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# Rebalancing Public and Private in the Law of Mortgage Transfer

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# REBALANCING PUBLIC AND PRIVATE IN THE LAW OF MORTGAGE TRANSFER

JOHN PATRICK HUNT,* RICHARD STANTON** & NANCY WALLACE***

*The law governing the United States' $13 trillion mortgage market is broken. Courts and legislatures around the country continue to struggle with the fallout from the effort to build a twenty-first century global market in mortgages on a fragmented, archaic legal foundation. These authorities' struggles stem in large part from the lack of clarity about the legal requirements for mortgage transfer, the key process for contemporary mortgage finance.*

*This Article argues that American mortgage transfer law is unclear in two distinct respects and offers suggestions for fixing the law. It is currently unclear whether a recorded mortgage assignment is needed to make sure that a mortgage transferee has a protected interest in the mortgage. It also is unclear whether a recorded assignment is needed to make sure that the transferee can lawfully foreclose on the mortgage. Revisions to the Uniform Commercial Code*

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*adopted around the turn of the century may be interpreted as doing away with preexisting laws arguably requiring parties to record their ownership interests to protect those interests and to foreclose on the mortgage. But the interaction of these revisions and preexisting state recording laws is most unclear, with consequences for borrowers, investors, and securitization arrangers.*

*This Article suggests an approach to law reform that would provide needed clarity and bring about an appropriate balance between private and public priorities. The Article 9 revisions reflect a preoccupation, prevalent in the 1990s, with reducing the cost of mortgage transfers to the transacting parties. Obviating public recording, as the Article 9 revisions purport to do, does reduce cost, but it also tends to eliminate public records of mortgage ownership. As we demonstrate, these public records have value, not only for parties that may transact in mortgages, but also for the public more generally. A more balanced approach would unequivocally require transacting parties to record their interests in order to protect them but would adopt this change in tandem with an expansion of low-cost digital recording. This approach provides the public benefits of high-quality mortgage records while reducing the cost and inconvenience of recording to transacting parties.*

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## INTRODUCTION

Although the U.S. mortgage market is about 80% of the size of the U.S. stock market,[1] the mortgage market does not get anywhere near 80% of the stock market's attention from the legal academy. This relative lack of attention would be understandable if mortgage law were clear and well-settled and if the mortgage market functioned smoothly. But recent events have shown the opposite to be true. Failed mortgages lay at the heart of the financial crisis,[2] and the legal system spends an inordinate amount of time and energy piecing through the fallout.[3] Mortgage law is overdue for increased scrutiny, in line with its importance to the American economy and American lives. This Article seeks to contribute to a much-needed critical

1. *See Mortgage Debt Outstanding*, BOARD GOVERNORS FED. RESERVE SYS. http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm (last modified June 2013) (reporting third-quarter 2012 mortgage debt outstanding of $13.1 trillion); S&P Dow Jones, *Dow Jones U.S. Total Stock Market Index Fact Sheet* 1, http://www.djindexes.com/mdsidx/downloads/fact_info/Dow_Jones_US_Total_Stock_Market_Index_Fact_Sheet.pdf (last modified July 2013) (reporting float-adjusted market capitalization of U.S. stock market at $18.6 trillion).

2. Both the majority and dissenting members of the Financial Crisis Inquiry Commission reached this conclusion. *See* FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT, at xxiii (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (characterizing declining standards for mortgage lending and the mortgage securitization pipeline as igniting the crisis); *see also id.* at 417–18 (statement of dissenting commissioners) (describing increased investment in high-risk mortgages as the most significant indicator of the credit bubble in the United States and Europe).

3. A June 26, 2013, advanced case search in WestlawNext for <(mortgage "deed of trust") /s foreclose!> returned 2,450 results for 2012, as compared with 677 for 2006, the last year before the mortgage crisis.

examination of mortgage law.[4] It explains why a crucial piece of that law—the law of mortgage transfer—is currently broken and offers suggestions for how to fix it.

Mortgage transfer has emerged as particularly important in recent years for two related reasons. The first reason is that so many mortgage transfers have occurred. Securitization has emerged as a key channel of mortgage finance, and securitization involves the transfer of mortgages from the originating lender, often through intermediate entities, to a securitization vehicle. Particularly in private-label securitizations of the 2000s, each mortgage was transferred several times.[5] The second reason is that mortgage transfers have been scrutinized because of the financial and foreclosure crisis. Disappointed investors and defaulting borrowers alike have questioned whether securitized mortgages, particularly subprime mortgages,[6] were transferred properly.[7] Investors have sought to hold securitization arrangers liable for improperly structured transactions, and borrowers have raised questions about transfers in foreclosure litigation.

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4. Securitization generally has received a good deal of scholarly attention, *See, e.g.*, Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 WASH. U. L.Q. 1061 (1996) (highlighting the efficiency benefits of securitization); Steven L. Schwarcz, *The Future of Securitization*, 41 CONN. L. REV. 1313 (2009) (discussing defects with securitization exposed by the financial crisis). Mortgage securitization in particular appears to have received less attention than its importance would justify. A relatively small number of articles have addressed this topic. *See, e.g.*, Thomas E. Plank, *Crisis in the Mortgage Finance Market: The Nature of the Mortgage Loan and Regulatory Reform*, TRANSACTIONS: TENN. J. BUS. L., Spring 2011, at 135, 142–44 (arguing that mortgage securitization is needed to protect against the risk of originator bankruptcy over the long term of the typical mortgage loan). The specific issue of mortgage transfer apparently received little attention until the foreclosure crisis.

5. *See* discussion *infra* Part I.

6. Yuliya Demyanyk and Otto Van Hemert have analyzed relevant data from the FirstAmerican CoreLogic database, which contains approximately 85% of subprime loans. *See* Yuliya Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 REV. FIN. STUDS. 1848, 1853–54 (2011). Demyanyk and Van Hemert give the number of subprime loans and the average loan size in the database each year from 2001 to 2007. *See id.* at 1854 tbl.1. Multiplying the number of loans by the average loan size for each year and summing across the seven years gives a total of $1.614 trillion in subprime loans in the database for 2001 to 2007. Not all these loans were securitized. Demyanyk and Van Hemert report securitization rates for 2001 to 2006, ranging from 54% in 2001 to 76% in 2004 and 2005. *Id.* at 1853 n.6. Multiplying the securitization rate for each year by the subprime loan issuance for that year and summing across the six years gives an estimate of $1.113 trillion in securitized subprime loans in the database for 2001 to 2006. Although this estimate is not perfect because securitized loans might have been larger or smaller on average than non-securitized loans, the technique described provides a ballpark figure for securitized subprime loans in the FirstAmerican CoreLogic database. Considering that 15% of subprime loans are not in the database at all, *id.* at 1853, the $1 trillion figure in the text seems conservative.

7. *See* discussion *infra* Part II.A.4, B.4.

We identify two discrete problems with the current law of mortgage transfer: ambiguity and insufficient weight afforded to the value of public title records. The first problem is that current law is ambiguous is two distinct ways. The first ambiguity is that in many states it is unclear whether a mortgage buyer must record its interest in order to ensure that its ownership interest in the mortgage is protected from subsequent claimants.[8] This ambiguity arises because mortgage loans have two parts, each potentially governed by its own set of rules, and the rules may be in conflict with each other.

Mortgage loans, as currently structured, typically consist of two instruments: a mortgage and a promissory note. Under the laws of many states, the mortgage itself is a real-property interest covered by the real-property recording laws.[9] These recording statutes may provide that a buyer's interest in the mortgage is at risk if the buyer does not record its interest in the mortgage in records maintained by a local official. The promissory note, on the other hand, is governed by the Uniform Commercial Code (UCC). The "1999 revisions" to Article 9 of the UCC, adopted in the fifty states between 1999 and 2001,[10] apparently provide that buyers' interests in promissory notes and associated mortgages can be protected without any recording.[11] The UCC and real-property recording statutes thus may give different answers to the question whether the buyer's ownership interest is protected.

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8. *See* discussion *infra* Part II.A.1–2.

9. *See* discussion *infra* Part II.A.1.

10. We follow convention in calling these amendments the "1999 revisions," even though they were approved by the membership of the American Law Institute and by the Uniform Law Commissioners in 1998. *See* 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: PRACTITIONER'S TREATISE SERIES § 30-1, at 2 (6th ed. 2010). The revisions were adopted in all states by the end of 2001. *See* Julian B. McDonnell, *Entering a New Period of Reevaluation*, *in* SECURED TRANSACTIONS UNDER THE UCC § 1A.01 (Matthew Bender ed., 2013) [hereinafter McDonnell, *Entering a New Period*]; David Frisch, *The Recent Amendments to UCC Article 9: Problems and Solutions*, 45 U. RICH. L. REV. 1009, 1009 n.3 (2011) (noting that the revised Article 9 went into effect in forty-five states and the District of Columbia by July 1, 2001 and in all fifty states by January 1, 2002); Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?*, 104 COM. L.J. 241, 241 (1999) [hereinafter McDonnell, *Article 9 Greedy?*] (stating that at least six states had adopted amendments in 1999). Article 3 of the Uniform Commercial Code also contains provisions relevant to transfer of mortgage and note. *See* REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE: APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 4–7 (2011) [hereinafter REPORT OF THE PERMANENT EDITORIAL BOARD], *available at* http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf (explaining how transfers affect the obligations of mortgage holders). Compliance with Article 3 may be important in preserving the right to foreclose on transferred mortgages, but because the Article 3 rules do not address the issue of mortgage recording, we do not discuss them at length in this Article.

11. See U.C.C. §§ 9-203(g), 9-308(e), 9-607(b) (2011) (discussed *infra* Part II.A.2).

The second ambiguity has to do with foreclosure.[12] In many states, it is unclear whether a mortgage buyer must record its interest in the mortgage to ensure that the buyer can foreclose on the mortgaged property in case of default. State real-property laws often seem to require a complete, recorded chain of title to the mortgage as a prerequisite to foreclosure (although state courts often circumvent seemingly clear language to this effect),[13] while the 1999 Article 9 revisions can be read to permit foreclosure without recording.[14]

These ambiguities in the law received little attention in a recent, influential report,[15] *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* ("the Report"), prepared by the Permanent Editorial Board for the Uniform Commercial Code ("the Board").[16] The Report affirms the importance of the Article 9 rules, stating that the rules "determine matters that are important in the context of enforcement of mortgage notes and the mortgages that secure them"[17] and "govern the transfer and enforcement of notes secured by a mortgage on real property."[18] We do not take issue with the Board's parsing of the complex text of the Article 9 rules,[19] but

12. *See* discussion *infra* Part II.B.1–2.

13. *See* discussion *infra* Part II.B.2.

14. *See* discussion *infra* Part II.B.1.

15. REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10. Many courts have cited the Report approvingly. *See, e.g.*, Jones v. Wells Fargo Bank, 666 F.3d 955, 960 n.4 (5th Cir. 2012) (per curiam) (citing the Report's discussion of the distinction between ownership of and right to enforce negotiable instruments); *In re* Veal, 450 B.R. 897, 908 n.12 (B.A.P. 9th Cir. 2011) (noting that the court's discussion of the relationship between Article 3 and Article 9 of the UCC in relation to mortgage notes "owes much" to the draft Report); Williams v. Wells Fargo Bank, No. C10-5880BHS, 2012 WL 1204946, at *2 n.2 (W.D. Wash. April 11, 2012) (stating that the Report helps explain the relationship between owners and servicers of notes); *In re* Walker, 466 B.R. 271, 279 n.13 (Bankr. E.D. Pa. 2012) (citing the view expressed in the Report that "assignment of the note automatically transfers a corresponding interest in the mortgage"); *In re* Jackson, 451 B.R. 24, 29 (Bankr. E.D. Cal. 2011) (relying on the Report's stance regarding the circumstances under which a party has the right to enforce a mortgage note). In addition, the Oklahoma Supreme Court has cited the Report twelve times, always for the proposition that the owner of a note may not be entitled to enforce it (e.g., when the owner does not possess the note). *See, e.g.*, Wells Fargo Bank, N.A., v. Heath, 280 P.3d 328, 333 n.7 (Okla. 2012).

16. The Board was created pursuant to an agreement between the American Law Institute and National Conference of Commissioners on Uniform State Laws in 1961. Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1346 & n.18 (1986). Among the Board's purposes are promoting uniformity in the UCC and discouraging nonuniform amendments. *Id.* at 18.

17. REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 14.

18. *Id.* at 1.

19. Some law professors did criticize the Report for purporting to resolve major social and policy issues through a technical application of statutory text. *See* Letter from Robert M. Lawless, Professor of Law, Univ. of Ill. Coll. of Law et al., to Permanent Editorial Bd. 8 (May 27, 2011) [hereinafter Lawless Letter], *available at* http://www.ali.org/pebcl/Levitin.pdf ("A UCC PEB report is simply an

we do contend that the statutory ambiguities we describe deserve greater attention.[20] More fundamentally, we also question whether the recording-free Article 9 system for mortgage transfers is a good one to begin with.

This brings us to the second problem with current law: the Article 9 rules may not give enough weight to the value of public title records. Article 9 gives short shrift to the interest in high-quality public records because it purportedly allows the mortgage transferee's interest to be protected without any recording anywhere.[21] To the extent that the Article 9 rules prevail over state real-property recording law, the Article 9 rules obviate mortgage assignment recording, and thus tend to degrade the quality of public title records. Potential buyers of real property, borrowers, and the public more generally all have legitimate interests in transparent, public title records, including mortgage records.

There is at least some doubt about whether lawmakers really thought about and understood what they were doing when they enacted the 1999 revisions to the Code.[22] But even if they did, the world looks different now: the value of transparent, public mortgage

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inappropriate for[u]m for addressing major policy issues. Doing so under the guise of a technical report does serious harm to the credibility and reputation of the ALI and NCCUSL").

20. *See supra* note 11.

21. *See* discussion *infra* Part III.

22. Generally, the UCC is the product of a relatively small group of unelected experts drawn from two bodies, the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) and the American Law Institute. *See* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 378–84 (2003) (describing the roles of the NCCUSL and ALI in drafting UCC). The expert drafters have been called a "private legislature." Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1101 (2002) (listing several authorities that indicate that "[t]he U.C.C. is now viewed as the output of a private legislature"). To be sure, state legislatures decide whether to enact UCC provisions and the provisions presumably are drafted with a view to whether the legislatures will in fact adopt them. *See* Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 579 (1998) ("Even when an interest group has not captured the uniform law drafting process, the drafters may be forced, in the interest of enactability, to anticipate and approximate the rule that would be produced by a captured state legislature."). But it appears that state legislatures often do not make meaningful changes to proposed UCC provisions. *See* Snyder, *supra*, at 380 ("Much of the time . . . the states do what they are told. Whatever deal was made in the private legislature becomes the deal in the public legislature."). It does not appear that the Article 9 revisions in particular were robustly debated in state legislatures. *See* McDonnell, *Article 9 Greedy?*, *supra* note 10, at 241 (stating that "[t]here appears to be no organized opposition" to adoption of the revisions). The Article 9 revisions have been the target of academic criticism. *See, e.g.*, Thomas E. Plank, *Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 OHIO ST. L.J. 231, 234–47 (2007) (arguing that Article 9 revisions inappropriately force sales of financial instruments into a framework designed for liens).

records is clearer than it was before the foreclosure crisis. At the same time, technology promises to overcome the biggest objection to maintaining transparent public records, namely the cost and delay of the traditional recording system. It seems likely that digitization makes it possible to give the financial services industry the speed and low cost per mortgage it demands, while also providing transparency for borrowers, potential purchasers, and other users of land records.[23]

The law should respond to the changes being worked by digitization. Specifically, policymakers should consider clearly requiring mortgage buyers to make public records of their interests in order to protect those interests, and should consider introducing this requirement in tandem with electronic recording. The most efficient way of accomplishing this may be through a national, authoritative lien registry, but that approach risks resistance from local authorities. Accordingly, policymakers should also consider the alternative approach of upgrading local recording capabilities and phasing in the recording requirement on a state-by-state basis as the upgrades are complete.

The Article proceeds as follows. Part I describes basic mechanics of mortgage securitization and transfer, focusing on the fact that mortgage assignments were not recorded in securitizations in the 2000s. Part II describes the unclear interaction between Article 9 rules applicable to unrecorded mortgage transfers and other state laws relating to recording and describes areas in which the unclear interaction has created problems. Part III argues that policymakers should reconsider mortgage transfer law, and should do so giving serious consideration to the value of public mortgage title records. Part IV argues that mortgage-transfer law should be reformed in tandem with increased use of electronic recording, and also sketches alternative legal and institutional arrangements for accomplishing the suggested reform. The Article concludes by emphasizing the need to focus on clarity an appropriate balance between public and private.

## I. MORTGAGE SECURITIZATION AND MORTGAGE TRANSFER

Under current practice, a mortgage loan has two parts: a promissory note containing the borrower's promise to repay the loan with interest and a security instrument granting a lender a security interest in the real property securing the debt.[24] The security

23. *See* discussion *infra* Part III.
24. *See* 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5.27,

instrument is commonly called the "mortgage," although the name of the most commonly used instrument varies from state to state: the "deed of trust" is the most commonly used instrument in many states, including California,[25] and the "security deed" is the most common instrument in Georgia.[26] This Article uses "note" to refer to the promissory note and "mortgage" to refer to the associated real-property security instrument. To refer to the two together, this Article uses "mortgage loan."[27]

Mortgage securitizations in the 2000s typically involved several transfers of the promissory note and associated mortgage: from an "originator" to an investment bank subsidiary known as a "sponsor," from the sponsor to another subsidiary known as the "depositor," and finally from the depositor to the trustee of a trust charged with holding the mortgages on behalf of investors.[28] This structure apparently has its origin in requirements for bankruptcy remoteness.[29]

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at 529 (5th ed. 2007) ("The mortgagee of real property has two things: the obligation owed by the mortgagor, and the interest in the realty securing that obligation.").

25. *See* 1 ROGER BERNHARDT, CALIFORNIA MORTGAGES, DEEDS OF TRUST, AND FORECLOSURE LITIGATION § 1.35 (2012) ("In California, the deed of trust has completely eclipsed the mortgage as the lending and title industries' preferred security instrument."); 4 HARRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE § 10:1 (3d ed. 2012).

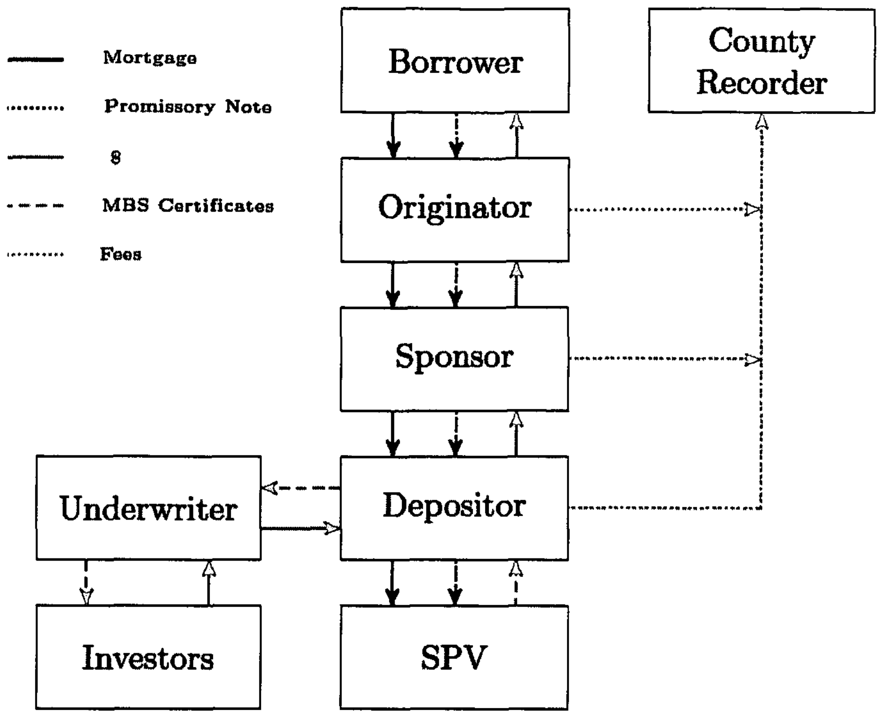
26. *See Georgia Real Estate InfoBase: The Security Deed and the Promissory Note*, GA. REAL EST. COMMISSION (May 12, 2011), http://www.gareinfobase.org/guide/requirement.aspx?id=cf534cc7-9d5d-e111-bb86-d639cd757391 ("A security deed . . . is the most common form of securing a financing agreement for real estate loans in Georgia.").

27. The Article uses the term "mortgage securitization" rather than "mortgage loan securitization" because of its greater familiarity, but in doing so the term is used to refer to transactions that attempt to transfer ownership of mortgage and note together.

28. John Patrick Hunt, Richard Stanton & Nancy Wallace, *All in One Basket: The Bankruptcy Risk of a National Agent-Based Recording System*, 46 U.C. DAVIS L. REV. 1, 9 (2012). For example, in the GSAMP 2006-HE3 transaction, the sponsor was Goldman Sachs Mortgage Co. and the depositor was GS Mortgage Securities Corp. *See* Amended Complaint at 19, Fed. Housing Fin. Agency v. Goldman, Sachs & Co., No. 11 Civ. 6198 (DLC), 2012 U.S. Dist. LEXIS 162281 (S.D.N.Y. Nov. 12, 2012).

29. *See* FIN. ACCOUNTING STANDARDS BD., FASB Technical Bulletin No. 01-1, ¶ 1 (2008); FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 140, at 9 (2000), *available at* http://www.gasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820919404&blobheader=application%2Fpdf; Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 13–15 (2011); Deloitte & Touche, *Learning the Norwalk Two Step*, HEADS UP, April 25, 2001, at 2, 4.

*Figure 1: Mortgage and promissory note transfer with traditional recording*




State laws usually provide that mortgage assignments can be recorded,[30] as discussed in more detail below.[31] However, mortgage assignments were not recorded in mortgage securitizations, at least from the late 1990s up to the crash of the private-label mortgage securitization market in 2007.[32] Recording may simply have been impractical: recording mortgage assignments is burdensome in mortgage securitizations because of the large volume of assignments and the relatively tight time frame for each transaction.[33] In a typical

30. *See* 1 NELSON & WHITMAN, *supra* note 24, § 5.34, at 614 & n.23 (indicating that Arkansas is one of the "very few jurisdictions" where recording acts are inapplicable to mortgage assignments).

31. *See* discussion *infra* Part II.A.1.

32. *See* Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 484–85 (2012).

33. Tax rules effectively impose a three-month timeframe on mortgage securitizations by imposing a 100% tax on contributions to the securitization vehicle made more than three months after the vehicle's startup date. *See* 26 U.S.C. § 860G(d) (2006). Although this rule covers only one particular type of securitization vehicle, the real estate mortgage investment conduit (REMIC), the large majority of residential mortgage securitizations reportedly employ this form. AEQUITAS COMPLIANCE SOLUTIONS, INC., FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE 17 (2012), *available at* http://www.aequitasaudit.com /images/aequitas_sf_report.pdf. The pooling and servicing agreement that governs

"private-label"[34] mortgage securitization from the 2000s, thousands of mortgage loans from different geographic regions[35] passed through at least two corporate entities on their way from the mortgage loan's originator to their intended destination. The destination was a special purpose vehicle ("SPV"), generally a trust, that was to hold the mortgage loans in a pool on behalf of investors who bought certificates entitling them to cash flows from the pool.[36] For example, in a transaction involving 10,000 mortgage loans, each following the originator-sponsor-depositor-SPV path,[37] there would be 30,000 separate assignments of the mortgages.[38] Backlogs at local recording offices may have made it more difficult for transacting parties to record assignments.[39]

At the same time that market participants were not recording assignments, the mortgage-recording rules discussed above remained on the books. As discussed below, the decision not to record mortgage assignments entailed some legal risks, even if the risks were thought to be small.[40] Two innovations of the mid-to-late 1990s apparently were intended to reduce those risks by obviating recording. The first was the Mortgage Electronic Registration System (MERS), which we have discussed at length elsewhere,[41] and which purports to use a common-agent theory to defeat any need to

a given transaction likewise may impose a deadline by which mortgages must be conveyed to the trust.

34. Our discussion focuses on "private-label" securitizations, i.e., securitizations other than those carried out by the housing government-sponsored enterprises (GSEs), Fannie Mae and Freddie Mac. *See* Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 FLA. L. REV. 827, 843–48 (2009) (charting the history of both GSE and private-label securitizations).

35. *See* GSAMP Trust 2006-HE3, Prospectus Supplement to Prospectus Dated August 3, 2006, at S-38 to -40 (Form 424B3) (Sept. 7, 2006) (describing the mortgage pool for one transaction as containing 10,736 mortgage loans with an aggregate principal balance of $1.6 billion, with no more than 0.23% of the loans secured by properties in any single zip code).

36. Levitin & Twomey, *supra* note 29, at 13–14.

37. It appears that in some cases the mortgage may not have followed the originator-sponsor-depositor chain at all. *See, e.g.*, Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C., 981 N.E.2d 1, 4 (Ill. App. Ct. 2012) (construing the record as showing that a securitized mortgage was never conveyed to sponsor or depositor).

38. Hunt, Stanton & Wallace, *supra* note 28, at 9.

39. *See Problems in Mortgage Servicing from Modification to Disclosure, Hearing Before the Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 65 (2010) (statement of R.K. Arnold, President and Chief Executive Officer, MERSCORP Holdings, Inc.) [hereinafter Arnold Testimony] ("[A]t certain time periods, the flow of assignments were [sic] overwhelming the county recorder system, resulting in long backlogs, and in some cases, taking the county recorder over a year to record an assignment.").

40. *See* discussion *infra* Part II.A.4, B.4; *see, e.g.*, 1 NELSON & WHITMAN, *supra* note 24, § 5.34, at 623 ("After reviewing all of the issues related to recording mortgage assignments . . . one must conclude that for the most part, recording is not very important.").

41. *See generally* Hunt, Stanton & Wallace, *supra* note 28.

record,[42] and the second was the revision of Article 9 of the Uniform Commercial Code to codify the proposition that "the mortgage follows the note."[43] We now explain the relevant Article 9 revisions in detail and show that the revisions are in tension with other provisions of the law of many states.

## II. CONFLICTS BETWEEN ARTICLE 9 AND MORTGAGE RECORDING LAW

Article 9 of the UCC may conflict with state real-property recording law in two areas. First, how does a mortgage assignee protect its interest in the mortgage against subsequently arising claims (how does the assignee "perfect" its interest)? Second, what must a mortgage assignee do to make sure that it has the right to foreclose if the borrower defaults on the loan?

### A. *Conflicting Methods of Protecting Interests in a Mortgage*

State real-property recording laws usually provide that mortgage assignments can be recorded,[44] and real-property recording laws in many states may provide that unrecorded interests in mortgages are vulnerable to competing claims, including those of bankruptcy trustees. However, Article 9 seems to provide that a mortgage loan buyer's unrecorded interest in the mortgage is secure, at least from the bankruptcy trustee, as long as certain conditions are met. Article 9 and real-property recording law thus seem to be in conflict in many states.

To give context and help explain this conflict, we briefly describe the nature of the problem and describe recording statutes in general. When a property interest is transferred, the transferee will want to protect that interest against third parties. If A transfers property to B, B will want to be sure that C cannot come along and claim the property, for example by purchasing outright from A or by lending

42. MERS is designed to act as a "common agent" for its members, who are key players in the mortgage securitization industry. Mortgages are recorded in the name of Mortgage Electronic Registration Systems, Inc. ("MERS, Inc.") and under MERS's theory recorded mortgage assignments are not necessary when mortgages are transferred between MERS members because MERS, Inc. remains the legal owner at all times. *Id.* at 11–12.

43. *See* U.C.C. §§ 9-203(g), 9-308(e) (2012) (discussed *infra* Part II.A.2); *see also* REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 8–13 (explaining how the Article 9 revisions codify the proposition that "the mortgage follows the note").

44. *See* 1 NELSON & WHITMAN, *supra* note 24, § 5.34, at 614 (asserting that there are "very few jurisdictions in which the recording acts do not apply to mortgage assignments"); Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 131 (2013) ("[T]he transfer of the mortgage generally is governed by the state law of conveyance and real property.").

money to A and taking a security interest in the property. What B must do to protect itself depends on the type of property and the nature of the competing claim, as described in more detail below. B often will be required to do something to make its claim discoverable by third parties, such as making a public filing or taking possession of the property. The general idea behind such a requirement is that B should not be protected against C unless C has some way of knowing of B's claim. In turn, C should check for the existence of conflicting claims to the property before proceeding with the transaction.

One of the most important conflicts arises when C is a bankruptcy trustee representing A's creditors as a group. When a party enters bankruptcy, a trustee may be appointed to gather the party's assets and administer them for the benefit of the creditors collectively.[45] The trustee may seek to gather assets the debtor has transferred away to various parties.[46] Speaking generally, unrecorded real-property interests are vulnerable to the trustee's claims,[47] while perfected interests under Article 9 of the UCC are invulnerable.[48] As we discuss below, an assignee's unrecorded interest in a mortgage may be simultaneously a vulnerable unrecorded real-property interest and an invulnerable perfected interest under Article 9.

What we have just described is a simplification of the complex law of filing and recording. We now turn to the relevant details of the two bodies of law relevant to mortgage recording.

### 1. *State real-property recording rules for protecting interests in mortgages*

There are three major types of real-property recording statute: "race," "notice," and "race-notice."[49] Under each type, an

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45. *See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7 (2d ed. 2001) (discussing bankruptcy as a collective debt-collection proceeding); CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 5.1, at 394–97 (2d ed. 2009) (describing the bankruptcy estate as "the 'what' in the core question of 'who gets what' in the bankruptcy distribution" and describing the role of a bankruptcy trustee as a representative of a bankruptcy estate).

46. *See* 5 COLLIER ON BANKRUPTCY ¶ 544.01, at 544-03 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. 2009) (describing the trustee's power to avoid certain transfers).

47. *See* 11 U.S.C. § 544(a)(3) (2006) (conferring on the trustee the rights of a hypothetical bona fide purchaser of real property). As we discuss, under the real-property recording statutes, a bona fide purchaser can prevail over unrecorded interests. *See infra* note 50 and accompanying text.

48. 5 COLLIER ON BANKRUPTCY, *supra* note 46, ¶ 544.03, at 544-12 (explaining that a security interest governed by Article 9 is vulnerable to a bankruptcy trustee's avoidance action "[i]f the holder of the security interest . . . has not taken the necessary steps under applicable law to put other creditors on notice of the interest by proper perfection").

49. *See, e.g.*, 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.02[1][b] (Michael Allan Wolf ed., 2013) (identifying three types of real-property recording

unrecorded interest in real property is vulnerable to a subsequent bona fide purchaser.[50]

The recording laws often can be interpreted to apply to interests in mortgages themselves, not just the underlying real property. In other words, the statutes often can be read to provide that a person who buys a mortgage or lends money and takes a mortgage as collateral is vulnerable to subsequent claims on the mortgage itself unless that person records its interest. These rules generally do not cover promissory notes. Specifically, many of the states with the most private-label securitized mortgages[51] have enacted statutes arguably providing that when a mortgage is assigned, and the assignee does not record, the assignee's interest may be vulnerable to competing claims to the mortgage.

Some of these states, such as California[52] and Florida,[53] have statutes that specifically mention mortgage assignments on their

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statutes, under each of which recording protects ownership interest from subsequent purchasers).

50. *Id.* (explaining that under a "race" statute, an unrecorded interest is vulnerable to any subsequent purchaser who records first, under a "notice" statute, an unrecorded interest is vulnerable to a subsequent purchaser who acquires an interest without notice, and under a "race-notice" statute, an unrecorded interest is vulnerable to a subsequent purchaser who acquire an interest without notice and records first). Under a "race" or "race-notice" statute, an owner can protect itself against subsequently arising claims by recording because subsequent purchasers win only if they record first. *Id.* § 82.02[1][c] Under a "notice" statute an owner can protect itself against subsequent claims by recording because recording gives notice to subsequent purchasers. *Id.* In addition to the three familiar types of recording statutes, Powell recognizes a fourth type, the "period of grace" statute, under which an owner will be protected against subsequent claims if the owner records within a specified grace period. *Id.* § 82.02[1][a]. Under all four types, an unrecorded interest or will become vulnerable to certain subsequent purchasers. "Purchaser" generally includes a mortgagee, as a mortgagee gives value for an interest in the property. *Id.* § 82.02[2][b].

51. The authors compiled a list of the ten states with the most private-label securitized mortgages from ABSNet. The states are, in order of the number of private-label securitized mortgages: California, Florida, Texas, Illinois, New York, Arizona, Georgia, Virginia, Michigan, and Maryland.

52. *See* CAL. CIV. CODE § 2934 (West 2013) ("[A]ny assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons . . . ."); *see also id.* § 1213 (providing that the recording provisions apply to "[e]very conveyance of real property"); Neilson v. Aguirre (*In re* Cedar Funding, Inc.), No. 08-52709-MM, 2010 WL 1346365, at *2 (Bankr. N.D. Cal. Apr. 5, 2010) (providing that interests in mortgages not perfected until recorded); Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 535 (Ct. App. 1969) (allowing a bona fide purchaser of a deed of trust from a record owner to prevail over a competing claimant despite not receiving an associated promissory note); Sec. Mortg. Co. v. Delfs, 191 P.53, 54 (Cal. Ct. App. 1920) ("If [the ownership claimant] had recorded its assignment . . . its rights could have been protected.").

53. *See* FLA. STAT. § 701.02(1) (2005) ("An assignment of a mortgage upon real property or of any interest therein, is not good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice,

face.[54] It is more common, however, for statutes to cover a class of instruments that includes mortgage assignments. For example, Illinois law provides that instruments, "which are authorized to be recorded, shall . . . be in force from and after the filing of the same for record . . . as to all creditors and subsequent purchasers, without notice,"[55] and also provides that mortgage assignments are instruments that can be recorded.[56] The most common pattern appears to be for a state statute to provide that any conveyance, deed conveying lands, or instrument affecting title to land is vulnerable, and for a statute or judicial authority to provide or suggest that a mortgage assignment is such a conveyance, deed, or instrument. In addition to the Illinois statutes just mentioned, statutes in Texas,[57] New York,[58] Arizona,[59] Virginia,[60] Michigan,[61] and Maryland[62] fall into

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unless the assignment is contained in a document that . . . is recorded according to law."); JP Morgan Chase Bank v. New Millenial, LC, 6 So. 3d 681, 685 (Fla. Dist. Ct. App. 2009) ("[I]f the original mortgagee assigns the mortgage to Entity A and Entity A fails to record that assignment, Entity A cannot claim priority over a latter assignee of the same mortgage (Entity B)."). However, FLA. STAT. § 701.02(4) provides that perfection of security interest in note perfects security interest in mortgage "[n]otwithstanding subsections (1), (2), and (3)." It appears that no reported Florida court opinion discusses this provision, which was adopted in 2005. *See* 2005 Fla. Laws 241.

54. We discuss the mortgage assignment recording laws of California and Florida in more detail in John Patrick Hunt, Richard Stanton & Nancy Wallace, *U.S. Residential-Mortgage Transfer Systems: A Data-Management Crisis*, *in* 2 HANDBOOK OF FINANCIAL DATA AND RISK INFORMATION 85, 118–30, (Margarita Brose et al. eds.) (forthcoming 2013).

55. 765 ILL. COMP. STAT. 5/30 (1995).

56. *See id.* at 5/28 ("No . . . assignment of mortgage . . . may include a provision prohibiting the recording of that instrument . . . ."). At least one Illinois court has held that recording a mortgage assignment is unnecessary to protect the mortgage's priority as against subsequently arising claims to the underlying property. *See* Fed. Nat'l Mortg. Ass'n v. Kuipers, 732 N.E.2d 723, 730 (Ill. App. Ct. 2000). In another case, the same court held that where failure to record a mortgage assignment causes a fraud relating to the mortgage to be effective, the loss from the fraud should fall on the party that failed to record. *See* Brenner v. Neu, 170 N.E.2d 897, 899 (Ill. App. Ct. 1960). It does not appear that Illinois' courts have directly addressed whether an assignee must record a mortgage assignment to protect the assignee's interest in the mortgage itself.

57. *See* TEX. PROP. CODE ANN. § 13.001 (West 2012) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchase for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."); *see also id.* § 13.002(1) ("An instrument that is properly recorded in the proper county is . . . notice to all persons of the existence of the instrument."). *But see id.* § 12.009(e) (providing that "provisions of Uniform Commercial Code prevail" over a provision permitting recording of "master form" of mortgage or deed of trust and incorporation by reference of master form in subsequent filings).

58. *See* N.Y. REAL PROP. LAW § 291 ("A conveyance of real property . . . may be recorded . . . . Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange, the same real property . . . ."). New York courts have treated mortgages as real-property interests, indicating that the

this category. Among the ten states with the most private-label securitized mortgages, Georgia is a special case. Although Georgia's recording statute, like those just discussed, would seem to make

statute governing "conveyance[s]" of real property would apply to mortgage assignments. *See, e.g.*, Halstead v. Dolphy, 892 N.Y.S.2d 897, 897 (N.Y. App. Div. 2010) (treating mortgage as interest in real property); Beneficial Homeowner Serv. Corp. v. Steele, 30 Misc. 3d 1208(A), at *2 (N.Y. Sup. Ct. 2011) ("Distilled to its essence, a mortgage is a conveyance of an estate in land False"); Gerow v. Sinay, 905 N.Y.S.2d 827, 831 (N.Y. Sup. Ct. 2010) (treating mortgagee as party that has "acquire[d] an interest in real property").

59. *See* ARIZ. REV. STAT. ANN. § 33-411 (2007) ("No instrument affecting real property gives notice of its contents to subsequent purchasers or encumbrance holders for valuable consideration without notice, unless recorded as provided by law in the office of the county recorder of the county in which the property is located."); *id.* § 33-706 ("An assignment of a mortgage may be recorded in like manner as a mortgage, and the record is notice to all persons subsequently deriving title to the mortgage from the assignor."). A mortgage assignment at least arguably "affect[s] real property." *See* Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 83 (Ariz. 1935) ("[A]ssignments of mortgages must be recorded as instruments affecting real estate in order to protect the holder of such assignment against subsequent purchasers without notice.").

60. *See* VA. CODE ANN. § 55-96 (2012) ("Every (i) such contract in writing, (ii) deed conveying any such estate or term, (iii) deed of gift, or deed of trust, or mortgage conveying real estate . . . shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or city wherein the property embraced in such contract, deed or bill of sale may be."). There is no clear explanation for "such" in the statutory text, but the immediately preceding section, *id.* § 55-95, refers to "[a]ny such contract or bill of sale as is mentioned in § 11-1." Section 11-1, in turn, refers to "[e]very contract, not in writing, . . . made for the conveyance or sale of real estate." *Id.* § 11-1; *see also* Ameribanc Sav. Banks v. Resolution Trust Corp., 858 F. Supp. 576, 582–83 (E.D. Va. 1994) (finding that under Virginia's recording statutes, a later, but recorded, deed of trust had priority over an unrecorded interest of an assignee of an earlier deed of trust, even though the earlier deed of trust was recorded in the name of the original lender, where litigants did not dispute issue).

61. *See* MICH. COMP. LAWS ANN. § 565.29 (West 2013) ("Every conveyance of real estate within the state . . . which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, whose conveyance shall be first duly recorded."); *id.* § 565.34 ("The term 'purchaser' . . . shall be construed to embrace every . . . assignee of a mortgage . . . ."); *see also* Qual-Prop. LLC v. Chase Manhattan Mortg. Corp., No. 263029, 2005 WL 3501586, at *1–2 (holding that section 565.29 governs contest between claimants to ownership of mortgage interest).

62. *See* MD. CODE ANN., REAL PROP. § 3-203 (LexisNexis 2013) ("Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has: (1) Accepted delivery of the deed or other instrument: (i) In good faith; (ii) Without constructive notice under § 3-202 [adverse possession]; and (iii) For a good and valuable consideration; and (2) Recorded the deed first."). A mortgage assignment could be an "other instrument" under this statute. Maryland has adopted a statute that may make explicit that UCC Article 9 governs mortgage assignments. *See id.* § 7-101(b) ("[T]he grant of a security interest in a mortgage by a mortgagee, or one of several mortgagees, or any assignee of his interest in a mortgage as security for payment of an indebtedness or performance of an obligation . . . is governed by Title 9 of the Maryland Uniform Commercial Code.").

unrecorded interests in security deeds vulnerable,[63] the state also has a special statute that provides that certain transfers of security deeds "need not be recorded,"[64] and that priority of claims to the deed "shall not be lessened" by failure to record.[65] The Georgia statute would appear to cover most transactions on the secondary market where the transferor is the mortgage servicer.[66]

There appears to be at least some authority suggesting that unrecorded mortgage assignments are vulnerable to purchasers under the law of each of the ten states with the most private-label securitized mortgages. This authority also suggests that unrecorded transfers from a bankrupt debtor may be vulnerable to attack by the bankruptcy trustee, because the bankruptcy trustee of a bankrupt debtor stands in the shoes of a bona fide purchaser of real property from the debtor.[67]

### 2. *Article 9 rules for protecting interests in mortgages*

In contrast to state real-property recording laws that seem to put transferees' interests in mortgages at risk unless the interests are recorded, the 1999 revisions to Article 9 of the Uniform Commercial Code appear to provide that transferees can be protected against certain third parties, including bankruptcy trustees, without any filing anywhere if the parties to the transfer comply with certain requirements. To use the UCC's language, under the right

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63. GA. CODE ANN. § 44-2-1 (2012) ("Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land is located. A deed may be recorded at any time; but a prior unrecorded deed loses its priority over a subsequent recorded deed from the same vendor when the purchaser takes such deed without notice of the existence of the prior deed."). The most common form of real-property security instrument in Georgia is the security deed, and a security deed is treated as conveying legal title under Georgia law, suggesting that a mortgage assignment is a "deed conveying lands" within the recording statute. *See In re* Jackson, 446 B.R. 608, 609 n.1 (Bankr. N.D. Ga. 2011) ("[A] deed to secure debt . . . transfers legal title."); DANIEL F. HINKEL, 2 PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE § 20:3 (7th ed. 2013) ("Both a mortgage and a security deed are alike in that they contain a conveyance of land . . . ."). *But see* Thomas v. Hudson, 10 S.E.2d 396, 400 (Ga. 1940) ("[T]he defendant assignees of the mortgage [did not] lose their priority over the subsequent purchaser and his predecessor in title by the fact that no assignment of the prior mortgage was recorded.").

64. GA. CODE ANN. § 44-14-64(d).

65. *Id.* § 44-14-64(e).

66. The Georgia provisions in question cover any transfer of a security deed "by a financial institution having deposits insured by an agency of the federal government or a transfer by a lender who regularly purchases or services residential real estate loans" on "one to four family dwelling units, where the transferor retains the right to service or supervise the servicing of the deed or interest therein." *Id.* § 44-14-64(d).

67. *See* 11 U.S.C. § 544(a)(3) (2006).

circumstances the buyer's interest in the mortgage can be "perfected" without filing.

We begin with a brief overview of protection of interests in personal property under the UCC.[68] Speaking somewhat loosely, the UCC concept of "perfection" captures the idea of protecting an interest against third-party claimants: If an interest is perfected, that interest is protected against subsequently arising claims to the property.[69] For many (possibly most) types of property, the UCC parallels the real-property system because the UCC requires some act that at least theoretically provides notice to third parties in order to perfect an interest in property.[70] The most common way to provide notice is to make a filing in the UCC filing system, although other ways exist.[71] It is also possible to perfect an interest in certain

68. Although UCC Article 9 generally focuses on "security interests," *see* U.C.C. § 9-109(a)(1) (2012), the UCC defines a buyer's interest in a promissory note as a security interest. *See* discussion *infra* Part II.A.2.b. The UCC's rules cover both loan transactions in which an interest in a promissory note is taken as collateral and outright sales of promissory notes.

69. *See* 4 WHITE & SUMMERS, *supra* note 10, § 31-4, at 149–50 (explaining that perfection gives the perfected secured creditor priority over unperfected secured creditors and lien creditors, including bankruptcy trustees, and that "[u]sually, though not invariably, a creditor who perfects takes priority over secured creditors who perfect later, yet is subordinate to those who perfected previously"). As the quotation from White and Summers indicates, time of perfection is important in determining priority under the UCC. But it is an oversimplification to say that an earlier perfected interest takes priority over a later perfected interest. The UCC's priority rules for security interests are in fact quite complicated. Disputes over whether a transferee's interest is protected may depend, for example, on the type of collateral and the type of competing interest. For instance, if a lender has perfected a security interest in goods that a merchant holds in inventory, a buyer who purchases the goods from the merchant in the ordinary course of business will take free of the security interest even though the lender's security interest would have priority over that of another lender who perfects later. *See* U.C.C. § 9-320(a); 4 WHITE & SUMMERS, *supra* note 10, § 33-8, at 358–59. Another example: If a lender has perfected a security interest in all the goods a merchant may acquire, a seller to the merchant who takes a purchase money security interest may achieve priority over the first lender. *See* U.C.C. § 9-324; 4 WHITE & SUMMERS, *supra* note 10, § 33-4, at 330–31. These complications do not, as far as we can tell, affect our discussion of the interaction of real-property law with the UCC's rules for automatic perfection of security interests in promissory notes and associated real-property mortgages.

70. *See* 4 WHITE & SUMMERS, *supra* note 10, § 31-4, at 150 (perfection "generally requires some action . . . which would put a diligent searcher on notice of the secured party's claim").

71. *Id.* ("[B]y far the most common and important method" of perfecting interests under the UCC, which governs personal property, "is the filing of a financing statement."). Nevertheless, security interests in certain types of property (including promissory notes) also may be perfected by taking possession. *See id.* Another method of perfection, available for certain intangible assets, is "control." UCC filing has some differences from real-property recording, although we use the terms interchangeably in this Article for convenience and because of broad similarities between the systems. *See* Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421, 446–47 (2005)

property "automatically," that is, without doing anything to provide notice. As we explain, the UCC seems to provide that a buyer's interest in promissory notes and mortgages can be perfected automatically and that no filing is necessary to protect the acquiring party's interest.

*a. Brief history of Article 9's interaction with recording statutes*

The history of the interaction of the UCC and state real-property recording law helps put the 1999 revisions' no-filing-required rule in perspective. The real-property recording statutes do not apply to promissory notes.[72] Instead, the UCC has governed how security interests in promissory notes are created and perfected.[73] However, it never has been clear how the UCC's rules for notes interact with the state recording statutes for mortgages when a promissory note is secured by a mortgage on real property. Before the 1999 amendments, the UCC seemed to cede primacy to the recording statutes. Official Comments to the UCC expressly deferred, first to "real estate law,"[74] then later to "other law,"[75] on "the question of the effect on the rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest."[76]

Although the UCC appeared to defer to real-property law on the question whether an assignee had to record its interest in a mortgage in order to protect the interest, prominent commentators resisted this conclusion. Jan Krasnowiecki and his coauthors, for example, argued that the mortgagor and mortgagee live in different "worlds." According to the "different worlds" argument, state recording laws are irrelevant to transfers of the mortgage which take place in the "mortgagee's world."[77] The recording laws govern only transactions in the "mortgagor's world," that is, transactions in which parties take

(explaining the differences between the UCC filing system and real-property recordation systems).

72. In fact, promissory notes may not be recorded under the laws of some states. *See, e.g.*, Brandrup v. ReconTrust Co., 303 P.3d 301, 316 (Or. 2013) ("Because a promissory note generally contains no description of real property and does not transfer, encumber, or otherwise affect the title to real property, it cannot be recorded in land title records.").

73. *See* Jan Z. Krasnowiecki et al., *The* Kennedy Mortgage Co. *Bankruptcy Case: New Light Shed on the Position of Mortgage Warehousing Banks*, 56 AM. BANKR. L.J. 325, 329 (1982).

74. U.C.C. § 9-102(3) cmt. 4 (1958).

75. *Id.* § 9-102 cmt. 4 (1967). The UCC official text apparently was changed in 1966. *See* Krasnowiecki et al., *supra* note 73, at 331–32 & nn.31–32.

76. U.C.C. § 9-103 cmt. 4 (1967).

77. Krasnowiecki et al., *supra* note 73, at 334.

interests in the land from the mortgagor.[78] Some,[79] but not all,[80] courts followed the "different worlds" approach and found that a mortgage assignee did not have to comply with state recording law to perfect its interest.

*b. Article 9's provisions for perfecting interests in mortgages after the 1999 revisions*

The 1999 amendments may have made the "different worlds" theory unnecessary, because the revisions eliminated the Code's language deferring to other law and inserted language seemingly providing that a buyer's interest in a mortgage can be perfected without recording.

Understanding the Article 9 mortgage rules after the 1999 amendments is challenging because the rules use terms in ways that may be counterintuitive, employing the vocabulary of secured transactions to describe sales of promissory notes and associated mortgages.[81] Thus, the buyer of a promissory note or mortgage is called the same thing as someone who made a loan secured by the note or mortgage: she is a "secured party."[82] The note seller is called the same thing as someone who borrowed money and gave the note or mortgage as security; she is the "debtor."[83] The note being sold is called the same thing it would be called if it were given as security for a loan: it is "collateral."[84] Thus, in the language of Article 9, the statement that a note buyer's interest in the mortgage is automatically protected as soon as the buyer buys the note could be phrased: "The secured party's security interest in the mortgage is automatically perfected when the security interest in the associated note attaches."

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78. *Id.*

79. *See, e.g.*, *In re* SGE Funding Corp., 278 B.R. 653 (Bankr. M.D. Ga. 2001).

80. *See, e.g.*, *In re* Maryville Sav. & Loan Corp., 743 F.2d 413, 416–17 (6th Cir. 1984) ("[T]he U.C.C. does not supercede the law in this state with respect to *liens upon real estate.*" (citation omitted) (internal quotation marks omitted)). The court in *Maryville* held that a party's interest in deeds of trust was perfected even though its interest in the related notes was not perfected. *See id.*

81. In ordinary usage, we recognize a difference between selling something and putting it up as collateral for a loan. The UCC drafters, however, merged the two concepts in the 1999 revisions. REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 8–9. "Article 9 uses nomenclature conventions to apply one set of rules to both" transactions in which notes are sold and transactions in which notes are collateral. This decision has been criticized. *See, e.g.*, Plank, *supra* note 22, at 235–37 (criticizing the Article 9 drafters for "inject[ing] an absolute conveyance of a property interest into a security or lien statute").

82. U.C.C. § 9-102(a)(72)(D) (2011).

83. *Id.* § 9-102(a)(28)(B).

84. *Id.* § 9-102(a)(12)(B).

The 1999 revisions, adopted by all fifty states by the end of 2001, amended the UCC to provide that in the sale of a promissory note secured by a mortgage, the security interest in the mortgage attaches when the security interest in the note attaches,[85] and that the security interest in the mortgage is perfected when the security interest in the note is perfected.[86] The UCC thus appears to provide that when the note is sold, the ownership interest in the mortgage is equal to the ownership interest in the note. As the Permanent Editorial Board explains at some length,[87] the UCC provides that the mortgage follows the note.[88]

The UCC also provides that the security interest in the promissory note can attach and be perfected without any recording.[89] The security interest in the note is perfected automatically. Combining this no-filing-for-notes provision with the mortgage-follows-the-note provision, it seems that the UCC provides that the buyer can perfect its interest in a mortgage without any recording or filing anywhere.[90] These special rules for automatic perfection of interests in mortgages stand in contrast to the rules for many other interests under the UCC, which are perfected by a making a filing, or by possession or control.[91]

The fact that a note buyer's interest in the note is perfected automatically does not mean that the buyer will prevail over all competing claimants. With respect to the note, if the note buyer does not take possession, it may lose out to a subsequent note buyer who acts in good faith.[92] However, a note buyer's automatically

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85. *Id.* § 9-203(g).
86. *Id.* § 9-308(e).
87. *See* REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 8–12.
88. U.C.C. §§ 9-203 cmt. 9, 9-308 cmt. 6.
89. *See id.* § 9-309(4) (providing that a security interest in a note that is sold is perfected immediately upon attachment).
90. *See* Julian B. McDonnell & James Charles Smith, *Promissory Notes and Mortgages*, *in* SECURED TRANSACTIONS UNDER THE UCC, *supra* note 10, § 16.09.
91. U.C.C. §§ 9-310(a), 9-502(a); *see* 1 JASON H.P. KRAVITT ET AL., SECURITIZATION OF FINANCIAL ASSETS, § 6.03[B], tbl.6-1 (3d. ed. 2013) (indicating that filing, possession, or control is needed to perfect a security interest in most types of property); 4 WHITE & SUMMERS, *supra* note 10, § 31-10, at 184 ("Section 9-310(a) identifies filing as the norm and, except when they are proceeds, there is no other way to perfect a security interest in most accounts (as distinguished from deposit accounts) and general intangibles.").
92. A security interest in an "instrument" is vulnerable to a subsequent good-faith purchaser of the instrument unless the buyer takes possession of the instrument. *See* U.C.C. § 9-330(d). It is not entirely clear that the subsequent good-faith purchaser of a mortgage note would win, however. The "instruments" to which section 9-330(d) applies are defined as "negotiable instrument[s]" or writings "of a type that in the ordinary course of business [are] transferred by delivery with any necessary indorsement or assignment." *Id.* § 9-102(47). Promissory notes secured by mortgages may be "instruments," as they are designed to be negotiable. But it seems

perfected status does seem to allow the note buyer to prevail over the note seller's bankruptcy trustee if the seller enters bankruptcy.[93]

The rules providing for automatic perfection of a note buyer's interest in a mortgage apply only if certain conditions are met. They apply when a security interest in the note attaches, and the UCC contains specific requirements for attachment of such an interest. The prerequisites for attachment of a security interest and, thus, applicability of the Article 9 rules are: (1) the seller must have rights (or the power to transfer rights) in the note;[94] (2) the buyer must give "value";[95] and (3) either an authenticated security agreement must describe the note or the buyer must possess the note.[96] Problems with recordkeeping in the mortgage securitization industry suggest that parties may not have documented their compliance with these requirements.[97] Parties seeking to invoke Article 9's protections in the future should comply with the rules for attachment of an Article 9 security interest in the note and maintain evidence of compliance with these requirements.

### 3. *Analyzing the conflict over protection of ownership interests under current law*

The real-property statutes may require a mortgage buyer to record its interest in order to be protected against subsequent claimants, such as bankruptcy trustees, while the UCC seems to provide that the buyers are protected against the same claimants without recording. It is not clear how the potential conflict between Article 9 and the state

doubtful that the mortgages themselves are "instruments" as that term is defined in Article 9. The mortgage is not a negotiable instrument, as it is not a "promise or order to pay a fixed amount of money" as required by U.C.C. § 3-104(a). Moreover, it appears that "transfer[] by delivery" is in fact not customary in the mortgage industry. *See* White, *supra* note 32, at 484–85 (describing methods used to transfer mortgages without mentioning delivery of the mortgage); *see also* Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Market Mortgage Market, and What To Do About It*, 37 PEPP. L. REV. 737, 758 (2010) [hereinafter Whitman, *Negotiability*] (stating that non-delivery of note is an "extremely widespread" practice in the mortgage industry and, "in many cases, appears to have been the result of a conscious policy on the part mortgage sellers to retain, rather than transfer, the notes representing the loans they were selling"). If transacting parties did not deliver the notes, it seems doubtful that they delivered the associated mortgage documents without the notes.

93. *See* 4 WHITE & SUMMERS, *supra* note 10, § 31-4, at 149–50 (explaining that perfection gives the perfected secured creditor priority over unperfected secured creditors and lien creditors, including bankruptcy trustees).

94. U.C.C. § 9-203(b)(2).

95. *Id.* § 9-203(b)(1).

96. *Id.* § 9-203(b)(3)(A)–(B).

97. *See* Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 18, 24–27 (2011) (summarizing issues with recordkeeping and alleged fraud in the mortgage industry); Renuart, *supra* note 44, at 119–28; White, *supra* note 32, at 473–76, 484–88.

recording statutes should be resolved under current law. Although the 1999 revisions eliminated specific language in the Code's Official Comments deferring to mortgage recording law, the revisions did not go as far as they could have in expressing an intent to supplant that law: language asserting that the Code's mortgage-follows-the-note rules prevailed "notwithstanding other law" was dropped in the UCC drafting process.[98] Moreover, apparently only a few states amended their recording laws to follow the new UCC regime: our research on the ten states with the largest numbers of mortgages securitized in private-label transactions[99] indicates that only two states, Florida[100] and Maryland,[101] made such amendments. Thus, the Code's rule that mortgage ownership is perfected without recording may be in conflict with real-property recording laws if they continue to provide that unrecorded real-property interests are vulnerable to subsequent claimants. The Board's Report does not address this potential conflict, as critics of the Report have noted.[102]

One might look to general provisions of the UCC to resolve the potential conflict over what buyers must do to protect interests in mortgages, but the UCC's general provisions seem potentially to point in opposite directions. The UCC yields to another statute "where the other statute was specifically intended to provide additional protection to a class of individuals engaging in

98. Drafts of the Article 9 revisions, including the ALI Proposed Final Draft of April 15, 1998, read, "Perfection of a security interest in a right to payment or performance also perfects a security interest in a lien on personal or real property securing that right, notwithstanding other law to the contrary." U.C.C. § 9-308(g) (Proposed Final Draft 1998). However, when the official 1999 version came out, it dropped the language "notwithstanding other law to the contrary." *See id.* § 9-308(e) (1999). Other phrasing differences apparently expressed a move toward giving the U.C.C. greater force against conflicting state law. *Compare id.* § 9-308 legislative note (1999) ("Any statute conflicting with subsection (e) *must* be made expressly subject to that subsection." (emphasis added)), *with id.* § 9-308(g) legislative note (Proposed Final Draft 1998) ("To avoid confusion, any statute conflicting with subsection (g) *should* be made expressly, subject to that subsection." (emphasis added)).

99. *See supra* note 51.

100. *See* FLA. STAT. § 701.02(4) (2005).

101. *See* MD. CODE ANN., REAL PROP. § 7-101 (LexisNexis 2013).

102. *See* Lawless Letter *supra* note 19, at 6. Despite these criticisms, there seemed to be little disagreement over the Board's reading of the Code's text. *See, e.g.*, E-mail from Kenneth Kettering, Visiting Professor, Univ. of Miami Sch. of Law, to Deanne Dissinger, Assoc. Deputy Dir., Am. Law Inst. (March 30, 2011, 9:59 PM) (on file with authors) ("The Draft Report is a lucid description of the UCC provisions that pertain to the matters covered by the report."). However, at least one academic did take issue with the Board's interpretation of the Code. *See* Letter from Bruce A. Campbell, Professor of Law Emeritus, Toledo Coll. of Law, to Deanne Dissinger, Assoc. Deputy Dir., Am. Law Inst. (May 27, 2011) (on file with authors) ("The Draft Report is thus, overall, a substantial oversimplification, and an oversimplification which distorts analysis and reaches dubious conclusions, potentially misleading lawyers, diplomats, and courts.").

transactions covered by the Uniform Commercial Code."[103] If Article 9 applies to mortgage sales, then those transactions are covered by the Code, and the real-property recording statutes seem intended to provide additional protection to mortgage purchasers. On the other hand, the UCC is to be interpreted "to promote its underlying purposes and policies," which are "to simplify, clarify, and modernize the law," as well as "to permit the continuing expansion of commercial practices through custom, usage, and agreement of the parties."[104] Eliminating any requirement to record mortgage assignments certainly could be seen as "simplify[ing]" the law, and to the extent that the private-label securitization industry abandoned recording, the reference to "commercial practice[]" may support an interpretation that recording no longer is required.

Without clear instruction in the statutory text about whether to follow the revised Article 9 provisions where they appear to conflict with other law, a court might attempt, in accordance with general principles of statutory construction, to give effect to both statutes to the extent possible.[105] One way of harmonizing the statutes would be to find that the term "perfected" under the UCC is limited by state recording statutes. State recording statutes typically protect certain classes of persons from claims based on unrecorded property interests. Typically, one such class consists of bona fide purchasers of real property for value who take without notice of a competing claim and record first.[106] A court could find that recording is required for protection against the persons specifically mentioned in the real property statutes, such as bona fide purchasers of real property. The bankruptcy trustee thus could prevail over the unrecorded interest in some states because the bankruptcy trustee is treated as a bona fide purchaser of real-property interests.[107] Perfection under the UCC, by contrast, could protect the claimant against other classes of competing claimants, such as judgment or statutory lienors (at least in some cases).[108] This interpretation gives some effect to the UCC's

103. U.C.C. § 1-103 cmt. 3 (2011).
104. *Id.* § 1-103(a).
105. *See* 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51:2, at 202–05 (7th ed. 2012) ("Courts try to construe apparently conflicting statutes on the same subject harmoniously, and, if possible, give effect to every provision in both." (footnote omitted)).
106. POWELL, *supra* note 49, § 82.01[3].
107. *See* 11 U.S.C. § 544(a)(3) (2006).
108. This analysis suggests that automatic perfection under Article 9 would prevail over judgment and statutory liens if judgment and statutory lienors were not mentioned in the real-property recording statutes and Article 9 is not preempted by the statutes specifically governing judgment and statutory liens. *See* 4 WHITE & SUMMERS, *supra* note 10, § 30-12, at 85–105 (discussing the relationship of Article 9

automatic perfection provisions without doing violence to the preexisting recording statutes. However, it does significantly undercut the UCC's provisions, because it effectively renders them inapplicable to real property in states with conflicting statutes.

If a court found that it could not harmonize Article 9 with state recording law as just described or in some other way, and therefore found that the statutes were in conflict, the court presumably would turn to general principles of statutory construction to resolve the conflict.[109] Given the principle that the specific trumps the general,[110] for example, Article 9's mortgage-follows-the-note provisions arguably should prevail because they are more specific than the recording statutes. In other words, the mortgage-follows-the-note provisions should apply specifically to sales of mortgage promissory notes, and recording statutes should generally apply to transfers of real-property interests. However, it is not entirely clear that the UCC's mortgage-follows-the-note rules are more specific. Many states do have specific provisions governing the recording of mortgages[111] or mortgage assignments in particular,[112] including statutes that specifically cover recording mortgage assignments in foreclosure.[113]

The argument can also be made that Article 9's provisions should govern because they were enacted after the recording statutes, and that the Article 9 revisions therefore repealed inconsistent provisions by implication.[114] Many states' recording statutes were in force before 1999 to 2001,[115] when state legislatures enacted the Article 9 revisions.[116] However, at least one state has passed legislation since

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with statutes specifically governing different types of statutory and judicial liens).

109. *See* U.C.C. § 1-103 cmt. 3 (stating that resolution of any conflict between the UCC and competing state statutes depends on "principles of statutory interpretation that specifically address the interrelationship between statutes").

110. *See* 2B SINGER & SINGER, *supra* note 105, § 51:5, at 280–83 ("[I]f two statutes conflict, the general statute must yield to the specific statute involving the same subject . . . .").

111. *See, e.g.*, ALASKA STAT. § 34.20.110 (2012) ("[A] deed of trust, given to secure an indebtedness, shall be treated as a mortgage of real estate, and recorded in full . . . ."); 765 ILL. COMP. STAT. 5/28 (1995) ("[M]ortgages . . . shall be recorded in the county in which such real estate is situated . . . .").

112. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-706 (2007) ("An assignment of a mortgage may be recorded in like manner as a mortgage . . . ."); GA. CODE ANN. § 44-14-35 (2012) (providing guidance for the applicability of mortgage recordings used to "secure the payment of money").

113. *See infra* note 157 (listing statutes requiring recorded mortgage assignments for nonjudicial foreclosure).

114. *See* 1A SINGER & SINGER, *supra* note 105, § 23:9, at 449 ("A repeal may arise by necessary implication from the enactment of a subsequent act.").

115. *See* POWELL, *supra* note 49, § 82.01[1][b] (describing colonial adoption of recording laws and their extension to the Northwest Territory in 1795).

116. *See supra* note 10.

2001 dealing with mortgage assignments.[117] Moreover, the fact that a statute was enacted later does not mean that it automatically trumps the previous statute, especially where there is no evidence that state legislators intended to supersede the old statute[118] and where the later statute did not refer explicitly to the earlier one.[119]

Despite these general observations about how Article 9 and state real-property recording statutes interact, the issue may be resolved differently in every state, and it is unclear in most states how the statutes in fact interact.[120] Only a few cases deal with the issue.[121] Although some commentators appear to have assumed that Article 9's rules would prevail,[122] one leading treatise does counsel against

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117. *See, e.g.*, GA. CODE ANN. § 44-14-162(b) (requiring that the foreclosing party file a "security instrument or assignment thereof vesting the secured creditor with title to the security instrument" with county clerk before foreclosure sale). This 2008 law reportedly was intended to "help borrowers 'identify who has the right to foreclose before they actually do.'" Austin Hall, *Mortgages, Conveyances to Secure Debt, and Liens*, 25 GA. ST. U. L. REV. 265, 270 (2008) (quoting a Georgia legislator's statement in House proceedings).

118. *See* 1A SINGER & SINGER, *supra* note 105, § 23:9, at 462 ("As legislative intent defines operation of a statute and divulges the purposes and limitations of the enactment, it may establish or deny a repeal by implication."); Lawless Letter, *supra* note 19, at 7 n.11 (arguing that it is "implausible" that state legislators intended to upset long-standing state real property law in adopting the revised Article 9).

119. *See* Letter from the Comm. on Legal Ops. of the Bus. Law Section of the Am. Bar Ass'n, to the Permanent Editorial Bd. for the Unif. Commercial Code 2 (May 31, 2011) (questioning whether Revised Article 9 "would be effective to change the requirements of real estate recording statutes without making express reference to such statutes" and asserting that "[u]nder many states' statutory construction rules (e.g., Washington State), passage of a statute may not automatically have the effect of amending or reversing contrary statutory provisions without expressly referring to the supplemental or superseded statutes").

120. *See* Lawless Letter, *supra* note 19, at 7 n.11 (stating that the relevant revisions of Article 9 are "utter failures" at providing clear law and thus legislatures might not have been aware of the ramifications asserted by the Permanent Editorial Board's Draft Report). In general, the UCC acknowledges that resolution of any conflict depends on "principles of statutory interpretation that specifically address the interrelationship between statutes" and defers to other statutes that are "specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code." U.C.C. § 1-103 cmt. 3 (2011).

121. *See, e.g.*, Provident Bank v. Cmty. Home Mortg. Corp., 498 F. Supp. 2d 558, 566–71 (E.D.N.Y. 2007) (analyzing the conflict under New York law and resolving it in favor of the UCC).

122. *See* McDonnell & Smith, *supra* note 90, § 16.09 ("Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights to the mortgage."). This result would be consistent with the overall thrust of the Article 9 amendments, as identified by McDonnell in a different forum:

> The U.C.C. specialists devoutly believe in secured credit. With appropriate fanfare, they have introduced changes designed to make it easier for financers to create and perfect security interests in the many different contexts in which secured financing is used. . . . It is as though U.C.C. specialists identified with secured creditors as the Clients, the Good Guys . . . .

relying exclusively on the proposition that the mortgage follows the note—under Article 9 or otherwise—instead of recording mortgage assignments.[123] The crucial point is that under current law, resolution of the potential conflict between Article 9 and real-property recording statutes is a question of state law, to be determined under the statutory schemes of each state and in light of each state's policies and legislative history of the relevant enactments. The potential conflict between the statutory schemes[124] creates unnecessary risk for everyone concerned—mortgage buyers, mortgage sellers, and mortgage borrowers alike.

*4. Disputes in which the conflict over protection of ownership interests is relevant*

Conflicts over whether interests in mortgages are perfected may not be overwhelmingly common, but the question of how to perfect an interest in a mortgage in light of Article 9 has received at least a fair amount of judicial[125] and scholarly[126] attention over the years. In

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McDonnell, *Article 9 Greedy?*, *supra* note 10, at 241–42 (noting that there was no organized opposition to the Article 9 revisions).

123. *See* 2 KRAVITT ET AL., *supra* note 91, § 16.04[A] ("[W]hether the transferee, as owner of the note acquires all rights of the mortgagee without having to record an assignment of the mortgage, is not entirely clear. In addition, there are reasons why recordation of the mortgage may be wise in order for the transferee to obtain the greatest possible rights in the mortgage and in the other ancillary loan documents . . . .").

124. *Cf.* Recent Case, *Massachusetts Supreme Judicial Court Unanimously Voids Foreclosure Sales Because Securitization Trusts Could Not Demonstrate Clear Chains of Title to Mortgages:* U.S. Bank National Ass'n v. Ibanez, *941 N.E.2d 40 (Mass. 2011)*, 125 HARV. L. REV. 827, 832 (2012) (arguing that there is no conflict between Massachusetts real-property recording statutes and the UCC because the mortgage follows the note as a "security interest" but not as a "real property interest"). The case note does not further flesh out this intriguing suggestion.

125. *See, e.g.*, *In re* Maryville Sav. & Loan Corp., 743 F.2d 413, 416–17 (6th Cir. 1984) (finding it necessary to analyze security interests in note and mortgage separately); *In re* Bristol Assocs., 505 F.2d 1056, 1061 (3d Cir. 1974) (holding that Article 9 governs only note, not mortgage); Landmark Land Co. v. Sprague, 529 F. Supp. 971, 976–77 (S.D.N.Y. 1981) (asserting that a "more compelling view" is that Article 9 governs both mortgage and note where note is assigned as a security), *rev'd on other grounds*, 701 F.2d 1065 (2d Cir. 1982); SGE Mortg. Funding Corp. v. Accent Mortg. Servs., Inc, (*In re* SGE Funding Corp.), 278 B.R. 653, 659–62 (Bankr. M.D. Ga. 2001) (following the "different worlds" theory); Unsecured Creditors' Comm. v. Shawmut Worcester Cnty. (*In re* Ivy Props., Inc.), 109 B.R. 10, 12–13 (Bankr. D. Mass. 1989) (analyzing perfection of security interest in mortgage under state recording law); First Nat'l Bank of Bos. v. Larson (*In re* Kennedy Mortg. Co.), 17 B.R. 957, 957 (Bankr. D.N.J. 1982) (adopting reasoning consistent with the "different worlds" theory); Rucker v. State Exch. Bank, 355 So. 2d 171, 174 (Fla. Dist. Ct. App. 1978) (finding that a security interest in a mortgage is governed by Florida real-property recording statute).

126. For discussions of how Article 9 and real-property recording statutes interacted under pre-1999 revision law, see 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 311 (1965); Peter F. Coogan et al., *The Outer Fringes of Article 9: Subordination Agreements, Security Interest in Money and Deposits, Negative Pledge Clauses,*

general, there is a continuing interest in how to perfect interests in mortgages because transacting parties want to be sure that their transactions have the intended effect: investors in entities that claim to own mortgages want to be sure that the entities in fact own the mortgages. In this section, we highlight some noteworthy situations where mortgage perfection has become or could become an issue in disputes over existing mortgage securitization transactions. Mortgage perfection issues have arisen in investor litigation and could arise if the entities operating the Mortgage Electronic Registration System (MERS) enter bankruptcy.

*a. Investor litigation*

If securitization trusts' interests in mortgages are not perfected, the resulting risks to mortgage investors may make representations about the validity of transfers false or misleading, and investors already have brought fraud claims based on alleged misrepresentations and omissions about the legal validity of mortgage assignments.[127] Moreover, parties in the securitization chain, such as mortgage originators, sponsors, and depositors, typically give warranties that run to mortgage-backed security (MBS) investors.[128] Some such warranties could be breached if the mortgages turn out to be vulnerable to competing claims due to failure to record.[129]

*b. MERS bankruptcy*

Mortgage perfection also could come into play on a massive scale if Mortgage Electronic Registration Systems, Inc. ("MERS, Inc."), the nominal owner of more than thirty million mortgages,[130] enters

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*and Participation Agreements*, 79 HARV. L. REV. 229 (1965); Peter F. Coogan & Albert L. Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535 (1963); Murdoch K. Goodwin, *Mortgage Warehousing—A Misnomer*, 104 U. PA. L. REV. 494 (1956); Krasnowiecki et al., *supra* note 73; Keith Meyer, *A Potpourri of Agricultural U.C.C. Issues: Attachment, Real Estate-Growing Crops and Federalization*, 12 HAMLINE L. REV. 741 (1989); Grant S. Nelson, *The Contract for Deed as Mortgage: The Case for the Restatement Approach*, 1998 B.Y.U. L. REV. 1111 (1998); Gregory M. Shaw, *Security Interests in Notes and Mortgages—Determining the Applicable Law*, 79 COLUM. L. REV. 1414 (1979); Comment, *An Article 9 Scope Problem—Mortgages, Leases, and Rents as Collateral*, 47 U. COLO. L. REV. 449 (1976).

127. *See, e.g.*, Summons with Notice at 2–3, Sealink Funding Ltd. v. Goldman Sachs Group, No. 652810/2012 (N.Y. Sup. Ct. Aug. 13, 2012), 2012 WL 3279419.

128. *See, e.g.*, Goldman Sachs Mortg. Co. and Aames Capital Corp., Flow Mortgage Loan Purchase and Warranty Agreement § 9.03 (Apr. 1, 2006) [hereinafter Goldman and Aames Agreement] (stating that representations and warranties of originator "inure to the benefit of" the sponsor and its "successors and assigns").

129. *See id.* § 9.02(m) ("Seller is the sole owner of record and holder of the Mortgage Loan and the indebtedness evidenced by each Mortgage Note.").

130. Arnold Testimony, *supra* note 39, at 10; *see also* 1 NELSON & WHITMAN, *supra*

bankruptcy.[131] When an entity enters bankruptcy, its bankruptcy trustee has various rights to property connected with the entity, and these rights can defeat unperfected interests belonging to third parties. Much of the litigation over perfection of interests in property deals with the rights of bankruptcy trustees as against various third parties.

Understanding the issue of mortgage perfection in MERS bankruptcy requires a brief introduction to MERS. MERS was conceived as a substitute for recording mortgage assignments and has been described as a national electronic database that tracks ownership of mortgage loans.[132] The system's members, who are participants in the mortgage industry, can cause a mortgage to be "registered" on MERS and publicly recorded in the name of "MERS, Inc."[133] MERS is designed so that MERS, Inc. both is itself the mortgagee and also acts as a common agent for all of MERS's members, so that recording in the name of MERS, Inc. and tracking ownership transfers on MERS makes it unnecessary to record assignments of mortgages.[134] In theory, the public record discloses the existence of the mortgage and the fact that MERS, Inc. holds legal title on behalf of one of MERS's members. Private records maintained on MERS in theory track which one of MERS's members is the current "true" ("beneficial" or "equitable") owner.[135] Figure 2 illustrates how a mortgage securitization using MERS would work.

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note 24, § 5.34, at 626 (stating that MERS "has already proven to be a remarkable success").

131. Ownership also may be challenged in the event that the mortgage originator or MERS, Inc. wrongfully or mistakenly assigns the mortgage to someone other than the trust after the securitization is completed. The subsequent assignment problem comes up in academic discussions of mortgage recording and property recording generally. *See, e.g.*, 1 NELSON & WHITMAN, *supra* note 24, § 5.34, at 614–21. Moreover, it seems plausible that subsequent mistaken or wrongful assignments occurred on the MERS system, as MERS, Inc. has not supervised its 20,000 certifying officers, each capable of assigning a mortgage on MERS, Inc.'s behalf. Nevertheless, we are unaware of actual cases of duplicate mortgage assignment and do not discuss this issue further.

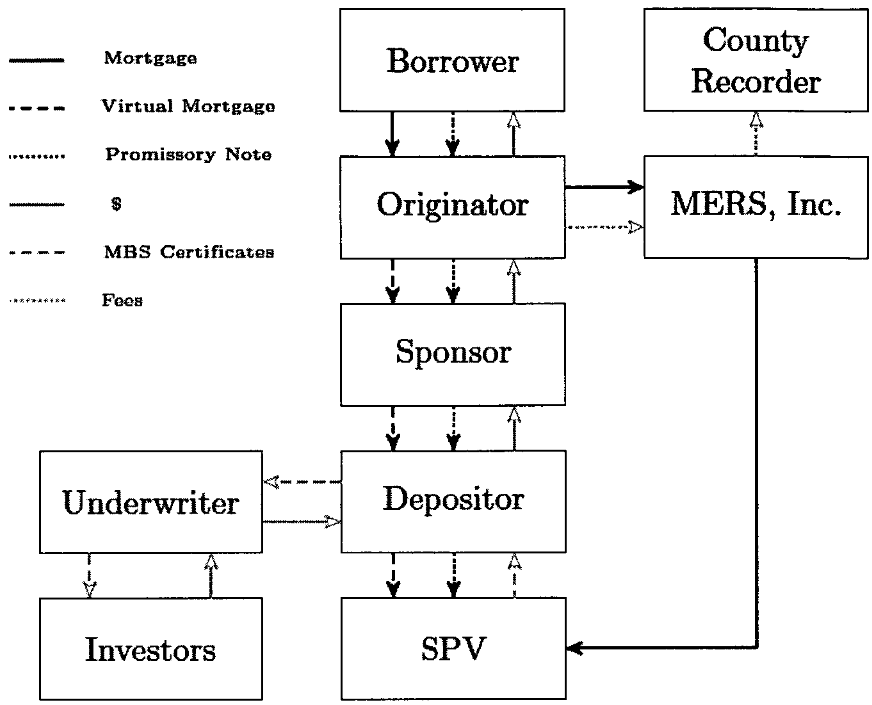
132. *See* Arnold Testimony, *supra* note 39, at 10 (describing MERS as a mortgage assignment tracking system).

133. *See* MERSCORP HOLDINGS, INC., MERS® SYSTEM RULES OF MEMBERSHIP, r.2 (2013).

134. Arnold Testimony, *supra* note 39, at 48.

135. Under MERS's current rules, in the event of foreclosure, MERS, Inc. assigns the mortgage to the foreclosing party so that that party has legal title at the time of foreclosure. *See* MERSCORP HOLDINGS, INC., *supra* note 133, r.8. Prior to a rule change in summer 2011, MERS, Inc. would foreclose in its own name.

*Figure 2: Mortgage and promissory note transfer with MERS recording*




MERS, Inc. faces threats to its solvency on a number of fronts. As operational problems at MERS have become public,[136] officials have become increasingly hostile to the system.[137] Federal banking regulators determined in 2011 that MERS, Inc. and its corporate

136. A review of foreclosure documents commissioned by the Assessor-Recorder of the City and County of San Francisco concluded that MERS apparently was wrong about the identity of the mortgage owner more than half of the time and that mortgages recorded on MERS generally had a higher rate of other compliance problems that non-MERS mortgages. AEQUITAS COMPLIANCE SOLUTIONS, INC., *supra* note 33, at 13–14. Specifically, Aequitas reviewed 382 residential foreclosure sales in San Francisco from January 2009 to October 2011. *Id.* at 1. In 192 cases, the security instruments were recorded on MERS, and MERS purported to have information about the mortgage owners (or "Beneficiaries under the Deed of Trust" in California parlance). *Id.* at 10, 13. In 112 of these cases, or 58%, the beneficiary recorded on MERS was different from the beneficiary named in the Trustee's Deed upon Sale, the document transferring ownership of the foreclosed property to the new owner at the foreclosure sale. *Id.* at 13.

137. *See, e.g.*, Press Release, Office of Senator Maria Cantwell, Cantwell to Justice Department: Fully Investigate Fraudulent Foreclosures Before Bank Settlement (Dec. 15, 2011), *available at* http://www.cantwell.senate.gov/news/record.cfm?id=335169 (announcing a letter Senator Maria Cantwell sent to Attorney General Eric Holder, which asserted that MERS "should be dissolved and shut down").

parent MERSCORP, Inc. employed "unsafe or unsound practices,"[138] and as a result, the companies operate under a federal consent decree that requires operational improvements[139] and potential additional capital contributions from MERS's members.[140] It remains unclear whether the companies will be able to meet the requirements of the decree.

MERS also faces lawsuits from county recorders who assert that MERS's claims to be a mortgagee or beneficiary under a deed of trust are fraudulent under state recording law,[141] from state attorneys general who claim that the MERS entities' conduct in foreclosure litigation was fraudulent,[142] and from private borrowers who claim to have been injured by the MERS entities' allegedly fraudulent conduct in claiming to be a mortgagee or beneficiary under a deed of trust.[143] These lawsuits could send MERS, Inc. into bankruptcy.[144]

If MERS, Inc. enters bankruptcy, a bankruptcy trustee with the powers of both a judgment creditor of MERS, Inc.[145] and a bona fide purchaser of real-property interests from MERS, Inc.[146] will be appointed to administer MERS, Inc.'s bankruptcy estate for the benefit of creditors. The MERS, Inc. bankruptcy trustee could seek to bring the securitized mortgages that the company nominally owns

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138. *See In re* MERSCORP, Inc., OCC No. AA-EC-11-20, 2011 WL 2411344, at *1 (U.S. Office of the Comptroller of the Currency Apr. 13, 2011) (consent order).

139. *See id.* at *3–5.

140. *Id.* at *4.

141. *See* Transcript of Motions Hearing at 81, Dallas County v. MERSCORP, Inc., No 3:11-CV-3722-O (N.D. Tex. May 23, 2012) (denying a motion to dismiss as to recorders' claims of fraudulent misrepresentation, unjust enrichment, conspiracy, and violation of Texas's allegedly mandatory recording statute).

142. Summons at 6, People v. JPMorgan Chase Bank, N.A., No. 0002768-2012 (N.Y. Sup. Ct. Feb 3, 2012), 2012 WL 361985. Alleged foreclosure misconduct often includes proceeding in which MERS, Inc. lacked standing because it did not hold the promissory note but falsely claimed to hold, own, or possess the note. *Id.* at 18–20.

143. MERS, Inc. generally has been successful in beating these lawsuits. *See, e.g.*, Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1038 (9th Cir. 2011) (upholding the dismissal of purported class action alleging fraud and consumer protection violations in use of MERS); *In re* Mortg. Elec. Registration Sys. (MERS) Litig., No. 09-2119-JAT, 2011 WL 4550189, at *1 (D. Ariz. Oct. 3, 2011) (dismissing seventy-two consumer-fraud cases against MERS). However, a recent decision of the Washington Supreme Court opened the door to consumer actions in that state by finding that designating MERS, Inc. as the beneficiary of a deed of trust presumptively satisfies the "deception" and "public interest impact" elements of a private cause of action under Washington's Consumer Protection Act. *See* Bain v. Metro. Mortg. Grp., 285 P.3d 34, 51 (Wash. 2012) (en banc).

144. This could happen if large judgments are entered against MERS, Inc., the company does not pay them, and creditors start an involuntary bankruptcy proceeding. *See generally* 11 U.S.C. § 303 (2006). MERS, Inc. also could become bankrupt by settling some lawsuits and losing others or simply if its backers decide to stop paying its apparently considerable legal bills.

145. *See id.* § 544(a)(1)–(2).

146. *See id.* § 544(a)(3).

into its bankruptcy estate and administer the mortgages along with the other estate property for the benefit of MERS, Inc.'s creditors. Thus, whether unrecorded interests in the mortgages were nevertheless protected under Article 9,[147] could determine the fate of over thirty million mortgages.

### c. *Recorder litigation*

Article 9's provisions on the relation between mortgage and note may be raised in lawsuits in which county recorders seek to recover for the nonpayment of mortgage assignment fees. We discuss two contexts in which the Article 9 provisions may be raised, although we conclude that the provisions do not appear relevant.

First, some state statutes appear on their face to require that mortgage assignments be recorded.[148] Instead of creating incentives to record by providing that unrecorded ownership interests are vulnerable or that recording is a prerequisite to foreclosure, these statutes may simply require recording. The decision not to record assignments in mortgage securitizations has led to litigation over whether industry participants who did not record mortgage assignments violated such statutes.[149] As we read Article 9, it does not purport to, and does not, supplant state laws that flatly require mortgage assignment recording. Although complying with the requirements of Article 9 may help transaction participants perfect their interests and preserve their right to foreclose without recording,

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147. *See* Hunt, Stanton & Wallace, *supra* note 28, at 22–25 (discussing the legal arguments for the mortgages becoming part of MERS, Inc.'s bankruptcy estate).

148. *See, e.g.*, 765 ILL. COMP. STAT. 5/28 (1995) ("Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated . . . ."); 21 PA. CONS. STAT. ANN. § 351 (West 2013) ("All . . . conveyances . . . shall be recorded in the office for the recording of deeds . . . ."); TEX. LOC. GOV'T CODE ANN. § 192.007(a) (West 2012) ("To . . . transfer . . . an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded."); *see also* Pines v. Farrell, 848 A.2d 94, 101 (Pa. 2004) (construing "property transfer" as including mortgage assignments). Arizona requires that the transferor either record an assignment or "indemnify the transferee in any action in which the transferee's interest . . . is at issue." ARIZ. REV. STAT. ANN. § 33-411.01 (2007).

149. *See, e.g.*, Union Cnty., Ill. v. MERSCORP, Inc., Civ. No. 12-665-GPM, 2013 WL 359366, at *7 (S.D. Ill. Jan. 30, 2013) (finding no mandatory duty to record under 765 ILL. COMP. STAT. 5/28); Montgomery Cnty., Pa. v. MERSCORP, Inc., 904 F. Supp. 2d 436, 443–45 (E.D. Pa. 2012) (holding that 21 PA. CONS. STAT. § 351 requires recording of mortgage assignments); *In re* Vasquez, 266 P.3d 1053, 1056 (Ariz. 2011) (en banc) ("Read in its entirety, § 33-411.01 does not impose a recording requirement. . . . Rather, the statute presents a transferor of a real property interest with options and consequences . . . .").

Article 9 will not cure a failure to record mortgage assignments where recording is required.

Second, some county recorder lawsuits advance the theory that failing to record a mortgage assignment causes the mortgage to lose priority relative to other claims on the underlying real property.[150] As the Article 9 provisions we discuss deal with rights to the note and mortgage, rather than rights to the underlying property, the provisions do not seem relevant to this theory.

### B. *Conflicting Mortgage Foreclosure Rules*

Some state statutes seemingly provide that a chain of recorded mortgage assignments is a prerequisite to foreclosure. At the same time, Article 9 can be read to provide that a mortgage owner may foreclose without a recorded chain of assignments if certain conditions are met. Thus, Article 9 and real-property recording law may be in conflict, at least in some states.

#### 1. *Article 9 rules for foreclosure*

Article 9's rules governing ownership of mortgages, discussed above, may bear on who has standing to foreclose. The standing issue relates to whether the foreclosing party has a sufficient interest in the mortgage to be permitted to proceed under state law.[151] Because Article 9's mortgage-follows-the-note rules seem to provide that the note buyer is in effect the mortgage owner, they may help determine whether the mortgage owner has standing to proceed.[152] We are not aware that these Article 9 rules create a conflict with other state law.

Article 9 contains additional rules specifically directed to procedures for foreclosure that do seem to conflict with other state law, at least in some states. This separate set of Article 9 rules provides that "[i]f necessary to enable a [buyer] to enforce the mortgage nonjudicially," a note buyer may record a copy of the sale

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150. *See, e.g.*, Second Amended Class Action Complaint at 30, Cnty. of Washington, Pa. v. U.S. Bank Nat'l Ass'n, No. 2011-7095 (Pa. Ct. C.P. Washington Cty., Nov. 15, 2012) (holding that U.S. Bank was unjustly enriched by asserting that mortgages with unrecorded assignments have priority over other competing liens on mortgaged property).

151. For an example of a case dealing with the issue of standing to foreclose, see U.S. Bank, N.A. v. Ibanez, 941 N.E.2d 40, 53–54 (Mass. 2011) (rejecting an argument that because the foreclosing parties "held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose").

152. *See, e.g.*, Permanent Editorial Board, *supra* note 10, at 12 & n.43 (arguing that the *Ibanez* decision to reject the view that holding the note in itself confers standing to foreclose "disregards the impact of Article 9").

agreement and an affidavit stating that a default has occurred and that the buyer is entitled to enforce the mortgage nonjudicially.[153] According to the UCC official commentary, this provision is intended to permit the buyer to become the "assignee of record" in states where only an assignee of record can use nonjudicial foreclosure.[154]

Although the Permanent Editorial Board discusses the procedure set forth in Article 9,[155] the procedure apparently has never been used in a case generating a reported opinion.[156] Moreover, the Code's procedure seems to be in conflict with laws in some states that expressly require a recorded chain of assignments as a prerequisite to foreclosure.

### 2. *State real-property recording rules for foreclosure*

A number of state statutes appear on their face to require recorded assignments for nonjudicial foreclosure.[157] For example, California Civil Code section 2932.5 provides, "The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded."[158] Courts in some states, including Minnesota,[159] California,[160] and Oregon[161] have issued decisions circumventing such

153. U.C.C. § 9-607(b) (2011).
154. *Id.* § 9-607, cmt. 8.
155. *See* REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 13–14.
156. A July 6, 2013, advanced search in WestlawNext for <(assignee /s record) & (9-607)> returned no case results.
157. *See e.g.*, CAL. CIV. CODE § 2932.5 (West 2013); IDAHO CODE ANN. § 45-1505(1) (2003); MICH. COMP. LAWS § 600.3204(3) (LexisNexis 2004); MINN. STAT. ANN. § 580.02(3) (West 2010); MONT. CODE ANN. § 71-1-313(1) (2011); OR. REV. STAT. § 86.735 (1) (2011); S.D. CODIFIED LAWS § 21-48-2 (2004). At least one other statute requires that at least a single "assignment" be recorded. *See* GA. CODE ANN. § 44-14-162(b) (2012) ("The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located.").
158. CAL. CIV. CODE § 2932.5. "Power of sale" is the California vehicle for nonjudicial foreclosure. *See* 1 BERNHARDT, *supra* note 25, § 2.14 ("No security instrument can be foreclosed extrajudicially unless it expressly authorizes such a procedure in a power of sale clause.").
159. *See* Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 502 (Minn. 2009).
160. Although section 2932.5 of the California Civil Code provides, "The power of sale may be exercised by [an] assignee if the assignment is duly acknowledged and recorded," California's state courts have interpreted the statute to cover only mortgages and not deeds of trust. *See, e.g.*, Herrera v. Fed. Nat'l Mortg. Corp., 141 Cal. Rptr. 3d 326, 338 (Ct. App. 2012), *review denied*, No. S203718, 2012 Cal. LEXIS 7643 (Aug. 8, 2012); *see also* Haynes v. EMC Mortg. Corp., 140 Cal. Rptr. 3d 32, 34 (Ct. App. 2012) (stating that the proposition that § 2932.5 applies "only to mortgages is well settled"), *review denied*, No. S202996, 2012 Cal. LEXIS 7371 (Aug. 8, 2012); Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 818 (Ct. App. 2011) (noting that it was established in 1908 that the statute applied to mortgages only), *review denied*, No. S197440, 2012 Cal. LEXIS 42 (Jan. 4, 2012); Stockwell v. Barnum, 7. Cal. App. 413, 417 (Dist. Ct. App. 1908) (establishing and explaining why the statute

requirements in the past few years, but courts in other states, including Michigan[162] and Georgia[163] have enforced requirements that mortgage assignments be recorded as a prerequisite to foreclosure.

Recent legislation in California may restore the requirement of a chain of assignments in that state. The California Homeowners' Bill of Rights,[164] which became law on January 1, 2013, provides that a notice of default may not be recorded on a first lien mortgage or deed of trust until the foreclosing party provides a statement to the borrower disclosing, among other things, the borrower's right to request "[a] copy of any assignment, if applicable, of the borrower's mortgage or deed of trust required to determine the right of the mortgage servicer to foreclose."[165]

*3. Analyzing the foreclosure conflict under current law*

The interaction of Article 9 with state foreclosure law must be evaluated separately under the statutory scheme of each state.[166] In

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applies only to mortgages). As deeds of trust are far more common than true mortgages in the state, this interpretation effectively guts the rule. *See In re* Cruz, 457 B.R. 806, 816–18 (Bankr. S.D. Cal. 2011) (noting the prevalence of deeds of trust and questioning courts' reliance on *Stockwell*'s "archaic" analysis). Until *Calvo*, it was widely believed that the distinction between mortgages and deeds of trust embraced in *Stockwell* had been eliminated. *See, e.g.*, Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 945 (Cal. 1933). Some bankruptcy courts in California continue to read the statute to cover deeds of trust. *See, e.g.*, *In re Cruz*, 457 B.R. at 818. However, district courts have reversed such rulings. *See, e.g.*, *In re* Salazar, 470 B.R. 557, 562 (S.D. Cal. 2012), *rev'g* 448 B.R. 814 (Bankr. S.D. Cal. 2011); *cf.* Barrionuevo v. Chase Bank, N.A., 885 F. Supp. 2d 964, 972 (N.D. Cal. 2012) (denying a motion to dismiss a wrongful foreclosure claim based in part on section 2932.5 but expressly declining to address the provision).

161. *See* Brandrup v. ReconTrust Co., 303 P.3d 301, 315–19 (Or. 2013) (holding that OR. REV. STAT. § 86.735(1) requires only that formal, written assignments of a mortgage be recorded as a prerequisite to nonjudicial foreclosure and that the statute does not require recording of mortgage transfers that result from operation of the principle "the mortgage follows the note").

162. *See* Kim v. JPMorgan Chase Bank, N.A., 825 N.W.2d 329, 332 (Mich. 2012) ("[A]s a general matter, a mortgagee cannot validly foreclose on a mortgage by advertisement before the mortgage and all assignments of that mortgage are duly recorded."). Under *Kim*, a borrower may not set aside a foreclosure sale because of failure to record mortgage assignments unless the borrower can show prejudice arising from the failure to record. *Id.* at 337.

163. *See, e.g.*, Stubbs v. Bank of Am., 844 F. Supp. 2d 1267, 1270 (N.D. Ga. 2012) (finding that the purpose of Georgia statute requiring recording as a prerequisite to nonjudicial foreclosure is to give the borrower notice of "the entity to whom the debt is owed").

164. 2012 Cal. Legis. Serv. AB 278 & SB 900 (codified at CAL. CIV. CODE §§ 2920.5 *et seq.* (West 2013)).

165. CAL. CIV. CODE § 2923.55. Depending on the interpretation of "any assignment, if applicable . . . required to determine the right," *id.*, this provision may or may not require a recorded chain of assignments. As of late July 2013, it does not appear that any published opinion has analyzed this provision.

166. State foreclosure law is heterogeneous. For example, just over half of states

general, where a statute that protects borrowers specifically requires recording as a prerequisite to foreclosure, Article 9's provision for recording a copy of a single note sale agreement should not trump this requirement.

Statutes requiring a recorded chain of assignments as a prerequisite to foreclosure seem to provide meaningful protections to borrowers,[167] despite the fact that some courts interpreting their states' chain-of-assignment rules have declined to address the issue of borrower protection.[168] The requirement of a recorded chain of assignments permits the borrower to understand and test the foreclosing party's claim that it can enforce the mortgage.[169] This is

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allow nonjudicial foreclosure, with the others requiring judicial involvement. *See* Niday v. GMAC Mortg., LLC, 284 P.3d 1157, 1169 (Or. Ct. App. 2012) (listing twenty-eight states that have enacted statutes permitting nonjudicial foreclosure); Robert Hockett, *Six Years on and Still Counting: Sifting Through the Mortgage Mess*, 9 HASTINGS BUS. L.J. 373, 397 (2013) ("About 30 states permit 'power of sale,' or 'nonjudicial' foreclosure instead of or in addition to judicial foreclosure."). There is authority from at least one state, California, to the effect that some provisions of the UCC are irrelevant to foreclosure. *See* Debrunner v. Deutsche Bank Nat'l Trust Co., 138 Cal. Rptr. 3d 830, 835–36 (Ct. App. 2012) (stating that the borrower's reliance on a UCC Article 3 note transfer provisions was "misplaced" in nonjudicial foreclosure proceeding). *Debrunner* addressed only Article 3 of the UCC, not Article 9.

167. *See, e.g*, Anita Lynn Lapidus, *What Really Happened:* Ibanez *and the Case for Using the Actual Transfer Documents*, 41 STETSON L. REV. 817, 833 (2012) (recommending that foreclosure defense attorneys "insist on reviewing the schedules of the [pooling and servicing agreement] to compare and contrast the assignments with important details, such as closing dates").

168. *See, e.g.*, Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 492, 501–02 (Minn. 2009) (stating that it would be outside the court's role to consider policy arguments and holding that the use of MERS satisfies the state requirement that "all assignments" of a mortgage be recorded in order to foreclose because the recording requirement covers only legal and not equitable assignments). *Cf.* Brandrup v. ReconTrust Co., 303 P.3d 301, 317–18 (Or. 2013) (finding that the legislature "did not clearly express" an intent to provide borrower with ability to determine whether person giving notice of foreclosure possesses the beneficial interest in the trust deed at issue and has the right to foreclose). More generally, courts are divided over whether laws requiring or encouraging public records of mortgage ownership protect the borrower or only prospective purchasers. *Compare* Haynes v. EMC Mortg. Corp., 140 Cal. Rptr. 3d 32, 37 (Ct. App. 2012) (arguing that the purpose of the state statute's recording requirement is to ensure the prospective purchaser is knowledgeable about who possesses authority to sell), *review denied*, No. S202996, 2012 Cal. LEXIS 7371 (Aug. 8, 2012), *with* Bain v. Metro. Mortg. Grp., 285 P.3d 34, 51 (Wash. 2012) (en banc) (noting that a borrower may be injured by concealment of the complete chain of title if she needs to "deal with the holder of the note to resolve disputes or to take advantage of legal protections," or if "there have been misrepresentations, fraud, or irregularities in the proceedings, and . . . the . . . borrower cannot locate the party accountable and with authority to correct the irregularity").

169. Questionable behavior by foreclosing parties highlights the borrower's interest in testing foreclosing parties' claims. *See* Dustin A. Zacks, *Robo-Litigation*, 60 CLEV. ST. L. REV. 867, 869–70 (2013) (citing examples of foreclosure attorneys' alleged misconduct, such as changing affidavits without servicers' knowledge, filing false lost-note claims, and signing documents on behalf of servicers without authority to do so).

true even when the right to enforce the note can be separated from ownership of the note, as the UCC permits. For example, consider the following situation: Forecloser is trying to foreclose on a property. Forecloser is not the original payee on the negotiable promissory note and the note does not have a chain of endorsements. The UCC apparently provides that Forecloser can enforce the note as long as there is a chain of transfers from the original payee to Forecloser, each made with intent to give the transferee the right to enforce the note.[170] The borrower may wish to probe whether such a chain of transfers with the requisite intent in fact happened, but may decide not to do so if Forecloser is the record mortgage owner. The recorded assignment provides some degree of comfort that Forecloser did not, say, find the promissory note lying on the ground.

The preceding example involved a negotiable note; the borrower's interest in tracing a chain of title is even clearer for nonnegotiable notes. The UCC provides clear rules permitting separation of ownership from the right to enforce negotiable notes.[171] Under these rules, it is at least arguable that the borrower should not care who owns the note, only who can enforce it. But in the case of a nonnegotiable note, there are no such clear rules in the UCC,[172] and it is harder to argue that the buyer is indifferent as to who owns the note.

Beyond the potential relevance of record ownership of the mortgage to the right to enforce the note, there is the possibility that additional procedural hurdles to nonjudicial foreclosure may be appropriate even when the right to enforce the note is undisputed. Nonjudicial foreclosure is special precisely because it involves taking a valuable asset without judicial involvement. Courts might well pause before concluding that the legislature cast aside protections against the use of this extraordinary remedy.[173]

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170. *See* REPORT OF THE PERMANENT EDITORIAL BOARD, *supra* note 10, at 5–7 & illus. 3.

171. *See id.* at 8 & n.28.

172. *See* Dale A. Whitman, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement To Enforce the Note*, 66 ARK. L. REV. 21, 29 n.31 (2013) (arguing that the transfer of the right to enforce nonnegotiable notes "is governed by the common law, and there are few modern cases explicating it"). In such cases the borrower's interest in understanding the chain of mortgage ownership seems even stronger.

173. *See generally* David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505, 507–08 (2012) (arguing that mortgage formalities "provide some protection to borrowers/homeowners" and that procedural hurdles to foreclosure encourage responsible lending); Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 425–26 (2013) (noting that the "increasingly predominating" view that "the revival of procedural regularity" reflects a "recognition that the underlying asset, the borrower's home, is both fraught with symbolic meaning and genuinely represents a locus for financial and social capital,

It might be argued that requiring public recording does not protect the borrower any more than simply requiring that evidence of the chain of assignments be presented in some form. But the requirement that mortgage assignments be recorded helps combat fraud against the borrower because recording false documents generally carries penalties[174] and creating a public record makes the chain of title available for public scrutiny. The Article 9 procedure does not provide equivalent protection to borrowers. Recording a single assignment, as the Article 9 procedure mandates, does not supply the complete chain of title and increases the risk of fraudulent claims.

*4. Disputes in which the foreclosure conflict is relevant*

Article 9 is potentially relevant to foreclosure litigation in several respects. As discussed, Article 9 may help foreclosing parties establish standing[175] and, potentially, overcome statutes that on their face seem to require a complete chain of recorded mortgage assignments as a prerequisite to foreclosure. Moreover, when transacting parties comply with Article 9's requirements and describe the transfer of the note in a security agreement, doing so seems to provide an argument that the parties have satisfied the Statute of Frauds.[176]

individual identity, and community belonging," while also expressing concern that emphasizing mortgage formalities may distract from substantive responses to the foreclosure crisis).

174. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-420 (2007) (naming penalties that range from a minimum fine of $5,000 to liability for damages to charges of a class one misdemeanor); OHIO REV. CODE ANN. § 2921.13(13) (LexisNexis 2003) (naming penalties such as a class one misdemeanor and a felony in the fifth degree).

175. This Article distinguishes the case where a statute affirmatively requires a chain of recorded assignments from the case where a borrower argues that the foreclosing party lacks standing to foreclose when the foreclosing party cannot produce such a chain, even when the foreclosing party can show that it has been assigned the note. *See, e.g.*, *In re* Mann, 907 F.2d 923, 926–27 (9th Cir. 1990) (noting that in a foreclosure situation, the filing of bankruptcy will trigger a stay, which would then have to be lifted in order for the foreclosure to proceed); *In re* Alcide, 450 B.R. 526, 536–37 (Bankr. E.D. Pa. 2011) (determining whether an entity is a "party of interest" based on whether it is the mortgage "holder" and thereby treating holder status as equivalent to ownership). The argument that a foreclosing party must affirmatively demonstrate an assignment of the mortgage even if it can show that it has been assigned the note was accepted in the high-profile case of *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011), which appears to have prompted the Permanent Editorial Board's Report. Article 9's "mortgage follows the note" provisions seem to give the foreclosing party a strong argument that it should not have to prove assignment of the mortgage separately from assignment of the note. Similarly, complying with Article 9 by describing the note and mortgage in a security agreement seems to furnish a strong argument that the parties complied with state statutes of frauds.

176. *But see* Leyva v. Nat'l Default Servicing Corp., 255 P.3d 1275, 1279–80 (Nev. 2011) (requiring a separate written assignment of mortgage to comply with the statute of frauds).

Apart from the obvious potential relevance to foreclosure litigation, Article 9's foreclosure rules and their interaction with other state foreclosure law could be relevant to investor litigation. As discussed previously, securitization arrangers gave warranties that run to MBS investors.[177] These warranties sometimes included promises that securitized mortgages were enforceable.[178] To the extent that Article 9's procedure aids mortgage enforcement, it will help arrangers defend against investors' claims for breach of warranty.

## III. THE NEED FOR REFORM AND THE VALUE OF PUBLIC TITLE RECORDS

It is unclear how Article 9 of the UCC interacts with state laws governing mortgage recording. One result of the lack of clarity is that transacting parties and others have poor guidance as to their rights and responsibilities, as discussed above.[179] The legal uncertainty may be one of the reasons that private-label mortgage securitization has not rebounded in the United States.[180]

One way to clarify the law would be for states to amend their title recording and foreclosure statutes to cede primacy to Article 9, embracing a regime based on identification of promissory notes in private contracts rather than public recording or filing. When the UCC was first being considered, it was assumed that laws inconsistent with or displaced by the UCC would have to be repealed affirmatively.[181] As a practical matter, it seems unlikely that widespread amendments of other statutes to conform to the UCC will

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177. *See supra* note 128 and accompanying text.

178. *See, e.g.*, Goldman and Aames Agreement, *supra* note 128, § 9.03; *see also id.* § 9.02(j) ("The Mortgage is a valid, subsisting, enforceable and perfected . . . lien . . . on the Mortgaged Property."); *id.* § 9.02(u) ("Upon default by a Mortgagor on a Mortgage Loan and foreclosure on, or trustee's sales of, the Mortgaged Property pursuant to the proper procedures, the holder of the Mortgage Loan will be able to deliver good and merchantable title to the Mortgaged Property.").

179. *See* discussion *supra* Part II.

180. *See, e.g.*, Steven L. Schwarcz, *Shadow Banking, Financial Markets, and the Real Estate Sector*, 32 REV. BANKING & FIN. L. 179, 188, 190 (2012) (characterizing the future of the private residential mortgage securitization market as "hard to predict" and "uncertain"). Another potential obstacle to the revival of private-label securitization is uncertainty around credit-rating agency reform. *See* Yesha Yadav, *The Problematic Case of Clearinghouses in Complex Markets*, 101 GEO. L.J. 387, 399–400 (2013) (arguing that reduced originator incentives to monitor quality of securitized loans leads to increased reliance on rating agencies).

181. *See, e.g.*, STATE OF N.Y. LAW REVISION COMM'N, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 77–78 (1956) ("Enactment of the Uniform Commercial Code as part of the law of New York will obviously require the repeal of many existing laws. . . . [P]reparation of such a repealer section demands a survey of all the statute law of the state . . . in order that all inconsistent provisions may be discovered and appropriately handled."). This discussion appears under the heading, "Repeals and Amendments That Would Be Required in Connection With Enactment of the Code." *Id.* at 77.

happen in the near future, as the trend in state legislation since the beginning of the foreclosure crisis has been toward more emphasis on recording, not less.[182]

However, this Article questions whether Article 9's private regime is a good idea to begin with.[183] To the extent the Article 9 rules obviate mortgage assignment recording,[184] they save the transacting parties time and money, but they do so at the expense of public records of mortgage ownership. As discussed, mortgage ownership records can benefit the borrower who wants to know who owns the borrower's mortgage when negotiating a loan modification or contesting a foreclosure.[185] Mortgage ownership records also can benefit parties in the mortgage business. As many scholars have pointed out, authoritative systems for verifying property ownership can improve efficiency for transacting and potentially transacting parties.[186]

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182. *See, e.g.*, CAL. CIV. CODE § 2923.55(b)(1)(B)(iii) (West Supp. 2013) (requiring servicers to advise borrowers of their right to request "a copy of any assignment, if applicable, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose"). Nevada's recording act, which was amended in 2011, provides:

> Any assignment of a mortgage of real property . . . must be recorded in the office of the recorder of the county in which the property is located . . . . If the beneficial interest under a deed of trust has been assigned, the trustee under the deed of trust may not exercise the power of sale . . . unless and until the assignment is recorded . . . .

NEV. REV. STAT. § 106.210 (2011).

183. Privatization of information has been criticized in fields other than mortgage law. For example, the privatization of litigation settlements has been criticized for its effect on the public record. *See, e.g.*, Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 6, 8 (2004) (positing that private settlements erode norms created by public laws).

184. *See* Philip H. Ebling & Steven O. Weise, *What a Dirt Lawyer Needs to Know About New Article 9 of the UCC*, 37 REAL PROP. PROB. & TR. J. 191, 213 (2002) ("Neither filing nor possession is necessary or effective to perfect the security interest."); McDonnell & Smith, *supra* note 90, § 16.09 ("Revised Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights in the mortgage.").

185. *See* Stubbs v. Bank of Am., 844 F. Supp. 2d 1267, 1270 (N.D. Ga. 2012) (noting that the purpose of the Georgia's requirement of recorded assignment as a prerequisite to foreclosure is to increase transparency and clarity in order "to avert any avoidable foreclosures . . . and to protect the integrity of Georgia's real property records"); Brescia, *supra* note 97, at 21–22 (describing recording statutes as an "important mechanism for protecting the rightful claims of lenders, borrowers, and third-parties"); White, *supra* note 32, at 494 ("In moving away from the old paper endorsement and delivery of note plus recorded mortgage assignment system, there are important consumer protection interests at stake."). Looking beyond the United States, it appears that Chinese law requires that a foreclosing party be the registered owner of the mortgage. *See* Patrick A. Randolph, Jr. & Lou Jianbo, *Chinese Real Estate Mortgage Law*, 8 PAC. RIM L. & POL'Y J. 515, 546 (1999) (describing the Chinese mortgage registration system and rule that a mortgage assignee must change mortgage registration to be confident of its ability to enforce a mortgage).

186. *See, e.g.*, Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 303–04 (1984) (arguing that registration-based proof-of-ownership systems are superior to possession-based systems for

But we emphasize that apart from the benefit to parties directly involved in mortgage transactions (borrowers and mortgage buyers and sellers), there is a more general public interest in public records.[187] This public interest should be taken into account in deciding what incentives should exist for public mortgage recording, and it is not clear that the public interest has been given proper weight in the past.[188]

Such a public interest seems implicit in established views of the recording system. Courts have recognized a public interest in encouraging recording,[189] and commentators[190] and courts[191] have

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valuable, nonfungible, immobile property that does not need to be transferred frequently and for which divided ownership is important); Douglas Baird & Thomas Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 187 (1983) (asserting that the argument that transaction parties "should be able to allocate ownership rights between themselves as they please . . . loses force when at stake are the rights of a third party who asserts a competing claim to the property"). *But see* Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209, 211 (1989) (arguing that a contractual-allocation system—such as that of Article 9—is equally effective and less expensive than a filing requirement). Schwartz's argument is based on the idea that a borrower (analogous to a mortgage seller) can credibly disclose the absence of debt (analogous to the absence of a prior sale of the mortgage) using SEC filings and tax returns. *See id.* at 220–21. This argument does not apply in any clear way to the mortgage market, however, where SEC filings and tax returns do not disclose the sale *vel non* of individual mortgage loans.

187. This interest apparently has not always been benign. For example, Plymouth Colony apparently used title records "to keep out undesirable immigrants" in the 1600s. Joseph A. Beale, Jr., *The Origin of the System of Recording Deeds in America*, 19 GREEN BAG 335, 335 (1907).

188. The same is true for drawbacks of public recording other than the immediate costs to transacting parties, such as the privacy issues discussed below. *See infra* notes 205–208 and accompanying text.

189. *See, e.g.*, Belisle v. Plunkett, 877 F.2d 512, 515 (7th Cir. 1989) (finding against defrauded investors in real property because they failed to record their interest); Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., Inc., 301 S.W.3d 1, 5 (Ark. 2009) (holding that the foreclosing party is "entitled to rely upon" the record and that permitting MERS to participate in a foreclosure action without being directed to do so by a recorded lender "would wreak havoc on notice"); Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 169 (Kan. 2009) (criticizing MERS for "creat[ing] a system in which the public has no notice of who holds the obligation on a mortgage"); Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 504 (Minn. 2009) (Page, J., dissenting) (explaining that the purpose of the state statute requiring recording of mortgage assignments "was to make the contents of the mortgage, and, so far as the statute goes, to make the title to the mortgage, matters of record" because of the importance "to subsequent incumbrancers, creditors, and contemplating purchasers, that some permanent and accessible evidence of the existence and contents of the mortgage, and of the title to the same, should be provided." (quoting Backus v. Burke, 51 N.W.2d 284, 286 (Minn. 1892))); MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 86, 88 (N.Y. 2006) (Kaye, J., dissenting in part) (questioning the majority's decision to require county clerks to record documents listing MERS as nominee mortgagee because "the MERS system will render the public record useless").

190. *See, e.g.*, SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 225 (5th ed. 2011) (listing the first function of a recording system as "provid[ing] a public place where interested parties can search for documents affecting land titles"); 1 JOYCE PALOMAR, PATTON & PALOMAR ON LAND TITLES § 4, at

long agreed that one major function of recording statutes is to create a public record of land ownership that makes information available to anyone who needs it.

Contemporary commentary likewise recognizes a public interest in public records. One recent article argues that "all ... who wish to rely on the [mortgage] as an element of their transactions will need to determine exactly what is owned and whether the one claiming to own it truly owns it."[192]

We concur, and would expand the focus beyond "transactions," at least as narrowly defined. Public real estate records, including mortgage records, are used not only by transactors and potential transactors in land but also by reporters,[193] academics,[194] political opposition researchers,[195] judgment creditors,[196] real-estate data-

14–15 (3d ed. 2003) (explaining that, in addition to the original purpose of "securing prompt recordation of all conveyances" and the equitable purpose of protecting subsequent purchasers, recording acts also serve the constructive purpose "of preserving an accessible history of each title, so that anyone needing the information may reliably ascertain in whom the title is vested and any encumbrances against it," and therefore "provide a system of semi-public records that have the same dignity and evidentiary value that attaches to public records"); Rufford G. Patton, *Priorities, Recording, Registration, in* 4 AMERICAN LAW OF PROPERTY § 17.5, at 535 (1952) ("The very earliest recording acts show a desire on the part of the enacting bodies to secure a permanent record of landholding, and to prevent fraudulent claims to lands by concealment of transfers."); Francis S. Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 139 (1944) ("[T]he primary object of the recording system was to rid conveyancing of livery of seisin but retain its publicital advantages . . . ."); John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91, 101 (2002) (asserting that recording statutes "encourage[e] filing, promote the notoriety of land ownership and preserve the muniments, or evidences, of title").

191. *See, e.g.*, Union Planters Bank, N.A. v. Hutson, 210 S.W.3d 163, 168 (Ky. Ct. App. 2006) (finding that a statute requiring filing timely mortgage release was intended to advance accurate real estate records); Prouty v. Marshall, 74 A. 550, 571 (Pa. 1909) ("The object of the recording acts is to give notice to the world of that which is spread upon the record."); Corpus v. Arriaga, 294 S.W.3d 629, 635 (Tex. App. 2009) ("The purpose of recording statutes in Texas is to give notice to all persons of the existence of the instrument.").

192. *See* Donald J. Kochan, *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267, 267 (2013). Kochan's article is largely aimed at demonstrating that free-market advocates should recognize a role for government title systems. *See generally id.* at 304–11. Kochan's analysis is quite useful, especially for those with libertarian sympathies, but his focus is different from ours: he does not discuss Article 9 in detail and explicitly eschews advocating any particular reform of title recording law or systems. *See id.* at 311.

193. *See, e.g.*, Brooke Barnett, Comment, *Use of Public Record Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 564 (2001) (noting that searches for public "[p]roperty, financial, or business information" are among the most common forms of database research performed by television stations); Jacob Gershman, *Senator's Property Records Highlight Gap*, WALL ST. J., Aug. 6, 2012, at A15.

194. *See, e.g.*, ALAN MACFARLANE, RECONSTRUCTING HISTORICAL COMMUNITIES 7–8 (1977) (recounting social anthropologists' use of land records to study economic and social change in India and Sri Lanka).

195. *See* DEMOCRATIC LEGISLATIVE CAMPAIGN COMM., 2005 DLCC GUIDE TO

centered businesses such as Trulia and Zillow,[197] and, of course, title insurers.[198] Government entities including housing code enforcers[199] and tax authorities make use of title records in discharging their functions.[200]

Most of these uses exploit the fact that public information about mortgage ownership creates an information commons. As the intellectual-property literature demonstrates, such commons have value even if their use is not entirely foreseeable when they are created.[201] Accordingly, patent law recognizes the value of information dissemination; frequently this is described as a bargain in

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COURTHOUSE RESEARCH 6 (2005) (opposition research manual with checklist including title records).

196. *See, e.g.*, ALAN M. AHART, THE RUTTER GROUP CALIFORNIA PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS ch. 6B-1, 6B-3 (2012) (concerning use of title records for judgment collection and creation of lien by filing abstract of judgment).

197. *See Trulia Estimates*, TRULIA, http://www.trulia.com/trulia_estimates (last visited Aug. 18, 2013) (describing Trulia's use of public real estate data in arriving at house value estimates); *What Is a Zestimate?*, ZILLOW, http://www.zillow.com/wikipages/what-is-a-zestimate (last visited Aug. 18, 2013) (describing Zillow's use of public real estate data in arriving at house value estimates).

198. *See* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1366 (2010) (asserting that private insurers' title plants "cannot function without the law creating legal incentives to deposit records into the central government maintained system"). Title insurers are especially important, as commentators have been arguing for at least forty years that title companies have more or less superseded the public record system. *See, e.g.*, Charles J. Meyers, Book Review, 116 U. PA. L. REV. 742, 742–43 (1968) (reviewing JAN KRASNOWIECKI, CASES AND MATERIALS ON OWNERSHIP AND DEVELOPMENT OF LAND (1965)) ("Today the plain fact is that in most urban centers, and in large parts of the outlands as well, title work is done by title insurance companies. . . . About the only purpose I can see in a detailed examination of the recording acts and the operation of the state-maintained registry of deeds is as an object lesson to the profession . . . ."). Meyers's "object lesson" was that the public system's "onerous" search rules, "creaky" grantor-grantee index, and failure to better protect users against mistakes led the title insurers to "come along with a better mousetrap." *Id.* at 743. More recently, authors have emphasized the promise of title insurance for developing countries. *See, e.g.*, Priya S. Gupta, *Ending Finders, Keepers: The Use of Title Insurance To Alleviate Uncertainty in Land Holdings in India*, 17 U.C. DAVIS J. INT'L L. & POL'Y. 63, 108 (2010) ("The Indian case has provided, I hope, a convincing account of the role that title insurance could play in achieving certainty and predictability in land holdings."). However, title insurance in the United States is at least arguably built upon the public system of land records. *See* Peterson, *supra*, at 1366. Perhaps title insurance could function just as well if there were no public records, but this claim is merely speculative.

199. *See* Kochan, *supra* note 192, at 295 (citing Kermit J. Lind, *Collateral Matters: Housing Code Compliance in the Mortgage Crisis*, 32 N. ILL. U. L. REV. 445, 448–49 (2012)).

200. *Id.* (citing Hernando de Soto, *The Destruction of Economic Facts*, BUSINESSWEEK, May 2, 2011, at 60, 62).

201. *See* Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143 (2004) (stating that because information cannot be used up, "rather than a tragedy, an information commons is a 'comedy' in which everyone benefits").

which the government exchanges a limited monopoly for disclosure of the patent.[202] The Supreme Court's recent decision in *Golan v. Holder*[203] recognizes the value of information dissemination in copyright law.[204] It seems likely that the value of making title information public is greater, perhaps much greater, than the benefits that can be identified today.

To be sure, public records have costs. Legitimate privacy interests must be accommodated.[205] For example, if the market moves to a single mortgage-and-note instrument, as commentators have proposed,[206] policymakers will have to grapple with whether the information in the note should be included in the lien registry. Moreover, public title information can be used to devise frauds.[207] A narrow focus on costs and benefits to the transacting parties shortchanges these matters of public concern, as well as the public interest in public records.[208]

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202. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 216 (2003) ("[O]ur references to a *quid pro quo* typically appear in the patent context."); Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 63 (1998) ("[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time."); Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1316–17 (2004) (criticizing the "common" understanding of a patent as bargain).

203. 132 S. Ct. 873 (2012).

204. See *id.* at 888–89 (holding that Congress's power under the Copyright Clause encompasses not only efforts to promote creation of new works, but also efforts to promote dissemination of existing ideas); Anupam Chander, Madhavi Sunder & Uyen Le, International Decisions, Golan v. Holder, *132 S. Ct. (2012)*, 106 AM. J. INT'L L. 637, 641–42 (2012) (discussing the Supreme Court's recognition of the importance of dissemination, as opposed to simply creation, as a way of promoting learning).

205. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1050–51 (2000) (arguing that noncontractual government-imposed information privacy rules are "not easily defensible under existing free speech law" and could create a slippery slope leading to other speech restrictions); *see also* Fred H. Cate, *The Commodification of Information and the Control of Expression*, AMICUS CURIAE, Sept.–Oct. 2002, at 3, 7 (calling for "balancing laws that restrict information flows with the legitimate need for, and legal protection of, those flows" in a discussion of consumer privacy regulation).

206. *See* White, *supra* note 32, at 498–99 (arguing that a single mortgage-and-note instrument better facilitates negotiating and transfer of real-estate).

207. BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 137 (2012) (giving examples of potential use of public title records to perpetrate frauds, including "the proverbial pursuit of wealthy heiresses by dowry-seeking bachelors," the sale of vacant houses after learning owners' identities from title records, and identity theft).

208. Issues such as privacy and the potential use of public records to facilitate fraud are important and should be part of a comprehensive review of the benefits of public mortgage recording. However, we focus for the remainder of this Article on the cost and inconvenience to the transacting parties as the downside of mortgage recording. We do so for ease of exposition and to maintain the focus of the

It could be that the concerns raised here do not apply to recording of mortgages, or more specifically, of mortgage assignments. After all, when mortgage assignments are not recorded, the existence of a mortgage on the property may be on the public record even if there is no record of the current owner of the mortgage or associated note.[209] However, there seems to be at least some demand for mortgage ownership information among the general LEXIS-using public. The information service's "Public Records" function permits users to search property records for the identity of the original lender on a given mortgage. If reliable, comprehensive information about subsequent owners were available, perhaps LEXIS would make that information available as well.[210]

A related objection is that even if the true owner of the mortgage were recorded, securitized mortgages are held in trust, so the public record would disclose only something akin to: "LaSalle Bank, N.A., as trustee for 2006-HE6 GSAMP Trust." But even this meager information may be of some value to borrowers and others, as both consumer law professors[211] and practitioners[212] have pointed out, because it discloses one of the parties with authority to take action with respect to the mortgage and provides a reference point for further investigation. Moreover. looking at the issue from a broader perspective, perhaps the law should require more public disclosures about securitizations in the public records; the identity of the servicer is one obvious candidate for disclosure.[213] There may well be good reasons not to disclose more than just the name of the securitization

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discussion, but also because cost and inconvenience seem to be the main objections at present to using the public mortgage recording system.

209. *Cf.* Whitman, *Negotiability*, *supra* note 92, at 769 (2010) (suggesting that no record-keeping system for note ownership is needed).

210. LEXIS apparently has found it worthwhile to pay a data vendor for the original lender information, which apparently is ultimately derived from public records. One might argue that demand for this function indicates only demand for information about who can enforce the mortgage, rather than about who owns it. But securitizations are intended to be structured so that the person who can enforce is the servicer, who may or may not be the original lender. *See* Levitin & Twomey, *supra* note 29, at 23 ("Servicers also are responsible for handling defaulted loans, including prosecuting foreclosures and attempting to mitigate investors' losses.").

211. *See, e.g.*, White, *supra* note 32, at 496 ("[T]here is a genuine consumer borrower interest in transparency of mortgage assignments so that the identity of the real counterparty is known.").

212. *See, e.g.*, Adam Leitman Bailey & Dov Treiman, *Moving Beyond the Mistakes of MERS to a Secure and Profitable National Title System*, PROB. & PROP. MAG., July–Aug. 2012, at 40, 45 (arguing that recording should use modern technology to make searching easy, instead of so difficult that people have to hire firms to do title research).

213. *See generally* White, *supra* note 32, at 497 (suggesting that servicer relationships should have to be disclosed in foreclosure litigation).

trustee in the public real-property records; our point is that the law should reflect a reasoned consideration of the tradeoffs involved, including the value of public records.

Some have argued that it is incorrect to blame developments of the 1990s such as the development of MERS and the revisions of Article 9 for the degradation of public mortgage records because the damage was done earlier. The argument is that participants in the mortgage securitization industry decided to stop recording mortgage assignments in the 1980s, if not before.[214] But the industry did not stop recording mortgage assignments entirely in the 1980s: mortgage assignments apparently were still commonly recorded as of 1999.[215] The public system had (and still has) information about mortgage ownership that we contend may be worth preserving, especially given that the social value of public records probably has increased rather than decreased with the continued advance of information technology. More fundamentally, the important question is not really whether the Article 9 revisions or MERS in fact caused any particular decrease in the information content of public mortgage records, but what incentives should or should not exist for maintaining public records of mortgage ownership.

Certainly, it is not crystal clear at this stage exactly what records should be public. The costs and benefits of public title records, in general and as applied to real property mortgages in particular, are a legitimate subject for discussion and debate. But the Article 9 revisions were drafted in a process that may not have been fully inclusive,[216] and the revisions apparently were not seriously debated in the state legislatures at adoption.[217] Subsequent events have shown

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214. *See* Dale A. Whitman, *A Proposal for a National Mortgage Registry: MERS Done Right*, 78 MO. L. REV. (forthcoming winter 2013) [hereinafter Whitman, *MERS Done Right*] (manuscript at 22–25). Interestingly, the 1986 Secondary Mortgage Market Guide cited as evidence of the industry's abandonment of mortgage recording states that recordation is not necessary "unless it is required by law to perfect the buyer's ownership interest"—precisely the issue addressed in this Article. *Id.* (manuscript at 23) (quoting CHARLES L. EDSON & BARRY G. JACOBS, SECONDARY MORTGAGE MARKET GUIDE § 9.03[1][C] (1986)).

215. See Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 241–42 (1999) [hereinafter Whitman, *Digital Recording*] (asserting that mortgage assignments are among the "twenty or thirty form documents that account for the vast bulk of real estate recordings").

216. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 631–32 (1998) (arguing that, among other problems, the uniform law drafting process "unduly constrict[s]" a number of represented groups).

217. *See* McDonnell, *Article 9 Greedy?*, *supra* note 10, at 241 (asserting that "[t]here appears to be no organized opposition" to adoption of Article 9 revisions).

that abandoning incentives for public title records of mortgage ownership may have been a mistake.

Policymakers should revisit the balance between party convenience and public records. They should do so conscious not only of the cost and delay that the traditional title recording system apparently imposed, but also of the value of public records of mortgage ownership. Specifically, policymakers should consider adopting a unified solution for land title law that offers both the efficiency and security that transaction participants need and the degree of transparency about real-property interests that the public interest requires.

## IV. MOVING TOWARD PUBLIC MORTGAGE OWNERSHIP RECORDS

Mortgage recording traditionally has been cumbersome and relatively costly, but it produces records that are useful to the transacting parties, to other parties who may transact mortgages, and to the public at large. The Article 9 regime, which identifies the promissory note in a private security agreement that does not have to be filed publicly, is just the opposite—it is inexpensive and efficient for the parties to the transaction, but it does not produce the public benefit of public records. Digital recording, which has "revolutionized" Article 9 filing for interests other than real-property mortgages,[218] seems to offer the best of both: public records generated efficiently and cheaply.

Commentators have noted that digitization undermines some chain-of-title doctrines,[219] and digitization also undermines the strongest justifications for Article 9's rules on mortgage transfer. If private authentication is no longer much cheaper than creating public records, there is no need to subordinate public records to private ones in the name of efficiency.[220] Policymakers should

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218. 4 WHITE & SUMMERS, *supra* note 10, § 31-10, at 185.

219. *See, e.g.*, Emily Bayer-Pacht, Note, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 339–40 (2010) (asserting that computerization undermines the rationale for four chain of title doctrines).

220. Indeed, to the extent that digitization makes recording cheap and easy, recording systems become more attractive for all types of property, not just mortgages. Mortgages present a strong case for recording because of the historical public interest in land title records, but perhaps recording should be considered for other types of property claims that are currently governed by a private authentication regime. For example, registration of trademarks and copyrights is optional, and legal incentives for copyright registration have generally decreased over time. *See* Mose Bracey, Note, *Searching for Substance in the Midst of Formality: Copyright Registration as a Condition Precedent to the Exercise of Subject-Matter Jurisdiction by Federal Courts over Copyright Infringement Claims*, 14 J. INTELL. PROP. L. 111, 123–33 (2006)

consider replacing the Article 9 regime for mortgages with a recording regime in tandem with the expansion of digital recording.[221]

### A. *Legal Infrastructure for Mortgage Ownership Recording*

The basic legal infrastructure for digital recording is already in place in many jurisdictions. Although it has not always been clear that state laws from the pre-digital era permit digital recording,[222] the Uniform Law Commission proposed a uniform act promoting digital real-property recording—the Uniform Real Property Electronic Recording Act[223] (URPERA)—in 2005. The majority of states have adopted a version of the model statute.[224] URPERA provides that electronic documents with electronic signatures can be recorded[225] and that an electronic signature satisfies notarization and related requirements.[226]

What is currently missing is a clear incentive for parties to maintain current records of mortgage loan ownership. Accordingly, we suggest that policymakers consider replacing the muddled and confusing rules on mortgage loan ownership discussed above with a regime that clearly requires that interests in mortgage loans be recorded to be protected. The most straightforward approach for creating such a regime would be a nationwide law: either a uniform state act or a federal statute governing mortgage recording on a national or a local registry. Certain changes to the UCC would need

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(tracing the evolution of registration and its generally declining importance). Cheaper registration could suggest a reason for reversing the trend away from formality in this area if there is value to the registry itself.

221. We are by no means the first to advocate digital recording. *See, e.g.*, Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 W. NEW. ENG. L. REV. 245–46 (2002) [hereinafter Whitman, *Are We There Yet?*] (proposing Uniform Electronic Recording Act to facilitate electronic recording); Whitman, *Digital Recording*, *supra* note 215, at 227–28 (advocating legislation to promote digitization of land title records in order to save costs).

222. *See* Whitman, *Are We There Yet?*, *supra* note 221, at 246 (suggesting that states should adopt digital recording acts that entail conveyancing via electronic documents, creating a public records system that accepts those electronic documents, and maintaining an electronic records database).

223. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT § 3(a)–(b) (2005) [hereinafter URPERA], *available at* http://www.uniformlaws.org/shared/docs/real%20property%20electronic%20recording/urpera_final_apr05.pdf.

224. *See Acts: Real Property Electronic Recording Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act (last visited Aug. 19, 2013) (showing that twenty-six states, as well as the Virgin Islands and the District of Columbia, adopted the URPERA and that two states currently have similar pending legislation).

225. URPERA §§ 3(a)–(b), 4(b)(2).

226. *Id.* § 3(c).

to accompany the new statute, such as repealing Section 9-308(e) as applied to real-property mortgages.[227] We discuss below whether the registry should be national or local.

Under our proposal, a party's ownership interest in a mortgage loan would be vulnerable to bona fide purchasers and lien creditors, and therefore bankruptcy trustees,[228] until such time as the party recorded its interest in whatever public registry is adopted. Recording would trigger other state laws based on a party's status as mortgagee of record. An agent could record in the name of a principal, but the parties would have to disclose the nature of the relationship.[229] The statute could take the form of a "pure race," "race-notice," or "pure notice" rule.

It might be argued that making an unrecorded interest in a mortgage vulnerable is too severe a sanction. If putting ownership of mortgage loans at risk is deemed too harsh a penalty for failure to record, the statute could make recording mandatory and impose sanctions for failing to do so. The key point is that there would be clear incentives to create public records of mortgage loan ownership. The law could go further and make recording on the registry a prerequisite to being able to enforce the mortgage, as Alan White has suggested.[230] This extension would increase the incentive to record, but it is not strictly necessary to our proposal.

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227. U.C.C. § 9-203(g) (2011) provides that a note assignment gives an interest in the mortgage that is good as between the parties. Section 9-308(e) provides that the interest in the mortgage is perfected automatically with no further action. The latter provision is more clearly in potential conflict with real-estate recording statutes. It might also be necessary to clarify or change how the UCC's rules for promissory notes apply to notes that are secured by real-property mortgages. Assuming the recording rules should apply to both note and mortgage because they should be governed by a unified regime, additional changes to UCC provisions governing perfection of interests in promissory notes would be needed to clarify that parties must record interests in mortgage notes. For example, U.C.C. § 9-309(4), which provides for automatic perfection of interests in promissory notes, would be changed. Likewise, U.C.C. § 9-313(a), which provides for perfection of interests in negotiable notes by possession, might have to be amended for mortgage notes. This latter change does not seem like a great loss to the industry, as it does not appear to be a standard practice to take possession of mortgage notes today. *See* sources cited *supra* note 92.

228. A bankruptcy trustee succeeds to the status of bona fide purchaser of real property from the debtor, 11 U.S.C. § 544(a)(3) (2006), and to the status of a lien creditor of the debtor. *Id.* § 544(a)(1). It is not absolutely clear what competing claimants should prevail over unrecorded interests in mortgages; our proposal is a starting point. A rule that makes interests in mortgage loans vulnerable to the transferor's bankruptcy trustee seems likely to induce recording.

229. Alan White has made a similar proposal. *See* White, *supra* note 32, at 497 (proposing that requiring full disclosure of all principal-agent relationships would increase electronic mortgage and note system reliability while providing full consumer protection).

230. *See id.* at 499.

As previously discussed, a regime providing incentives for mortgage recording would not be an innovation; most states already have laws on their books that do exactly that. The issue is simply removing the confusing and potentially conflicting Article 9 provisions so that industry participants have clear guidance about what the law requires. The new system and its associated legal framework would eliminate the confusing interaction between Article 9 and the real-property laws, and would replace both with a unified legal regime.

### B. *Institutional Infrastructure for Mortgage Ownership Recording*

In order for a recording-based legal regime to make sense in the era of securitization, there must be a practical way to record quickly and at low cost. Fortunately, public recording systems are already moving in this direction. Commentators have noted a "consistent trend"[231] toward computerized systems that offer non-chronological search options, often including searches on property location rather than the standard grantor and grantee search option.[232] As early as 2002, Salt Lake County, Utah; Orange County, California; Maricopa County, Arizona; and many other local jurisdictions stored documents in digital form and permitted online searches, although they did not yet permit recording of original digital documents.[233] Although not all jurisdictions have adopted any form of digital recording, the technology continues to spread.[234] In a number of jurisdictions, some digitally recorded documents are scanned paper documents, but other recorded documents are created digitally without any hard copies.[235] Practitioners have noted and applauded the trend toward digital property records, calling for leadership at the state level to develop modern digitized title systems and pointing out the potential benefits to borrowers, lenders, and title insurers.[236]

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231. Bayer-Pacht, *supra* note 219, at 357 n.118.
232. *Id.* at 358–60.
233. Whitman, *Are We There Yet?*, *supra* note 221, at 247. New York County's Automated City Register Information System (ACRIS) permits online index searches and viewing digital copies of deeds. *See* Bailey & Treiman, *supra* note 212, at 42, 46; Bayer-Pacht, *supra* note 219, at 359 n.128. San Bernardino County, California permitted electronic recording as early as 1992. *See* E-mail from Benjamin Weber, Senior Policy Analyst, City & Cnty. of S.F., Office of the Assessor-Recorder, to John Patrick Hunt, Assistant Professor of Law, Univ. of Cal., Davis School of Law (Aug. 11, 2012, 3:55 PM) (on file with authors).
234. San Francisco County implemented electronic recording in April 2013. Press Release, San Francisco Office of the Assessor-Recorder, Assessor-Recorder Chu Announces Beginning of E-Recording (April 15, 2013), *available at* http://www.sfassessor.org/Modules/ShowDocument.aspx?documentID=1287.
235. *Id.*
236. *See* Bailey & Treiman, *supra* note 212, at 45–46.

An authoritative mortgage registry could take a national or a local form. We discuss the benefits and drawbacks of each structure in turn.

### 1. *Alternative one: Authoritative national lien registry*

#### a. *Description of the authoritative national lien registry and its legal infrastructure*

Policymakers should consider a national, authoritative electronic mortgage lien registry. Real-property title scholars,[237] consumer law scholars,[238] comparative institutional economists,[239] and the Governors of the Federal Reserve System[240] all have called for some kind of national, authoritative registry of mortgage liens.[241] In previous scholarship, the authors of this Article have compared such a system favorably to alternatives.[242] This Article provides a preliminary description of such a system and of some of the issues involved in implementing it.

By "authoritative," we mean a registry that would supplant both the Article 9 rules for mortgage ownership perfection and the state real-property law of mortgage recording, as described above.[243] By "national," we mean that there should be a single means for transacting parties to record and assign mortgages on property located anywhere in the United States. A national solution avoids the inefficiency of differing and potentially conflicting state and local rules and practices. Although it may be possible to create a system

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237. *See, e.g.*, Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 25 (2011) (proposing a gradual shift to a federal system through private opt-in to a national registry); Dale A. Whitman, *A National Mortgage Registry: Why We Need It, and How To Do It*, 45 UCC L.J. 1, 16–32 (2013); Whitman, *MERS Done Right*, *supra* note 214 (manuscript at 2–3).

238. *See, e.g.*, White, *supra* note 32, at 497–99 (proposing mechanisms to create such a system).

239. *See* ARRUÑADA, *supra* note 207, at 113–14.

240. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS 24–25 (2012), *available at* http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf.

241. A related proposal, focusing on the note rather than the mortgage, calls for a national registry of electronic notes. *See* James M. Davis, *Paper Weight: Problems in the Documentation and Enforcement of Transferred Mortgage Loans, and a Proposal for an Electronic Solution*, 87 AM. BANKR. L.J. (forthcoming 2013) (manuscript at 4–5). Davis's proposal generally seems compatible with ours, as he advocates creating a public record of mortgage loan ownership. *Id.*

242. *See* Hunt, Stanton & Wallace, *supra* note 28, at 61–62.

243. *See supra* Part II.A.1–2.

that is uniform for users while retaining local control, a national system is the most straightforward way to achieve uniformity.[244]

Our suggestion is not simply to legitimize MERS, as some have proposed.[245] MERS is not public. Instead, it is owned by the mortgage industry, including the government-sponsored housing entities, and thus may tend to favor inexpensive recording over publicity of records. MERS's behavior to date suggests that it is not oriented toward maintaining high-quality, publicly available records. Although representatives of MERS claim that a borrower can find out who is registered on the system as the mortgage holder, they do not claim that this information is public.[246] Moreover, MERS does not seem to provide a strong incentive to keep transfer records current. Although failing to update records to reflect transfers is currently a violation of MERS rules,[247] the authors are not aware that MERS has enforced these rules.[248] There does not seem to be any other

244. *Cf* Marsh, *supra* note 237, at 25 (discussing possible local opposition to a national system and a proposal for gradual transition). Marsh has suggested a uniform act that would permit parcels of real property to move permanently out of the local title recording system into a new federal system. *See id.* However, Marsh does not address the relationship between title recording and the UCC. The interaction between the new federal recording system and the UCC remains unclear under her proposal. Moreover, we are unsure that it is advisable to replace local land records for all purposes, rather than just for mortgages. It is possible to imagine separate, parallel systems for mortgage and other claims. Although such a setup is probably inefficient, others have embraced a separate registry for real estate liens without expressly calling for abandonment of the traditional county-based system. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 240, at 24–25; White, *supra* note 32, at 498–99. We also are unsure that the migration to a new system should happen on a parcel-by-parcel, as opposed to county-by-county, state-by-state, or national basis. Whatever the scope of the national registry, migration on the basis of larger geographic units seems more efficient. Although a transition period undoubtedly would be needed, a parcel-by-parcel approach does lengthen the period that two systems are operating for any given geographic region. Relatedly, we do not necessarily embrace the individual-choice aspect of Marsh's proposal. Owner's choice is inconsistent with a more efficient region-by-region migration, and, as we have discussed, many of the crucial issues with title records are public rather than private.

245. *See, e.g.*, Hockett, *supra* note 166, at 406 (suggesting "reform of the current mortgage and note system, ideally in the form of a readily accessible and editable electronic registry system, e.g., a fully generalized MERS system" as one potential response to crisis); Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 610 (2011) ("MERS itself could be strengthened and regulated to form the foundation of a new, alternative national recording system.").

246. *See* Declaration of William C. Hultman ¶ 11, *In re* Agard, 444 B.R. 231 (Bankr. E.D.N.Y. 2011) (No. 10-77338-REG) (asserting that a homeowner can use a toll-free number or website to find out the servicer of its mortgage loan).

247. MERSCORP HOLDINGS, INC., *supra* note 133, r. 2, § 3(c)–(e).

248. Indeed, as of late 2009, MERS Inc.'s CEO testified that MERS does not so much "expect" that members enter transfers on the system as "operate a system that offers that capability." Deposition of R.K. Arnold at 178, Henderson v. MERSCORP, Inc., No. CV-08-900805.00, 2010 WL 8248633 (Montgomery Cty., Ala. Cir. Ct. May 6,

incentive to register assignments on the system. MERS does not appear to have been designed to run as a system in which publicity of records was an important value, and it is unclear whether regulation could improve MERS.[249] Moreover, as we have pointed out elsewhere, the corporate entities housing MERS could go bankrupt, with potentially distressing consequences.[250]

*b. Implementation issues with an authoritative national lien registry*

Although a thorough discussion of potential constitutional issues with an authoritative national lien registry lies beyond the scope of this paper, we do not perceive serious constitutional issues under current law. Article 9 recognizes the possibility of federal preemption,[251] as it must.[252] The federal government already operates filing systems governing mortgages on aircraft[253] and ships,[254] and security interests in and/or assignments of patents,[255] registered trademarks,[256] and registered copyrights,[257] all apparently

2010), 2009 WL 8631162.

249. A related point is that MERS, Inc. is a private entity. If the electronic registry were made mandatory, parties would be required to transact with a private entity in order to transfer mortgages. As the struggle over the Affordable Care Act's individual mandate indicates, forcing transactions with private entities can create political resistance. *See generally* Nat'l Fed'n. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2584–87 (2012) (evaluating a challenge brought by twenty-six state attorneys general to the Affordable Care Act individual mandate, which the Court described as a mandate that individuals "become active in commerce by purchasing a product").

250. *See* Hunt, Stanton & Wallace, *supra* note 28, at 21 (contemplating that lawsuits and investigations of MERS, Inc. could potentially lead to bankruptcy).

251. *See* U.C.C. § 9-109(c)(1) (2011) ("This article does not apply to the extent that a statute, regulation, or treaty of the United States preempts this article . . . .").

252. *See id.* § 9-109 cmt. 8 ("Article 9 defers to federal law only when and to the extent that it must—i.e., when federal law preempts it.").

253. *See* 49 U.S.C. § 44107 (2006) (providing that a security interest in an aircraft must be recorded with the Administrator of the Federal Aviation Administration).

254. *See* 46 U.S.C. § 31321(a)(1) (providing that a mortgage "that includes any part of a documented vessel" must be filed with the Secretary of the Department of Homeland Security to be valid, except as against mortgagor, mortgagor's heirs, and persons with actual notice of the mortgage). When federal ship mortgage law was overhauled effective January 1, 1989, one commentator observed, "As a practical matter, the Coast Guard will have to completely computerize all vessel documentation and mortgage information under the new law. The House Report goes into some detail about the computer system." David McI. Williams, *Recent Developments in the Law of Marine Finance: Public Law 100-710*, 36 FED. B. NEWS & J. 371, 371–72 (1989).

255. *See* 35 U.S.C. § 261 ("An assignment, grant, or conveyance [of a patent] shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage."). Some commentators and courts have concluded that the Article 9 filing system, rather than the federal system, governs security interests in patents. *See, e.g.*, 4 WHITE & SUMMERS, *supra* note 10, § 30-12, at 86–87.

256. *See* 15 U.S.C. § 1060(a)(4) ("An assignment shall be void against any subsequent purchaser for valuable consideration without notice, unless the

without constitutional problems. A federal filing system governs perfection and priority of federal tax liens.[258] Given the national scope of the mortgage market, creating and mandating the use of a federal mortgage lien registry seems squarely within Congress's power to regulate interstate commerce.[259] States or local authorities might rely on real-property recording's historically local character to try to fashion a Tenth Amendment challenge to legislation mandating use of the federal registry to protect interests in mortgages, but as two leading commentators observe, "The federalism principle that prevents the federal government from ordering state or local governments to take certain governmental actions appears to be a very limited principle,"[260] and the decisions establishing it "did not grant state and local government immunity from federal regulation of commercial activity."[261] Legislation creating the national registry need not require the states to do anything, so it does not seem to resemble the laws at issue in the two most prominent decisions upholding Tenth Amendment challenges, *New York v. United States*[262] and *Printz v. United States.*[263]

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prescribed information reporting the assignment is recorded in the United States Patent and Trademark Office within 3 months after the date of the assignment or prior to the subsequent purchase"). As with patents, some courts and commentators have reached the conclusion that the Article 9 filing system, not the federal system, governs security interests in registered trademarks. *See* 4 WHITE & SUMMERS, *supra* note 10, § 30-12, at 87.

257. *See* 17 U.S.C. § 205(d) ("As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c) .... Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer."); *see also id.* § 205(c) (providing that "[r]ecordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document" if the document reasonably identifies the work and the work is registered); *In re* Peregrine Entm't, Ltd., 116 B.R. 194, 204–06 (C.D. Cal. 1990) (finding a filing under UCC Article 9 ineffective to perfect a security interest in registered copyrights). See 4 WHITE & SUMMERS, *supra* note 10, § 30-12 at 88–89, for an argument that the *Peregrine* opinion, which created "mischief," has been undercut by the 1999 revisions to Article 9.

258. *See* 26 U.S.C. §§ 6321–6326.

259. U.S. CONST. art. I, § 8, cl. 18; *see, e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that even if an economic or commercial activity is purely intrastate, Congress may regulate the activity if there is a rational basis for believing that in aggregate the activity substantially affects interstate commerce).

260. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 4.10(d)(i), at 690 (5th ed. 2012).

261. *Id.*

262. 505 U.S. 144, 174–75 (1992) (striking down a federal statute that required states to take title of radioactive waste).

263. 521 U.S. 898, 933 (1997) (invalidating a federal statute requiring state officials to conduct firearm background checks).

We see two major potential obstacles to adopting national lien recording. First, there is a monetary cost of setting up a national title registry, including its legal infrastructure, and implementing conforming changes to state law. An analysis of these costs is beyond the scope of this Article but clearly would be a crucial step in deciding to move forward with the proposal.

The second, and probably more important, potential obstacle is political. There are three important groups of stakeholders who might either support or oppose the proposal. The first is government actors. Local recorders might resist the loss of revenue and authority that could come along with national registry.[264] The change could accompany a move of the title recording function from the local to the state[265] or even national level. Moreover, states might resist the national registry as a threat to their sovereignty and authority over land.[266] Although the existing complaints about failure to record mortgage assignments have focused on the concrete matters of fees[267] and the quality of title records,[268] rather than abstract questions of sovereignty, local resistance to the national registry seems like a very real possibility.

The second group is MERS's members, which include not just the leading federal entities operating in the mortgage market,[269] but also the major private mortgage lenders.[270] They have invested in MERS

264. Seemingly anticipating the possibility that local recorders might resist electronic recording, URPERA provides two alternatives for adopting standards for electronic recording. One provides for a commission in which recorders are a majority, and the other provides for implementation by a state agency. *See* URPERA § 5.

265. *See* Bailey & Treiman, *supra* note 212, at 46; Whitman, *Are We There Yet?*, *supra* note 221, at 269–70 (suggesting that local land recorders should have control over, or at least input into, any statewide electronic recording agency); Whitman, *Digital Recording*, *supra* note 215, at 260–61 (arguing that a state system would allow searchers to "work in the records county or group of counties" and "make it easier to hire highly competent people to manage the system").

266. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 251, 282 (1997) (asserting that to "diminish" Idaho's control over lands and waters in its territory would cause "offense to Idaho's sovereign authority and its standing in the Union").

267. *See, e.g.* Montgomery Cty., Pa. v. MERSCORP, Inc., 904 F. Supp. 2d 436, 450–51 (E.D. Pa. 2012) (denying a motion to dismiss a county recorder of deeds' lawsuit based on the failure to record mortgage assignments and finding that the recorder, by pleading lost recording fees, "pleaded a pecuniary interest" sufficient to allow the suit to go forward).

268. *See, e.g.*, Nueces Cty. v. MERSCORP Holdings, Inc., No. 2:12-cv-00131, 2013 WL 3353948, at *2, *20 (S.D. Tex. July 3, 2013) (denying motion to dismiss county recorder of deeds' lawsuit and finding that alleged lost fees and degradation of title records satisfy Article III standing requirements).

269. *See Member Search*, MERS ONLINE, https://www.mersonline.org/mers/mbr search/validatembrsearch.jsp (last visited Aug. 13, 2013) (MERS members include Fannie Mae, Freddie Mac, the FDIC, and eleven federal home loan banks).

270. *See id.* (MERS members include Bank of America, N.A., Citibank, N.A., JP

as an alternative to mortgage assignment recording and might prefer to keep the system in place. However, it is at least conceivable that removing the legal uncertainty around MERS could motivate these stakeholders to support an authoritative federal registry.

The third group consists of participants in the title industry.[271] Title insurers, for example, have invested in the creation of relatively user-friendly plant records that reorganize the information contained in official title records.[272] Centralizing title records in a single, searchable national registry—or improving the usefulness of official records in any respect—might undermine this investment and create resistance. More generally, title insurers might resist any large-scale overhaul of an environment in which they have adapted to thrive. But the industry might be persuaded to support the new approach. As others have noted, title companies could profit from representing public records in more efficient and user-friendly ways.[273] In any event, the pecuniary interests of the title industry should not in themselves derail efforts to explore an improved recording system.

2. *Alternative two: Upgrading local recording systems*

Although a national system enjoys widespread support among commentators and seems to be the most efficient alternative, the political obstacles could be significant. As discussed, states and localities simply might not be willing to cooperate in transferring responsibilities that have been theirs for centuries. Further, recording fees are a source of revenue that local governments may not want to give up, as recent county recorder lawsuits against MERS to recover unpaid fees suggest.[274]

These political issues with a national system suggest that policymakers should consider a second-best alternative: widespread upgrades to local systems to handle electronic mortgage

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Morgan Chase Bank, N.A., U.S. Bank, N.A, Wells Fargo Bank, N.A., as well as affiliates of each of these).

271. *See* Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 155 (2011) (arguing that title insurance companies should "take a candid, reflective look" at the issue of public versus private recording systems).

272. *See, e.g.*, CEB, CALIFORNIA TITLE INSURANCE PRACTICE § 4.10 (2d ed. 2011).

273. *See* Bailey & Treiman, *supra* note 212, at 45–46 ("Title companies could make money, and increase efficiency by designing computer programs that could access the publicly published land records, and analyze and index in any variety of creative new ways that could, in effect, produce a rudimentary title report in a matter of seconds.").

274. *See, e.g.*, Dallas Cnty., Tex. v. MERSCORP, Inc., No. 3:11-CV-2733-O (N.D. Tex. May 25, 2012) (denying in part a motion to dismiss a lawsuit brought by three Texas counties to recover recording fees).

assignments.[275] A local approach, once universally adopted, might be almost as efficient as a national one. Local courts[276] and tax authorities[277] already transact electronically, presumably reaping efficiency benefits, without unifying these functions at the state or national level. It is true that national entities such as the GSEs would have to deal with different local authorities, but it is likely that the process of recording could be made uniform across counties through the use of common software standards. Moreover, different counties' systems could be reached through a common portal. Although an analysis of the technical issues is beyond the scope of this Article, if all counties adopt compatible forms of electronic recording, in the end the user might not notice the difference between local and national control.

The most significant difficulty with a local approach is the likelihood that there will be a period in which there is a patchwork, with some counties using electronic recording and others using traditional paper-based recording. Unlike federalization of land records, it seems unlikely that states and localities will resist switching from paper to electronic recording as a matter of principle. Rather, it seems that the key issue would be funding, particularly for less affluent or rural counties.[278] But recent events illustrate that mortgage recording is a national problem for the federal government and mortgage industry. Accordingly, federal authorities and industry participants should consider shouldering some of the financial burden of upgrading local mortgage systems.

## CONCLUSION

The ambiguities that currently afflict mortgage-transfer law increase risks both for parties who transact in mortgages and for borrowers. Greater clarity is needed, but we suggest that greater clarity should accompany a change in the substantive direction of the

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275. Under this proposal, the UCC's private authentication provisions could be dropped on a state-by-state basis once all the counties in a given state have adopted electronic recording. The UCC provisions potentially could be repealed if a supermajority of counties in the state adopt recording.

276. *See, e.g.*, *Small Claims—General Information*, L.A. SUPERIOR COURT, https://ww2.lasuperiorcourt.org/eFiling/eFilingNotice.aspx (last visited Aug. 13, 2013) (providing instructions for electronic filing of documents in the Los Angeles Superior Court).

277. *See, e.g.*, *Pay Property Taxes*, YOLO CNTY. http://www.yolocounty.org/Index.aspx?page=1661 (last visited Aug. 13, 2013) (providing for online payment of Yolo County property taxes).

278. *See* Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 STAN. L. & POL'Y REV. 359, 388 n.181 (2009) (noting the "digital divide between rural and urban residents").

law. The most recent major development in mortgage transfer law, the mortgage-transfer rules in the 1999 revisions to Article 9, seem to have been aimed at eliminating legal incentives to maintain public records of mortgage assignments. The mortgage-transfer rules seem to have the same goal as MERS and are of approximately the same vintage. Both seem to reflect a preoccupation with reducing the cost and burden of recording mortgage transfers with local authorities. The focus seems to have been exclusively on the cost of maintaining public records of mortgage ownership.

We seek to refocus the discussion on the benefits side of the ledger and to remind the reader that public records have value. To that end, we recommend that policymakers reconsider the balance between private efficiency and convenience on the one hand and public records on the other. In so doing, legislators should consider the savings associated with digital recording. Digitization pushes the balance between economy and publicity toward publicity. It is time to consider a legal regime that gives transacting parties incentives to record their interests in mortgages, and in so doing, to reach an appropriate balance between public and private.