In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosures

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IN DEFENSE OF STRICT FORECLOSURE: A LEGAL AND ECONOMIC ANALYSIS OF MORTGAGE FORECLOSURE

JAMES GEOFFREY DURHAM*

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I. Introduction

The law of mortgage foreclosures affects significant economic interests of a large number of people, yet in most states mortgage foreclosure procedures are carried out as a matter of routine. The purpose of this Article is to critically explore the current state of mortgage foreclosure law and to evaluate it in terms of economic efficiency, equity, and fairness. The Article ultimately concludes that strict foreclosure, rather than foreclosure by sale, is the most efficient method of foreclosure, and is equitable and fair in almost every situation.

On initial consideration, any theory premised upon the validity of strict foreclosure may appear defective because foreclosure without sale is perceived as a penalty or a forfeiture and hence inequitable and unfair. However, the thesis of this Article is based on the assertion that the unfavorable reputation of strict foreclosure is unwarranted. As one author has noted:

American students are familiar with the history of the remedy of foreclosure which the English Chancellor developed to relieve mortgagees after the development of the equity of redemption. Americans commonly assume, however, that fore-
closure was a harsh and inequitable weapon which enabled mortgagees to take advantage of luckless mortgagors. Their reaction to the institution is indicated by the epithet which was used in America to describe the institution of foreclosure without a sale—namely, strict foreclosure. Under the English practice the contrast is between "foreclosure" and "foreclosure by sale" as in America. The reason for the English usage is that foreclosure was not in any sense "strict." The Chancellor had been so zealous in his efforts to protect mortgagors and had devised so many safeguards for mortgagors that the remedy of foreclosure did not really foreclose. In England, therefore, the demand for reform in foreclosures came from mortgagees, not mortgagors; the changes which were made by the courts and Parliament in the English law of foreclosure during the nineteenth century were designed to relieve mortgagees and not mortgagors.¹

Modern mortgage foreclosure law is deeply rooted in perceptions of the common law, particularly in the perception of the forces behind strict foreclosure and the effects of strict foreclosure. These perceptions have served as the focus for the development of modern mortgage foreclosure law, including the development of foreclosure by sale and many protections for mortgagors. In seeking to protect mortgagors from mortgagees, the law has been changed to implement poorly defined purposes in furtherance of vague notions of equity and fairness.² Further, attempts at serious reform of mortgage foreclosure law have failed to address what goals foreclosure law should have and how to reach those goals; rather, reforms have been, on the whole, piecemeal tinkering with accepted doctrines.³

Mortgage foreclosures are part of an economic transaction. As such, mortgage foreclosures should and can be analyzed as economic transactions. Efficiency should be the primary goal in devising a mortgage foreclosure process because, in a broad sense, efficiency benefits all parties to the mortgage foreclosure

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² For purposes of this Article, equity and fairness are distinct concepts. Equity is society's method for allocating burdens and benefits. Fairness consists of both procedural fairness in effecting the allocation of societal burdens and benefits, as well as the overall fairness of that allocation.

³ For a discussion of the most prominent proposal for reform, the Uniform Land Transactions Act, see infra notes 159-223 and accompanying text.
process. Once one considers the inefficiency of past and current mortgage foreclosure law and the inefficiency of the reform proposals, one can accept efficiency as a positive goal for mortgage foreclosure law. Almost all reforms which benefit mortgagors are inefficient in that the reforms enhance mortgagors’ bargaining positions and their ability to delay the foreclosure process, neither of which leads to the most efficient result. In addition, large groups of people bear the costs of the current foreclosure process, while very few benefit.

Prompt strict foreclosure offers the most efficient result. Strict foreclosure is a rapid determination of a mortgagee’s and a mortgagor’s economic rights: either the mortgaged property is worth more than the mortgage loan balance and the parties will deal accordingly, or the property is worth less than the mortgage loan balance and the mortgagee will take the property to satisfy the mortgage debt. Efficiency is not society’s only goal, but equity and fairness are served by strict foreclosure in almost all cases.

II. THE STATE OF MORTGAGE FORECLOSURE LAW

A. History

Legal history is a controversial area of legal scholarship. Scholars and practitioners alike question the use and accuracy of legal history when examining some areas of law, and mortgage foreclosure law is probably subject to that criticism. Criticism notwithstanding, a review of the history of this area of the law is important for a critical evaluation of its current status.

4. The parties may agree to change their positions if it is in both parties’ economic interests, or a mortgagor will sell the property to a third party.


6. Without an evaluation of the accepted history of early mortgage law, it is too easy to focus on foreclosure patterns that provide little justification for the law. In updating Professor Osborne’s treatise on mortgage law, Professor Nelson and Dean Whitman excluded pre-fourteenth century English history. Apparently, they used history to explain current law rather than to evaluate it. See generally G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law § 1.2 (1979)[hereinafter cited as Nelson & Whitman].
1. Form of the Transaction

Several terms have developed to describe the transaction in which a lender obtains an interest in a borrower's property to secure payment of a debt. Modern mortgage concepts originated from the concept of a simple pledge.7 "Gage" is the Anglo-Saxon term for pawn or "pledge"8 and is etymologically linked to "vadium," the Roman word for pledge.9 This etymological connection suggests that a connection exists between the Roman civil-law concept of pledge and the English concept of mortgage.

Although the connection between pre-Norman Conquest Anglo-Saxon and Roman land security law cannot be identified with certainty,10 one can ascertain that our present concept of mortgage is similar to its counterpart in Roman law. Unlike Anglo-Saxon law, Roman law contained no distinction between the use of land or chattels as security for debts.11 Roman law provided a simple method for establishing a security interest.12 Roman law did not require a lender to take possession of property used for security; the lender obtained a lien by engaging in a legally recognized notorious act, such as registration in a public office.13 Upon default by the pledgor, Roman law, similar to modern mortgage law, required the pledgee to bring a legal action before realizing on the security.14

The term "mortgage" was probably first used before the time of Glanville, who wrote around 1190.15 Glanville wrote of both the vivum vadium, or live pledge, and the mortum vadium,

8. Chaplin, supra note 7, at 5.
9. Id.
10. 1 L. Jones, supra note 7, § 1a at 3; G. Osborne, supra note 7, § 1 at 2.
11. See Chaplin, supra note 7, at 5.
12. Id.
13. Id.
14. Id. at 7.
15. See generally 1 G. Glenn, supra note 7, § 2 at 3; 1 L. Jones, supra note 7, § 2 at 4; G. Osborne, supra note 7, § 1 at 2; 1 Pollock, supra note 7, at 119; Chaplin, supra note 7, at 8.
or dead pledge (hence "mortgage").\textsuperscript{16} Under a live pledge, the pledgee (gagee) possessed the land and its profits, which the gagor used to reduce the pledgor's (gagor's) debt.\textsuperscript{17} The situation was similar under a dead pledge or mortgage, except that the gagor received the land's profits to compensate him for loaning money to the gagor, and the receipt of profits did not reduce the amount of the original debt.\textsuperscript{18} The mortgage was deemed usurious because the mortgagee was compensated for his loan of money.\textsuperscript{19} Usury was a sin, not a crime,\textsuperscript{20} and religious requirements apparently did not deter all lenders from using the mortgage.\textsuperscript{21}

During Glanville's time, the only gagor recognized in the King's court required the gagor to put the gagor into actual possession of the land.\textsuperscript{22} Interestingly, the gagor did not enjoy continued possession of the gaged land pursuant to any legally enforceable right.\textsuperscript{23} The gagor, or a third party, could force the gagor from the property and the gagor's only legal remedy was a suit for money damages.\textsuperscript{24} However, if the gagor did remain in possession and the gagor failed to pay the debt when due, the pledge became legal title and the gagor became the owner of the gagor's estate.\textsuperscript{25} In order to defend his title, the gagor in Glanville's time was required to prove his gagor's debt.\textsuperscript{26} The gagor's status was later weakened when the developing common law system of estates required that a gagor's interest be quantifiable as an estate for years, an estate for life, or an estate in fee.\textsuperscript{27}

Around 1260, the term of years became a popular form of

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} See generally 1 G. Glenn, supra note 7, § 2 at 4-5; 1 L. Jones, supra note 7, §§ 2-3 at 4-6; G. Osborne, supra note 7, § 1 at 3; 1 Pollock, supra note 7, at 118-19; Chaplin, supra note 7, at 8.
\textsuperscript{19} Late in the Twelfth Century, the receipt of any compensation for a loan of money was usury. This is in contrast to the current definition of usury: the receipt of too much compensation for a loan.
\textsuperscript{20} 1 Pollock, supra note 7, at 119.
\textsuperscript{21} G. Osborne, supra note 7, § 1 at 4.
\textsuperscript{22} Id. at 2; 1 G. Glenn, supra note 7, § 2 at 4.
\textsuperscript{23} 1 Pollock, supra note 7, at 120.
\textsuperscript{24} Id.
\textsuperscript{25} Chaplin, supra note 7, at 8.
\textsuperscript{26} Id. at 9.
\textsuperscript{27} 1 Pollock, supra note 7, at 122.
gage, favored by gagees.28 A gage could require a gagor to transfer his estate to the gagee for a term of years and, if the gagor failed to pay the debt, the gagee gained complete title to the estate.29 Under the term of years gage, the gagee's status was that of tenant, and he was still required to prove the amount of the debt if the gagor did not pay.30

Late in the thirteenth century,31 and certainly by the fifteenth century,32 a transaction similar to the modern mortgage emerged.33 That transaction involved a mortgagor's execution of a deed conveying the property in fee simple to the mortgagee, on the condition that upon payment of the debt, title automatically reverted to the mortgagor.34 On the due date, the mortgagor either paid the debt and regained title, or failed to pay and forever lost his claim to title.35

The development of the rigid categorization of estates in land therefore proved beneficial to mortgagees. As a result of this development, before a mortgagee could obtain fee simple ownership of the land, the mortgagor had to have initially transferred a fee simple estate.36 The mortgagee's position was further strengthened by the development of the conditional deed. A conditional deed of mortgage requires payment of a precise amount at an exact time; a mortgagee's fee simple interest dates from the execution of the mortgage and is only defeasible upon payment that precisely meets the terms of the deed. The conditional mortgage deed has fallen into disuse however, in substance if not in form, as a result of its harsh character:

While a mortgagee's interest in land has for a long period, in this country, been a mere chattel estate, and has amounted in substance to a mere pledge of the land, and is constantly characterized as such, we still continue to create it by a deed professing in terms to grant a conditional fee, and permit to cling

28. Id.
29. Id.
30. Id.
31. Id. at 123.
32. Nelson & Whitman, supra note 6, § 1.2 at 5.
33. Id. See generally 1 G. Glenn, supra note 7, § 2 at 6; G. Osborne, supra note 7, § 5 at 8; Chaplin, supra note 7, at 8.
34. Nelson & Whitman, supra note 6, § 1.2 at 5.
35. 1 G. Glenn, supra note 7, § 2 at 8; Nelson & Whitman, supra note 6, § 1.2 at 6; G. Osborne, supra note 7, § 5 at 9; Chaplin, supra note 7, at 8-10.
36. G. Osborne, supra note 7, § 5 at 8.
to the contract, like a lichen growth, certain embarrassing features of real estate title.\textsuperscript{37}

2. \textit{Lender's Realization on Security}

The demise of the conditional mortgage deed is largely due to the change in, and reliance upon, the procedures lenders use to realize on their security. Professor Glenn once remarked that, "So far as the mortgage is concerned, it is impossible to draw the line between procedure and substantive law."\textsuperscript{38} Procedure became critical because, in many situations, allowing the mortgagee to keep the mortgaged property would constitute a forfeiture,\textsuperscript{39} and the common law chancellors were loath to allow forfeitures.\textsuperscript{40}

In Glanville's time, if the gageor failed to pay the debt, the gagee could use "a writ expressly framed for foreclosure."\textsuperscript{41} This writ was similar not only to a suit for strict foreclosure,\textsuperscript{42} but was also similar to the mandatory Roman law procedure for realizing on a lender's vadium.\textsuperscript{43} The lender was still required to prove his debt before he could obtain a judgment and legal title to the security.\textsuperscript{44}

The lender's burden of proving the debt may explain the shift to the use of conditional deeds.\textsuperscript{45} If the conditional deed operated as written, it forced a mortgagor to bring suit to prove that the mortgage deed's conditions had been met to regain ownership of the security.\textsuperscript{46} In the law courts, therefore, if the date for payment had passed and the condition could no longer be fulfilled, the mortgagee became the owner of the security without having to prove the debt.\textsuperscript{47} It is difficult to determine

\textsuperscript{37} Chaplin, \textit{supra} note 7, at 4.
\textsuperscript{38} 1 G. Glenn, \textit{supra} note 7, § 17.5 at 111.
\textsuperscript{39} A forfeiture occurs when the property is worth more than the amount of the debt. The difference between value and debt is normally referred to as the owner's "equity." If the owner loses his "equity," in theory a forfeiture occurs.
\textsuperscript{40} Thus the maxim: "Equity abhors a forfeiture."
\textsuperscript{41} Chaplin, \textit{supra} note 7, at 7.
\textsuperscript{42} \textit{Id.} See \textit{infra} notes 55, 72-101 and accompanying text.
\textsuperscript{43} Chaplin, \textit{supra} note 7, at 7.
\textsuperscript{44} \textit{Id.} at 9.
\textsuperscript{45} \textit{See supra} note 37 and accompanying text.
\textsuperscript{46} Chaplin, \textit{supra} note 7, at 9.
\textsuperscript{47} Nelson & Whitman, \textit{supra} note 6, § 1.2 at 6.
whether the chancellors of the English courts ever permitted strict adherence to the terms of mortgage deeds.\textsuperscript{48} Apparently, however, the practice of allowing late-paying debtors to regain the security dates back to Roman law.\textsuperscript{49} The chancellors of the English court routinely permitted a mortgagor to make a late payment. This practice became known as the "equity of redemption."\textsuperscript{50}

By the early 1600's the equity of redemption was recognized "as a matter of course and right."\textsuperscript{51} A mortgagor had to tender payment of the debt within a reasonable time in order to redeem his estate.\textsuperscript{52} A mortgagee could deprive a mortgagor of his equity of redemption by seeking a decree that required the mortgagor to pay by a specific date or be precluded from later asserting a claim to the security.\textsuperscript{53} The mortgagee's ability to foreclose the mortgagor's equity of redemption was a logical development because both parties needed to clarify their rights in the security.\textsuperscript{54}

Several methods developed for foreclosing a mortgagor's equity of redemption. Strict foreclosure is the ability to cut off the equity of redemption and, under strict foreclosure principals, the failure to redeem by the mortgagor leaves the mortgagee with absolute ownership of the property. Another foreclosure method is foreclosure by sale, which includes foreclosure by judicially ordered sale and foreclosure by sale authorized by a power of sale contained in the mortgage agreement. Foreclosure by sale enabled mortgagors to avoid the harsh results of strict foreclosure. Unlike strict foreclosure, under a foreclosure by sale the mortgagee does not obtain the security in satisfaction of the debt.\textsuperscript{55} Rather, the security is sold and the mortgagee receives the proceeds of the sale up to the amount of the debt; the mortgagor receives the balance of the proceeds.\textsuperscript{56} If the security is not sold, the foreclosure becomes a strict foreclosure and the mort-

\textsuperscript{48} 1 G. Glenn, supra note 7, § 3 at 12-13; G. Osborne, supra note 7, § 6 at 13.
\textsuperscript{49} 1 G. Glenn, supra note 7, § 3 at 11; G. Osborne, supra note 7, § 3 at 6, 8; 1 L. Jones, supra note 7, § 7 at 10.
\textsuperscript{50} See generally 1 G. Glenn, supra note 7, § 2 at 6-7.
\textsuperscript{51} G. Osborne, supra note 7, § 6 at 13.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} 1 G. Glenn, supra note 7, § 57 at 381.
\textsuperscript{55} Nelson & Whitman, supra note 6, § 7.31 at 519.
\textsuperscript{56} Id.
gagee obtains ownership of the property. 57

In summary, the history of mortgage law demonstrates an effort to avoid forfeitures. Even well-written contracts were not enforced if the enforcement caused one party to profit unfairly from the loss of another. Although forfeitures have been historically disfavored, it was recognized that a court should allow the mortgagee to act in its best interest where a mortgagor has no worthwhile interest. Early courts resolved conflicts between mortgagees and mortgagors on a case by case basis, guided only by nebulous considerations of equity. Those courts' efforts have influenced modern courts, and their concerns are undoubtedly still present in modern courts' undefined sense of equity and fairness.

B. Current Law

This section examines the modern treatment of the equity of redemption, strict foreclosure, and foreclosure by sale. Additionally, it examines current provisions for reinstatement by a mortgagor in default, appraisal of the security as part of foreclosure, statutory redemption, and limitations on deficiency judgments. Each of these concepts has an impact on the efficiency of foreclosure and each indicates some notion of equity and fairness.

1. Reinstatement

Reinstatement statutes allow a mortgagor to negate any attempt by the mortgagee to accelerate the entire loan balance, and thereby avoid foreclosure of the mortgage, by paying all present and future installments due. 58 A reinstatement statute essentially gives a mortgagor an opportunity to require a mortgagee to behave as if a default never occurred. A "quasi-reinstatement" statute has also emerged; if a mortgage agreement does not contain an acceleration clause, quasi-reinstatement statutes normally permit dismissal of judicial foreclosure

57. G. Osborne, supra note 7, § 311 at 648.
58. Nelson & Whitman, supra note 6, § 7.7 at 439. Professor Nelson and Dean Whitman state that an increasing number of states are enacting reinstatement or arrearages statutes. Id.
proceedings upon the mortgagor's payment of past due payments, interest, and costs. Where a mortgage contains an acceleration clause, the mortgagor may only redeem by paying the entire loan balance, interest, and costs.

Ten states have reinstatement statutes. Of the ten, two states allow only foreclosure by sale and their reinstatement statutes are specifically keyed to the judicial foreclosure process. Five states limit reinstatement to situations in which the mortgagee chooses to foreclose by a power of sale. Two states

59. Eight states have quasi-reinstatement statutes. FLA. STAT. ANN. § 702.08 (West 1984); IND. CODE ANN. § 34-1-53-3 (Burns 1962); MICH. COMP. LAWS ANN. § 27A.3110 (West Supp. 1984); MINN. STAT. ANN. § 581.07 (West 1984); Neb. Rev. Stat. § 25-2148 (1979); N.Y. REAL PROP. ACTS. LAW § 1341 (McKinney 1979); N.D. CENT. CODE § 32-19-12 (1983); S.D. CODED LAWS ANN. § 21-47-10 (1979). Three of the eight states also have true reinstatement. MINN. STAT. ANN. § 580.30 (West Supp. 1984); Neb. Rev. Stat. § 76-1012 (1984); WASH. REV. CODE ANN. § 61.24.090 (1984). The statutes in the eight quasi-reinstatement states essentially restate the result a court would normally reach. If a mortgagor pays all that is currently due before a judgment is granted in a foreclosure action or before a court-ordered sale occurs, the mortgagor has cured his default and the judicial proceedings are dismissed. NELSON & WHITMAN, supra note 6, § 7.4 at 430. One critical difference found in many of these statutes applies when a mortgage does not contain an acceleration clause. Unless a statute applies, many courts preclude a mortgagee, who has previously chosen to foreclose for failure to make payments before all payments are due, from bringing a future foreclosure action upon later defaults if the mortgage does not contain an acceleration clause. In such instances, courts find that the initial foreclosure action extinguished the mortgage. Quasi-reinstatement statutes generally provide that, when a mortgagor redeems after judgment but future payments are due on the mortgage, the judgment is satisfied only to the extent of the payments then in default; upon later default, the mortgagee may conduct a foreclosure sale without bringing a new action. The drafters of quasi-reinstatement statutes apparently intended to benefit mortgagees with constantly defaulting mortgagors. Quasi-reinstatement statutes are currently of little use because most mortgages now include acceleration clauses. Id. § 7.6 at 435. Quasi-reinstatement therefore has little impact on current mortgage foreclosure law and its efficiency.

60. See generally supra statutes cited in note 59.


allow reinstatement in both judicial and power of sale foreclosures. 66 One state allows reinstatement in both judicial and power of sale foreclosures of deeds of trust. 66

True reinstatement statutes affect the foreclosure process because a defaulting mortgagor is able to save himself from acceleration. Interestingly, most of the states with reinstatement statutes permit reinstatement in either judicial or power of sale foreclosures, but not both. All the reinstatement statutes provide, however, that in addition to curing a default, a mortgagor must pay his mortgagee’s basic costs in proceeding to foreclosure. 67 With the exception of Nebraska’s statute, all of the reinstatement statutes provide for the mortgagee’s recovery of attorney’s fees. 68 Additionally, all reinstatement statutes except those of Alaska, Minnesota, and Pennsylvania allow a mortgagee to recover trustee’s fees. 69 Alaska, Illinois, and Pennsylvania restrict the number of times a mortgagor may use reinstatement. 70

Although provisions requiring a mortgagor to pay a mortgagee’s costs may deter a mortgagor from abusing the privilege of reinstatement, 71 reinstatement statutes may result in inefficiency. The existence of true reinstatement statutes lengthens the foreclosure process and makes it more expensive in the ten states that have them. Three of the ten states, California, Illinois and Pennsylvania, are among the country’s most populous; this inefficiency is therefore not insubstantial.

2. Strict Foreclosure

Strict foreclosure is a procedure by which a mortgagee gains judicial termination of a mortgagor’s equity of redemption, 72 and becomes the owner of the mortgaged land in satisfaction of a debt. 73 No sale of the property is required. 74 Today, strict fore-

67. See supra statutes cited in note 61.
68. Id.
69. Id.
70. Id.
71. NELSON & WHITMAN, supra note 6, § 7.8 at 441.
72. See supra notes 55-57 and accompanying text.
73. NELSON & WHITMAN, supra note 6, § 7.9 at 443.
74. Id.
closure is rarely used in this country.\textsuperscript{75}

Six states expressly provide for strict foreclosure as a primary method of foreclosure—Connecticut, Maine, Massachusetts, New Hampshire, Vermont, and Illinois.\textsuperscript{76} Of these states, the most limited version of strict foreclosure is found in Illinois. An Illinois appellate court, in \textit{Great Lakes Mortgage Corp. v. Collymore},\textsuperscript{77} construed statutory provisions requiring foreclosure by sale in most instances to nonetheless permit common law strict foreclosure.\textsuperscript{78} At common law, the court found strict foreclosure is available to a mortgagee under limited circumstances.\textsuperscript{79} Additionally, \textit{Collymore} stated that strict foreclosure was permissible only upon proof of certain facts:

(1) that the mortgagor or the owner of the equity of redemption is insolvent; (2) that the value of the property is less than the mortgage indebtedness and taxes on the property; and (3) that the mortgagee accepts title to the property in extinction of the mortgage indebtedness, i.e., that he gives up the right to a deficiency judgment against the mortgagor.\textsuperscript{80}

The court in \textit{Collymore} noted that each of the above facts was

\textsuperscript{75} The predominant form of foreclosure in the United States today is foreclosure by sale—either by judicially ordered sale or pursuant to a power of sale in a mortgage or a deed of trust. \textit{See Nelson & Whitman, supra} note 6, \S 7.9 at 442.


\textsuperscript{77} 14 Ill. App. 3d 68, 302 N.E.2d 248 (1973).

\textsuperscript{78} Id. at 71, 302 N.E.2d at 250.

\textsuperscript{79} Id.

\textsuperscript{80} Id.
proved in that case.\textsuperscript{81} The appellate court subsequently ordered the trial court to enter a decree for strict foreclosure that included a three-month redemption period.\textsuperscript{82}

Connecticut, Maine, Massachusetts, New Hampshire and Vermont have statutes that specifically permit a mortgagee to use strict foreclosure as a primary remedy.\textsuperscript{83} After strict foreclosure is decreed or asserted, these five states give a mortgagor a specific time period in which to redeem.\textsuperscript{84} If the mortgagor does not redeem within that period, his right of redemption terminates.\textsuperscript{85} The redemption period is three years in Massachusetts\textsuperscript{86} and one year in Maine\textsuperscript{87} and New Hampshire.\textsuperscript{88} The redemption period is six months in Vermont, although the court may shorten the redemption period in its discretion.\textsuperscript{89} In Connecticut, a court must set a redemption period when it decrees foreclosure.\textsuperscript{90}

Where a mortgagee can choose between different methods of foreclosure including strict foreclosure, the length of the redemption period affects a mortgagee's decision to choose strict foreclosure. A mortgagee in Massachusetts is likely to opt for foreclosure by sale because Massachusetts law cuts off the ability of the mortgagor to redeem at the time of sale,\textsuperscript{91} while in a strict foreclosure, a mortgagor may redeem for three years after the foreclosure decree.\textsuperscript{92} By contrast, strict foreclosure is more attractive to a mortgagee in Vermont, who must wait just six months or less to determine whether the mortgagor will redeem.\textsuperscript{93} This period of time is typically shorter than the sale process itself.

An analysis of strict foreclosure in Connecticut, Maine,

\textsuperscript{81} Id. at 72, 302 N.E.2d at 251.
\textsuperscript{82} Id. at 73, 302 N.E.2d at 251.
\textsuperscript{83} See supra statutes cited in note 76.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Mass. Gen. Laws Ann. ch. 244, §§ 1, 18 (West 1959).
\textsuperscript{90} Metropolitan Life Ins. Co. v. Bassford, 120 Conn. 348, 130 A. 692 (1935).
\textsuperscript{91} Mass. Gen. Laws Ann. ch. 244, § 11 (West 1959). A power of sale must be in the mortgage. Id.
\textsuperscript{92} Id. §§ 1, 18.
\textsuperscript{93} Vt. Stat. Ann. tit. 12, § 4531a (Supp. 1983). In order for a Vermont mortgagee to choose foreclosure by sale, the mortgage must contain a power of sale. Id.
Massachusetts, New Hampshire, Vermont, and Illinois is not complete without a discussion of the availability of deficiency judgments. Under strict foreclosure, a mortgagee obtains ownership of the security rather than a money judgment followed by a sale to raise the money awarded. Illinois courts refuse to permit deficiency judgments after strict foreclosure. The Maine, Massachusetts, and Vermont statutes do not state whether a mortgagee may obtain a deficiency judgment following strict foreclosure but these states' statutes specifically provide for deficiency judgments following foreclosures by sale. The New Hampshire statute does not address deficiency actions. The Connecticut statute allows deficiency actions following the strict foreclosure redemption period. Some commentators assert that foreclosure without sale in the United States deserves the label "strict" because it operates "summarily, harshly and oppressively." Strict foreclosure is often criticized as harsh when the mortgaged property's value has greatly increased. On the other hand, it is reasonable to provide the swift remedy of strict foreclosure to the mortgagee if the mortgaged property's value is equal to or less than the amount of the mortgage debt. Further, strict foreclosure may be efficient in all cases because the parties to a mortgage can easily ascertain their rights at any given time. On the other hand, modification of strict foreclosure may confuse the parties' legal rights and may lessen the efficiency of strict foreclosure.

3. Foreclosure by Sale

a. Judicial Foreclosure

The American answer to strict foreclosure criticism was

94. 14 Ill. App. 3d at 71, 302 N.E.2d at 250.
96. See supra note 88.
98. G. OSBORNE, supra note 7, § 312 at 652; Tefft, supra note 1, at 595.
99. Tefft, supra note 1, at 595.
100. Id. at 598.
101. If the mortgaged property is worth the same or less than the amount of the debt, the mortgagor has no economic interest to protect. Attention then shifts to other values promoted by a foreclosure process.
foreclosure by sale, and more usually, foreclosure sale by court order. Virtually every state provides for judicial foreclosure, the process that allows the mortgagor to bring an action for a court-ordered sale of the mortgaged property after a default by the mortgagor.102

Judicial foreclosure is the primary method of foreclosure in at least twenty-five states.103 Thirty-four states permit foreclosure by power of sale provisions104 and six states allow strict foreclosure as a primary method of foreclosure.105 Any preference for judicial foreclosure in states with alternative methods of foreclosure may frequently be explained by reference to the different requirements of the available foreclosure options. For example, Massachusetts has a three-year redemption period following strict foreclosure,106 but it does not have a post-sale redemption period following a court-ordered sale.107 Further, if lien priority problems or junior lienholders are present, a mortgagor may be wise to address title problems in a judicial foreclo-


103. Nelson & Whitman, supra note 6, § 7.11 at 446.

104. See infra note 111 and accompanying text.

105. See supra notes 76-83 and accompanying text.


107. Id. § 11.
sure action rather than opt for a power of sale foreclosure and leave title questions unanswered.108

The problem with judicial foreclosure is that it is typically a lengthy procedure and is therefore expensive:

A typical action in equity to foreclose and sell involves a long series of steps: a preliminary title search to determine all parties in interest; filing of the foreclosure bill of complaint and lis pendens notice; service of process; a hearing, usually by a master in chancery who then reports to the court; the decree or judgment; notice of sale; actual sale and issuance of certificate of sale; report of the sale; proceedings for determination of the right to any surplus; possible redemptions from foreclosure sale; and the entry of a decree for a deficiency.109

Procedures for judicial foreclosure vary widely but in every state the process is difficult and expensive.

b. Power of Sale Foreclosure

The concept of the power of sale is to provide a streamlined process similar to, but better than, judicial foreclosure.110 Thirty-four states have statutes that provide for power of sale foreclosure,111 the process that allows the mortgagee to force a

108. NELSON & WHITMAN, supra note 6, § 7.12 at 447. Some states expressly require all foreclosures to be by judicial action. See, e.g., FLA. STAT. ANN. § 702.01 (West 1969); IDAHO CODE § 6-101 (1979). Others accomplish the same result by prohibiting private sales pursuant to a power of sale. See, e.g., ILL. ANN. STAT. ch. 110, § 15-101 (Smith-Hurd 1984); N.M. STAT. ANN. § 48-7-7 (1978). Massachusetts, New Hampshire and Vermont, on the other hand, restrict use of judicial foreclosure to situations in which there is a power of sale in the mortgage. MASS. GEN. LAWS ANN. ch. 244, § 11 (West 1959); N.H. REV. STAT. ANN. § 479:22 (1983); VT. STAT. ANN. tit. 12, § 4531A (Supp. 1984). Nevertheless, the question of the availability of judicial foreclosure is clearly resolved in favor of allowing it, while it takes some affirmative authority to allow other forms of foreclosure. Professor Osborne argued that power of sale should be available unless otherwise provided. G. OSBORNE, supra note 7, § 337 at 726. The states do not appear to have heeded this argument because most states that do not have power of sale statutes have no case law discussing nonjudicial foreclosure. Professor Nelson and Dean Whitman assert, in their update of Professor Osborne’s work, that in states not having power of sale statutes, title questions following a nonjudicially ordered sale usually deter attempts at using a power of sale. NELSON & WHITMAN, supra note 6, § 7.12 at 447.

109. NELSON & WHITMAN, supra note 6, § 7.12 at 447.
110. Tefft, supra note 1, at 590.
111. ALA. CODE § 35-10-3 (1975); ALASKA STAT. § 34.20.070 (Supp. 1983); ARIZ. REV. STAT. ANN. § 33-807 (1974); ARK. STAT. ANN. § 51-1112 (1947); CAL. CIV. PROC. CODE § 725a (West Supp. 1983); COLO. REV. STAT. § 38-37-113 (Supp. 1983); GA. CODE ANN. § 44-
sale of the mortgaged property without bringing a judicial action. Provisions for power of sale foreclosure vary widely from state to state.\textsuperscript{112}

Georgia, Maryland, and North Carolina have unusual variations in their power of sale foreclosure process. In these three states, court confirmation of the sale is required in some, or all, power of sale foreclosures before the sale is final. In Maryland, all foreclosure sales conducted pursuant to powers of sale contained in mortgages or deeds of trust must receive "final ratification by the court."\textsuperscript{113} A mortgagee in Georgia who exercises a power of sale may only seek a deficiency judgment by petitioning a court for confirmation of the sale within thirty days of the sale.\textsuperscript{114}

North Carolina law provides that a mortgagee must cause a hearing to be held before the clerk of court prior to exercising a


In the remaining states allowing a power of sale, the power of sale must be stated in the mortgage or deed of trust.


power of sale. If the clerk of court finds that there is a valid debt, a default, that the mortgage contains a power of sale, and that proper notice has been given to the mortgagor, the clerk must authorize the sale. The clerk's finding may be appealed to the state's district or superior courts. Finally, if a mortgagee buys at the sale, a mortgagor may attack the fairness of the sale price in defending the mortgagee's suit for a deficiency.

The statutes of these three states do not, in all cases, further the purpose underlying power of sale foreclosure. Power of sale foreclosure is designed to accomplish foreclosure more rapidly than other methods by eliminating judicial action. Because these statutes require incurring the time and expense of a judicial action, the purpose of the power of sale is not served.

The power of sale foreclosure process is simple, but may be time consuming. Furthermore, titles acquired by purchasers at power of sale foreclosures may be subject to title defects. Every state requires notice of an impending sale, as well as a waiting period between the notice and the sale. Professor Nelson and Dean Whitman list three reasons why a purchaser's title may be less stable in a power of sale foreclosure than in a judicial foreclosure:

First, the court supervision involved in judicial foreclosure will prevent many defects from arising. Second, because judicial foreclosure is an adversary proceeding, the presence of other parties who will bring possible defects to the court's attention constitutes added protection against a faulty end product. Finally, the concept of judicial finality provides substantial insulation against subsequent collateral attack even on technically defective judicial foreclosure proceedings. None of these protections are inherent in power of sale foreclosure.

In some cases, therefore, power of sale foreclosure provides an easier, quicker method of foreclosure than does judicial fore-

116. Id. § 45-21.16(d).
117. Id.
118. Id. § 45-21.36.
119. NELSON & WHITMAN, supra note 6, § 7.20 at 477.
120. See, e.g., MD. REAL PROP. CODE ANN. § 7-105 (Supp. 1983).
121. NELSON & WHITMAN, supra note 6, § 7.19 at 475.
122. Id.
123. Id. § 7.20 at 477.
closure. This is true in those situations where only one mortgage exists and no other liens, claims, or questions about title or priority arise. If, however, there are questions about liens or other claims, or the power of sale is open to judicial attack for improper notice or improper disposition of proceeds, power of sale foreclosure may be undesirable. Because even a simple power of sale foreclosure involving one mortgage and no other liens or claims may involve a mortgagor's attack on the notice of the sale, all such sales are subject to some uncertainty. Even if the mortgagee successfully defends the private sale, the lengthy judicial process defeats the purpose of the power of sale.

Further, problems with unstable titles may reduce the number of interested buyers at a foreclosure sale held pursuant to a power of sale and those who buy will probably pay less because of the risk of judicial action. Potential title problems and the resulting depressed sales of mortgaged property reduce the efficiency of power of sale foreclosure and make its purported superiority to judicial foreclosure questionable.

c. Establishing Value and Court Confirmation

Nine states permit the value of mortgaged property to be established at judicial foreclosure sales while only Arkansas permits the value of mortgaged property to be established at power of sale foreclosure sales. In general, these states' statutes are designed to encourage high bids at the time of the foreclosure sale and to force resale if the highest bid price is too low. These nine states' statutes vary widely.

If a mortgaged property in Arkansas does not bring at least two-thirds of its appraised value at a foreclosure sale, the sale is disregarded and a second sale is held within one year. Further, if a second sale is held, the high bid at the sale will be accepted but the mortgagor will have one additional year to redeem his property for the sale price plus interest of ten percent per ann-


126. Id.
In theory, the mortgagee is encouraged to bid at least two-thirds of the appraised value, but if the mortgagee does not or cannot so bid, the foreclosure process is delayed for two years.

In four of the nine states where value is established in judicial sales, the value so established serves as a guide to the court in confirming the foreclosure sale. In each of these four states, the court may accept or reject a bid, regardless of whether the bid is higher or lower than the established value. Two of these states, Kansas and Washington, also allow the court to order that a value be established before the sale to provide a bidding level that must be reached before the sale will be confirmed. In Michigan, the court sets an “upset” price, a level that the bidding must reach before a sale may occur. The New Mexico and Ohio statutes provide that no sale is valid unless the highest bid is at least two-thirds of the appraisal of the mortgaged property. A different variation is found in the West Virginia statute, which provides that when the cash sales price is less than two-thirds of the established value, the property must be offered on credit terms; the higher of the cash or credit bids must be accepted. Finally, the Louisiana Code provides that when a sale yields less than two-thirds of the property’s established value, the sheriff must resell the property to the highest bidder at the new sale. The statutes in these nine states provide varying degrees of efficiency to the foreclosure process. With the exception of Louisiana and West Virginia, more than two sales may be necessary before a court’s prescribed minimum price is bid. The cost of foreclosure by sale is increased by any such delay.

127. Id. For a discussion of statutory redemption and its impact on the foreclosure process, see infra notes 147-58, 222-23 and accompanying text.


130. MICH. COMP. LAWS § 600.3155 (West 1968).


134. LA. REV. STAT. ANN. art. 5253 (West 1983).
4. Deficiency Judgments

A mortgagee's ability to recover a deficiency judgment against the mortgagor when a foreclosure produces a sum that is less than the mortgage debt affects both the initial mortgagee-mortgagor relationship and the efficiency of foreclosure by sale. Theoretically, allowing a mortgagee to pursue a mortgagor for a personal judgment may induce the mortgagee to rely on a mortgagor's personal wealth and therefore accept more risk with respect to the security. On the other hand, not allowing a deficiency judgment may cause a mortgagee to insist on a greater amount of security for a loan.

The availability of a deficiency judgment may also affect the mortgagee's participation at the foreclosure sale. Allowing a mortgagee to reach a mortgagor's other assets does not encourage the mortgagee to bid up to the property's value at a sale. On the other hand, not permitting a mortgagee to obtain a deficiency judgment induces him to bid up to the amount of the mortgage debt in order to minimize his loss by reselling the property on the open market.

Twenty-nine states statutorily permit deficiency judgments after judicial foreclosure sales.135 Thirteen of these twenty-nine states limit deficiency judgments in some way.136 Some states limit recoveries for deficiencies to certain types of mortgagors or property.137 Other states limit the amount of deficiency judg-


137. Arizona does not permit the recovery of a deficiency judgment if the property in question is improved with a one or two family dwelling; California refuses recovery if
ments to no more than the difference between the appraised or established value and the mortgage debt. This limit theoretically encourages mortgagees to push the resale bidding to at least the lesser of the mortgage debt or the fair market value. Only one state, Nebraska, prohibits deficiency judgments following judicial foreclosures. The remaining twenty states have no express statutory or common law provision for deficiency actions following judicial foreclosure.

Of the thirty-four states that allow power of sale foreclosure, twelve states specifically allow deficiency judgments following a power of sale foreclosure, and three states specifically prohibit them. One state, Montana, allows deficiency judgments following power of sale foreclosures unless the mortgagee is the original vendor of the mortgaged property or the mortgaged property consists of fifteen acres or less. Eight of the twelve states that allow deficiency judgments after power of sale foreclosures limit recovery to no more than the difference between the mortgage debt and the value of the mortgaged property. However, in the remaining eighteen states that permit

the mortgaged property is an owner-occupied one to four unit dwelling; Florida will not allow recovery when the mortgage is a purchase money mortgage and the mortgagee buys the property at the sale; Montana will not allow recovery if the vendor is the mortgagee; and Oregon refuses a recovery if the mortgage is a purchase money mortgage or a trust deed that is judicially foreclosed against an owner-occupier. See supra statutes cited in note 135.


140. See supra note 111 and accompanying text.


144. Id. § 71-1-317.

145. Arizona, Idaho, Michigan, Nebraska, Nevada, North Carolina, South Dakota, and Utah limit the deficiency judgment to no more than the difference between the mortgage debt and the value of the mortgaged property. See supra statutes cited in note 141. Arizona also bars any deficiency action if the property is two and one-half acres or
power of sale, a mortgagee should be able to bring an action for the difference between the sale price and the secured debt. On the whole, few states place real restrictions on deficiency judgments. State statutes that limit the amount of deficiency judgments are designed to encourage bidding at foreclosure sales but have little practical impact on mortgagees and mortgagors. The few states that prohibit or severely limit the availability of deficiency judgments increase the cost of mortgage foreclosure.

5. Post-Sale Redemption

Post-sale (or statutory) redemption has a dramatic effect on the efficiency of the foreclosure process. Post-sale redemption allows a mortgagor, and in some cases a junior lien holder, to redeem the mortgaged property after a foreclosure sale has been held. A mortgagor’s equity of redemption before sale has a different impact on the sale process than does the right to redeem after the sale. Faced with the threat of statutory redemption, a buyer will pay less for the mortgaged property at a foreclosure sale because he must gamble that at the end of the redemption period he will get the property rather than a return of his money if the mortgagor redeems.

Twenty-nine states have statutory redemption. Twenty-five of those states have statutory redemption following judicial foreclosure sales, and fourteen have statutory redemption following power of sale foreclosure. Maine alone has a one-year re-

less and improved by a one to two family dwelling. Id. Michigan only so limits the deficiency if the mortgagee is the buyer at the foreclosure sale. Id.

146. Nelson & Whitman, supra note 6, § 7.1 at 425.
147. Id. § 8.1 at 525.
Redemption period following notice of strict foreclosure.\textsuperscript{159} Interestingly, of the fourteen states that allow statutory redemption following power of sale foreclosure, all but Missouri, Rhode Island, and Wisconsin also allow it in judicial foreclosure.\textsuperscript{161} However, eight states that have power of sale foreclosure do not allow statutory redemption following power of sale foreclosure sales although they permit statutory redemption following judicial sales.\textsuperscript{152}

Redemption periods vary widely. The statutory redemption periods following judicial foreclosure sales range from ten days in North Carolina\textsuperscript{153} to two years in Tennessee.\textsuperscript{154} Fifteen states have redemption periods of one year following judicial foreclosure sales.\textsuperscript{155} The range for statutory redemption periods following power of sale foreclosure sales is ten days in North Carolina\textsuperscript{156} to three years in Rhode Island.\textsuperscript{157} Eight states provide for a one year redemption period following power of sale foreclosure.\textsuperscript{158}

Permitting statutory redemption decreases the amounts bid at sale because a buyer buys subject to the mortgagor’s right to redeem; he may therefore never get possession of that which he is bidding to buy. Statutory redemption is therefore costly and


\textsuperscript{152} Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington do not allow statutory redemption following power of sale foreclosure. See supra statutes cited in note 148.


\textsuperscript{155} Alabama, Alaska, Arkansas, California, Idaho, Iowa, Kansas, Kentucky, Minnesota, Montana, Nebraska, North Dakota, Oregon, South Dakota, and Washington have basic one year redemption periods following judicial foreclosure sales. See supra statutes cited in note 148.


\textsuperscript{158} Alabama, Arkansas, Michigan, Minnesota, Missouri, Montana, North Dakota, and Wisconsin provide a one year redemption period. See supra statutes cited in notes 148-49.
affects the efficiency of mortgage foreclosure.

C. Uniform Land Transactions Act

The Uniform Land Transactions Act (ULTA) was promulgated in 1975 by the National Conference of Commissioners on Uniform State Laws, and was extensively amended in 1977. The ULTA deals with all contractual transfers of real property. The ULTA was intended to “have a major impact on the development of legislation in the real property law area. . . .” The Commissioners stated that one of the major purposes of the ULTA was to provide uniformity in state laws, thereby facilitating an atmosphere that would encourage greater development of the secondary mortgage market.

1. Protected Parties

The ULTA specifically singles out “protected parties” for special protection in mortgage foreclosures. Section 1-203 of the ULTA provides that a protected party is one of three types of persons who is involved with “residential real estate.” Residential real estate is a parcel of not more than three acres improved or to be improved with four or fewer dwelling units for which the protected party has not been a lessor for commercial purposes. The types of persons who may be protected parties in a secured transaction under the ULTA are: (1) a person who occupies or intends to occupy the premises as his residence; (2) a person who is primarily or secondarily liable on the loan

169. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 129, 151 (1975) [hereinafter cited as COMMISSIONERS’ HANDBOOK 1975].
160. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 172 (1977) [hereinafter cited as COMMISSIONERS’ HANDBOOK 1977].
161. COMMISSIONERS’ HANDBOOK 1975, supra note 159, at 129.
162. Id.
163. Id. at 152.
164. UNIF. LAND TRANSACTIONS ACT § 1-203(a), 13 U.L.A. 560 (West Master ed. 1980).
and is related to an individual who occupies or intends to occupy the premises as his residence; and (3) a person who purchases residential real estate and assumes or takes subject to the obligation of a prior protected party. The third provision allows a person to purchase real estate from a protected party, assume the protected party’s loan, rent the premises for residential use, and still be a protected party.

2. Reinstatement

Section 3-512 provides mortgagors with limited rights to reinstate the mortgage and avoid acceleration. Under this section, protected parties are given much more latitude than other mortgagors. Notwithstanding any acceleration, a protected party may reinstate the mortgage prior to the sale of the mortgaged property by paying all sums due, performing all other obligations due under the mortgage note, and paying the mortgagee’s costs of proceeding to foreclosure reasonably incurred after the mortgagee gave notice of his intent to foreclose. This section also provides significant protection to a mortgagee by allowing a protected party mortgagor to avoid acceleration only once every twelve months. It is much more difficult for nonprotected party mortgagors to avoid acceleration under the ULTA. After a mortgagor’s default, a mortgagee must give at least fifteen days notice of acceleration and the mortgagor must make all past due payments within the fifteen day period in order to avoid acceleration. This provision is a statutory fifteen day grace period in addition to any grace period provided for by the mortgage note.

Section 3-512 also contains a codification of the common

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168. **UNIF. LAND TRANSACTIONS ACT** § 3-508, 13 U.L.A. 702 (West Master ed. 1980). Under § 3-508, a mortgagee who has a power of sale may exercise the power at a public sale or by a privately negotiated sale. *Id.* Reinstatement by a protected party is allowed until either a public sale is held or a contract is executed in a privately negotiated sale. *Id.* § 3-512(a), (c), 13 U.L.A. at 709-10.
169. **UNIF. LAND TRANSACTIONS ACT** § 3-512(c), 13 U.L.A. 710 (West Master ed. 1980).
170. *Id.* § 3-512(d), 13 U.L.A. at 710.
171. *Id.* § 3-512(b), 13 U.L.A. at 710.
172. *Id.*
law equity of redemption. It provides that a mortgagor may avoid foreclosure by tendering, prior to a sale, all sums due under the mortgage along with reasonable costs of proceeding to foreclosure.\textsuperscript{173}

3. \textit{Strict Foreclosure}

In its current form, the ULTA does not address strict foreclosure in great detail. A specific procedure for judicial foreclosure is set forth in section 3-509.\textsuperscript{174} Section 3-509 is intended to be the sole means of judicial foreclosure under the ULTA. However, section 3-509(h) states that “[a]ny existing procedure for strict foreclosure is not affected by this section,”\textsuperscript{175} which leaves standing any existing statutory or common law right to strict foreclosure. The current version of the ULTA makes no other mention of strict foreclosure.

The original version of section 3-507 included a detailed treatment of strict foreclosure.\textsuperscript{176} However, the strict foreclosure provisions of that section were deleted by the 1977 Amendments to the ULTA.\textsuperscript{177} Former section 3-507 was entitled: “Taking Title in Satisfaction of the Obligation.”\textsuperscript{178} Not surprisingly, the first provision of former section 3-507 precluded strict foreclosure upon a mortgagor who was a protected party.\textsuperscript{179} To qualify for strict foreclosure under the previous version of the ULTA, the mortgagee’s mortgage had to contain a provision authorizing strict foreclosure.\textsuperscript{180} After the mortgagor’s default, former section 3-507(a) required the mortgagee to give notice to the mortgagor and to any other person with a recorded interest that

\begin{itemize}
  \item \textsuperscript{173} Id. § 3-512(a), 13 U.L.A. at 709.
  \item \textsuperscript{174} See \textit{infra} notes 193-217 and accompanying text.
  \item \textsuperscript{175} \textit{Unif. Land Transactions Act} § 3-509(h), 13 U.L.A. 322 (West Master ed. Supp. 1984).
  \item \textsuperscript{176} \textit{Commissioners’ Handbook 1975}, supra note 159, at 279-82.
  \item \textsuperscript{178} \textit{Unif. Land Transactions Act} § 3-507, 13 U.L.A. 322 (West Master ed. Supp. 1984). \textit{See also} \textit{Commissioners’ Handbook 1975}, supra note 159, at 279-281 (the provisions of the former § 3-507 are contained therein).
  \item \textsuperscript{179} \textit{See Commissioners’ Handbook 1975}, supra note 159, at 279-81.
  \item \textsuperscript{180} \textit{See id.} at 276.
\end{itemize}
could be terminated by strict foreclosure.181 Former section 3-507 required the notice to state that, in the event no one entitled to receive notice objected within five weeks, the mortgagee could take title to the mortgaged property.182 Further, former section 3-507 required that the notice be recorded and sent to each person entitled to receive it, unless the only person entitled to receive notice was the mortgagor.183

If any party entitled to receive notice of strict foreclosure objected within five weeks, former section 3-507 required that the mortgagee abandon strict foreclosure and resort to foreclosure by sale.184 If no one entitled to notice objected, the mortgagee could execute a deed to himself, which would effectively transfer clear title to him, and he could then take possession of the mortgaged property subject to title becoming absolute.185 Until title became absolute, any objection that the mortgagee was not entitled to strict foreclosure or did not comply with the statute was remediable by redemption or a demand for foreclosure by sale. Title became absolute upon the earlier of the mortgagee’s execution of a contract to sell the mortgaged property or two years.186 Use of former section 3-507 precluded a mortgagee from bringing a deficiency action.187

One commentator, Professor Bruce, characterized former section 3-507 as “an expedient and inexpensive device that provides a needed alternative in commercial secured transactions.”188 Bruce stated that he hoped “the traditionally negative view of strict foreclosure” would not limit the use of former section 3-507.189 Despite the foregoing commentary, former section 3-507 lasted only two years. It is difficult to explain why former section 3-507 was deleted when the ULTA was amended. Most of the amendments apparently arose from discussions between the ULTA’s drafters and American Bar Association groups and

181. See id. at 279-80 (citing former § 3-507(a) of the Uniform Land Transactions Act).
182. Id.
183. Id. (citing former § 3-507(c) of the Uniform Land Transactions Act).
184. Id. (citing former § 3-507(d) of the Uniform Land Transactions Act).
185. Id.
186. Id. (citing former § 3-507(f) of the Uniform Land Transactions Act).
187. Id. (citing former § 3-507(e) of the Uniform Land Transactions Act).
189. Id.
representatives. Former section 3-507 was the prime casualty of the amendatory process; the drafters made few other substantive changes to Article Three of the ULTA between the 1975 and 1977 versions. It is still interesting to note the effect of former section 3-507. The required notice had to state that foreclosure by sale could be forced by the mortgagor but that he could thereafter be liable for any deficiency. Theoretically, this provision would cause a mortgagor with little or no equity not to impede the foreclosure and to simply allow the mortgagee to take the property. The drafters of former section 3-507 designed it to give a mortgagor a choice in determining whether to submit to strict foreclosure. The mortgagor needed only to object to strict foreclosure to prompt foreclosure by sale. The mortgagor could thus short circuit an otherwise speedy foreclosure process.

4. Foreclosure by Sale

a. Judicial Foreclosure

Under the ULTA, judicial foreclosure is less favored than power of sale foreclosure. The traditional judicial foreclosure process is, however, "radically" altered by the ULTA to "minimize its inherent limitations." Interestingly, the judicial foreclosure section provides that after a judgment of foreclosure, the foreclosure sale is conducted under the ULTA power of sale provisions unless the judgment specifies otherwise.

ULTA's foreclosure by sale process is simple. The mortgagee must give notice of acceleration and intent to foreclose and may file suit immediately thereafter unless the mortgagor is a protected party. If the mortgagor is a protected party, the mortgagee must wait five weeks after default before giving no-

190. COMMISSIONERS’ HANDBOOK 1977, supra note 160, at 151.
191. Id.
192. COMMISSIONERS’ HANDBOOK 1975, supra note 159, at 280 (citing former § 3-507(a) of the Uniform Land Transactions Act).
193. Bruce, supra note 188, at 1284.
194. Id. at 1285.
195. UNIF. LAND TRANSACTIONS ACT § 3-509(c), 13 U.L.A. 705-06 (West Master ed. 1980).
196. Id. § 3-505(b), 13 U.L.A. at 697.
197. Id.
tice of intent to foreclose. The mortgagor must then wait an additional five weeks before filing suit. All appropriate parties must be served in the foreclosure action. In the event a court finds the mortgagor in default and proper notice has been given, the court must enter judgment for the mortgagee and order a sale.

In most cases the sale is then carried out under section 3-508, the power of sale section. After the sale, the person who conducted it must report to the court and the court must confirm the sale if “justice has been done.” The court clerk must then enter satisfaction of the judgment to the extent of the proceeds of the sale, and, except to the extent that deficiency judgments are limited by section 3-510(b), any deficiency becomes a general judgment lien as of the date the judgment is entered by the clerk.

Although this statutory foreclosure process is speedy, two matters are left to the common law. First, the court can direct a sale to be “conducted in accordance with the law relating to the sale of real estate on execution.” Second, no statutory guidance is given for determining whether “justice has been done by the sale.” Professor Bruce suggests that courts will have to look to prior law to decide when they will confirm sales. There is no indication whether a court may consider the property’s value in confirming a sale, or what standards it will use if it does consider the property’s value. A court may opt for a non-ULTA sale or it may refuse to confirm a sale and cause delay by holding another sale. The use of either creates a potential for delay beyond the time inherent in the ULTA’s streamlined foreclosure provision.

198. Id. § 3-505(d), 13 U.L.A. at 698.
199. Id. § 3-505(b), 13 U.L.A. at 697.
200. Id. § 3-509(c), 13 U.L.A. at 705-06.
201. Id.
202. Id. See infra notes 209-23 and accompanying text.
203. UNIF. LAND TRANSACTIONS ACT § 3-509(e), 13 U.L.A. 706 (West Master ed. 1980).
204. See infra notes 218-21 and accompanying text.
205. UNIF. LAND TRANSACTIONS ACT § 3-509(e), 13 U.L.A. 706 (West Master ed. 1980).
206. Id. § 3-509(c), 13 U.L.A. at 706.
207. Id. § 3-509(e), 13 U.L.A. at 706.
208. Bruce, supra note 188, at 1285.
b. Power of Sale Foreclosure

Section 3-508 of the ULTA permits power of sale foreclosure only if the process is authorized by the mortgage or some other agreement between the mortgagee and the mortgagor.\textsuperscript{209} As with a judicial foreclosure, a mortgagee must wait five weeks after default before notifying a protected party of his intent to foreclose. Public and private sales are forbidden for a five week period after a mortgagee notifies a mortgagor of his intent to exercise his power of sale.\textsuperscript{210} A mortgagee must also notify all persons with recorded interests that may be extinguished by such a sale.\textsuperscript{211} The notice must state the time and place of any public sale, and, if a private sale is intended, the mortgagee’s intent to execute a private sale contract and the time after which a private sale may be made.\textsuperscript{212}

Section 3-508 differs from most power of sale statutes by authorizing private sales. Section 3-508(a) requires that for any sale, public or private, “every aspect of the sale, including method, advertising, time, place, and terms, must be reasonable.”\textsuperscript{213} In addition to authorizing private sales, section 3-508 permits sales in parcels or on credit.\textsuperscript{214} A mortgagee may buy the mortgaged property at a public sale and may even buy it at a private sale if the private sale is conducted by a “fiduciary or other person not related to the creditor.”\textsuperscript{215}

c. Establishing Value and Court Confirmation

The ULTA contains no provision for establishing the value of mortgaged property sold under its provisions.\textsuperscript{216} Furthermore, the only confirmation required by the ULTA is that following a court-ordered sale. In that circumstance, the ULTA directs a court to confirm that “justice has been done by the sale.”\textsuperscript{217}

\begin{flushright}
\textsuperscript{209} Unif. Land Transactions Act § 3-505(c), 13 U.L.A. 697 (West Master ed. 1980).
\textsuperscript{210} Id. § 3-508(a), 13 U.L.A. at 702-03.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} See supra note 208 and accompanying text.
\textsuperscript{217} See supra notes 203-08 and accompanying text.
\end{flushright}
5. Deficiency Judgments

The ULTA generally permits deficiency judgments\(^{218}\) and the ULTA specifically provides for obtaining such a judgment in the judicial foreclosure procedure.\(^{219}\) The ULTA’s only restriction is that no deficiency judgment may be obtained against a protected party after foreclosure of a purchase money security interest.\(^{220}\) The Act does not limit the amount of a deficiency judgment a mortgagee may obtain against either a protected or a nonprotected party. The common law rule that the amount of a deficiency equals the debt less the sale proceeds apparently prevails.\(^{221}\)

6. Post-Sale Redemption

The ULTA does not permit post-sale redemption. Professor Bruce calls the omission a “wise” step.\(^{222}\) He views the granting of an absolute equity of redemption until sale, along with a protected party’s ability to reinstate, as “fair balance” to the exclusion of post-sale redemption.\(^{223}\)

III. Economic Analysis

This section analyzes the current status of mortgage foreclosure law according to economic efficiency, equity, and fairness. The preceding sections have set forth the current status of mortgage foreclosure law with an emphasis on those aspects which create difficulty in proceeding with the mortgage foreclosure and therefore increase the costs of foreclosure. Mortgage foreclosure is part of a broader economic transaction which begins with the mortgage loan itself and ends with the loan’s satisfaction by payment or foreclosure. Nevertheless, it is possible to consider the process of mortgage foreclosure independently in order to evaluate its efficiency. Foreclosure has demonstrable costs which

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218. UNIF. LAND TRANSACTIONS ACT § 3-510(b), 13 U.L.A. 707-08 (West Master ed. 1980).
219. Id. § 3-509(e), 13 U.L.A. at 708.
220. Id. § 3-510(b), 13 U.L.A. at 707-08.
221. Bruce, supra note 188, at 1287.
222. Id. at 1277.
223. Id.
A. Efficiency

1. Basic Considerations

"Efficiency" has both plain\textsuperscript{224} and complex\textsuperscript{225} meanings. The definition adopted by Professor Polinsky is perhaps the best for purposes of this Article: "the relationship between the aggregate benefits of a situation and the aggregate costs of the situation."\textsuperscript{226} Efficiency is reaching the best result from the standpoint of costs and benefits, disregarding notions of equity or fairness.

An examination of mortgage foreclosure procedural efficiency must include a consideration of the entire lending process. This Article is therefore based upon certain assumptions about the relationship between foreclosure and the entire lending process. Perhaps the most important assumption is that commercial mortgagees\textsuperscript{227} do not vary the interest rates charged to mortgage borrowers according to the creditworthiness, or potential for default, of the borrower. Instead, commercial mortgagees establish and charge one rate to those meeting their minimum creditworthiness criteria regardless of the borrower's particular financial stability.\textsuperscript{228} The cost of an increased risk un-

\begin{footnotesize}
\textsuperscript{224} WEBSTER'S NEW COLLEGIATE DICTIONARY 362 (1977) defines "efficiency" as "effective operation as measured by a comparison of production with cost."

\textsuperscript{225} Judge Posner defines efficiency as "exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized." R. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977).

\textsuperscript{226} M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983).

\textsuperscript{227} Commercial mortgagees are entities, usually banks, thrift institutions, and insurance companies, engaged in mortgage lending as a primary part of their business. This Article primarily applies to commercial mortgagees because it is difficult to categorize the lending policies of private mortgagees such as homeowners and business persons engaged in selling their own property. Private mortgagees behave differently because they frequently have motivations for lending other than the receipt of interest.

\textsuperscript{228} The loan approval process is usually a "yes" or "no" proposition rather than an evaluation of what a particular mortgagor should have to pay to make a loan to him
\end{footnotesize}
dertaken by a commercial mortgagee will not directly affect the interest rate charged to the particular mortgagor presenting the greater risk. Instead, a lender spreads that risk by increasing the interest rates charged to all persons entering into mortgage transactions with that commercial mortgagee.

A second assumption is that a commercial mortgagee passes on the cost of foreclosing on defaulted mortgages to its mortgage borrowers in the form of higher interest rates, to its savings depositors in the form of lower interest rates, or to its stockholders in the form of lower earnings. This assumption is in turn based upon the assumptions that foreclosing a mortgage costs money and a mortgagee must offset higher mortgage foreclosure costs in some manner.

This Article further assumes that competition exists among commercial mortgagees.\textsuperscript{229} The less expensive and more predictable the foreclosure process is, the more freely competitive commercial mortgagees will be. Consider, for example, a market consisting of ten commercial mortgagees, each holding a different percentage of the mortgage market. As is typical in most business settings, some mortgagees hold large market shares, while others’ market shares are quite small. Mortgagees will distribute the anticipated risk of loss on each loan resulting from a lengthy foreclosure over all mortgage loans. Assuming that economies of scale apply to the lending industry, the smaller a commercial mortgagee’s loan pool is, the larger the incremental cost per loan will be. A small commercial mortgagee’s loan pool may be so small that spreading the anticipated risk over its loan pool inhibits its ability to compete with larger commercial mortgagees.

Although all commercial mortgagees should benefit from simple, predictable foreclosure procedures, small commercial mortgagees will receive the greatest benefit. Small commercial mortgagees could compete more effectively with large commercial mortgagees because lower foreclosure costs would reduce the interest rates they must charge.\textsuperscript{230} In any event, lower costs for

\begin{flushright}
\textsuperscript{229} For example, on December 23, 1984, published interest rates for mortgages in Dayton, Ohio varied from 8\% to 14\%. Dayton Daily News, Dec. 23, 1984, at F2, col. 1.

\textsuperscript{230} If efficiency is viewed in the aggregate, it is irrelevant where the benefits or reduced costs fall. The benefits involved in loss allocation are relevant, however, when considering equity and the political impact of changing foreclosure law.
\end{flushright}
all mortgagees would improve the lending environment for all commercial mortgagees by reducing loan interest rates, raising interest paid to depositors, increasing mortgagees' earnings, or some combination of the three.

Finally, at the risk of taking assumptions too far, two further assumptions lead one to conclude that any savings in foreclosure costs will result in lower interest rates on mortgage loans. The first assumption is that commercial mortgagees are sufficiently profitable that any reduction in their cost of doing business will not result in increasing their profits but rather in lowering the cost of their product, the rate of interest charged on mortgage loans. The second assumption is that the interest rates paid by commercial mortgagees to their savings depositors either have been regulated and are therefore limited or are inflexible because of competition. If one accepts these two propositions, the obvious result from lowering the cost of mortgage foreclosures for commercial mortgagees will be a reduction in the interest rates charged to their mortgage borrowers.

In summary, an individual defaulting mortgagor does not bear the cost of mortgage foreclosure. The costs are borne by a larger group or groups that may include depositors, shareholders, or mortgagors in general. Also, lower foreclosure costs benefit society in general. Lowering foreclosure costs reduces the cost of the mortgage process, increases competition between commercial mortgagees, and thereby lowers mortgage loan interest rates.

The interests of a mortgagor, a mortgagee, a mortgagee's savings depositors, and a mortgagee's shareholders may conflict with respect to the speed of the foreclosure process. For a mortgagor, a speedy foreclosure at low cost and high economic return is almost always best. For a particular mortgagor, however,
speed may not be to his individual economic advantage. The longer the foreclosure process, the more time a mortgagor has to reinstate or redeem the mortgage or to dispose of the property in the market if the market value of the property exceeds the debt.

If a mortgagor acts in his best economic interest, a mortgagor will reinstate, redeem, or sell only when he believes that the property can be disposed of for a price in the open market higher than the debt and that the gain from the sale will outweigh the cost of a foreclosure delay.\footnote{233} The economic interests of a mortgagee and a mortgagor coincide when a foreclosure sale obtains the highest price. Otherwise, their interests are opposed with respect to the speed of the foreclosure process and the ability of the mortgagor to delay foreclosure. It should be remembered, however, that continued timely payment by the mortgagor is the most efficient result for all participants in the commercial mortgage lending process.

2. Coase Theorem

In what has come to be known as the “Coase Theorem,”\footnote{234} Ronald Coase\footnote{235} proposed an approach for evaluating the efficiency of the assignment of legal rights. To use the Coase Theorem in its most basic form, one must assume that, in negotiating, two parties incur no transaction costs;\footnote{236} that is, one is concerned with the substantive costs and benefits rather than the costs of getting together and negotiating.\footnote{237} A basic statement of the Coase Theorem is as follows: If there are no transaction costs, the efficient outcome will occur no matter to which party legal rights are assigned.\footnote{238}

One may utilize the Coase Theorem to analyze mortgage foreclosure law efficiency. If the law gives mortgagees a legal right to absolute, immediate, nonjudicial strict foreclosure upon

\footnote{233. Predictions of a mortgagor's behavior are based on the assumption that a mortgagor is an economic actor and acts to maximize his wealth or minimize his losses, and does not act emotionally.}
\footnote{234. See M. Polinsky, supra note 226, at 11-14.}
\footnote{235. See Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).}
\footnote{236. M. Polinsky, supra note 226, at 12.}
\footnote{237. See infra notes 242-44 and accompanying text.}
\footnote{238. M. Polinsky, supra note 226, at 12.}
default by mortgagors, a mortgagor will repurchase a property from a mortgagee by paying the mortgage loan balance when the purchase is in the mortgagor's best economic interest. A mortgagee will retain a property when it is not in a mortgagor's best economic interest to purchase the property.\textsuperscript{239} On the other hand, if the law permits mortgagors to insist upon a long, protracted foreclosure process, a mortgagee will simply purchase that right from a mortgagor when it is in the mortgagee's best economic interest. When it is not in a mortgagee's best economic interest to purchase a mortgagor's right to delay the foreclosure process, the parties will undertake the process.\textsuperscript{240} In reality, however, as Coase himself points out, transaction costs are inherent in negotiation.\textsuperscript{241}

\section*{B. Transaction Costs}

Parties cannot conduct transactions without incurring some costs. Efficiency in an economic transaction depends not only on maximizing the aggregate economic benefits available to the parties, but also on minimizing the costs of determining the size of a party's share of those benefits. Transaction costs therefore play a significant role in determining what is efficient; the transaction costs may be so high that such costs render inefficient a result determined to be efficient in the abstract. "In general, transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached."\textsuperscript{242} This broad definition does not quite fit the mortgage foreclosure process, unless the statutorily mandated process is viewed as a search for the party with whom the mortgagee must bargain, either a purchaser at a sale or the mortgagor himself. If the mortgage foreclosure process is interpreted in this way, the transaction costs are relatively easy to identify.

The mortgage foreclosure process has significant transaction

\begin{footnotesize}
\textsuperscript{239} It will be in a mortgagor's economic interest to repurchase the property when the property has a market value greater than the balance on the mortgage loan.
\textsuperscript{240} Coase, \textit{supra} note 235, at 15.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} M. Polinsky, \textit{supra} note 226, at 12.
\end{footnotesize}
costs, most of which are incurred directly by the mortgagee. The mortgagee's transaction costs may be categorized as costs incurred in taking direct actions and costs incurred by the passage of time prior to conclusion of the foreclosure process. Direct costs include fees paid by a mortgagee to persons handling the technical aspects of a foreclosure, the cost of filing notices, the cost of filing a lawsuit, trial related costs, and the cost of a foreclosure sale.

The cost of time passage is the time value of money, or interest. Interest may or may not be reimbursed in the foreclosure process. During the foreclosure process, the interest payable under a note continues to accumulate at the contract rate until a judgment is entered or a sale is completed. A mortgagee may suffer loss to the extent that prevailing market interest rates exceed the contract rate because, after acceleration is declared, the mortgagee is entitled to invest his money as he chooses but cannot because foreclosure has not yet been completed.

Quantifying a mortgagor's transaction costs is not accomplished as easily. One such cost is the value of the mortgagor's time spent negotiating about a threatened foreclosure or defending a foreclosure action. A mortgagor also incurs out-of-pocket expenditures, such as attorney's fees during the defense of a foreclosure action. Additionally, in some cases, a mortgagor may bear the cost of foreclosure indirectly by paying a higher price for a loan at its inception. In most cases, a mortgagor is also assessed certain costs directly at the completion of the foreclosure process.243

One type of transaction cost is difficult to assign to either party. Properties sold at a foreclosure sale typically sell for less than market value.244 When a property is worth less than the mortgage loan balance, the "loss" corresponding to the difference between the property's market value and the sales price falls on the mortgagee. This loss is shared by a mortgagee and a mortgagor when the value of mortgaged property exceeds the

243. If the value of the mortgaged property is less than or equal to the amount of the mortgage debt, these foreclosure costs will be borne by the mortgagor only if the jurisdiction allows a deficiency judgment.

244. The most likely buyer at a foreclosure sale is the mortgagee, who will pay no more than the balance on the mortgage loan. See generally Nelson & Whitman, supra note 6, § 7.12 at 452.
mortgage loan balance but does not exceed the sum of the mortgage loan balance and the costs associated with the foreclosure sale. Finally, this loss falls on the mortgagor when the foreclosure sale price exceeds the sum of the mortgage loan balance and the costs of the foreclosure process.

Transaction costs may be substantial, regardless of the party bearing the burden of payment. The assignment of the parties' legal rights in a mortgage foreclosure affects the amount of aggregate transaction costs. For example, assigning to a mortgagee the absolute right to immediate strict foreclosure without judicial action reduces transaction costs to a minimal amount. In that instance, the only cost attributed to the transaction is the cost of bargaining between a mortgagee and a mortgagor, which is only incurred when a mortgagor feels he has an economic interest in the property worth protecting. On the other hand, assigning to the mortgagor the rights most beneficial to him, as for example, allowing a broad right to reinstate before sale and to redeem after sale, makes transaction costs relatively high. In such an instance, a mortgagee must choose one of two alternatives: he must either endure the lengthy process and incur the cost or he must negotiate with the mortgagor. Presumably, a mortgagor would be fully aware of his redemption and reinstatement rights and that he is free of the costs allocated to the mortgagee. Assigning legal rights in a mortgage foreclosure is therefore important because the assignment affects transaction costs.

C. Equity and Fairness

Although considerations of economic efficiency may indicate that a mortgagee should have an absolute right to immediate, nonjudicial strict foreclosure, the public and most legislators likely would reject that result. The justification for a foreclosure procedure other than nonjudicial strict foreclosure deemphasizes economic efficiency in favor of equity and fairness.

Efficiency as a policy objective relates only to insuring the best possible use of factors or outputs of production. Not only are other policy objectives important, but they often take precedence over efficiency considerations. The most important of these other objectives are insuring fairness in economic distribution ("equity") and fairness in the process of exchange.
This section identifies the most important factors contributing to equity and fairness in mortgage foreclosures and considers each factor in relation to the others.

1. Equity

Equity may be either the subjective expression of societal preference for the assignment of legal rights or the objective determination of what societal preferences should be, based on an analysis of the results of the assignment of legal rights. These two approaches are markedly different methods for determining equity. A consideration of each method is necessary for an understanding of equity in the foreclosure process.

The rejection of strict foreclosure by a great majority of jurisdictions and the existence of extensive mortgagor protection indicates that society prefers the assignment of some legal rights to mortgagors in mortgage foreclosures. All but six states have rejected strict foreclosure as the primary method of foreclosure. Commentators have assailed strict foreclosure as unduly harsh on mortgagors. Furthermore, many states offer reinstatement, only some states allow power of sale foreclosure, some states require judicial confirmation of foreclosure sales, some states ban or limit deficiency judgments, and most states allow post-sale redemption. Taken as a whole, these states' provisions support the proposition that society has made an equitable determination that strict foreclosure is not desirable and that defaulting mortgagors should be "protected."

The changes made to the ULTA from 1975 to 1977 are another indicator of the contemporary rejection of strict foreclosure. The drafters omitted strict foreclosure from the 1977 ver-

246. See supra notes 75-76 and accompanying text.
247. See supra notes 98-100 and accompanying text.
248. See supra notes 58-71 and accompanying text.
249. See generally supra note 111 and accompanying text.
250. See supra notes 124-34 and accompanying text.
251. See supra notes 135-46 and accompanying text.
252. See supra notes 147-58 and accompanying text.
sion of the ULTA. This omission indicates that the organized bar and the commissioners considered strict foreclosure undesirable or politically unacceptable. The ULTA also provides extensive mortgagor protection, including reinstatement and court confirmation of court-ordered foreclosure sales. Further, protected parties have greater rights of reinstatement and immunity from deficiency judgments and foreclosure of purchase money mortgages.

On the other hand, one may explain the rejection of strict foreclosure and the establishment of mortgagor protection as benefiting the legal community, and interests represented by attorneys, rather than benefiting society. No clearly accurate method exists to determine the mortgage foreclosure method that society prefers. The organized bar’s resistance to the provisions for strict foreclosure in the ULTA and the lack of enthusiasm for the ULTA in general indicate at least some sentiment in the general population that the current state of the law is equitable.

Determining society’s subjective desires does not indicate what society should objectively prefer. If society compared the current winners and losers in foreclosure by sale and the costs associated with mortgage loans, perhaps a different preference would result. Objectively, defaulting mortgagors are the beneficiaries of foreclosure by sale because the current system is designed to protect their individual economic interests by giving them greater opportunities to avoid or negate foreclosure. On the other hand, mortgagees, mortgagees’ savings depositors and shareholders, and mortgagors who do not default on mortgage loans are clearly potential losers of foreclosure by sale. In one sense, a mortgagor benefits from any mortgage foreclosure process because he does not lose the mortgaged property automatically upon default. Lenders, their shareholders, and two categories of a lender’s customers bear the expense of the process. It is

254. See supra note 175 and accompanying text.
255. See supra notes 168-73 and accompanying text.
256. See supra notes 216-17 and accompanying text.
257. See supra notes 164-65, 168, 220 and accompanying text.
258. Of course, it is difficult to ascertain public opinion, even after conducting a widespread public opinion survey.
259. See supra notes 190-92 and accompanying text.
arguable that, because any mortgagor may default, all mortgagors benefit potentially from foreclosure laws that protect mortgagors. This assertion misses the point, however, because unless a mortgagor defaults he is not benefitted. Any equitable consideration of benefits should focus on actual and not potential benefits. Defaulting mortgagors are the only parties who actually benefit from mortgagor protection.

The various interests involved in a foreclosure setting cannot be allocated with any degree of certainty between an individual mortgagor and the groups that suffer from that mortgagor's right to a costly foreclosure. It is possible, however, to identify areas in which the interests of certain broad groups affected by the foreclosure process should prevail over the interests of an individual.

2. Fairness

A fair foreclosure process is one that is in fact fair as well as perceived as fair by those affected or potentially affected by it. Society will reject a system that is fair in fact if it is not perceived to be fair. Fairness and equity overlap to some degree. Fairness is highly subjective, and the perception of fairness is particularly subjective. Whether society deems a particular act fair or not usually depends on society's relative assignment of legal rights prior to the act. Equitable choices frequently are based on a perception of procedural fairness. Equity and fairness must therefore be considered together.

Procedural fairness in mortgage foreclosures requires that a mortgagor have an opportunity to assert that foreclosure is inappropriate. Procedural fairness also requires that a mortgagor be provided with the means to protect his economic interests as a matter of right. These two somewhat divergent considerations are inherent in the process of judicial foreclosure. A court must determine the appropriateness of a particular foreclosure before sale is ordered, and a mortgagor may redeem a mortgage and sell the property before the sale or he may bid at the sale. By comparison, judicial strict foreclosure provides the mortgagor only with an opportunity to attack the appropriateness of the foreclosure, and power of sale foreclosure provides the mortgagor only with an opportunity to protect his economic interest.

An opportunity to raise objections in a meaningful manner
is an important part of procedural fairness. The ability to protect one’s economic interest, however, is inherent in free bargaining and the unrestricted ability to enter into economic transactions. Although objective considerations underlie procedural fairness, once society makes equitable determinations, the perception of fairness is purely subjective. Society may not perceive as procedurally fair a system, such as absolute nonjudicial strict foreclosure, that comports purely with economic efficiency because society views lenders, especially lending institutions, as being more powerful than borrowers. Society views a procedural rule as unfair if it gives a stronger economic actor a summary right to terminate the economic interest of its partner. Further, current mortgage foreclosure law contains extensive protection for mortgagors, including reinstatement, statutory redemption, and limits on deficiency judgments. Some of these protections specifically benefit homeowners. Society will likely perceive a provision for absolute, nonjudicial strict foreclosure of home mortgages as unfair.

IV. PROPOSAL FOR STRICT FORECLOSURE

This section synthesizes the conclusions of the prior sections and proposes changes in the current law of mortgage foreclosure. The proposed changes would align mortgage foreclosure law more closely with economic efficiency and social reality.

A. Synthesis

Current mortgage law is inefficient. As stated, three large economic groups bear the cost of mortgage foreclosure while the benefits of the process are confined to the small group of mortgagors who default. The initial cost of mortgage foreclosures is easily identified because the passage of time is the most significant aspect. Foreclosure transaction costs are identifiable, and the assignment of legal rights in the mortgage foreclosure process substantially affects those costs. If economic efficiency is

260. See, e.g., CAL. CIV. PROC. CODE § 580b (West 1977); OHIO REV. CODE ANN. § 2329.08 (Baldwin 1975); OR. REV. STAT. § 88.070 (1981). These statutes provide limitations on deficiency judgments.

261. See supra notes 242-44 and accompanying text.

262. See supra notes 239-44 and accompanying text.
society's only goal, mortgagees should be entitled absolutely to nonjudicial strict foreclosures. It is inefficient to permit a large number of individuals to bear the costs of foreclosure for the benefit of a few.

Currently, one state provides a reasonably efficient foreclosure process. Maine permits strict foreclosure upon notice and permits a mortgagor within one year to redeem the property for the amount of the debt.263 Maine's foreclosure procedure is more efficient than procedures of other states that permit strict foreclosure because the procedure in Maine is private; no judicial action is required.264 Maine's strict foreclosure procedure is not optimally efficient, however, because it allows a mortgagor to redeem the property up to one year after notice of strict foreclosure. The redemption period decreases efficiency by increasing the amount of time the process requires when compared with a process without redemption. The Maine procedure, therefore, lowers transaction costs by permitting strict foreclosure, but does not minimize them because it allows a mortgagor to redeem.

The clearest example of inefficiency is judicial foreclosure as literally every state allows it. Transaction costs of foreclosure are increased substantially by the uncertainty inherent in judicial proceedings. Additionally, several states prohibit or limit deficiency judgments265 and thereby preclude a mortgagee in some cases from recovering all money expended in connection with the mortgage. Many states266 and the ULTA267 create further inefficiency by extending additional protections to homeowners or to the owners of small parcels of property. Efficiency is not determined by the parties' identities. Instead, efficiency is the utilization of the best method of allocating legal rights between parties that choose to engage in the regulated activity.

Although inefficient, current law may accurately reflect the social policy concerns of equity. Society probably will not permit a mortgagee to have an absolute right to strict foreclosure. Therefore, the question is whether the efficiency achieved by

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264. Id.
265. See supra notes 137-38 and accompanying text.
266. See supra note 260 and accompanying text.
267. See supra notes 164-67 and accompanying text.
strict foreclosure must be completely discarded in favor of equity and procedural fairness, or whether there can be a balance.

One answer favors retention of the current, inefficient system because, on the whole, the system appears fair. However, although current law may appear fair, it is not in fact fair. Another solution is the ULTA, which in its amended form attempts to streamline nonjudicial and judicial foreclosure by sale. However, even if the ULTA is thought to include valid equitable choices, society may perceive some of its provisions as unfair. If commercially reasonable, the ULTA permits foreclosure sales through private negotiations.268 The ULTA also permits mortgagors to buy at their own foreclosure sales and to privately negotiate the purchase of the mortgaged property when the sale is conducted by a fiduciary or other third party.269 Because the practice of allowing a mortgagee to purchase at a foreclosure sale is also found outside the ULTA,270 it is questionable whether the current system appears procedurally fair. The ULTA method may not provide a solution to mortgage law inefficiency because it merely attempts to make current law uniform and does not deal with the fundamental question of efficiency.

B. Basic Proposal

Judicial strict foreclosure is the best available method of foreclosure, and should be adopted by all states. Efficiency considerations should outweigh almost all objections to strict foreclosure. By minimizing transaction costs and clarifying the legal positions from which a mortgagor and a mortgagee bargain,271 strict foreclosure is the most efficient method of handling default by the mortgagor. Further, strict foreclosure is equitable. Defaulting mortgagors should, as in strict foreclosure, bear the costs of default and should not, as in foreclosure by sale, shift

269. Id.
270. See generally NELSON & WHITMAN, supra note 6, § 7.21 at 486.
271. If the property is worth less than the balance on the mortgage loan, no bargaining will occur because the mortgagor will allow strict foreclosure. If the property is worth more than the mortgage debt, the mortgagee may choose to pay that difference to the mortgagor and acquire the property directly, or the mortgagor may sell the property to a third party and pay off the mortgage loan.
the costs of default to others. As a broad proposition, efficiency dictates that society should not be willing to allocate its resources to cause many to incur substantial cost for the benefit of a few.272

Nonjudicial strict foreclosure, although efficient, would likely be criticized as unfair. Society would probably find the specter of a mortgagee seizing his mortgagor’s property without giving the mortgagor an opportunity to raise objections to be unfair in fact. Further, society would almost certainly perceive nonjudicial strict foreclosure as unfair. Strict foreclosure should include judicial involvement because society would surely be willing to equitably allocate the resulting transaction costs in order to provide this element of fairness.

The judicial strict foreclosure process should be as expeditious as possible in order to minimize costs. An inexpensive way to make the process fair in fact, as well as in appearance, is to include in the mortgage agreement a provision stating that, upon a mortgagor’s default, the mortgagee may obtain strict foreclosure by bringing a judicial action. The ULTA’s strict foreclosure provisions required such a statement.273 In addition, the ULTA’s requirement that the mortgagor be given fifteen days from receipt of notice of default to bring his loan current274 should be generally available. Admittedly, this grace period produces some delay and cost. The proposal is probably fair, however, and it would provide a socially acceptable, equitable allocation of costs. Beyond notice and a brief reinstatement period, however, there should be no protection for a mortgagor275 other than those implicit in the ability to defend against an action for foreclosure.276

Finally, in a suit for strict foreclosure, the process should permit a mortgagee to include a cause of action for a deficiency. If the mortgagor is denied recovery for a deficiency, others will

272. Of course, society may be willing to allocate resources equitably to benefit small groups.

273. See COMMISSIONERS’ HANDBOOK 1975, supra note 159, at 275-76 (citing former § 3-505(c) of the Uniform Land Transactions Act).

274. UNIF. LAND TRANSACTIONS ACT § 3-512(b), 13 U.L.A. 710 (West Master ed. 1980).

275. Other protections commonly include statutory redemption and limits on deficiencies.

276. For example, a mortgagor could prove that there has not been a default, or he could redeem by paying the balance on the mortgage loan.
bear the resulting cost.277 Shifting the burden is inefficient and inequitable. With respect to determining the amount of a deficiency, the process should require an appraisal of the market value of the mortgaged property, by a neutral party appointed by the court and paid by the mortgagee.278 If the appraisal indicates that the value of the property is less than the balance on the mortgage loan, the court should order strict foreclosure and issue a judgment for the deficiency. The mortgagor should then have no further rights in the mortgaged property.

C. Residential Mortgagors

Understandably, a difference in the perception of the fairness of a process may result when that same process is applied to different groups. For example, applying strict foreclosure to residential and business mortgagors may create differing perceptions of fairness. Two aspects of this Article’s proposal for judicial strict foreclosure will probably raise concerns about fairness: the ability of the mortgagor to have strict foreclosure when the property is worth more than the balance on the mortgage loan and the ability of the mortgagee to have both strict foreclosure and a deficiency judgment.

If the foreclosure process protects certain groups, the initial problem is the selection of group members. The ULTA’s protected party provisions279 provide generally sufficient distinctions between residential mortgagors and business mortgagors. However, the ULTA provisions should be narrowed so that one who assumes the mortgage of a protected party becomes a protected party himself only if he in fact either occupies the property or one of his relatives occupies the property.280 In this manner, only those who live in their homes, or who own homes in which their relatives live, will be protected.

277. The mortgagor is no longer concerned if a deficiency is not allowed because he is not personally liable for the mortgage loan, and he has no economic interest in the property because, when a deficiency is sought, the property by definition is worth less than the balance on the mortgage loan.

278. If the mortgagee bears the cost of an appraisal, he will require an appraisal only when he believes the property is worth less than the balance of the mortgage loan.

279. See supra notes 164-67 and accompanying text.

280. This essentially is what § 1-203(a) of the Uniform Land Transaction Act requires for the initial borrower to be considered a protected party.
Permitting strict foreclosure when the mortgaged property is worth more than the balance of the mortgage loan appears to permit a forfeiture. In fact, this proposal for strict foreclosure is not a forfeiture, because a mortgagor may sell the property to a third party and extinguish his debt. If he chooses not to exercise that option, the mortgagor can hardly claim that strict foreclosure works a forfeiture.

Nonetheless, strict foreclosure of property that has a value greater than the value of the mortgage loan appears unfair. A protected party mortgagor should therefore be permitted to defend against a strict foreclosure action by demanding that the court order an appraisal of the property at his expense. If the appraisal shows that the property's value is equal to or less than the balance of the mortgage loan, the court should render a judgment for strict foreclosure and a monetary judgment for any difference between the mortgage loan balance and the appraised value of the property. If, on the other hand, the appraisal shows that the property is worth more than the balance on the mortgage loan, the court should dismiss the action for strict foreclosure and allow an action for foreclosure by sale. To foster the perception of fairness, the "value of the property" should be the market value and the foreclosure sale should be judicial. The sale should be quickly and publicly executed, and the buyer should be the highest bidder. This method minimizes delay. Finally, if the property is sold for less than the balance on the mortgage loan, the mortgagee should be entitled to a deficiency judgment.

The mortgagee should always be permitted to seek a deficiency judgment. Although it may be perceived as unfair to allow the mortgagee to obtain a deficiency judgment in addition to strict foreclosure, it is in fact fair to make the mortgagor pay his

281. The mortgagor "forfeits" the difference between the value of the property and the balance on the mortgage loan, that is, his equity in the property.
282. Arguably, the mortgagor might not be able to find a buyer in the time it takes for judicial strict foreclosure. However, if the property cannot be sold for more than the balance on the mortgage loan, the market value of the property is less than the balance on the mortgage loan.
283. See supra note 278 and accompanying text.
284. Any perceived unfairness to a mortgagor in this system is illusory. By the time of foreclosure, a mortgagor has chosen to forgo a sale to a third party at market value. Because a mortgagor has an opportunity to effect such a sale, he should not be able to delay the foreclosure process further.
debt. Unless the mortgagor causes a sale to be held, he will only be liable for the difference between market value and the balance on the mortgage loan. When a mortgagor has enjoyed the benefit of the money borrowed from a mortgagee, he should be required to repay it.

V. Conclusion

The rights of strict foreclosure proposed by this Article differ substantially from this country’s accepted theory of foreclosure by sale. These proposals represent a simplification of existing foreclosure procedures. Efficiency should be society’s primary consideration. The current law of mortgage foreclosure is flawed because it focuses almost entirely on equity and fairness. Certain societal needs are met by current law, but mortgage foreclosures are primarily economic transactions and current law results in inefficient behavior which is detrimental to the interests of all parties to mortgage transactions. It is time to make foreclosures more efficient.

285. See supra notes 277-78 and accompanying text.

286. This statement may not apply when a mortgagee also sold the property to the mortgagor or was otherwise affiliated with the seller of the mortgaged property. For the purposes of this Article, it is assumed that the mortgagor, and not the mortgagee, controlled the initial market value of the property at the time of acquisition.