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British Cures for American Foreclosure Woes: A Comparative Analysis of Foreclosure Law in the United States and United Kingdom

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I. INTRODUCTION

"But because no political society can be, nor subsist, without having in itself the power to preserve property... and all this for the preservation of the property of all the members of that society, as far as is possible."[1] *– John Locke*

John Locke's theories on the natural right to property and the government's role in protecting those rights are foundational principles of the Anglo-American legal system.[2] These legal assurances serve an invaluable function in the modern free market by preserving personal gains from adverse interests. Undoubtedly, the quintessential piece of personal property in the 21st century is the homestead. Despite its importance, this asset has suffered from inconsistent and ineffective state-based legislation across the United States, hindering economic recovery. This hindrance spawns from an ineffective system of state regulation that overly burdens mortgages and mortgage securities. As the greatest cause of diminished property values in the United States, foreclosure is an affective area of law that requires thoughtful legislation.[3] In fact, foreclosure sales decrease individual property values, lower surrounding community property values, and create ripple effects throughout the real estate market.[4] Wall Street is also directly affected by foreclosures through the diminution in value of mortgage-backed securities.[5] Yet, despite its national significance, foreclosure regulation has largely been controlled by state legislatures and courts, leading to large discrepancies in both procedural and substantive law.[6] The recent passage of federal foreclosure legislation, however, ushers in a new era of personal property rights protection in America.

Before discussing recent American developments, it is imperative to understand the history of the Anglo-American legal system as well as

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[1] JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, Chap VII, §87-88 (1690).

[2] Chester Antieau, *Natural Rights and the Founding Fathers-The Virginians*, 17 WASH. & LEE L. REV. 43 (1960).

[3] Anthony Pennington-Cross, *The Value of Foreclosed Property*, THE FEDERAL RESERVE BANK OF ST. LOUIS WORKING PAPER SERIES, WORKING PAPER 2004-022A (Sept. 2004).

[4] *Id.*

[5] *See generally* Gary Madich, Gregory Reed, Scott Thomas, Kent Weber, *Foreclosure Delays: Potential Impacts and Opportunities in the Aon-agency MBS Market*, J.P. MORGAN ASSET MANAGEMENT INSIGHTS (October 2010), http://www.jpmorganinstitutional.com/blobcontent/184/768/1288220108979_INSIGHTS_Foreclosure_Delays.pdf; *see also* Grant Nelson & Dale Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1406-1408 (2004).

[6] Elizabeth Brown, *A Comparison of the Handling of the Financial Crisis in the United States, the United Kingdom, and Australia*, 55 VILL. L. REV. 509 (2010); John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 482 (1992) ("Uniformity is essential for efficient secondary market operation [because it allows investors] to assess portfolio values on a rate-of-return basis without worrying about jurisdictional differences....").

the basics of land finance law. The first section of this article will set the background on three important topics: land finance history, current United Kingdom foreclosure law, and current American foreclosure practice. After establishing a background on these topics, the article will examine newly passed legislation and newly formed regulatory agencies in the United States. Finally, the article will take a comparative look at the United States and United Kingdom regulatory schemes, in order to better understand the advantages and pitfalls of each system. It is because the United States and United Kingdom have distinct legal systems with a common origin that this comparative analysis can capitalize on the success and failures of their independent regulatory developments. Much like our founding fathers borrowed principles from the early English legal system; the United States can glean from the regulatory steps taken in the United Kingdom to improve the American foreclosure landscape.

II. BACKGROUND

A. Anglo-American Land Finance History

Despite its current widespread usage, the personal property mortgage is a relatively new development in the context of real estate finance. Prior to 1916, banks and financial institutions rarely gave loans to individual borrowers for the purchase of real estate.[7] The emergence of personal property mortgages arose from the demand for private homeownership in the newly formed middle class of the early 20th century.[8] This new and expanding socioeconomic class encompassed individuals with skilled professions, moderate salaries, and limited access to capital. The middle class sought to break the landlord-tenant relationship that dominated the 19th century and enjoy the benefits of owning private property.[9] With the establishment of an effective banking system, government subsidies,[10] and large amounts of available capital for financial institutions, the personal mortgage became an instrument intended to benefit both creditor and borrower.

The mortgage relationship operates substantially the same in both the United States and the United Kingdom. It begins with an interested buyer for a piece of real property who cannot personally finance the transaction. Therefore, the prospective buyer must secure a loan in order to complete the purchase. Since the buyer has limited capital, the lending institution requires collateral in order to ensure repayment of the principal

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[7] THOMAS HERZOG, AMERICAN SOCIETY OF ACTUARIES, HISTORY OF MORTGAGE FINANCE WITH AN EMPHASIS ON MORTGAGE INSURANCE (2009).
[8] *Id.*
[9] *Id.*
[10] *Id.* (Examples of U.S. Government subsidies include those provided by: Federal Housing Administration, Veterans Affairs Office, Housing and Urban Development (HUD), and the Home Loan Bank Board.).

on the loan. This is secured by the very property being purchased, in conjunction with a promissory note or deed of trust. In both the United States and United Kingdom, the creation of a mortgage contract creates a relationship with several equitable and legal interests.[11]

The mortgagor, or the buyer of the property – also the borrower on the loan – is bound to a covenant to repay the loan secured by the property, a right to possession of the property, an equitable and legal right to redemption, and the right to collect rent or improve the land.[12] The mortgagee, or the institution making the loan, retains a similar legal right to redemption, a covenant to be repaid, a legal right to foreclosure, and in some cases, a power of sale.[13] The foreclosure right represents the mortgagee's ability to foreclose the mortgagor's legal and equitable right to redemption in the secured property after the principal of the loan becomes due.[14] By extinguishing the right to redemption, the mortgagee can "take the mortgaged property and treat it as his own, free from any right for the mortgagor to redeem the mortgage."[15] Depending on the jurisdiction and the terms of the mortgage, the mortgagee may also have a power of sale.

Another modern trend in land finance has been the development of mortgage servicing companies. Historically, while loans were serviced by the holder of the note, the current trend among large financial institutions has been to outsource day-to-day servicing of the loan to outside companies.[16] These companies are responsible for collecting and crediting monthly loan payments, handling an escrow account if necessary, and handling default related services should the borrower fail to make monthly payments.[17] In response, both countries have formed regulations that directly address the servicing of a loan. The addition of mortgage servicers creates another layer of complication for homeowners. In fact, the transfer of loans between mortgage servicers has been a recent source of abusive practices, prompting additional regulatory responses.[18]

Modern financial institutions have also found creative ways of further leveraging mortgages by creating mortgage-backed securities. By pooling large amounts of mortgages together, financial companies can issue "claims on the principal and interest payments made by borrowers on the loans."[19] Although American and British firms both securitize

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[11] *See generally* MARK HAPGOOD, PAGET'S LAW OF BANKING (11th ed. 1996).
[12] THOMAS JEFFERIES, HALSBURY'S LAWS OF ENGLAND (Lord Mackay ed., 5th ed. 2008).
[13] *Id.* at 189.
[14] Hapgood, *supra* note 11 at 614.
[15] *Id.*
[16] Janean Chun, *The 5 Biggest Mortgage Servicing Traps*, DAILYFINANCE.COM, Nov. 21, 2009, http://www.dailyfinance.com/2009/11/21/the-5-biggest-mortgage-servicing-traps/.
[17] FEDERAL TRADE COMMISSION, MAKING PAYMENTS TO YOUR MORTGAGE SERVICER, *available at* http://www.consumer.ftc.gov/articles/0190-making-payments-your-mortgage-servicer (last visited Feb. 27, 2015).
[18] *Id.*
[19] U.S. SECURITIES AND EXCHANGE COMMISSION, MORTGAGE-BACKED SECURITIES, http://www.sec.gov/answers/mortgagesecurities.htm (last visited Jan. 20, 2014).

mortgages, the 2008 United States subprime mortgage market was responsible for one of the largest economic crises in history.[20] From over inflated property values to questionable lending practices, the subprime mortgage crisis highlighted many flaws in the mortgage relationship and its disjointed regulation.[21] Sadly, until recently, little has been done to remedy the issues that created this crisis[22] and the current state of American foreclosure law continues to drag on the economy. Without improvements, the ineffective regulatory system will have a cyclical effect on our economy.

B. Foreclosure Law in the United Kingdom

Homeownership has gained increasing popularity in the United Kingdom since the advent of the First World War.[23] As of 2011, the overall homeownership rate in England and Whales was 64 percent.[24] Among these homeowners, approximately 37.3 percent have property debt.[25] In other terms, fewer than two in five households in the United Kingdom have a mortgage.[26] Unlike the United States, the United Kingdom has a variety of legislation that regulates the mortgage relationship at a national level.

The Law of Property Act ("LPA") enacted in 1925 was a foundational piece of legislation that regulated mortgages. After passage of the LPA, mortgages could only be created through a legal charge in the deed that created rights and duties at law.[27] Prior to the adoption of the LPA, the courts devised a structure of competing rights: the right to redemption of the property was given to the mortgagee and the equity of redemption was given to the mortgagor.[28] These rights continue to exist through the common law despite the passage of the LPA, other legislation, or even the intent of the parties.[29] Another major change brought about by the LPA is the introduction of a power of sale independent of the language

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[20] Noah Karley, Christine Whitehead, *The Mortgage-Backed Securities Market in the U.K.: Developments Over the Last Few Years*, HOUSING FINANCE INTERNATIONAL, http://www.housingfinance.org/uploads/Publicationsmanager/0212_UKM.pdf; *see also* Pennington-Cross, *supra* note 3.
[21] Pennington-Cross, *supra* note 3.
[22] Brown, *supra* note 6.
[23] Sam Marsden, *Home Ownership Falls for First Time in Nearly 100 Years – ONS*, THE TELEGRAPH, Apr. 19, 2013, http://www.telegraph.co.uk/property/propertynews/10006239/Home-ownership-falls-for-first-time-in-nearly-100-years-ONS.html.
[24] *Id.*
[25] Mona Chalabi, *Mortgages: How Many Britons Have One, and How Much Do They Owe?*, THE GUARDIAN, May 13, 2013, http://www.theguardian.com/news/datablog/2013/may/13/mortgages-property-debt-uk-trends.
[26] *Id.*
[27] Hapgood, *supra* note 11, at 586-587.
[28] *Id.* at 586.
[29] *Id.*

used in the mortgage.[30] The power of sale allows the mortgagee to sell the property free from the mortgagor's right of redemption and apply the proceeds toward the balance owed on the loan. Unlike the foreclosure right, the power of sale can be exercised without involving the courts.[31] In respect of this powerful tool for mortgagees, the courts have imposed a duty on lenders to act in good faith when exercising the power of sale.[32] The creation of an inherent power of sale creates uniformity in foreclosure practice by defining the procedural device used to recoup the outstanding principal. This is done at a national level in the United Kingdom, something that varies drastically in the United States from state to state.

Prior to 2011, the United Kingdom had left regulation of the mortgage-creating financial institutions to the Financial Services Authority ("FSA").[33] The FSA was one part of a tripartite system of regulation that included the Bank of England and the Treasury.[34] The three-part regulatory system was unsuccessful, with critics stating, "no one had sufficient responsibility for critical issues, and thus, no regulator was in a position to recognize the coming of the crisis and prevent or react to it."[35] In place of this fractured regulatory system, British lawmakers sought to consolidate agencies with specific roles and power to enforce their provisions. In 2011, the United Kingdom created the Financial Conduct Authority ("FCA"), a body of the Treasury, with the principal purpose of "facilitating efficiency and choice in the market for financial services; securing an appropriate degree of protection for consumers; and protecting and enhancing the integrity of the UK financial system."[36]

In addition to legislation regulating foreclosure procedural tools, the FCA, established a code of conduct sourcebook for lending institutions with mortgage business customers.[37] The Mortgages and Home Finance: Conduct of Business sourcebook ("MCOB") sets rules and regulations for lenders in their course of business with mortgagors. In particular, MCOB 13 regulates conduct for arrears and repossessions.[38] This section of the

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[30] *Id.* at 609.
[31] *Id.*
[32] *Id.* at 611 (describing the duty as something less than "fiduciary." The duty follows the 'neighbor principle' in English law).
[33] Daniel Lamb, *A Specter is Haunting the Financial Industry – The Specter of the Global Financial Crisis: A Comment on the Imminent Expansion of Consumer Financial Protection in the United States, United Kingdom, and the European Union*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 213, 247 (2011).
[34] *Id.*
[35] *Id.* at 248.
[36] *Id.* at 250.
[37] *See* FINANCIAL CONDUCT AUTHORITY, HOW WE OPERATE (last visited Feb. 20, 2015), http://www.fca.org.uk/about/governance; *see also* FINANCIAL CONDUCT AUTHORITY, MORTGAGES AND HOME FINANCE: CONDUCT OF BUSINESS SOURCEBOOK ("MCOB"), http://fshandbook.info/FS/html/FCA/MCOB (last visited Feb. 20, 2015).
[38] MCOB, *supra* note 37 at http://fshandbook.info/FS/html/FCA/MCOB/13.

sourcebook provides clear instructions to financial institutions when dealing with defaulting borrowers. In particular, MCOB 13.3.2A provides

> "A firm *must*, when dealing with any customer in payment difficulties: (1) make reasonable efforts to reach an agreement with a customer over the method of repaying and payment shortfall or sale shortfall, in the case of the former having regard to the desirability of agreeing with the customer an alternative to taking possession of the property; (2) liaise, if the customer makes arrangements for this, with third party source of advice regarding payment of shortfall or sale shortfall; (3) allow a reasonable time over which the payment shortfall or sale shortfall should be repaid, having particular regard to the need to establish, where feasible, a payment plan which is practical in terms of the circumstances of the customer; (4) grant, unless it has good reason not to do so, a customer's request for a change to: (a) the date on which the payment is due (providing it is within the same payment period); or (b) the method by which payment is made; (5) where no reasonable payment arrangement can be made, allow the customer to remain in possession for a reasonable period to effect a sale; and (6) not repossess the property *unless all other reasonable attempts to resolve the position have failed*."[39]

MCOB 13.3.2A represents many of the obligations placed on mortgagees from the duty arising from the power of sale. Moreover, failure to follow the rules set forth in the MCOB is punishable by fines, injunctions, and even criminal prosecutions.[40] The MCOB further regulates repossessions of mortgaged property.[41] This provision incorporates the previously mentioned requirements while also obliging the mortgagee to contact local authorities and establish whether the

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[39] *Id.* (Arrears and repossessions: regulated mortgage contracts and home purchase plans (emphasis added)).

[40] *See* FINANCIAL CONDUCT AUTHORITY, HOW WE ENFORCE THE LAW, http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law (last visited Feb. 20, 2015).

[41] MCOB, *supra* note 37, § 13.4.5.

customer is eligible for local authority housing after eviction.[42] While these regulations may seem excessive, or even inconsequential, they do more than provide borrowers procedural protections: they define the relationship and the corresponding duty owed by mortgagors.

Besides repossession through the power of sale, the mortgagee may also recoup the principal balance of an unpaid mortgage debt through foreclosure. The power to foreclose the mortgagor's equity of redemption can only be achieved through a court order and is therefore used sparingly.[43] By seeking a foreclosure in the United Kingdom, the mortgagee extinguishes the mortgagor's rights to the property and places all legal rights and interests with the mortgagee, even if the property value is in excess of the principal on the loan.[44] There is a two-stage process for foreclosure actions brought by mortgagees. "First, the court will make a nisi order giving the mortgagor a fixed period, usually six months, to pay off the outstanding amounts. The mortgagee's power of sale is suspended during this period. If the mortgagor does not pay off the debt in the prescribed period, the order will be made absolute."[45] After a nisi order has been given, the court effectively extends the deadline of repayment on the loan and the mortgagor retains possession of the property.[46] Like the MCOB regulations, the mortgagee must extend the mortgagor certain opportunities to renegotiate the terms of the loan during this prescribed period.[47]

However, these various regulations and protections have not always been in place. In fact, before the financial crisis of 2008, both the United States and the United Kingdom engaged in a regulatory "race to the bottom," "on the grounds that it was necessary to maintain or increase their competitive positions."[48] Much like the "race to the bottom" engaged by multi-national firms seeking the cheapest labor price, financial institutions also move their businesses to countries with favorable or little regulatory oversight. While this deregulation may be beneficial in the short term, the devastation created by the 2008 financial collapse highlights the risks associated with such tactics. In fact, since the collapse of the American subprime mortgage market, the United Kingdom financial regulatory system has undergone substantial restructuring.[49]

With updated and reorganized protections in place, the rate of repossession and foreclosure in the United Kingdom is now very low. The

[42] MCOB, *supra* note 37, § 13.4.5 (2).
[43] Mark Harrison, *Repossession vs. Foreclosure in the UK-The Big Myths*, EZINEARTICLES.COM, http://ezinearticles.com/?Repossession-vs.-Foreclosure-In-The-UK---The-Big-Myths&id=404151 (last visited Jan. 20, 2014); *see also* Hapgood, *supra* note 11, at 614.
[44] Hapgood, *supra* note 11, at 614.
[45] *Id.*
[46] Jefferies, *supra* note 12, at 350.
[47] *Id.*
[48] Brown, *supra* note 6, at 563.
[49] *Id.*

Council of Mortgage Lenders, a non-profit trade association for the mortgage lending industry, put the rate of repossession of all properties for the third quarter of 2013 at 0.06 percent.[50] The rate of repossessions continues to decrease despite the expiration of several government programs instituted in 2009 to help defaulting mortgagors.[51] The effects of the United Kingdom's regulations are the result of one overarching policy decision: to prevent foreclosures and repossessions by creating significant statutory, regulatory, and judicial safeguards. In response, securing a mortgage in the United Kingdom has become increasingly difficult.[52] Lenders require substantial down payments, significantly higher interest rates than those set by the government, and proof of income from mortgagors.[53] Despite these significant obstacles, homeownership rates are similar to that of the United States.

C. Foreclosure Law in the United States

As previously stated, homeownership rates in the United States are similar to those found in the United Kingdom. In fact, as of November 2013, the homeownership rate in the United States was 65.3 percent, or 1.3 percent more than in the United Kingdom.[54] While the homeownership rate is similar between the countries, the rate of repossession or foreclosure is quite different. As of October 2013, there were 1,252,416 properties at some stage of foreclosure in the United States, or 0.102 percent of all homes.[55] This is almost double the rate of repossessed and foreclosed properties in the United Kingdom (0.06 percent).[56] In addition to an increased rate of foreclosure, the effect of foreclosure on the underlying property value is substantial. As of September 2013, the median sale price of foreclosed homes was $74,900 less than the median sale price of non-foreclosed homes during the same period.[57]

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[50] COUNCIL OF MORTGAGE LENDERS, ARREARS AND REPOSSESSIONS CONTINUE TO FALL, SAYS CML ("CML Report"), Nov. 14, 2013, http://www.cml.org.uk/cml/media/press/3731 (last visited Jan. 20, 2014) (noting that this is the lowest recorded level since the organization began reporting the statistic in 2008).

[51] Alan White, *Foreclosure Crisis in Europe vs. US*, CREDITSLIPS.COM, (last visited Jan. 20, 2014), http://www.creditslips.org/creditslips/2011/08/foreclosure-crisis-in-europe-vs-us.html.

[52] Paul Farrow, *It's Never Been Harder to Get a Mortgage*, THE TELEGRAPH, Aug. 25, 2012, http://www.telegraph.co.uk/finance/personalfinance/borrowing/mortgages/9496462/Its-never-been-harder-to-get-a-mortgage.html.

[53] *Id.*

[54] U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU NEWS CB13-173, NOV. 5, 2013, http://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[55] *National Real Estate Trends and Market Info.* ("Trends and Market Info"), REALTYTRAC.COM, http://www.realtytrac.com/statsandtrends/ (last visited Jan. 20, 2014); *see also Foreclosure Trends*, REALTYTRAC.COM, http://www.realtytrac.com/statsandtrends/foreclosuretrends (last visited Jan. 20, 2014).

[56] CML Report, *supra* note 50.

[57] Trends and Market Info, *supra* note 55.

Unlike the United Kingdom, the United States has largely avoided passing national-level legislation regulating the mortgage relationship. For example, only twenty-one states required judicial foreclosure as of 2006.[58] In practice, these twenty-one states require a mortgagee to pursue repossession of a defaulted property through a lawsuit in court. The other twenty-nine states do not require judicial involvement in order for a home to be repossessed and eventually sold. Other states, such as California, do not even use the mortgage instrument, but require a deed of trust that operates similarly to mortgage and usually involves a third-party, escrow.[59]

While the LPA provided the power of sale for every mortgage in the United Kingdom, this is not incorporated into every mortgage agreement by statute in the United States. However, many mortgages and deeds of trust in the United States contain power of sale provisions as part of the agreement.[60] These provisions are only valid in states that do not require judicial foreclosures and allow the mortgagee to sell the property without having to go to court.[61] Despite these provisions, several states, including New York, have passed legislation regulating a sale under these circumstances.[62] Lenders prefer settling borrower defaults by power of sale provisions because they are often cheaper and less time consuming than seeking judicial action.[63]

Another peculiar aspect of the American foreclosure landscape is the existence of quasi-governmental entities such as Fannie Mae and Freddie Mac. In 1970, Freddie Mac was commissioned by Congress to regulate and assist the secondary mortgage market.[64] In addition, these entities also guarantee mortgage-backed securities and help prevent foreclosure by assisting homeowners.[65] However, their guarantees of mortgage securities during the early 2000s led directly to a financial collapse costing taxpayers $189 billion in bailout funds.[66] In response to

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[58] Kelly Edmiston & Roger Zalneraitis, *Rising Foreclosures in the United States: A Perfect Storm*, *in* THE FEDERAL RESERVE BANK OF KANSAS CITY ECONOMIC REVIEW, FOURTH QUARTER 2007 (2007).
[59] Cam Merritt, *What Is a Deed of Trust in California?*, S.F. GATE, http://homeguides.sfgate.com/deed-trust-california-9088.html (last visited Jan. 20, 2014).
[60] *Power of Sale Clause,* LEGAL INFORMATION INSTITUTE, CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/power_of_sale_clause (last visited Jan. 20, 2014).
[61] *Id.*
[62] N.Y. RPA. LAW § 1405.
[63] Edmiston & Zalneraitis, *supra* note 58.
[64] FREDDIE MAC, COMPANY PROFILE, http://www.freddiemac.com/corporate/company_profile/?intcmp=AFCP (last visited Jan. 20, 2014).
[65] *Id.*, *see also* FANNIE MAE, CORPORATE GOVERNANCE, http://www.fanniemae.com/portal/about-us/governance/corporate-governance.html (last visited Jan. 20, 2014).
[66] James Glassman, *Why We Need Fannie and Freddie*, POLITICO.COM, Nov. 20, 2013, http://www.politico.com/magazine/story/2013/11/why-we-need-fannie-and-freddie-100122.html.

their mismanagement, both Fannie Mae and Freddie Mac were placed under the conservatorship of the Federal Housing Finance Administration in 2008.[67] While flawed, these organizations serve an invaluable function in the American mortgage market: bringing stability to a highly irregular and unevenly-regulated market. Whereas mortgages in the United Kingdom are all subject to substantially similar regulations, mortgages in the United States are subject to different laws that vary drastically from state to state. These quasi-governmental organizations ensure financial institutions can buy and sell mortgages regardless of the state they originated from or under what legal assurances they were given. Without these organizations, it would be exceedingly difficult to compare the value of a mortgage issued in California, to one issued in New York as they are "guaranteed" under different jurisdictions with varying procedural and substantive laws.[68]

While foreclosure practice remains distinct in each state, Congress has attempted regulating the foreclosure process through federal legislation. Their first attempt was the Federal Mortgage Foreclosure Act ("FMFA") as part of The Housing Act of 1973.[69] Although supported by the Nixon administration, this failed bill would have provided a foreclosure by power of sale for any "mortgage made, owned, insured, guaranteed by any federal instrumentality."[70] In 1995, a similar bill was proposed that would have enacted statutory foreclosure by a power of sale remedy for all mortgages insured or guaranteed by the federal government.[71] These bills failed to attract popular support in Congress for several reasons. First, both bills were heavy-handed attempts to dictate a specific federal foreclosure process, thereby trampling state's rights. Instead of bills that mandate specific foreclosure procedures, a federal foreclosure bill should seek to define the substantive relationship between the parties. Not only would this preserve state's rights, but is more likely to garner popular support amongst lawmakers who oppose federal government intrusion.

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[67] *Id.*

[68] Since New York is a judicial foreclosure state and California allows non-judicial foreclosure, the actual amount paid back on the principal can be vastly different. In non-judicial foreclosures, usually executed through a power of sale, the mortgagee gives up the right to seek a deficiency judgment against the mortgagor. *See* Mark S. Pécheck and Kelsey M. Lestor, The ABCs of California Foreclosure, LOS ANGELES LAWYER, January 2012, http://www.gibsondunn.com/publications/Documents/PecheckLestor-ABCsofCAForclosureLaw.pdf. Therefore, if the mortgagee exercises a power of sale and the underlying property is sold for less than the amount owed on the loan, the actual value of the mortgage instrument will be less than the agreed upon principal, or face value of the note.

[69] Nelson and Whitman, *supra* note 5, at 1411.

[70] *Id.*

[71] Patrick Randolph, Jr., *The New Federal Foreclosure Laws*, 49 OKLA. L. REV. 123 (1996).

Another attempt at regulating foreclosure practice has come from the National Conference of Commissioners on Uniform State Laws in the Uniform Nonjudicial Foreclosure Act ("UNFA").[72] This proposal gained support from "some of the nation's leading real estate finance practitioners and scholars."[73] Again, much like the failed congressional bills, the UNFA sought to create specific foreclosure procedures in order to bring uniformity. In particular, the UNFA outlined "three methods of nonjudicial foreclosure and permit[ed] the secured creditor to elect the method to be used."[74] While innovative, these specific procedural proposals stand no chance of approval in Congress. In fact, since the Act was promulgated in 2002, it has failed to be enacted by Congress despite pressure from the Uniform Law Commission.

The United Kingdom was not the only country that passed new financial regulation in the wake of the subprime mortgage market collapse in 2008. In July 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[75] As opposed to previous attempts at direct federal legislation regulating the mortgage market and foreclosure process, Dodd-Frank sought to "curb, in large part, the trend toward federalization of consumer financial protection through bolstering state control over regulation."[76] The legislation provided a right of action for state's attorney general to bring civil actions against financial institutions to enforce the regulations in Dodd-Frank.[77] While Dodd-Frank adds some level of protection and uniformity to the foreclosure landscape, it suffers from the same systemic issues in American foreclosure governance. By deferring significant responsibility to state enforcement of financial regulation, lawmakers are promoting a dysfunctional regulation system with state-to-state differences. For example, because enforcement of these provisions are left to the discretionary choice of the states' attorney general, a violation of Dodd-Frank in one state may be subject to enforcement, while the same violation in another state could go unpunished. In the competitive real estate finance market, this will force lenders and financial institutions to seek the state with the lightest enforcement of these provisions. Or, in the context of consumer protections, lenders may pursue one course of foreclosure in State X, while pursuing another less favorable form of foreclosure for the borrower in State Y, where enforcement of Dodd-Frank is lacking.

As seen, land finance law and foreclosure law have largely been left to the states to regulate in America. This often leads to the legal

[72] Nelson and Whitman, *supra* note 5, at 1399.
[73] Nelson and Whitman, *supra* note 5, at 1402 & n. 2.
[74] UNIFORM LAW COMMISSION, NONJUDICIAL FORECLOSURE ACT SUMMARY, http://www.uniformlaws.org/ActSummary.aspx?title=Nonjudicial%20Foreclosure%20Act (last visited Jan. 20, 2014).
[75] Lamb, *supra* note 33, at 237.
[76] *Id.*
[77] *Id.*

consultation of a local attorney who can provide the requisite information on how to legally proceed in a foreclosure case.[78] With federal foreclosure legislation, both parties would be assured that the controlling federal provisions apply and are guaranteed certain rights and responsibilities under the law.[79] The current system has created a somewhat dysfunctional and inefficient system of governance that affects property values, foreclosure rates, and our domestic economy. Despite these effects, lawmakers have remained reluctant to create federal legislation regulating financial institutions and mortgage markets. While this may be done out of respect for American federalism, 21st century banking and foreclosure practice requires a new-age approach.

D. New Developments in American Foreclosure Law

In response to the failed attempts by states to regulate foreclosure practice and the devastating effects of the financial crisis, lawmakers passed substantial federal reforms to foreclosure in the Dodd-Frank Act. The Consumer Finance Protection Bureau (the "Bureau"), an idea of Harvard Law School bankruptcy professor Elizabeth Warren and now Democratic Senator from Massachusetts, advocated for greater consumer protections in the wake of the 2008 financial crisis.[80] After a struggling start to define its purpose and hire capable individuals, the Bureau began taking shape in 2011.[81] It was not until the highly contentious January recess appointment of Richard Cordray that the Bureau began taking any substantive steps.[82] Even then, leaders of the organization were slow to enforce the newly enacted rules and regulations delegated by Congress, waiting for "slam-dunk cases" before taking action.[83] Today it boasts of several achievements: "a consumer complaint process that has already made banks more responsive. A data based method for assessing which institutions deserve the most scrutiny … A renewed onslaught of enforcement actions. And a record of hitting each rulemaking deadline set by Dodd-Frank as it fundamentally reshaped the mortgage market, while other agencies let theirs slide."[84] To fully appreciate the Bureau's role in

[78] *See generally* John Schoen, *Homeowners Battle Banks to Stop Foreclosures… and Win*, NBCNEWS.COM, Mar. 12, 2012, http://www.nbcnews.com/business/homeowners-battle-banks-stop-foreclosures-win-403572.
[79] For a more detailed example of the challenges created by varying foreclosure law, see Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 703 (2008).
[80] Lydia Depillis, *A watchdog grows up: The inside story of the Consumer Financial Protection Bureau*, WASHINGTON POST, Jan. 11, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/11/a-watchdog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau/.
[81] *Id.*
[82] *See id.*
[83] *Id.*
[84] *Id.*

regulating the mortgage market, it is essential to examine the rules and regulations that govern this federal agency.

Like the Financial Conduct Authority in the United Kingdom, the Bureau has been given certain forms of enforcement by the legislature. The Bureau's primary method of enforcement is outlined in 12 U.S.C. § 5564 entitled "Litigation Authority." Under the Bureau's litigation authority, it may bring a civil action against those that violate the regulations it promulgates.[85] It is important to note that the regulatory organization must give notice to the Attorney General before taking any action.[86] In addition to bringing civil actions, the Bureau has a variety of relief forms that it may seek. For example, if there is a violation of the organization's rules, then it can seek recession or modification of contracts, refunds of money, and even restitution.[87] The Bureau can also refer matters to criminal proceedings if needed.[88] These forms of relief are almost identical to the ones offered by the MCOB in the United Kingdom to the Financial Conduct Authority.

While the Bureau has been granted substantial enforcement authority, what the organization actually enforces is radically different than what was previously regulated by federal agencies. One of the most substantial regulations administered and enforced by the Bureau is the Real Estate Settlement Procedures Act ("RESPA") of 2011.[89] The goal of RESPA is to "ensure that consumers throughout the nation are provided with more helpful information about the cost of the mortgage settlement and [are] protected from unnecessarily high settlement charges caused by certain abusive practices."[90] Specifically, Subpart C of RESPA provides regulations on mortgage servicing. From setting proscribed periods of time in which mortgage servicers must respond to borrowers,[91] to establishing loss mitigation procedures and timelines,[92] RESPA formalizes the relationship between borrowers and lenders under federal law. Prior to the enactment of RESPA, these relationships were left to the states to regulate, which often provided little to no guidance in the form of deadlines or timetables. The resulting abuses by mortgage servicers included exorbitant fees, improperly force-placed insurance, and dual tracking.[93] The passage

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[85] 12 U.S.C. § 5564(a) (2010). It is also important to note that the Bureau has its own administrative hearings on violations of regulations, but these are largely devoid of any real consequence to the violator. *See* 12 U.S.C. § 5563 (2010).
[86] 12 U.S.C. § 5564(d) (2010).
[87] 12 U.S.C. § 5565 (2010).
[88] 12 U.S.C. § 5566 (2010).
[89] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, RESPA – REAL ESTATE SETTLEMENT PROCEDURES ACT, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/res/respa_hm (last visited Jan. 24, 2014).
[90] *Id.*
[91] 12 C.F.R. § 1024.35.
[92] 12 C.F.R. § 1024.41.
[93] *See* NOLO.COM, ABUSES BY THE MORTGAGE SERVICING INDUSTRY, http://www.nolo.com/legal-encyclopedia/abuses-the-mortgage-servicing-industry.html

of RESPA provides nationwide protections for personal mortgage consumers that previously did not exist under state law.

For example, 12 C.F.R. § 1024.41(e)(1) states:

> "(1) In general. Subject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower."

The regulations center around specific timing and procedures that borrowers or lenders should use before foreclosure action commences. However, these regulations are extremely specific by providing strict timetables for borrower and lender responses.

Besides RESPA, the Consumer Financial Protection Bureau is responsible for administering other important federal regulations, previously enforced by a multitude of different agencies. First, the organization can now enforce the Fair Debt Collection Practices Act, which had previously been under the exclusive control of the Federal Trade Commission.[94] Second, the Bureau can enforce violations of the Truth in Lending Act, which had previously been administered by the Federal Reserve Board.[95] The consolidation of the enforcement of these regulations is the result of the previous failure of the segmented system, which led to a division of responsibility and ultimately allowed the financial collapse in 2008.[96] As previously mentioned, a similar consolidation of power occurred within the Financial Conduct Authority in the United Kingdom. By centralizing the enforcement of these regulations, it ensures that standards are applied equally nationwide and

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(last visited Jan. 24, 2014). (Dual tracking occurs when a mortgage servicer simultaneously proceeds with foreclosure while loan modification discussions are occurring. This can result in foreclosure before completion of the loan modification process).

[94] *See* FEDERAL TRADE COMMISSION, FAIR DEBT COLLECTION PRACTICES ACT, http://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-debt-collection-practices-act-text (last visited Jan. 24, 2014); *see also* C.F.R. T. 12, Ch. X, Pt. 1006.

[95] *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REGULATIONS, http://www.federalreserve.gov/bankinforeg/reglisting.htm#Z (last visited Jan. 24, 2014); *see also* 12 C.F.R. § 1026.1.

[96] CONSUMER FINANCIAL PROTECTION BUREAU, CREATING THE CONSUMER BUREAU, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Jan. 24, 2014).

not on a state-by-state basis. This uniformity eliminates much of the confusion and mismanagement of a segmented regulatory system; where no one segment is ultimately accountable.

The idea of federal legislation on the issue of foreclosure is not novel. As previously discussed, FAMFA and UNFA were both attempts at foreclosure regulation at the national level. While both proposed useful changes to American foreclosure practice, they ultimately failed to garner congressional support because they attempted to accomplish too much through heavy-handed procedural changes.[97] In addition to these two proposals, there have been numerous articles that suggest federal foreclosure legislation may be more effective than the current regime of state regulation.[98] Like FAMFA and the UNFA, these articles largely recommend regulating the procedural mechanisms associated with a foreclosure sale. Instead, federal foreclosure reform should seek to define the substantive relationship between the parties, much like the MCOB in the United Kingdom. By defining the responsibilities of the parties involved in a foreclosure, federal legislation would demystify the rights and roles of the parties, while allowing states the opportunity to define their own procedural specifics.

III. COMPARATIVE ANALYSIS

Both the United States and the United Kingdom regulatory systems underwent substantial restructuring in the wake of the 2008 financial crisis. While both nations have experienced recent declines in foreclosure,[99] it is imperative to understand which regulations are responsible for these improvements. The importance of this analysis is essential to prevent the repeal of successful regulation in the inevitable "race to the bottom" in which nations engage to attract investment.

A. Regulatory Structure

The power to regulate can be a useful, yet crippling tool in its effects on an economy. In the case of American foreclosure law, the previous regulatory structure to the 2008 financial crisis had been dominated by states, with little oversight from the federal government. This led to a highly fractured system of different foreclosure procedures, confusion for homeowners and lenders, and pseudo-governmental agencies that attempted to bring some uniformity to the system. The interplay between state regulation and minimal federal oversight was a

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[97] *Id.* at 743.
[98] *See id.*
[99] COUNCIL OF MORTGAGE LENDERS, *supra* note 47; *see also* Alex Veiga, *Homes Lost to Foreclosure Hit 6-Year Lo in 2013*, ABCNEWS.COM, Jan. 16, 2014, http://abcnews.go.com/US/wireStory/homes-lost-foreclosure-hit-year-low-2013-21551503.

principal cause of the housing bubble and resulting foreclosure epidemic.[100] This directly affected the regulatory structure in the United Kingdom, as both nations sought to make their regulatory schemes more favorable to investors.

Since the 2008 financial crisis, both countries have consolidated regulatory power and oversight. In the United Kingdom, a tripartite system was replaced by the singular Financial Conduct Authority who, through its promulgation of the MCOB, laid down clear and effective rules on mortgage regulation.[101] Similarly, the Bureau in the United States assumed the regulatory responsibilities of several other agencies, and through their consolidation, has provided a unified front of enforcement against foreclosure abuse.[102] The success of a country's regulatory system is highly dependent on accountability and uniformity of enforcement. Separation of regulators, lack of enforcement, and differing internal regulations lead to forum shopping by investors, which in turn leads to questionable lending practices and foreclosure procedures. While the current regulatory systems in the United States and the United Kingdom seem effective, lawmakers must resist the race to deregulation once the concerns of the financial crisis have faded. If they fail to heed these lessons of history, we will once again be plunged into financial uncertainty.

B. Regulatory Substance

While the regulatory structure in both nations has largely focused on centralizing oversight, the substance of the promulgated regulation is noticeably different. The two notable differences are (1) that the regulations in the United States provide a private right of action under certain regulations and (2) that the United Kingdom's regulations limit its content to defining the nature of the mortgagor-mortgagee relationship without providing extensive procedural regulations.

1. Private Rights of Action

The Bureau has provided American consumers with private rights of action under certain statutory regulations. Specifically, in 12 U.S.C. § 2605, which governs mortgage-servicing practices, Congress provided that "[w]hoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts…"[103] However, courts have been reluctant to infer private rights of action in other statutory regulations promulgated by the organization. For example, 12 U.S.C. §§ 2603-2604, which pertain to disclosure requirements on

[100] Brown, *supra* note 6, at 535.
[101] *See* Lamb, *supra* note 33.
[102] *Id.*
[103] 12 U.S.C. § 2605(f).

lenders, have not been found to include private rights of action. Courts have held that violations of these regulations are not actionable by general consumers.[104] While the Bureau has provided consumers with limited direct recourse, these regulations have gone beyond the protections offered in the United Kingdom.

The MCOB does not provide a private right of action under any of its regulations.[105] Instead, enforcement of foreclosure regulations in the United Kingdom is left to the Financial Conduct Authority. As previously stated, the Financial Conduct Authority has been granted a variety of tools and punishments to enforce its regulations. This has two effects. First, it eliminates a multitude of lawsuits that would be filed by disgruntled consumers complaining of violations of the MCOB. In the United States, the decision to provide private rights of action for certain foreclosure regulations ensures that numerous lawsuits will be filed. As the regulations promulgated by the Consumer Financial Protection Bureau arise under federal law, many of these lawsuits end up in federal court. In fact, the number of foreclosure suits in federal courts has nearly doubled, from 4,267 in 2010 to 8,130 in 2012.[106] The added strain of extra cases, combined with unduly long delays in appointing new judges, all during a time of fiscal austerity for the judiciary, means cases are sometimes delayed for years without adjudication.[107]

The United Kingdom avoids this issue by centralizing enforcement of its regulations with the appropriate regulatory agency. This is, however, not without pitfalls of its own. The centralization of enforcement requires diligent efforts on the part of the agency, as well as constant and effective communication with lenders, servicers, and consumers.

Like the Bureau, the Financial Conduct Authority provides an online consumer complaint process where individuals can seek protection and enforcement for regulation violations.[108] The number of complaints received by each regulatory entity provides perspective on its role in enforcement. For example, the Financial Conduct Authority received a total of 2.9 million complaints in the first six months of 2013.[109] This was

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[104] *E.g.*, *Collins v. FMHA–USDA*, 105 F.3d 1366, 1367–68 (11th Cir.), *cert. denied* 521 U.S. 1145 (1997); *Allan v. GreenPoint Mortg. Funding*, 730 F.Supp.2d 1071, 1976 (N.D. Cal. 2010); *Delino v. Platinum Community Bank*, 628 F.Supp.2d 1226, 1232–33 (S.D. Cal. 2009); *Bloom v. Martin*, 865 F.Supp. 1377, 1384–85 (N.D. Cal. 1994), *aff'd on other grounds* 77 F.3d 318 (9th Cir. 1996).

[105] MCOB, *supra* note 37.

[106] U.S. DISTRICT COURTS TABLE 4.4, *Civil Cases Filed, by Nature of Suit*, *available at* http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/judicial-facts-figures-2012.aspx.

[107] Gary Martin, *Vacancies, Backlogs Plague Federal Judiciary*, HOUSTON CHRONICLE, March 1, 2013, http://www.chron.com/news/politics/article/Vacancies-backlogs-plague-federal-judiciary-4321484.php.

[108] FINANCIAL CONDUCT AUTHORITY, Complaints and Compensation, *available at* http://www.fca.org.uk/consumers/complaints-and-compensation.

[109] FINANCIAL CONDUCT AUTHORITY, Complaints Data, *available at* http://www.fca.org.uk/static/documents/aggregate-complaints-data-2014-h1.pdf.

down 15 percent from the last 6 months of 2012.[110] By comparison, the Consumer Financial Protection Bureau received approximately 176,700 consumer complaints from July 2011 to June 2013.[111] Although the United States has approximately five times the population of the United Kingdom, the Financial Conduct Authority receives 16 times more complaints in six months than the Bureau had in over a year.[112] While the regulations between the two entities may seem similar, the enforcement and number of complaints could not be more different.

The second effect of centralized enforcement without granting private consumers a private of action is the leveraged ability to collect civil penalties from regulation violations. Again, the disparaging differences between the two nation's regulatory agencies provide a unique perspective into their respective enforcement ability. During the 2012/2013 fiscal year, the Financial Conduct Authority collected approximately £381.9 million British pounds sterling, or approximately $634.3 million U.S. dollars from violations of regulations.[113] In comparison, the Bureau collected a mere $32 million for fiscal year 2012/2013.[114]

The differences between the two organizations yearly collections are illustrative of their respective effectiveness. As explained above, there are a variety of factors that lead to the discrepancy in civil fines assessed and collected. Perhaps the most important difference is the lack of private enforcement afforded by the MCOB. This has two effects. First, it keeps violations of the regulations out of the court system and second, it provides a unified mechanism of enforcement, thereby increasing its leverage in securing fines. This article would recommend that Congress heed the example of the Financial Conduct Authority and eliminate any private rights of action under federal foreclosure legislation. Instead, the enforcement of federal foreclosure legislation should be serviced by one regulatory agency, who would work with consumers to remedy abusive practices. In fact, the Bureau already has an extensive online claims process like the one featured by the Financial Conduct Authority. While consumers may feel they have lost significant power to fight abusive practices with the elimination of their ability to sue, however, the data suggests that enforcement by an agency would yield greater results.

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[110] *Id.*

[111] CONSUMER FINANCIAL PROTECTION BUREAU, *Consumer Response: A Snapshot of Complaints Received*, July 2013, at 6, *available at* http://files.consumerfinance.gov/f/201307_cfpb_snapshot_complaints-received-july.pdf.

[112] WORLD BANK, Population Totals, http://data.worldbank.org/indicator/SP.POP.TOTL (last visited Feb. 12, 2014).

[113] FINANCIAL CONDUCT AUTHORITY, Annual Report *2012/2013*, Oct. 07, 2013, at 91, *available a*t http://www.fca.org.uk/static/documents/annual-report/fsa-annual-report-12-13.pdf.

[114] CONSUMER FINANCIAL PROTECTION BUREAU, CFPB Financial Report – Fiscal Year 2013, at 23, *available at* http://files.consumerfinance.gov/f/201312_cfpb_report_financial-report.pdf.

2. Regulatory Complexity

Another key success to the MCOB has been the substance of the regulations promulgated by the Financial Conduct Authority. Specifically, their ability to accurately and explicitly define the relationship between mortgagees, mortgagors, and mortgage servicers has left little ambiguity as to the roles and responsibilities of each party. While providing great substantive regulation, the MCOB has largely stayed away from defining procedural specifics. This provides homeowners with substantive protections without hindering the efforts of financial intuitions in servicing the loan. As further addressed below, the current regulatory structure under the Bureau contains excessively specific time frames and procedural steps, making the regulations overly complex and therefore burdensome.

To illustrate the substance of the MCOB, this article will further examine section 13.3, entitled "Dealing fairly with customers in arrears." MCOB § 13.3.3A states:

> "In complying with MCOB 13.3.2A R, a firm must give a customer a reasonable period of time to consider any proposals for dealing with the payment difficulties."

While the regulation clearly imposes responsibilities on the lender or servicer, it does so without providing overly complex time schemes or procedural specifics. Instead, it provides a framework that outlines the relationship between the two parties with allowable variances.

In comparison, 12 C.F.R § 1024.41(b) provides, in part:

> "(2) Review of loss mitigation application submission.
>
> > (i) Requirements. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:
> >
> > > (A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and
> > >
> > > > (B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the

> loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options."

The difference between the two regulations is readily apparent. While both regulations concern similar issues or the course of action to be taken if a borrower falls behind in payments, RESPA creates a strict timeline for which mortgage servicers must adhere. In addition, it also provides specific information that must be included in the correspondence. The regulations provided by RESPA are overly complex and actually burden smaller businesses and lenders who may not have the resources to have an attorney constantly advising them of regulation specifics.[115]

The regulations propounded by the Bureau may sound effective in theory, but the realistic consequences of providing overly specific regulations are the burdening of business.[116] Another effect of overly complex regulation, even at the state level, is added costs to homeowners and new homebuyers.[117] Specifically, the Federal Housing Administration announced in December of 2013 that it eliminated the "across-the-board adverse-market fee instituted in 2008 to help cover the costs of high rates of delinquencies."[118] However, the agency did not eliminate this fee in states with foreclosure timelines that remained stubbornly long.[119] An analysis by Mark Fleming of CoreLogic, a real estate data service, found that foreclosures in judicial states took 46 percent longer to complete than a foreclosure in a non-judicial state.[120] Further, a study conducted by the Federal Housing Finance Agency in 2013 found "the dramatic increases in timelines seen in certain states have created fundamentally unfair cross subsidies between borrowers in different states, because the current pricing regime fails to account for the material difference in the risk of loss across states."[121]

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[115] Stephanie Levy, *CFPB Recognizes Cost Burden of Compliance for Small Banks*, INSIDEARM.COM, Dec. 3, 2013, http://www.insidearm.com/daily/cfpb-recognizes-cost-burden-of-compliance-for-small-banks/.

[116] *Id.*

[117] Lisa Prevost, *Paying for Foreclosure Delays*, NYTIMES.COM, Jan. 2, 2014, http://www.nytimes.com/2014/01/05/realestate/paying-for-foreclosure-delays.html?_r=0.

[118] *Id.*

[119] *Id.*

[120] Mark Fleming, *The Market Pulse -Hidden Costs to Consumers*, CORELOGIC Mar. 18, 2013, at 2, *available at* http://www.corelogic.com/downloadable-docs/marketpulse_2013-march-1.pdf.

[121] Prevost, *supra* note 117.

The statistics above highlight the complexities of regulation in our federal system. In the United Kingdom, where the "state" system is largely non-existent, multiple levels of government regulation and legislation on the same issue does not exist. However, in the United States, where the states have rights to regulate the foreclosure process and the federal government also has authority to regulate foreclosures, numerous opportunities for regulations to conflict exist. This in turn, leads to disparate impacts across the nation. In order to avoid discrepancies and inconsistencies in foreclosure legislation, lawmakers and regulators should create as little disunity as possible by eliminating some of the many levels of regulation. One way this can be done is by simplifying the regulations that are produced nationally by avoiding specifics that might run counter to local regulations. If the federal regulations, like the MCOB, provide broad generalized guidelines for the duties and responsibilities of the parties, the states could work out the specifics as they see fit. Not only would this lead to less confusing and burdensome legislation, it would conform to the principles of federalism, leaving local controversies to the states.

IV. CURRENT FORECLOSURE TRENDS

A. Developments in the United States

While foreclosure rates have been on the decline, some states are still struggling with stubbornly high rates of foreclosure. In an attempt to combat this, one state in particular has taken aggressive action. On January 1, 2013, the California Homeowner Bill of Rights took effect, granting homeowners in the state larger protections against abusive bank practices. [122] The legislation provides four major protections for homeowners: (1) a lender cannot engage in dual-tracking, or the process of pursuing a foreclosure action while a loan modification application has been submitted; (2) lenders must provide homeowners with a single point of contact; (3) penalties for "robo-signing," where a creditor fails to read a document that a computer has signed; and (4) homeowners have a private right of action to sue for violations.[123] The effects of California's new legislation have had mixed results. Specifically, while foreclosures have reduced dramatically since the passage of this legislation and property values are on the rise, the long-term effects have yet to be seen. The increased regulatory "hoops" that lenders and servicers must jump through

[122] Amy Loftsgordon, *California Foreclosure Protection: The Homeowner Bill of Rights*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/california-foreclosure-protection-the-new-homeowner-bill-rights.html (last visited Feb. 26, 2014).
[123] *Id.*

will inevitably lead to higher fees and costs for homeowners.[124] In fact, the increase in regulations may force lenders to pursue more judicial foreclosures in California for the safety of judicial oversight, thereby limiting their potential civil liability for possible violations of the foreclosure regulations.[125]

Another recent development in the American foreclosure landscape has been the rise of the servicer. As previously discussed, mortgage servicers are not lenders of the loan, but rather a company that handles the day to day management of the loan in place of the original lender. In fact, "[]ervicing companies like Nationstar and Ocwen Financial now [account for] 17 percent of the mortgage servicing market, up from 3 percent in 2010…"[126] Both California and New York have received sharp rises in complaints over abusive practices by mortgage servicing companies.[127] The addition of another player in the foreclosure realm adds yet another layer of complexity to an already complex system. The cause of increased participation by servicers has largely been attributed to the added costs on lenders to navigate the new foreclosure regulations and procedures.[128] This has "further diminish[ed] the bank's appetite for the business [of servicing]."[129] While a rebounding economy and new regulations seem promising, only time will tell if these new developments are here to stay.

B. Developments in the United Kingdom

As previously stated, the United Kingdom has seen a steady decline of foreclosures, coined "repossessions," since the advent of the foreclosure crisis. In fact, the foreclosure rate in the United Kingdom is at its lowest point in the past six years.[130] While the foreclosure rate has been effectively managed in the United Kingdom, it is not without problems of its own. The rate of foreclosure in some areas of the United Kingdom still remains comparatively high.[131] Specifically, different parts of London

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[124] Esther Cho, *Impact of the California Homeowner Bill of Rights on Foreclosures*, DSNEWS.COM, Apr. 15, 2013, http://dsnews.com/impact-of-california-homeowner-bill-rights-on-foreclosures-2013-04-15/.
[125] *Id.*
[126] Jessica Silver-Greenberg and Michael Corkery, *Loan Complaints by Homeowners Rise Once More*, NYTIMES, Feb. 18, 2014, http://dealbook.nytimes.com/2014/02/18/loan-complaints-by-homeowners-rise-once-more/?_php=true&_type=blogs&hp&_r=0.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Angela Monaghan, *UK Repossessions Fall to Six-Year Low*, THE GUARDIAN, Feb. 13, 2014, http://www.theguardian.com/business/2014/feb/13/uk-repossessions-fall-six-year-low.
[131] Rupert Jones, *Home Repossession North-South Divide at Widest in Six Years, Finds Study*, THE GUARDIAN, Oct. 31, 2013,

have experienced different levels of foreclosure rates since the financial crisis. For example, "[t]here is still a long way to go before the northern property market returns to its pre-recession health, and all the while the north is still playing catch-up, and falling further and further behind the south."[132] This north-south divide may be demonstrative of a larger issue the United Kingdom faces: a growing income inequality gap. With income inequality also on the rise in the United States, this will be another issue that will continue to affect economic recovery.

V. CONCLUSION

The United States and the United Kingdom both suffered from the financial collapse of 2008, but one country suffered less in the aftermath than the other. While both countries have unique systems of government, they share a rich history and a common-law legal system. In fact, many principles of American law were directly incorporated from the English system and commonalities can still be seen in today's contemporary legal landscape. This article proposes that Americans look once again across the ocean to their English counterparts in order to better understand the successes and failures of a highly regulated market. The country that can adapt to the changing world will be successful, and adaptation requires diligent awareness of competitors. That being said, not every reform or regulation in the United Kingdom will remedy the issues here in the United States, but if a comparative analysis can yield even one improvement, than it is worth examining. Lawmakers, lawyers, and law students alike should heed the lessons of our British counterparts. After all, there may be some British cures for our American foreclosure woes.

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http://www.theguardian.com/money/2013/nov/01/home-repossessions-north-south-divide-chester-london.

[132] *Id.*