How Do Case Law and Statute Differ? Lessons from the Evolution of Mortgage Law

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Abstract

This paper traces the history of mortgage law in the United States. I explore the history of foreclosure procedures, redemption periods, restrictions on deficiency judgments, and foreclosure moratoria. The historical record shows that the most enduring aspects of mortgage law stem from case law rather than statute. In particular, the ability of creditors to foreclose nonjudicially is determined very early in states' histories, usually before the Civil War, and usually in case law. In contrast, the aspects of mortgage law developed through statute change more frequently. This finding calls into question whether common law is inherently more flexible than the civil-law system used in some other countries. However, case law tends to be less responsive to populist pressures than statutes. My findings suggest that the reason common law favors financial development is unlikely to be its greater flexibility relative to law made by statute.

1. Introduction

Common-law countries provide creditors and equity investors with more protection and better enforcement of contracts than civil-law countries (on creditor rights, see, for example, La Porta et al. [1998]; Djankov, McLiesh, and Shleifer [2007]; Djankov et al. [2008]; on other types of financial contracts, see, for example, Lerner and Schoar [2005] and La Porta et al. [1998]). As a consequence of such greater protection and enforcement, common-law countries have better developed financial systems such that businesses find it easier to raise capital in them. However, it is unclear exactly what feature of common law leads to these benefits. It has been widely argued that the common-law system, with its

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strong reliance on case law, is inherently quite flexible and, in particular, adapts more quickly to changes in economic conditions than does civil law, which relies on code (see, for example, Priest 1977; Rubin 1977; Beck, Demirgüç-Kunt, and Levine 2003; Levine 2005; Gennaioli and Shleifer 2007; La Porta, Lopez-de-Silanes, and Shleifer 2008; Ponzetto and Fernandez 2008). In his summary of the literature, Levine (2005, p. 64) asserts that "a defining trait of British common law is that judges regularly interpret and shape the law as new circumstances arise." Similarly, in their review, La Porta, Lopez-de-Silanes, and Shleifer (2008, p. 305) conclude that "the central strategy of judicial law making is distinguishing cases from precedents, which has an unintended benefit that the law responds to a changing environment."

The analysis of the history of U.S. mortgage laws that I document in this paper instead reveals the remarkable inflexibility of laws developed in case law. I examine the early case law and document when states enacted the various statutes that now govern real estate security instruments (mortgages and deeds of trusts). I explore what led states to adopt a nonjudicial foreclosure procedure as the common procedure the lender uses to foreclose, what led to differences in the time period the borrower has to redeem the property either before or after foreclosure (redemption periods), and what led some states to restrict the lender's recourse to only the property (rather than the property as well as the borrower's other assets and income) in the event of default.

What I find is that the aspects of mortgage law that developed mainly through case law show remarkable persistence. Arguably, the most important creditor right in mortgage law is the ability to foreclose without seeking a judge's approval. In most states, whether a lender can foreclose without a judge's approval is determined in case law, and the case law is established early in states' history, typically before the Civil War. Once there is precedent, the rules regarding the procedure the lender must follow rarely change substantially. Once there is a body of case law, changing the procedure the lender must use to foreclose requires the legislature to change the civil code of procedures. Changing the civil code of procedures is akin to the way law is made in civil-law countries. Rather than adapt quickly to economic conditions, case law can be extremely inflexible, as the history of mortgage laws reveals. In contrast, aspects of mortgage law that are determined by statute, such as how long the borrower has to get the property back after a foreclosure sale, change much more over time.

These more frequent statutory interventions almost always aim to benefit debtors at the expense of creditors. Legal scholars have long understood that legislatures tend to interfere with private debt contracts in such a populist fashion. As Thurgood Marshall argued in 1827 (*Ogden v. Saunders,* 25 U.S. 213, 334–35 [1827]), the interventions of state legislatures denigrate creditors' rights and threaten the advancement of commerce:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to proper for his

own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.

In the history of U.S. mortgage laws, I find no early examples in which state legislatures interfered with private contracts to benefit creditors at the expense of debtors; the only interventions in which state legislatures enacted a statute to enhance creditor rights are a handful of deed-of-trust statutes in the latter half of the 20th century and early 21st century. In contrast, three sets of evidence are consistent with legislatures passing statutes abrogating creditors' rights in response to populist pressure.

First, in the few instances in which I find that foreclosure switched from being a nonjudicial process to a process requiring judicial approval, the change usually happened through statute rather than judicial rulings. Second, in the 1930s, many state legislatures passed antideficiency statutes, which restricted the right of creditors to pursue a borrower in default personally such that the creditor's only recourse became the mortgaged property. Consistent with such laws being a result of populist pressure, I find that farm foreclosure rates and the share of out-of-state credit predict whether a legislature passed such a statute. State judiciaries often struck down these statutes, however. In all such instances in which an antideficiency statute was meant to apply retroactively, judges intervened to preserve the integrity of private contracts. In at least one instance, a judge went further and prevented the law from applying to future mortgages. Finally, as has been established by Alston (1983, 1984), the foreclosure moratoria of the 1930s were acts of legislatures responding to widespread farm mortgage distress. Similar to their reaction to antideficiency statutes, judges deemed many of the foreclosure moratoria unconstitutional. In essence, in the history of mortgage law, the judiciary serves to restrain the populist impulses of state legislatures.

The history of U.S. mortgage law is not the only evidence that aspects of case law make the common-law system inflexible. In their study of private limited-liability companies (PLLCs), Guinnane et al. (2008) find that the United States was extremely slow to adopt PLLCs because of precedents in case law forbidding them. The comparison of the contracting environments in 19th-century America and France by Lamoreaux and Rosenthal (2005) also challenges the notion that the common-law legal system is inherently more flexible than legal systems based on a civil code. Malmendier (2009) finds that law in the early Roman Republic, often seen as the precursor to the civil-law system (see La Porta, Lopez-de-Silanes, and Shleifer 2008), adapted frequently to business needs.

Given the extremely early date at which I find that foreclosure procedures were established, it is safe to treat differences in some state mortgage laws, at least at present, as exogenous, which may provide economists with a useful instrument for studying the effect of differences in creditor rights (see, for example, Pence 2006; Mian, Sufi, and Trebbi 2011). Furthermore, the extent to which a creditor's right to nonjudicial foreclosure is determined in case law, and the relative lack of case law's response to populist pressures, suggests that it is uncorrelated with economic fundamentals more than a century later. More generally, the distinction I find between the effects of economic circumstances on statutes relative to their influence on case law suggests that differences in state laws that arose through case law are more plausibly exogenous than differences in state laws that arose through statute.

Section 2 of this paper describes the nature of mortgage contracts and foreclosure processes in the United States, defines some basic terminology, and provides a summary of how creditor friendly the mortgage laws are in each state at present. Section 3 shows that the creditor's right to power-of-sale foreclosure emerged largely in case law and rarely changes over time. It also documents that statutory redemption rights, which are exclusively determined in statute, change much more frequently. Section 4 discusses the reaction of legislatures to populist pressures in the 1930s and judges' responses to the legislation. Section 5 concludes.

2. Mortgage Laws in America Today

The laws across U.S. states differ in the legal theory underlying the mortgage contract and in how they balance the rights of creditors with those of borrowers. Despite at least five distinct attempts over the years to create a uniform mortgage code, mortgages today continue to be governed by a very diverse set of state laws.[1] Table 1 summarizes the dimensions of mortgage laws along which states differ and the extent to which an aspect of mortgage law is pro-creditor.

The first difference across states is in the legal theory underpinning the mortgage. What is commonly termed a mortgage consists of two legal documents. The specific terms under which the borrower must repay the loan are contained in the promissory note. The borrower is known in legal terms as the mortgagor, and the creditor is referred to as the mortgagee. In a title-theory state, the mortgage provides the mortgagee ownership of the property until the borrower has paid off the debt. If a state follows title theory, the lender retains title to the property until such time as the borrower pays off the mortgage. Under lien theory, the mortgage merely provides the lender with a lien on the property; the borrower owns the property during the duration of the mortgage, and the lender's interest in the property is limited to situations in which the borrower defaults on the mortgage. Table A1 and Figure A1 document that older states tend to follow title theory, and younger states usually follow lien theory. While the distinction between title

[1] Durfee and Doddridge (1925) and Pomeroy (1926) discuss at length the provisions of a uniform mortgage act. This act does not ever seem to have been passed. Reeve (1938) argues for the need for a uniform real estate mortgage act. That act too does not seem to have become law. Schwartz (1972) notes the proposed Uniform Land Transactions Act, which was never adopted. Bernhardt (1992) discusses the provisions of the Uniform Land Security Interest Act of 1985, which has yet to be adopted by any state. Nelson and Whitman (2004) analyze the Uniform Nonjudicial Foreclosure Act of 2002 and argue for its adoption at the federal level.

Table 1
Creditor or Debtor Friendliness of U.S. Mortgage Law

Aspect	Creditor or Debtor Friendly
Lien theory rather than title theory	Neither
Deed of trust rather than mortgage	Neither
Power-of-sale foreclosure usual procedure	Creditor
Longer statutory redemption periods	Debtor
Longer equitable redemption periods	Debtor
Deficiency judgments permitted without substantial restrictions	Creditor
Scire facias rather than standard judicial procedure	Creditor

and lien theory no longer has any substantial effect on the balance of power between borrower and creditor, different legal theories nevertheless require different mortgage documents, which adds to the paperwork burden of national lenders.[2]

States also differ in whether the standard real estate security instrument is a mortgage or a deed of trust, although the term "mortgage" refers to both instruments in everyday usage. In most states, the standard way to finance a property is with a mortgage. However, in some states the standard instrument is a deed of trust wherein the legal title to the property is entrusted to a third party known as the trustee. Unlike a mortgage, for which there are only two parties, there are three parties in a deed-of-trust transaction. In a deed-of-trust state, the trustee sells the property if the borrower defaults. In states that follow the lien theory of mortgages, the equitable title nevertheless remains with the borrower. The main reason some states use a deed of trust rather than a mortgage is because, as I discuss in greater detail below, when lenders began including power-of-sale clauses in mortgages, some judges viewed it as improper for the lender to be able to sell the property.

When a borrower becomes delinquent on her mortgage, there are two main factors that affect the speed with which the lender can take possession of the property. First, some states require the lender to go to court and receive a judge's approval to foreclose (judicial foreclosure). In other states, the lender may sell the property if the mortgage contains a power-of-sale clause, or, if a deed of trust is the standard real estate finance instrument, the trustee is obliged to sell the

[2] The existence of title theory is a product of the evolution of mortgage laws in England. In medieval England, in the most common form of mortgage, the lender received the rents and profits from the land to satisfy the debt. This prevented the contract from being seen as one in which the borrower was paying interest per se to the lender, which thus ensured that the contract was not usurious (Glaeser and Scheinkman 1998). Until the early 16th century, all lending at interest was forbidden, although occasional exceptions were made for money lending by Jews to gentiles (Temin and Voth 2008). As a result, it was crucial that the mortgage contract be structured in such a way that the contract did not violate usury laws. The mortgage contract evolved into a conditional conveyance (Jones 1878) in the sense of the property conveying to the borrower only on satisfaction of the debt rather than merely serving as collateral in the event the borrower failed to make timely interest and principal payments. This structure further differentiated the contract from an interest-bearing loan. The advantage of title theory in medieval England was thus that the payment of rents and profits on land to which the lender had title prevented the lender from being in violation of usury laws.

property on the lender's behalf. States that permit power-of-sale foreclosure are often known as nonjudicial foreclosure states, although there technically are nonjudicial foreclosure procedures other than power-of-sale foreclosure.[3] Even in power-of-sale states, however, the lender usually can pursue judicial foreclosure if it chooses. Given the higher transaction costs and time to foreclose associated with judicial foreclosure, however, lenders usually foreclose nonjudicially if state law permits it without any additional burdens relative to judicial foreclosure. Lenders in a power-of-sale state might choose to use judicial foreclosure if there is a problem with the title to the property. Some states also require the lender to pursue judicial foreclosure if it wants to obtain a deficiency judgment, as I discuss later in this section. Finally, some states that technically permit power-of-sale foreclosure give the borrower greater redemption rights under power-of-sale foreclosure or impose other burdens on lenders if they foreclose by power of sale such that they more commonly choose judicial foreclosure.

The second main factor that affects the speed with which a lender can foreclose is redemption rights. A redemption right is the right of the borrower to redeem the property by paying off the entire balance of the mortgage. A redemption period is a period during which the borrower has redemption rights. If the redemption period precedes the foreclosure sale, the right of the borrower to redeem during that time is known as an equitable redemption right. Such a right might take the form of requiring the lender to wait, say, 6 months after the first serious delinquency before it can foreclose. In practice, most states have some equitable redemption period that arises because of long notification and advertisement requirements, although some might not necessarily term these waiting times equitable redemption periods. Many states also allow the borrower some time period after the foreclosure sale to redeem the property. The borrower's right to redeem the property for some specified number of months after the foreclosure sale is known as a statutory redemption right. Because statutory redemption rights cloud the title of the property for prospective buyers at the foreclosure auction, they are arguably more problematic for lenders than are equitable redemption rights.

Finally, some states have laws that restrict the rights of lenders to pursue a residential borrower personally to recover the debt owed to the lender. For example, suppose a borrower defaults on a mortgage of $300,000, and the fair market value of the property is only $200,000. The borrower still owes the lender $100,000 after the lender seizes the property. To recover the $100,000, the lender in most states can obtain a deficiency judgment, which will enable it to seize any other assets the borrower has and garnish the borrower's wages. In some states, the lender automatically receives a deficiency judgment if the value of the property is not adequate to cover the debt owed, but in most states the lender must file a lawsuit

[3] Some other states permit nonjudicial foreclosure through a method known as foreclosure by advertisement. However, at present, this foreclosure method is usually seen to be even more cumbersome for lenders than judicial foreclosure and is thus rarely used by lenders; see, for example, Barry (1980).

to obtain a deficiency judgment. A mortgage in which the lender can get a deficiency judgment is generally known as a recourse mortgage. If there is no specific clause in the promissory note that establishes a nonrecourse mortgage, a clause known as an exculpatory clause, the mortgage is a recourse mortgage unless state statute overrides it. Exculpatory clauses are not generally used in U.S. residential mortgages, although they are common in commercial mortgages. States that have sweeping antideficiency statutes that effectively make mortgages nonrecourse are known as nonrecourse states.

Table 2 illustrates the diversity across states in mortgage laws and provides a crude index of the extent to which a state's laws are pro-creditor; Figure 1 presents the information geographically. I score states on a 4-point system. I award 2 points for the foreclosure procedure usually used. I award states permitting power-of-sale foreclosure with minimal restrictions 2 points. I award 1 point to the two states that offer a creditor-friendly form of judicial foreclosure known as scire facias, Delaware and Pennsylvania. Section 3 explains why Delaware and Pennsylvania developed this unusual form of judicial foreclosure. It differs from other forms of judicial foreclosure in that the onus is on the borrower to provide a reason why the lender should not be able to foreclose. The figures Russell and Bridewell (1938) present on the cost and time it took in the 1930s to foreclose in Delaware and Pennsylvania support the idea that this is an expedient if not a cheap procedure. States in which judicial foreclosure is the norm receive no points for the foreclosure procedure. The source for the data is the USFN (2008).

The primacy of power-of-sale foreclosure in the scoring system reflects its prominence in the most recent foreclosure crisis and the literature surrounding it. A sudden increase in the number of foreclosures, such as that observed during the financial crisis of 2007–9, can overwhelm a judicial system and lead to substantial delays in the lender's ability to recover its collateral. Using data from the recent foreclosure crisis, Mian, Sufi, and Trebbi (2011) find that the availablity of judicial foreclosure decreases the number of foreclosures. There are economic consequences of this availability even if, as Gerardi, Lambie-Hanson, and Willen (2013) argue, judicial foreclosure only delays, instead of prevents, foreclosures. Because of the debt-overhang problem (see Melzer 2012), a delay in foreclosing implies that the property will be in worse condition by the time the lender recovers its collateral. Perhaps because of these reasons, Calomiris, Longhofer, and Miles (2013) document differences in home price dynamics between judicial and nonjudicial states.

One point is awarded if the state permits deficiency judgments without substantial restrictions. I allocate only 1 point for this aspect of foreclosure laws, as recourse provisions affect primarily higher-income borrowers. Although Ghent and Kudlyak (2011) show that state laws that restrict deficiency judgments increase the risk of foreclosure, they find that it matters only for home values of $200,000 or more. They also find that recourse affects the lender's ability to get the borrower to agree to a deed in lieu of foreclosure or a short sale. With the exception of Nevada, the state classification here follows the scheme of Ghent

Table 2

Creditor-Friendliness Score of U.S. States' Current Mortgage Laws

State by Region	Score
Pacific:	
Alaska	2
California	3
Hawaii	2
Oregon	3
Washington	2
Regional average	2.4
Mountain:	
Arizona	3
Colorado	3
Idaho	4
Montana	3
Nevada	3
New Mexico	4
Utah	4
Wyoming	4
Regional average	3.5
West North Central:	
Iowa	0
Kansas	2
Minnesota	2
Missouri	3
Nebraska	4
North Dakota	1
South Dakota	1
Regional average	1.9
West South Central:	
Arkansas	4
Louisiana	2
Oklahoma	1
Texas	4
Regional average	2.8
East North Central:	
Illinois	2
Indiana	2
Michigan	3
Ohio	2
Wisconsin	0
Regional average	1.8
East South Central:	
Alabama	3
Kentucky	2
Mississippi	4
Tennessee	4
Regional average	3.3
Middle Atlantic:	
New Jersey	2
New York	2
Pennsylvania	3
Regional average	2.3
South Atlantic:	
Delaware	3
District of Columbia	4
Florida	2
Georgia	4
Maryland	4
North Carolina	3.5
South Carolina	2
Virginia	4
West Virginia	4
Regional average	3.4
New England:	
Connecticut	2
Maine	2
Massachusetts	4
New Hampshire	4
Rhode Island	4
Vermont	1
Regional average	2.8

Note. States are classified according to laws in place for residential mortgages originated in 2010 or later. Scores are awarded as follows: 4 = most creditor-friendly laws, 0 = least creditor-friendly laws; power-of-sale foreclosure is the usual procedure = 2, deficiency judgments are permitted without substantial restrictions = 1, statutory redemptionis usually less than 6 months = 1. Although Delaware and Pennsylvania require judicial foreclosure, their scire facias is unusually creditor friendly and so is awarded 1 point rather than 0; North Carolina permits deficiency judgments on refinanced mortgages but forbids them on purchase mortgages and so is awarded .5 point, as it permits deficiency judgments on refinanced mortgages but forbids them on purchase mortgages.

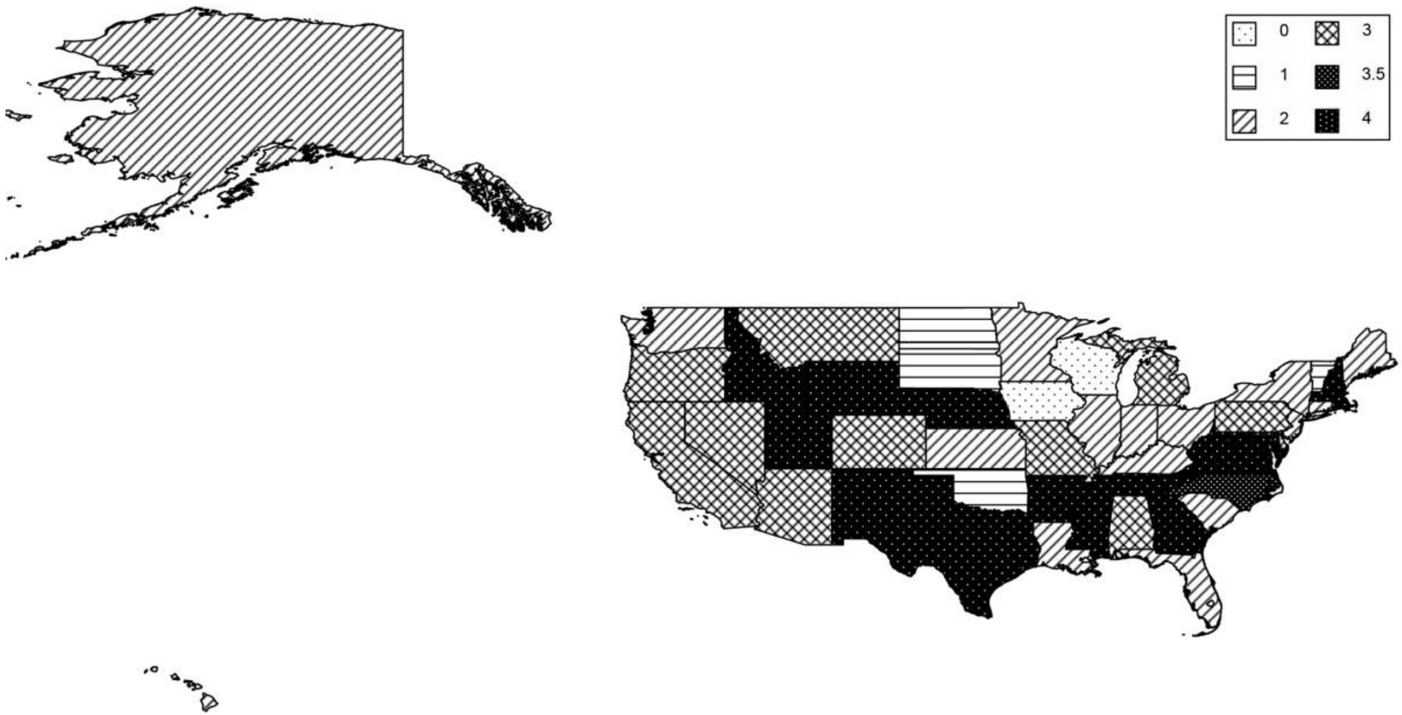

Figure 1. Creditor-friendliness scores of current U.S. mortgage laws

and Kudlyak (2011). Nevada changed to a nonrecourse state after the end of their sample period (see Li and Oswald 2014). I award North Carolina .5 point rather than no points, as it permits deficiency judgments on mortgages used to refinance an existing mortgage on a property but bans them on mortgages used to purchase a property. Finally, I award 1 point if the state has no statutory redemption period or a redemption period of less than 6 months. The data source for statutory redemption rights is USFN (2008).

Figure 1 and Table 2 reveal substantial heterogeneity within census regions in the degree to which mortgage laws are creditor friendly. Although midwestern (West North Central and East North Central) states have the least creditor-friendly laws, even within these regions there is substantial heterogeneity. The heterogeneity across geographically similar states is due to what La Porta, Lopez-de-Silanes, and Shleifer (2008, p. 286) refer to as the "well-known judicial arbitrariness in common law countries." As Section 4 demonstrates, the validity of power-of-sale foreclosure, which makes up half of the creditor rights score, is largely decided in case law and is thus subject to the preferences of an individual judge. Similarly, while various legislatures attempted to pass antideficiency statutes, individual judges decided differently as to the constitutionality of such statutes despite circumstances appearing quite similar in different states.

3. Foreclosure Procedures

3.1. Historical Background

For the first mortgages in America, foreclosure was an exclusively judicial process, and in all of the 13 original colonies that had chancery courts (also known as equity courts), only what is now known as strict foreclosure was available.[4] Because strict foreclosure does not involve a sale of the property, there was no concept of a statutory redemption period in colonial America. Strict foreclosure involved the lender going to an equity court and asking it to terminate the borrower's equity of redemption; foreclosure by sale of the property was not permitted, and any equity the borrower had in the property would be lost in the foreclosure. The equity-of-redemption principle, an invention of English equity courts[5] in the late 17th century, meant that, despite not having made payment on the date stipulated in the mortgage, the borrower could regain his property by paying all principal, interest, and fees due on the debt at some time after the expiration of

[4] Pennsylvania, which lacked chancery courts and included the state of Delaware in colonial times, developed the writ of scire facias as a rapid foreclosure alternative (Skilton 1943).

[5] Courts of equity (also known as courts of chancery, or simply chanceries) existed to prevent the strict letter of the law from being enacted too harshly on subjects. In effect, the legal concept of equity is the idea that there is a set of principles that might not be explicit in rules of law but that most human beings agree to as a matter of basic ethics or natural law. Chancellors used discretion in these courts far more than in courts of law. In contrast to courts of law, courts of chancery admitted verbal (parol) evidence regarding the conditions under which parties agreed to the mortgage contract. Although the concept of equity of redemption was not formally recognized in English courts of law, Chaplin (1890) cites evidence from as early as the 12th and 13th centuries that courts of law exercised some equitable interpretation of mortgages.

the contract. Early in the history of the equity of redemption, there seems to have been no limitation on the time frame during which the borrower could redeem his property (Jones 1878). Eventually, the lender could petition a court of equity to set a date by which the borrower had to repay the principle, interest, and fees. If the borrower had not completed payment by that date, he would forever lose his right to redeem the property, and the conveyance to the lender would become unconditional (Williams 1866). Such an end was known as foreclosure before the modern usage of foreclosure by sale.

As a result of difficulties in obtaining a strict foreclosure, at some point in the 18th century British lenders began asking the courts to agree to a sale in lieu of foreclosure. A sale in lieu of foreclosure ensured that the borrower would receive any value of the property in excess of that required to pay off the debt such that the borrower did not forfeit his estate altogether. In the absence of well-developed land and financial markets with small parcel sizes, many borrowers would have had positive equity, and a sale in lieu of foreclosure would have been fairer to the borrower. The success of sales in lieu of foreclosure eventually led to the insertion of power-of-sale clauses into many mortgages to further encourage chancellors to grant a sale in lieu of redemption.

With the exception of Connecticut, which still requires strict foreclosure, American states rapidly embraced the concept of a foreclosure sale rather than strict foreclosure. As foreclosure by sale grew in popularity, many states permitted the borrower a statutory right of redemption wherein the borrower could regain possession of the property after a foreclosure sale by repaying the principal, interest, and fees.

3.2. Power-of-Sale Foreclosure

Early on, a foreclosure sale still necessitated the approval of a judiciary. Gradually, however, courts came to respect power-of-sale clauses inserted in mortgages or trust deeds in many states. A landmark U.S. Supreme Court ruling in *Newman vs. Jackson* (25 U.S. 570 [1827]) favored power-of-sale clauses in regulating a dispute in the Georgetown area of Washington, D.C., and set a precedent for other states. Despite this precedent, it took decades for many states to rule that power-of-sale foreclosure was valid or to begin using power-of-sale clauses. However, by 1863 lenders were able to foreclose by a nonjudicial foreclosure procedure in many states (J.F.D. 1863). Table 3 summarizes the use of power-of-sale foreclosure in selected years.

The similarities between the laws in the different periods are striking. Of the 37 states for which I have data from 1863, only nine states (Oregon, Arkansas, Oklahoma, Illinois, New York, Georgia, South Carolina, Maine, and New Hampshire) changed their stance on power-of-sale clauses substantially between 1863 and 2008**.** As I discuss below, early Wisconsin case law makes me question the assertion in J.F.D. (1863) that power-of-sale foreclosure was "usual" in 1863 and that only eight states truly changed their foreclosure laws. The median number of changes is 0, and the mean is less than .5.

Table 3

Availability of Power-of-Sale Foreclosure (POS) for Residential Property

State by Region	1863	1879	1904	1928	1938	1957	2008	Substantive Changes, 1863–2008
Pacific:								
Alaska	N.D.	N.D.	N.D.	Usual (1919)	Usual	Usual	Usual	0
California	Usual (1852)	Available	Available	Available	Usual	Usual	Usual	0
Hawaii	N.D.	N.D.	N.D.	Available	Available	Available[a]	Available	0
Oregon	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Usual (1961)	1
Washington	N.D.	N.D.	N.D.	Unavailable	Unavailable	Unavailable	Usual	1
Mountain:								
Arizona (Arizona Territory)	N.D.	N.D.	Available (1887)	Unavailable (1913)	Unavailable	Unavailable	Usual (1971)	2
Colorado	N.D.	Available	Usual	Usual	Usual	Usual	Usual	0
Idaho	N.D.	N.D.	Unavailable by statute (1898) (?)	Unavailable	Unavailable	Usual	Usual	1
Montana (Montana Territory)	N.D.	Available (1872)	Available	Available	Available	Available, not usual	Usual	1
Nevada	N.D.	Available (without foreclosure), rare (1876)	Available (without foreclosure), rare	Available, not in use	Available	Available, not usual	Usual	1
New Mexico	N.D.	N.D.	N.D.	N.D.	Unavailable	Unavailable	Available and usual for deeds of trust originated in 2006 or later	1
Utah	N.D.	N.D.	Available	Available	Unavailable	Unavailable	Usual	1
Wyoming	N.D.	N.D.	Available (1894 or earlier?)	Available	Available	Usual	Usual	0
West North Central:								
Iowa	Unavailable by statute (1861) but available before	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable without mortgagor's consent	0
Kansas	Unavailable by statute (1859)	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0

Minnesota	Available (1860)	Available	Usual	Usual	Usual	Usual	Usual	0
Missouri	Usual (1840)	Usual	Usual	Usual	Usual	Usual	Usual	0
Nebraska	N.D.	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Available (if deed of trust)	1
North Dakota (Dakota Territory)	N.D.	Available (1877)	Available	Available	Unavailable (1933)	Unavailable	Unavailable	1
South Dakota (Dakota Territory)	N.D.	Available (1877)	Available	Available	Usual	Usual	Available, rare due to title difficulties	1
West South Central:								
Arkansas	Available (1848)	Available	Available	Available	Available	Available, rare	Usual	2
Louisiana	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0
Oklahoma (Indian Territory)	Available (1848), followed Arkansas law	Available	Available	Available	Available	Available, rare	Available if POS clause inserted (1986), rare	1
Texas	Usual (1849)	Usual	Usual	Usual	Usual	Usual	Usual	0
East North Central:								
Illinois	Available (1846)	Available	Unavailable by statute (1879)	Unavailable	Unavailable	Unavailable	Unavailable	1
Indiana	Unavailable by statute (1852) but available before	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0
Michigan	Usual (1838)	Usual	Usual	Usual	Usual	Usual	Usual	0
Ohio	Available (1850)	Available, rare	Available, rare	Available, rare	Available	Available, rare	Unavailable	0
Wisconsin	Available (1850)[b]	Available	Available	Available	Available	Available, not usual	Unavailable	0
East South Central:								
Alabama	Usual (1830)	Usual	Usual	Usual	Usual	Usual	Usual	0
Kentucky	Unavailable by statute (1820)	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0
Mississippi	Usual (1838)	Usual	Usual	Usual	Usual	Usual	Usual	0
Tennessee	Available (1818)	Available	Available	Available	Usual	Usual	Usual	0
Middle Atlantic:								
New Jersey	Unavailable	Available, rare (1867)	Available	Available, rare	Unavailable	Unavailable	Unavailable	0
New York	Usual by statute (1774)	Available	Available	Available	Available	Available, rare	Available, rare	1

Table 3 (*Continued*)

State by Region	1863	1879	1904	1928	1938	1957	2008	Substantive Changes, 1863–2008
Pennsylvania	Unavailable but uses scire facias (1705)	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	0
South Atlantic:								
Delaware	Unavailable but uses scire facias (1705)	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	Unavailable but uses scire facias	0
District of Columbia	Available (1827)	Usual	Usual	Usual	Usual	Usual	Usual	0
Florida	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0
Georgia	Unavailable	Available (1867)	Available	Available	Usual	Usual	Usual	1
Maryland	Available (1859)	Available	Available	Available	Usual	Usual	Usual	0
North Carolina	Usual (1830)	Usual	Usual	Usual	Usual	Usual	Usual	0
South Carolina	Available (1857)	Available	Usual	Usual	Unavailable	Unavailable	Unavailable	1
Virginia	Usual (1823)	Usual	Usual	Usual	Usual	Usual	Usual	0
West Virginia	Usual (1823)	Usual	Usual	Usual	Usual	Usual	Usual	0
New England:								
Connecticut	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	0
Maine	Available	Available, rendered impractical by 12-month redemption period (1871)	Available, rare	Available, rare	Available, rare	Available, rare	Available, rare	1
Massachusetts	Available (1826)	Usual	Usual	Usual	Usual	Usual	Usual	0
New Hampshire	Unavailable	Available, rare (1874)	Available	Available	Usual	Usual	Usual	1
Rhode Island	Available (1858)	Usual	Usual	Usual	Usual	Usual	Usual	0
Vermont	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable	Available, very rare	0

Sources. J.F.D. (1863); Jones (1879, 1904, 1915, 1928); Russell and Bridewell (1938); Skilton (1943); Prather (1957); USFN (2008); Warren (1988); Hill (1892); Lawyer (1973); Baker (1962–64); Vogel (1984); Lionberger (1883); Barry (1980).

Note. For substantive changes, average =. 47, median = 0. N.D. = no data.

[a] Prather (1957) indicates that power-of-sale foreclosure is unavailable in Hawaii, but see the precedent set in *Maile v. Carter,* 17 Haw. 49 (1905).

[b] J.F.D. (1863) indicates that power-of-sale foreclosure is “usual,” but Wisconsin’s early laws indicate otherwise.

Figure 2 maps the states that had adopted power of sale or deeds of trust by 1863. There is no obvious geographical pattern. There is also no significant correlation between either the state's age or whether the state follows the title theory of mortgages or the lien theory of mortgages and whether it allows nonjudicial foreclosure as of 1863. The absence of any clear geographical pattern or basis in the theory of the mortgage makes it necessary to carefully examine the case law and relevant statutes to better understand the divergence in legal development.

As Drummy (1976, p. 90) eloquently states, "the power of sale is considered a right of contractual agreement rather than one of legislative invention" such that, in most cases, the validity of power-of-sale foreclosure and deeds of trust is determined in case law rather than by statute. Consequently, often the decision of a single judge often ends up determining the process. For example, despite the national Supreme Court precedent in 1827, Justice Loyal C. Kellogg of the Supreme Court of Vermont declared that a power-of-sale clause was not generally valid in *Wing v. Cooper* (37 Vt. 169, 183–84 [1864]). Kellogg's reasoning was as follows:

> A power of sale given by a mortgage deed is not an ordinary power, and as between the mortgagor and mortgagee, it should be strictly construed. In this state, it is in practice unusual if not unknown. We have no statute regulating its exercise, and a sale under it might be made without the concurrence of the mortgagor, and even without notice to him. It is too important a power to rest upon implication and local reasoning, and ought not, as we think, to be recognized in any case unless it is conveyed by an express grant and in clear and explicit terms.

While this ruling did not exactly forbid power-of-sale clauses, which would have been inconsistent with the national precedent, the interpretation of the ruling banned them for all practical purposes. Without the legislature intervening to regulate the exercise of power-of-sale foreclosure, the ruling seems to make it impossible to enforce a power-of-sale clause.

Table 4 summarizes the early case law and statutes that exerted such a permanent influence on the practicability of power-of-sale foreclosure. Examination of the cases reveals that, with rare exceptions, judges upheld the validity of power-of-sale clauses inserted in mortgages. In only six states (Vermont, Florida, Wisconsin, Louisiana, Utah, and Nebraska) did judges rule in such a way as to make the exercise of power-of-sale clauses impossible or impractical. In the case of Iowa, judges went further in essentially overturning a statutory ban; the legislature enacted a new ban on power-of-sale foreclosure shortly thereafter.

Furthermore, once the validity of power-of-sale foreclosure is decided in case law, the case law governing its use does not substantively change unless there is a statutory intervention. To the extent that the laws on power-of-sale foreclosure change at all, they do so because of statute. Legislatures usually act to abrogate the ability of parties to enter into contractual agreements with power-of-sale clauses rather than to preserve the rights of creditors. For example, the legislature of Oregon intervened in 1862 to require mortgages to be foreclosed in a court of law. Similar statutes were passed in Arizona (1913), Idaho (1898), New Mexico (1929), Iowa (1858 and 1873), Kansas (1859), North Dakota (1933), Illinois (1862), Indi-

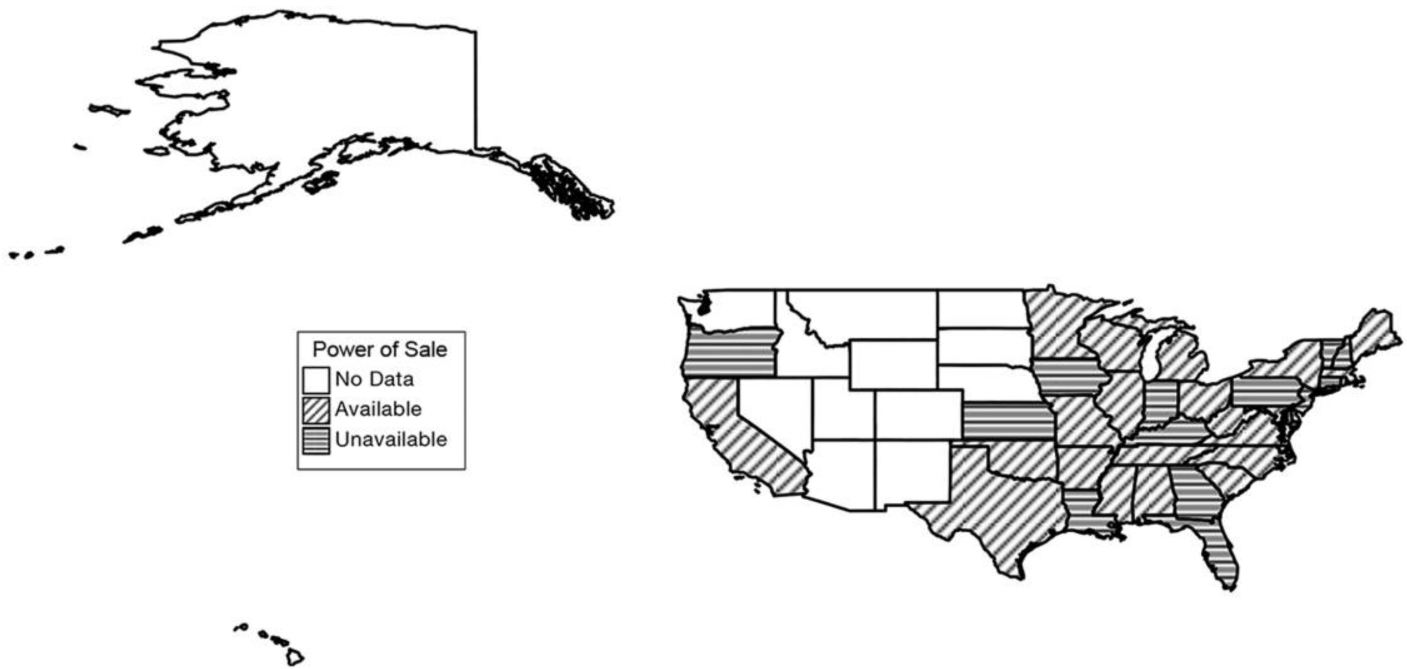

Figure 2. Availability of power-of-sale foreclosure in 1863

ana (1879), Kentucky (1820), and South Carolina (1932). The Maine legislature only made it impractical by passing a statute with a 12-month redemption period in 1871. Other statutory interventions merely prescribed particular procedures required for the use of power-of-sale clauses.

Prior to World War II, the only case in which a legislature intervened to creditors' advantage was the 1774 New York statute, but even that statute might not be truly a statutory intervention to benefit creditors. Rather, there was some initial doubt regarding the validity of power-of-sale foreclosure in New York. The 1774 statute merely clarified the matter. Furthermore, New York state courts had long and clearly upheld the rights of creditors with power-of-sale clauses (see, for example, *Jackson v. Turner,* 7 Wend. 458 [1831]; *Lawrence v. Farmers' L&T. Co.,* 13 N.Y. 200 [1855]; *Elliott v. Wood,* 45 N.Y. 71 [1871]). The reason that New York now uses judicial foreclosure is that the legislature instituted increasingly onerous statutes that creditors had to follow to exercise a power-of-sale clause (Jones 1879, pp. 604–8).

The instances in which the legislature intervenes to make power-of-sale foreclosure illegal or impractical reveal of the responsiveness of legislators to debtors rather than creditors. In an unusually early statute, Kentucky banned power-of-sale foreclosure in 1820. As Thorp (1926) discusses, 1819–21 was marked by record low commodity prices, financial panic, and a collapse in real estate values. As a rapidly expanding western state at that time, it is likely that Kentucky was heavily reliant on out-of-state credit, and the legislature may have been responding to populist demands from farmers for relief. Data from the U.S. census reveal that Kentucky's population grew by almost 40 percent between 1810 and 1820. Kentucky was very agrarian and heavily dependent on slave labor; U.S. census records from 1820 indicate that more than one-fifth of Kentucky's population consisted of slaves. Substantial capital would have been required to purchase the slaves, which made Kentucky reliant on out-of-state capital. In a time of distress, and without settled case law on the matter, the legislature favored domestic borrowers over out-of-state creditors.

The states that passed statutes making power-of-sale foreclosure difficult to enforce in the second half of the 19th century are Idaho, Illinois, Indiana, Iowa, and Kansas. Although these states passed anti-power-of-sale statutes at different points during the last half of the 19th century, all of these states were heavily dependent on out-of-state credit, and fear of foreclosure featured prominently in agrarian unrest (see Stock 1984). Legislatures responded to such foreclosure fears by reducing the risk of foreclosure for their constituents at the expense of creditors from out of state. The reason legislatures could intervene in these cases is that the states were young enough that there was no well-established case law upholding power-of-sale clauses.

Several state legislatures intervened during the Great Depression. At the beginning of the Great Depression, the legislature of New Mexico intervened to make power-of-sale foreclosure illegal. North Dakota banned nonjudicial foreclosure in 1933 (Vogel 1984) as part of wide-ranging farm foreclosure relief. As

Table 4

Early Statutes and Case Law regarding Power-of-Sale Foreclosure

State by Region	Year	Case or Statute	Treatment of Power-of-Sale Clause and/or Deed of Trust	Court	Reference	Creditor or Debtor Friendly
Pacific:						
Alaska	1919	Statute	Regulates exercise; appears it was already in common use		Warren (1988)	Debtor
California	1852	*Benham v. Rowe*	No legal question regarding validity	Supreme Court of California	2 Cal. 387	Creditor
Hawaii	1905	*Maile v. Carter*	Upholds	Supreme Court of Hawaii	17 Haw. 49	Creditor
Oregon	1862	Statute	Requires foreclosure of mortgages by suit		Hill (1892), vol. 1, sec. 414	Debtor
	1961	Statute	Introduces deed of trust as mortgage alternative permitting foreclosure under power of sale			Creditor
Mountain:						
Arizona	1887	*Hopper v. Stump*	Affirms mortgagee has right to sell the property; later cases interpret it as right to power-of-sale foreclosure	Supreme Court of Arizona	2 Ariz. 262	Creditor
	1913	Statute	Requires court foreclosure for all mortgages		Lawyer (1973)	Debtor
	1971	Statute	Introduces deed of trust as mortgage alternative permitting foreclosure under power of sale		Lawyer (1973)	Creditor
Colorado	1882	*Brick and Manuf'g Co. v. McAllister*	No legal question regarding validity	Supreme Court of Colorado	6 Colo. 261	Creditor
Idaho	1898 (?)	Statute	Explicitly requires foreclosure in court of law; *Brown v. Bryan* (1898) applies to deeds of trust as well		6 Idaho 1	Debtor
Nevada	1876	*Evans v. Lee*	Upholds	Supreme Court of Nevada	11 Nev. 194	Creditor
New Mexico	1886	*Milligan v. Cromwell*	Recognizes power-of-sale clauses in usual circumstances	Supreme Court of New Mexico	3 N.M. 557	Creditor
	1929	Statute	Bans		40 N.M. 44	Debtor
Utah	1894	*Dupee v. Rose*	Renders impractical?	Supreme Court of Utah	10 Utah 305	Debtor
	1961	Statute	Introduces deed of trust as mortgage alternative permitting foreclosure under power of sale		Baker (1962–64)	Creditor
Wyoming	1894 or earlier	Statute?	Mentions governing statute; case deals with chattel mortgages		4 Wyo. 203	Creditor

West North Central:						
Iowa	1857	*Leffler v. Armstrong*	Clearly upholds validity in both mortgages and deeds of trust	Supreme Court of Iowa	4 Iowa 482	Creditor
	1858	Statute	Requires all mortgages to be foreclosed on judicially; does not apply to deeds of trust		7 Iowa 450	Debtor
	1859	*Fanning v. Kerr*	Upholds right to exercise if present in mortgage; severely limits scope of 1858 statute	Supreme Court of Iowa	7 Iowa 450	Creditor
	1873	Statute	Bans; applies retroactively to mortgages made since 1861		Jones (1879)	Debtor
Kansas	1859	Statute	Requires court approval to foreclose; includes deeds of trust		McCahon 214	Debtor
Minnesota	Before 1860	Statute	Explicitly permits		J.F.D. (1863)	Creditor
Missouri	1840	*Carson v. Blakey*	Upholds	Supreme Court of Missouri	6 Mo. 273	Creditor
Nebraska	1873	*Kyger v. Ryley*	Case interpreted by later judges as to require court intervention to foreclose; out-of-town creditor	Supreme Court of Nebraska	2 Neb. 20; 34 F. 154	Debtor
North Dakota	1877	Statute	Regulates use		Jones (1879)	Debtor
	1933	Statute	Bans		Vogel (1984)	Debtor
West South Central:						
Arkansas	1850	*Crittenden v. Johnson*	No legal question regarding validity	Supreme Court of Arkansas	11 Ark. 94	Creditor
Louisiana	1848	*Ricks v. Goodrich*	Rules not to uphold; out-of-state creditor	Supreme Court of Louisiana	3 La. Ann. 212	Debtor
Texas	1851	*Howards v. Davis*	Upholds	Supreme Court of Texas	6 Tex. 174	Creditor
East North Central:						
Illinois	1845	*Longwith v. Butler*	Upholds; viewed as "much liable to abuse"	Supreme Court of Illinois	8 Ill. 32	Creditor
	1879	Statute	Bans		Jones (1904)	Debtor
Indiana	1852	Statute	Bans		20 Ind. 457	Debtor
	1863	*Eaton and Hamilton R. R. Co. v. Hunt*	Interprets statutory law as to treat it as a "cumulative remedy" necessitating judicial intervention for both mortgages and deeds of trust	Supreme Court of Indiana	20 Ind. 457	Debtor
Michigan	1848	*Mundy v. Monroe*	Only question regarding validity is whether it complies with statute governing conditions of advertisement or redemption rights	Supreme Court of Michigan	1 Mich. 68	Creditor
Ohio	1850	*Woodruff v. Robb*	Upholds	Supreme Court of Ohio	19 Ohio 212	Creditor
Wisconsin	1850	*Byron v. May*	Does not obviate the chancery court; appears to give substantial opportunity for mortgagor to sue in chancery pursuant to use	Supreme Court of Wisconsin	2 Pin. 443	Debtor
	1853	*Walton v. Cody*	Upholds but with treatment of equity of redemption at election of mortgagor	Supreme Court of Wisconsin	1 Wis. 420	Creditor

Table 4 (*Continued*)

State by Region	Year	Case or Statute	Treatment of Power-of-Sale Clause and/or Deed of Trust	Court	Reference	Creditor or Debtor Friendly
East South Central:						
Alabama	1835	*Hogan v. LePretre*	No legal question regarding validity in deeds of trust	Supreme Court of Alabama	1 Port. 392	Creditor
Kentucky	1820	Statute	Bans before any case law had decided it		J.F.D. (1863)	Debtor
Mississippi	1838	*Sims v. Huntley*	Upholds		J.F.D. (1863)	Creditor
Tennessee	1818	*Darby's Lessee v. Russel*	Does not comment on it	Supreme Court of Tennessee	6 Tenn. 138	Creditor
Middle Atlantic:						
New Jersey	1867	*Clark v. Condit*	Upholds but states that it is "liable to great abuse, and the exercise of it will be jealously watched"	Court of Chancery of New Jersey	18 N.J. Eq. 358	Debtor
New York	1774	Statute	Clarifies as valid		Lionberger (1883)	Creditor
South Atlantic:						
District of Columbia	1827	*Newman v. Jackson*	Upholds	U.S Supreme Court	25 U.S. 570	Creditor
Florida	1907	*Wylly-Gabbett Co. v. Williams*	Prohibits assignments of title using power-of-sale clauses; effectively forbids including via deeds of trust; out-of-state creditor	Supreme Court of Florida	53 Fla. 872	Debtor
Georgia	1867	*Robenson v. Vason*	Upholds	Supreme Court of Georgia	37 Ga. 66	Creditor
Maryland	1859	*Wilson v. Russell*	No question about validity; valid by long use in common law	Court of Appeals of Maryland	13 Md. 494	Creditor
North Carolina	1830	*Harrison v. Battle*	States right to it via deed of trust; appears to be settled law	Supreme Court of North Carolina	16 N.C. 537	Creditor
South Carolina	1857	*Mitchell v. Bogan*	Upholds		J.F.D. (1863)	Creditor
	1932		Bans		178 S.C. 133	Debtor
Virginia	1823	*Chowning v. Cox*	No legal question regarding validity	Supreme Court of Virginia	22 Va. 306	Creditor
West Virginia	1823	*Chowning v. Cox*	No legal question regarding validity	Supreme Court of Virginia	22 Va. 306	Creditor
New England:						
Maine	1871	Statute	Renders impractical by new redemption period		Barry (1980)	Debtor
Massachusetts	1826	*Eaton v. Whiting*	Decides notes with it are akin to mortgages; no dispute as to validity	Supreme Court of Massachusetts	20 Mass. 484	Creditor
New Hampshire	1874	*Very v. Russell*	Upholds	Supreme Court of New Hampshire	65 N.H. 646	Creditor
Rhode Island	1858	*Nichols v. Baxter*	Recognizes; appears to be settled law	Supreme Court of Rhode Island	5 R.I. 491	Creditor
Vermont	1864	*Wing v. Cooper*	Refuses to uphold a parol agreement, in part because there is no statute prescribing its exercise	Supreme Court of Vermont	37 Vt. 169	Debtor

Note. Data were not collected for Washington, Montana, South Dakota, Oklahoma, Pennsylvania, Delaware, or Connecticut.

Alston (1983) points out, North Dakota had an unusually high farm foreclosure rate during the Great Depression, which suggests that its ban on foreclosure was also a populist measure. The South Carolina legislature passed a statute effectively banning power-of-sale foreclosure in 1932. The West Virginia legislature attempted to make power-of-sale foreclosure illegal in 1933, but the courts deemed the act unconstitutional (Poteat 1938).

Early Wisconsin case law foreshadows the issues that creditors would encounter with nonjudicial foreclosure. The decisions in *Byron v. May* (2 Wis. 443 [1850]) and *Walton v. Cody* (1 Wis. 420 [1853]) are clear that power-of-sale clauses do not obviate the jurisdiction of chancery courts to decide the correct way to dispose of a property. Indeed, the judge in *Walton v. Cody* seems to suggest that the equity of redemption resides with the mortgagor and "will expire by the limitations which the [mortgagor] himself has prescribed" (1 Wis. 434). Since the debtor remained in possession of the property during the 24-month equitable redemption period, nonjudicial foreclosure was impractical. The claim by J.F.D. (1863) that nonjudicial foreclosure was "usual" is also not supported by evidence suggesting that Wisconsin may never have truly been a power-of-sale foreclosure state. As a result, the change in Wisconsin is not a sudden reversal.

Even when economic circumstances changed to make power-of-sale foreclosure convenient, the shift away from judicial foreclosure could not be accomplished by case law. Rather, the wording of earlier statutes banning power-of-sale foreclosure permitted certain legislatures to introduce a new real estate finance instrument, the deed of trust, to permit power-of-sale foreclosure. In particular, Oregon (1961), Utah (1961), Arizona (1971), and New Mexico (2006) passed deed-of-trust statutes to circumvent the previous statutes in these states, which applied only to mortgages.

3.3. Statutory Redemption Periods

As foreclosure by sale became the normal procedure to foreclose—both in situations in which the mortgage contained a power-of-sale clause and in judicial foreclosure—legislatures interceded to protect borrowers by enacting statutory redemption periods. There are more changes to redemption rights over time than to the availability of power-of-sale foreclosure because, unlike power-of-sale clauses, redemption periods are set by statute rather than settled primarily in case law. Table 5 summarizes the changes in the rights of redemption over time.The average number of changes is .88 and the median number of changes is 1.[6]

Although more flexible than power-of-sale foreclosure, highlighting the importance of early institutional developments, redemption periods are surprisingly persistent. More than half of all states did not change their policy on redemption periods substantially between the first available date for which I have data, typically before the Civil War, and 1938. Since 1938 there have been more

[6] Baker, Miceli, and Sirmans (2008) also summarize the rights of redemption afforded to the borrower in the various states and some of the changes over time.

Table 5

Redemption Periods (in Months) in Usual Nonagricultural Residential Foreclosure Procedure

	1879	1904	1915	1928	1938	1957	2008	Substantive Changes
Pacific:								
Alaska (Alaska Territory)	N.D.	4 (1900)	2[a]	4[a]	N.D.	N.D.	12[a]	3
California	6 (1851)	6	6	6	0[a]	0	0	1
Hawaii (Hawaii Territory)	N.D.	0	0	0	N.D.	0	0	0
Oregon	2 (1872)	2	4[a]	4	12[a]	12	4[a]	3
Washington	6 (1869)	12[a] (1886)	12	12	12	12	12[a] (8 If so stated in mortgage and right to a deficiency judgment is waived)	2
Mountain:								
Arizona	6 (1877)	6	6	6	6	6	0[a]	1
Colorado	6 (1879)	6	6	6	6	6	6	0
Idaho	6 (1864)	12[a] (1895)	12	12	12	0[a]	0	2
Montana	6 (1867)	12[a] (1895)	12	12	12	12	4[a]	2
Nevada	6 (1861)	6	6	6	12[a]	12	0[a]	2
New Mexico	N.D.	12 (1889)	9[a] (1909)	9	9	9[a] (3 If waived in mortgage instrument; 1957)	1[a] (1964)	3
Utah (Utah Territory)	6 (1870)	6	6	6	6	6	3[a]	1
Wyoming	N.D.	6 (1895)	6	6	6	6	3[a]	1
West North Central:								
Iowa	12 (1873)	12	12	12	12	12	6[a]	1
Kansas	0	0	0	18[a] (1923)	18	18	3[a]	2
Minnesota	12 (1858)	12	12	12	12	12	6[a] (1967)	1
Missouri	0	12[a] (1899?) If power of sale used	12	12	12	12	12	1
Nebraska	9 (1859)	9	9	9	9	9	0[a]	1
North Dakota	12 (1877)	12	12	12	12	12	2[a] (Shortened from 6 in 1981)	2
South Dakota	12 (1877)	12	12	12	12	12	6[a]	1

West South Central:								
Arkansas	12 (1879)	12	12	12	12	0[a]	0	1
Louisiana	0	0	0	0	0	0	0	0
Oklahoma	N.D.	12 (1889)	12	N.D.	6[a]	6	6 (Waived if foreclosure with appraisal)	1
Texas	0	0	0	0	0	0	0	0
East North Central:								
Illinois	12 (1825)	12	12	12	12	12	3[a]	1
Indiana	12 (1861)	12	12	12	12	12	3[a]	1
Michigan	12 (1844)	6[a] (1899?)	12[a]	12	12	12	6[a]	3
Ohio	0	0	0	0	0	0	0	0
Wisconsin	24 (1849)	12[a] (1889) If nonjudicial foreclosure; 0 by action	12 If nonjudicial foreclosure; 0 by action	12 If nonjudicial foreclosure; 0 by action	12	12	6[a] (1978)	2
East South Central:								
Alabama	24 (1841)	24	24	24	24	24	12[a]	1
Kentucky	0	0	0	0	0	0	0	0
Mississippi	0	0	0	0	0	0	0	0
Tennessee	24 (1820)	24	24	24	24	0[a] (24 But waived in most security instruments)	0	1
Middle Atlantic:								
New Jersey	0	0	0	0	0	0	0	0
New York	0 (1838)	0	0	0	0	0	0	0
Pennsylvania	0 (1879)	0	0	0	0	0	0	0
South Atlantic:								
Delaware	0	0	0	0	0	0	0	0
District of Columbia	N.D.	0 (None mentioned)	N.D.	N.D.	N.D.	0	0	0
Florida	0	0	0	0	0	2[a]	0[a]	2
Georgia	0	0	0	0	0	0	0	0
Maryland	0	0	0	0	0	0	0	0
North Carolina	0	0	0	0	0	0	0	0
South Carolina	0	0	0	0	0	0	0	0

Table 5 (*Continued*)

	1879	1904	1915	1928	1938	1957	2008	Substantive Changes
Virginia	0	0	0	0	0	0	0	0
West Virginia	0	0	0	0	0	0	0	0
New England:								
Connecticut	0	0	0	0	0	0	3[a]	1
Maine	12 (1871)	12	12	12	12	12	3[a] (1975)	1
Massachusetts	0	0	0	0	0	0	0	0
New Hampshire	0	0	0	0	0	0	0	0
Rhode Island	0 (1857)	0	0	0	0	0	0	0
Vermont	12 (1827)	12	12	12	12	12	6[a]	1

Note. Values are the redemption periods for foreclosure under the most common circumstances (for example, right to a deficiency judgment waived) for residential security instruments and include both statutory and mandatory, fixed equitable periods of right of redemption. Periods are rounded to the nearest month. For substantive changes, average = .88, median = 1. N.D. = no data.

[a] Changes in the redemption period were made, and the date, when known, is noted in parentheses. A question mark indicates uncertainty about the date of the change.

changes, with the tendency being toward reducing the redemption period. Between 1957 and 2008, a total of 23 states reduced or eliminated their redemption periods by statute. Only Connecticut increased the redemption period by inserting a 3-month period for equitable right of redemption. It seems that institutional inertia rather than any other factor has led many states to retain their rights of redemption from the 19th century.

Unlike the pattern in nonjudicial foreclosure, there is more geographical clustering of redemption rights, as Figure 3 shows. I chose 1904 as the date to illustrate rather than 1879, the earliest date with available data, to allow the effect of the mortgage distress of the 1890s to be reflected. The greater influence of geography in redemption rights owes to legislatures responding more than judges to regionalized mortgage distress. While not a perfect mapping, western states—which were more reliant on out-of-state credit and had more farm mortgage distress—tended to have more generous redemption periods than did states in the Northeast.

Some states allowed the borrower 2 years or more, while others afforded the borrower no grace period. The borrower usually retained possession of the property until the expiry of the redemption rights (see Russell and Bridewell 1938). In some cases, attempts by states to provide for a redemption period were deemed unconstitutional by the courts, such as the attempt by Missouri to allow borrowers a 30-month redemption period (Skilton 1943).

To summarize, the validity of power-of-sale clauses was usually initially determined in case law, and judges usually deemed contracts with them legitimate. Absent an intervention by the legislature, the case law on power-of-sale foreclosure almost never changed over time despite evolving economic circumstances. Rather, changes in the validity of power-of-sale clauses were accomplished by statute and usually undermined creditors' rights in response to populist pressures. In contrast, redemption rights, which are determined by statute in a process similar to that in civil countries, change more frequently and reflect more populist influences.

4. The Great Depression: Antideficiency Statutes and Statutory Moratoria

The farm and home mortgage distress of the Great Depression presented a unique challenge for state legislators and judges. Legislatures almost universally intervened in a way aimed to benefit current mortgagors and, to the extent the restrictions led lenders to restrict the supply of credit (see Pence 2006), future mortgagors. I have already noted the interventions of New Mexico and North Dakota to ban nonjudicial foreclosure during the 1930s. Poteat (1938) documents that 31 other state legislatures intervened on behalf of debtors in the 1930s. Much of the statutory relief was meant to abrogate private contracts to which both parties had agreed. The statutes mostly consisted of restrictions on deficiency judgments, foreclosure moratoria, or both. As I will show, judges tempered legislators' zeal for relieving debtors of their burdens at the expense of creditors.

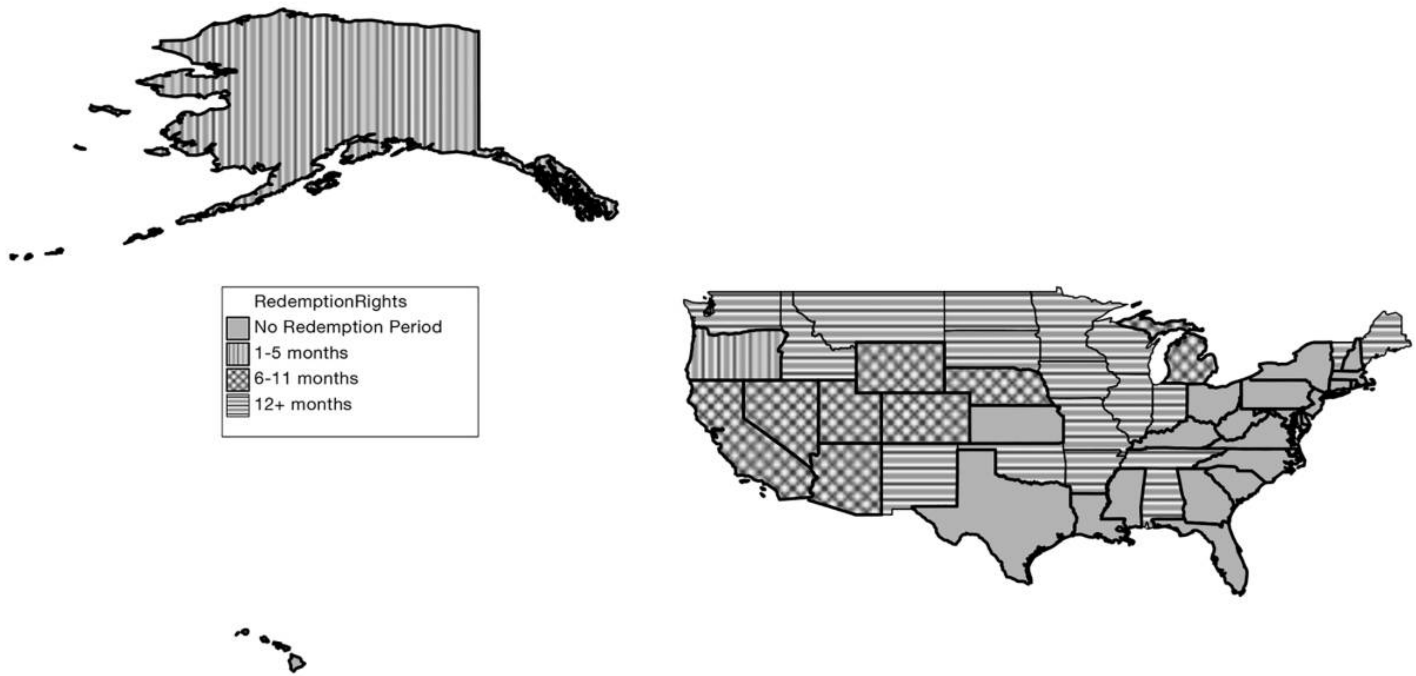

Figure 3. Redemption rights as of 1904

4.1. *Antideficiency Statutes*

Until the Great Depression, there were few restrictions on deficiency judgments. As of 1879, in most states and territories the lender was free to pursue "all his remedies concurrently or successively" (Jones 1879, p. 2:233). By that time, it had become standard for an American mortgage to consist of both a note and the mortgage itself, and the lender could both sue on the note and seize the property (Jones 1879, vol. 2, chap. 27), often simultaneously. Only in California and Colorado did the lender have only one remedy (Jones 1879, vol. 2, chap. 30), what is now known as the one-action rule, and only in California could the lender take an action precluding it from the right to a deficiency judgment. In Minnesota and Nevada the borrower had to exhaust the property before suing on the note (Jones 1879, vol. 2, chap. 27), which is somewhat similar in effect to the one-action rule. In Dakota Territory, Indiana, Iowa, Michigan, Nebraska, New York, and Washington Territory, the lender could not simultaneously sue on the promissory note and file a lawsuit for foreclosure; the lender could pursue actions in the sequence of its choice, however.

The more moderate antideficiency statutes of the 1930s consisted of fair-market-value provisions. A fair-market-value provision is a requirement that, regardless of the value of the winning bid at the foreclosure sale, the borrower receives credit for the fair market value of the property in determining the size of the deficiency judgment. Although some states' codes had fair-market-value restrictions prior to the 1930s (see Skilton 1942), during 1933–35, Alabama, Idaho, Michigan, New Jersey, New York, Pennsylvania, South Carolina, and Texas all modified their statutes to include a fair-market-value provision (Poteat 1938). Without a fair-market-value provision, creditors can abuse deficiency judgments as, unlike their British counterparts, American lenders could bid at a sale in lieu of foreclosure. Often, they were the only bidders and bid far less than the value of the debt or the fair market value of the property, which left borrowers liable for the deficiency. Since foreclosure by sale had become the standard procedure, with the lender often the only bidder, this left the borrower exposed to the risk that he would both lose his property and owe a substantial deficiency judgment in excess of his true debt if the lender bid less than the debt. Skilton (1942) and Vaughan (1940) detail several such cases of lenders bidding amounts far lower than the fair market value of property.

Consistent with preventing such abuses, judges in the 1930s deemed many of the antideficiency statutes with fair-market-value restrictions constitutional provided that the statute was limited to a fair-market-value restriction and did not otherwise infringe on the enforcement of the mortgage contract. Judges declared the fair-market-value restrictions in the statutes of New Jersey, Pennsylvania, South Carolina, and Texas to be unconstitutional as impairments of the contracts clause of the U.S. Constitution. In the case of New Jersey, this was likely because the act also included several other procedural requirements on deficiency judgments such that courts determined that the law would have been a de facto violation of the contracts clause. Similarly, the Pennsylvania statute contained a number of procedural restrictions on the foreclosure process. The Supreme Court of South Carolina judge determined in *Federal Land Bank v. Garrison* (185 S.C. 255, 193 S.E. 308 [1937]) that, because the act included a fair-market-value provision written in such a way as to apply retroactively, the entire act was unconstitutional and thus null and void. The Texas law may have been declared unconstitutional because of the vague language of the law; the law required the borrower to get credit for the "actual value" of the property.

Many states went much further in restricting the rights of lenders in deficiency judgments during the Great Depression. The appendix in Poteat (1938) provides a state-by-state account of the antideficiency statutes and the case law surrounding them as of 1938. The legislatures of Iowa and Ohio set a statute of limitations of 2 years on when the creditor could collect on the deficiency judgment. Michigan passed a statute mandating that the lender use judicial foreclosure if it wished to secure a deficiency judgment. Georgia enacted a statute requiring that the deficiency judgment be filed within 30 days of the foreclosure sale if the lender had used a power-of-sale clause to foreclose. A number of states (Arizona, Arkansas, California, Minnesota, Montana, Nebraska, North Carolina, North Dakota, and South Dakota) attempted to prohibit deficiency judgments entirely during the 1933–35 period, often only for purchase mortgages.

The case of Arkansas provides an insightful illustration of why some states' attempts to ban deficiency judgments were successful and others were not. In Arkansas, as in other states, the statute was intended to apply to current mortgages. The court in Arkansas, as in most other states, struck down the constitutionality of any restriction on the lender's right to a deficiency judgment on mortgages entered into before the legislature passed the statute, as that would violate the contracts clause of the U.S. Constitution. However, in most states judges upheld the constitutionality of the law as it applied to future mortgages. In *Adams v. Spillyards* (187 Ark. 641, 61 S.W.2d 686, 649–50 [1933]), however, Judge Edgar L. McHaney of the Supreme Court of Arkansas prevented the act from any permanent effects by writing,

> Now, as to its application to future contracts, or to mortgages and deeds of trust on real estate executed subsequent to the effective date of the act, we think a careful examination of the act itself discloses that it has no application to the foreclosure of such contracts or mortgages. It does not in express terms apply to foreclosures on mortgages and deeds of trust on real estate to be hereafter executed, but apparently to foreclosures on contracts already in existence. In fact, the words "mortgage" or "deed of trust" are nowhere used in the act. Foreclosures on real estate are several times mentioned, and foreclosures on mechanics' liens and purchase money liens are covered as well as mortgages and deeds of trust. The evident purpose of the Legislature was to relieve a present condition by applying the poultice of the act to the sore spot of deficiency judgments in foreclosures of mortgages, caused by decline in realty values. They made it expressly applicable to cases of foreclosure now pending and sales already made but not confirmed, which could not possibly have reference to future contracts, (section 3); and also to "suits filed after the effective date of this act and real property is sold under foreclosure decree of courts fore-

closing same, said sale shall not be confirmed," etc. The whole context, we think, shows the Legislature was dealing with what it deemed a temporary emergency.

Thus, a seemingly minor difference in wording between the antideficiency statute of Arkansas and those of states like Arizona and California led to permanent differences in foreclosure law and outcomes. The Arizona, California, Minnesota, Montana, North Carolina, and North Dakota prohibitions continue to this day.

Comparing the restrictions above with those Ghent and Kudlyak (2011) report for 2009, we can see that virtually all of the restrictions on deficiency judgments other than some states' fair-market-value provisions date from the foreclosure crisis of the early 1930s. To better understand why states differed in whether they tried to enact a ban on deficiency judgments, I look at foreclosure rates from the 1931–32 period using data from farm mortgages and the importance of out-of-state farm mortgage credit in 1930. The data for farm foreclosure rates are from Stauber and Reagan (1935) and include foreclosures because of tax liens. Deeds in lieu are counted as foreclosures. See Alston (1983, 1984) for more discussion of farm foreclosures in the Great Depression.

To proxy for the relative importance of out-of-state capital, I compute the 1930 ratio of total farm mortgages in the state to real estate mortgages made by banks in that state. A high ratio indicates that the state is more dependent on out-of-state capital. The hypothesis is that legislators are more responsive to their own electorate than to individuals who live in another state and are unable to exact vengeance on pro-debtor legislators at the voting booth. The data on the volume of farm mortgages are from Horton, Larsen, and Wall (1942), and the banking data are from Board of Governors of the Federal Reserve System (1959).[7]

I estimate a probit model in which the dependent variable takes a value of one if the state attempted to prohibit deficiency judgments and zero otherwise. I view the decisions by courts regarding the constitutionality of the prohibition to be primarily idiosyncratic results of different judges rather than the concerted efforts of state legislators. As a result, even if the attempt to prohibit deficiency judgments failed, I code the dependent variable as one. I estimate the model using the combined foreclosure rate for 1931 and 1932, although the results are very similar when I use the combined foreclosure rate for 1931–33 or the combined foreclosure rate for 1931–34.

The first column of Table 6 contains the results of the benchmark probit estimates. The table shows the effect of a 1-unit change on the probability that the state attempted to ban deficiency judgments estimated at the means of foreclosure rates. An increase of 10 foreclosures per 1,000 farms per year is associated with a 6-percentage-point higher chance of attempting to enact a ban on deficiency judgments, and the coefficient on the farm foreclosure rate is statistically significant at the 1 percent level in every specification. The share of loans pro-

[7] The ideal Out-of-State Credit variable would use as the denominator the total amount of farm real estate mortgages made by banks in that state rather than the total amount of real estate mortgages made by banks in that state. Unfortunately, the banking data do not disaggregate mortgages made by banks in a state into residential, farm, and other until 1939.

Table 6
Marginal Effects from Probit Estimation on Deficiency Judgment Bans

	(1)	(2)
Farmfrate3132	.0058**	.0074**
	(.0018)	(.0025)
Out-of-State Credit	.0082+	.0099*
	(.0047)	(.0049)
Rural Share		−.0035
		(.0034)
Pseudo R^2 (%)	34	37

Note. The dependent variable takes a value of one if the state legislature attempted a ban on deficiency judgments in 1933–35. The term Farmfrate3132 is the average number of foreclosures per 1,000 farms in 1931 and 1932 combined; Out-of-State Credit is the 1930 ratio of farm mortgages in the state to total real estate loans by banks in the state; Rural Share is the percentage of the state's population that lived in rural areas according to the 1930 census. Both specifications correctly predict 87.2% of outcomes. $N = 47$.

+ Significant at the 10% level.
* Significant at the 5% level.
** Significant at the 1% level.

Table 7
Correlation between Independent Variables Predicting Attempted Antideficiency

	Farmfrate3132	Out-of-State Credit	Rural Share
Farmfrate3132	100		
Out-of-State Credit	44	100	
Rural Share	66	48	100

Note. The term Farmfrate3132 is the average number of foreclosures per 1,000 farms in 1931 and 1932 combined; Out-of-State Credit is the 1930 ratio of farm mortgages in the state to total real estate loans by banks in the state; Rural Share is the percentage of the state's population that lived in rural areas according to the 1930 census.

vided by out-of-state creditors also influenced whether the state attempted to ban deficiency judgments. The coefficient on Out-of-State Credit is statistically significant at only the 10 percent level for one specification. The reason for the weak statistical significance of Out-of-State Credit is likely because the two variables are highly correlated. As Table 7 illustrates, the correlation between the proxy for out-of-state credit and the foreclosure rate is 44 percent.

One concern with Out-of-State Credit is that it may be partially capturing the importance of agriculture to the state rather than merely the extent to which the state depends on out-of-state capital. To my knowledge, there is no reason to believe that a more agrarian state would be more likely to follow populist policies. However, Table 7 shows that the correlation between Out-of-State Credit and the share of the state's population that was rural according to the 1930 U.S. census

Table 8
Probit Model Predictions of Attempted Deficiency Ban versus Outcomes

	Actual		
Predicted	Attempted Ban	Did Not Attempt Ban	Total
Attempted ban	3	1	4
Did not attempt ban	5	38	43
Total	8	39	47

is 48 percent. To address the possibility that Out-of-State Credit is proxying for how agrarian the state is, another probit model includes the share of the population that was rural to better capture the extent to which creditors were nonvoters. The results are very similar to the benchmark specification, and the coefficient is statistically insignificant.

Table 8 breaks down the accuracy of the predictions by outcome. The probit model correctly predicts 87 percent of outcomes. Table 8 shows that the model correctly predicts 81 percent of the 83 percent of states that did not attempt a ban. The model is less successful in predicting the rarer outcome of a state attempting a ban: it predicts slightly less than one-half of the 17 percent of states that attempted a ban. The χ^2-statistic for a test of independence between the outcomes predicted by the model and the actual outcomes observed is $[(3-.68)^2/.68] + [(1-3.32)^2/3.32] + [(5-7.32)^2/7.32] + [(38-35.68)^2/35.68] = 10.4$, which is statistically significant at the 1 percent level.

4.2. Foreclosure Moratoria

During the Great Depression, the majority of state legislatures also enacted foreclosure moratoria. The moratoria varied in character and included a temporary increase in the statutory redemption period, a stay on all foreclosures until a specific date (for example, 1935), a stay on all foreclosures for an unspecified period of time (for example, "until the emergency has passed"), and a grant of more discretion to judges in deciding whether a foreclosure suit could proceed. In many cases the moratoria were voluntary (Skilton 1943). Alston (1984) shows that states with higher farm foreclosure rates were more likely to enact such moratoria, while Rucker and Alston (1987) demonstrate that these moratoria successfully prevented farm foreclosures. However, Alston (1984) also shows that creditors reacted by providing less new mortgage credit. These findings are consistent with the assertion in this paper that statutory law reacts to populist sentiment to the disadvantage of creditors.

What is perhaps less appreciated is how state judiciaries reacted to such moratoria. Bunn (1933), D.P.K. (1933), Poteat (1938), and Skilton (1943) review the case law extensively. Judiciaries declared many of the compulsory moratoria, and all those without clearly defined end dates were deemed unconstitutional because they violated the contracts clause. The courts of Idaho declared even a foreclosure holiday statute an unconstitutional impairment of contract (Poteat 1938). The

Supreme Court of North Dakota decreed that any extension of the statutory redemption period to mortgages existing before the moratorium statute had passed was unconstitutional (D.P.K. 1933). The Court of Civil Appeals of Texas struck down a similar statute (D.P.K. 1933). The Texas legislature tried again in 1934 to provide some relief to mortgagors by authorizing judges of the district courts to stay foreclosure suits and grant continuances, but the courts of Texas deemed this statute to also be unconstitutional (Poteat 1938). In 1938 the Nebraska Supreme Court declared a similar statute enacted by the legislature in 1937 unconstitutional (Poteat 1938). Even when judiciaries did not strike down a moratorium, they limited its scope or made clear in a ruling that they would not tolerate extensions of it.

Iowa is perhaps the only case in which a judge instituted a moratorium: Judge Charles C. Bradley agreed not to sign any more foreclosures as a condition of his release after being kidnapped and beaten by several Iowa farmers (Skilton 1943). Despite such threats to their own safety, justices in Iowa limited the scope of the legislature's moratorium statute (Poteat 1938). Judges in Minnesota and Wisconsin also faced angry mobs at the courthouses (see, for example, *New York Times* 1933a, 1933b). It is in this climate that judges in Minnesota and Wisconsin declared these states' moratoria statutes, both of which had a limited time frame, constitutional.

5. Conclusions

In this paper, I have reviewed the history of America's mortgage laws. Aspects of mortgage law that develop in case law rarely change, while features of mortgage law determined by statute show more variation over time. Furthermore, to the extent that legislatures intervene in mortgage law, they do so in populist fashion. In contrast, judges limit the application of statutes abrogating creditor rights. Thus, while the history of mortgage law reveals fundamental differences between how laws are determined in case law and in civil code, it does not support the hypothesis that case law is inherently more flexible.

Appendix

Title versus Lien Theory

As of 1878, the description of state mortgage laws by Jones (1878) permits the theory underlying mortgage laws in the United States (some of which were then territories) to be loosely classified according to Table A1.[8] Such classifications are not absolute; for example, many title-theory statutes explicitly state that the lender is not the owner of the property despite having title for the duration of the mortgage. For comparison, Table A1 also presents the legal theory underlying mortgages in each state in 1957 from Prather (1957) and in 1995 from Geis (1995). Despite more than a century having passed, most states that followed title

[8] Jones (1878) uses the classification "mortgage of common law" versus "mortgage of equity."

theory in 1878 retained some vestige of it in 1995. Of the 21 states that followed title theory in 1878, only Arkansas, Florida, Kentucky, and West Virginia were considered lien-theory states by 1995. The comparison shows how persistent legal foundations can be in a legal system based on case law such as the American system.

Table A1
Dominant Legal Theory of Mortgages in U.S. States

State by Region	1879	1957	1995
Pacific:			
Alaska	N.D.	N.D.	Lien
California	Lien	Lien	Lien
Hawaii	N.D.	Lien	Lien
Oregon	Lien	Lien	Lien
Washington	N.D.	Lien	Lien
Mountain:			
Arizona	Lien	Lien	Lien
Colorado	Lien	Lien	Lien
Idaho	N.D.	Lien	Lien
Montana	N.D.	Lien	Lien
Nevada	Lien	Lien	Lien
New Mexico	N.D.	Lien	Lien
Utah	Lien	Lien	Lien
Wyoming	N.D.	Lien	Lien
West North Central:			
Iowa	Lien	Lien	Lien
Kansas	Lien	Lien	Lien
Minnesota	Title	Lien	Lien
Missouri	Lien	Intermediate	Lien
Nebraska	Lien	Lien	Lien
North Dakota	N.D.	Lien	Lien
South Dakota	N.D.	Lien	Lien
West South Central:			
Arkansas	Title	Intermediate	Lien
Louisiana	Lien	Lien	Lien
Oklahoma	N.D.	Lien	Lien
Texas	Lien	Lien	Lien
East North Central:			
Illinois	Title	Intermediate	Intermediate
Indiana	Lien	Lien	Lien
Missouri	Lien	Lien	Lien
Ohio	Title	Intermediate	Intermediate
Wisconsin	Lien	Lien	Lien
East South Central:			
Alabama	Title	Title	Title
Kentucky	Title	Lien	Lien
Mississippi	Title	Intermediate	Intermediate
Tennessee	Title	Title	Title
Middle Atlantic:			
New Jersey	Title	Intermediate	Intermediate
New York	Lien	Lien	Lien
Pennsylvania	Title	Title	Intermediate

Table A1 (*Continued*)

State by Region	1879	1957	1995
South Atlantic:			
Delaware	Lien	Intermediate	Lien
District of Columbia	N.D.	Intermediate	N.D.
Florida	Title	Lien	Lien
Georgia	Lien	Title	Lien
Maryland	Title	Title	Intermediate
North Carolina	Title	Intermediate	Intermediate
South Carolina	Lien	Lien	Lien
Virginia	Title	Intermediate	Title
West Virginia	Title	Intermediate	Lien
New England:			
Connecticut	Title	Intermediate	Title
Maine	Title	Title	Title
Maryland	Title	Intermediate	Intermediate
New Hampshire	Title	Title	Title
Rhode Island	Title	Title	Title
Vermont	Title	Intermediate	Intermediate

Sources. Jones (1878); Prather (1957); Geis (1995).
Note. N.D. = no data.

Figure A1 shows that the states that followed title theory in 1879 were predominantly older states. Of the original 13 colonies, only New York, Georgia, and the Carolinas followed lien theory while, of the states incorporated after 1840, only Florida, Minnesota, and West Virginia followed title theory. The only states west of the Mississippi to follow title theory were Arkansas and Minnesota. The reason is that older states modeled their mortgage laws on British laws. In 1878, the British Empire continued to follow the title theory of mortgages, and Jones (1878) attributes the lien theory of mortgages to the 18th-century English barrister Lord Mansfield. New York led the way; as early as 1828, it was a lien-theory state. As a young state, California tried to emulate New York in its civil code (see, for example, Guidotti 1943), which explains why it chose lien theory at an early date. Many still younger western states chose to follow California law, and so there is a much greater likelihood of following lien theory among the western states.

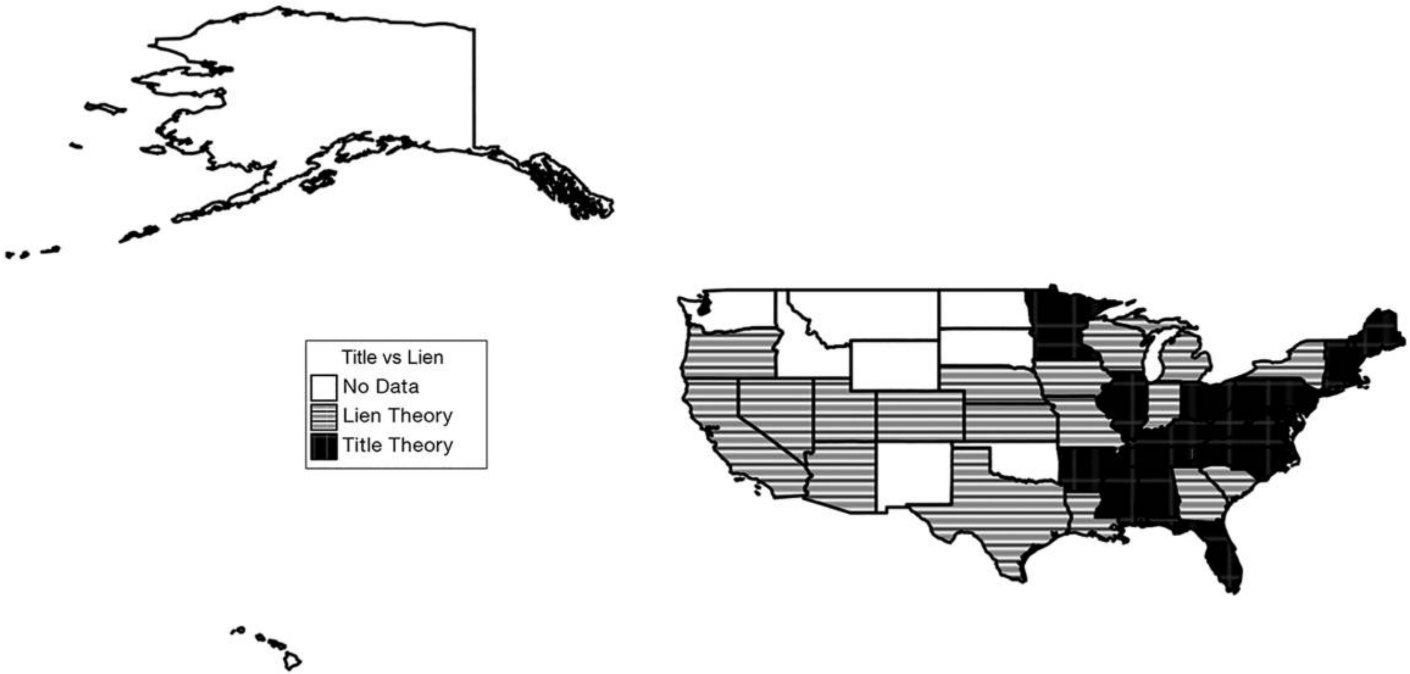

Figure A1. Title and lien theory states as of 1879

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