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Where Kafka Reigns: A Call for Metamorphosis in Unlawful Detainer Law

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WHERE KAFKA REIGNS: A CALL FOR METAMORPHOSIS IN UNLAWFUL DETAINER LAW

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> The right . . . to be heard on relevant matters, and to be secure in their constitutional rights, as well as the desirable purpose of preventing a multiplicity of suits, is, and must be, superior to the desire to provide a speedy remedy for possession.
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> *Rosewood Corp. v. Fisher*, 263 N.E.2d 833, 839 (Ill. 1970)

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A (KAFKAESQUE) SHORT STORY

Homes are sacred spaces. Although they are real property, like office buildings or restaurants, in American culture and jurisprudence, homes are specially protected. Culturally, the American dream often centers around the ability to buy a home and raise a family. Songs and movies about going home abound, and many of us remember our heights marked on walls or our initials carved in wood nostalgically. Legally, home ownership is incentivized through tax breaks and shielded from attack by creditors through bankruptcy and homestead laws; homes are protected from searches by privacy law and in many states, one can defend the home with deadly force. Indeed, homes are our most valued piece of property. We bury our dogs in the backyard, and raise children under its roof. We fight and make up. We eat, we drink, we sleep, and we love—in our homes. And so, we hope and expect that the law will protect our homes. But, as this Article discusses, this is not always true. The story below illustrates how things can go dreadfully wrong.

A homeowner makes his payments, but due to bulky, antiquated, and wholly ineffective automated servicing systems, the bank misapplies them to another account. Because of this error, a computer program cranks out a default notice and sends foreclosure documents to a local attorney, who will carry out the foreclosure sale. All of this happens within a month or two and without anyone in authority involved. No one, except for the homeowner, gathers enough information to learn that the foreclosure is illegal. After receiving notice of foreclosure, the homeowner calls the bank, foreclosure attorneys, and the press—but to no avail. The homeowner even seeks out an attorney of his own, but he cannot afford to pay much, and few attorneys take foreclosure cases. Thus, the homeowner fails to find counsel, and the foreclosure occurs in less than two months. The system is broken.

The homeowner's house is sold on the courthouse steps for pennies on the dollar. And the new buyer—another large bank—files a court action, called an unlawful detainer, to evict the homeowner and to take possession of the house. When the homeowner receives a summons, he sees a clear path to telling a court what happened for the first time. On his court date, the homeowner appears on time, in a suit, and with documents. He fights for his home. The homeowner provides proof that he made payments in the amount required by the note, that he notified the bank and foreclosure attorney of the same, and he argues that the new buyer cannot

possibly have "right to possession" because the foreclosure sale was illegal.

And you, reader, know that the homeowner is right. The foreclosure is void because it was illegal. Title did not pass, and the new buyer has no right to possession.

But the homeowner loses anyway. The court tells the homeowner that it is prohibited from considering evidence that would challenge title, and rules in favor of the new buyer, who produced no evidence at all. The court orders the homeowner to evacuate his home in twenty days and to pay rent for the months he occupied the home. If the homeowner does not do this, the judge warns that he will face wage garnishment and forced eviction by the sheriff.

INTRODUCTION

Does this scenario sound like a bad dream or a Kafka short story? It may, but I assure you it is not. This story reflects a new reality in which nonjudicial foreclosure, combined with draconian unlawful detainer laws, concretizes the injuries associated with wrongful foreclosure, degrades the perceived legitimacy of the courts, and suppresses valid claims of wrongful foreclosure. Indeed, this very scenario happens regularly in a variety of states.[1] This story is a very real tale of how homeowners are harmed by a foreclosure process that has largely escaped scholarly review. Rooted in the belief that sunshine is a powerful disinfectant, this Article aims to shed light on states that hogtie homeowners and makes a normative argument that such a process is inconsistent with the rest of home-centric jurisprudence, notions of legitimacy, the modern trend towards centralization and consolidation of claims, and our basic understanding of tort claims as deterrents.

In nonjudicial foreclosure states, foreclosures occur without judicial involvement. Typically, the noteholder, or a representative of the noteholder, initiates foreclosure through a private trustee. The private trustee gives notice to the homeowner, initiates the sale, and

1. *See, e.g.*, Fannie Mae v. Truong, 361 S.W.3d 400, 402 (Mo. 2012). In this case a homeowner was evicted in an unlawful detainer despite the fact that he asserted that the bank sent him two letters on the same day that fundamentally contradicted one another and made the foreclosure illegal. The first letter indicated Mr. Truong complied with the modification schedule and could receive a permanent modification. The second, sent on the same day by the same bank, stated he was in default and would be foreclosed. The foreclosure occurred only about a month after the letters were sent, and only one day after Mr. Truong returned from Vietnam to find the letters in the mail. When Truong attempted to raise these facts in the unlawful detainer, he was precluded from doing so.

deeds the property to the new buyer.[2] Advocates of nonjudicial foreclosure tout its expediency, while those who criticize nonjudicial foreclosure lament that it does not protect a homeowner before he is legally divested of his home.[3]

Both are right. Nonjudicial foreclosure is fast—at least twice as fast as judicial foreclosure.[4] But, because the noteholder controls the nonjudicial foreclosure process, nonjudicial foreclosure does a poor job of detecting negligent or fraudulent foreclosures. In the modern mortgage era, when it is increasingly common to question who owes what to whom, and when government reports[5] suggest that hundreds of thousands of foreclosures involve errors, nonjudicial foreclosure is too porous a filter to separate wrongful foreclosures from justified ones. As a result, there are those who suggest that nonjudicial foreclosure is never a good fit in the modern mortgage era, and that it should be replaced by full judicial process. Those advocates suggest that no amount of examination after a foreclosure can solve the fundamental problems present in nonjudicial foreclosure.

This is an important debate, but it is not the focus of this Article, which takes a largely pragmatic approach. Nonjudical foreclosure will not be abolished anytime soon; it is deeply imbedded—especially in the West. As a result, I assume the ongoing existence of nonjudicial foreclosure, and focus only on a subset of nonjudicial foreclosure states that, rather than mitigate the risks of nonjudicial foreclosure, enhance them—or even cause them. This specific problem and my suggested solutions are the focus of the remainder of this Article.

After a nonjudicial foreclosure, a court often becomes involved in the physical eviction of the homeowner.[6] Typically, the buyer of

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2. Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 35, 1403 (2013).

3. *See, e.g.*, Kasey Curtis, *The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry*, 36 W. ST. U. L. REV. 119, 124 (2008).

4. *See* KAREN M. PENCE, BD. OF GOVERNORS OF THE FED. RESERVE, FORECLOSING ON OPPORTUNITY: STATE LAWS AND MORTGAGE CREDIT 5 (2013), http://www.federalreserve.gov/pubs/feds/2003/200316/200316pap.pdf (judicial foreclosure process ranges from 148 to 300 days longer than nonjudicial foreclosures); John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 CATH. U. L. REV. 103, 126 (2013) (nonjudicial disclosure process ranges from twenty to 120 days, depending on state).

5. BD. OF GOVERNORS OF THE FED. RESERVE, INDEPENDENT FORECLOSURE REVIEW (2014), http://www.federalreserve.gov/publications/other-reports/files/independent-foreclosure-review-2014.pdf.

6. Throughout this Article, I refer to the "homeowner" when referring to the party who experiences a foreclosure and faces eviction. More precisely, after a foreclosure sale, this party is the "past homeowner." However, as described herein, because the legal status of that party is not legally decided in many states before eviction, and because it is entirely possible

the home at the foreclosure sale brings an unlawful detainer to the appropriate court. The buyer asserts that it acquired title at the foreclosure sale; that the homeowner remains illegally; that the court should evict the homeowner; and, that the court should award damages for the delay.[7] The buyer's most fundamental assertion is that it has title and right to possession. But what if the homeowner can prove that the foreclosure was illegal—even void—meaning that title never passed?[8] Can the homeowner remain in the home? And can the homeowner bring a counterclaim against the buyer if the buyer had reason to know the foreclosure was void?

The answer to these questions depends on where the homeowner lives. In many states, before a court evicts a homeowner, it requires the buyer to prove title. The court also entertains defenses. But in some states, the homeowner is prohibited from asserting defenses.[9] As a result, the buyer does not have to prove title. In these states, when there is a wrongful foreclosure, the homeowner is almost always removed from the home *before* the court considers legal title, despite the fact that title would determine right to possession. Appellate courts in these states—to the extent they have considered the issue—typically concede this means that a homeowner could be removed from the home, only to later prove that it was his all along. Although this may not be ideal, to date, it has been deemed constitutional in those states.[10] These courts typically justify the homeowner's limited right to defend by noting that homeowners can file a separate action to adjudicate whether the foreclosure was legal, and that the unlawful detainer is intended to be an expedited process.[11]

This Article addresses the differences between nonjudicial foreclosure states that allow challenges to unlawful detainers ("challenge states") and nonjudicial foreclosure states that do not ("no-challenge states"). It argues that nonjudicial foreclosure is at best a porous filter—or an initial sifting—that will not cull out all the illegal foreclosures that occur. The Article argues that if the

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that the person remains the "homeowner" despite foreclosure, I employ the term "homeowner" throughout.

7. *See, e.g.*, MO. REV. STAT. §§ 534.200, 534.330 (2012).

8. "The distinction between *void* and *voidable* is often of great practical importance. Whenever technical accuracy is required, *void* can be properly applied only to those provisions that are of no effect whatsoever—those that are an absolute nullity." *Void*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. *See, e.g.*, Broken Heart Venture, L.P. v. A & F Rest. Corp., 859 S.W.2d 282, 286 (Mo. Ct. App. 1993).

10. *See, e.g.*, Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 457 (Mo. 2013); Curtis v. Morris, 909 P.2d 460, 464 (Ariz. Ct. App. 1995).

11. *See, e.g.*, *Wells Fargo Bank*, 392 S.W.3d at 458.

unlawful detainer does not require the buyer to prove title and allow the homeowner to present defenses, then the unlawful detainer is equally porous—or employs the same sifting criteria—as nonjudicial foreclosure. As a result, the bona fides of a foreclosure are not tested prior to eviction, and although a court is ostensibly involved, it does not function in its typical role. The court does not consider evidence, allocate burdens of proof, or otherwise resolve disputes; instead, unlawful detainer in these states is really de facto nonjudicial eviction. This is not only harmful to homeowners, courts, and society, but also a missed opportunity to use the unlawful detainer process as a means to keep the efficiencies of nonjudicial foreclosure while improving the accuracy of those foreclosures.

I argue that a two-phase, progressive filtering regime—such as what exists in challenge states—is superior to what exists in the minority of states that stubbornly retain no-challenge regimes. In order to strain out wrongful foreclosures, no-challenge states should adopt the two stage filtering that occurs in challenge states.

Specifically, the first filter in the system should be nonjudicial foreclosure. Although this filter lets foreclosures move quickly, it is only modestly effective at culling the bad from the good. The second filter should be a full adjudicative process in unlawful detainer actions. This second filter should allow for defenses, leave the burden of proof on the plaintiff, and take the time necessary to provide due process. At this stage, the majority of foreclosures will still pass through uncontested because the homeowner agrees that the foreclosure was appropriate. However, for those who suffered a wrongful foreclosure, the service of process, the right to defend, and the court's ability to consider legal and factual disputes will reduce the number of wrongful foreclosures that become wrongful evictions. This two-stage, progressive filtering system retains the expediency of nonjudicial foreclosure for most foreclosures while better identifying and rejecting illegal foreclosures.[12]

The remainder of this Article explores these ideas. Part I discusses the role of the "home" in American jurisprudence and more generally, in American society. Part II discusses the differences between judicial and nonjudicial foreclosure in order to establish context for considering the history of unlawful detainer law and the split in nonjudicial foreclosure states between those who allow challenges to title in unlawful detainers ("challenge states") and those who do not ("no-challenge states"). Part III chronicles the current

12. To be fair, the idea of two stages of filtering foreclosures is not my own. As discussed in Part III, several states already employ this method. I have just given it a name and hopefully provided some support for the method to be adopted more widely.

state of the law in each state in an effort to identify the majority position and legal trend away from no-challenge regimes. Part IV turns to my normative position. This Part argues that no-challenge states cause, augment, and concretize harm from wrongful foreclosures. It focuses on how these harms occur to homeowners, courts, and society as a whole. Finally, Part V proposes basic paths for reform and responds to potential critiques of my position. A brief conclusion follows.

I. HOME AS SACRED PROPERTY

This Article uses the terms "home" and "homeowners." The focus is on residential real estate that is used as a primary dwelling. "Home" can be defined many ways. And there is reasonable debate about which description is most accurate. There is also debate about whether the home plays too large a role in American jurisprudence—particularly Fourth Amendment law—to the detriment of other spaces that also deserve privacy protections.[13] Others argue that the concept of home is oversimplified, suggesting instead that how people view their homes and the privacy they expect in them is nuanced and context specific. I discuss many of these views briefly below, but do not delve deeply into the debate. My cursory treatment is not meant to diminish the importance of these discussions for broader legal and sociological questions. However, for purposes of this Article, a brief treatment suffices.

I have the luxury of taking a pluralistic, even permissive approach, to the meaning of "home." This is because, even if only the basic consensus points in the literature are accepted as true, there is still considerable agreement around many central tenants of what a home is, what it means to those who reside in it, and the role it occupies in the law. Whether home is viewed as personal property,

13. Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 909 (2010) ("Even subjective expectations of privacy suggest a relative view of home privacy and call into question the privileging of all things residential. Citizens ascribe much greater intrusiveness to searches of bedrooms, for example, than searches of home garages, curbside residential garbage, or surveillance of backyards."); *see also* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737–39 (1993) (demonstrating empirically that people consider fly-over searches into their backyard less intrusive than the search of a bedroom). These are important points, and have intuitive appeal. However, given that foreclosure and eviction removes a person from the entire structure, these nuanced arguments about context specific privacy expectations are not germane to this Article.

a true extension of a person's psyche, a "castle,"[14] or a functional place for people to live, few disagree that a family's home is important to a person's physical, emotional, and financial well-being.[15]

A. Scholarly Concepts of Home

Although subject to minor variations in academic circles, there is scholarly congruity on many central ideas of what home is. Most scholars acknowledge that the concept of home involves a physical structure. And "many scholars agree that home can represent a person's security, self-identity, and center for social interaction."[16] Home is frequently identified as a place of retreat, safety, relaxation, freedom, and independence.[17] In terms of self-identity, a home reflects its occupant's sense of self. It provides space to develop and express identity.[18] Some argue that "after the body itself, the home is seen as the most powerful extension of the psyche."[19] Home is also viewed as a "locus for social relationships."[20] Margaret Jane Radin—one of the seminal scholars of property and personhood—captures all this is one sentence. She writes, "There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic."[21]

With very few exceptions, American law also embraces home exceptionalism or "home-centric" ideals. Homeowners receive tax reductions for interest paid on a residential property.[22] Bankruptcy

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14. The Castle Doctrine is alive and well in many states. *See* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 662 (2003). For an early incarnation of the doctrine, see State v. Patterson, 45 Vt. 308, 320–21 (1873) ("The idea that is embodied in the expression that, a man's house is his castle, is not that it is his *property*, and, as such, that he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family.").

15. The role of the home in personhood and dignity is a frequent topic of symposiums. *See, e.g.*, Kristen David Adams, *Housing, Personhood, and Dignity*, 36 STETSON L. REV. 1 (2006).

16. Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 319 (2006).

17. Peter Somerville, *The Social Construction of Home*, 14 J. ARCHITECTURAL & PLAN. RES. 226, 227 (1997).

18. *See* Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J. L. & SOC'Y 580, 593 (2002).

19. *See* Carole Després, *The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development*, 8 J. ARCHITECTURAL & PLAN. RES. 96, 100 (1991).

20. Ballard, *supra* note 16, at 284–85.

21. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 987 (1982).

22. I.R.S., PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION (2014), http://www.irs.gov/pub/irs-pdf/p936.pdf.

law exempts homes from certain calculations and from forfeiture.[23] The home looms large in privacy law, too. Obscene material that would be illegal if possessed in public is legal in the home.[24] And warrantless arrests in public pass constitutional muster, while warrantless arrests in the home do not.[25] Even a warrantless thermal scan of a home violates the law.[26] And the home is essential in creditor law. For example, in many states, a creditor cannot collect a valid judgment against a debtor by a lien on their home.[27] If one needs more proof, entire government programs were enacted in the last decade to preserve homeownership.[28] If this is not "home-centric" enough, some say that American law should go further. They argue for housing as a right,[29] and note that in most other Western countries it already is.[30]

Beyond scholarship and the law, home is central to American culture and identity. Langston Hughes wrote of a "new skyline in Harlem" where there "won't be any more houses where the steps are creaking . . . ." as a way of describing hope for an entire community.[31] Harriet Beecher Stowe said, "[H]ome is a place not only of strong affections, but of entire unreserves; it is life's undress rehearsal, its back-room, its dressing room."[32] And the home has not

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23. 11 U.S.C. § 522 (2014).

24. "As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." Stanley v. Georgia, 394 U.S. 557, 568 (1969).

25. *See* Payton v. New York, 445 U.S. 573, 602 (1980).

26. Kyllo v. United States, 533 U.S. 27, 40 (2001).

27. *See, e.g.*, CAL. CIV. PROC. CODE §§ 704.710–.730 (2014) (establishing a "homestead exception" that prevents creditors, in most cases, from forcing the sale of a primary dwelling).

28. The most obvious example of the government's desire to preserve homeownership is HAMP. "The Home Affordable Modification Program (HAMP) was created by the Department of Treasury (Treasury) in 2009 to encourage modification of residential loans and avoid foreclosure where possible." Thomas M. Schehr & Matthew Mitchell, *The Home Affordable Modification Program and A New Wave of Consumer Finance Litigation*, 91 MICH. B.J. 38, 38 (2012). Although voluntary for some servicers, the program was compulsory for Fannie Mae and Freddie Mac. John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L.Q. REP. 194, 195 (2011).

29. *See generally* Kristen David Adams, *Do We Need A Right to Housing?*, 9 NEV. L.J. 275 (2009).

30. "Of course, most (States) have ratified rights to housing at an international level in a range of instruments, from the United Nations (UN) to the Council of Europe. Implementation of these rights is obliged and promoted within both a programmatic approach, as well as a violations and remedies approach (opportunities for litigation in the event of breaches)." Padraic Kenna, *Housing Rights–The New Benchmarks for Housing Policy in Europe?*, 37 URB. LAW. 87, 87 (2005).

31. LANGSTON HUGHES, *Hope for Harlem*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 1, 436–37 (1995).

32. HARRIET BEECHER STOWE, LITTLE FOXES 9 (1866), https://archive.org/details/littlefoxes00stowgoog.

escaped popular culture. Miranda Lambert sings the "House That Built Me"[33] about her desire to find herself by returning home. Phillip Phillips sings of "Home"[34] as a place of security, and Crosby, Stills, Nash & Young sing of a "very, very, very fine house"[35] where everything is easy and domestic bliss is real.[36] Even Dorothy knew there was "no place like home." American Gothic wouldn't be the same without the American Gothic House[37] as its backdrop, and most of us grew up with the promise of the American Dream—complete with a home of our own—as part of the zeitgeist.

Indeed, the concept of home, whether drawn from scholars, laws, or literature, is sacrosanct. Even writing about it brings feelings of nostalgia and warmth. I note this not to be sentimental, but to frame what is at stake in this Article. This Article is about losing a real piece of property called home. But because it is the "home," and not an office building—there is more to it. From a positive law standpoint, the lack of protection for the home in unlawful detainer law is anomalous and inexplicable. And from a normative perspective, this radical departure from home-centric precepts is unwise, unfair, and unsustainable.

To understand these arguments, the next two parts provide some context as to how foreclosures occur in America, and more specifically, how some states deal with evicting homeowners after the foreclosure sale.

II. JUDICIAL V. NONJUDICIAL FORECLOSURE

Most foreclosures in the United States occur through either a judicial or nonjudicial process.[38] Strict foreclosure, a form of judicial process in which there is no sale of property, is allowed in at

33. Miranda Lambert, *The House That Built Me*, YOUTUBE (Mar. 31 2010), https://www.youtube.com/watch?v=DQYNM6SjD_o.

34. Phillip Phillips, *Home*, YOUTUBE (Aug. 2, 2012), https://www.youtube.com/watch?v=HoRkntoHkIE.

35. Crosby, Stills, Nash & Young, *Our House*, YOUTUBE (Apr. 13, 2013), https://www.youtube.com/watch?v=c7goifK_2qY.

36. There's ample material to read. But if you enjoy music as I do, these songs might more effectively call up your own memories of home than any scholarly observations. Enjoy.

37. *American Gothic House*, WIKIPEDIA, http://en.wikipedia.org/wiki/American_Gothic_House (last modified Jan. 29, 2015, 5:46 PM).

38. Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 139 (2013).

least two states.[39] The two main processes are discussed below. Although the nonjudicial system is emphasized in this Article, judicial foreclosure is discussed in order to show why the issues discussed in this Article are unique to nonjudicial states.

A. Judicial Foreclosure

Approximately forty percent of states mandate judicial foreclosure.[40] In almost all judicial foreclosure states:

> [T]he mortgage holder must file an action in court and obtain a court decree authorizing a foreclosure sale. Generally, the party seeking to foreclose must establish its standing to do so. The plaintiff must show that there is a valid mortgage between the parties and that it is the holder of the mortgage or, otherwise, is a proper party with authority to foreclose.[41]

Judicial foreclosure typically entails a lengthy series of steps: (1) the filing of a foreclosure complaint and *lis pendens* notice; (2) the service of process on all parties whose interests may be prejudiced by the proceeding; (3) a hearing before a judge or a master in chancery who reports to the court; (4) the entry of a decree or judgment; (5) the notice of sale; (6) a public foreclosure sale, usually conducted by a sheriff; (7) the post-sale adjudication as to the disposition of the foreclosure proceeds; and, if appropriate, (8) the entry of a deficiency judgment.[42]

Most pertinent to this Article, in a judicial foreclosure, the homeowner is allowed to raise defenses to the foreclosure in the foreclosure proceeding.[43] "Once the judgment is final, the usual doctrines related to finality apply. Because finality doctrines eliminate most or all defenses to the action, they also protect the rights of the purchaser at the sale and stabilize title."[44]

As a result, the unlawful detainer (sometimes called a wrongful detainer, forcible detainer, or forcible entry action) that follows is

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39. Connecticut and Vermont primarily use the strict foreclosure method, while Illinois allows strict foreclosure under limited circumstances. LAWRENCE R. AHERN III, LAW OF DEBTORS AND CREDITORS § 8:15 (2014).

40. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004).

41. Renuart, *supra* note 38, at 139.

42. Nelson & Whitman, *supra* note 40, at 1403.

43. *See id.*

44. Renuart, *supra* note 38, at 140.

quick and typically frictionless since the right to possession has already been adjudicated. The unlawful detainer is merely a judicial process to remove people who do not voluntarily leave after the foreclosure. It avoids self-help, thereby making violence or confrontation less likely,[45] and it provides a vehicle for damages for the buyer. A challenge to the underlying foreclosure, and its ability to pass title to the new buyer, is understandably prohibited as a court has already considered the validity of the foreclosure in the judicial foreclosure proceeding.[46]

B. Nonjudicial Foreclosure

Nonjudicial foreclosure is substantially less complicated and less costly than judicial foreclosure.[47] In fact, proponents often note the speed of nonjudicial foreclosure as one of its benefits.[48] In a nonjudicial foreclosure, when a noteholder identifies a default under the terms of the governing documents (the note and deed of trust), the noteholder appoints a successor trustee who carries out the foreclosure process.[49] "Following a default by the homeowner, the holder of the mortgage or the trustee named in a deed of trust must give notice according to the terms of the mortgage or deed of trust and applicable statutes in order to sell the home."[50] This is rarely the original trustee identified in the deed of trust. Instead, it is more common that the noteholder appoints a successor trustee.[51]

The types of notice include include notification of default, of acceleration, and of the sale.[52] The type of notice and how much time must lapse between the notice and the foreclosure sale differs from state to state. Most states require publication notice in addition to

45. *See, e.g.*, J. TERRY B. FRIEDMAN ET AL., CAL. PRAC. GUIDE: LANDLORD-TENANT ch. 7-A (2013) (describing the process in the nation's largest nonjudicial foreclosure state).

46. *See, e.g.*, Lady v. Montgomery Ward & Co., 399 N.E.2d 346, 348–49 (Ill. App. Ct. 1980) (holding that defendant was prohibited from challenging title in the wrongful detainer action and that proper method would be to challenge the validity of the foreclosure in the judicial foreclosure action).

47. Nelson & Whitman, *supra* note 40, at 1403.

48. *See id.* at 1404.

49. Campbell, *supra* note 4, at 126.

50. Renuart, *supra* note 38, at 140.

51. Campbell, *supra* note 4, at 126. In a few nonjudicial states, a trustee is not employed at all. And in one state, Colorado, the trustee is a public official appointed by the governor. COLO. REV. STAT. § 38-37-104 (2014). Regardless of these differences, the fundamental fact is that in nonjudicial states, courts do not rule on the appropriateness of foreclosure before it happens.

52. Renuart, *supra* note 38, at 140.

mailed notice. And depending on state law, notice can be provided and foreclosure completed in twenty to one hundred twenty days.[53]

California has one of the longest notice periods—three months—while Missouri has one of the shortest—twenty days.[54] To stop nonjudicial foreclosure, the homeowner must seek an injunction or raise legal defenses in a separate action.[55] Homeowners in every nonjudicial foreclosure state struggle to find lawyers to represent them, because of the financial status of many homeowners and a genuine deficit of consumer lawyers who navigate foreclosure law.[56] "The shorter the notice period is, the more likely it is that a homeowner will be unable . . . to take meaningful steps to stop the foreclosure."[57]

The actual foreclosure sale occurs without court involvement.[58] The appointed trustee carries out the sale and conveys title to the buyer.[59] A court is involved only if the homeowner files an affirmative action that challenges the foreclosure.[60]

Just as in judicial foreclosure states, if the homeowner does not leave his home voluntarily, the buyer initiates an unlawful detainer action. The purpose is to obtain an order that requires the homeowner to vacate the property and that awards any appropriate damages. As discussed in the next Part, states differ on whether or not a homeowner can raise defenses in an unlawful detainer action. In many states, the homeowner is prohibited from offering proof that the foreclosure was improper. This is true even though, unlike judicial states, no court in nonjudicial states has considered the

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53. Campbell, *supra* note 4, at 126 (alteration in original).

54. *Id.* at 126 n.167.

55. Renuart, *supra* note 38, at 141.

56. This fact may be best illustrated by reviewing the website for the National Association of Consumer Advocates. NAT'L ASS'N OF CONSUMER ADVOCATES, http://www.consumeradvocates.org. The group is the nation's largest consumer attorney organization. There are certainly other attorneys who do consumer work, but NACA attorneys are entirely dedicated to it and are often leaders in their fields. A search on the "Find an Attorney" page reveals that in Texas, there are only thirteen attorneys in the entire state who are members of NACA and who say they are willing to deal with mortgage issues. A few other randomly selected nonjudicial foreclosure states have the following number of comparable attorneys: Mississippi (2); Missouri (11—and one of them is me); Arizona (5); Nevada (3); Washington (11). Compare that to the fact that from 2008 to 2011 alone, there were at least twelve million foreclosures. In 2008, there were 2.3 million properties in foreclosure. In 2009, as the mortgage crisis continued to build, there was an estimated 2.9 million properties in foreclosure. In 2010, the number was roughly the same. In 2011, there were 2.7 million more, and in 2012, there were roughly 1.8 million. NATIONAL FORECLOSURE REPORT, CORELOGIC (2013), http://www.corelogic.com/downloadable-docs/national-foreclosure-report-august-2013.pdf.

57. Campbell, *supra* note 4, at 126–27.

58. *Id.* at 126–29.

59. *Id.*

60. *Id.*

bona fides of the foreclosure. In other states, the unlawful detainer action works like any other case; the buyer (plaintiff) has the burden of proof, and the homeowner (defendant) has the right to defend.[61] From this point forward, I refer to courts that allow defenses as "challenge states" and those who prohibit defenses as "no-challenge states."

Why would any court prohibit a homeowner from defending, and why it would relieve the buyer—often an institutional investor or large bank—from proving it has clear title? The answer lies in the history of unlawful detainers.

III. UNLAWFUL DETAINERS

A. History of Unlawful Detainers in Landlord-Tenant Setting

During this nation's early years, unlawful detainer proceedings were common in the landlord-tenant setting.[62] Today, they exist in every state.[63] Unlawful detainers are often used to quickly remove renters from a premise—often less than ten days after the eviction action.[64] This expediency, although favored by landlords, has been criticized as fundamentally inconsistent with protecting renters' rights because it prevents renters from raising defenses to eviction.[65]

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61. Seitz v. Fed. Nat'l Mortg. Ass'n, 909 F.Supp.2d 490 (E.D. Va. 2012); Wayne Inv. Corp. v. Abbott, 215 N.E.2d 795 (Mass. 1966).

62. The Supreme Court of Appeals of West Virginia noted in a 1912 possession case that, "[t]ext books and judicial decisions from other states having similar statutes, hold that the remedy of a mortgagee or trustee is ejectment, not unlawful entry and detainer." Frum v. Prickett, 76 S.E. 453, 453 (W. Va. 1912). In 1906, the Supreme Court of Washington reiterated that, "'in view of the fact that this was an action of unlawful detainer, it was necessary that the conventional relation of landlord and tenant be clearly established.' It has been frequently held that title cannot be tried in an action for unlawful entry and detainer." Meyer v. Beyer, 86 P. 661, 662 (Wash. 1906). A 1976 article in the *Stanford Law Review* notes that in California "virtually all unlawful detainer actions" involve nonpayment of rent from a landlord-tenant relationship. Ben H. Logan III & John J. Sabl, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 741 n.62 (1976). The article also notes, "since unlawful detainer actions are summary actions, they are resolved much faster than other civil suits." *Id.* at 739.

63. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

64. *Id.*

65. *Id.* (noting that "because the summary procedure for eviction enables the landlord to enforce the terms of the leasehold within a framework designed for speed rather than fairness, the relationship largely avoids judicial scrutiny"); *see also* James H. Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 42 (1980) (suggesting alternative dispute resolution); Ken Karas,

Despite these criticisms, expedited unlawful detainers persist in rental settings. These actions prohibit a number of inquiries, mainly inquiries about title.[66] The ability to evict a renter without litigating title dates back to 1381. English landlords were prohibited from using self-help to recover leased property. As a trade-off for having to bring an action in court, landlords were not required to establish title.[67]

Regardless of its origin, the separation between litigating possession and litigating title was adopted with vigor in the United States. Indeed, statutes of forcible entry and detainer were some of the first laws enacted.[68] As Professor Spector of Southern Methodist University explains, in these actions "possession was the primary substantive issue, and the primary remedy available was the return of possession, reflecting the principle developed in the ancient law of real property that possession ends the dispute."[69] Spector also notes that in addition to relying upon traditional separations between possession and actual ownership, unlawful detainer proceedings limited issues that could be pleaded or raised as defenses because courts of law and equity were split.[70] One dispute was commonly resolved by two separate actions.[71] Thus, unlawful detainer actions were streamlined, limited proceedings. Litigants could only bring narrow claims and defendants were not allowed to bring counterclaims, add parties, or raise defenses.[72] Although the law and equity slowly dissolved in most courts the mid-nineteenth century, the piecemeal approach to landlord-tenant law persisted.

An astute observer might wonder whether this piecemeal adjudication of rights is constitutional. The United States Supreme Court

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Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York, 24 COLUM. J.L. & SOC. PROBS. 527, 553–60 (1991) (discussing right to counsel); Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562–89 (1988) (right to counsel).

66. *See* Hallquist v. United Home Loans, Inc., 715 F.3d 1040, 1047 (8th Cir. 2013) (confirming that a party "cannot challenge title issues in an unlawful-detainer action, as it adjudicates only lawful possession"); Reynolds v. Wells Fargo Bank, N.A., 245 S.W.3d 57, 60 (Tex. App. 2008) ("The only issue in a forcible detainer action is the right to actual possession. The merits of title are not to be adjudicated."); Sav. Bank of Puget Sound v. Mink, 741 P.2d 1043, 1046 (Wash. Ct. App. 1987) ("In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed . . . .").

67. *See* Spector, *supra* note 63, at 142–52, for a detailed discussion of this history.

68. *Id.* at 152.

69. *Id.* at 153.

70. *Id.* at 154.

71. *Id.*

72. *Id.* at 157–58.

answered that question—at least in the rental setting.[73] In *Lindsey v. Normet,* a tenant argued that Oregon's unlawful detainer law, which prohibited most defenses, was unconstitutional because it denied due process to renters.[74] The United States Supreme Court held that Oregon's process was constitutional.[75] Although the tenant was barred from raising the defense that the landlord maintained the premises, the landlord was also barred from claiming back rent or asserting other claims.[76] The Court explained, "The tenant is barred from raising claims in the FED (forcible entry and detainer) action that the landlord has failed to maintain the premises, but the landlord is also barred from claiming back rent or asserting other claims against the tenant."[77] Further, "the tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action."[78] This reasoning, that a limited action is appropriate so long as the remaining rights can be litigated in another case, has survived even if its underlying rationale is questionable. As discussed in Part V—which includes my proposed solutions and some discussion of opposing views—no-challenge regimes have been contested on constitutional grounds, and when they survive, are often justified on the same grounds as in the rental context: a homeowner can pursue his remedies in a separate action.[79]

Because unlawful detainer in the rental setting is constitutional, there is little incentive for states to change. As a result, although

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73. *See* Martin-Bragg v. Moore, 161 Cal. Rptr. 3d 471, 489 (Cal. Ct. App. 2013) ("Each of these cases reflect the courts' recognition that when complex issues of title are involved, the parties' constitutional rights to due process in the litigation of those issues cannot be subordinated to the summary procedures of unlawful detainer.") (citing Lindsey v. Normet, 405 U.S. 56, 64–66 (1972)); Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 459 (Mo. 2013)("Requirement that mortgagors assert claims regarding title in separate action did not violate mortgagors' procedural due process rights."); Andries v. Covey, 113 P.3d 483, 485 (Wash. Ct. App. 2005) ("A constitutional challenge to the limitations of the unlawful detainer proceedings [does] not have merit, because the counterclaiming party could raise his claims in some other, proper proceeding."); Sav. Bank of Puget Sound v. Mink, 741 P.2d 1043, 1046 (Wash. Ct. App. 1987) ("The right to raise a particular counterclaim in a special proceeding such as an unlawful detainer action is not a fundamental right that is protected by either the state or federal constitution.").

74. Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.").

75. *Id.*

76. *Id.* at 65–66.

77. *Id.*

78. *Id.*

79. Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 457 (Mo. 2013).

policy moved towards favoring joinder of claims[80] and statutes created class actions and mass actions to eliminate excessive litigation,[81] in the unlawful detainer setting it is perfectly normal for one action to determine the right to possession and another action to determine damages.[82] Indeed, in states like Oregon, a renter could prove that a landlord failed to maintain the premises, presumably allowing the renter to recover back rent as damages, even though that same renter was removed from the apartment for failure to pay rent owed.

If this sounds strange or inefficient, it pales in comparison to the odd results that occur in no-challenge states, described in the following sections.

B. Unlawful Detainers in the Foreclosure Setting

Historically, most unlawful detainer statutes did not apply to foreclosures. They specifically referenced landlords and tenants. As a result, the obvious path to removing a homeowner from a home was eviction. However, eviction actions allow for litigation of many issues, and they do not limit defenses the way unlawful detainers do. As a result, for at least the last fifty years, purchasers at foreclosure sales have used unlawful detainer laws to evict foreclosed homeowners.

The transmutation of unlawful detainer actions from landlord-tenant cases to mortgage cases was initially accomplished through creative lawyering and judging. One clever way took advantage of the fact that some deeds of trust state that the trustee, who holds legal title to the property until the note is satisfied, rents the property to the homeowner. In these cases, the deed typically sets the

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80. *See* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1061 (1985) ("There is a strong movement in federal court litigation toward 'packaging' all aspects of a controversy into a single lawsuit. Rules in three areas—joinder, supplemental jurisdiction, and claim preclusion—increasingly mandate the joinder of all persons interested in, and all claims arising from, a single transaction. Such packaging promotes efficient dispute resolution by avoiding repetitive, piecemeal litigation and by binding all interested persons to a single judgment.").

81. *See generally* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1780 (3d ed.).

82. Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 454 (Mo. 2013) ("[A]ny claims regarding the validity of title or seeking damages related to invalid assertions of title must be brought in a separate action" from the unlawful detainer action.").

rent at one cent per month.[83] And courts have reasoned based on such language that the subsequent buyer, who assumes the rights of the previous mortgagee, can rely upon the unlawful detainer statute in order to evict the "renter"—who is really the homeowner.[84] There are some obvious flaws in this reasoning. Chief among them is the fact that the trustee never collected rent (which might constitute waiver) and that a new deed of trust applies to the buyer (which means the buyer doesn't stand in the shoes of the previous owner or trustee). Regardless, perhaps due to familiarity with unlawful detainer laws and desire to expedite evictions, attorneys argued, and courts accepted, this position in some states.[85]

Other states found a different path. For example, Arizona courts concluded that "one who remains in possession of property after termination of his interest under a deed of trust is a tenant at will or sufferance."[86] As a result, the Arizona unlawful detainer statute applied to tenants "at will or by sufferance," and thereby, the unlawful detainer process was applicable.[87]

In recent times, the application of unlawful detainer statutes to foreclosures required less creativity. A number of states amended their unlawful detainer statutes to specifically include homeowners who remained in the home after foreclosure.[88] These amendments often involved nothing more than adding a phrase to the existing statute, so that it covered the foreclosure setting. This created real challenges because much of the remaining statutory language was based on a presumption of landlord/tenant relations; it did not recognize or consider the potential for bona fide disputes over who owned the property to begin with. Nonetheless, in a troubling example of path dependency, in some cases the entire statutory

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83. *See* FREDDIE MAC, http://www.freddiemac.com/uniform/unifsecurity.html. This webpage contains sample deeds of trust approved by Fannie Mae. Many deeds of trust contain this language. The author relied upon a deed of trust from Missouri. Interestingly, this language does not appear in every deed of trust on the Fannie Mae website.

84. *See, e.g.*, AgriBank FCB v. Cross Timbers Ranch, 919 S.W.2d 256, 261–62 (Mo. Ct. App. 1996).

85. *See, e.g.*, Yarbrough v. Household Fin. Corp. III, 455 S.W.3d 277, 281 (Tex. App. 2015).

86. Andreola v. Arizona Bank, 550 P.2d 110, 112 (Ariz. Ct. App. 1976).

87. *Id.* (citing ARIZ. REV. STAT ANN. § 12-1173(1) (2014)).

88. VA. CODE ANN. § 5445 (1919) ("If an occupant refuses possession to purchaser at a judicial sale under trust deed, the purchasers can recover possession of the property in an action of unlawful detainer."); Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings*, 68 J. MO. B. 162 (2012). Examples of amended statutes include N.H. REV. STAT. § 540:12 (2014) ("The owner, lessor, or purchaser at a mortgage foreclosure sale of any tenement or real estate may recover possession thereof from a lessee, occupant, [or] mortgagor . . . .").

language was carried over from the rental setting to the mortgage setting.[89]

Regardless of the method, the result has been that, in most states, unlawful detainer proceedings apply to the mortgage context. This, in and of itself, might not be a problem. Some states, despite concluding that unlawful detainer procedures apply to foreclosures, do not let the expedited nature of the proceedings prevent a homeowner from challenging the basic elements of the unlawful detainer.[90] These "challenge states" are discussed in Subsection 1. Other states take a harsher approach, concluding that the homeowner—now a defendant in the unlawful detainer—can do little or nothing to defend himself. These are "no-challenge states." They are discussed in Subsection 2.

1. Challenge States

Although most states have laws that ostensibly prohibit challenges to unlawful detainers, a number of courts in those states softened this approach in the last decade.[91] This is most likely because the mortgage crisis revealed ample evidence that hundreds of thousands, even millions, of foreclosures are fundamentally flawed,[92] making it difficult to assume that all buyers at foreclosure sales acquire legal title.[93]

In these emerging "challenge states," unlawful detainers are still considered limited actions, but courts allow the defendant to at least defend on the grounds that the party seeking to remove the homeowner is not the legal owner at all.[94] Homeowners are still prohibited from inserting ancillary claims, but they can require the plaintiff to prove its case, and they can mount a defense.[95] The overarching reasoning in these cases is that if the action turns wholly on who has a right to possession, that question can only be answered by first deciding who the rightful owner is. The language of these decisions can be awkward precisely because courts try to balance

89. For example, Missouri kept its entire statutory scheme, but made it include foreclosures by adding language that made the unlawful detainer law apply when "a mortgage or deed of trust has been foreclosed." MO. ANN. STAT. § 534.030 (2015).

90. *See. e.g.,* Seitz v. Fed. Nat'l Mortg. Ass'n, 909 F.Supp.2d 490 (E.D. Va. 2012); Wayne Inv. Corp. v. Abbott, 215 N.E.2d 795 (Mass. 1966).

91. *See, e.g., id.*

92. *See, e.g., About the Settlement,* JOINT STATE-FED. NAT'L MORTG. SERVICING SETTLEMENTS, http://www.nationalmortgagesettlement.com/about (last visited Jan. 6, 2016).

93. *See* Renuart, *supra* note 38, at 136.

94. *See, e.g., Seitz*, 909 F.Supp.2d at 490; *Wayne Inv. Corp.*, 215 N.E.2d at 795.

95. *See, e.g., id.*

equitable considerations with statutory language that ostensibly curtails the right to defend. This legal yoga makes for some real stretches, but produces a result that is more desirable than adherence to rigid rules because it is consistent with other home jurisprudence, values process over expediency, and avoids ratifying wrongful foreclosures through a quasi-judicial system. One is reminded of Professor Carol Rose's "crystals and mud," in which Rose argued that crystals—bright line law—may not be as desirable as mud—malleable law.

The type of muddy legal reasoning required to work around statutory prohibitions on inquiry into title is on full display in a recent Virginia case.[96] In *Seitz v. Federal National Mortgage Association,* when faced with an explicit prohibition against "trying the title," the court reasoned that:

> Under Virginia law, although a court, in an unlawful detainer case, may not "try the title" in the sense of determining who, as against all others, has title to the property, it is permitted to adjudicate issues concerning title, at least, insofar as those issues bear on the right to possession as between the parties to the unlawful detainer action.[97]

A fair observer might say that this is slicing it pretty thin, but the distinction between a true quiet title action and deciding superior title between litigants allowed the court to avoid evicting a homeowner who might have a superior claim to possession.

Other courts have been more transparent in their reasoning. For example, in *Wayne Inv. Corp. v. Abbott,* the Massachusetts Supreme Court held in a one-paragraph opinion that "the purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be shown and legal title may be put in issue."[98] Similarly, the Tennessee Court of Appeals recently held that the unlawful detainer statute was constitutional, but only because "[t]here is absolutely no doubt that wrongful foreclosure can be raised as an affirmative defense to an unlawful detainer action brought by the purchaser of property in foreclosure."[99]

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96. *Seitz*, 909 F.Supp.2d at 490.

97. *Id.* at 500.

98. *Wayne Inv. Corp.*, 215 N.E.2d at 795.

99. CitiMortage, Inc. v. Drake, 410 S.W.3d 797, 808 (Tenn. Ct. App. 2013).

In all, despite relatively consistent statutory language limiting the right to try title, nineteen states have allowed homeowners to defend in unlawful detainers. These states are the following: Alabama,[100] Arkansas,[101] Alaska,[102] California,[103] Colorado,[104] Georgia,[105] Idaho,[106] Massachusetts,[107] Michigan,[108] Mississippi,[109]

100. *Ex parte* BAC Home Loans Servicing, LP., 159 So. 3d 31, 41 (Ala. 2013) (holding that any issues regarding bidders' right to possession of property bought at foreclosure auctions go to the question of whether bidders could prove the element of the right to possession in their ejectment actions and trial courts have subject-matter jurisdiction to hear any cause of action problems).

101. Webb v. Herpin, 233 S.W.2d 385, 386 (Ark. 1950) (holding that a defendant had the right to do more than simply offer a bare denial of the plaintiff's claim for title and that the best way to do this would be to offer proof that the defendant owned the property).

102. Pac. Coast Co. v. Brown, 2 Alaska 621, 623 (D. Alaska Dec. 4, 1905) (holding that since law and equity are merged in Alaska, equitable challenges to title may be raised).

103. Wood v. Herson, 114 Cal. Rptr. 365, 368 (Cal. Ct. App. 1974) ("[T]he problem of determining at what point the unlawful detainer proceeding has provided the means of litigating equitable attacks by the defendant therein on plaintiff's title has been resolved with varying results.").

104. Colorado's last ruling on this issue is dated. *See* McCrimmon v. Raymond, 234 P. 1058, 1058 (Colo. 1925) (holding that equitable defenses may be interposed in unlawful detainers).

105. *See, e.g.*, Brown v. Christian, 576 S.E.2d 894, 895–96 (Ga. 2003) ("A plaintiff in an ejectment action, in order to recover, must establish that at the time of filing his action, he possesses legal title or its equivalent, as well as the right of entry."). The court went on to conclude that defects in the title transfer during foreclosure meant the plaintiff could not prove its claim.

106. *See, e.g.*, PHH Mortg. Servs. Corp. v. Perreira, 200 P.3d 1180, 1186 (Idaho 2009) (considering the doctrine of after-acquired title to determine whether the plaintiff actually received clear title from the foreclosure sale).

107. *See, e.g.*, Wayne Inv. Corp. v. Abbott, 215 N.E.2d 795, 795 (Mass. 1966) (holding that the purpose of summary process to obtain possession of premises purchased by mortgagee at foreclosure sale is to enable the legal title holder to gain possession of the wrongfully withheld premises, but a right to possession must be shown and legal title may be put in issue).

108. Michigan is an odd case, but I hesitantly list it here. Michigan appears to use eviction actions instead of unlawful detainers. These allow the litigation of title. *See, e.g.*, Bryan v. JPMorgan Chase Bank, 848 N.W.2d 482, 485 (Mich. Ct. App. 2014). However, this case also makes clear that if a homeowner does not exercise the right to statutory redemption within one year of foreclosure, even if the homeowner brings a claim for wrongful foreclosure during that time, they lose the right to pursue the claim. As such, Michigan is a "challenge" state, but it is unclear whether that challenge becomes moot after one year if there is no effort to reinstate.

109. White v. Usry, 800 So. 2d 125, 128 (Miss. Ct. App. 2001) (allowing a claim for forcible entry and detainer to be converted into a claim for quiet title when defendant pleaded counterclaims asserting it had legal title to property); *see also* McCallum v. Gavin, 116 So. 94, 95 (Miss. 1928) ("Often, however, the right and extent of possession is determined by title deeds. This judgment, involving possession alone, does not adjudicate the title in any sense so as to be res adjudicata upon the question of title, but such deeds are often admissible for the purpose of possession.") (citing Murf v. Maupin, 74 So. 614, 615 (Miss. 1917)).

Montana,[110] Nebraska,[111] North Carolina,[112] Oregon,[113] South Dakota,[114] Tennessee,[115] Utah,[116] Virginia,[117] and Washington.[118]

2. No-Challenge States

In no-challenge states, courts have hewn tightly to the statutory language, even if it produces troubling results. These courts typically quote language from the statute and landlord–tenant cases to support their positions.[119] The language most often quoted involves

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110. Fed. Nat'l Mortg. Ass'n v. Patrick, No. DA 10-0064, 2010 WL 4967980, at *2 (Mont. Dec. 7, 2010) (reversing summary judgment for a buyer because there was no evidence in the record to establish title, and the defendant at least facially contested it); State *ex rel.* Hamshaw v. Justice's Court of Union Twp., 88 P.2d 1, 5 (Mont. 1939).

111. I have classified Nebraska as a challenge state. This is technically wrong, but functionally right. In Nebraska, if a party raises a challenge to title, it divests the court hearing the detainer action of jurisdiction, resulting in a dismissal. This effectively works as allowing homeowners to challenge title by forcing a new action in a new court where title can be adjudicated. *See, e.g.*, Cummins Mgmt., L.P. v. Gilroy, 667 N.W.2d 538, 542–43 (Neb. 2003).

112. *See, e.g.*, Chandler v. Cleveland Sav. & Loan Ass'n, 211 S.E.2d 484, 488 (N.C. Ct. App. 1975) (holding that a party in a summary eviction proceeding has the right to challenge title, but is not required to do so).

113. Option One Mortg. Corp. v. Wall, 977 P.2d 408, 410 (Or. Ct. App. 1999) ("[Oregon statutory law] expressly allows title to real property to be 'controverted or questioned' but not '*determined*' by the district court. Indeed, an FED court has authority to consider issues regarding title 'insofar as necessary for determination of possession,' but the judgment may not determine how those issues affect title."). Rhode Island is omitted from both the challenge and no-challenge list. Although Rhode Island has procedures for nonjudicial foreclosure, many foreclosures still involve judicial proceedings. As a result, it is difficult to classify.

114. *See, e.g.*, Heiser v. Rodway, 247 N.W.2d 65, 68 (S.D. 1976) ("[T]he right . . . to be heard on relevant matters, . . . as well as the desirable purpose of preventing a multiplicity of suits, is, and must be, superior to the desire to provide a speedy remedy for possession.").

115. *See, e.g.*, CitiMortage, Inc. v. Drake, 410 S.W.3d 797, 807–08 (Tenn. Ct. App. 2013) ("[W]rongful foreclosure is a defense to an unlawful detainer brought by a purchaser in foreclosure.").

116. *See* Golden Meadows Properties, LC v. Strand, 241 P.3d 375, 382 (Utah Ct. App. 2010) (analyzing each of defendant's challenges to title and rejecting each, but not asserting at any point that such defenses were inappropriate).

117. *See, e.g.*, Seitz v. Fed. Nat'l Mortg. Ass'n, 909 F.Supp.2d 490, 500 (E.D. Va. 2012) ("[Although it cannot determine who has title to property, a court in an unlawful detainer action is] "permitted to adjudicate issues concerning title, at least, insofar as those issues bore on the right to possession as between the parties to the unlawful detainer action . . . . [in the unlawful detainer action at issue, the mortgagor had] asserted, as a defense, that the foreclosure was invalid and that, therefore, he [was] entitled to possession.").

118. Peoples Nat'l Bank of Wash. v. Ostrander, 491 P.2d 1058, 1060 (Wash. Ct. App. 1971) ("Due to the trial court's limited jurisdiction in an action for unlawful detainer, set-offs or counterclaims have not been allowed. However, affirmative equitable defenses have been permitted.").

119. *See, e.g.*, Kransky v. Hensleigh, 409 P.2d 537, 537–40 (Mont. 1965) ("The occupancy of premises by one person with the consent . . . of the person entitled to assert a right to the possession of the premises, creates between the parties the [implied] relation of landlord

explicit prohibitions on challenging title.[120] It also demands expediency, referring to the actions as "summary proceedings."[121] Compounding the problems created by the statutory language, many courts focus on precedent to interpret these statutes, even if that precedent largely developed in a landlord-tenant atmosphere. This precedent often severely limits adding parties or raising counterclaims.[122]

The result is that in these no-challenge states, there is little that can be done by a defendant, and almost nothing that needs to be proven by a plaintiff to cause an eviction. After all, unlawful detainers are actions to prove that a party is wrongfully possessing property owned by another. However, if the ownership of the property cannot be litigated, there is little to do but evict the current resident. Indeed, in a foreclosure setting, the combination of summary proceedings, prohibitions on inquiry into title, and dramatic

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and tenant . . . [The bona fide purchasers are therefore] entitled to bring unlawful detainer action upon [a] refusal to pay rent after demand."); *see also* Chapman v. Deutsche Bank Nat'l Trust Co., 302 P.3d 1103, 1107 (Nev. 2013) ("The primary purpose of an unlawful detainer action is to . . . give possession [of property] to one from whom it is unlawfully being withheld. Consistent with this purpose, a person who obtains title to property at a trustee's sale may remove holdover tenants by means of an unlawful detainer action under NRS 40.255(1)(c).").

120. For a statutory example, *see* ARIZ. REV. STAT. ANN. § 12-1177 (2014) ("On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into."). For examples of similar case law, see Cummins Mgmt., L.P. v. Gilroy, 667 N.W.2d 538, 543 (Neb. 2003) ("Because of its summary nature, the Legislature has narrowed the issues that can be tried in a forcible entry and detainer action . . . The action does not try the question of title, but only the immediate right of possession . . . [T]he district court's jurisdiction arises out of legislative grant, and it is inherently limited by that grant."); *see also* Hallquist v. United Home Loans, Inc., 715 F.3d 1040, 1047 (8th Cir. 2013) (holding that under Missouri law, title issues cannot be challenged in an unlawful-detainer action, as it adjudicates only lawful possession); Chapman v. Deutsche Bank Nat'l Trust Co., 302 P.3d 1103, 1107 (Nev. 2013) ("[unlawful detainer] proceedings are summary and their scope limited . . . 'title to property cannot be an issue in such actions . . . even though such pleading and proof may incidentally involve the question of title.'"); Reynolds v. Wells Fargo Bank, N.A. *ex rel.* Freemont Inv. & Loan SABR 2005-FR1, 245 S.W.3d 57, 60 (Tex. App. 2008) ("To the extent that Appellant is arguing that notice of foreclosure was not proper, the issue is beyond the scope of the proceedings below. The only issue in a forcible detainer action is the right to actual possession. The merits of title are not to be adjudicated."); Andries v. Covey, 113 P.3d 483, 485 (Wash. Ct. App. 2005) ("[A]n unlawful detainer action 'is a narrow one, limited to the question of possession . . . . [sic] [and] to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed.' [Additionally], a constitutional challenge to the limitations of the unlawful detainer proceedings [does] not have merit, because the counterclaiming party could raise his claims in some other, proper proceeding."); Sav. Bank of Puget Sound v. Mink, 741 P.2d 1043, 1046 (Wash. Ct. App. 1987) ("In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed.") (quoting Munden v. Hazelrigg, 711 P.2d 295, 298 (1985)).

121. *Id.*

122. *See* Hong Kong Dev., Inc. v. Nguyen, 229 S.W.3d 415, 435 (Tex. App. 2007); *see also* Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 455 (Mo. 2013).

limitations on the right to pursue affirmative defenses or counterclaims stacks the deck against the homeowner and guarantees that these "proceedings" are predetermined in favor of the new buyer.[123]

In fact, the "summary proceeding" language tends to encourage courts to expedite timeframes and to limit discovery, meaning that most cases are decided on summary judgment.[124] Similarly, unlawful detainers are often set in bulk dockets in dozens or hundreds of other cases, making it less likely that a court will examine the facts and law, even if it arguably could find a way to do so.[125]

The limits on inquiry into title, often framed as completely prohibiting it, present a daunting problem to defendants. Even if the former homeowner believes that the foreclosure was void—meaning it does not have legal significance and in fact never did—this cannot be raised as a defense in an unlawful detainer proceeding.[126] Though the homeowner might have evidence showing that the party seeking to evict him has no legal title, the law prohibits the court from considering that evidence.[127] Instead, the court is compelled to enter judgment for the plaintiff in the unlawful detainer, allowing the eviction of the homeowner. The common law limits on counterclaims and affirmative defenses have similar effect, and further signal to the court that it should not decide the issues that might determine property ownership,[128] converting the court into little more than a rubber stamp.

The result of the no-challenge unlawful detainer is that unless a homeowner can file an affirmative action and stay the resolution of

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123. *See, e.g.*, Martin-Bragg v. Moore, 161 Cal. Rptr. 3d 471, 486 (Cal. Ct. App. 2013) ("The unlawful detainer law's provisions for summary determination of the right to possession would be lost if the lawsuit were to be transformed into an ordinary action at law involving complex issues of title to the property. '[A]n action for unlawful detainer can coexist with other causes of action in the same complaint,' it has been held, but only 'so long as the entire case is treated as an ordinary civil action, not as a summary proceeding.'") (quoting Lynch & Freytag v. Cooper, 267 Cal. Rptr. 189, 192 (Cal. Ct. App. 1990)).

124. *Id.*

125. *Id.*

126. Fannie Mae v. Truong, 361 S.W.3d 400, 404–05 (Mo. 2012) ("We acknowledge Truong has been dispossessed of his home and firmly believes he can demonstrate his legal right to possession is superior to that of Fannie Mae. In light of this assertion, this Court laments the harshness of this result. Unlawful detainer proceedings are summary in nature and the ordinary rules and proceedings of other civil actions do not apply."); *Wells Fargo Bank*, 392 S.W.3d at 454 ("Missouri courts repeatedly have stated that equitable defenses and counterclaims are not permitted in response to [unlawful detainer actions].").

127. *Id.*

128. *Id.*

the unlawful detainer,[129] it is entirely possible for the homeowner to lose the home, only to later prove in a separate case that the home was his all along.

The homeowner is not the only one who may feel helpless. Trial courts that hear unlawful detainers are equally bound. Oftentimes, a court cannot entertain the most meritorious assertion that the foreclosure, purportedly passing title to the new owner, was illegal. Even if a new owner is the same as the party who allegedly wrongfully foreclosed (such as when a bank buys the house it foreclosed on at the foreclosure sale), the court cannot entertain counterclaims by the homeowner relating to problems with the foreclosure, loan origination, or servicing. The court may genuinely believe that the homeowner is the rightful legal owner, but still be required to evict that homeowner and assess damages. Some courts have expressed frustration at having their powers circumscribed by statute.[130]

At present, there are eight no-challenge states. These states are: Arizona,[131] Minnesota[132], Missouri,[133] Nevada,[134] New Hamp-

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129. *See, e.g.*, *Wells Fargo Bank*, 392 S.W.3d at 461 ("As a result of this statutory limitation on the substantive scope of unlawful detainer actions, homeowners who believe their foreclosures are improper must act to protect themselves if they do not want to lose possession of their home. They must either: (1) sue to enjoin the foreclosure sale from occurring, or (2) if the sale has occurred and the buyer has sued for unlawful detainer, bring a separate action challenging the foreclosure purchaser's title and seek a stay of the unlawful detainer action in that separate case.").

130. For example, one trial court judge in Missouri indicated that he thought it unlikely he would strike the statute as unconstitutional, but he explained that he understood how strange it was that a party could evict someone without offering any proof of title. He said, "I understand the problems inherent in the statute that says you can't defend the case on the basis that the party that's suing you—Mickey Mouse [sic] who claims he's got a deed on your house and he wants to evict you." Appellants' Brief at 45, *Wells Fargo Bank*, 392 S.W.3d (Mo. 2013) (No. SC92649), 2012 WL 6825485, at *45.

131. *See* ARIZ. REV. STAT. ANN. § 12-1177 (2014) ("On the trial of an action of forcible entry or forcible detainer, the only issue shall be the right of actual possession and the merits of title shall not be inquired into."). *See also* Curtis v. Morris, 909 P.2d 460, 463–64 (Ariz. Ct. App. 1995) (overruling a previous case that would have allowed title to be considered in forcible entry and detainer actions); Fenter v. Homestead Dev. & Trust Co., 413 P.2d 579, 582 (Az. Ct. App. 1966) ("The equitable defense of estoppel may not be asserted since this defense is in nature of the assertion of an encumbrance upon the property involved in this case and that is the type of question which should be resolved in an action to quiet title."); Reeves v. City of Phoenix, 400 P.2d 364, 367 (Ariz. Ct. App. 1965) (recognizing that the decision on the forcible detainer action before this Court was not definitive of the issues in a then-pending quiet title action relating to the same property, and that the forcible detainer action was decided without prejudice to the quiet title action).

132. CitiMortgage, Inc. v. Kraus, No. A14-0922, 2015 WL 134180, at *1 (Minn. Ct. App. Jan. 12, 2015) (holding that a party in an eviction proceeding was not entitled to raise the validity of the foreclosure as a defense).

133. *Wells Fargo Bank*, 392 S.W.3d at 457.

shire,[135] Texas,[136] West Virginia,[137] and Wyoming.[138]

IV. NO CHALLENGE STATES CAUSE, ENHANCE, AND CONCRETIZE HARM

Although there is a genuine debate about whether nonjudicial foreclosure is the best way to deal with alleged default, this Part asserts that there is very little that can be said in defense of coupling nonjudicial foreclosure with no-challenge regimes. Nonjudicial foreclosure is expedient, but by its very nature, it is less likely to catch mistakes than a judicial review, which occurs in judicial foreclosure states. In a purely economic model, some errors are acceptable when these errors are rare and outweighed by the gains of efficiently turning non-performing notes, and non-paying homeowners, into performing loans and new, responsible homeowners. Much like Learned Hand's tort formula (B < PL),[139] some might argue that there is some point where seeking to making the foreclosure system even more accurate is outweighed by the cost of doing so.

But even if we assume that nonjudicial foreclosure is economically rational, preventing the limited number of homeowners from challenging a wrongful foreclosure at the unlawful detainer stage is neither consistent with existing law nor desirable from legally and socially normative perspectives. Specifically, the process of preventing challenges to nonjudicial foreclosure in an unlawful detainer: (1) makes the potential harm of inaccurate foreclosures permanent; (2) runs against notions of judicial efficiency; (3) suppresses valid claims that could serve to disincentive banks from engaging in wrongful foreclosures; and (4) erodes confidence in the legitimacy of the courts.

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134. Chapman v. Deutsche Bank Nat'l Tr. Co., 302 P.3d 1103, 1107 (Nev. 2013) ("[I]t has universally been held that title to property cannot be an issue in such actions . . . even though such pleading and proof may incidentally involve the question of title.").

135. N.H. REV. STAT. ANN. § 540:17.

136. "The only issue in a forcible detainer action is the right to actual possession. The merits of title are not to be adjudicated." Reynolds v. Wells Fargo Bank, N.A., 245 S.W.3d 57, 60 (Tex. App. 2008) ("Splitting jurisdiction between courts, the ultimate question of title can be determined in district court."); Dormady v. Dinero Land & Cattle Co., 61 S.W.3d 555, 557 (Tex. App. 2001).

137. Tribeca Lending Corp. v. McCormick, 745 S.E.2d 493, 496 (W. Va. 2013)

138. Knight v. Boner, 459 P.2d 205, 207 (Wyo. 1969).

139. B<PL is the formula that Judge Hand proposed to determine the standard of care for the tort of negligence. Essentially, if the Burden < Probability of Occurrence × Cost of Injury, then the standard of care has not been met. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

A. Harm to Individuals

Nonjudicial foreclosure, in and of itself, causes some injury, but those injuries are enhanced and concretized by no-challenge regimes. As previously discussed, a nonjudicial foreclosure happens without judicial review of the merits of the foreclosure. This inadvertently allows more errors and requires less fact checking by the foreclosing entity. All the problems experienced in judicial states occur more frequently in nonjudicial states. These problems include robo-signing,[140] inappropriate allocation of payments,[141] and in one infamous case, foreclosure on a home that had no loan at all.[142] These wrongful foreclosures, even if they do not result in eviction, cause stress and damage credit. The impact varies, depending on a consumer's credit at the time of foreclosure.[143]

Similarly, regardless of whether a nonjudicial state allows challenges or not, nonjudicial foreclosure happens faster, making it harder for homeowners to locate counsel and identify and obtain new housing. In all nonjudicial foreclosure states, homeowners typically have less time to prepare for foreclosure sales and possibly seek new housing.

Consequently, homeowners in nonjudicial states who suffer a wrongful foreclosure experience similar problems regardless of whether they are in challenge or no-challenge regimes. But, the overall impact of wrongful foreclosures differs amongst those regimes. No-challenge regimes in some instances cause, and in all instances enhance and reify, the harm of wrongful foreclosures.[144]

As an example, for a homeowner who faces a wrongful foreclosure but can remain in his home while contesting the unlawful detainer (challenge state), a diminished credit score might impact

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140. *See* Campbell, *supra* note 4, at 106. Robo-signing is the process of producing documents to support foreclosure that are fraudulent, either because they are forged or because they were signed with people with no personal knowledge of the file.

141. *Id.*

142. *See* Harriet Johnson Brackey, *Lauderdale Man's Home Sold Out from Under Him in Foreclosure Mistake*, SUN SENTINEL (Ft. Lauderdale, Fla.) (Sept. 23, 2010), http://articles.sun-sentinel.com/2010-09-23/business/fl-wrongful-foreclosure-0922-20100921_1_foreclosure-defense-attorney-foreclosure-case-jumana-bauwens; Joshua Rhett Miller, *Bank of America to Pay Florida Couple in Mistaken Foreclosure Case*, FOX NEWS (June 6, 2011), http://www.foxnews.com/us/2011/06/06/bank-america-pays-florida-couple-in-mistaken-foreclosure-case.

143. CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM (2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

144. I note here that problems produced by no-challenge states also disproportionately impact minorities, because foreclosures in general disproportionately affect minorities. Studies that map foreclosures onto neighborhoods show this fact vividly. This is due in large part to the fact that minorities are given far more subprime loans per capita than whites.

credit card rates or an effort to buy a new car. But it will not make finding a new home impossible because the homeowner is not evicted while he defends the unlawful detainer. The same cannot be said for no-challenge states, where a homeowner will have to find new housing immediately. Foreclosures will remain on a homeowner's credit report for a period of seven years.[145] Generally credit scores can be rehabilitated two years following the action; however, this only happens when the foreclosure is an isolated event. Since most foreclosures correspond with escalating interest rates and other defaults that push the individual deeper into debt, the score rehabilitation likely doesn't happen right at the two-year mark for most individuals.[146] In general, credit scores are central to a person's ability to rent or buy a residence,[147] and credit scores below 620 are considered poor.[148] As a result, no-challenge states make the full impact of diminished credit felt *before* determining whether the homeowner has legal title to the home. This leads to many problems, including, in some of the worst cases, homelessness.[149]

Beyond the fundamental need to find housing, no-challenge states amplify other problems associated with wrongful foreclosures. A homeowner will almost certainly deplete resources on higher rent, a higher security deposit, increased costs of commuting, and the like.[150] And he and his family will wrestle with significant life

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145. MYFICO, http://www.myfico.com/crediteducation/questions/foreclosure-fico-score-affect.aspx (last visited Jan. 6, 2016); TRANSUNION, https://www.transunion.com/personal-credit/customer-support/faqs/credit-basics.page (last visited Jan. 6, 2016).

146. *Foreclosure Affects More Than Just Your Credit*, CONSUMER EDUC. SERVS., INC., http://www.cesisolutions.org/resources/credit-and-debt-resource-center/consequences-of-foreclosure/ (last visited Jan. 6, 2016).

147. Credit scores also impact individuals' ability to procure employment (as many employers run credit scores), insurance rates, security clearances, rates on credit cards, as well as their ability to buy a car and a whole host of other important issues.

148. This website is consistent with most that identify credit score ranges such as the following: Excellent Credit: 750–850, Good Credit: 700–749, Fair Credit: 650–699, Poor Credit: 600–649, Bad Credit: Below 600. Gerri Detweiler, *What Is a Bad Credit Score?*, CREDIT.COM (Jan. 29, 2015), http://www.credit.com/credit-scores/what-is-a-bad-credit-score/.

149. *See* FORECLOSURE AND HOMELESSNESS: UNDERSTANDING THE CONNECTION, INST. FOR CHILDREN, POVERTY, & HOMELESSNESS (2013), http://www.icphusa.org/filelibrary/ICPH_policybrief_ForeclosuresandHomelessness.pdf; Theresa Walker, *New O.C. Program Helps Homeless People Fix Their Credit*, ORANGE CTY. REGISTER (July 7, 2015, 5:24 PM), http://www.ocregister.com/articles/credit-670370-hope-village.html. Some who study this issue report that the foreclosure crisis is contributing to an increase in homelessness. G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES, THE URBAN INS. (2009), http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf.

150. Foreclosure-Response.org is a joint project of the Urban Institute, the Center for Housing Policy, and the Local Initiatives Support Corporation. Its website provides nationwide foreclosure data with a focus on foreclosure prevention and neighborhood stabilization. *Understand Why Foreclosures Matter: Ways Foreclosures Affect Families*, FORECLOSURE-RESPONSE.ORG,

disruption.[151] If he relied on public transit, the routes may change or may be non-existent if relocated to a new location.[152] Homeowners with children struggle to find rental properties in the same school district.[153] And homeowners who must downsize struggle to find a place to store their belongings.[154] They may also face difficult questions from family or acquaintances.[155] In sum, the loss of a home means a great deal more than just finding a new place to live. It fundamentally alters a person's entire life.

These problems produce real and lasting emotional and physical harm.[156] As one study concluded:

> Repercussions may be felt in many areas, from parenting to self-esteem, as turmoil, fear, and uncertainty rise. For some families, increased personal and family stress feeds marital problems and exacerbates negative behaviors (child abuse, addictions, etc.).[157]

Another study found that there were thirty-nine percent more suicide attempts among those facing foreclosure than those who were not.[158] Another concluded that prolonged stress associated with foreclosures increases a person's chances of having hypertension and heart disease and exacerbates pre-existing health conditions.[159]

There are two more emotional implications of foreclosure that deserve specific attention and that are amplified in no-challenge states. Professor Brent White[160] analyzes why more homeowners do not strategically default even when doing so would save them

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http://www.foreclosure-response.org/policy_guide/why_foreclosures_matter.html?tierid=311 (last visited June 17, 2013, 8:15 AM).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. KINGSLEY, SMITH, & PRICE, *supra* note 149, at 12.

157. *Id.*

158. *See* Anna Cuevas, *Foreclosure Related Suicide on the Rise*, HUFFINGTON POST (Sept. 16, 2012), http://.huffingtonpost.com//-suici_b_1678163.html; *see also* Janet Currie & Erdal Tekin, *Is There a Link Between Foreclosure and Health?* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. 17310, 2011), http://www.nber.org/papers/w17310.pdf (finding an increase in hospitalizations for anxiety, suicide attempts, and hypertension in zip codes with high rates of foreclosure).

159. Craig Evan Pollack & Julia Lynch, *Health Status of People Undergoing Foreclosure in the Philadelphia Region*, 99 AM. J. PUBLIC HEALTH 1833, 1833–35 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2741520/pdf/1833.

160. Brent T. White, Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis, 45 WAKE FOREST L. REV. 971, 994 (2010).

money.[161] He concludes that a potent combination of guilt and fear—guilt that one did not "honor their promises" and fear that foreclosure will ruin their lives through wrecked credit—are at work.[162] He quotes homeowners who view the prospect of foreclosure as "terrifying" and a young mother who described losing her home as feeling like she "let [her] children down . . . a terrible embarrassment, and [ ] humiliating."[163] White argues that these feelings, even more than cognitive bias or innumeracy, may be the explanation for the relatively small number of strategic defaults. Put simply, people fight to stay in their homes, even when it does not make financial sense, because they are afraid and worry that they are being irresponsible, maybe even immoral, if they do not fight to keep their home. White's analysis suggests that wrongful foreclosure followed by eviction will cause significant embarrassment, deep humiliation, and paralyzing fear. This is also consistent with research suggesting that individuals facing foreclosure exhibit higher rates of major depression, and in some documented cases, the threat of losing a home has led from depression to suicide.[164]

My own experiences counseling foreclosed homeowners square with White's conclusions. Homeowners routinely experience severe depression after losing their homes. It is not uncommon for them to reveal that they sought professional help, began taking medication for anxiety, or reverted to drinking after years of sobriety. Even if homeowners lose their homes because of the bank's failure to accurately account for payments, those homeowners still describe feeling shame at the "for sale" sign in the yard, having to answer questions from family or friends, and from trying to explain the problem to landlords who are frightened by a foreclosure on their credit report.[165]

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161. *Id.* at 979–86.

162. *Id.* at 1001, 1004.

163. *Id.* at 993.

164. *Id.*

165. Homeowners also routinely talked about things like the "dog is buried in the backyard" or the pain of "saying goodbye to a neighborhood." This suggests that both White's analysis, and the views of scholars like Radin—who suggested that home is a form of personal property deeply entangled with identity—work together to create powerful attachments to home. It is worth noting that the harms of wrongful foreclosure and actual eviction do not stop with the homeowners. In addition to the disruption that accompanies family displacement, even those who do not move can be affected, both mentally and physically. If cities are forced to cut back on services—including emergency responders—because of the other costs of foreclosures, such as a smaller budget as a result of a decreasing tax base, then residents encounter challenges both to their safety and general wellbeing. In fact, if remaining residents seek to access basic services from their local governments, demand often exceeds the supply of available community resources. Given that spillover effects linger after home foreclosures, these impacts on municipalities and residents can set off a chain reaction that is

For some, these problems are unavoidable; they are the consequences of foreclosure. But for those who face wrongful foreclosure, their residents in a challenge or no-challenge state determines whether they will face the full array of potential emotional and physical harm, or only a subset of those harms. And emotional and physical harm to homeowners and their family are only the beginning of damage caused by no-challenge regimes. The following three Sections identify threats that extend beyond the foreclosure system.

B. Claim Splitting

No-challenge states also run against the trend of eliminating piecemeal litigation and encouraging resolution of all disputes in one action. While the law has moved towards compulsory counterclaims, joinder of parties, and, in general, promoting single-case resolution issues for anything that arises from the "same transaction or occurrence," unlawful detainers produce splintered litigation. This runs against the primary point of joinder rules: a desire to make sure that "whenever feasible to settle all controversies between the litigants in one suit."[166] These rules are rooted in the idea that broad joinder promotes judicial economy, and, as the primary force behind the Federal Rules of Civil Procedure explains, "end[s] the necessity for litigating the same issues over and over . . . ."[167]

At a functional level, no-challenge states take one transaction and artificially divide it. Not only does this deviate from positive law, but one can observe the implications of promoting, instead of discouraging, piecemeal litigation. For example, no-challenge states weaken confidence in the validity of foreclosure sales by leaving ultimate questions of title unresolved, even though the property may then be resold multiple times. Because the unlawful detainer produces no *res judicata* effect, the homeowner still has the legal right to challenge the foreclosure after the sale (sometimes as many as five years later). This creates the possibility that multiple sales will later be held invalid, creating cascading liability for subsequent buyers and sellers. This is far from efficient and one of many reasons

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likely to persist until the homes are reoccupied or adequate interim remedies are provided. For a thorough discussion of the harms foreclosure causes communities, see David Kane, *Restoration Remedies for Remaining Residents*, 61 UCLA L. REV. 812, 824 (2014).

166. *See* Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 702–03 (2007).

167. *Id.* (citing Professor, later Judge, Charles E. Clark).

piecemeal litigation is more costly, both in terms of time and money, to litigants and to courts.

C. Suppressing Valid Claims

By definition, because no-challenge states choose to evict *before* certainty that foreclosure is valid, they amplify the ultimate harm. But the problem is worse than simply producing more wrongful evictions. No-challenge states add insult to injury by making it less likely that many evictions will ever be redressed. This happens in at least two ways. First, homeowners are taught through experience in no-challenge states that courts cannot help them. If a homeowner tells a judge, and even proves to a judge that it is possible or even likely that they are being evicted illegally, but that court proceeds nonetheless with eviction, it erodes the homeowner's confidence in the judicial system. This delegitimizing is discussed more fully below. Secondly, no-challenge states tend to suppress valid claims by limiting the time and resources homeowners have to seek counsel and making it less likely that the home will ever be returned—thereby removing what is likely the primary reason to pursue the claim at all.[168] This is related to the claim splitting discussed *supra*. Because the homeowner is forced to pursue remedies in a separate action, it takes more time, money, and effort than simply raising defenses. Ironically, although claim splitting would suggest more cases (two for each issue), the result is that the second claim—an affirmative claim by the homeowner—is typically suppressed.

In general, one would expect that nonjudicial states produce far fewer homeowners who seek help or pursue claims to stop foreclosure or eviction. And one would anticipate that no-challenge regimes would suppress claims at a higher rate than challenge regimes. But this effect, understandably, has not been measured in other research. This is true for a number of reasons. In many states, filing is not electronic, which makes it almost impossible to research what claims are being filed in the state. And there are many different types of claims that can be filed to challenge a foreclosure, depending on what actions are alleged to have led to the illegal foreclosure or attempted foreclosure.

These include, but are not limited to, wrongful foreclosure, negligence, negligent misrepresentation, common law fraud, breach of contract, unjust enrichment, money had and received, tortious interference with a contract, consumer fraud, and equitable claims

168. *See infra* Foreclosure Time Frames Tables.

such as rescission. Because of the variety of claims, and because those same claims can be pursued in a myriad of non-foreclosure settings, even in states that have searchable electronic systems, identifying the number of claims that are filed cannot be accurately measured without reviewing the individual factual allegations of each potential complaint.

As a workaround, I attempted to identify other ways to roughly approximate whether homeowners are seeking relief or pursuing remedies related to foreclosures. One such effort is reflected in the charts below. Drawing upon information from the National Foreclosure Mitigation Counseling Program, I compiled the number of foreclosures in each state as well as reports on the number of homeowners who received assistance through a government program.[169] This is not meant to suggest that homeowners could not have sought relief in other ways. However, the working assumption is that by observing all states, and by dividing each state into judicial and nonjudicial categories, there may be some trends that suggest whether nonjudicial foreclosure proceedings make it less likely that homeowners will seek relief, and whether there is a similar trend between challenge and no-challenge states. I have also included the foreclosure timeframes for each state as a reference.

The charts tell a story consistent with my intuitions. Judicial states accounted for 251,375 foreclosures in the studied time period, and 22,352 people received assistance. The nonjudicial states accounted for 385,964 foreclosures, but only 20,754 people received assistance. This means that despite accounting for over sixty percent of all foreclosures, homeowners in nonjudicial foreclosure states accounted for only forty-eight percent of those who received assistance. Put another way, one out of 11.24 homeowners sought assistance in judicial states, which is about 8.9%. In nonjudicial states, the number falls to one out of 18.6 people, or 5.4%.

169. The National Foreclosure Mitigation Counseling Program ("NFMC") organizes, trains, and funds over 1,200 nonprofit counseling agencies across the country. These organizations provide free assistance to families at risk of losing their homes, determine homeowner eligibility for state and federal foreclosure prevention assistance programs, and identify possible courses of action. There is a much higher correlation of homeowners in judicial states receiving assistance than in nonjudicial states. *National Foreclosure Mitigation Counseling Program Members*, NEIGHBOR WORKS AMERICA, http://nfmcmembers.org/ (last visited Jan. 6, 2016).

JUDICIAL STATES

STATE	COMPLETED FORECLOSURES[170]	BORROWERS RECEIVING ASSISTANCE[171]	RATIO (%)	FORECLOSURE TIMEFRAME (MONTHS)
Florida	111,005	3,871	3.5	9
New Mexico	2,620	162	6.2	7
South Carolina	9,566	2,095	22.0	7
Illinois	31,054	824	2.7	13
Ohio	27,909	4,213	15.0	12
Pennsylvania	13,578	5,074	37.4	10
Louisiana	5,959	52	0.8	6
Maryland	4,474	2,128	48.0	6
New Jersey	3,996	193	4.8	14
New York	3,670	1,385	37.0	13
Indiana	17,510	160	0.9	12
Hawaii	492	310	63.0	9
Iowa	4,374	1	.0002	17
Kansas	3,690	125	3.4	12
New York	3,670	1,385	37.8	13
Massachusetts	2,971	176	5.9	8
Kentucky	2,121	179	8.4	7
Delaware	1,491	15	1.0	8
Maine	762	3	0.4	22
North Dakota	463	1	0.2	10
Total	251,375	22,352	8.9%	10.75

170. NATIONAL FORECLOSURE REPORT, CORELOGIC (2013), http://www.corelogic.com/downloadable-docs/national-foreclosure-report-august-2013.pdf.

171. NATIONAL FORECLOSURE MITIGATION COUNSELING PROGRAM: CONGRESSIONAL UPDATE, NEIGHBORWORKS AMERICA (2013), http://www.neighborworks.org/Documents/HomeandFinance_Docs/Foreclosure_Docs/ForeclosureCounseling(NFMC)_Docs/Congressional-Repts/2013NFMCReport.aspx. This report did not provide data for Oklahoma or Connecticut.

NONJUDICIAL STATES

STATE	COMPLETED FORECLOSURES	BORROWERS RECEIVING ASSISTANCE	RATIO (%)	FORECLOSURE TIMEFRAME (MONTHS)
California	58,068	11,314	19.5	7
Arizona	25,911	936	3.6	4
North Carolina	26,577	1,179	4.4	5
Michigan	59,535	719	1.2	9
Texas	42,522	138	0.3	3
Georgia	39,827	2,111	5.3	4
Colorado	12,874	31	0.2	7
Missouri	14,147	734	5.2	3
Tennessee	19,876	489	2.5	4
Washington	19,839	27	0.1	6
Virginia	12,824	197	1.5	5
Nevada	10,229	1,025	10.0	7
Minnesota	11,071	770	7.0	12
Wisconsin	9,413	119	1.3	12
Alabama	6,857	753	11.0	4
Arkansas	5,228	5	.001	5
Idaho	3,906	88	2.3	9
Utah	3,698	3	.0008	5
Oregon	3,206	44	1.4	7
Nebraska[172]	1,723	4	0.2	6
New Hampshire	2,099	5	0.2	4
Rhode Island	1,592	3	0.2	3
Mississippi	1,169	14	1.2	4
Montana	1,122	37	3.3	9
Alaska	840	3	0.4	7
Wyoming	723	3	0.4	6
West Virginia	501	3	0.6	5
Total	385,964	20,754	5.4%	6

Further refining supports the intuition that although all nonjudicial foreclosure states repress claims, no-challenge states do so at a higher rate. As demonstrated in the charts below, challenge states experienced 277,169 foreclosures in the studied timeframe. 17,018

172. Nebraska was categorized as a judicial state in the CoreLogic National Foreclosure Report. CORELOGIC, *supra* note 170, at 7. However, Nebraska appears to have a mix of judicial and nonjudicial foreclosures, and the trend is towards nonjudicial foreclosures. For that reason, it is included here.

sought assistance. That is 6.14% of all people experiencing foreclosure. In no-challenge states, there were 99,132 foreclosures. Only 2,844 people received assistance, or 2.87%. This suggests that people in challenge states seek assistance at a rate that is more than double that of those in no-challenge states.

NONJUDICIAL STATES: CHALLENGE

STATE	COMPLETED FORECLOSURES	BORROWERS RECEIVING ASSISTANCE	RATIO (%)	FORECLOSURE TIMEFRAME (MONTHS)
Alabama	6,857	753	11.0	4
Arkansas	5,228	5	.001	5
Alaska	840	3	0.4	7
California	58,068	11,314	19.5	7
Colorado	12,874	31	0.2	7
Georgia	39,827	2,111	5.3	4
Idaho	3,906	88	2.3	9
Michigan	59,535	719	1.2	9
Mississippi	1,169	14	1.2	4
Montana	1,122	37	3.3	9
Nebraska	1,723	4	0.2	6
North Carolina	26,577	1,179	4.4	5
Oregon	3,206	44	1.4	7
South Dakota*				
Tennessee	19,876	489	2.5	4
Utah	3,698	3	.008	5
Virginia	12,824	197	1.5	5
Washington	19,839	27	0.1	6
Total	277,169	17,018	6.14%	

Nonjudicial States: No-Challenge

State	Completed Foreclosures	Borrowers Receiving Assistance	Ratio (%)	Foreclosure Timeframe (months)
Arizona	25,911	936	3.6	4
Missouri	14,147	734	5.2	3
Nevada	10,229	1,025	10.0	7
New Hampshire	2,099	5	0.2	4
Texas	42,522	138	0.3	3
West Virginia	501	3	0.6	5
Wyoming	723	3	0.4	6
Total	99,132	2,844	2.87%	

The primary suppressing agent in no-challenge states is likely removal from the home. People who must find a new place to live and experience life disruptions described in the preceding Part, *before* they can even attempt to prove that the foreclosure is illegal, are less likely to have the stamina to pursue a lawful claim. In addition to having some reason to believe that the courts are stacked against them, the homeowners are also occupied with the very real work of surviving and are less likely to have the time or inclination to seek legal counsel.

Finally, homeowners already thrown out of their homes have less incentive to litigate. This may be the most fundamental way that no-challenge states suppress claims. Most homeowners do not want money when a foreclosure is wrongful; they want their house. They want to stop the eviction and save the home where they raised their kids, buried their dog, or celebrated their anniversaries. But if the home is already sold and likely soon to be occupied by a new family, there is far less reason to fight. Many homeowners, faced with the stress of finding a new home and the reduced likelihood they will ever recover their home, simply walk away. No-challenge states take away the primary thing homeowners would fight for, and in doing so they help immunize those who carry out wrongful foreclosure claims. This claim suppression is compounded by the fact that eviction produces lower wealth, and reduced wealth is tied to an inability to access justice. "The costs of filing and maintaining a lawsuit may, for those with lower incomes and wealth, become

insurmountable obstacles."[173] Socioeconomic status, and not the strength of a claim, will exclude certain litigants.[174]

D. Broken Deterrence

The suppression of valid claims for wrongful foreclosure produces an unexpected, perverse result. Namely, wrongful foreclosures lead to the suppression of claims that, if brought, would have led to less wrongful foreclosures. Put another way, no-challenge regimes eliminate economic disincentives that could produce market-based behavior reform. Although scholars debate the overall effectiveness of the tort system as deterrent, there is strong evidence that the ability to bring claims has a moderating effect on undesirable and illegal behavior. For example, Gary Schwartz concludes that tort law may not be the "strong" form of deterrence some economic models would predict, but that it has at least a "moderate" deterrent effect.[175] Andrew Popper argues more forcefully that suggesting that tort law has no deterrent effect is to "deny our collective experience."[176] One of our country's more learned judges concurs. Richard Posner wrote in *The Economic Structure of Tort Law* that "what empirical evidence there is indicates that tort law likewise deters, even where . . . liability insurance is widespread."[177]

Studies of the actual decision makers at various companies support these conclusions. For example, when executives were asked how they would respond to a tort lawsuit that resulted in liability for a company in the same line of commerce, seventy-three percent agreed that this would prompt their company "to examine methods of production regarding the affected product [or service] and, if needed, quietly take steps to make sure our products are in compliance with applicable standards."[178] One might also conclude that tort liability is a real concern given the efforts companies have

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173. Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 618 (2012).

174. *Id.* at 620.

175. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378–79 (1994).

176. Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 181 (2012).

177. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 10 (1987).

178. Popper, *supra* note 176, at 197.

taken to insulate themselves from jury trials and class actions.[179] Similarly, the number of companies that spend millions of dollars on consulting from attorneys in order to avoid lawsuits, or the story of the Ford Pinto, also suggest that tort claims can and do alter behavior.[180]

If tort liability is at least a minimal deterrent of illegal behavior, the claim suppression that occurs in no-challenge states is troubling. Banks engage in wrongful foreclosures, and then a broken legal regime allows that very foreclosure to produce injury that insulates the banks from claims that might otherwise result in liability and behavior modification. This cycle misplaces economic incentives at precisely the time in our history in which meaningful checks on banks are necessary.[181]

E. Delegitimizing the Judicial System

No-challenge states weaken faith in the judicial system. The mortgage crisis that began in 2008 and continues today is one of the most severe challenges the United States has faced. It is widely agreed that reckless banks collapsed the world economy and then carried out foreclosures that were often fundamentally flawed.[182] It is these same banks—and Fannie Mae and Freddie Mac—that are the often buyers of foreclosed properties. When a state responds to this crisis by enforcing laws that allow these banks to evict people from their homes with no proof that the foreclosure is valid, it raises significant questions about the rule of law and the legitimacy of courts. Homeowners and those who observe their plight are left wondering whether the law is rational and whether courts really protect citizens and provide due process.

A cornerstone of American jurisprudence is that courts exist, and more broadly that laws exist, to protect rights and to produce just results. Indeed the preamble to the Constitution—our first legal

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179. American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013) (detailing how major credit card companies include arbitration clauses to avoid juries and class actions).

180. Liability, and punitive damages in particular, dissuade manufacturers from making unsafe products. *See e.g.*, Symposium, Jon S. Vernick et al., *How Litigation Can Promote Product Safety,* 32 J.L. MED. & ETHICS 551, 554 (Winter, 2004).

181. There has never been another time in United States history that resulted in more scandals or complexity. For an overview of the problems in the modern mortgage era, see John Campbell, *Mortgage Crisis in a Nutshell*, YOUTUBE (Apr. 21, 2012), https://www.youtube.com/watch?v=YBbwb6Sv4PM.

182. *See, e.g.*, Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis,* 13 N.C. BANKING INST. 5, 7–8 (2009).

document—identifies among its purposes establishing justice, promoting the general welfare, and securing the blessing of liberty.[183] Most of us assume that we are entitled to due process before we are deprived of significant rights or property by the government. And it is widely believed—if not always fervently so—that courts exist to produce just results and to resolve disputes.

The belief that courts must be perceived as providing fair process and that courts must, at least in general, produce results that conform to notions of justice is rooted in rich bodies of literature. For example, in the criminal law context,

> [a] growing literature suggests that a criminal justice system derives practical value by generating societal perceptions of fair enforcement and adjudication. Specifically, perceptions of procedural fairness—resulting in perceptions of the system's 'legitimacy,' as the term is used—may promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes.[184]

Research suggests that when a criminal justice system is perceived as doling out liability and punishment in ways that map nicely onto societal institutions of justice, it promotes compliance, cooperation, and deference.[185]

These twin pillars of "legitimacy" and "moral credibility" are both important to public faith in courts. However, of the two, process looms larger.[186] And this is more than mere instrumentalism.[187] Research suggests that people do not value process merely because it will produce fair results.[188] Instead, the best explanation may be from Kees Van den Boss, whose "fairness heuristic theory" suggests

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183. U.S. CONST. pmbl.

184. Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 211–12 (2012).

185. *Id.* at 211–12, 211 n. 3. (referring to work by numerous scholars, including LAURA I. APPLEMAN, SENTENCING, EMPIRICAL DESERT, AND RESTORATIVE JUSTICE, IN CRIMINAL LAW CONVERSATIONS 59 (Paul H. Robinson et al. eds. 2009), PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 135–212, 231–60 (2008); Douglas A. Berman, *A Truly (and Peculiarly) American "Revolution in Punishment Theory,"* 42 ARIZ. ST. L.J. 1113 (2010)).

186. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–7 (1990).

187. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 6–7 (2011).

188. *Id.*

why procedure is vital to perceptions of fairness.[189] In essence, Van den Boss asserts that people will not always know whether outcomes are just (in contrast to the view of equity theorists).[190] This is because they may not have other outcomes to compare the results to. But what they will frequently have is information about the process.[191] Through substitution, or perhaps because of the availability heuristic, they will judge the outcome by asking, "Was the process fair?" If it was, they will accept the outcome more readily, and deem the entire process just.

Indeed, Hollander-Blumoff and Tyler say:

> Procedural justice research suggests not only that people are more satisfied with the results of a fair decision making process, but also that people are more likely to defer to the decisions and judgments of an authority, and comply with those judgments in the long term, when they perceive that the authority has made those decisions according to a fair process.[192]

Even perceptions of whether the decision maker acted neutrally may be bound up with whether the decision maker was perceived to follow fair procedures.[193] And this perception of whether procedures are fair, at least in terms of judicial proceedings, turns partially on whether it appears that the decision maker based her decision on facts and evidence.[194] As Hollander-Blumhoff and Tyler explain, "[b]ecause the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law."[195]

One of the most prolific and respected authors on procedural justice theories, Nancy Welsh, distilled what research reveals about what leads people to conclude that a dispute resolution process is procedurally fair.[196] There are four factors: (1) "the process provides an opportunity for the disputants to express their views

189. Kees van den Bos, *Fairness Heuristic Theory: Assessing the Information to Which People Are Reacting has a Pivotal Role in Understanding Organizational Justice*, *in* THEORETICAL & CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE 63–80 (2001).

190. *Id.* at 65.

191. *Id.*

192. Hollander-Blumoff & Tyler, *supra* note 187, at 6.

193. *Id.* at 7.

194. *Id.* at 10.

195. *Id.*

196. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52 (2004).

(generally described as 'an opportunity for voice');" (2) "the third party demonstrates consideration towards what the disputants have said;" (3) "the third party treats the disputants in an even-handed way and tries to be fair;" and (4) "the third party treats the disputants with dignity and respect."[197]

If it is true that procedural fairness is essential to overall perceptions about the fairness of dispute resolution, then it does not take much analysis to see how unlawful detainers degrade perceptions of legitimacy in courts. Welsh's factors allow for a clear analysis: (1) the unlawful detainer process in no-challenge states denies any "opportunity for voice"; (2) it prohibits the judge from considering any evidence produced by the homeowner/defendant; (3) it advantages the plaintiff by removing its burden of proof; and (4) although the court may not intend or desire to treat the homeowners with anything less than respect, the process itself—as discussed *supra*—causes homeowners humiliation, fear, and general emotional harm. Beyond degrading the homeowner's confidence in the courts, the systemic problems in the unlawful detainer law—at least in no-challenge states—will also serve to erode public confidence in courts. This is never desirable, but it is even more problematic given the abysmal view the American public has developed for the judiciary.[198]

V. THE WAY FORWARD

Based on the foregoing analysis, I conclude that no-challenge regimes are both analytically inexplicable and morally indefensible. But if one accepts this, what solutions are there? The promise lies in challenge states.

Challenge states strike a balance between speed and legitimacy; they marry the best features of nonjudicial foreclosure with the best

197. *Id.*

198. *See, e.g.*, Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 872 (1997) ("Recent public opinion polls provide evidence that dissatisfaction with the legal system is widespread and that the public generally holds lawyers and judges in low regard."). Things have not improved since 1997. Tyler reported that only thirty to forty percent of Americans reported having "a great deal of confidence in the Supreme Court as an institution." A recent Gallup Poll reported only twelve percent had a "great deal" of confidence, while only eighteen percent more had "quite a lot." Similarly, only ten percent had a great deal of confidence in the criminal justice system, with only thirteen percent reporting "quite a lot" of confidence in the same. *Confidence in Institutions*, GALLUP (June 5–8, 2014) http://www.gallup.com/poll/1597/confidence-institutions.aspx.

features of judicial foreclosure. In challenge states, initially, all foreclosures move quickly because they are nonjudicial. However, if a foreclosure is at least arguably improper, that matter can be raised by the homeowner in the unlawful detainer. Since these issues can be litigated in the unlawful detainer, and since most homeowners who face eviction but believe that it is unjust will at least raise the issues, the foreclosures that need examination receive it. This means less homeowners lose their homes inappropriately, but it also means that many times foreclosures occur with minimal court involvement. As a result, no-challenge states should be converted to challenge states. The primary methods for accomplishing this must be statutory reform and constitutional challenges. The remaining Sections briefly discuss both options, noting limitations to my analysis and realistic obstacles to reform.

A. Constitutional Challenges

Many lawyers with whom I have discussed this topic assert that the no-challenge regime cannot be constitutional. They mention problems with procedural due process, noting that this seems to be a clear example of the right to a pre-deprivation hearing. I readily agree; however, as tempting as these arguments may sound, I then note that constitutional challenges have already failed in some states.[199]

I have personal experience with this. I was part of an impact litigation claim[200] designed to challenge the unlawful detainer statute in Missouri.[201] Missouri was ripe for such a claim because it has a rare combination of especially swift nonjudicial foreclosure and particularly harsh unlawful detainers statutes. The nonjudicial foreclosures occur in about three weeks—the fastest in the country. This meant temporary restraining orders were almost never obtained prior to the sale, and homeowners struggled to understand the foreclosure process before their home was sold.

Compounding the problem, the unlawful detainer laws in Missouri are uniquely restrictive. Missouri has an outright ban on inquiry into title. The statute states: "The merits of the title shall in

199. Wells Fargo Bank, N.A. v Smith, 392 S.W.3d 446, 457–58 (Mo. 2013).

200. While working at Simon Law PC, Erich Vieth and I filed a number of impact litigation claims. We partnered on this claim with Campbell Law LLC, founded by Alicia Campbell, my wife.

201. *Id.*

nowise be inquired into . . . ."[202] The state also prohibits counterclaims and affirmative defenses via common law.

But perhaps the most draconian portion of the unlawful detainer law is the double damage provision. The law provides that if a person is found to be unlawfully detaining a property, she must pay twice the fair monthly rent.[203] This adds insult to injury, and makes it even less likely that a homeowner will try to slow an unlawful detainer. Indeed, if a homeowner wanted to file a separate action to stay the unlawful detainer, his attorney would almost certainly counsel him one of the risk of double damages accruing throughout the litigation. Similarly, the author is aware of some courts that have standing orders that unlawful detainers may not be stayed.

These characteristics meant that in Missouri, a homeowner could face a wrongful foreclosure, then face an unlawful detainer in which there was no right to present evidence regarding the illegality of the foreclosure, only to then be ordered to pay extraordinary amounts of money to the party that purchased the home. After consulting with colleagues, our team of attorneys concluded that evicting homeowners in a court action that did not allow them to defend the claim at all violated due process. We pursued a direct appeal to the Missouri Supreme Court, challenging the validity of the statute.[204] Our facts were good. The homeowner had substantial proof that the foreclosure was illegal and void.[205] We advanced both due process and equal protection arguments. Namely, we argued that it violated fundamental procedural due process requirements to create a court proceeding in which the plaintiff was guaranteed to win, even if it presented no evidence, and the defendant was guaranteed to lose, precisely because it had no right to defend. We argued that there could be no justification for creating an irrebuttable presumption in favor of one party, and that this was especially true given that what was at stake was a home (sacred under the law). We also advanced an equal protection argument, asserting that there was no rational basis for allowing one particular set of plaintiffs to win every single case filed without evidence, when every plaintiff in every other case had to offer proof.[206]

We lost.

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202. MO. REV. STAT. § 534.210 (2014).

203. MO. REV. STAT. § 534.330 (2014).

204. Like many states, the Missouri Constitution grants exclusive appellate jurisdiction to the state's supreme court to hear challenges to the validity of statutes. MO. CONST. art. V, § 3.

205. For a detailed factual account, see Brief for Appellants, *Wells Fargo Bank*, 392 S.W.3d 446 (Mo. 2013) (No. SC92649), 2012 WL 6825485.

206. *Id.*

The court held that unlawful detainer law was ancient and well established, citing law dating back to at least King Henry II circa 1166.[207] It concluded that although it may not be ideal to split the causes of action, a homeowner could avoid losing his home by filing a separate action in another court.[208] And even if the homeowner lost his home before filing that action, his rights were preserved because he could pursue a separate action.[209] The court suggested that the legislature might want to look at the issue, but held it could not wade into these "policy" arguments.[210] It cited to *Lindsey v. Normet,* 405 U.S. 56 (1972)—from the rental context—for additional support.[211]

I must admit that I am not entirely persuaded by the court's reasoning, but the point of this Article is not to re-litigate the case. Rather, I document the failure of this impact litigation (a somewhat hard thing to relive) to highlight the fact that constitutional challenges in no-challenge states are far from guaranteed to succeed. Despite success in the Missouri Supreme Court in the past on consumer issues, despite a solid set of facts, and despite advancing legal and equitable arguments, we lost. It is entirely possible that challenges in other states would face similar results. Unlawful detainer procedures are deeply engrained, and although some no-challenge courts have not considered a direct challenge to constitutionality, they have nonetheless, consistently, if only implicitly, approved the unlawful detainer procedures.[212]

However, none of this is meant to say that others are guaranteed to fail. Impact litigation brought by established constitutional scholars and litigators could improve on our arguments raised in *Wells Fargo Bank, N.A. v. Smith*,[213] and strong expert work in a trial court might lend additional factual support to the case. Courts are becoming increasingly educated about mortgage issues, and they may be more responsive to these arguments. Finally, it is my hope that

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207. *Wells Fargo Bank*, 392 S.W.3d 446, 453 (Mo. 2013).

208. Indeed, the court went so far as to chastise the plaintiff (or us) for not doing so. *See id.* at 463. In doing so, the court ignored the law that prevented the unlawful detainer court from staying its own action.

209. *See id.* at 459.

210. *Id.* at 464.

211. *Id.* at 457–58.

212. For example, the Arizona Supreme Court has had multiple opportunities to consider the forcible entry and detainer statutes. It has never expressed any concerns about the due process implications in its holdings. *See, e.g.*, Curtis v. Morris, 925 P.2d 259, 260 (Ariz. 1996); Taylor v. Stanford, 414 P.2d 727, 730 (Ariz. 1966); Hinton v. Hotchkiss, 174 P.2d 749, 754 (Ariz. 1946).

213. 392 S.W.3d at 449.

this Article provides at least some additional arguments and empirical evidence to support challenges—information that we could not fully gather in the Missouri case. Regardless, at a minimum, constitutional litigation takes time and the result is not certain. Another potential avenue for reform lies in the legislature. I discuss some specific tenets of reform below.

B. Statutory Reform

If impact litigation is not an option, the only other clear path is statutory reform. This can be accomplished by the normal legislative means, or in the right states, by ballot initiative. It is beyond the scope of this Article to craft legislation, but I suggest a few central tenets that should be included.

1. The proposed statutory language should explicitly apply only to foreclosures of residential properties that are primary dwellings.
2. The proposed statutory language should not attempt to redline unlawful detainer law. This will create unnecessary complications. Instead, I would suggest new statutory language that relates only to residential properties and that prescribes an exclusive means of eviction.
3. The proposed statutory language should explicitly allow for sanctions against homeowners who assert frivolous defenses, including potential sanctions and a doubling or trebling of rent owed.
4. The proposed statutory language should require the new buyer to prove title, prove the homeowner possesses the property, and to prove damages.
5. The proposed statutory language should explicitly state that if the homeowner challenges title, the action will be converted into a quiet title action in which the court is required to resolve who ultimately owns the property.
6. The proposed statutory language should state that these residential eviction actions can be pursued in any appropriate court, including associate courts, but that a homeowner may move to transfer the case to a circuit or district court if he contests title. The language should indicate that such motions shall be granted.
7. The proposed statutory language should overtly allow for counterclaims and affirmative defenses.

C. A Compromise Solution

In some states, both impact litigation and legislative reform may be destined to fail. In those states, local courts could marginally improve the situation by enacting local rules. Those rules would say that if a homeowner files an affirmative action that calls into question the validity of title while an unlawful detainer proceeding is ongoing, the unlawful detainer proceeding *shall* be stayed. This does not avoid piecemeal litigation and may encourage forum shopping, but it does avoid wrongful evictions prior to adjudication. This reform may seem simple, however, it is my experience that some states do not allow courts that hear unlawful detainers to stay their own actions. Based on the "summary proceeding" language, courts are sometimes compelled to move forward, even if the court has concerns about doing so. A local rule by the chief judge could potentially alleviate this tension, so long as there is no case precedent in conflict with the rule.

D. Potential Critiques of This Conclusion and Responses

Some may argue that if a homeowner can delay eviction by arguing the foreclosure was illegal, this will create frivolous assertions of that kind so that the homeowner can obtain more time in the home. This concern is unlikely to prove true. In all cases, a defendant can raise frivolous defenses, engage in motion practice, refuse to produce discovery, invent reasons to push the trial setting, and otherwise delay having to pay a judgment. This is dealt with through ethical rules that prohibit lawyers from pursuing non-meritorious defenses and by courts who have the power to dismiss such defenses or otherwise refuse delays. In the unlawful detainer setting, there is also a guarantee that a homeowner who delays can be ordered to pay rent for the time they were in the home.[214] Although this does not mean there will never be a frivolous defense, it does mean that the risk is no greater than it is in other cases.

Others may argue that allowing challenges will create de facto judicial foreclosure because courts will have to wade through the bona fides of each foreclosure. Two things are clear. First, half of all states have judicial foreclosure, and their economies continue to function. Full judicial foreclosure does not damn a state to economic ruin. Second, only contested unlawful detainers will end up

214. *See, e.g.*, FED. R. CIV. P. 11.

being litigated, as only homeowners with concerns about the underlying foreclosure will assert them. As a result, only a small fraction of the total foreclosures in a state will be considered by the court.

Finally, some will argue that sorting out foreclosures will slow down evictions. At a normative level, society should, and routinely does, value fairness over expediency, even if doing so has costs. Moreover, current no-challenge regimes deviate from trends in American law, making them the anomaly that should be rectified. Finally, any assertion that expedited eviction is good for the economy is undercut by countervailing arguments that such expediency perverts the economic deterrent impact of torts and delegitimizes courts—two outcomes that are destabilizing to society and that can actually reduce voluntary compliance with courts.

CONCLUSION

No-challenge states are broken, but there is no need to invent a solution. Instead, we know that it is possible to recognize the efficiencies of nonjudicial foreclosure while obtaining the accuracy of judicial review. Challenge states provide this working model and represent the majority position. No-challenge states should adopt this model too. Doing so offers significant gains to homeowners, courts, and society as a whole, and it produces surprisingly little cost to stakeholders. Indeed, while maintaining efficiency, it repairs a number of existing problems by reducing unnecessary injury to homeowners, aligning unlawful detainer law with notions of joinder and home-centric jurisprudence, protecting process and judicial legitimacy, and promoting, rather than suppressing, tort claims that are needed to produce market reform.