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Supremacy and Superiority: the Constitution's Effect on State Lien Priority Statutes

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Introduction

Seven million foreclosures.[1] The Great Recession's transformative effect on the American landscape is countered by progressive legislative initiatives that sought to mitigate the breadth of the county's foreclosure crisis. State lien priority statutes gained unprecedented relevance in the last eight years and played an integral role in this mitigation effort, supplemented by mid-crisis amendments in hard-hit states such as Nevada[2] and Florida.[3] These statutes serve to curtail the negative externalities of foreclosure and equitably allocate foreclosure sale proceeds in America's common interest communities, but their viability stands at odds with the

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[1]*National Foreclosure Report*, CoreLogic, http://www.corelogic.com/about-us/researchtrends/national-foreclosure-report.aspx#.VRriqDvF9As (last visited Mar. 31, 2015) ("7 million homes lost to foreclosure since homeowner rates peaked").

[2]Effective October 1, 2009, Nevada increased the limited priority afforded to association from 6 months to 9. Nev. Rev. Stat. § 116.3116(2).

[3]In 2010, the Florida legislature increased association lien priority from 6 months to 12 at the height of the foreclosure crisis. S.B. 1196, Gen. Assemb. (Fla. 2010).

interests of the federal government and the superiority of federally insured mortgages under the Supremacy Clause.[4]

As the sub-prime mortgage market failed, homeowners became unable to pay not only their mortgages, but they also fell behind on the assessments owed to their homeowners associations.[5] For the delinquent properties in America's common interest communities, either condominium buildings or subdivisions governed by an association to which homeowners were no longer paying assessment dues, the community associations began exercising their right to seek the same remedy as many fellow-lienholders: foreclosure.[6]

Some state lien priority statutes existed and retained fervent support from pro-common interest community lobbyists[7] before the late-2007 collapse of America's residential real estate market, but the catastrophic foreclosure crisis that ensued gave these statutes exceptional relevance. As the nation's mortgage lenders found themselves pitted against not only defaulting homeowners, but also junior lienholders, the battle for lien priority threatened what little recovery a foreclosure may provide. With mortgagee and association holding respective rights to foreclose and recover the homeowners' debts, millions of properties quickly swung

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[4]Washington & Sandhill Homeowners Ass'n v. Bank of America, N.A., 2014 WL 4798565 (D. Nev. 2014), appeal dismissed, (9th Cir. 14-17032) (Oct. 13, 2015). *See The Federal Housing Administration (FHA)*, HUD.GOV (2015), http://portal.hud.gov/hudportal/HUD?src=/program__offices/housing/fhahistory (last visited Mar. 31, 2015).

[5]"Furthermore, and particularly in states with judicial foreclosure, there are long delays in the completion of foreclosures. During these delays, neither the defaulting unit owners nor the first mortgagee typically pay the assessments on the unit." Distribution of JEB Report on Common Interest Assessment Lien Priority, Joint Editorial Board for Uniform Real Property Acts (Aug. 22, 2013), http://www.uniformlaws.org/shared/docs/jeburpa/2013aug22__JEBURPA__UCIOA%20Lien%20Priority__Request%20for%20Comments.pdf (last visited Mar. 31, 2015).

[6]Distribution of JEB Report, *supra* note 5.

[7]*See Neighbors: the Nature and Benefits of Community Associations*, Community Associations Institute (2015), http://www.caionline.org/info/readingroom/Publication%20Excerpt%20Library/NeighborsBrochure.pdf (last visited Mar. 31, 2015) ("More than 75% of residents say their association rules protect and enhance property values. Only 3% say the opposite is true.").

in a battle for priority between the similarly interested mortgagee and association.

In their most ideal form, lien priority statutes strike an equitable balance between an association and a mortgagee's ability to recover at least a portion of the assessments and mortgage payments owed to them. A winner-take-all foreclosure scheme where one entity holds exclusive priority serves the interests of neither party and produces significant negative consequences. Effective statutes offer specified, limited recovery amounts to an association and prevent two otherwise inequitable results: either the mortgagee or the association asserting absolute priority and wiping out any recovery for the other.

Recent decisions across states and circuits have inconsistently opined on the convergence of state and federal law in this context, which typically arises when associations seek to assert some version of state-given priority against mortgagee interests held by federal agencies.[8] With a similar plight of inconsistency, not all states impose lien priority statutes and those that do lack uniformity in the amount and type of priority rights associations receive. Courts also struggle to conceptualize the effect of the Supremacy Clause and the rights of federal interests relative to lien priority statutes.[9] These inconsistencies—both in the conceptualization of federal interests under the Supremacy Clause and an association's priority, or lack thereof—burden not only the mortgage industry from underwriting to foreclosure, but also the courts charged with adjudicating these priority battles.

The question is not whether the Constitution supports absolute supremacy for federal interests, or if state law should be permitted to enforce a similar superiority for association liens against these federal interests. Instead, the real estate industry and legislators might consider an equitable alternative to allocating this constitutional supremacy and state-based superiority to best serve the interests of a national mortgage industry that often relies on the state-

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[8] *Compare* Washington & Sandhill Homeowners Ass'n v. Bank of America, N.A., 2014 WL 4798565 (D. Nev. 2014), appeal dismissed, (9th Cir. 14-17032) (Oct. 13, 2015) *supra* note 4 *with* Freedom Mortg. Corp. v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174, 1177 (D. Nev. 2015).

[9] *Id.*

regulated stability and infrastructure of the common interest community that protects the real collateral securing millions of mortgages around the country. Maintaining state lien priority statutes, despite legitimate federal preemption, affords a dual support: (1) the statutes find support in the federal government's own encouragement for creating common interest communities; and (2) they facilitate an equitable result for all interested parties that mitigates the negative externalities of foreclosure.

This Article proceeds in four parts. Part I highlights the privatization of public functions that is at the heart of common interest communities around the country. The surge in the popularity of these privatized American communities simultaneously ushered the evolution of new legal procedures creating the communities and establishing their lien rights. Part II situates common interest communities' lien rights amongst those of other interested lienholders and examines the functional implementation of state lien priority statutes that supposedly protect common interest communities. Part III identifies well-founded Supremacy Clause precedent and identifies the inconsistent judicial interpretations of the Supremacy Clause in the context of state lien priority statutes. Part IV considers the equitable challenge to complete federal supremacy in favor of certain state lien priority statutes despite the valid and constitutional supremacy of superior federal interests.

I. COMMON INTEREST COMMUNITIES

Common interest communities are an engrained American institution representing 24% of U.S. homes.[10] In 2013, the country's 328,500 common interest communities accounted for 26.3 million housing units with 65.7 million residents.[11] This Section explains the privatization of American communities and the legal creation and general lien rights of common interest communities.

a. *The Privatized Community*

Over the last 60 years, "common interest communities

[10]Community Associations Institute, Statistical Review for 2013: National Statistics, http://www.caionline.org/about/press/Documents/State%20and%20National%20Statistics,%202013.pdf (last visited Mar. 31, 2015).

[11]*Id.*

have evolved from an innovation in suburban residential development to its main staple."[12] As the subprime mortgage market blossomed and real estate markets simultaneously boomed, common interest community residents increased from 45.2 million in 2000 to just under 60 million in 2008.[13] Even following the real estate market's 2007 crash, growth of common interest communities continued.[14] By 2013, homes in common interest communities were valued at $4.65 trillion with $65 billion collected in assessments from homeowners.[15]

The Community Associations Institute (CAI) identifies six core benefits that spurred this remarkable growth.[16] Common interest communities (1) benefit homeowners through collective management; (2) privatize public functions; (3) expand affordable homeownership; (4) minimize costs and foster marketing efficiencies; (5) provide amenities, opportunities, and options; and (6) build a sense of community.[17]

The CAI's second benefit—the privatization of public functions—represents common interest communities' most dramatic effect on American neighborhoods. Since the 1960s, the surge in common interest communities has been coupled with a drastic shift in responsibility from government agencies to private sector communities.[18] Professor James Winokur explains the magnitude of this privatization:

> [t]hese communities provide substantial and costly public facilities and services which end up being financed by developers of such servitude regimes and, ultimately, by the residents who buy homes and pay assessments to support these amenities. The public facilities provided range from park-like open spaces to streets, lighting, water and sewer facilities and recreational facilities. Services increasingly provided by common interest communities, but which previously have typi-

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[12]James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 Santa Clara L. Rev. 1135, 1138 (1998).

[13]Community Associations Institute, *supra* note 10 (referring to statistics from 2000 and 2008).

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]Winokur, *supra* note 12 at 1138–39.

> cally been provided by public governments, include general facilities maintenance, trash collection and disposal, and snow removal.[19]

The private furnishing of otherwise public obligations forms an inherent interdependency between homeowner and association.[20] The easements held by associations grant control over the condition and maintenance of communities, which are collectively enjoyed and used by all homeowners.[21] Privatization, however, has costs beyond the property taxes already levied against properties: "[t]he financial responsibilities of community associations are funded exclusively by the community's residents, who are required to pay regular and special assessments as needed to meet association costs." In sum, "[t]hose entitled to enjoy the easements are the one who must pay the cost of maintenance."[22]

Homeowners in common interest communities bear the expenditure burden of paying property taxes and funding the association. Specific homeowners benefiting from the association, not property tax payers collectively, finance the community services that once fell within the municipality's public domain. In doing so, "local governments and tax payers are relieved of the responsibility to finance and provide services for these developments."[23] The association forms a more intimate, private version of the public municipality that seemingly aligns with nostalgic notions of the by-gone American small town. This community, however, is distinct from the larger city and state—governed, maintained, and funded privately.

b. *Creation and Lien Rights of Common Interest Communities*

Common interest communities are residential neighborhoods with governing associations responsible for oversight

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[19]Winokur, *supra* note 12 at 1138–39.

[20]Natelson, Law of Property Owners Associations at 219–20 (quoting Sea Gate Ass'n v. Fleischer, 211 N.Y.S.2d 767, 778 (Sup 1960)).

[21]Winokur, *supra* note 12 at 1139.

[22]*Id.*

[23]Karen Ellert Pena, *Reigning in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 St. Mary's L. J. 323, 332 (2002).

and management of the community. These associations function for the benefit of their 65.7 million residents.[24] Purchasing property in a common interest community necessitates membership in the association and obligates the homeowner to pay association assessments in exchange for the association's management and maintenance of the community.[25] The community creates these commitments through recordation of a Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"), which establishes the association's function and a homeowner's duties.[26] Recordation of the declaration by the original developer establishes a lien in favor of the association against each property that has priority over all future liens, subject to a few key exceptions.[27] The obligations under the declaration—namely to pay assessments in exchange for maintenance of the community—automatically attach to the deed for property held by future homeowners.[28]

Associations, like mortgagees, hold a lien on property that can be enforced through state foreclosure proceedings.[29] If a homeowner falls behind on assessment dues, just as when a

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[24]Community Association Institute, An Introduction to Community Association Living, 3–5 (2006), http://www.caionline.org/info/readingroom/Publication%20Excerpt%20Library/community_association_living.pdf (last visited Mar. 29, 2013).

[25]Marc w. Dunbar & Peter M. Dunbar, The Homeowners Association Manual 1–2 (5th eds., Pineapple Press 2004).

[26]Pena, *supra* note 23 at 329.

[27]Kovitz Shifrin Nesbit, The Art & Practice of Collecting Delinquent Assessments: A Guide to Keeping Your Association in the Black (Sept. 2012) *available at* http://www.ksnlaw.com/assets/Collection_Booklet_.pdf (last visited Mar. 31, 2015).

[28]Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law 6 (American Law Institute 1981).

[29]*See, e.g.*, Fla. Stat. Ann. § 720.3085(5) ("The association may bring an action in its name to foreclose a lien for unpaid assessments secured by a lien in the same manner that a mortgage of real property is foreclosed . . ."); Societe Generale v. Charles & Co. Acquisition, Inc., 157 Misc. 2d 643, 597 N.Y.S.2d 1004, 1009 (Sup 1993); D. Kirk Drussel, Mortgages and Mortgage Foreclosure in New York § 22:16 (2013) ("In the event that unpaid common charges are due, any member of the board of managers may file a notice of lien . . . The lien may be foreclosed by suit authorized by and brought in the name of the board of managers acting on behalf of the unit owners, in a similar manner as a mortgage of real property . . .").

homeowner falls behind on mortgage payments, foreclosure provides a means of recovery for the association and mortgagee alike.[30] The respective priority of an association or mortgagee's lien, however, determines the availability and amount of recovery possible through foreclosure.[31]

II. LIEN PRIORITY STATUTES

The relative priority of interested lienholders governs the distribution of foreclosure sale proceeds. In the basic priority scheme, interests fall in this descending order of priority: (1) property tax liens; (2) first mortgages; and (3) all other junior lienholders. In this situation, the association lands somewhere amongst the junior lienholders—at risk for minimal or no recovery at the foreclosure sale after all unpaid taxes and the first mortgage consume what value the delinquent property retained. Although widely inconsistent across the country, state lien priority statutes reallocate this priority or orchestrate alternative means of guaranteeing limited recovery for associations.[32]

This section summarizes the super-priority status of prop-

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[30]*See* Tamara Lush, *Homeowner Associations Foreclose on Residents*, USA Today (July 9, 2011 5:00PM), http://usatoday30.usatoday.com/money/economy/housing/2011-07-09-homeowner-foreclosure__n.htm (last visited Mar. 31, 2015).

[31]*See* U.S. v. Pioneer American Ins. Co., 374 U.S. 84 (1963).

[32]*See infra* note 39; Alabama: Ala. Code § 35-8A-316(b) (six-month limited priority); District of Columbia: D.C. Code § 42-1903.13(a)(2) (2012) (six-month limited priority); Florida: Fla. Stat. §§ 718.116(1)(b), 720.3085(2)(c) (West 2012) (twelve-months limited priority or 1% of the original mortgage debt); Illinois: 765 Ill. Comp. Stat. Ann. § 605/9(g)(4) (West 2012) (six-month limited priority); Maryland: Md. Code Ann., Real Prop. § 11B-117(c) (West 2012) (four-month limited priority); Massachusetts: Mass. Gen. Laws Ann ch. 183A, § 6(c) (West 2012) (six-month limited priority); Missouri: Mo. Ann. Stat. § 448.3-116(2) (West 2012) (six-month limited priority plus fines due at time of subsequent refinancing); New Hampshire: N.H. Rev. Stat. Ann. § 356-B:46(I) (2012) (six-month limited priority); New Jersey: N.J. Stat. Ann. § 46:8B-21 (West 2012) (six-month limited priority); Pennsylvania: 68 Pa. Cons. Stat. Ann. § 5315(b) (West 2012) (six-month limited priority for planned community association assessment lien); *id.* § 3315(b) (West 2012) (six-month limited priority for condominium association assessment lien); *id.* § 4315(b) (West 2012) (six-month limited priority for cooperative association assessment lien); Rhode Island: R.I. Gen. Laws Ann. § 34-36.1-3.16(b) (West 2012) (six-month limited priority); Vermont: Vt. Stat. Ann. tit. 27A, § 3-116(b) (West 2012) (six-month limited priority); Tennessee: Tenn. Code Ann. § 66-27-415(b)

erty tax liens, the origins of association lien priority in the Uniform Common Interest Ownership Act, and the individual lien priority statutes enacted in Nevada and Florida as examples of the inconsistent lien priority schemes currently existing throughout the country. In 2015, Florida and Nevada topped the list of states with persisting foreclosure filings.[33] With 46,000 common interest communities in Florida and another 3,200 in Nevada,[34] their priority schemes are noteworthy indications of how lien priority statutes actually function.

a. *The Tax Lien's Super-Priority Status*

Property tax liens receive super-priority over the interests of mortgagees, associations, and other lienholders in most jurisdictions across the country. The broad significance of property taxes—which is markedly similar to association assessments—necessitates this priority.[35] Delinquent property tax payments threaten the municipalities' ability to provide critical services to residents using, enjoying and benefiting from those services.[36] As Professor Frank Alexander identifies, property taxes remain a predominant source of local revenue and thus, "the property tax lien is the first and senior lien against the property, senior even as to mortgages and other liens arising prior in time and property recorded earlier in time."[37] The effectuation of this priority is inconsistent amongst states, but the basic premise for some version

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(West 2012) (six-month limited priority); and Washington: Wash. Rev. Code Ann. § 64.34.364(3) (six-month limited priority). *See also* Christian J. Bromley, *Encouraging Cooperation: Harmonizing the Battle of Association and Mortgage Lien Priority in America's Common Interest Communities*, 43 Real Est. L.J. 255 (2014).

[33]Bankrate reports 1 in every 441 housing units received a foreclosure filing in Florida and 1 in every 495 housing units received a foreclosure filing in Nevada. Stacy Jones, *Top Foreclosure States January*, Bankrate (Feb. 20, 2015) http://www.bankrate.com/finance/real-estate/top-10-states-for-foreclosure/ (last visited Mar. 31, 2015).

[34]Community Associations Institute, *supra* note 10.

[35]Michelle Z. Marchiony, *Comment: Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source*, 6 Emory L.J. 217, 219 (2012).

[36]*Id.*

[37]Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 748, 770 (2000).

of priority remains: "[t]he importance of property tax revenues in public finance heightens the need to enforce the tax, and state statutes provide local governments with authority to do so."[38]

b. *The Uniform Common Interest Ownership Act*

Associations' limited priority originated with the Uniform Common Interest Ownership Act (UCIOA) and other uniform acts in the early 1980s.[39] Similar statutes were gradually enacted and currently exist in multiple states, but with much inconsistency.[40]

Although the recordation of a community's declaration establishes the association's lien prior to any future homeowner's mortgage,[41] determining the priority of an association lien is no longer grounded solely in the common law "first-in-time" principle. A mortgagee, especially those holding a first mortgage on a given property, will rarely permit the subordination of their lien to anything except property tax liens. A previously recorded association lien becomes subordinate to mortgagees because either or both of the following: (1) the association lien is only perfected when the homeowner fails to pay assessments and not upon the filing of the association's declaration; or (2) mortgagees often refuse to originate loans without a guarantee of superior priority to association liens.[42] A mortgagee's lien often covers far more debt than that from an association for unpaid assessments and if the mortgagee takes priority, it very well may consume the foreclosure sale proceeds entirely.

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[38]Marchiony, *supra* note 35 at 219.

[39]Huge Lewis, *National Matrix of Association "Super-Priority" Lien Legislation*, Uniform Law Commission (Oct. 25, 2013), http://www.uniformlaws.org/shared/docs/jeburpa/CAIlienprioritymatrix2013.pdf (last visited Mar. 31, 2015).

[40]*See infra* notes 43–68 (notes on UCIOA and states).

[41]Kovitz Shifrin Nesbit, *supra* note 27.

[42]J. Martin Knaust, *Article: Guilt by Association: Assessment Liability to Homeowners' Associations After Foreclosure*, 41 Stetson L. Rev. 835, 841–42 (2012).

The UCIOA's priority scheme, which was adopted in eight states,[43] "provides that a common interest community association's lien for unpaid assessments has priority over the lien of an otherwise first-lien mortgage lender to the extent of six months' worth of regularly-budgeted but unpaid assessments at the time of a foreclosure."[44] The association's six-month priority operates primarily against the mortgagee with associations still subordinated to "liens for real estate taxes and other governmental assessments or charges."[45] This priority functions to secure recovery of some assessments through the foreclosure sale and allows any good-faith purchaser to acquire the property "free of the association's debt that gave rise to the lien."[46]

The six-month priority was premised on two assumptions: (1) that mortgagees would seek to enforce their lien quickly and complete the foreclosure within six months; and (2) the property would have sufficient value to cover the balance of the first mortgage and unpaid assessments.[47] Long before the foreclosure crisis, the UCIOA's drafters "believed that the six-month association lien priority struck a functional balance between the need to protect the financial integrity of community associations and the legitimate expectations of first mortgage lenders."[48]

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[43]Alaska: Alaska Stat. § 34.08.470 (six-month priority); Colorado: Colo. Rev. Stat. Ann. § 38-33.3-316 (six-month priority); Connecticut: Conn. Gen. Stat. Ann. § 47-258 (six-month priority); Delaware: Del. Code Ann. tit. 25, § 81-316 (six-month priority), Minnesota: Minn. Stat. Ann. § 515B.3-116(c) (six-month priority); Nevada: Nev. Rev. Stat. § 16.3116(2) (nind-month priority); Vermont: Vt. Stat. Ann. tit. 27A, § 3-116(b) (six-month priority); and West Virginia: W. Va. Code § 36B-3-116(b) (six-month priority).

[44]Distribution of JEB Report on Common Interest Assessment Lien Priority, *supra* note 5.

[45]Uniform Common Interest Ownership Act § 3-116(c) (2008).

[46]*Id.* at § 3-116(k)(4).

[47]Distribution of JEB Report, *supra* note 5.

[48]Unif. Common Int. Ownership Act § 3-116, comment 1. *See* Distribution of JEB Report, *supra* note 5.

c. *Nevada Lien Priority*

Nevada adopted the 1982 version of the UCIOA and its affordance of six-month limited priority for association liens.[49] In 2009, the Nevada legislature expanded this priority to nine months,[50] but added an exception for conflicting federal legislation. The Nevada statute provides the additional three months priority "unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien."[51]

The Nevada Supreme Court interpreted the application of this priority in 2014 and held that associations actually hold absolute, not six- or even nine-month limited priority. The court relied on the statute's plain language, which identifies an association lien as "prior to all other liens and encumbrances," including a first mortgage.[52] Based on the priority of this *lien* and the association's corresponding right to nonjudicial foreclosure of that lien, a Nevada association foreclosure can extinguish a first mortgage entirely.[53] This result lacks any of the equitable balance intended by the UCIOA drafters and alternatively affords the association exactly what the UCIOA and the Nevada statute intended to avoid: absolute priority status of a mortgagee at the expense of unpaid associations.[54]

d. *Florida Lien Priority*

Florida separates condominium and homeowners' association liens into separate statutes that greatly expand an as-

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[49]Nev. Rev. Stat. § 116.3116(2). *See* Uniform Common Interest Ownership Act States, *Community Associations Institution* (2015), http://www.caionline.org/govt/Pages/UCIOA.aspx (last visited Mar. 31, 2015).

[50]Nev. Rev. Stat. § 116.3116(2).

[51]*Id.*

[52]SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 408 (Nev. 2014) (citing Nev. Rev. Stat. § 116.3116(2)).

[53]*Id.*

[54]*See generally* Unif. Common Int. Ownership Act § 3-116, comment 1; Distribution of JEB Report, *supra* note 5.

sociation's potential recovery.[55] Florida association liens markedly depart from the UCIOA and states like Nevada in two key ways: (1) a 2010 amendment doubled the available priority amount;[56] and (2) the priority functions as a liability on purchasers, not as a lien competing with mortgages.[57]

Amidst the depths of the foreclosure crisis, Florida increased associations' priority from six months of regular unpaid assessments to 12 or 1% of the foreclosing mortgage amount.[58] This extension contemplates what the UCIOA drafters could have never foreseen decades prior.[59] The challenges of the foreclosure crisis, especially with protracted timeframes in judicial foreclosure states like Florida, necessitate increased priority rights for associations.[60]

The priority does not operate in the traditional sense of competition with other lienholders.[61] If a mortgagee or other lienholder effectuates the foreclosure sale, the association recovers through statutory liability imposed upon the foreclosure sale purchaser.[62] Instead of a limited priority for the association's lien over that of the mortgagee, the purchaser—who is very likely to be that mortgagee—becomes liable for unpaid assessments up to the 12-month or 1% limit.[63] The Florida scheme is effectively identical to limited priority over a mortgagee, but guarantees the recovery of unpaid fees through the statutorily imposed liability of the purchaser, not against the foreclosing mortgagee's sale proceeds.

State lien priority statutes ideally function similarly to the priority afforded for property tax liens while still maintaining access to substantial relief for mortgagees. By statutorily

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[55]*See* Condominium Act, Fla. Stat. Ann. §§ 718.116 (West 2012); Homeowners' Association Act, Fla. Stat. Ann. § 720.3085 (West 2012).

[56]*See* S.B. 1196, Gen. Assemb. (Fla. 2010).

[57]*See* Condominium Act, *supra* note 55; Homeowners' Association Act, *supra* note 55.

[58]S.B. 1196, *supra* note 56.

[59]Distribution of JEB Report, *supra* note 5.

[60]*Id.*

[61]*Cf.* Nev. Rev. Stat. § 116.3116.

[62]Fla. Stat. Ann. §§ 718.116 (West 2012); Fla. Stat. Ann. § 720.3085 (West 2012).

[63]*Id.*

identifying limited priority for the unpaid assessments owed to the association and vital for its maintenance of the community, the statutes identify the association's lien as at least partially equivalent to a private property tax lien. Associations' actual priority, however, is a matter of state law, which lacks any interstate consistency or clarity.[64]

Nevada adopted the UCIOA long before the foreclosure crisis and expanded priority to nine months.[65] The Nevada Supreme Court decision in *SFR Investments*, however, yields absolute priority rights to associations under the statute and frustrates any possibility for the intended equity of the UCIOA.[66] Florida's statutes provide the most "priority"—up to 12 months of unpaid assessments or 1% of the mortgage amount—but the enforcement of these liens is premised on a very different procedure that likely prevents the *SFR Investments* result.[67] Florida's limited priority is provided through the statutory liability of a foreclosure sale purchaser. The statute allows a mortgagee to foreclose its interest and imposes liability for the priority amount on that mortgagee as foreclosure sale purchaser.[68] The mortgagee receives the value of its lien, less the association's "priority."

III. THE IMPACT OF THE SUPREMACY CLAUSE ON LIEN PRIORITY

a. *Supremacy Clause Precedent*

Under the Supremacy Clause of the Constitution, federal laws "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[69] Foreclosure, however, has traditionally been a matter of state law—not federal law.[70] The application of subordinate state foreclosure laws in light of federal interests, however, is well established in the Ninth Circuit. Ninth Circuit decisions rely on the Appellate Court's 1979 decision in *Rust v.*

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[64] *See supra* notes 39–63.

[65] Nev. Rev. Stat. § 116.3116.

[66] SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408 (Nev. 2014).

[67] Fla. Stat. Ann. §§ 718.116 (West 2012); Fla. Stat. Ann. § 720.3085 (West 2012).

[68] *Id.*

[69] Constitution Art. 6, Cl. 2.

[70] *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994).

Johnson for the principle that "[s]tate legislation must yield under the Supremacy Clause of the Constitution to the interests of the federal government when the legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs."[71] State lien priority statutes must then subordinate their own legislative priority to the interests of the federal government.

The federal interests falling under this precedent arise throughout the real estate industry: the Federal Housing Administration, the Department of Veterans Affairs, Fannie Mae, and Freddie Mac.[72] Recent legislation and press releases identify the specific conflict between constitutional and state precedent for lien priority and speak directly to the supremacy of federal interests. The Housing and Economic Recovery Act prevents any property under conservatorship by the Federal Housing Finance Agency (FHFA) from "be[ing] subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency."[73] A FHFA press release in late 2014 expressed concern for states "granting priority rights in foreclosure proceedings for homeowner associations."[74] The release recognized the necessity of first-lien position for Fannie Mae and Freddie Mac as a "bedrock principle."[75]

These recent confirmations of federal supremacy, particularly in relation to association liens, draw a clear and easily overlooked distinction. Federal law "precludes involuntary

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[71]Rust v. Johnson, 597 F.2d 174, 178 (9th Cir. 1979) (citing Public Utility Dist. No. 1 of Pend Oreille County v. U.S., 417 F.2d 200, 202 (9th Cir. 1969); City of Los Angeles v. U.S., 355 F. Supp. 461, 465 (C.D. Cal. 1972)).

[72]*See FHA.com*, Federal Housing Administration, http://www.fha.com/ (last visited Mar. 6, 2016); *Home Loans*, U.S. Department of Veterans Affairs, http://www.benefits.va.gov/homeloans/ (last visited Mar. 6, 2016); Fannie Mae, http://www.fanniemae.com/portal/index.html (last visited Mar. 6, 2016); Freddie Mac, http://www.freddiemac.com/ (last visited Mar. 6, 2016).

[73]12 U.S.C. § 4617(j)(3).

[74]*Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens* (2014), https://www.law.cornell.edu/uscode/text/12/4617 (last visited Mar. 6, 2016).

[75]*Id.*

extinguishment" of federal interests through state lien priority statutes favoring associations.[76] These statements reject the winner-take-all foreclosure scheme when associations are the statutorily-guaranteed winners. They do not reject the possibility of any recovery for the association at all.

b. *Inconsistent Interpretations*

Courts have struggled to implement state lien priority statutes in light of federal interests. Recent decisions reveal vast inconsistencies in judicial interpretation, which produce precedent that similarly lacks the same uniformity missing from state lien priority statutes around the country. These decisions present diverging analyses for lienholders: (1) the federal interests, as discussed herein, are constitutionally supreme to those of an association under state lien priority statutes;[77] or (2) federal interests are not superior to state-created association lien priority and, in fact, federal policies support this subordination of federal interests.[78]

1. *Supreme Federal Interests*

In *Washington & Sandhill*, the District Court for the District of Nevada considered the respective lien rights of an association and the United States Department of Housing and Urban Development (HUD).[79] The first mortgage simultaneously encumbering the property with the association was federally insured by the FHA and subsequently transferred to HUD.[80] The court examined both state law, which governs the state's foreclosure procedure, and federal law, due to the existence of federal mortgage insurance and HUD's claim to the property's title. The court found that HUD held superior title over the association's first-in-time foreclosure.

The court's holding recognized the recent Supreme Court of Nevada decision ruling "that HOA foreclosure of their

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[76] *Id.*

[77] Washington & Sandhill Homeowners Ass'n v. Bank of America, N.A., *supra* note 4.

[78] Freedom Mortg. Corp. v. Las Vegas Development Group, LLC, 106 F. Supp. 3d 1174, 1177 (D. Nev. 2015).

[79] Washington & Sandhill Homeowners Ass'n v. Bank of America, N.A., *supra* note 4.

[80] *Id.*

super-priority lien under § 116.3116 does extinguish a first deed of trust on the property."[81] Despite this authority under Nevada law, the association's foreclosure was invalid under the Supremacy Clause of the Constitution. In pertinent part, the court explained

> in situations where a mortgage is insured by a federal agency under the FHA insurance program, state laws cannot operate to undermine the federal agency's ability to obtain title after foreclosure. Accordingly, even though [the Association] would generally be able to conduct a foreclosure pursuant to Nevada Revised Statutes § 116.3116 that would extinguish a first secured interest, such a foreclosure in this case would 'operate[] to impede or condition the implementation of federal policies and programs' and therefore 'must yield under the supremacy clause of the Constitution to the interests of the federal government.'[82] Under this decision, federal supremacy stands paramount to state superiority.

While not binding in many states with so-called "equitable solution" statutes, absolute federal supremacy provides strong persuasive precedent favoring federal interests in the judicial foreclosure areana. The grounding purpose of these state statutes—which admittedly are enacted in only some states—is to provide at least some recovery to associations and mortgagees. The District Court in *Washington & Sandhill* frustrated that purpose. The decision may be valid under the Constitution and mortgagees often do risk much greater loss than associations, but on the whole, it is in the best interest of all parties that both the association and mortgagee recover something.

2. *Superior Association Rights*

In *Las Vegas Development Group, LLC*, the District Court for the District of Nevada similarly considered association and mortgagee lien priority when the mortgage at issue was federally insured, but not yet transferred to a federal agency.[83] The court analyzed the same Nevada statute, NRS § 116.3116, and cited to the Nevada Supreme Court's hold-

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[81] *See Id.* (citing SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 409 (Nev. 2014)).

[82] *See Id.* (citing Rust v. Johnson, 597 F.2d 174, 179 (9th Cir. 1979)).

[83] Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC, *supra* note 78.

ing in favor of a winner-take-all foreclosure scheme.[84] The court found that "Nevada's HOA superpriority lien law is consistent with HUD's single-family mortgage-insurance program," and thus, not preempted under the Constitution.[85]

While considering the Supremacy Clause amongst other arguments, the court disagreed with constitutional preemption entirely.[86] An interpretation of federal policy drove the court's analysis of the federal supremacy. In pertinent part,

> permitting a lender to lose its security interest when it fails to protect its collateral by satisfying HOA liens is not just consistent with—but contemplated by—HUD's program. . . . The policy behind the program is to boost housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and other blighted areas, and the realization as soon as feasible of a decent home and a suitable living environment for every American family. As part of that policy, Congress directed HUD to exercise its powers, functions, and duties to encourage and assist the increase of efficiency in residential construction and maintenance and the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities.[87]

Policy rather than a strict application of federal supremacy determined the court's conceptualization of the state lien priority statute and otherwise conflicting federal interests.

IV. SURVIVING FEDERAL PREEMPTION

The foreclosure crisis crippled many America residential communities and necessitated the use of lien priority statutes at an unprecedented level. Even with clear decline in 2015 foreclosure and delinquency rates, foreclosure filings

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[84] *Id.* at 1176 (citing SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 419 (Nev. 2014)).

[85] *Id.* at 1177.

[86] *Id.* at 1189.

[87] *Id.* at 1183-88 (citing U.S. Dep't of Housing & Urban Dev., Lender's Guide to the Single Family Mortgage Insurance Process, 4155.2, Ch. 1, § A at 2, *General Information on Programs, Process and Loan Origination Requirements/Restrictions, available at* http://portal.hud.gov/hudportal/documents/huddoc?id=4155-2__l__secA.pdf; 42 U.S.C. § 1441; 12 U.S.C. § 1701(t)).

persisted nationally.[88] When these statutes function to achieve their intended purpose—an elimination of the inequitable winner-take-all foreclosure process—the application of otherwise valid federal preemption only further frustrates the goal of equitable results in an unfavorable situation.

The Constitution fully supports the supremacy of federal lienholders, but the federal government's own support of common interest communities and lien priority statutes mitigation of foreclosures' negative externalities contradict the necessity for federal supremacy. This challenge to the Supremacy Clause is premised on the caveat that an effective lien priority statute achieves legitimate relief for associations and mortgagees—not absolute priority for either.

a. *Federal Encouragement for Common Interest Communities*

A public-private partnership in the early 1960s supported the development of common interest communities and spurred their half-century explosion around the country.[89] As the first common interest communities hit the market in California nearly 50 years ago, other developers seeking to imitate the successful new model of residential housing faced one key hurdle: the Federal Housing Administration would not issue mortgage insurance.[90] The fate of common interest communities rested in the hands of the federal government and its Federal Housing Administration (FHA)—the same agency holding the superior federal interest threatening state lien priority statutes.

The National Housing Act of 1961 gave life to this new conception of residential development and granted the FHA authority to issue federal mortgage insurance on loans secured by units in common interest communities.[91] The Act conditioned this extension of federal mortgage insurance on

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[88] *See National Foreclosure Report*, CoreLogic (Jan. 2015), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-january-2015.pdf (Mar. 31, 2015).

[89] Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private* 92 (Yale Univ. 1994). *See* Winokur, *supra* note 12 at 1138 n.8.

[90] *Id.*

[91] Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 161 ("The Commissioner is authorized, in his discretion and under such terms and condi-

requirements that states enact a condominium act before buyers in that state received eligibility for the insurance.[92] Before the end of 1961, the country offered overwhelming support for the future of common interest communities with 31 states passing the first condominium acts.[93]

The federal government and its collaboration with proponents of this privatized community revolution strongly encouraged "the accelerated shift toward residential development in common interest communities."[94] By providing FHA mortgage insurance to purchasers of common interest community real estate, the federal government facilitated the growth of these communities. The federal government does not serve any interest by asserting absolute priority of federally insured mortgage liens to the detriment of the community and economic stability in general.

b. *Mitigating Negative Consequences*

In situations where either mortgagee or association extinguishes the other entirely, effective lien priority statutes mitigate the negative consequences caused by foreclosure. The association functions as a privatized municipality equally deserving some version the priority held by the public cousin, the property tax lien. Just as insolvent municipalities produce widespread economic injuries for the communities they maintain, systems allocating equitable priority for associations and mortgagees best mitigage the damage caused by delinquent properties and inadequately funded associations.

Effective statutes yield benefit in a less than ideal setting to three distinct parties. First, to the association, whose "collection of common charges represents the life blood of the

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tions as he may prescribe (including the mini- mum number of family units in the structure which shall be offered for sale and provisions for the protection of the consumer and the public interest), to insure any mortgage covering a one-family unit in a multifamily structure and an undivided interest in the common areas and facilities which serve the structure . . .").

[92] *Id.*

[93] Clifford J. Treese, *Federal Involvement in Community Associations*, Community Associations Institute (Sept. 11, 2013), http://www.caionline.org/events/boardmembers/Documents/federal__involvement.pdf (last visited Mar. 31, 2015).

[94] Winokur, *supra* note 12 at 1138.

association."[95] Second, the mortgagee, whose security is dependent on the value of the property located in a common interest community.[96] And finally, the larger community—both the community under the association's management and the surrounding municipality—whose investments and general economic stability partially rely on the maintenance of well-capitalized associations and healthy real estate markets.[97]

The problem is simple: "[i]f some owners do not pay their proportionate share of common expenses, the association will be forced to shift the burden of delinquent assessments to the remaining unit owners through increased assessments or reduced services and maintenance, potentially threatening property values within the community."[98] Lien priority statutes need not grant priority over property tax liens because such liens protect the interests of the general public and "outweigh the interests of the community alone."[99]

The statutes do, however, have the potential to manage the association-mortgagee priority battle where one seeks to extinguish the other. Some guaranteed recovery partially funds the association, maintains the common interest community, and protects property values for the benefit of mortgagees whose collateral is secured in that property as well as other owners within and around the community. The strength of real estate markets lends great significance to the global financial health of the municipality and state at large.

V. CONCLUSION

Common interest communities are far from utopias, but

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[95]Letter from Community Association Institute, to Joint Editorial Board for Uniform Real Property Act (Oct. 31, 2013), *available at* http://www.uniformlaws.org/shared/docs/jeburpa/CAIbaumanUCIOAcomments.pdf (last visited Mar. 31, 2015).

[96]*Id.*

[97]*Id.*

[98]*Report of the Joint Editorial Board for Uniform Real Property Acts*, Uniform Law Commission (June 1, 2013), http://www.uniformlaws.org/shared/docs/jeburpa/2013jun1_JEBURPA_UCIOA%20Lien%20Priority%20Report.pdf (last visited Mar. 31, 2015).

[99]*Id.*

"[t]he community association concept works—for neighborhoods, municipalities, the U.S. housing market and the nearly 66 million Americans who choose to make their homes in common-interest communities."[100] As Nevada's lien priority statute displays, the intended equity of these statutes often fails in practice. Effective lien priority statutes offer definitive and substantive recovery and prohibit the inequity of mortgagee or association liens eliminating the other. An effective statute provides a protective remedy for all of these impacted parties when the foreclosure tragedy threatens community stability. Assuming these statutes function in this ideal sense, absolute federal supremacy renders these statutes entirely futile if the foreclosure of a federally insured mortgage lien automatically and entirely extinguishes the association lien. This absolute right is based upon well-founded Supremacy Clause precedent, but the statutes' potential benefits stretch from associations facing insolvency to the real estate market at large and contradicts the necessity of this federal supremacy. The federal agency asserting the superior federal interest of HUD—the FHA—is the same agency that christened the birth of common interest communities by providing buyers with access to federal mortgage insurance. In the interest of economic stability and equity, the federal government serves no interest, not even its own, by asserting federal supremacy. The absolute superiority afforded to association liens, in states such as Nevada, similarly serves no one, but these statutes in other states and in amended versions deserve the opportunity to function effectively without absolute federal preemption.

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[100]Community Associations Institute, *supra* note 10.