TAXING ZOMBIES: KILLING ZOMBIE MORTGAGES WITH DIFFERENTIAL PROPERTY TAXES

*David P. Weber**

Zombie mortgages and abandoned properties are costly problems for cities and counties across the country. The term "zombie mortgage" is meant to, and hopefully does, evoke images of undead mortgages that are nearly impossible to eliminate. In the legal literature, the term is used to describe the circumstance when a lender or mortgagee has initiated foreclosure proceedings, the homeowner has quit the premises, and the lender later abandons the foreclosure process, often without notifying the owner of record. The mortgages, accompanying fees, and real estate taxes are "zombies" because the affected homeowner cannot escape them by abandoning the property, even after notice of eviction. Generally, the affected homeowner cannot shed these "zombies" through bankruptcy, either.

This Article argues that a tax-based tool known as differential property taxes could alter the status quo *in a way that incentivizes owners or lenders to improve or dispose of the vacant property much more quickly than in the past and, thus, combat "zombie mortgages." This Article analyzes the legality of differential taxation as a tool for combating vacant property and highlights the legal impediments faced in certain jurisdictions. Strategic implementation of differential property taxes could be another effective tool to use in the ongoing battle against vacant and abandoned properties.*

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* Associate Dean for Academic Affairs & Professor of Law at Creighton University School of Law. The author would like to thank Professor R. Wilson Freyermuth for bringing up the idea in an ABA webinar at which the author was presenting and Creighton University for supporting this work.

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"In those moments where you're not quite sure if the undead are really dead, dead, don't get all stingy with your bullets."[1]

I. INTRODUCTION

Zombie mortgages[2] and abandoned properties are costly problems for cities and counties across the country.[3] The term "zombie mortgage" is meant to (and hopefully does) invoke images of undead mortgages that are nearly impossible to eliminate. In the legal literature,[4] the term is generally used to describe the circumstance when a lender/mortgagee has initiated foreclosure proceedings, the homeowner has quit the premises, and the lender later abandons the foreclosure process, often without notifying the owner of record.[5] The mortgages, accompanying fees, and real-estate taxes are "zombies" because the affected homeowner cannot escape them by abandoning the property (even after notice of eviction)

1. ZOMBIELAND (Columbia Pictures 2009).

2. *See* David P. Weber, *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, 45 N.M. L. REV. 37 nn.1 & 3 (2014) (detailing the "rise" of zombies in legal scholarship).

3. *See, e.g.*, Dominic Rushe, *Clearing Detroit's Blight Will Cost City Almost $2bn, Taskforce Report Finds*, GUARDIAN (May 27, 2014, 2:18 PM), http://www.theguardian.com/world/2014/may/27/detroit-blight-remove-vacant-structures-buildings-report (noting that in Detroit alone there are 84,641 blighted structures and vacant lots of which nearly half need to be demolished). Not only is the problem expensive, it is extremely time consuming. If Detroit were to deal with the properties at a pace of 7,000 per year (the quickest other municipalities have been able to achieve), it would still take more than eleven years to fully address the current vacant and blighted property without taking into account any further deterioration. *Id.*

4. Interestingly, some have read the 1883 Haitian Criminal Code as outlawing zombieism. Code Pénal de Haïti [CRIMINAL CODE] art. 246 (1883) (Haiti). The code stated that an "attempt on life by poisoning, using a substance that, without giving death, will cause a more-or-less prolonged state of lethargy . . . ." *Id.*. Some believe the concept of zombies derive from the Haitian creole "zonbi," which has been described as "a 'living-dead,' or, figuratively, a person devoid of any will or character." Anne Guha, *Does the Haitian Criminal Code Outlaw Making Zombies?*, LIBR. CONGR.: IN CUSTODIA LEGIS (Oct. 31, 2014), http://blogs.loc.gov/law/2014/10/does-the-haitian-criminal-code-outlaw-making-zombies. Guha reported that in some traditional Haitian beliefs, people were "'zombified' by a bokor (the Voodoo equivalent of a sorcerer)" rather than zombie mortgages which generally only require a recalcitrant lender. *Id.*

5. Weber, *supra* note 2, at 42 (noting that lenders may generally desist in the foreclosure process and are not required to notify the borrower when doing so).

or even through bankruptcy (although some exceptions might apply, depending on the jurisdiction).[6]

These vacant properties are common sources of vandalism, theft, crime, and accident.[7] In addition, the vacant properties erode the tax base of the municipality and decrease the value of nearby properties.[8] These problems, taken together, represent the so-called "broken window" theory that correlates vacant and abandoned property (homes with broken windows) to property devaluation and/or increased crime.[9] To combat the problem, states, counties, cities, and public/private partnerships have all attempted to enact various solutions,[10] some with greater success than others.[11] While many of the proposed tactics have contributed to a solution, the vacant-property problem is still a massively expensive problem facing the country, especially specific regions where the Great Recession struck hard and where recovery is weak or nonexistent.[12]

This Article argues that a tax-based tool, differential property taxes, can alter the *status quo* in a way that incentivizes owners and/or lenders to act to improve or dispose of the vacant property much more quickly

6. *Compare* Pigg v. BAC Home Loans Servicing (*In re* Pigg), 453 B.R. 728, 732, 736 (Bankr. M.D. Tenn. 2011) (holding that the bankruptcy court had equitable power to authorize the debtor to sell the property free and clear because of the creditor's "consent[] to the sale by [its] inaction."), *and In re* Colon, 465 B.R. 657 (Bankr. D. Utah 2011) (holding that postpetition homeowners' association ("HOA") fees can be properly dischargeable in a Chapter 13 bankruptcy in certain contexts contrary to the express language of Chapter 7 of the Bankruptcy Code), *with In re* Spencer, 457 B.R. 601 (E.D. Mich. 2011) (declining to allow discharge of postpetition HOA fees in a Chapter 13 setting), and *In re* Fristoe, No. 10–32887, 2012 WL 4483891, at *4 (Bankr. D. Utah 2012) (criticizing the outcome in *Colon* as unpersuasive and inconsistent with the language of the Bankruptcy Code).

7. *See, e.g.*, Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1182–83 (2008) (noting that long-term abandonment of properties leads to "higher rates of crimes such as drug dealing, prostitution, looting, arson, gang activity, and murder," and that "[a]bandoned properties carry a very high risk of fire—either through poor maintenance or by arson."); WILLIAM C. APGAR, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 20 (2005), http://www.issuelab.org/resources/1772/1772.pdf (stating that drug dealing "is perhaps the most problematic as well as the most common of the more serious crimes taking place in vacant buildings").

8. *See* Johnson, *supra* note 7, at 1181 (noting the "significant negative economic impact on tax revenues and property values" in the areas near foreclosed abandoned properties, and citing a study by the City of Philadelphia that noted residential property within 150 feet of abandoned property declined over $7,500 in value upon sale); *see also* Anne B. Shlay & Gordon Whitman, *Research for Democracy: Linking Community Organizing and Research to Leverage Blight Policy*, 5 CITY & CMTY. 153, 162 (2006), http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6040.2006.00167.x/pdf (noting correlations between the proximity and number of abandoned properties in a given area and a decrease in property value). The study found that five abandoned homes on a block nearly doubled the decrease in property value from that of an area with a single vacant home. *Id.*

9. *See, e.g.*, FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 16 (Ctr. for Comty. Progress, 2011).

10. *See, e.g.*, Weber, *supra* note 2, at 62–77 (noting, among others, the enactment of vacant property registration ordinances, the creation of community land banks and/or dedicated courts, and enhanced policing efforts).

11. *See, e.g.*, ALEXANDER, *supra* note 9, at 19, 22, 24–27.

12. Alexander Eichler, *Vacant Homes Impose Big Costs on Cities Amid Budget Crises: GAO*, HUFFINGTON POST (Dec. 6, 2011, 8:27 PM), http://www.huffingtonpost.com/2011/12/06/vacant-homes-gao_n_1132813.html.

than in the past. Provided that differential tax treatment is authorized in the affected state, such a remedy provides an effective and efficient tool for local authorities to combat the vacant properties and their associated costs. Part II of this Article analyzes the legality of differential taxation as a tool for combating vacant property and highlights the legal impediments faced in certain jurisdictions. Part III of this Article gives a brief overview of the current mechanisms being utilized to combat vacant and abandoned properties and highlights how, and where, differential taxation would supplement and/or enhance local efforts. Part IV of this Article concludes by recommending strategic implementation of differential property taxes as another tool to use in the ongoing battle to control vacant and abandoned properties and the associated blight.

II. DIFFERENTIAL TAXATION – PUNISHING THE ZOMBIES

The basic idea behind differential taxation is to tax generally similar items at differential rates.[13] Obviously there is concern with this type of concept because it could allow for unfair or preferential treatment of certain properties at the expense of other similarly situated properties. To make the tax effective, and not unfairly discriminatory, material differences in property—such as abandonment—should be considered in determining the amount of services demanded, the impact on property values, and, therefore, corresponding property tax rates.

This Article encourages counties and localities to assess higher tax rates on vacant properties to motivate the lender and/or owner to either rehabilitate or dispose of the property. Allowing the lender to maintain its security interest in the property with no adverse consequences or carrying costs will not move it off of its default position of wait-and-see. If localities are able to impose higher carrying costs, those costs should motivate lenders to act either through a finalized foreclosure sale or by allowing a short-sale. As one might expect, however, those facing the adverse tax treatment are wont to complain. As the taxes are perceived as discriminatory, the complaints often arise as allegations of federal or state constitutional violations.[14]

A. Equal Protection Challenges

From a federal point of view, the starting point of any discriminatory law is the Equal Protection Clause of the Fourteenth Amendment.[15] Generally stated, although the Equal Protection Clause does not prohibit

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13. *See, e.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003) (rejecting an equal-protection challenge to an Iowa law that provided different tax treatment for revenues from slot machines on riverboats than for revenues from slot machines on racetracks).

14. *See, e.g.*, *id.* at 103; Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004) (striking down differential tax as lacking "a rational basis in the constitutional sense" under the Iowa Constitution).

15. U.S. CONST. amend. XIV, § 1.

differential treatment between classes of people, it does prohibit the government from treating similarly situated individuals differently.[16] If the different treatment is based on a suspect classification, or lacks a rational basis, heightened scrutiny will be used to assess the law.[17] In the case of differential taxation, the Supreme Court has held that federal Equal Protection claims only require a "rational basis" review.[18] Therefore, a law will be upheld

> so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.[19]

In *Fitzgerald v. Racing Association of Central Iowa*,[20] the Supreme Court, noting the disparate treatment for certain types of gambling establishments (*e.g.*, slot machines on riverboats taxed at 20% versus slot machines at racetracks taxed at 36%), nevertheless allowed the disparate treatment stating that it was permissible for the state legislature to favor one industry over the other.[21] The Court stated that the classification did not distinguish on the basis of protected categories or in-state versus out-of-state businesses.[22] As such, the law was subject only to rational-basis review.[23] Under rational-basis review, "one ha[d] no difficulty finding the necessary rational support" based on varied economic and financial incentives the state was attempting to impose.[24]

In a previous case based explicitly on property taxes, however, the Supreme Court held that differential treatment did in fact violate the Equal Protection Clause.[25] In that case, *Allegheny Pittsburgh Coal Company v. County Commission*, the Supreme Court held that substantial differences in property tax assessments in West Virginia were impermissible.[26] In *Allegheny*, the petitioners challenged their real-estate taxes on

16. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (holding that any "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

17. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135–37 (2011).

18. *See, e.g.*, *Fitzgerald*, 539 U.S. 106–07; *F.S. Royster*, 253 U.S. at 415.

19. *Fitzgerald*, 539 U.S. at 107 (quoting Nordlinger v. Hahn, 505 U.S. 1, 11–12 (1992) (internal quotation marks omitted)).

20. 539 U.S. 103 (2003).

21. *Id.* at 108–10. On remand from the Supreme Court, the Iowa Supreme Court did, however, again strike down the law. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004). This time the Iowa Supreme Court based its ruling only on Iowa's equality provision and found the "the classifications made in [the differential tax law] lack a rational basis in the constitutional sense." *Id.*

22. *Fitzgerald*, 539 U.S. at 107.

23. *Id.*

24. *Id.* at 109.

25. Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336, 343 (1989).

26. *Id.*

the ground they were assessed and taxed at a rate more than thirty times higher than similar parcels based on dates of sale.[27] The county used deed-transfer information to obtain the market value of any given parcel.[28] Parcels that had not been sold in many years had exceedingly low values assigned to them, leading to the stark contrast in taxes.[29]

Given the distinctions in the local legislation, property-tax differentials for zombie properties may still survive judicial scrutiny. While not exactly the same issue as the differential tax proposed in this Article, the Supreme Court left us with some clear guidance in *Allegheny* as to how these differential taxes will be judged. First, the Court noted that the standard used to examine differential taxes is the Equal Protection Clause of the Fourteenth Amendment.[30] Second, the states have broad taxing power and "a State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable."[31] So long as the "classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy," it shall withstand judicial scrutiny.[32] Whereas in *Allegheny* the Court ultimately declared that West Virginia's practice of using the sales price to determine the tax assessment impermissibly taxed the petitioners at higher levels than "others of the same class," the outcome was largely dictated by systemic undervaluation of neighboring properties, not the purposeful imposition of graduated taxes.[33]

The Court later clarified in *Nordlinger v. Hahn*[34] that the systemic, unintentional undervaluation was at the heart of its decision in *Allegheny*.[35] In *Nordlinger,* the Court stated that "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."[36] In only using sales-based pricing, West Virginia was clearly not attempting to determine a "current market value."[37] In *Nordlinger* itself, the Court reviewed an Equal Protection challenge to a California constitutional amendment that provided that the assessed value of property could only increase by 2% per year unless there

27. *Id.* at 341.
28. *Id.*
29. *Id.* at 341–42.
30. *Id.* at 343.
31. *Id.* at 344.
32. *Id.*
33. *Id.* at 345 (noting that "[i]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property").
34. Nordlinger v. Hahn, 505 U.S. 1 (1992).
35. One of the key distinctions between the California and West Virginia cases was that West Virginia's Constitution mandated taxation based on the "estimated current market value," which clearly was not happening, in contrast to California which assessed taxes based on the "acquisition cost." *Id.* at 9.
36. *Id.* at 16.
37. *Id.* at 14–16 n.6.

were improvements made or a change in ownership, with two minor exceptions.[38] The net result, as in *Allegheny*, is that more recent purchasers pay higher taxes because their property values are reassessed at the time of sale.[39]

In its Equal Protection analysis, the *Nordlinger* Court noted that "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."[40] Under the rational-basis standard of review, as long as there is a "plausible policy reason" for the disparate treatment, and the classification is rationally related to that reason, the law will withstand scrutiny.[41] Furthermore, the level of review "is especially deferential in the context of classifications made by complex tax laws."[42] Given the State's interest in community preservation and stability, the Court held that a tax rate designed to discourage rapid transfers of property is a legitimate, rational goal.[43] Therefore, a statute that taxed properties more recently transferred at a higher rate survived the Equal Protection challenge.

Under that analysis, it would seem that a locality's interest in community preservation, rehabilitating properties, and improving the tax rolls would clearly qualify as a "plausible policy reason" sufficient to survive a rational-basis challenge. Therefore, under *Nordlinger*, differential taxation of vacant or abandoned properties should survive any Equal Protection Clause challenge. Furthermore, taxing the abandoned properties is intended to cause the lenders to dispose of the properties more quickly by creating increased carrying costs. By allowing a discriminatory tax based on abandonment status, municipalities are able to motivate lenders to act on their zombie properties proactively. Moving the lenders to act will certainly benefit the affected homeowners and should also serve to stimulate repossession and rehabilitation of the properties to the benefit of the municipality.

B. State-Based Challenges

The challenges to differential taxes that have had the most success have been those based on state statutes or constitutions that mandate uniform tax treatment.[44] As with the Iowa Supreme Court decision in

38. *Id.* at 5.
39. *Id.* at 6 (noting the amendment was labeled as the "welcome stranger" amendment as the newcomers pay more in taxes).
40. *Id.* at 9; *see also id.* at 12 ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.") (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983)).
41. *Nordlinger*, 505 U.S. at 11.
42. *Id.*; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (noting "[t]he latitude of discretion is notably wide in the classification of property for purposes of taxation").
43. *Nordlinger*, 505 U.S. at 12.
44. *See, e.g.*, Kenai Peninsula Borough v. State, 751 P.2d 14, 16 (Alaska 1988) (upholding statute requiring municipalities to tax oil and gas production property at similar rates to other real property); *see also* Harbour Vill. Apartments v. City of Mukilteo, 989 P.2d 542, 608 (Wash. 1999) (striking down

Fitzgerald, some state supreme courts have struck down tax classifications that would have been sustained by the Supreme Court by relying on state equal protection or uniformity clauses.[45] For example, the Nebraska Supreme Court, based largely on a uniformity provision in the Nebraska Constitution, has been more hostile to differential tax treatment and more accommodating to challenges to differential taxation.[46] Nebraska's uniformity provision requires that "[t]axes . . . be levied by valuation uniformly and proportionately upon all real property and franchises . . . ."[47] Nebraska courts have interpreted that provision fairly strictly.

1. State Hostility Toward Differential Taxation

In *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, the Nebraska Supreme Court ruled that pipelines and railroads were entitled to equal *ad valorem*-tax treatment even though federal laws otherwise provided favorable property-tax treatment.[48] Eleven years after *Northern Natural Gas*, the Nebraska Supreme Court invalidated a valuation scheme that taxed farmland controlled by mining companies differently from farmland not controlled by mining companies.[49] This decision, *Constructors, Inc. v. Cass County Board of Equalization*, held that the valuation scheme violated the uniformity clause of the Nebraska Constitution.[50] In *Constructors*, the Nebraska Supreme Court refused to allow differential-tax treatment based on the identity of the owner.[51] The *Constructors* court said that "[p]roperty of the same character must be taxed the same. Differential tax treatment can only be based on the use or nature of the property, not upon who controls the property . . . ."[52]

That ruling betokens a silver lining for the proposal in this Article. Even in states with a uniformity clause such as Nebraska's, which provides in part that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution[,]"[53] differential taxation is theoretically permissible based on the "use or nature of the property."[54] Abandoned property would ap-

property tax on nonuniformity grounds as it taxed rental property higher than other real property, and the *ad valorem* requirements, because the tax on the residential apartments was based on the number of dwelling units rather than value).

45. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004).
46. NEB. CONST. art. VIII–1.
47. *Id.*
48. N. Nat. Gas Co. v. State Bd. of Equalization & Assessment, 443 N.W.2d 249, 253 (Neb. 1989).
49. Constructors, Inc. v. Cass Cty. Bd. of Equalization, 606 N.W.2d 786, 792–95 (Neb. 2000).
50. *Id.*; *see also* NEB. CONST. art. VIII–1.
51. *Constructors*, 606 N.W.2d at 792–95.
52. *Id.* at 876.
53. NEB. CONST. art. VIII–1.
54. *Constructors*, 606 N.W.2d at 794.

pear to have a definite nature and lack of use that should allow it to qualify for what may otherwise be considered nonuniform taxation.

Uniform property-tax clauses, such as the ones in Nebraska, are very common in state constitutions.[55] One leading treatise has identified nine basic types of uniformity clauses.[56] Among those nine, three of the more common are: 1) a "uniform and equal rate" of property taxation;[57] 2) "uniform" taxation only;[58] and 3) uniform taxation within the taxed class or class of property.[59] Washington, which has one of the strictest anti-differentiation stances in the country, has constitutional prohibitions against nonuniform taxation of real property, as well as an *ad valorem* requirement.[60] The Washington Supreme Court has gone so far as to say that "tax uniformity is 'the highest and most important of all requirements applicable to taxation under our system.'"[61]

In *Samis Land Co. v. City of Soap Lake*, the landowner successfully challenged a "standby charge" that attempted to impose a high annual charge on vacant, unimproved land that remained unconnected to water or sewer service.[62] Although the city alleged that the charge was a fee because the owner of the property received a related benefit by owning property where a connection to city water and sewer lines was available, the Washington Supreme Court concluded that, since the owner neither used the water nor burdened the sewer system, there was no direct relationship between the charge and the benefit and that the standby charge was therefore a tax.[63] Because the standby charge was deemed a tax, the constitutional analysis was straightforward. The tax was $60 per year per parcel without regard to the value of the land, and therefore was not uniform and struck down.[64]

In *Samis*, the dissent argued vociferously that the primary purpose of the municipality was to regulate water and sewage appropriately, via its broad police power to promote the general welfare of the public, and not to raise revenue.[65] If that were the case, any perceived illegitimacy of

55. *See, e.g.*, DEL. CONST. art. VIII, § 1; GA. CONST. art. VII, § 1, para. 1; IND. CONST. art. X, § 1; ME. CONST. art. IX, § 8; N.J. CONST. art. VIII, § 1, para. 1; W. VA. CONST. art. X, § 1.

56. JOHN MARTINEZ, 4 LOCAL GOVERNMENT Law § 23:6 (2016). The nine basic types identified are: one, property taxation according to its value; two, property taxation in proportion to its value; three, taxation in proportional and reasonable rates; four, uniform taxation; five, equal and uniform taxation; six, legislatively established uniform and equal taxation; seven, uniform taxation within the same class of subjects; eight, uniform taxation within the same class of property; and nine, taxation that provides a "a fair distribution of the expenses of government." *Id.*

57. *See* TEX. CONST. art. VIII, § 1.

58. *E.g.*, N.J. CONST. Art. VIII, § 1, para. 1.

59. *See, e.g.*, DEL. CONST. art. VIII, § 1; GA. CONST. art. VII, §1, para. 1.

60. WASH. CONST. art. VII, §§ 1, amend. LXXXI & 2, amend. LXXIX.

61. Samis Land Co. v. City of Soap Lake, 23 P.3d 477, 482 n.13 (Wash. 2001) (citing Inter Island Tel. Co. v. San Juan Cty., 883 P.2d 1380 (Wash. 1994)).

62. *Id.* at 488.

63. *Id.* at 480.

64. *Id.* at 487.

65. *Id.* at 488–89 (Johnson, J., dissenting). The dissent also noted, correctly, that the burden of proof was likely to be dispositive. *Id.*

the standby charge is not at all clear. Under the *Covell* tests in Washington,[66] it appears that the broad police power to regulate would allow a nonuniform fee if a related service were rendered in return. The *Covell* tests are a three-part test to distinguish permissible fees from unconstitutionally imposed property taxes.[67] Under those tests, Washington courts consider first, whether the primary purpose of the law is to regulate behavior or collect revenue; second, whether the revenue collected is segregated and allocated exclusively to the activity being assessed; and third, if there is a direct relationship between the amount assessed and any service received.[68]

Applying a differential tax to abandoned properties, and therefore to the owners, would appear on its face to violate the nonuniformity provisions of the Washington State Constitution. The argument could be made, however, that the higher tax is for the direct provision of services to the property itself and neighboring properties through upkeep, maintenance, and enhanced security. To the extent a municipality can prove it is providing these additional services, which are already happening in many of the most afflicted jurisdictions, the fact the proposal is labeled a differential tax should not prevent a court from examining whether the tax would better be considered a fee.[69] In a state like Washington, labeling the charge as an Abandoned Property Fee and establishing a segregated, exclusive account to administer the related services may pass constitutional muster, provided that there exists a direct relationship between the fee and the services rendered.[70]

2. *Embracing Differential Taxation to Cure Some Evils*

Some states with uniformity clauses in their constitutions or statutes do provide exceptions to the harsh results that a uniform approach can require.[71] Classifications that have withstood challenge have included those based on the "type of local government unit, size of population or extent of services provided."[72] In Georgia, a municipality created four

66. *See, e.g.*, Covell v. City of Seattle, 905 P.2d 324, 327 (Wash. 1995).

67. *Samis*, 23 P.3d at 482.

68. *Covell*, 905 P.2d at 327; *see also* Hillis Homes, Inc. v. Snohomish Cty., 650 P.2d 193, 195 (Wash. 1982).

69. Ironically, many courts have already employed language requiring them to look to the true nature of the transaction and not to accept the label at face value in determining whether a charge is a tax or fee, although they did so to examine whether fees were disguised taxes and not vice versa. *See, e.g.*, *Covell*, 905 P.2d at 327.

70. *Samis*, 23 P.3d at 485.

71. *See, e.g.*, Hegenes v. State, 328 N.W.2d 719, 722–23 (Minn. 1983) (upholding differential real-estate taxation for properties with four or more units); *see also* Youngstown Sheet & Tube Co. v. City of Youngstown, 108 N.E.2d 571, 575 (Ohio Ct. App. 1951) (allowing for a classification of taxation provided the classification is based on the subject of the taxation rather than the identity of the taxpayer).

72. *See* MARTINEZ, *supra* note 56, § 23:6; *see also* Hart v. Columbus, 188 S.E.2d 422 (Ga. Ct. App. 1972) (upholding differential tax rates based on the types and amounts of municipal services rendered).

service districts that were taxed at different rates that varied based on the type and quantity of governmental services provided.[73] In Colorado, the Colorado Supreme Court held that "different tax rates on different geographical areas of property do[] not establish a violation of the constitutional requirement of uniformity."[74] In Oregon, which requires uniformity of taxation within a class, the supreme court nevertheless upheld a classification based on geography, noting that it "is nevertheless constitutionally permissible if it is also based upon qualitative differences that distinguish the geographical area . . . ."[75] The South Dakota Supreme Court has also upheld differential taxation based on property type, and has allowed classifications based on agricultural or nonagricultural use.[76]

In a bit of a twist on the problem, Minnesota, when faced with a situation with undesirable property, enacted a "Contamination Tax"[77] to be "imposed on the contamination value of taxable real property."[78] The tax is structured to require taxation based on the amount of the contamination value discount,[79] the assessed rate for property in that class, and the degree of culpability of the owner.[80] By taxing the contamination value instead of the market value, as is otherwise required, the Minnesota Supreme Court held that localities are able to capture tax revenue to properties they continue to serve, but because of pollution may have zero market value.[81]

The contamination tax is not perfectly analogous to the zombie or abandoned property tax either in scope or functionality, but it offers some arguments as to why the abandoned property tax should be upheld, even when faced with uniformity challenges. While the contamination taxes largely end up taxing the property at rates below the rate that would be dictated by the standard *ad valorem* tax,[82] they do clearly allow

73. *Hart*, 188 S.E.2d at 425 (noting the variety of services including garbage collection, "fire protection, public works and public safety (less fire), paving and sewer.").

74. Senior Corp. v. Bd. of Assessment Appeals, 702 P.2d 732, 738 (Colo. 1985).

75. Jarvill v. City of Eugene, 613 P.2d 1, 13 (Ore. 1980).

76. *In re* Refusal of State Bd. of Equal., 330 N.W.2d 754, 758 (S.D. 1983).

77. Westling v. Cty. of Mille Lacs, 543 N.W.2d 91, 93 (Minn. 1996); *see also* MINN. STAT. §§ 270.91–.98 (2016).

78. MINN. STAT. § 270.91.

79. The contamination value is determined by "the amount of the market value reduction." *Id.* § 270.93.

80. *Id.* § 270.91.

81. *Westling*, 581 N.W.2d at 821. This outcome differs from an attempt in New Jersey to tax contaminated properties at the market value they would have had if no contamination existed. In that setting, the Supreme Court of New Jersey disallowed its tax authority from charging a higher tax to owners of contaminated property. In *Inmar Associates, Inc. v. Borough of Carlstadt*, the borough of Carlstadt attempted to assess a property that housed toxic waste as if the presence did not affect the property's market value. 549 A.2d 38 (N.J. 1988). Initially the New Jersey Appellate Division agreed with the Borough's decision to tax the contaminated property at a market value is if it were not contaminated because, it stated, to do otherwise would benefit the polluters at the expense of the public and would incentivize, rather than limit, the amount of contamination. Inmar Assocs., Inc. v. Borough of Carlstadt, 518 A.2d 1110, 1111 (N.J. Super. Ct. App. Div. 1986). The Supreme Court of New Jersey, however, remained steadfast to the constitutional principles of uniformity regardless of the public policy issues. *Inmar Assocs.*, 549 A.2d at 45–46.

82. *Inmar Assocs.*, 549 A.2d at 46.

for differential taxation based on enhanced costs to the community to serve the properties in question. Ultimately then, the argument becomes one of framing and how best to deal with the negative externalities imposed on communities from abandoned properties. If the legal obstacle is only one of equal protection (either state or federal), then the locality can easily demonstrate a reasonable interest in decreasing the number of abandoned properties either by citing maintenance costs, crime and/or hazard rates, or community stability. If the legal obstacle is a uniformity clause, however, the legal challenge is more difficult,[83] though not impossible.

As outlined above, perhaps one of the best approaches to enforce a tax on abandoned properties within a state governed by a uniformity clause would be to justify the additional tax on geography, land-type, or extent of the services rendered. This approach could even prevail in a jurisdiction that allowed only uniform taxation in a single class. For those jurisdictions with abandoned properties clustered in defined geographic areas, differentiation based on geography might provide another avenue to impose higher tax rates on the abandoned properties. The downside to additional taxation based solely on geography would be the over-inclusive nature of the tax. Unless all of the properties in the jurisdiction were zombie properties, at least part of the burden would be borne by those already suffering the adverse consequences of owning property surrounded by abandoned properties. For those jurisdictions that allow uniform treatment within a class, the path may be slightly clearer. It may be possible to compose a new classification of abandoned properties legislatively (at the state or local level), depending on the state constitution and statutes involved.

C. *Affirmative State and Municipal Action*

In contrast to those states with constitutions or statutes requiring tax uniformity, several states have taken the opposite approach and either explicitly provide for the possibility of differential taxation by allowing classification of property or by not requiring uniform taxation.[84] States without a prohibition would generally be free, subject to statutory and federal constitutional limits, to impose differential taxes. In those states that allow classification, however, the approaches to differential taxation have varied significantly.

In 1978, voters in Massachusetts approved an amendment to the state constitution to specifically allow differential taxation on property for "no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same

83. *See* discussion *supra* Subsection II.B.1.

84. *See, e.g.*, KY. CONST. § 171 (requiring taxes to be "uniform upon all property of the same class"); MASS. CONST. amend. art. CXII. There are a handful of states that do not have a uniformity clause. *See generally*, CONN. CONST.; VT. CONST.

class, and except that reasonable exemptions may be granted."[85] The Commonwealth of Kentucky's constitutional provision goes beyond a set number of categories and grants the General Assembly the "power to divide property into classes and to determine what class or classes of property shall be subject to local taxation."[86] In 1990, Kentucky adopted Statute 91.285, *Taxation of Abandoned Urban Property by City of the First Class*.[87] The statute specifically allows a qualifying city to institute a higher rate of tax on abandoned urban property or blighted or deteriorated property.[88] As long as the city follows certain statutory guidelines regarding the determination of abandonment, it is free to tax these properties at higher rates.[89]

Rhode Island, a state without a uniformity clause,[90] also has legislation that allows its cities to impose a real estate nonutilization tax.[91] The statute itself offers several justifications for the tax, including the increased resources required to maintain and/or police the property, the deterioration of the municipalities' real estate, and a decreased market value that would otherwise reward individuals with a lower property tax for failing to maintain their properties while continuing to use their share of city resources.[92] Rhode Island took a restrictive approach by naming the cities that were empowered to enact a nonutilization tax in the text of the statute.[93]

As opposed to state-led initiatives, Louisville, Kentucky, was one of the first localities to adopt an abandoned-urban-property tax.[94] Louisville's tax applies to properties that have been vacant in excess of one year and: one, are dilapidated, unfit or unsafe; two, by reason of neglect have accumulated rubbish or vermin; or three, have been tax delinquent for no less than three years.[95] Louisville adopted a tax rate for abandoned properties of $1.50 per $100 of value—approximately three times the standard rate for property in that class,[96] although much lower than the rate adopted in Rhode Island. As with other states and localities, the leg-

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85. MASS. CONST. amend. art. CXII. The four classes are residential, open space, commercial, and industrial. MASS. GEN. LAWS ch. 59, § 2A(b) (2014). In Wisconsin, the original state constitution required rigid uniformity, but it has since been amended five times. *See* Jack Stark, *The Uniformity Clause of the Wisconsin Constitution,* 76 MARQ. L. REV. 577, 580 (1993). A 1941 amendment specifically allows municipalities to collect nonuniform taxes, but the provision has been interpreted to require either 100% taxation at the standard rate or 100% exemption. *Id.* at 599.

86. KY. CONST. § 171.

87. KY. REV. STAT. ANN. § 91.285 (West 1990).

88. *Id.*

89. *Id.*

90. R.I. CONST. art. VI, § 12.

91. 44 R.I. Gen. Laws § 44–5.1–1 (2016).

92. *Id.* § 44–5.1.

93. *Id.* § 44–5.1–3. Rhode Island taxes the abandoned property at a rate of $10 per $100 of value. *Id.* § 44–5.1–4.

94. LOUISVILLE, KY., METRO CODE § 38.80(A)(1)–(2) (2016).

95. *Id.* § 38.09.

96. *Id.* § 38.80(A)(1)–(2) (2016) (noting the typical *ad valorem* rate is $0.4921 per $100 of assessed valuation compared to a rate of $1.50 per $100 of assessed valuation for abandoned urban property).

islative intent of this type of statute or ordinance is to diminish the incidence of vacant or abandoned properties and allow the locality to deal with an inventory of 6,000 to 7,000 vacant properties at any time.[97]

In 2008, Providence, Rhode Island, enacted a nonutilization tax,[98] and it defined vacant and abandoned property to be any structure that has been continuously unoccupied for one year and either has been cited for failure to comply with maintenance standards or has not been maintained, as shown by the outer condition of the building.[99] The statute is worded in such a way to be an effective tool against zombie properties. Section 21-253 requires that "any person or entity who, through foreclosure or otherwise, vacates or maintan [sic] vacant property [to] notify the department of inspections and standards."[100] Other localities in Rhode Island have also enacted the nonutilization tax.[101] The Providence municipal ordinance taxes the owner of record (similar to any other property tax).[102] To make the tool more effective, the state or municipality will need to shift the tax or fees to the lenders because, in many instances, the homeowners are absent and/or without the required resources.

Differential taxation, of the type imposed in Rhode Island or Louisville, Kentucky, can be an especially powerful tool to state and city administrators dealing with zombie properties. With the right structuring, the tax will redistribute the externalities of the abandoned properties from the abutting homeowners and municipality to the lenders who fail to move the property to the next owner who can make beneficial use of it. Utilizing differential taxation will allow municipalities to target their resources and tax powers at the most problematic parcels. This type of targeting should efficiently assist in either minimizing the inventory of vacant properties or collecting enough revenue to properly maintain the abandoned structures and property.

III. CURRENT WEAPONS TO DEFEAT ZOMBIE PROPERTIES

Property values are seemingly beginning their recovery after the 2008 recession, and foreclosure and delinquency rates are generally hold-

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97. *See Frequently Asked Questions*, LOUISVILLEKY.GOV https://louisvilleky.gov/government/vacant-public-property-administration/frequently-asked-questions (last visited April 5, 2017).

98. PROVIDENCE, R.I., CODE OF ORDINANCES § 21–252 (2008).

99. *Id.* § 21-252. The statute also includes property with no structures that is obviously abandoned. *Id.*

100. *Id.* § 21–253(b).

101. *See, e.g.*, PAWTUCKET, R.I., CODE art. XIV, § 363–55 (1997).

102. Rhode Island's statute has come under scrutiny in recent years, however, given that Governor Raimondo has attempted to use the tax differentiation tool to assess higher taxes on more luxurious, second non-owner occupied homes. *See* Justin Katz, *Rhode Island Property Tax Targets Taylor Swift—But Hits Less Wealthy Residents Too*, WATCHDOG.ORG (Mar. 25, 2015), http://watchdog.org/208157/ri-property-tax-taylor-swift.

ing steady or improving.[103] In January, 2017, the mortgage delinquency rate was 4.25%, just over a 16% year-over-year drop.[104] Foreclosure starts were also down approximately 2% year-over-year.[105] In April, 2015, the percentage of loans in foreclosure nationally reached the lowest rate (1.51%) since January, 2008[106] and as of January, 2017 has fallen to 0.94%.[107] Amid this otherwise pretty picture lurks some troubling data. Although the number of vacant properties has decreased, the number of bank-owned vacancies has increased by 67% year-over-year.[108]

Unsurprisingly, states with high volumes of foreclosed and/or delinquent mortgages are typically facing the longest roads to recovery. Judicial-foreclosure states such as New York and New Jersey, have some of the nation's largest inventory of ninety-plus day delinquencies and foreclosures.[109] Nonjudicial-foreclosure states, such as Mississippi, Alabama, and West Virginia, have among the highest inventory.[110] One metric used to assess the foreclosure situation is a "pipeline ratio" that estimates how long it would take any given jurisdiction to clear its foreclosure and seriously delinquent property inventories at current rates.[111] During the height of the problem in 2015, using a pipeline ratio, it was estimated that it would take the District of Columbia slightly over forty-three years to process its inventory.[112] A handful of other states also had ratios that estimated ten years or more to work through the backlog.[113]

A good percentage of these foreclosures are considered zombies. In February, 2015, RealtyTrac estimated that 25% of then-active foreclosures were zombie foreclosures.[114] Although the total number of zombie foreclosures dropped by 6% year-over-year, the percentage of zombie foreclosures in relation to all foreclosures actually increased by 4% to

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103. *See, e.g.*, BLACK KNIGHT FIN. SERVS., BLACK KNIGHT MORTGAGE MONITOR (Dec. 2015) [hereinafter MORTGAGE MONITOR (Dec. 2015)], http://www.bkfs.com/Data/DataReports/BKFS_MM_Dec2015_Report.pdf.

104. *See, e.g.*, BLACK KNIGHT FIN. SERVS., BLACK KNIGHT MORTGAGE MONITOR (Jan. 2017) [hereinafter MORTGAGE MONITOR (Jan. 2017)], http://www.bkfs.com/Data/DataReports/BKFS_MM_Jan2017_Report.pdf.

105. *Id.*

106. Ben Lane, *Black Knight: Total Loans in Foreclosure Fall to Lowest Level Since 2008*, HOUSINGWIRE (May 22, 2015), http://www.housingwire.com/articles/33975-black-knight-total-loans-in-foreclosure-fall-to-lowest-level-since-2008.

107. *See, e.g.*, MORTGAGE MONITOR (Jan. 2017), *supra* note 104.

108. *U.S. Residential Vacancies Decrease 9% in Q3 2016 But Bank-Owned Vacancies up 67% from a Year Ago*, REALTYTRAC (Sep. 7, 2016) [hereinafter *U.S. Residential Vacancies Decrease*], http://www.realtytrac.com/news/foreclosure-trends/q3-2016-residential-property-vacancy-zombie-foreclosure-report/ (noting that political pressure has, in part, contributed to lenders' decisions to complete foreclosures).

109. *See, e.g.*, MORTGAGE MONITOR (Jan. 2017), *supra* note 104.

110. *Id.*

111. *See, e.g.*, BLACK KNIGHT FIN. SERVS., BLACK KNIGHT MORTGAGE MONITOR (Apr. 2015), http://www.bkfs.com/Data/DataReports/BKFS_MM_Apr2015_Report.pdf (April 2015).

112. *Id.*

113. *Id.*

114. *One in Four U.S. Foreclosures are "Zombies" Vacated by Homeowner, Not Yet Repossessed by Foreclosing Lender*, REALTYTRAC (Feb. 5, 2015) [hereinafter *One in Four Zombies*], http://www.realtytrac.com/news/foreclosure-trends/zombie-foreclosures-q1-2015.

25% of all foreclosures.[115] In June, 2015, RealtyTrac indicated that although zombie foreclosures continued to represent about 24% of all foreclosures, the number of zombie foreclosures continued to fall generally.[116] Some regions, however, showed particular susceptibility to the problem.[117] For example, New Jersey, Florida, New York, Nevada, and Indiana were still greatly plagued by zombie foreclosures.[118]

The financial drag on property values due to zombie status is high.[119] Even when comparing foreclosed property values, the property values of zombie foreclosure properties were 22% lower than the property values of owner-occupied foreclosures.[120] In jurisdictions like New Jersey and New York, the zombie problem does not appear to be receding much.[121] In February, 2015, RealtyTrac reported a whopping 109% year-over-year increase in zombie foreclosures in New Jersey, a 54% increase in New York, and a 24% increase in California.[122]

The recovery in property values has also been slowest in the bottom quintile. As of the end of 2014 in Nevada, for example, property values for the bottom quintile were still 46.6% off pre-crisis levels compared to the top quintile, which was 'only' off 35.9%.[123] In California, the difference was more dramatic. Property-value levels were 31.6% off pre-recession levels for the bottom quintile of properties and only 3.4% off the top quintile.[124] As zombie foreclosures seem to disproportionately affect lower-value housing, the news is disappointing for those most affected by them. As the recovery in property values is not proportionate, the drag applied by zombie foreclosures is likely to last well beyond the point at which most homeowners have recovered to pre-recession property value levels.

A. Vacant Property Registration Ordinances

One of the most common responses for localities has been to implement vacant property registration ordinances ("VPROs").[125] As the

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115. *Id.*
116. Jennifer Von Pohlmann, *Homeowner Vacated "Zombie" Foreclosures Down 10 Percent from a Year Ago in Q2 2015*, RealtyTrac (June 10, 2015), http://www.realtytrac.com/news/foreclosure-trends/q2-2015-zombie-foreclosures/ (June 10, 2015).
117. *Id.*
118. *Id.*
119. *See id.*
120. *Id.*
121. *U.S. Residential Vacancies Decrease*, *supra* note 108.
122. *One in Four Zombies*, *supra* note 114. On a positive note, Florida experienced a 35% year-over-year decrease in zombie foreclosures although it still had the highest total number, and Illinois enjoyed a 40% decrease. *Id.*
123. BLACK KNIGHT FIN. SERVS., BLACK KNIGHT MORTGAGE MONITOR (Nov. 2014), http://www.bkfs.com/Data/DataReports/BKFS_MM_Nov2014_Report.pdf.
124. *Id.*
125. *See* Dan Immergluck et al., *Local Vacant Property Registration Ordinances in the U.S.—An Analysis of Growth, Regional Trends and Some Key Characteristics* 1 (August 12, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130775.

depth and breadth of the housing crisis took root, many municipalities found themselves faced with overwhelming numbers of vacant or abandoned properties that quickly threatened to destroy entire neighborhoods.[126] Homeowners who were underwater or insolvent often received notices of default and/or foreclosure or simply abandoned the property prior to any formal action.[127] As a result, the localities enacted legislation to enable them to get out in front of the problem, generally in one of two forms: the "classic model"[128] and the "foreclosure model."[129] Both models have been effective as tracking mechanisms that alert the city or locality early on to a potential source of trouble. Additionally, by requiring the lenders and/or servicers to register a property as abandoned, maintain and secure the property, and pay an associated fee (often on a sliding scale based on the length of vacancy),[130] localities are better able to police the situation and monitor the affected property and those in near proximity.[131]

The prevalence of the VPROs in the United States, and especially in those states most affected by the housing crisis in the late 2000s, has expanded dramatically in the past six years.[132] VPROs, although useful tools, have been opposed by the mortgage industry which fears a multitude of localized compliance obligations for vacant properties as well as the corresponding imposition of fees and fines.[133] Additionally, VPROs suffered a significant setback in the spring of 2014 when the Federal Housing Finance Agency ("FHFA") reached a settlement agreement

126. *Id.* at 5–6.

127. Weber, *supra* note 2, at 62–77. I suggested several remedies to assist both the homeowners and localities including potential relief in bankruptcy and changes to the laws of foreclosure to limit the zombie mortgage phenomenon. *Id.*

128. The "classic model" is designed to account for any vacant or abandoned properties whether or not the foreclosure process has begun. *Id.* at 44.

129. The "foreclosure model," as the name suggests, only tracks those properties that are at some stage of default, most commonly where an initial notice of default has been delivered to the borrower. *Id.*

130. *See, e.g.*, CINCINNATI, OHIO, CODE OF ORDINANCES § 1123 (2012). In Cincinnati, Ohio, for example, owners of vacant properties must procure a license until the property is once again habitable. The license fees are on a sliding scale and increase the longer the property is uninhabitable. The city can place a lien on the property for failure to pay the license fee. In addition, the owner of the vacant property must carry a minimum of $300,000 in liability insurance. *Id.* §§ 1101–77.1 (b).

131. New York is also considering a new law, the New York State Abandoned Property Neighborhood Relief Act of 2015, that would impose stricter maintenance and reporting requirements of lenders who hold mortgages on abandoned properties. B. A6932, 2015–2016 S. Assemb., Reg. Sess. (N.Y. 2015); *see also* Jon Campbell, *Mayors Join 'Zombie Properties' Push*, J. NEWS (June 4, 2014, 10:48 P.M.), http://www.lohud.com/story/news/politics/albany-watch/2014/06/04/mayors-join-zombie-properties-push/9993535.

132. As of February, 2016, Safeguard Properties estimates over 1,900 VPROs. *Property Registration*, SAFEGUARD PROPS. http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx. (last visited April 5, 2017).

133. *Cf.* Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 URB. L. 399, 415 (2012). The mortgage industry has, however, been more receptive to statewide registration efforts as they are more conducive to uniform compliance procedures. *Id.* (noting that, as of 2011, Connecticut, Texas, and Virginia had adopted statewide registration laws).

with the City of Chicago after it successfully challenged Chicago's vacant property ordinances.[134]

The FHFA had claimed that the Housing and Economic Recovery Act of 2008 preempted the city's ordinance. The FHFA, conservator of Fannie Mae[135] and Freddie Mac,[136] owned more than 250,000 loans secured by properties in Chicago and would have faced substantial costs had it needed to comply with the city's $500 registration fee per property and the obligation to maintain and secure the property.[137] According to the terms of the settlement, the FHFA is not required to comply with the ordinance nor will it be subject to the fines or registration fees (though it will continue to voluntarily register its properties with the city).[138]

This settlement has potential far-reaching consequences, as it appears the FHFA's preemption argument would prevail in other localities as well should the matter go to trial, although it should not affect private lenders. The implication for the localities with VPROs already on the books may be that all vacant properties secured by mortgages held by Fannie Mae and Freddie Mac would be exempt from the ordinance. That is significant because it is estimated that, in 2010, Fannie Mae and Freddie Mac were involved in approximately half of all residential property mortgages.[139] Therefore, while VPROs are still effective at identifying abandoned properties and imposing some of the maintenance obligations on the lenders, the extent of its reach has been greatly reduced, for the time being, by the FHFA/Chicago settlement agreement. That being said, VPROs should not be discarded as a tool for combating vacant properties, as the ordinances are still quite effective against private lenders and can be very useful as sources of information regarding the extent of the abandoned property problem where Fannie Mae and Freddie Mac voluntarily agree to comply.

Lastly, although the Chicago settlement with the FHFA seemed to portend a decrease in the prevalence of VPROs, the Attorney General of

134. Mary Ellen Podmolik, *FHFA, Chicago Settle Vacant Property Dispute*, CHI. TRIB. (Apr. 7, 2014), http://articles.chicagotribune.com/2014-04-07/business/chi-fhfa-vacant-buildings-dispute-2014 0407_1_fhfa-vacant-building-ordinance-fannie-mae.

135. The Federal National Mortgage Association ("Fannie Mae"). Fannie Mae helps maintain a secondary market for residential mortgages in the United States. Although government-created, it is a for-profit, privately-owned enterprise. *See* Brent J. Horton, *For the Protection of Investors and the Public: Why Fannie Mae's Mortgage-Backed Securities Should be Subject to the Disclosure Requirements of the Securities Act of 1933*, 89 TUL. L. REV. 125, 127–28 (2014).

136. The Federal Home Loan Mortgage Corporation ("Freddie Mac"). Freddie Mac purchases mortgages on the secondary market and then pools them and securitizes them for resale to investors. *See, e.g.*, Florence Wagman Roisman, *Protecting Homeowners from Non-Judicial Foreclosure of Mortgages Held by Fannie Mae and Freddie Mac*, 43 REAL EST. L.J. 125, 125–27 (2014).

137. In addition to the fees and maintenance obligations, the VPRO also imposed fines as high as $1,000 per infraction in cases of violations of the ordinance. *See* Podmolik, *supra* note 134.

138. *Id.*

139. *The Budgetary Cost of Fannie Mae and Freddie Mac and Options for the Future Federal Role in the Secondary Mortgage Market Before the House Committee on the Budget* (June 2, 2011) (Statement of Deborah Lucas, Assistant Dir. for Fin. Analysis), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/122xx/doc12213/06-02-gses_testimony.pdf.

New York proposed a new VPRO statute in February, 2015.[140] The bill, the Abandoned Property Neighborhood Relief Act,[141] is similar to other VPROs in that it would establish a registry and require lenders to monitor and secure abandoned homes.[142] It also contains a notice requirement that would require lenders to advise homeowners of their right to occupy the home until an official court order directs them to leave.[143]

B. Land Banking

Another tool that has become more common is the land bank. In essence, a land bank is an entity that takes ownership of vacant, abandoned, or tax-delinquent properties and later disposes of them through sale to a new purchaser.[144] In New York, for example, land banks can acquire property via gift, devise, transfer, exchange purchase, or through foreclosure.[145] New York land banks can acquire property through foreclosure because in New York, land banks may only be created by a foreclosing governmental unit.[146] In other jurisdictions in which the land bank is a private or *quasi*-public entity, the foreclosing entity may transfer the property directly into the land bank.[147]

Once the land bank acquires the property, different concerns come into play. In some cases the land bank is forced, due to the state of the home, to demolish the structure on the property; in others, it is required to expend funds to maintain or secure the structures.[148] For these reasons, the operation of a land bank is extremely costly.[149] In jurisdictions where land banks have been created, however, they have effectively rehabilitated property and thereafter returned the property to the tax rolls.[150] This is of the utmost importance given the negative self-reinforcing cycle of

140. *See* Glenn Blain, *Zombie Foreclosures Overrunning State, Jumped 38% in 2014: Attorney General Report*, N.Y. DAILY NEWS (Apr. 27, 2015), http://www.nydailynews.com/new-york/zombie-foreclosures-jumped-38-2014-report-article-1.2200140. Attorney General Schniederman championed similar legislation in 2014. *See, e.g.*, Trey Garrison, *New York Attorney General: Zombie Property Killer*, HOUSINGWIRE (Feb. 14, 2014), http://www.housingwire.com/articles/28980-new-york-attorney-general-zombie-property-killer.

141. B. A6932, 2015-2016 S. Assemb., Reg. Sess. (N.Y. 2015).

142. *Id.*

143. *Id.* In 2015, Omaha, Nebraska, also adopted a VPRO. *See* Roseann Morning, *Council Reaches Compromise Over Abandoned Properties*, OMAHA WORLD-HERALD (Nov. 18, 2015), http://www.omaha.com/news/metro/council-reaches-compromise-over-abandoned-properties/article_5d323c68-d766-5fb2-b1c7-f6ea1c395358.html.

144. Stephan Whitaker & Thomas James Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* (Fed. Reserve Bank of Cleveland, Working Paper No. 11–23, 2011).

145. N.Y. NOT-FOR-PROFIT CORP. § 1608(b) (2016).

146. *Id.* § 1603.

147. *See* Peter Slavin, *In 13 States, Land Banks Stabilizing Weakened Municipalities*, URBANLAND (Jan. 23, 2015), http://urbanland.uli.org/industry-sectors/13-states-land-banks-stabilizing-weakened-municipalities.

148. *Id.*

149. *Cf. id.*

150. In many jurisdictions, properties held by land banks are exempt from real-property taxation. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. § 1608(a) (2016).

abandoned properties. If one home goes vacant and fails to pay property taxes a city can respond. But, if the vacancies become contagious as communities become less desirable, localities very quickly find themselves with many vacant homes, none of which are paying property taxes but all still require public expenditures for safety and maintenance.[151]

One of the main benefits of land banks is their potential ability to pass on clean title.[152] Given the often-lengthy periods of property-tax default, and instances of market values down to single-digit dollars,[153] many abandoned properties fetch no bidders at public auction.[154] In these instances, where the tax liens combined with interest and penalties vastly exceeds the fair-market value, the open-market system fails the community as every property represents a negative value proposition.[155] Further complicating the matter is the fact that some jurisdictions sell tax liens on the market to investors who have every incentive to collect on the outstanding tax, but no incentive to return the property as quickly as possible to the tax rolls.[156] Therefore, the land bank's ability to transfer marketable, insurable title to subsequent purchasers is significant.

Unfortunately, the success of the land bank, especially in its ability to pass on clean title, is strictly dependent on the relevant state's foreclosure laws. Those states most affected by the real-estate crisis have adopted mechanisms to accelerate or facilitate the transfer of these properties as efficiently as possible.[157] For those states who have not adopted such changes, land banks will be a less relevant solution and, in many cases, will refuse to accept transfers of property unless the property is already free and clear of any tax liens.[158] Even with a successful land bank, however, the remedy is typically one that will be employed as part of a com-

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151. *See* ALEXANDER, *supra* note 9, at 25 (noting that, "a cycle of nonpayment of property taxes can thus become a spiral of deterioration[,]" and "in many jurisdictions, property tax delinquency simply marks the beginnings of a complex and prolonged period of enforcement through tax foreclosures").

152. *See* ALEXANDER, *supra* note 9, at 21. In addition, Atlanta has developed a system where its land bank is able to forgive delinquent taxes and transfer clean title to a new purchaser. *Id.* at 30 (citing O.C.G.A. § 48–4–64(c)). Not all land banks are so empowered, in which case they often only accept land with clear title. *See id.* at 31.

153. Emily Badger, *Now on Auction in Detroit: Homes Starting at $1,000*, WASH. POST: WONKBLOG (May 10, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/10/now-on-auction-in-detroit-homes-for-as-little-as-1000.

154. *See id.*

155. *See* ALEXANDER, *supra* note 9, at 25.

156. *See id.*

157. *See* Slavin, *supra* note 147 (discussing the third generation of land banks that have increased power and control and noting specifically the Cuyahoga County land bank that also aims for housing stabilization and preservation).

158. *See Policies & Procedures*, LUCAS CTY. LANDBANK, http://co.lucas.oh.us/Document Center/Home/View/7244 (last visited April 5, 2017) (noting that "[a] donation of property encumbered by liens or other clouds on the title may be denied . . .").

prehensive solution, rather than the only option, given the relatively high costs of running it.[159]

C. *Foreclosure Fast Track*

Real-property law generally does not change very quickly. Since 2009, however, several states have adopted laws intended to allow a foreclosure to be fast-tracked, typically in the case of abandoned property.[160] Those states, including Illinois,[161] Indiana,[162] Kentucky,[163] Michigan,[164] Minnesota,[165] Nevada,[166] New Jersey,[167] and Oklahoma,[168] targeted unoccupied and abandoned properties in an attempt to facilitate the mortgagee's right to quickly and cheaply foreclose on properties. The rationale behind the significant change to traditional foreclosure law, which strongly protected the mortgagor's right to possession until the foreclosure was finished, is that with abandoned properties nobody's rights are actually infringed upon since the mortgagor has already abandoned the property and the mortgagee's and community's rights are enhanced by promptly dealing with a potential nuisance.[169]

The purpose of the laws is clear from their names. They are intended to speed up the entire foreclosure process. Unsurprisingly, the vast majority of these laws are in judicial-foreclosure states where a delinquent mortgage is now averaging 1,000 days in delinquency, compared to 200 to 400 in 2005.[170] That means there are essentially delays of two years or more in the foreclosure process in judicial-foreclosure states. In addition, judicial-foreclosure states are taking longer to come down from their recession highs in terms of new foreclosure starts. The pipeline ratio (the time in years for a property to proceed through the foreclosure process) is approximately 4.4 in judicial states versus 4.0 in nonjudicial.[171] Behind that number, the top four judicial states (Delaware at 10.5, New

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159. *See, e.g.*, GREATER OHIO POLICY CTR., TAKING STOCK OF OHIO COUNTY LAND BANKS: CURRENT PRACTICES AND PROMISING STRATEGIES, 11 (May 2015), http://greaterohio.org/files/policy-research/greaterohiolandbankreport5-15-15.pdf.

160. *See* GEOFFREY WALSH, FAST TRACK FORECLOSURE LAWS: ARE THEY HEADED IN THE RIGHT DIRECTION? 1 (Jan. 2014), http://www.nclc.org/images/pdf/pr-reports/report-fast-track-foreclosure-laws.pdf.

161. 735 ILL. COMP. STAT. 5/15-1505.8 (2013).

162. IND. CODE §§ 32-30-10.6-1–5 (2012).

163. KY. REV. STAT. ANN. § 426.205 (West 2012).

164. MICH. COMP. LAWS § 600.3240 (2014).

165. MINN. STAT. § 582.032 (2013).

166. NEV. S. 278, 2013 Leg., 77th Sess. (2013).

167. N.J. STAT. ANN. § 2A:50-73 (2012).

168. OKLA. STAT. tit. 46, § 302 (2014).

169. Jann Swanson, *Fast-Tracking Foreclosures Might Eliminate Dead Weight Loss*, MORTGAGE NEWS DAILY (May 21, 2014, 10:23 AM), http://www.mortgagenewsdaily.com/05212014_fast_track_foreclosures.asp.

170. MORTGAGE MONITOR (Dec. 2015), *supra* note 103, at Appendix.

171. *Id.*

York at 9.8, Hawaii at 9.7, and North Dakota at 7.9) are all higher than the highest nonjudicial (Massachusetts at 7.3).[172]

These fast-track laws are the states' response to the lengthy delays. They provide extremely expedited time frames for foreclosures of abandoned, residential property. For example, in Illinois, a mortgagee may file a motion to expedite the foreclosure, along with an affidavit that the property is abandoned.[173] In that case, the respective court must hold a hearing within a compressed window of approximately three weeks.[174] In contrast, under the traditional process, a homeowner would have the right to bring the mortgage current within ninety days of receiving the summons,[175] plus several additional months of a redemption period.[176] In the case of abandoned properties, however, if the court determines the property is abandoned "the court shall grant the motion and immediately proceed to a trial of the foreclosure."[177] Furthermore, as mentioned above, under the fast-track provisions, the mortgagor's rights of redemption are reduced to just thirty days after the judgment date.[178] This period differs from the normal statutory period of either seven months from the service of the initial complaint or three months following the judgment of foreclosure.[179]

The fast-track provisions are almost uniformly triggered by a claim of abandonment that is generally predicated on the fulfillment of certain statutory criteria.[180] The most common criteria to find abandonment include: broken or boarded-up windows and doors, no utilities or services, damage or deterioration to the property, accumulated trash, overgrown grass, uncorrected housing-code violations, or signed statements from the mortgagors evincing a clear intent to abandon.[181] Nearly all of these states focus the fast-track provision specifically on abandoned housing.[182] This type of targeting rationally attacks the source of the problem without reducing a mortgagor's rights as the owner of the property.

The fast-track laws were generally adopted at the behest of the lending community as they tried to seek expedited mechanisms to repos-

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172. *Id.* Pipeline Ratio. Included in the non-judicial average is the District of Colombia which has an eye-popping pipeline ratio of 27.3, though Black Knight makes clear in a note that there are "less than 5,000 loans in the pipeline." *Id.*

173. 735 ILL. COMP. STAT. 5/15-1505.8 (2016).

174. *Id.* ("[T]he motion shall be heard by the court no earlier than before the period to answer the . . . complaint has expired and no later than 21 days after the period to answer the . . . complain has expired.").

175. 735 ILL. COMP. STAT. 5/15-1602.

176. 735 ILL. COMP. STAT. 5/15-1603.

177. *Id.* Likewise, in Indiana, if the court finds the property abandoned, it can immediately order a foreclosure sale. IND. CODE § 32-29-7 (2016).

178. 735 ILL. COMP. STAT. 5/15-1603. Michigan also provides for a redemption period of one month for abandoned residential property. MICH. COMP. LAWS § 600.3240(9) (2014).

179. 735 ILL. COMP. STAT. 5/15-1504(a)(3)(O).

180. *See, e.g.*, 735 ILL. COMP. STAT. 5/15-1200.5, -1504.1.

181. *See, e.g.*, 735 ILL. COMP. STAT. 5/15-1505.8 (b) (incorporating 735 ILL. COMP. STAT. 5/15-1200.5).

182. *See, e.g.*, MINN. STAT. § 582.032 (2013).

sess the delinquent properties.[183] The initial purpose of the laws was to quickly process delinquent properties, thereby benefitting lenders at the expense of the mortgagors. It is much less clear, however, that the affected communities receive any benefit. In states with the largest amount of bank-owned property, procedures that simply expand lenders' inventory of low-to no-value property, with little incentive to repair the dilapidated properties, do nothing to alleviate the problem of decaying communities and reduced sources of tax as the properties continue to decline in value. It may ultimately prove that the lenders are better at securing the vacant properties to prevent additional stripping, vandalism, and theft. But without rehabilitation and resale of the properties, either by restoring the individual homes or by demolishing the structures and selling the land to abutting properties, the fast-track foreclosure is a less significant tool for communities than the other proposal discussed above.

In a twist of fate, however, in the spring of 2015, the Wisconsin Supreme Court decided in a unanimous opinion that it could compel the lender to sell the vacant property—even against the lender's wishes—under the fast-track law.[184] In *Carson*, the homeowner was ultimately able to procure a judicial finding that the home was abandoned, which compelled the court to order a sale of the property.[185] Bank of New York Mellon argued, unsuccessfully, that the statute was permissive so lien holders were entitled, though not required, to foreclose; and that even if the lien holder was required to foreclose, the statute did not contain a deadline for the conclusion of a sale.[186]

During the pendency of the foreclosure (which Bank of New York Mellon initially sought), neither Carson nor Bank of New York Mellon secured the property and it was vandalized repeatedly.[187] The City of Milwaukee ordered Bank of New York Mellon to secure the property, but it failed to do so.[188] In addition, the City of Milwaukee assessed Carson $1,800 in municipal fines for lack of maintenance, including overgrown grass and weeds and accumulated garbage.[189] Sixteen months after the judgment of foreclosure was entered, Bank of New York Mellon had not disposed of the property nor did it have any plans to do so.[190] At that point, Carson successfully filed to have the property deemed abandoned, and the court ordered Bank of New York Mellon to sell the property

183. *See, e.g.*, Tim Devaney, *Failure to Foreclose Holds Back Real Estate Rebound*, WASH. TIMES (Mar. 28, 2013), http://www.washingtontimes.com/news/2013/mar/28/failure-to-foreclose-holds-back-real-estate-reboun/?page=all (urging foreclosure fast track laws to speed properties through the foreclosure process).

184. Bank of New York Mellon v. Carson, 2015 WI 15, ¶¶ 44–45.

185. *Id.* ¶ 8.

186. *Id.* ¶ 2.

187. *Id.* ¶ 9.

188. *Id.*

189. *Id.*

190. *Id.* ¶ 10.

within a reasonable time following a five-week period from the date of the amended judgment.[191]

The Wisconsin Supreme Court analyzed the plain language of the statute to hold that, once a court made a finding of abandonment, it was compelled to order the sale within a reasonable time following a five-week period from the date of that judgment.[192] To bolster its findings, the court highlighted the primary purpose of the abandoned property statute as "evinc[ing] an intent to ensure a prompt sale of the property."[193] The irony in the decision is that the lenders initially sought the accelerated foreclosure process.[194] Milwaukee Mayor, Tom Barrett, praised the decision for giving municipalities another "valuable tool" to combat the problem and urged lenders to make use of the tool after years of resistance and uncertainty.[195]

This decision is significant as it represents a clear shift in the traditional power dynamic between lien holder and lien grantor. Whereas traditionally the lien holder had the unilateral prerogative to foreclose or not, that power has been stripped away in Wisconsin. The homeowner, faced with the potential obligations of ownership of a zombie property into perpetuity, now is able to escape the property legally, quickly, and with finality. The potential downside to the case is that it publicly highlights the drawbacks to fast-track foreclosure laws and is likely to result in fewer lenders lobbying for such legislation without statutory language that reinstates their primacy of place in the foreclosure hierarchy.

D. Uniform Law Commission – Home Foreclosures Procedures Act

Since 2013, the Uniform Law Commission ("ULC") has been considering, and drafting a Home Foreclosures Procedures Act ("HFPA").[196] In July 2015, the ULC approved the HFPA[197] over opposition from the American Bankers Association,[198] the Mortgage Bankers Association

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191. *Id.*

192. *Id.* ¶ 18.

193. *Id.* ¶ 33. Legislative intent always swayed the court as the legislative testimony highlighted a desire to allow municipalities to quickly deal with the problems associated with abandoned properties. *Id.* ¶¶ 36, 37.

194. *See* Michael Bologna, *Milwaukee Mayor Touts Court Ruling Helping Cities Deal with 'Zombie Homes,'* BLOOMBERG BNA: BANKR. L. REP. (February 19, 2015).

195. *Id.*

196. *See, e.g.*, Memorandum, from John A. Sebert, ULC Exec. Dir. to ULC Drafting Comm. on Residential Real Estate Mortg. Foreclosure Processes and Procedures (May 4, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/2012may4_RREMFPP_Stakeholders%20Meeting%20Report.pdf.

197. *See, e.g.*, Press Release, Uniform Law Comm'n, National Law Group Wraps Up 124th Annual Meeting: Seven New Acts Approved (July 15, 2015), http://www.uniformlaws.org/NewsDetail.aspx?title=Uniform%20Law%20Commission%20Wraps%20Up%20124th%20Annual%20Meeting.

198. Letter from Stephen A. O'Connor, Senior Vice President, Pub. Policy & Indus. Rel., Mortg. Bankers Assoc., to William R. Breetz, Jr., Chairman of the Uniform Law Comm'n Comm. for the Home Foreclosure Procedures Act (July 8, 2015), http://www.uniformlaws.org/shared/docs/Res

("MBA"),[199] and the Securities Industry and Financial Markets Association ("SIFMA").[200] While the HFPA covers a wide range of issues (including amendments to the holder in due-course doctrine), for the purposes of this Article, §§ 601 through 606, dealing with abandoned property, are the most relevant.[201]

Among the more-interesting ideas in the HFPA is one already implemented in the foreclosure fast-track statutes that allows either the creditor or a governmental subdivision to take the initial legal action to have a property declared vacant.[202] As Comment 1 states, the justification for this procedure is that "homeowner[s] [are] no longer making a valuable economic use of the property to provide shelter. . . . [And] [a] foreclosure sale will not result in a possessor being forced to relocate to other housing."[203] By allowing a party other than the creditor to dictate whether a foreclosure proceeding commences, the law allows other parties with at least an incidental interest in the property to dictate that rehabilitative actions will be taken.

In a judicial foreclosure, if the property is determined to be "abandoned,"[204] the motion can only be withdrawn with the court's permission, while in a nonjudicial foreclosure, the foreclosure request can only be withdrawn if the original moving party consents.[205] This mechanism frees the property from a typical zombie cycle where the creditor may have initiated foreclosure proceedings, the mortgagor vacated the premises, and then the creditor abandoned the foreclosure prior to taking title—often without the mortgagor knowing that the foreclosure proceedings were terminated.

If the foreclosure proceeding on the abandoned property continues, the timeframes are accelerated. In a judicial foreclosure, the court could order the public sale of the property between thirty and forty-five days after the entry of foreclosure.[206] If there is no equity in the property beyond the value of the extinguishing mortgage, however, the court could bypass a public sale and directly transfer title in the property to the fore-

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idential%20Real%20Estate %20Mortgage%20Foreclosure%20Process%20and%20Protections/2015jul8_Home%20Foreclosure_MBA_Comments.pdf.

199. *Id.*

200. Letter from Christopher B. Killian, Managing Director, Securitization Group, SIFMA, William R. Breetz, Jr., Chairman of the Uniform Law Comm'n Comm. for the Home Foreclosure Procedures Act (July 7, 2015), http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/2015jul7_HomeForeclosure_SIFMA_Comments_Killian.pdf. It should be noted that opposition from both the MBA and SIMFA stemmed largely from the HFPA's proposal on the holder in due-course doctrine rather than focusing on the sections on abandoned property. *Id.*

201. UNIF. HOME FORECLOSURE PROCEDURES ACT §§ 601–606 (UNIF. LAW COMM'N TENTATIVE DRAFT 2015).

202. *Id.* §§ 601–02.

203. *Id.* § 601, n.1.

204. *See id.* § 603. This section sets forth an extensive listing of criteria which can give rise to the presumption of abandonment.

205. *Id.* § 604.

206. *Id.* § 605(a)(1).

closing creditor.[207] In a nonjudicial foreclosure, the creditor could conduct the public sale between thirty and sixty days after the determination that the property is abandoned.[208] In any event, once the property has been declared abandoned, following the proper procedures, the creditor must either "cause the public sale or transfer of the mortgaged property" within 120 days after the order or determination of abandoned status or release its mortgage and file the release with the appropriate registrar.[209]

This type of mechanism, coupled with the maintenance requirements imposed on the creditor under § 606, should have the resultant effect of minimizing the time the property remains vacant. Either the creditor will foreclose the property and repossess (and ideally rehabilitate but at a minimum "maintain"[210]), or it will release the mortgage and allow a third party the opportunity to return the property to productive use. Either outcome is preferable to the *status quo ante* that allows the property to continue as a zombie, often with deleterious effects for the entire community such as "creating public health risks, including infestations by vermin, . . . fiscal impacts on local governments, . . . [and] added expenses to provide essential services to blighted neighborhoods, such as police and fire protection."[211]

Given the recent decrease in delinquency and defaults in mortgages,[212] it will be interesting to see the extent to which the HFPA is embraced. It may be that its timing resembles the old adage of "closing the barn door after the cows have gotten out," but that does not mean it is not good policy. Although the national market for real estate has improved markedly, the areas touched by blight and abandoned properties have been much slower to recover.[213] The HFPA would directly benefit those communities most and should be strongly considered by policymakers facing high levels of zombie properties.

E. Dedicated Courts, Personnel, & Enhanced Enforcement

Several localities have received recognition for the role their housing courts play in the abandoned property issue. In Cleveland, Ohio, a town hit particularly hard by the real estate crisis,[214] specialized courts

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207. *Id.* § 605(a)(2).
208. *Id.* § 605(b).
209. *Id.* § 605(c).
210. *Id.* § 606(a)(1)–(4).
211. *Id.* § 601 cmt. 1.
212. *See supra* text accompanying notes 103–08.
213. *See id.*
214. In 2010, the Cleveland Housing Court's caseload reached an all-time high, with over 11,000 civil cases and 6,800 criminal cases. Hon. Raymond L. Pianka, *Cleveland Housing Court—A Problem-Solving Court Adapts to New Challenges,* FUTURE TRENDS IN STATE CTS. 44, 45 (2012), http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Courts-and-the-Community/~/media/Microsites/Files/Future%20Trends%202012/PDFs/ClevelandHousingCt_Pianka.ashx. Cleveland was actively dealing with abandoned properties even prior to the great recession, and its housing court was established in 1980. *See* ALAN MALLARCH ET AL., CLEVELAND AT THE

and procedures, in place since 1980, have been put to the task[215] of stringently enforcing the housing code and city ordinances.[216] One example of how the Cleveland Housing Court has responded recently is through its development of a corporate docket to address nonresponsive corporate owners of abandoned properties.[217] If the entity that failed to respond to the initial summons fails to respond again, it may be liable for contempt of court charges and fines of $1,000 per day.[218] As of March, 2012, the Cleveland Housing Court had assessed over $100 million in sanctions for contempt of court orders.[219] Additionally, the Court Community Service program is used to assign misdemeanor offenders the task of securing abandoned properties, cleaning up the lots, or making minor repairs.[220] The Ohio law also provides a private right of action for nuisance abatement.[221] Under the terms of the law, the city, a nearby neighbor, or a housing-related nonprofit can file a claim against the owner of the nuisance property to remedy the problem.[222]

In San Diego, California, a new municipal position was created in 1996 to explicitly monitor and respond to abandoned properties.[223] The Vacant Properties Coordinator works to restore the vacant properties "to productive use in the economy."[224] The coordinator is empowered to issue a notice of abatement to clean and secure the abandoned property or the city will do so and charge the owner the costs of securing the property.[225] One of the requirements in San Diego is that the owner must submit a statement of intent delineating the expected period of vacancy and a plan to maintain the property and either reoccupy, rehabilitate, or demolish the structure.[226] Failure to file the statement of intent is a misdemeanor and fines may be assessed.[227]

Both Baltimore, Maryland, and Tucson, Arizona, attempted to create task forces to combat abandoned properties and blight. The Tucson task force, SABER (Slum Abatement and Blight Enforcement Response), was created in 2001 as a collaboration among seven to nine city departments.[228] Likewise, Baltimore created the TEVO (Targeted En-

CROSSROADS: TURNING ABANDONMENT INTO OPPORTUNITY 1 (June 2005) http://www.clevelandhousingcourt.org/pdf/at_the_crossroads.pdf.

215. Pianka, *supra* note 214, at 47.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* (noting, however, that many of the sanctions have not been collected).

220. *Id.* at 48.

221. *Id.* at 46.

222. OHIO REV. CODE ANN. § 3767.41 (West 2012).

223. *Vacant Property Rehabilitation Programs*, CITY OF SAN DIEGO, https://www.sandiego.gov/ced/housing/vacant (last visited April 5, 2017).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. JAMES H. CARR & MICHELLE MULCAHY, NAT'L CMTY REINVESTMENT COAL., REBUILDING COMMUNITIES IN ECONOMIC DISTRESS: LOCAL STRATEGIES TO SUSTAIN HOMEOWNERSHIP,

forcement Toward Visible Outcomes) program in 2005 to increase code enforcement and reduce the inventory of vacant properties.[229] That plan, along with the Tucson plan, failed to succeed due to a lack of resources.[230] In 2013, however, the Mayor of Baltimore, Stephanie Rawlings-Blake, proposed a plan called the "Vacants to Value" program that budgeted over $20 million in demolition expenses for vacant properties over a two-and-a-half-year period to reduce the inventory of vacant houses.[231] In addition to the demolitions, the plan would allow the city to compel the owners to rehabilitate the property or force the property to be sold at auction.[232]

As with the previous measures identified, all of these programs are attempts by cities to rehabilitate properties, restore them back to an acceptable condition, and have them returned as productive parcels on the tax rolls. The extent to which these programs succeed often appears to depend on the extent to which a pocket of the sector has suffered significant decay or blight. The programs that are able to identify problem areas early on and respond quickly appear to be the ones best positioned to counteract the decline of the neighborhood. The issue for the municipalities, however, is that all of these programs require resources, and sometimes the city planners may conclude that the benefits simply do not outweigh the costs.

F. Eminent Domain

The final tactic mentioned in this Article is perhaps the most intriguing, least tested, and most likely to face legal challenge.[233] In 2012, Cornell law professor Robert C. Hockett proposed that cities use their powers of eminent domain to seize the mortgages encumbering proper-

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RECLAIM VACANT PROPERTIES, AND PROMOTE COMMUNITY-BASED EMPLOYMENT 8 (October 2010); *see also*, CITY OF TUCSON, ARIZ., COMPREHENSIVE ANNUAL FINANCIAL REPORT vii (Fiscal Year July 1, 2000–June 30, 2001).

229. *See* Doug Donovan, *Project Targets Vacant Housing*, BALT. SUN (Jan. 18, 2005), http://articles.baltimoresun.com/2005-01-18/news/0501180255_1_vacant-houses-vacant-properties-housing-department.

230. *See* Emily Bregel, *Tucson's Aging Mobile Homes: Better Than Nothing?*, TUSCON.COM (May 4, 2014), http://azstarnet.com/news/local/tucson-s-aging-mobile-homes-better-than-nothing/article_8293a7fc-5efe-5413-913a-c8f1fa86e44b.html (noting that the City Attorney's Office "eliminated the 'neighborhood prosecution team'" and "the concerted effort of a decade ago has evolved into a reactive code-enforcement system that is complaint-driven"); Julie Scharper, *Rawlings-Blake Unveils Plan for Vacant Housing*, BALT. SUN (Nov. 3, 2010), http://articles.baltimoresun.com/2010-11-03/news/bs-md-ci-vacants-plan-20101102_1_mayor-stephanie-rawlings-blake-city-owned-properties-vacant-properties.

231. *See* Yvonne Wenger, *City to Raze Hundreds of Vacant Houses in Stepped-Up Plan*, BALT. SUN (Aug. 16, 2013), http://articles.baltimoresun.com/2013-08-16/news/bs-md-ci-vacants-demolition-20130816_1_vacant-houses-east-baltimore-rowhouses.

232. *Id.*

233. *See, e.g.*, Mike Konczal, *Is Richmond's Mortgage Seizure Scheme Even Legal?*, WASH. POST (Sept. 21, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/21/is-richmonds-mortgage-seizure-scheme-even-legal.

ties and pay the mortgagees the fair market value of those mortgages.[234] In the proposal, the city would only seize mortgages on properties that were "under water"—where the owner owed more than the property was worth.[235] In those cases, the cities would be able to purchase the mortgages at fair market value and still pay much less than the face value of the debt secured with those mortgages.[236] While a full-blown analysis of the legality of this mechanism is beyond the scope of this Article, the basics deserve to be mentioned.

The City of Richmond, California, appears to be the first city in the country to enact an ordinance that would provide it with such power.[237] Richmond, like many cities in California, was hit extremely hard by the housing market collapse. It is estimated that over half of owners with mortgages on their homes in Richmond are underwater, and, of those, "the average underwater homeowner owes 45 percent more than their home is worth."[238]

The fact that the city would be using its powers of eminent domain to take an intangible form of property should not make the action illegitimate as public entities have been able to seize items, such as sports franchises and stocks, using this power in the past.[239] In fact, long-standing Supreme Court case law seems to support the concept.[240] As long as the stated reason for using the power of eminent domain furthers a "public purpose," the use of the power will be upheld.[241]

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234. *See* Robert C. Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 121 (2012) [hereinafter *Municipal Condemnation*]; *see also* Robert Hockett, *Seize the Loans of Belly-Up Homes*, N.Y DAILY NEWS (June 30, 2014, 4:25 A.M.) [hereinafter *Belly-Up*], http://www.nydailynews.com/opinion/seize-loans-belly-up-homes-article-1.1847145.

235. *See Municipal Condemnation*, *supra* note 234, at 121–22; *Belly-Up*, *supra* note 234.

236. *See Municipal Condemnation*, *supra* note 234, at 121–22.

237. RICHMOND, CAL., ORDINANCE NO. 19-07 N.S. (2007).

238. *See* Konczal, *supra* note 233.

239. *Id. See* City of Oakland v. Oakland Raiders, 646 P.2d 835, 837 (1982). On appeal the Supreme Court of California held that "taking intangible property by eminent domain was authorized because neither the federal and state constitution nor the revised California eminent domain law distinguished between real or personal property and tangible or intangible property." Thomas W.E. Joyce, III, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation*, 13 FORDHAM URBAN L.J. 553, 556 (1984). The court also concluded that "the acquisition and . . . operation of a sport franchise maybe be an appropriate municipal function. *Oakland Raiders*, 646 P.2d at 843. The court remanded the case to the trial court to decide if, on the facts, there was a valid public use to justify the city's proposed action. The trial court entered judgment against the city and the Court of Appeals affirmed, holding that "the burden that would be imposed on interstate commerce outweighed the local interest in exercising statutory eminent domain authority over the franchise." Anthony F. Della Pelle, *Can the City of Los Angeles "Take" the Clippers?*, A.B.A. (Sept. 3, 2014), http://www.americanbar.org/groups/litigation/committees/realestate/news_analysis/articles_2014/open/0814-donald-sterling-los-angeles-clippers.html.

240. *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. 507, 531–32 (1848) (holding that a state may use its powers of eminent domain for intangible property, such as corporate franchises, and that the use of such power is not in conflict with the Contracts Clause of the U.S. Constitution).

241. *See, e.g.*, Kelo v. City of New London, Conn., 545 U.S. 469, 479–80 (2005) (noting that since the "close of the 19th century, [the Supreme Court] has embraced the broader and more natural interpretation of public use as 'public purpose'" in its eminent domain jurisprudence).

Lenders, of course, are challenging the ordinance on as many fronts as they can think of,[242] but that has not prevented other cities from also considering similar action. Cities such as Irvington and Newark in New Jersey, Yonkers in New York, and Pomona and Oakland in California have all recently discussed the tactic or suggested it receive further study.[243] In response to these proposals, Wall Street and financial giants have hit back, threatening to halt any mortgage lending in any city that attempted to use its power of eminent domain to forgive any mortgage debt.[244] The FHFA has also taken a strong position on the use of eminent domain in this context and "has determined such use presents a clear threat to the safe and sound operations of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks."[245] In mounting their opposition, *The New York Times* reported in January, 2014, that lenders have lobbied Congress, made robocalls to residents, and sent mass mailings to dissuade residents and cities from pursuing this tactic, an approach which has been successful in at least four other cities.[246]

For geographic areas faced with a stagnant, decreased real-estate market with no near-term growth prospects in home prices, the idea remains an intriguing one. For areas that are recovering or have economic signals of growth in the short term, however, it is unlikely that the localities would be willing to risk the wrath of lenders or otherwise preclude their residents from being able to receive mortgages backed by government-sponsored enterprises. This plan was originally developed to deal with underwater homeowners and not abandoned properties. It is more focused on reducing the outstanding debt so current homeowners are not forced into foreclosure by these underwater properties. That being said, the tool may have some relevancy just because of its existence.

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242. Among other defenses, the lenders are attacking the ordinance by arguing that the city does not have the ability to use eminent domain for mortgages, that the mortgages are not located within the jurisdiction of the city, that the Dormant Commerce Clause prevents this type of law, that the ordinance violates the Contracts Clause of the Constitution, that there is no appropriate public purpose, or that valuation techniques to assess the rate which the city should pay for the mortgages are flawed and inappropriate. *See* Konczal, *supra* note 233.

243. Eunice Lee, *Irvington Moves a Step Closer to Using Eminent Domain to Fight Foreclosures*, NJ.COM (Mar. 30, 2014, 11:05AM), http://www.nj.com/essex/index.ssf/2014/03/irvington_moves_a_step_closer_to_using_power_of_eminent_domain_to_stem_foreclosure_crisis.html; *see* Shaila Dewan, *More Cities Consider Using Eminent Domain to Halt Foreclosures*, N.Y. TIMES (Nov. 15, 2013), http://www.nytimes.com/2013/11/16/business/more-cities-consider-eminent-domain-to-halt-foreclosures.html?_r=0&gwh=7DD0E4F14998001DEFACD8AA03FC719D&gwt=pay.

244. Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html.

245. FED. HOUS. FIN. AGENCY, FHFA STATEMENT ON EMINENT DOMAIN (Aug. 8, 2013), http://www.chapa.org/sites/default/files/FHFAStmtEminentDomain080813.pdf. The FHFA stated that in the event any locality attempted to use eminent domain to restructure mortgage loans, it might:

> initiate legal challenges to [the action] . . .; act by order or by regulation to direct the regulated entities to limit, restrict or cease business activities within the jurisdiction . . .; or take such other actions as may be appropriate to respond to market uncertainty or increased costs created by any movement to put in place such programs.

Id.

246. Dewan, *supra* note 244.

If a municipality is able to threaten to write down a mortgage on a property the lender has failed to maintain, it may be able to spur the lender into performing those maintenance obligations. Likewise, reducing the amount of debt secured by the property could potentially price in buyers that would otherwise have been unable to purchase the property. Neither scenario seems too likely, but the threat of eminent domain represents one more tool for localities to use in dealing with the residual effects of the housing crisis.

IV. Conclusion

"Life is wasted on the living."[247]

This Article has focused on how to move a lender off of its position of inactivity and stimulate action so abandoned properties are more rapidly restored to a beneficial role in the community. Rehabilitative action clearly benefits municipalities and homeowners, and it benefits lenders tangentially by supporting property values in neighborhoods where they may have interests in other real property. While the transaction/carrying costs of maintaining the abandoned properties can add up, the costs to the affected communities are devastating. Abandoned properties often result in higher crime, incidences of vandalism, and public-safety concerns that can result in blight and, potentially, the demise of the entire community.

In addition to the more traditional mechanisms that are currently being considered, such as vacant property registration ordinances, land banking, foreclosure fast-track statutes, the Home Foreclosures Procedures Act, increased courts and personnel, or even eminent domain, this Article suggests a more fundamental tax-based approach. In the United States, the consumer is accustomed to the idea of undesirable products being heavily taxed (with the ubiquitous example being cigarettes). This Article proposes applying the taxation power of the states to the undesirable product of abandoned, vacant properties.

While some jurisdictions have state-imposed constitutional barriers to this type of program, those states that do not will find themselves with an additional tool to combat these vacant properties. Allowing the states to enforce taxes based on the abandoned status of a property will motivate creditors to dispose of that property sooner and will also allow the localities to recoup a greater percentage of the money expended on maintenance and supervision of the property. In the end, the goal is to maintain a higher percentage of properties occupied and economically beneficial for the communities, lenders, and homeowners. Incentivizing

247. Old zombie proverb. Ok, so zombies *probably* do not have proverbs, though that would clearly be a fitting one. The actual source is a book in the nonzombie masterpiece collection involving a hitchhiker, a towel, a guide, and a galaxy. DOUGLAS ADAMS, THE RESTAURANT AT THE END OF THE UNIVERSE 19 (1982).

creditors to act more quickly to avoid additional tax liability allows the states and localities to meet those goals.