagee might be able to avert this situation by committing itself, by contract, to pay all assessments associated with defaulting units. But if, in the more common case, a variety of mortgagees have financed the units in the community, each mortgagee faces a collective action problem: it is in the interest of all lenders, collectively, to have assessments paid and the community maintained, but it is not in the individual interest of any mortgagee to pay without assurance that all of the other mortgagees will also pay. In this situation—which unfolded in many communities in the wake of 2008—giving the association lien priority solves the collective action problem.

b. Perspective from the Time of the Loan

The broadest view of the lender's interest would focus on the time the lender makes the mortgage loan, a time at which the lender does not know which borrowers will default on association assessments and under what circumstances. That is, the

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218. *See, e.g.*, Boyack, *supra* note 21, at 77–79.

borrower might be a lone defaulter in an otherwise healthy community, or the borrower might be one of many defaulters in a community where values have plummeted. The mortgage lender, however, can control the risks associated with the lone defaulter by requiring the borrower to pay assessments in escrow for the period that approximates the delay the bank expects in pursuing foreclosure.[219] By contrast, the mortgage lender has no way to account for the collective action problem that would arise if the association faces multiple defaults. From the lender's perspective, then, the legal rule that protects best against the multiple-default risk should be preferable. That rule would give priority to associations' liens, not to mortgage liens.

3. A Pattern of Ex Post Thinking?

In the big picture, mortgagee banks are better off with a rule that accords priority to association liens. Nevertheless, lenders appear to focus only on the short term: what is best for lenders at the moment of a foreclosure sale.

This kind of *ex post* thinking has been characteristic of banks in other lien priority disputes as well. Consider, for instance *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*,[220] one of the leading cases establishing that association assessments were binding against successor owners. The developer had established a community association with power to make and collect assessments for maintenance of beaches, roads, and common areas.[221] A homeowner defaulted on both the assessments and his mortgage, leading the bank to foreclose and ultimately take title to the home.[222] When, in the midst of the Depression, the association sought to enforce its lien for assessments against the bank, the bank contended that the covenant to pay assessments was unenforceable against successors, litigating to the New York Court of Appeals to avoid paying a trivial amount—even though maintenance of community properties would have been in the interest of banks generally, many of whom had recently acquired title through foreclosure.[223] Elsewhere, I have speculated that the bank might have litigated the *Neponsit* case in the hope that it would lose, establishing a principle that such covenants were generally enforceable.[224] That speculation was based on an assumption that the bank would understand its long-term interest. In light of the more recent battle over lien priorities, the assumption might have been too charitable.

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219. Moreover, lien priority is less likely to be critical when the community is thriving, because a foreclosure sale is more likely to generate enough to satisfy both the mortgage lien and the association lien.

220. 15 N.E.2d 793 (N.Y. 1938).

221. *Id.* at 794.

222. *See* Stewart E. Sterk, *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, *in* PROPERTY STORIES 379, 386 (Gerald Korngold & Andrew P. Morriss ed., 2d ed. 2009).

223. *See id.* at 397.

224. *Id.*

IV. The Road Forward

A. According Priority to Association Liens

The most comprehensive reform would be to subordinate mortgage liens to association liens. That sort of reform requires action at both the federal and state level. At the federal level, uncertainty remains over HERA's coverage.[225] Until that uncertainty is resolved, preemption concerns will stifle reform efforts in the states. Perhaps federal appellate courts will construe HERA narrowly. If not, however, congressional action will be necessary to avoid a blanket prohibition on all association lien foreclosures against units in which federal agencies hold a mortgage interest—a result Congress could not possibly have intended.

At the state level, legislation is the only route to comprehensive reform. The drafters of UCIOA have taken positive steps to protect common interest communities, but in light of the events of recent years, those steps do not go far enough. The drafters are in the best position to lead state legislatures to rethink current lien priorities.

Even if courts and legislatures embraced reform, first mortgage lenders would undoubtedly raise constitutional challenges to legislation that would reduce the priority of existing first mortgage liens,[226] especially in those cases where the declaration explicitly subordinates the association's lien to first mortgage liens.[227] Although these challenges might play well in the political arena, they have little substance as a matter of federal constitutional law.[228] As Part III establishes, according priority to association liens *benefits* mortgage lenders at every moment until the mortgagor defaults. As a result, mortgagees suffer no damages from a loss of formal priority, even in those cases where the declaration explicitly subordinates the association's lien to first mortgage liens. Under these circumstances, a "takings" claim is unlikely to succeed.[229] Indeed, a state could institute formal eminent domain proceedings to "take" the priority of first mortgage liens, and could award a nominal sum to pre-default mortgagees as damages for any supposed loss.[230] A contracts clause claim would fare

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225. Nevada federal district courts have held that HERA bars association foreclosures that would extinguish mortgages owned by the Federal Housing Finance Authority unless the authority consents. *See, e.g.*, JP Morgan Chase Bank, N.A. v. Las Vegas Dev. Grp., LLC, No. 2:15-CV-1701 JCM, 2017 WL 937722 (D. Nev. Mar. 9, 2017), *appeal filed*, No. 17-15680 (9th Cir. Apr. 10, 2017). The issue has not yet been addressed by any federal appellate court.

226. *See id.* (discussing the argument and responses to it).

227. *See* Winokur, *supra* note 63, at 370–72.

228. Mortgagees might also raise issues of state constitutional law. *See e.g.*, Coral Lakes Cmty. Ass'n v. Busey Bank, N.A., 30 So. 3d 579, 584 (Fla. Dist. Ct. App. 2010). Analysis of fifty different state constitutions is beyond the scope of this Article.

229. For a recent empirical study demonstrating the judicial hostility to takings claims, see James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016).

230. In light of the Supreme Court's policy of "affording legislatures broad latitude in determining what public needs justify the use of the takings power," Kelo v. City of New London, 545 U.S. 469, 483 (2005), there is little doubt that a federal constitutional challenge would fail. Protecting associations and their residents against free riding would appear to be at least as justifiable a purpose as promoting economic development in the *Kelo* case, or overcoming oligopoly in the housing market in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229

no better than a takings claim. A contract right is property and may be taken for a public purpose so long as just compensation is paid.[231]

Legislative adjustment of default priority rules would presumably not outlaw subordination agreements going forward. Developers educated by the recent housing crisis, however, should be less likely to include subordination provisions in community declarations—especially because a subordination clause should make the development less attractive to educated consumers.

B. Evaluating a Procedural Alternative

Professor Andrea Boyack has proposed a less direct route to reform: allow a mortgage lender's priority to erode over time if the lender delays foreclosure proceedings.[232] She suggests that if a mortgagee fails to foreclose within six months of default on a first mortgage, "every month of unpaid assessments would become secured by a lien superior in payment priority to the first mortgage."[233] Her creative proposal, like outright subordination of the first mortgage lien, is designed to remove the mortgage lender's incentive to free ride at the expense of the community.[234]

Professor Boyack's proposal has a number of attractive aspects. First, implementation would not depend on construction or amendment of HERA; she focuses only on the consequences of lender delay. Second, even if a state legislature were unwilling to override subordination provisions in existing declarations, her proposal would protect community associations against foreclosure delays. Third, because the proposal appears to be a procedural one, it might avoid specious constitutional challenges by lenders.

Nevertheless, the solution is not perfect. Perhaps because Professor Boyack wrote before a number of state supreme courts had concluded that UCIOA's six-month super priority gave associations a true lien priority rather than a payment priority, Professor Boyack's focus was on increasing payment priority. Her lien-erosion proposal does not give associations the affirmative right to foreclose and extinguish the mortgage lender's lien, even if the mortgagee delays bringing foreclosure proceedings. As a result, her proposal does not protect associations against the collection delays that ensue when banks delay foreclosure sales in the hope of market recovery. A better alternative (albeit one that operates within the realm of uncertainty created by HERA) would simply deprive a first mortgagee of priority over the association if the mortgagee does not hold a foreclosure sale within six months—thus giving the association the affirmative power to foreclose.

Both Professor Boyack's proposal and the complete-loss-of-priority alternative are best suited to states that permit quick and inexpensive nonjudicial foreclosures. By contrast, in states that require judicial foreclosure of mortgages, and particularly in states that have attempted to delay foreclosure sales to protect defaulting residents, it might be impossible to conclude a foreclosure sale within six months of default. In those states, mortgagees might contend that the supposedly procedural reform leaves

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(1984).

231. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 19 n.16 (1977).

232. Boyack, *supra* note 21, at 128–30.

233. *Id.* at 128.

234. *Id.* at 129.

them with no avenue to protect their lien priority, effectively creating the equivalent of an outright reversal of lien priority.

Professor Boyack advances her alternative as an alternative that is politically more palatable than according outright priority to the association's lien.[235] But if banks have the political power to block the most sensible reform—a reversal of current lien priority—it is difficult to see why banks would not exercise the same power to block the less straightforward procedural alternative.

CONCLUSION

Mortgage lenders have been, and continue to be, a powerful lobbying force, both with legislators and with developers. A first step toward reform is to educate those lenders to take a longer view. One of this Article's objectives has been to provide ammunition in that education effort.

235. *Id.* at 128.