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Limiting the Foreclosure Power of Texas HOAs with a Percentage Threshold Comment.

Laci Ehlers

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COMMENT

LIMITING THE FORECLOSURE POWER OF TEXAS HOAs WITH A PERCENTAGE THRESHOLD

LACI EHLERS

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I. INTRODUCTION

The Texas Constitution bestows the legislature with the duty to protect Texans' homesteads from forced sale.¹ Sadly, the Constitution's protections do not preclude the involuntary sale of a homestead by the very organization established to represent the best interests of the homeowners and the community, the

1. TEX. CONST. art. XVI, § 49; *see Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.—Houston [1st Dist.] 1994, no writ) (mandating that foreclosure against a homestead may only be done under the specific instances listed in the Texas Constitution (citing *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 634 (Tex. 1987))). The Texas Property Code defines an urban homestead as one "consist[ing] of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon." *See* TEX. PROP. CODE ANN. § 41.002 (West 2007) (listing the requirements for both urban and rural homesteads). To establish a homestead interest, the homeowner must "show both an intent to use the land as homestead and a manifestation of such use." Randy B. Warmbrodt, Casenote, *Inwood N. Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY'S L.J. 435, 438 (1987); *accord Dominguez v. Castaneda*, 163 S.W.3d 318, 330 (Tex. App.—El Paso 2005, pet. denied) (indicating that homestead rights require overt acts of usage and the intention to claim as a homestead (citing *Sanchez v. Telles*, 960 S.W.2d 762, 770 (Tex. App.—El Paso 1997, writ denied))).

neighborhood homeowners' association (HOA).²

During the 77th Session of the Texas Legislature, the legislature made great strides to increase homeowners' protections from the dangerous power of HOAs to foreclose on a home for unpaid fines and interest.³ However, the limitations are still not enough to curb the overreaching power of a non-profit organization pretending to be a governmental entity.⁴ Homeowners still lack safeguards against HOAs taking their homesteads over a minimal amount in controversy, especially in comparison to the value of the home involved in the forced sale.⁵

For example, in *Sloan v. Owners Ass'n of Westfield*,⁶ the homeowner, Sloan, owed a mere \$1,172.82 in unpaid assessment fees.⁷ After a suit by the HOA, the court granted an order of foreclosure on the HOA's lien and allowed the sale of Sloan's homestead.⁸ Similarly, in *Hodges v. Canyon Creek Ridge No. 1 Homeowners Ass'n*,⁹ the amount in controversy was an

2. TEX. CONST. art. XVI, § 50; TEX. PROP. CODE ANN. § 204.010 (West 2007).

3. See Act of June 14, 2001, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Gen. Laws 1857, 1860–63 (“A property owners’ association may not foreclose a property owners’ association assessment lien if the debt securing the lien consists solely of: (1) fines assessed by the association; or (2) attorney’s fees incurred by the association solely associated with fines assessed by the association.”), amended by Act of June 17, 2011, 82d Leg., R.S., ch. 1026, 2011 Tex. Sess. Laws 1026 (to be codified at PROP. § 209.009); TEX. S.B. 507, 77th Leg., R.S. (2001) (proposing notice requirements and a chance for homeowners to redeem their property after a foreclosure).

4. See *Scoville v. SpringPark Homeowner’s Ass’n*, 784 S.W.2d 498, 506 (Tex. App.—Dallas 1990, writ denied) (Ovard, J., dissenting) (analogizing an HOA to a “private government”); Brian Jason Fleming, Note, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 574 (2006) (equating the expanding role of HOAs to the characteristics found in “quasi-governmental organization[s] and ‘private governments’” (alteration in original) (quoting Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 253 (1976))).

5. See Karen Ellert Peña, Comment, *Reining in Property Owners’ Associations’ Power: Texas’s Need for a Comprehensive Plan*, 33 ST. MARY’S L.J. 323, 324 (2002) (describing a situation where the homeowner’s fines in a litigation battle far exceeded the value of the homestead).

6. *Sloan v. Owners Ass’n of Westfield*, 167 S.W.3d 401 (Tex. App.—San Antonio 2005, no pet.).

7. *Id.* at 403.

8. *Id.*

9. *Hodges v. Canyon Creek Ridge No. 1 Homeowners Ass’n*, No. 05-00-01848-CV, 2002 WL 418201 (Tex. App.—Dallas Mar. 19, 2002, no pet.) (not designated for publication).

insignificant \$750 for a “special assessment.”¹⁰ Even though Hodges remained current on all utilities and normal homeowners’ dues, and despite attempts to pay off the delinquent amount, the HOA proceeded with a foreclosure sale.¹¹ The HOA in *Goddard v. Northhampton Homeowners Ass’n*¹² foreclosed on the homestead to collect only \$600 in unpaid assessments.¹³ The homeowner, Goddard, even attempted to pay the past due assessment; however, because the check was slightly short, the HOA rejected the entire monthly payment without informing Goddard of his mistake.¹⁴

This Comment narrowly concentrates on the power of an HOA¹⁵ to foreclose on a homestead, and specifically recommends a change to limit that power, which would allow the Texas Property Code to further the objectives of the Texas Constitution.¹⁶ Part II provides a brief history of the homestead protections included in the Texas Constitution and addresses how the current HOA foreclosure power relates. Part III discusses the development, growth, and characteristics of the HOA, including its purpose, strengths, and problems. Part IV analyzes recent case law and legislative efforts to provide homeowners more protection against the excessive power of the HOA, specifically the recent attempt by the legislature, the Texas Residential Property Owners Protection Act.¹⁷ Part V introduces an innovative approach implemented in California that limits the foreclosure power of HOAs. Finally, Part VI proposes a change to the Texas Property Code that restricts the power of an HOA to foreclose pursuant to a percentage threshold related to the value of the homestead.

10. *Id.* at *1.

11. *Id.*

12. *Goddard v. Northhampton Homeowners Ass’n*, 229 S.W.3d 353 (Tex. App.—Amarillo 2007, no pet.).

13. *Id.* at 354.

14. *Id.*

15. TEX. PROP. CODE ANN. § 204.010 (West 2007).

16. *See* TEX. CONST. art. XVI, § 50(a) (stating that the “homestead of a family . . . shall be, and is hereby protected from forced sale, for the payment of all debts . . .”).

17. PROP. § 209.009 (West 2007).

II. TEXAS CONSTITUTIONAL HOMESTEAD PROTECTIONS AND THE CONFLICT WITH HOMEOWNERS' ASSOCIATIONS

A. *Homestead Protections in the Texas Constitution and the Effect of Inwood North Homeowners' Ass'n v. Harris*

The Texas Constitution reads, in part, “the homestead . . . is . . . protected from forced sale, for the payment of all debts except . . . (1) the purchase money thereof, . . . (2) the taxes due thereon[,] . . . or for work and material used in constructing improvements thereon.”¹⁸ By solidifying the exemption in the Constitution, the drafters intended to shield the homestead from the influence of legislators and creditors.¹⁹ Under the homestead exemption, the Texas Constitution protected even impoverished debtors from falling into the more vexing situation of homelessness.²⁰

In the dissenting opinion of *Inwood North Homeowners' Ass'n v. Harris*,²¹ Justice Mauzy observed that “since 1876 the extent of [constitutional] protection [of the homestead property] has been clear; i.e., no lien other than one for taxes, purchase money, or labor and materials for home improvements is valid.”²²

18. TEX. CONST. art. XVI, § 50(a)(1)–(2), (5); *see also* Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 353 (2002) (identifying the limited exceptions to homestead protections under the Texas Constitution). The first homestead exemption, a creation by Texas, was the Statute of January 26, 1839. TEX. CONST. art. XVI, § 50, interp. commentary (West 2007) (citing Act approved Jan. 26, 1839, 3d Cong., R.S., § 1, 1839 Repub. Tex. Laws 125–26, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 125, 125–26 (Austin, Gammel Book Co. 1898)).

19. TEX. CONST. art. XVI, § 50, interp. commentary (West 2007) (citing Act approved Jan. 26, 1839 § 1); *see id.* art. VII, § 22 (“The Legislature shall have power to protect by law from forced sale, . . . property of all heads of families.”); Randy B. Warmbrodt, Casenote, *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY'S L.J. 435, 436 (1987) (presenting the exemption's history of protecting the homestead against foreclosure).

20. *See* *Cocke v. Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931) (asserting the idea of the homestead exemption as a protection for the place of residence from the danger of loss due to improvidence or misfortune (citing *Iken v. Olenick*, 42 Tex. 195, 197 (1874))); *Florey v. Estate of McConnell*, 212 S.W.3d 439, 443 (Tex. App.—Austin 2006, pet. denied) (“Constitutional homestead rights protect citizens from losing their homes.”); Randy B. Warmbrodt, Casenote, *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY'S L.J. 435, 437 (1987) (claiming the constitutional provision prevented debtors from losing the ability to provide a home).

21. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632 (Tex. 1987).

22. *Id.* at 639 (Mauzy, J., dissenting); *see* TEX. CONST. art. XVI, § 50 (providing

Nevertheless, the majority in *Harris*, a 1987 landmark case, held that “a covenant to pay assessments enforced by a foreclosure provision is superior to an after-acquired homestead exemption[,]” thus opening the door for HOAs to use foreclosure to compel payment of assessments.²³

Between 1981 and 1983, Harris purchased several lots in the Inwood North subdivision.²⁴ The deeds contained details of the “declaration of covenants and restrictions” filed in December 1980 in the county property records when the subdivision was created; specifically, the deeds provided that Harris’s lots were subject to covenants that run with the land and that would obligate all parties obtaining rights to the lots.²⁵ Harris failed to pay the required assessment fees, and the Inwood North Homeowners’ Association brought suit for the delinquent amounts and to “foreclose on the ‘Vendor’s Lien’” included in the deeds.²⁶ Even though the Supreme Court of Texas agreed that the “Vendor’s Lien” was not present in the declarations, the court overruled the lower courts and held that the HOA had the ability to create a lien by the existence of a contractual lien, and consequently, could foreclose against the property.²⁷

protection for Texans’ homestead property from liens, with a few listed exceptions).

23. *Harris*, 736 S.W.2d at 637; William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 19; see James J. Brown, *Condemnation and Eminent Domain: Inverse Condemnation—An In-Depth Look*: Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379 (Fla. 1999), 29 STETSON L. REV. 829, 834 (2000) (explaining the impact of *Inwood North Homeowners’ Ass’n v. Harris* on Texas homestead rights); Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 436 (1987) (outlining the proceedings and the majority’s opinion).

24. *Harris*, 736 S.W.2d at 634.

25. *Id.*; see Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 435 (1987) (describing the process the developer executed in order to create Inwood North Homeowners’ Association).

26. *Harris*, 736 S.W.2d at 634.

27. *Id.*; see Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 435–36 (1987) (indicating that the lower courts did not approve the foreclosure due to the constitutional provision regarding homesteads). Courts have ruled that, even if the lien has been incorrectly designated as a “vendor’s lien,” the lien will still be enforced as a “contractual lien.” See *Md. Cas. Co. v. Willig*, 10 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1928, writ ref’d) (citing *Helm v. Weaver*, 69 Tex. 143, 6 S.W. 420, 421 (1887)) (explaining that if a vendor’s lien was not created, then the instruments generated a contract lien).

Following a declaration that the “interpretation of the homestead laws are to be made liberally[,]” the court held that “when the property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead.”²⁸ Thus, the court established that the protection of the homestead exemption is not absolute and may be attacked if the covenant exists before the homestead claim is established.²⁹

B. *Homeowners’ Association Foreclosure Power Under the Texas Constitution*

Based on the common law of servitudes, the caveat to the homestead exemption found in the Texas Constitution is that a covenant running with the land may attach before a valid homestead claim is established.³⁰ As with a lien affixed to the

28. *Harris*, 736 S.W.2d at 635. The *Harris* court recognized that Texas jurisprudence had articulated that the “homestead exemption was founded on principles of soundest policy Its design was not only to protect citizens and their families from destitution, but also to cherish and support in bosoms of individuals, those feelings of sublime independence which are so essential to maintenance of free institutions.” *Id.* at 634–35 (quoting *Franklin v. Coffee*, 18 Tex. 413, 416 (1857)) (internal quotation marks omitted). However, the court still insisted that homestead rights may not avoid or destroy a pre-existing encumbrance against the property. *Id.* at 635.

29. *Johnson v. First S. Props. Inc.*, 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.); see *Harris*, 736 S.W.2d at 635 (“[A] previously acquired lien[] . . . cannot be subsequently defeated by the voluntary act of a debtor in attempting to make property his homestead.” (quoting *Gage v. Neblett*, 57 Tex. 374, 378 (1882)) (internal quotation marks omitted)); *Miles Homes of Tex., Inc. v. Brubaker*, 649 S.W.2d 791, 793 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.) (advancing that a party is estopped from asserting the homestead exemption if the covenant was executed previously). *Contra Harris*, 736 S.W.2d at 641 (Mauzy, J., dissenting) (arguing that the court is forbidden from foreclosing against a homestead because the contractual lien is not included as one of the three liens permitted to attach to a homestead under the Texas Constitution); Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 446–47 (1987) (relaying the reasoning of the dissenting opinion written by Justice Mauzy and joined by Justice Gonzalez in *Harris*). The conclusion that prior established liens prevail over a subsequent homestead claim was originally held in *Gage v. Neblett* in 1882; however, the lien was not enforceable through foreclosure against the homestead. *Gage*, 57 Tex. at 378; accord *Inge v. Cain*, 65 Tex. 75, 79 (1885) (“Mortgages and other liens were valid before, but not effective until the property was stripped of the homestead character If [liens] are never valid, they can never be operative What cannot ‘ever be valid,’ is never valid, and what is never valid, is always void.”).

30. See Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing*

property prior to a homestead claim, courts have held that a pre-existing covenant running with the land is also superior to a homestead claim.³¹ Several elements must first be satisfied before a covenant can qualify as running with the land.³² First, the covenant must touch and concern the land.³³ Second, the covenant must be filed in the county's real property records in order to bind the parties and their assigns.³⁴ Third, the original parties must "intend that the covenant run with the land"³⁵

that Power, 66 TEX. BUS. J. 218, 220 (2003) (stressing that a valid homestead claim will not stop a pre-existing contractual lien); see also Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2504 (2004) (indicating that the origin of property owners' associations is in the common law, and statutes and legislation adjust the power of these associations).

31. See, e.g., *Peters v. Clements*, 46 Tex. 114, 123 (1876) (reiterating the elementary principle that subsequent purchasers are obligated to the recitals in the deed).

32. *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 621 (Tex. App.—Eastland 2009) (citing *Montfort v. Trek Res., Inc.*, 198 S.W.3d 344, 355 (Tex. App.—Eastland 2006, no pet.)), *rev'd on other grounds*, 2011 WL 3796568 (Tex. Aug. 26, 2011) (not designated for publication). See generally Howard R. Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEX. L. REV. 419, 423 (1949) (detailing the development of the elements required to establish a covenant that runs with the land).

33. *Harris Cnty, Flood Control Dist. v. Glenbrook Patiohome Owners Ass'n*, 933 S.W.2d 570, 574 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (citing *Harris*, 736 S.W.2d at 635). A restriction that limits the use or creates a duty concerning the use of land, and is not personal to the assignor, is considered to "touch and concern the land." *Ehler v. B.T. Suppenas Ltd.*, 74 S.W.3d 515, 521 (Tex. App.—Amarillo 2002, pet. denied); *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 115 (Tex. App.—Houston [14th Dist.] 1996, no writ). Personal rights to the assignor may relate to the property conveyed but can be asserted "independently of ownership of the property[.]" and, thus, are not considered to touch and concern the land. *Jackson v. Thweatt*, 883 S.W.2d 171, 176 (Tex. 1994).

34. *Rolling Lands Invs., L.C. v. Nw. Airport Mgmt, L.P.*, 111 S.W.3d 187, 200 (Tex. App.—Texarkana 2003, pet. denied) (citing *Harris*, 736 S.W.2d at 635); *accord Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n*, 178 S.W.3d 384, 391 (Tex. App.—Fort Worth 2005, pet. denied) (naming "specifically binds the parties and their assigns" as one of the elements involved with a covenant running with the land (citing *Voice of Cornerstone Church Corp. v. Pizza Prop. Partners, Inc.*, 160 S.W.3d 657, 665 (Tex. App.—Austin 2005, no pet.)).

35. *Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386, 394–95 (Tex. App.—Texarkana 1999, pet. denied) (citing *Harris*, 736 S.W.2d at 635). Courts should look to the language of the covenant to determine whether the intent is that the covenant run with the land. *TX Far W., Ltd. v. Tex. Invs. Mgmt., Inc.*, 127 S.W.3d 295, 302 (Tex. App.—Austin 2004, no pet.). The parties involved must also have "privity of estate." *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 910 (Tex. 1982); *accord Panhandle & S.F. Ry. Co. v. Wiggins*, 161 S.W.2d 501, 505 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (restating that privity of estate must exist for a covenant to run with the land). "[Privity of estate between the parties] means there must be a mutual or successive relationship to the same rights of property." *Westland Oil*, 637

Finally, the party purchasing the land must have either actual or constructive notice of the covenant.³⁶

Although covenants are generally labeled as “restrictive,” covenants may create affirmative duties.³⁷ One such covenant is a homeowner’s duty to pay assessments³⁸ to his HOA for the benefit and maintenance of the neighborhood, and a lien may thus be introduced for the enforcement of the fees.³⁹ As seen in

S.W.2d at 910–11; *accord* Wayne Harwell Props. v. Pan Am. Logistics Ctr., Inc., 945 S.W.2d 216, 218 (Tex. App.—San Antonio 1997, writ denied) (defining “privity of estate” as a “mutual or successive” connection to identical rights in the property).

36. 718 Assocs., Ltd. v. Sunwest N.O.P., Inc., 1 S.W.3d 355, 364 (Tex. App.—Waco 1999, pet. denied) (citing *Harris*, 736 S.W.2d at 635); *see* *Davis v. Huey*, 620 S.W.2d 561, 565–66 (Tex. 1981) (asserting that the covenants of which the purchaser had actual or constructive notice bind that purchaser). Once the deed is filed in the county’s real property records, a purchaser is charged with notice of the provisions within the “declaration of covenants and restrictions” and any other contents of the recorded instruments. *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984) (citing *Strong v. Strong*, 128 Tex. 470, 98 S.W.2d 346, 347 (Tex. 1936)). “[A]nyone purchasing with notice [is] bound by the covenant.” *Int’l Ass’n of Machinists, Lodge No. 6 v. Falstaff Brewing Corp.*, 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ). Actual notice constitutes actual knowledge provided to the purchaser of the property bound by the covenants. *See Bennett v. Cocks*, 15 Tex. 67, 71 (1855) (stating the means of the execution of the bill of sale provide actual notice); *Simms v. Lakewood Vill. Prop. Owners Ass’n*, 895 S.W.2d 779, 788 (Tex. App.—Corpus Christi 1995, no writ) (illustrating an example of actual notice where the map filed by the developer in the land records for the subdivision’s plan and scheme was also included in the brochures used to advertise the property). Constructive notice is the potential knowledge obtained had the purchaser properly examined the land records. *Sherman v. Sipper*, 137 Tex. 85, 152 S.W.2d 319, 321 (1941); *see* “Moore” Burger, Inc. v. Phillips Petrol. Co., 492 S.W.2d 934, 939 (Tex. 1972) (explaining that a party is charged with constructive notice when an inquiry into the rights of the previous owner would have revealed the requisite facts).

37. Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 440 (1987).

38. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2510 (2004) (noting that assessments, unlike membership dues or optional charges, are “a proportionate share of the expenses incurred to fund the association’s business and governmental service[s]” (quoting WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 35–36 (2d ed. 1988)) (internal quotation marks omitted)); *see also* *San Antonio Villa Del Sol Homeowners Ass’n v. Miller*, 761 S.W.2d 460, 464 (Tex. App.—San Antonio 1988, no writ) (identifying assessment fees as necessary expenses to run the association shared by the community owners).

39. *See Frey v. DeCordova Bend Estates Owners Ass’n*, 647 S.W.2d 246, 248 (Tex. 1983) (enforcing the assessment obligation in the covenant running with the land); *Simms*, 895 S.W.2d at 783 (holding covenants containing assessment fees to be valid and enforceable). “Since affirmative duty covenants associated with common property usually contemplate monetary payment, an additional feature, such as a lien, may be introduced into the covenant to secure the assessment payments.” Randy B. Warmbrodt, Casenote,

Harris, once the elements for attaching a covenant to the land are satisfied, and the “declaration of covenants and restrictions” is filed in the county’s real property records, then as long as the process occurs prior to the establishment of a homestead claim, any person later receiving a deed to the recorded property is obligated to pay the assessment and is restricted by any other provisions filed in the record.⁴⁰

Therefore, on the basis that homeowners have consented to the provisions in the deed, modern courts have been able to justify the restrictive covenants creating and providing power to an HOA.⁴¹ By purchasing a home within a community governed by an HOA created under a declaration of covenants and restrictions, homeowners agree to the terms and legal duties set forth in that declaration, including use restrictions and assessments.⁴²

III. GENERAL INFORMATION ABOUT THE DEVELOPMENT, GROWTH, AND CHARACTERISTICS OF HOMEOWNERS’ ASSOCIATIONS

A. *What Is a Homeowners’ Association?*

The concept of HOAs is not a recent creation. The first HOA

Inwood North Homeowners’ Association, Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 440–41 (1987).

40. *Harris*, 736 S.W.2d at 633; *accord* Supkis v. Madison Place Homeowners’ Ass’n, No. 01-07-00573-CV, 2008 WL 2465788, at *4 (Tex. App.—Houston [1st Dist.] June 19, 2008, pet. denied) (mem. op.) (explaining the significance of recording a “declaration of covenants and restrictions” with the county’s real property records); *Montfort v. Trek Res., Inc.*, 198 S.W.3d 344, 355 (Tex. App.—Eastland 2006, no pet.) (listing the elements required to establish a covenant running with the land (citing *Harris*, 736 S.W.2d at 635)).

41. *Davis*, 620 S.W.2d at 566; *see* *Powell v. Tall Timbers Prop. Ass’n*, No. 09-01-495 CV, 2002 WL 1990930, at *2 (Tex. App.—Beaumont Aug. 29, 2002, no pet.) (not designated for publication) (promoting the use of contract rules in the area of restrictive covenants); *Dyegard Land P’ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.—Fort Worth 2001, no pet.) (indicating that the rules of contract construction apply to restrictive covenants); Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 54 (1990) (justifying the support for restrictive covenants due to consent from those subject to the agreement).

42. Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 221 (2003). *But see* Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 884 (1988) (disregarding the use of consent as an argument for restrictive covenants and equating the usage more to coercion).

dates back to 1743 in London when residents of Leicester Square placed restrictions on themselves regarding a private park.⁴³ In the United States, the first recorded residential association in continuous existence was organized by Boston residents in 1844.⁴⁴ Today, HOAs account for 52%–55% of approximately 309,600 communities across the country.⁴⁵

An HOA is a non-profit organization created initially in a community by the developer, through a grant of authority by the state and local governments, by establishing a covenant typically called a “Master Declaration” or a “Declaration of Covenants, Conditions, and Restrictions” (CC&Rs).⁴⁶ The declaration binds homeowners to mandatory membership in the HOA through attachment to homeowners’ deeds.⁴⁷ After the developer

43. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 208 (1992); see Howard R. Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEX. L. REV. 419, 421 (1949) (indicating that restrictive covenants to control the use of land originate as far back as sixteenth-century England).

44. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 209 (1992); accord Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2505 (2004) (describing the “Committee of the Proprietors of Louisburg Square” as the oldest known property owners’ association in America).

45. *Industry Data: National Statistics*, COMMUNITY ASS’N INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited July 23, 2011); see Sharon Kolbet, Comment, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners’ Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 TEX. WESLEYAN L. REV. 85, 90 (2008) (stating that the number of community associations in 2008 increased to an estimated 300,800).

46. See *Sloan v. Owners Ass’n of Westfield*, 167 S.W.3d 401, 402–03 (Tex. App.—San Antonio 2005, no pet.) (clarifying the introduction and development of HOAs); Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 220 (2003) (representing an HOA as a non-profit organization created by the developer at the inception of the community).

47. See Randy B. Warmbrodt, Casenote, *Inwood North Homeowners’ Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY’S L.J. 435, 441 (1987) (explaining that properly filing the CC&Rs in the county land records establishes the HOA and the mandatory membership requirement). See generally *Gray v. Key Ranch at the Polo Club Home Owners Ass’n*, No. 03-09-00145-CV, 2010 WL 143421, at *1–2 (Tex. App.—Austin Jan. 12, 2010, no pet.) (mem. op., not designated for publication) (specifying that deeds executed shall be subject to the “restrictions contained in the Declaration of Covenants, Conditions, and Restrictions”); *Dyegard Land P’ship v. Hoover*, 39 S.W.3d 300, 303 (Tex. App.—Fort Worth 2001, no pet.) (showcasing an example where a restrictive covenant “ran with the title to said land” and was “binding upon all parties and persons claiming

relinquishes a pre-established number of lots to homeowners, the control of the HOA is passed to a board of directors.⁴⁸ The board of directors is generally comprised of volunteers from the community, elected by members of the community, to oversee the organization and respective activities.⁴⁹

Much like a “mini-government,” an HOA may promulgate rules and regulations related to architectural control, home use and occupancy, mandatory fees and assessments, and it may enforce compliance with its police powers.⁵⁰ Regardless of their size, HOAs typically operate “uniform[ly] in manner and hold similar duties and powers[,]” with the only major difference being that smaller HOAs are self-managed and larger HOAs may hire a board-controlled management company to assist with meeting responsibilities.⁵¹

said land or any part thereof”).

48. See Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 329 (2002) (indicating that control of the HOA generally passes to the board of directors after the sale of a specified number of lots in a subdivision).

49. Sharon Kolbet, Comment, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 TEX. WESLEYAN L. REV. 85, 90 (2008). The number of governing volunteers exceeds one million across the country. Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 331 (2002).

50. See *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632, 635 (Tex. Civ. App.—San Antonio 1977, no writ) (providing an example where “Planned Unit Developments . . . present[ed] a relatively new and unique concept in cooperative living because of its mini-government which [was] empowered pursuant to its Declaration and By-laws to enact rules and regulations”); Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 330 (2002) (equating the responsibilities of an HOA to the functions of a local government). *But see* Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 49 (1990) (distinguishing an HOA regulation from governmental regulation by listing several factors, the most significant of which is the HOA’s voluntary nature, and listing several other factors that create a great distinction between the two entities). Some commentators have suggested that because HOA activities could be characterized as “state action,” fourteenth amendment guarantees should be extended to property owners. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 601 (1993) (commenting on the possibility that HOAs should provide residents with constitutional protections).

51. Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 331 (2002); accord Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community*

B. *Purpose of Homeowners' Associations*

Despite the horror stories, HOAs serve an extremely important purpose in the community.⁵² The rules and regulations established by the developer, and enhanced by the association's board of directors, facilitate the operation, use, improvements, modifications, and repairs of the common property.⁵³ Architectural specifications help preserve a uniform neighborhood consistent with the original development plan, which ensures that property owners will continue to receive the expectation of their purchase.⁵⁴ Through assessment fees, HOAs maintain various amenities and open spaces in promotion of the health and safety of the community's residents.⁵⁵ Collectively, the restrictions enforced by the HOA work toward the common goal of preventing a decrease in the property value of each individual property.⁵⁶

Associations: In Search of the Appropriate Analogy, 27 REAL PROP. PROB. & TR. J. 589, 603 (1993) (illustrating the differences between a small and large HOA).

52. See Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 332 (2002) (emphasizing that “[d]evelopers, homeowners, and governments each reap the benefits” of an HOA).

53. William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 19. See generally Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 331 (2002) (outlining how each involved party—government, developer, and homeowner—participates, benefits, and affects the overall health of the neighborhood and the other involved parties).

54. William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 19; see *Gettysburg Homeowners Ass'n v. Olson*, 768 S.W.2d 369, 370 (Tex. App.—Houston [14th Dist.] 1989, no writ) (describing HOAs as being “responsible for enforcing and maintaining the architectural integrity” of the subdivision) (citation and internal quotation marks omitted).

55. *Scoville v. SpringPark Homeowner's Ass'n*, 784 S.W.2d 498, 500 (Tex. App.—Dallas 1990, writ denied). See generally David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766 (1995) (echoing the Community Associations Institute's (CAI) message that HOAs carry out the service of providing a strong feeling of security considering the growing impression that the government does not do enough).

56. See Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2505 (2004) (explaining that an HOA protects property values “through maintenance of the ‘property itself and through preservation of the [property's] character and appearance.’” (citation omitted)). See generally *Anderson Mill Mun. Util. Dist. v. Robbins*, No. 03-04-00369-CV, 2005 WL

Today, more HOAs extend the association's purpose by providing services to the homeowners such as security, recreation, social events, street lights, and even utilities.⁵⁷ Just as assessment fees help maintain the status of the community, the money also works to foster a neighborly and relaxed atmosphere.⁵⁸

Obviously, the availability of services and benefits is contingent on the HOA's ability to collect money through assessment fees from the homeowners.⁵⁹ HOAs cannot afford to absorb a high number of delinquencies; therefore, enforcement of payments from the individual homeowners is necessary to ensure costs are spread evenly.⁶⁰ Consequently, when a homeowner fails to pay his portion of the neighborhood expenses, the HOA, representing the remaining homeowners, may use the covenants established in the CC&Rs to enforce payment.⁶¹

C. *Power to Foreclose in Texas*

The potential powers of HOAs in Texas are found in the Texas Property Code⁶² and in case law.⁶³ When specifically articulated

2170355, at *11 (Tex. App.—Austin Sept. 8, 2005, no pet.) (not designated for publication) (deciding enforcement of the HOA's restrictions was needed to sustain the value of the property); *Scoville*, 784 S.W.2d at 507 (citing the CC&Rs to show the developer's intent to preserve the value of the community).

57. See *Simms v. Lakewood Vill. Prop. Owners Ass'n*, 895 S.W.2d 779, 783 (Tex. App.—Corpus Christi 1995, no writ) (examining the provisions of the covenant listing "common areas, streets, [and] utilities" as the association's responsibility); William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 19 (listing the types of services an HOA may be responsible for providing). *Contra* Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 333 (2002) (identifying the burdens of HOAs, including excessive regulation potentially leading to heated disputes).

58. Cf. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2506 (2004) (advancing that "[o]ne out of every six people in the United States" chooses to live in a community that shares common facilities).

59. See *id.* at 2509.

60. See William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 19 (expressing the association's need to collect money in order to deliver services and benefits).

61. Randy B. Warmbrodt, Casenote, *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987), 19 ST. MARY'S L.J. 435, 441 (1987).

62. TEX. PROP. CODE ANN. §§ 201.001–.005 (West 2007 & Supp. 2010); see *id.* § 204.010 (West 2007) (setting forth the foreclosure power to associations in certain

in the CC&Rs, these powers take effect and are subject to change only by a per-majority vote of the HOA members.⁶⁴ The deed restrictions carry the obligations to the homeowners and provide remedies for the HOA such as the foreclosure power.⁶⁵

Until the 82nd Session of the Texas Legislature, HOAs had the ability to foreclose through judicial or nonjudicial means, the primary method being nonjudicial.⁶⁶ Judicial foreclosure involves the filing of a lawsuit and receiving a legal judgment for a foreclosure, if so granted.⁶⁷ An HOA's use of nonjudicial

subdivisions).

63. *Inwood N. Homeowner's Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 636-37 (Tex. 1987). In April 2002, the foreclosure power of HOAs in Harris County was slightly reduced with the ruling in *Brooks v. Northglen Ass'n*, which prohibited foreclosure based solely on late charges. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170-71 (Tex. 2004); Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 2, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (summarizing homeowners' associations' powers).

64. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2508 (2004); see also Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 220 (2003) (asserting that the CC&Rs, bylaws, rules, and regulations govern the operations of the HOA). An HOA's governing documents are "enforceable as the laws, charters, and constitutions of public governments." They constitute the "rules of the regime under which . . . the residents will be living." Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2508 (2004) (quoting EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 127 (1994)).

65. *Cottonwood Valley Home Owners Ass'n v. Hudson*, 75 S.W.3d 601, 603 (Tex. App.—Eastland 2002, no pet.) (citing *Harris*, 736 S.W.2d at 636); see *Stewart v. Valenta*, 361 S.W.2d 910, 913 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.) (recognizing that a deed imposes an obligation on the grantor and the grantee to abide by the restrictions incorporated therein).

66. See TEX. H.B. 1228, 82d Leg., R.S. (2011) (reducing an HOA's ability to use nonjudicial foreclosure, and only permitting it when the homeowner agrees in writing to waive expedited foreclosure). Compare TEX. PROP. CODE ANN. T.2, App., Title Examination Standard 16.10 (West Supp. 2010) (describing the nonjudicial foreclosure process, including examining and complying with the security instrument, notice requirements based on the date of sale, and outlining the statute of limitations), with *id.* Title Examination Standard 16.20 ("When title is based on a court's foreclosure of a lien or an execution sale, an examiner may rely on the deed of the officer who conducted the sale only after verifying the existence and apparent validity of the judgment conferring authority to make the sale and of the order of sale or writ of execution and levy.").

67. Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 2, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf>. See generally Att'y

foreclosure is authorized by a power of sale in the deed restrictions, and no legal judgment is required.⁶⁸ More than half of the states authorize nonjudicial foreclosure.⁶⁹ However, only

Gen. of Tex. v. Casner, 224 S.W.3d 216, 217 (Tex. App.—El Paso 2004, no pet.) (addressing a case arising from a judicial foreclosure for unpaid assessments); *Hudson*, 75 S.W.3d at 603 (reviewing whether an HOA is entitled to use judicial foreclosure for an assessment lien). “When foreclosures are conducted judicially, the courts have carefully worked out the rights of [the] parties and the impact of these rights on the foreclosure process.” Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1468–69 (2004).

68. Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 2, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf>. See generally *Holly Park Condo. Homeowners' Ass'n v. Lowery*, 310 S.W.3d 144, 145, 149 (Tex. App.—Dallas 2010, pet. denied) (granting summary judgment in favor of the owner in a wrongful foreclosure suit after the HOA conducted a nonjudicial foreclosure on a condominium); *W. Trinity Props., Ltd. v. Chase Manhattan Mortg. Corp.*, 92 S.W.3d 866, 867 (Tex. App.—Texarkana 2002, no pet.) (discussing a situation involving a scheduled nonjudicial foreclosure and holding that the trustee's lien was superior to the trustee's interest, regardless of its status). The requirements for a nonjudicial foreclosure are:

- (1) that the security instrument confers the power of sale;
- (2) that there has been a default under the terms of the instrument;
- (3) that the trustee or substitute trustee was properly appointed;
- (4) that all statutory requirements in effect at the time of sale have been met;
- (5) that all additional requirements, if any, contained in the security instrument have been met; and
- (6) that a trustee's deed has been delivered.

PROP. T.2, App., Title Examination Standard 16.10.

69. Jack Jones & J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 TENN. L. REV. 279, 293–94 (1984). A majority of states permit nonjudicial foreclosure, typically through a power of sale contained in a deed of trust. See ALA. CODE § 35-10-1 (LexisNexis 1991) (permitting the party entitled to the mortgage debt to execute a power of sale against the secured land if same was given to the mortgage grantee); ALASKA STAT. § 34.20.070 (2010) (allowing a deed of trust trustee to foreclose against the secured land under a power of sale “without first securing a decree of foreclosure and order of sale from the court”); ARIZ. REV. STAT. § 33-807(A) (LexisNexis 2010) (“By virtue of his position, a power of sale is conferred upon the trustee of a trust deed under which the trust property may be sold . . .”); CAL. CIV. CODE § 2932 (Deering 2005) (providing that a power of sale may be given in a mortgage which may be exercised upon default); COLO. REV. STAT. §§ 38-37-10 to -110 (2010) (setting forth the procedure by which a trustee may foreclose under a power of sale); D.C. CODE § 42-815(b) (LexisNexis 2011) (permitting nonjudicial foreclosure under a power of sale provided that the statutory requirements are duly satisfied); GA. CODE ANN. § 23-2-114 (1982) (articulating the necessity for a power of sale to be strictly construed in a foreclosure); IDAHO CODE ANN. § 45-1503(1) (2003) (granting an automatic power of sale in a deed of trust designed to secure payment against specific real property); MD. CODE ANN., REAL PROP. § 7-105(b) (LexisNexis 2010) (“A mortgage . . . may . . . declare the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage . . . provides that a sale may be made.”); MICH. COMP. LAWS SERV. § 600.3201 (LexisNexis 2004) (providing that every mortgage containing a power of sale

eighteen states predominately rely upon the power of sale foreclosure, while some states actually prohibit it.⁷⁰

The difference between judicial and nonjudicial foreclosures

may, upon default, be foreclosed by advertisement); MINN. STAT. ANN. § 507.15 (West 2002) (setting forth a uniform short form mortgage containing a power of sale provision that is lawful and valid for use in Minnesota); MO. ANN. STAT. § 443.290 (West 2000) (mandating that all mortgages containing a power of sale in the mortgagee “shall be valid and binding by the laws of [Missouri] upon the mortgagors and debtors”); MONT. CODE ANN. § 71-1-223 (2009) (allowing a real estate mortgage containing a power of sale provision to be foreclosed by action or under the mortgage’s terms); NEV. REV. STAT. § 107.080 (2009) (stating the validity of the inclusion of a power of sale in deeds of trusts and listing the requirements for the exercise thereof); N.H. REV. STAT. ANN. § 479:25 (LexisNexis 2003) (granting the holder of a power of sale the option to forgo obtaining a decree of sale through the courts and to instead follow the mortgage’s terms and statutory requirements for nonjudicial foreclosure); N.C. GEN. STAT. § 45-21.16 (Supp. 2010) (listing requirements to be met for a valid foreclosure under a power of sale); OR. REV. STAT. § 86.710 (2009) (granting an automatic power of sale to the trustee upon creation of the deed of trust in real property); R.I. GEN. LAWS § 34-11-12 (1995) (setting forth a model foreclosure deed under a power of sale acknowledging the ability to sell mortgaged land); S.D. CODIFIED LAWS § 21-48-1 (2004) (“Every mortgage of real property containing therein a power of sale, upon default being made in the conditions of said mortgage, may be foreclosed by advertisement.”); TENN. CODE ANN. § 66-27-415 (2010) (permitting community associations to provide in the CC&Rs “that the association’s lien may be foreclosed in like manner as a deed of trust with power of sale”); UTAH CODE ANN. § 57-1-23 (LexisNexis Supp. 2010) (allowing a deed of trust trustee to foreclose under a power of sale without an express provision for same); WASH. REV. CODE ANN. § 61.24.030(1) (LexisNexis Supp. 2010) (mandating that for a trustee’s sale to be valid, the deed of trust must contain a power of sale); *Lee v. HSBC Bank USA*, 218 P.3d 775, 780 (Haw. 2009) (stating that nonjudicial foreclosure under a power of sale may proceed only by satisfying the Hawaii law requirements); *Leininger v. Merchs. & Farmers Bank of Macon*, 481 So. 2d 1086, 1090 (Miss. 1986) (holding that nonjudicial foreclosures of deeds of trust are authorized by contract and recognized by Mississippi law); *Stewart v. Rockdale State Bank*, 52 S.W.2d 915, 916 (Tex. Civ. App.—Austin 1932, writ granted) (“[A] decree is [not] essential in every instance to be a valid foreclosure. There may be a foreclosure under a power, as in ordinary trust deeds.”), *aff’d on other grounds*, 124 Tex. 431, 79 S.W.2d 116 (1935); *Young v. Sodaro*, 456 S.E.2d 31, 34 n.7 (W. Va. 1995) (“In the event there is a default in payment of a debt secured by a deed of trust, the holder thereof need not apply to a court to foreclose it . . . [T]he property merely becomes liable to sale under the power of sale conferred upon the trustee.”).

70. James L. Winokur, Symposium, *Meanor Lienor Community Associations: The “Super Priority” Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 376 n.96 (1992). Each state with nonjudicial foreclosure has different rules regarding the process. Compare TEX. PROP. CODE ANN. § 51.002 (West 2007) (“A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month.”), with N.C. GEN. STAT. § 45-21.16 (“After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section . . . [specifying] a time and place for the hearing before the clerk of court . . .”).

may have a substantial impact because assessment defaults will continue to accrue during the pendency of the proceedings.⁷¹ A nonjudicial sale could potentially result in less time and money than a judicial sale, with the process taking only a few months.⁷² In a judicial foreclosure, the proceeding could continue for one to two years, and the owner's failure to pay the disputed assessment fees could generate further defaults.⁷³

During the 82nd Session of the Texas Legislature, legislators approved limiting HOA foreclosure procedures by requiring court orders obtained through an application for "expedited foreclosure[.]" and directed the Supreme Court of Texas to adopt the appropriate rules for the procedure.⁷⁴ The new language

71. James L. Winokur, Symposium, *Meanor Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 376 (1992).

72. See generally Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (indicating that information and statistics on nonjudicial foreclosures are difficult to collect because of the lack of public record). A potential disadvantage to the use of nonjudicial foreclosure is susceptibility to judicial review due to issues with the property title, which could include a previously attached lien. *Foreclosure* ENCYCLOPEDIA OF EVERYDAY LAW, <http://www.enotes.com/everyday-law-encyclopedia/foreclosure> (last visited Oct. 5, 2011). Nonjudicial foreclosure authority also raises constitutional concerns. James L. Winokur, Symposium, *Meanor Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 376-77 (1992).

73. James L. Winokur, Symposium, *Meanor Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 376 (1992). In a judicial foreclosure, attorney's fees may accrue that, under Texas HOA provisions, an HOA may collect from the delinquent homeowner. PROP. § 209.008 (West 2007). In some instances, attorney's fees have amounted to more than \$4,000. Sandi M. Skousen, *New Foreclosure Option Combines Best of Existing Processes*, PAC. BUS. NEWS (June 14, 1998, 6:00 PM), <http://www.bizjournals.com/pacific/stories/1998/06/15/story8.html>. *Compare* Haas v. Ashford Hollow Cmty. Improvement Ass'n, 209 S.W.3d 875, 881 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (providing interpretation of section 209 of the Texas Property Code to determine whether an HOA may recover attorney's fees of \$1,811.28), *with* Tees v. E. Lake Wood Homeowners Ass'n, No. 12-04-00020-CV, 2006 WL 133229, at *6 (Tex. App.—Tyler Jan. 18, 2006, no pet.) (not designated for publication) (finding section 209 of the Texas Property Code to be inapplicable because the litigation did not concern a collection matter).

74. TEX. H.B. 1228, 82d Leg., R.S. (2011); see TEX. CONST. art. XVI, § 50(r) (authorizing the Supreme Court of Texas to create rules for expedited foreclosure proceedings associated with mortgage liens); TEX. R. CIV. P. 736 (relating to the special proceedings for foreclosure on a home equity loan).

added to the Texas Property Code only applies to communities created and instruments filed after January 1, 2012.⁷⁵ Communities that file the relevant instruments before January 1, 2012 still have the ability to use both judicial and nonjudicial foreclosure.⁷⁶ Additionally, legislators authorized the removal of the provision in a dedicatory instrument that permits an HOA to use the power of foreclosure upon “a vote of at least 67[%]” of the homeowners.⁷⁷

D. *Reasons for Retaining the Power to Foreclose*

Advocates of the foreclosure power for HOAs argue that without the ability to foreclose, homeowners are less likely to pay the required assessments, much less pay them on time, creating a devastating situation for the HOA.⁷⁸ When assessments are not paid, the cash flow becomes minimal, resulting in a vast reduction in maintenance and community operations, contradicting the purpose of the HOA’s existence.⁷⁹ Ultimately, the property values of the homes will begin to decrease, causing the community as a whole to suffer.⁸⁰

75. TEX. H.B. 1228.

76. *Id.*

77. *Id.*; see *HB 1228 Passed—Payments, Collections, Foreclosures*, HOA REFORM COALITION, (June 1, 2011), <http://hoareformcoalition.org/2011/06/01/hb-1228-passed-payments-collections-foreclosures/> (discussing the provisions included in H.B. 1228 and the changes to the foreclosure power).

78. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2522 (2004); see Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 221 (2003) (discussing the effect on the HOA when homeowners fail to pay assessments in a timely manner). If homeowners fail to pay the HOA, the “association will lose credibility, more homeowners will become delinquent in assessment payments, and the association’s cash flow will become at risk or impaired.” Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2522 (2004) (internal quotation marks omitted).

79. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2522 (2004) (citing DONALD B. KUPERMAN, ASSESSMENT COLLECTION IN CONDOMINIUM AND HOMEOWNER ASSOCIATION LITIGATION: COMMUNITY ASSOCIATION LAW 262 (Wayne S. Hyatt & Philip S. Downer eds., 1987)).

80. *But see* Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, in 17 HOUSING POL’Y DEBATE 1, 58 (Fannie Mae Foundation, 2006), available at http://www.nw.org/network/neighborworksProgs/foreclosuresolutions/pdf_docs/hpd_4closehsgprice.pdf

Furthermore, the foreclosure tool allows for a quick solution to unpaid assessments, providing an “effective way to collect overdue assessments, enforce deed restrictions, [and] provide essential services” before the HOA spirals toward financial ruin.⁸¹ As seen with defaults on a mortgage,⁸² foreclosure has the economic advantage of “swiftly, efficiently, and cheaply recover[ing] or sell[ing] the property.”⁸³

The foreclosure power also promotes the HOA’s ability to govern the homeowners and the use of the common property, making the association more than a mere “civic club.”⁸⁴ If legislators were to greatly reduce the power of HOAs by stripping away the right of foreclosure, individual homeowners would continue to use the common areas without contributing financially to the property’s protection for the good of the community, creating a detrimental situation for the homeowners who the restrictive covenants were designed to protect.⁸⁵

(revealing that single-family homes drop in value by 0.9% for every foreclosed home in the neighborhood). As a result of foreclosures in 2009, Texas is expected to experience an average decline of \$1,253 in home values. *Soaring Spillover: Accelerating Foreclosures to Cost Neighbors \$502 Billion in 2009 Alone; 69.5 Million Homes Lose \$7,200 on Average*, CENTER FOR RESPONSIBLE LENDING (May 2009), <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>.

81. Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf>; see Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2522 (2004) (claiming unpaid assessments can be a “devastating blow to the HOA”).

82. Compare Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 2, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (explaining the powers afforded to HOAs to foreclose on mortgaged properties), with TEX. PROP. CODE ANN. § 51.002 (West 2007) (listing the requirements for a nonjudicial sale).

83. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2523 (2004) (internal quotation marks omitted). *Contra* Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1404 (2004) (advocating a negotiated sale over the conventional foreclosure because of the potential for producing a higher foreclosure price).

84. See Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (defining “civic clubs” as a “small number of members paying dues while a large[] number refused” to pay).

85. Matthew Taylor Morones & William G. Gammon, *Community Owners*

Advocates also point out that actual foreclosure on a homestead is rare.⁸⁶ HOAs only want to perform their duties, which require homeowners to pay their assessment fees.⁸⁷ In fact, when a suit is filed, a homeowner typically pays the delinquency or settles the suit, eliminating the need for foreclosure.⁸⁸

E. *Reasons for Eliminating the Power to Foreclose*

Proponents of restricting HOA foreclosure powers claim HOAs have very few checks and balances, leading to abuse.⁸⁹ An HOA board of directors may render a decision that is “unfairly discriminatory or may adopt a resolution without rational foundation, adequate investigation, or notice to the members.”⁹⁰ When added to the HOA’s fiduciary duty to the homeowners, the potential for mistreatment of authorized powers increases.⁹¹

Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power, 66 TEX. BUS. J. 218, 221 (2003). The need for HOAs can be justified by the economic theory of the tragedy of the commons, which explains that an individual homeowner makes personal decisions about the use of common property without consideration of the negative externalities, causing the commons to fall into ruin and the community to suffer as a whole. Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 1968, at 1244, available at <http://www.sciencemag.org/content/162/3859/1243.full>.

86. See Irene Beanie Adolph et al., *Homeowner Associations—American Dream or Nightmare?*, FACTS & ISSUES (League of Women Voters of the Houston Area), Oct. 2008, at 5, available at <http://www.lwvhouston.org/Issues/HOA/HomeownersAssocFacts.pdf> (relaying the CAI’s claim that foreclosures are rare). *But see* HOA DATA, <http://www.hoadata.org/hoayr.html> (reporting that in the Houston area alone, over 15,000 actual foreclosures or suits to foreclose occurred between 1985 and 2001).

87. Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf>.

88. *Id.*

89. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2523 (2004).

90. Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 48 (1990); accord E. Richard Kennedy & Ellen Hirsch de Haan, *Litigation Involving the Developer, Homeowners’ Associations, and Lenders*, 39 REAL PROP. PROB. & TR. J. 1, 25–26 (2004) (providing examples of abuse by the HOA). *Contra* Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (arguing that few associations abuse the foreclosure power and the few examples of abuse are isolated incidents).

91. See generally E. Richard Kennedy & Ellen Hirsch de Haan, *Litigation Involving the Developer, Homeowners’ Associations, and Lenders*, 39 REAL PROP. PROB. & TR. J. 1, 27 (2004) (describing the fiduciary duties of an HOA).

Another problem is the unequal balance between the remedies available to the homeowners for an HOA's breach of compliance and the HOA's strong power of foreclosure. For example, maintenance of the common areas is ordinarily listed in the CC&Rs.⁹² If an HOA fails to fulfill its obligations, homeowners face the arduous and expensive process of bringing an action for specific performance while continuing to pay assessment fees.⁹³ In contrast, if a homeowner fails to meet his respective obligations by missing one assessment payment, the HOA has the ability to foreclose against the property.

Even if foreclosure actions are as rare as the advocates for the power assert, the simple threat of foreclosure can lead homeowners to pay legal fees greater than the actual amount in delinquency.⁹⁴ Statistics show that when given more power to foreclose, the annual pace of filing can potentially double, as seen in the Houston area since changes were made in 1995 to section 204 of the Texas Property Code.⁹⁵ Even more disturbing, homeowners considered to be in the bottom quarter of home

92. See *Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 247 n.1 (Tex. 1983) (including maintenance as one of the pertinent sections of a covenant); *Goddard v. Northhampton Homeowners Ass'n*, 229 S.W.3d 353, 354 (Tex. App.—Amarillo 2007, no pet.) (clarifying that the assessments cover the maintenance responsibilities for the community); *Scoville v. SpringPark Homeowner's Ass'n*, 784 S.W.2d 498, 507 (Tex. App.—Dallas 1990, writ denied) (quoting a provision of the CC&Rs that specifically references maintenance of common spaces).

93. E. Richard Kennedy & Ellen Hirsch de Haan, *Litigation Involving the Developer, Homeowners' Associations, and Lenders*, 39 REAL PROP. PROB. & TR. J. 1, 30 (2004); see *Haas v. Ashford Hollow Cmty. Improvement Ass'n*, 209 S.W.3d 875, 883 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (asserting that the assessment fees that accrue during the trial will also be considered delinquent if unpaid).

94. See Irene Beanie Adolph et al., *Homeowner Associations—American Dream or Nightmare?*, FACTS & ISSUES (League of Women Voters of the Houston Area), Oct. 2008, at 3, available at <http://www.lwvhouston.org/Issues/HOA/HomeownersAssocFacts.pdf> (describing legal effects of *Inwood North Homeowners' Ass'n v. Harris* and the modification in 1995 to the Texas Property Code, resulting in an increase in foreclosure filings across the range of home values).

95. See TEX. PROP. CODE ANN. § 204.002 (West 2007) (specifying the applicability of the statute to the Houston area). “The HOA powers enumerated [in Texas Property Code section 204] have been interpreted . . . to grant much greater powers to associations in excess of their covenants, especially allowing unlimited power to bring claims of violations and charge fines.” Irene Beanie Adolph et al., *Homeowner Associations—American Dream or Nightmare?*, FACTS & ISSUES (League of Women Voters of the Houston Area), Oct. 2008, at 6, available at <http://www.lwvhouston.org/Issues/HOA/HomeownersAssocFacts.pdf>.

values face the risk of HOA foreclosure proceedings at a rate ten times higher than those found in the top quarter.⁹⁶

IV. RECENT EFFORTS OF THE LEGISLATURE AND THE LATEST CASE PROVIDING MORE PROTECTION FOR HOMEOWNERS

A. *Texas Residential Property Owners Protection Act*

During the 76th Session of the Texas Legislature, many bills concerning open meetings and records, disclosure requirements, alternative dispute resolution (ADR), foreclosure, and general governance of HOAs were introduced in an effort to establish more protection for Texas homeowners from the powers of HOAs.⁹⁷ However, it was not until the next legislative session that legislators responded to public outcry by enacting the Texas Residential Property Owners Protection Act (TRPOPA), which provided encouraging progress by supplying homeowners with safeguards from HOA powers.⁹⁸

Prior to TRPOPA, HOAs had the broad power to foreclose on a homeowner's property simply for delinquent fees resulting from violation of a rule.⁹⁹ In fact, in Harris County alone, more than 1,050 foreclosures were pursued by HOAs in 1997, an increase from just 390 in the entire state of Texas in 1988.¹⁰⁰ At the height

96. Irene Beanie Adolph et al., *Homeowner Associations—American Dream or Nightmare?*, FACTS & ISSUES (League of Women Voters of the Houston Area), Oct. 2008, at 3, available at <http://www.lwvhouston.org/Issues/HOA/HomeownersAssocFacts.pdf>.

97. See TEX. H.B. 554, 76th Leg., R.S. (1999) (including property owners' disputes with property owners' associations (POAs) within the jurisdiction of small claims courts); TEX. H.B. 699, 76th Leg., R.S. (1999) (calling for the exemption of homesteads from foreclosure); TEX. H.B. 954, 76th Leg., R.S. (1999) (proscribing the ability to redeem property when an HOA forecloses on an assessment fee lien); TEX. H.B. 3407, 76th Leg., R.S. (1999) (relating to open meetings and records of an HOA); TEX. H.B. 3298, 76th Leg., R.S. (1999) (dealing with the powers of POAs); see also TEX. S.B. 237, 76th Leg., R.S. (1999) (concerning the procedures of an HOA's operations). See generally Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 324 (2002) (listing HOA-related legislation introduced during the 76th and 77th Texas Legislative Sessions).

98. Act of June 14, 2001, 77th Leg., R.S., ch. 926, § 1, 2001 Tex. Gen. Laws 1857, 1857–63 (codified at PROP. §§ 209.001–.013 (West 2007 & Supp. 2010)).

99. *Contra* PROP. § 209.009 (West 2007) (limiting the power of a property owners' association by prohibiting foreclosure solely for debt consisting of fines or attorney's fees due to the fines assessed).

100. Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing*

of the foreclosures, the media and public embraced the plight of a Houston widow forced out of her home by her HOA.¹⁰¹ Wenonah Blevins, an eighty-two-year-old woman, was evicted after failing to pay \$876 in assessment fees.¹⁰² At the foreclosure sale, Blevins's \$150,000 home sold for a mere \$5,000.¹⁰³ In response to the public outcry, the legislature passed TRPOPA in 2001.¹⁰⁴

TRPOPA, which was carefully fashioned to strike a balance between the necessities of the HOA and deference to the homeowner, passed the legislature with the stated purpose of "provid[ing] guideline[s] for the operation of associations as well as specific protections for Texas homeowners living in association-managed communities."¹⁰⁵ As enacted, the elements of TRPOPA apply only to residential community associations that require membership from the homeowners and have the authority to collect assessments.¹⁰⁶ The legislation addressed several pertinent issues including "procedural standards for HOAs, public record filings, public disclosures," and, specifically reviewed by this Comment, the "regulation of foreclosure actions."¹⁰⁷

In section 209.009 of the Texas Property Code, the legislature

that Power, 66 TEX. BUS. J. 218, 221 (2003).

101. Sharon Kolbet, Comment, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 TEX. WESLEYAN L. REV. 85, 92 (2008).

102. William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW, July/Aug. 2002, at 18.

103. Ross Guberman, *Home Is Where the Heart Is*, LEGAL AFF. Dec. 2004, at 42, 43.

104. Act of June 14, 2001, ch. 926, § 1 (codified at PROP. §§ 209.001–.013); see William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 21 n.25. (referencing TRPOPA as unofficially named "Wenonah Blevins Residential Property Owners Protection Act").

105. William G. Gammon & Matthew Taylor Morones, Feature, *A Foreclosure Too Far: An Introduction to the Texas Residential Property Owners Protection Act*, HOUS. LAW., July/Aug. 2002, at 18, 21.

106. PROP. § 209.003 (West Supp. 2010).

107. Sharon Kolbet, Comment, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 TEX. WESLEYAN L. REV. 85, 91–92 (2008); see Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 350–51 (2002) (listing and explaining the areas covered by S.B. 507, later enacted as TRPOPA). See generally PROP. §§ 209.001–.013 (containing the statutory provisions of TRPOPA).

took important steps to rein in the HOA's overused power to foreclose.¹⁰⁸ TRPOPA limits the power to foreclose by prohibiting the action in certain circumstances.¹⁰⁹ The statute specifically states that "[a] property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of: (1) fines assessed by the association; or (2) attorney's fees incurred by the association solely associated with fines assessed by the association."¹¹⁰ The new legislation addressed concerns over foreclosures based solely upon unpaid fines, but left relatively unchecked the power to foreclose for delinquent assessments.¹¹¹

B. *Brooks v. Northglen Ass'n*

Just as *Inwood North Homeowners' Ass'n v. Harris* was a landmark case defining the broad power of HOAs to foreclose, *Brooks v. Northglen Ass'n*¹¹² was significant in starting to swing the pendulum back toward providing more safeguards for homeowners.¹¹³ In 1994, Northglen Association, an HOA encompassing more than 1,600 homes, unilaterally amended the CC&Rs to allow for the assessment of late fees on delinquent assessments.¹¹⁴ In response, homeowner Brooks organized a committee of fellow homeowners and complained that the HOA had acted outside its authority under the CC&Rs by adopting the amendment without a vote from the homeowners.¹¹⁵

Even though the Supreme Court of Texas ruled that, based on the CC&Rs's language, Northglen had the authority to assess late fees, the court held that Northglen could not foreclose against the property for unpaid late charges.¹¹⁶ The court referred to the

108. See PROP. § 209.009 (containing restrictions concerning when an HOA may foreclose).

109. *Id.*

110. *Id.*

111. Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 4, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf>.

112. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).

113. See *id.* at 170–71 (denying Northglen the power to foreclose and distinguishing the case from *Harris*).

114. *Id.* at 160–61.

115. *Id.* at 161.

116. *Id.*

attorney general's opinion stating that later-imposed costs not found in the original CC&Rs would not be grounds for foreclosure.¹¹⁷ Since the late charges were not included in the original CC&Rs, Northglen could not use Brooks's failure to pay the charges as a basis for foreclosure.¹¹⁸

Although the *Brooks* decision addresses the narrow issue of prohibiting foreclosure based on later-added CC&Rs that lack the requisite homeowner approval, the case signifies a step toward limiting the power of HOAs.¹¹⁹ The court set a precedent for distinguishing the effect of charges not created by the CC&Rs.¹²⁰

V. CALIFORNIA'S APPROACH TO LIMITING THE FORECLOSURE POWER OF HOMEOWNERS' ASSOCIATIONS

Addressing debts relating to HOA assessment fees, California passed the Davis-Stirling Common Interest Development Act, which limits when judicial or nonjudicial foreclosure can be used to collect delinquent assessment fees that accrued on or after January 1, 2006.¹²¹ The limitations are aimed at protecting homeowners' equity in the homestead.¹²² Accordingly, California HOAs are now prohibited from foreclosing on a homestead unless the homeowner has more than \$1,800 in delinquent fees or has been delinquent for more than a year.¹²³ The restriction appeared

117. "The Attorney General concluded that, in determining whether foreclosure is a remedy, the issue is 'whether the lien for those costs (i) attached to the property prior to the homestead right and (ii) is the result of a restriction that runs with the land.'" *Id.* at 170 (quoting Tex. Att'y Gen. LO-97-019 (1997)).

118. *Id.* at 171.

119. See J. Richard White et al., *Real Property*, 58 SMU L. REV. 1077, 1114 (2005) (denoting the ruling in *Brooks* as limiting foreclosure based on late charges not created in deed restrictions).

120. See *Brooks*, 141 S.W.3d at 171 (limiting the power of an HOA to foreclose). See generally J. Richard White et al., *Real Property*, 58 SMU L. REV. 1077, 1114 (2005) (clarifying that foreclosure is allowed for unpaid assessments under the deed restrictions but not for other charges later amended into the deed).

121. CAL. CIV. CODE § 1367.4(b) (Deering Supp. 2011).

122. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 200 (2006); Barry Hester, Comment, *Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia*, 25 GA. ST. U. L. REV. 1205, 1215-16 (2009).

123. CIV. § 1367.4(b)(2); Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 202 (2006); Barry Hester, Comment, *Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia*, 25 GA. ST. U. L. REV. 1205, 1216 (2009). The

the concerns of foreclosure opponents, one of whom stated, “If you don’t pay your credit card, what do you do? They take you to court. They’re not going to take your house away There are other ways of getting the money.”¹²⁴

According to the California statute, an HOA is also required to offer a homeowner the chance to participate in ADR methods before it resorts to recording a lien on the property, and prior to initiating foreclosure proceedings for delinquent assessments.¹²⁵ The “meet and confer” program designed for use by HOAs allows the HOA to develop its own “fair, reasonable, and expeditious” procedures for resolving disputes with a homeowner.¹²⁶ However, if the HOA opts not to create its own ADR method, the statute establishes a procedure deemed “fair, reasonable, and expeditious” that allows for the HOA and homeowner to “meet and confer” in a good faith effort to reach a binding agreement.¹²⁷

In addition to the “meet and confer” program, homeowners threatened with foreclosure also have the ability to invoke the more common ADR methods.¹²⁸ The cost of the dispute

threshold amount of \$1,800 does not include “accelerated assessments, late charges, fees and costs of collection, attorney’s fees, or interest.” Civ. § 1367.4(b). The initial proposed legislation set the threshold at \$2,500 but was unable to make any progress toward enactment. S.B. 137, 2005–06 Leg., 1st Reg. Sess. (Cal. 2005).

124. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006) (internal quotation marks omitted).

125. Civ. § 1367.1(c)(1)(A) (Deering Supp. 2011); *id.* § 1367.1(c)(1)(B). “Meet and confer” is the ADR program for associations. *Id.* § 1367.1(c)(1)(A); *id.* § 1363.810 (Deering 2005) (applying the “meet and confer” program to disputes between an HOA and a homeowner). Prior to initiating foreclosure proceedings, and in addition to the provisions available under “meet and confer” program, a homeowner may also have the opportunity to engage in “alternative dispute resolution with a neutral third party.” *Id.* § 1367.1(c)(1)(B) (Deering Supp. 2011); *id.* § 1369.510(a) (Deering 2005) (defining the ADR methods available in the article). The provision for recording liens and for foreclosure proceedings emphasizes that the decision for alternative dispute resolution is the choice of the owner. *Id.* § 1367.1(c)(1)(A) (Deering Supp. 2011); *id.* § 1367.1(c)(1)(B).

126. *Id.* § 1363.820 (Deering 2005). Article 5 establishes the minimum requirements for a “fair, reasonable, and expeditious” ADR resolution method developed by the HOA. *Id.* § 1363.830.

127. *Id.* § 1363.840(a). The HOA may not refuse a homeowner’s request to “meet and confer,” and there shall be no fee to participate in the procedure. *Id.* § 1363.840(b)(2).

128. “Alternative dispute resolution” is defined as “mediation, arbitration, conciliation, or other nonjudicial procedure.” *Id.* § 1369.510(a).

resolution is paid by both the HOA and the homeowner.¹²⁹ Failure to comply with any of the preliminary provisions to foreclosure can result in the homeowner's right to sue the HOA.¹³⁰ However, the homeowner may not petition for arbitration if the HOA initiates a judicial foreclosure.¹³¹

VI. PROPOSED MODIFICATION TO LIMIT THE EXISTING
FORECLOSURE POWER OF HOMEOWNERS' ASSOCIATIONS
TO A PERCENTAGE THRESHOLD BASED ON THE VALUE
OF THE HOMESTEAD

Even with the progress made by the passage of TRPOPA and the positive momentum generated by *Brooks*, Texas HOAs still have a relatively unchecked power, the power to foreclose on a home for an amount substantially less than the home's value and equity.¹³² Ultimately, neither possible "solution" institutes any more of a check on HOAs than previously experienced.

A. Threshold for Implementing Foreclosure

The threshold limitation California implemented in its state foreclosure provisions for HOAs is closer to the level of protection homeowners deserve. However, the constraint has one major weakness, a fixed threshold limitation.¹³³ By setting the threshold with an inflexible statutory number, the provision fails to correct the problem of the punishment outweighing the offense, thus failing to protect homeowners.¹³⁴

129. *Id.* § 1369.570(b).

130. *Id.* § 1369.590(a).

131. *Id.* § 1367.1(a)(6) (Deering Supp. 2011); accord Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 203 (2006) (contending that the use of ADR methods is only limited by the fact that a homeowner may no longer request arbitration after the initiation of judicial foreclosure).

132. See TEX. PROP. CODE ANN. §§ 209.001–013 (West 2007 & Supp. 2010) (codifying a limited number of safeguards for homeowners); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004) (indicating that without proper notice to the homeowners of the new provisions, the HOA could not use foreclosure as a remedy).

133. See CIV. § 1367.4(b) (Deering Supp. 2011) (creating a threshold of \$1,800 in delinquent fees before an HOA may foreclose on a home).

134. See *Goddard v. Northhampton Homeowners Ass'n*, 229 S.W.3d 353, 354 (Tex. App.—Amarillo 2007, no pet.) (establishing the delinquent assessments by the homeowner as a mere \$600); *Sloan v. Owners Ass'n of Westfield*, 167 S.W.3d 401, 403 (Tex. App.—San Antonio 2005, no pet.) (claiming the homeowner only owed \$1,172.82 in

Alternatively, the threshold should be determined based on a percentage of the home's fair market value.¹³⁵ Using this percentage-based calculation, the higher the value of the home, the higher the threshold the HOA must meet before foreclosure actions may be executed.¹³⁶

A higher threshold may initially seem to benefit only affluent homeowners; however, the result would actually be similar for all homeowners across the income spectrum. An expensive home brings higher HOA assessment fees.¹³⁷ As the market values of the home and the community increase, the demands on the expectations of the HOA also increase.¹³⁸ Consequently, the

unpaid assessment fees); *Hodges v. Canyon Creek Ridge No. 1 Homeowners Ass'n*, No. 05-00-01848-CV, 2002 WL 418201, at *1 (Tex. App.—Dallas Mar. 19, 2002, no pet.) (not designated for publication) (providing that the delinquent amount was an insignificant \$750).

135. See *City of Sherman v. Wayne*, 266 S.W.3d 34, 47 (Tex. App.—Dallas 2008, no pet.) (observing that the traditional options for determining market value are the “comparable sales method, the cost method, and the income method” (citing *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001))). Historically, courts have favored the comparable sales approach to calculate prices willing buyers and sellers would negotiate in the open market, otherwise known as fair market value. *Estate of Sharboneau*, 48 S.W.3d at 182.

136. See CHARLES DAVIES & WILLIAM G. PECK, *MATHEMATICAL DICTIONARY AND CYCLOPEDIA OF MATHEMATICAL SCIENCE* 191 (New York, A. S. Barnes & Co. 1857) (explaining that when two variables both increase together and in a manner that the ratio is constant, the relationship is “directly proportional”). See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (describing a proportional relationship between the measure of punishment and the amount of harm); *Utah Welfare Rights Org. v. Lindsay*, 315 F. Supp. 294, 300 (D. Utah 1970) (discussing the direct proportional relationship between increases in grants and increases in living costs).

137. See Peter Gordon & Huanghai Li, *Residents' Satisfaction with Local Public Goods and Services: The Effects of Income and Privatization in Southern California*, FIBRESERIES (RICS, London, U.K.), May 2010, at 8, available at http://www.ricsamericas.org/files/editor/file/Press%20Release%20Items/Residents_satisfaction_with_local_services.pdf (reporting the annual HOA assessment to be 0.3% of the home's value).

138. See *Roxrun Estates, Inc. v. Roxbury Run Vill. Ass'n*, 526 N.Y.S.2d 633, 637 (App. Div. 1988) (recognizing the “differing costs of maintaining improved properties” and appropriately increasing the assessments); Peter Gordon & Huanghai Li, *Residents' Satisfaction with Local Public Goods and Services: The Effects of Income and Privatization in Southern California*, FIBRESERIES (RICS, London, U.K.), May 2010, at 11, available at http://www.ricsamericas.org/files/editor/file/Press%20Release%20Items/Residents_satisfaction_with_local_services.pdf (presuming that above-median-income homeowners find neighborhoods that match their desires); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 439–40 (2006) (noting that people are willing to pay more for premium privileges). See generally David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766 (1995) (commenting that

threshold should reflect elevated HOA assessment fees covering amplified HOA obligations. Assuming the average homeowner purchases a home within his respective income bracket, this percentage threshold will be the same for homeowners in all income brackets.¹³⁹

The real trick to developing a threshold approach is finding the proper balance—too high of a threshold would reduce the legitimate power of HOAs to motivate the payment of fines and assessment fees and, of course, too low a threshold would maintain the current injustices experienced by unprotected homeowners.¹⁴⁰ Observers have commented that:

While it may seem like an attenuated chain from an unpaid assessment of \$120 to financial ruin for the [common interest development], opponents note that delinquent assessments in the aggregate certainly have an impact on the stability of homeowners associations, especially when statutes permit those delinquencies to continue for long periods.¹⁴¹

Determining the exact, appropriate percentage for the threshold is beyond the scope of this Comment due to the complex research needed, at a minimum, on market trends, the rate of foreclosures across Texas, and the average homeowner's ability to pay.¹⁴²

B. *Alternate Remedies for Homeowners' Associations Before Reaching the Threshold*

1. Small Claims Court

A valid alternate remedy for an HOA before reaching an

HOAs in gated communities are now employing private security guards as an additional neighborhood service).

139. See generally *Steel Hill Dev., Inc. v. Town of Sanbornton*, 392 F. Supp. 1144, 1149 n.5 (D.N.H. 1975) (explaining that a development was built with a certain income bracket in mind); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 65 (7th ed. 2007) (“[A]ssum[e] man is a rational maximizer of his ends in life, his satisfactions”).

140. See Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 206 (2006) (finding that foreclosure can motivate homeowners to pay delinquent assessments).

141. *Id.* at 207 (citing Letter from Karen K. Conlon, President, Cal. Ass'n of Cmty. Managers, to Denise Ducheny, Cal. State S. (Mar. 22, 2005)).

142. See generally *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003) (outlining complications involved in determining the most effective percentage in order to result in the most efficient outcome).

established foreclosure threshold is the use of small claims court, formerly deemed the “poor man’s court.”¹⁴³ Small claims courts were implemented as an “accessible and effective mechanism[] for asserting legal rights.”¹⁴⁴ In fact, a small claims court can provide a fair resolution, deter self-help methods, and solve recurring social issues by allowing a plaintiff the opportunity to bring a small claim without high court costs, while providing a defendant the opportunity to establish a valid defense.¹⁴⁵

A small claims court, under section 28.003(a) of the Texas Government Code, has jurisdiction for actions not exceeding \$10,000 and shares concurrent jurisdiction with the justice courts.¹⁴⁶ If either party is dissatisfied with the results from the small claims court, the party still has the option to appeal.¹⁴⁷ Therefore, due to the cost in time, effort, and most importantly, money, the small claims court provides a convenient forum comparable in size to a claim for a minor delinquency.¹⁴⁸

143. Bernard M. Stoller, *Small Claims Courts in Texas: Paradise Lost*, 47 TEX. L. REV. 448, 448 (1969); accord Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006) (pointing out that critics will argue small debts are appropriate for small claims court).

144. Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 343 (1994).

145. See *id.* at 344 (listing the benefits of a well-functioning small claims court); see also Bernard M. Stoller, *Small Claims Courts in Texas: Paradise Lost*, 47 TEX. L. REV. 448, 449 (1969) (promoting the positive aspects of small claims courts for the parties involved).

146. TEX. GOV'T CODE ANN. § 28.003 (West Supp. 2010); see *Sultan v. Mathew*, 178 S.W.3d 747, 752 (Tex. 2005) (recognizing the concurrent jurisdiction between small claims courts and justice courts), *superseded by statute*, GOV'T § 28.053 (West Supp. 2010), as stated in *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 303 n.6 (Tex. 2010); *Lister v. Walters*, 247 S.W.3d 381, 383 (Tex. App.—Texarkana 2008, no pet.) (paraphrasing the Texas Government Code provision on small claims courts).

147. *Sultan*, 178 S.W.3d at 748. A judgment from small claims court may be appealed to county court if the amount in controversy is more than \$20. GOV'T § 28.052(a) (West Supp. 2010); *id.* § 28.053(b). However, a “[j]udgment of the county court or county court at law on the appeal [from the small claims court] is final.” *Sultan*, 178 S.W.3d at 748 (quoting GOV'T § 28.053(d)) (internal quotation marks omitted); *Davis v. Covert*, 983 S.W.2d 301, 302 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.).

148. Bernard M. Stoller, *Small Claims Courts in Texas: Paradise Lost*, 47 TEX. L. REV. 448, 449 (1969).

2. Alternative Dispute Resolution Methods

Arbitration and mediation are two effective ADR methods for dealing with minor delinquent assessment issues.¹⁴⁹ Both methods are time-efficient and relatively inexpensive compared to the cost of challenging a foreclosure action.¹⁵⁰ Other states have enacted measures that encourage the use of ADR methods.¹⁵¹ In Florida, arbitration is used as an obstacle to surpass before a party has the ability to file suit.¹⁵² With the passage of California's recent modifications to HOA powers, an HOA must first participate in ADR proceedings before a suit can be brought for a delinquent assessment that has met the threshold.¹⁵³

Mediation has advantages over litigation including being a "cheaper, faster, and potentially more hospitable" solution.¹⁵⁴ Mediation provides parties the opportunity to work together and

149. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2519 (2004). Arbitration has been defined as:

[A] contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of matters involved voluntarily select arbitrators or judges of their own choice, and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law.

In re Anaheim Angels Baseball Club, Inc., 993 S.W.2d 875, 879 (Tex. App.—El Paso 1999, no pet.) (quoting *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992)). Mediation takes place when an impartial person "facilitates communication between parties to promote" a non-binding "reconciliation, settlement, or understanding." TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (West 2007).

150. See Paul Bannister, *Homeowner Horror Stories: Associations are Heaven or Hell*, BANKRATE (Jan. 1, 2004), <http://www.bankrate.com/finance/real-estate/homeowner-horror-stories-associations-are-heaven-or-hell.aspx> (outlining cases and situations where fighting a foreclosure action resulted in high court costs); cf. Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 364 (2010) (contending that the benefits of arbitration include "confidentiality, speed, and party autonomy").

151. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2518 (2004).

152. FLA. STAT. § 718.1255(4)(a) (West 2010). A member of a Florida HOA reform task force is quoted on the topic of alternative disputes as stating, "[p]eople can't afford to spend tens of thousands of dollars to fight their association." Ross Guberman, *Home Is Where the Heart Is*, LEGAL AFF., Dec. 2004, at 42, 46.

153. CAL. CIV. CODE § 1367.1(c)(1)(A) (Deering Supp. 2011); accord Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 202 (2006) (exploring the California statutory provision providing for alternative dispute prior to foreclosing).

154. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

educate one another about their unique situations and needs without the application of an overbroad general principle.¹⁵⁵ Indeed, the mediation process allows for consideration of “facts, needs, and interests” relevant to reaching an agreement, which typically are not measured in standard litigation.¹⁵⁶

Even though arbitration is a more expensive and time-consuming alternative to mediation, the arbitration process is still less expensive than litigation for judicial foreclosure or for a homeowner to fight foreclosure through power of sale.¹⁵⁷ The benefits of arbitration, emphasized by Congress, are that the process is typically “cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”¹⁵⁸

155. *See id.* (contending that mediation allows parties to educate each other without the hurdles of restrictive procedure).

156. *Id.* *But see* Kent B. Scott & Cody W. Wilson, *Questions Clients Have About Whether (and How) to Mediate and How Counsel Should Answer Them*, DISP. RESOL. J., May/July 2008, at 26, 29 (suggesting the disadvantages of mediation, while minor, include too much discovery, the chance of failing to resolve the dispute, and that a potential litigation strategy will be compromised); Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 10 (2004) (implying that parties may not be satisfied with the outcome of the mediation process).

157. *See* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 732–33 (2006) (pointing out that attorney’s fees and other expenses incurred in litigation, such as discovery costs, are lower in the arbitration process). The Supreme Court has recognized the advantages of arbitration for individuals needing “a less expensive alternative to litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

158. Kirk D. Jensen, *Can Financial Institutions Be Required to Arbitrate on a Class-Wide Basis Notwithstanding Provisions that Prohibit Class Arbitration?*, 122 BANKING L.J. 328, 336 (2005) (quoting H.R. REP. NO. 97-542, at 13 (1982)) (internal quotation marks omitted). *But see* *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953) (arguing that by choosing to use arbitration, one gives up the right to sue, and the power to vacate the award is limited), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW 21, 35 (1997) (finding that some of the disadvantages to arbitration may be the same justifications considered advantages in different scenarios, such as lack of review of arbitrator decisions, absence of discovery, and no establishment of precedent).

3. Collection Agency

Previously, delinquent assessment fees were not considered “debt” due to the lack of credit involved in the process.¹⁵⁹ As a result, courts refused to allow HOAs to use collection agencies for delinquent assessments since no debt could be assigned to the collector.¹⁶⁰ Consequently, in 1997, the court in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*¹⁶¹ removed the requirement of credit from the definition of “debt.”¹⁶² Debt for the HOA is now created when the property is purchased and the obligation to pay assessment fees attaches, regardless of when services were received, allowing HOAs the option to employ a collection agency.¹⁶³

The use of a collection agency by an HOA provides a quick and easy way to eliminate the assessment fee debt.¹⁶⁴ Once the unpaid fees are turned over to the collection agency, the collection agency works under the HOA’s instructions to contact the homeowner and pursue payment.¹⁶⁵ An HOA is also, after satisfying statutory requirements, able to pass the cost of a

159. See *Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163, 1168 (3d Cir. 1987) (defining “debt” as “involving the offer or extension of credit to a consumer”). Courts initially were misled in believing that credit was an essential element for a transaction to be deemed “debt.” Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 25 (1999).

160. See *Azar v. Hayter*, 874 F. Supp. 1314, 1319 (N.D. Fla.) (mandating that “debt collectors” must be “the assignee[s] of the debt” (citing *Meads v. Citicorp Credit Servs., Inc.*, 686 F. Supp. 330, 333 (S.D. Ga. 1988))), *aff’d* 66 F.3d 342 (11th Cir. 1995). See *generally Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210, 211 (N.D. Ill. 1996) (holding that condominium fees are not regarded as debt), *rev’d sub nom.*, *Newman v. Boeh, Pealstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997); Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 25 (1999) (distinguishing the definition of debt from delinquent assessments based on a homeowner not receiving any services prior to paying the assessment fee).

161. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997).

162. *Id.* at 1329.

163. Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 26 (1999); see also *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604, 608 (S.D. Cal. 1997) (identifying unpaid HOA fees as “debt”).

164. *The Benefits of Using a Debt Collection Agency*, ARTICLESBASE (Sept. 29, 2009), <http://www.articlesbase.com/finance-articles/the-benefits-of-using-a-debt-collection-agency-1281236.html>.

165. *Id.*

collection agency on to the homeowner, similar to attorney's fees in a foreclosure proceeding.¹⁶⁶

Even though collection agencies work on behalf of the HOA in securing delinquent assessment fees, the use of an agency still conveys benefits to the homeowner, which are not available in litigation.¹⁶⁷ A collection agency specializes in negotiating with debtors to ensure the best way to fully recover outstanding fees, such as creating a payment plan.¹⁶⁸ Debt collectors are also knowledgeable about corresponding law and will work within the regulatory parameters, thereby helping HOAs to eliminate the chance of accidentally overstepping legal boundaries and violating homeowners' rights.¹⁶⁹

However, HOAs must be aware of the disadvantages of using a collection agency.¹⁷⁰ For instance, use of a collection agency may reduce the opportunity for the homeowner to plead a defense.¹⁷¹ Most importantly, an HOA must also contemplate the prevalently known drawback of collection agencies—their reputation for taking advantage of those who lack the ability and resources to

166. TEX. PROP. CODE ANN. § 209.008(a) (West Supp. 2010); *see* TEX. H.B. 1228, 82d Leg., R.S. (2011) (requiring an HOA to first provide written notice, by certified mail, to a homeowner of the amount delinquent and the options available, and provide at least thirty days for payment before passing the collection agency's fees on to the homeowner); *see also* Haas v. Ashford Hollow Cmty. Improvement Ass'n, 209 S.W.3d 875, 885 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (including the costs of collection with the balance due by the homeowner for unpaid assessment fees); Sloan v. Owners Ass'n of Westfield, 167 S.W.3d 401, 403 (Tex. App.—San Antonio 2005, no pet.) (providing that the costs of collection are included in the lien for unpaid maintenance charges).

167. *See* Hamm v. Arrowcreek Homeowners' Ass'n, 183 P.3d 895, 898 (Nev. 2008) (establishing the collection agency as an agent of the HOA); *see also* Durham v. Cont'l Cent. Credit, Inc., 600 F. Supp. 2d 1124, 1127 (S.D. Cal. 2008) (stating that the collection agencies' fees must be reasonable).

168. *Collection Agencies: Advantages and Disadvantages*, COLLECTION-AGENCY-QUOTES.COM, <http://www.collection-agency-quotes.com/Collection-Agencies-Advantages-And-Disadvantages.html> (last visited Oct. 6, 2011).

169. *The Benefits of Using a Debt Collection Agency*, ARTICLESBASE (Sept. 29, 2009), <http://www.articlesbase.com/finance-articles/the-benefits-of-using-a-debt-collection-agency-1281236.html>.

170. *E.g.*, Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 59 (1999) (providing examples of issues related to collection agencies, such as misstatements in amount owed and the legal status of the debt).

171. Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1140–41 (2008). Collection agencies specialize in obtaining money, not in determining the right amount to collect or amount owed. *Id.* at 1141.

protect themselves.¹⁷² Poor collection techniques could dissolve any semblance of an amicable relationship remaining between the HOA and homeowner.¹⁷³

C. *Potential Shortfalls in the Threshold Approach*

A safeguard already exists that prevents an HOA from using augmented attorney's fees when calculating delinquencies for the threshold.¹⁷⁴ Under Texas HOA provisions, an HOA is authorized to collect attorney's fees from the delinquent homeowner.¹⁷⁵ However, attorney's fees accrued while attempting to enforce the provisions of the CC&Rs can quickly escalate.¹⁷⁶ During the 77th Session of the Texas Legislature, a provision was added to reduce the effect of attorney's fees:

If the dedicatory instrument or restrictions of an association allow for nonjudicial foreclosure, the amount of attorney's fees that a property owners' association may include in a nonjudicial foreclosure sale for an indebtedness covered by a property owners' association's assessment lien is limited to the greater of: (1) one-third of the amount of all actual costs and assessments, excluding attorney's fees, plus interest and court costs, if those amounts are permitted to be included by law or

172. William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 570 (2010). Congress passed the Fair Debt Collection Practices Act (FDCPA) in an effort to end harassment by debt collectors and prohibit excessively harsh and potentially illegal tactics to collect debts. Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 802, 91 Stat. 874, 874 (1977) (current version at 16 U.S.C. §§ 1692-1692p (2006 & Supp. 2009)).

173. See *Foley Newsom Oil Co. v. Crawford*, 515 S.W.2d 750, 752 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (demonstrating the harmful relationship that can result between the collection agency and the debtor).

174. See TEX. PROP. CODE ANN. § 209.008(f) (West Supp. 2010) (limiting the amount of fees that can be collected).

175. *Id.* § 209.008(a); see Symposium, *Meanor Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 363 (1992) (pointing out the importance of recovering attorney's fees when enforcing assessments).

176. See *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 305 n.1 (Tex. App.—Fort Worth 2001, no pet.) (listing the amount of attorney's fees expected to be recovered at the trial level and for any potential appeals to follow); *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.—Houston [1st Dist.] 1994, no writ) (summarizing the awarded amounts for attorney's fees for the trial and following appeal).

by the restrictive covenants governing the property; or
(2) \$2,500.¹⁷⁷

California's recent legislation establishing the \$1,800 minimum for foreclosure exposes another potential loophole regarding the threshold approach for HOAs.¹⁷⁸ Evidently, California HOAs are now refusing to accept any payment for delinquent assessments unless the entire unpaid amount is paid in full.¹⁷⁹ For instance, "[i]f the monthly dues are \$300, and the homeowner can only pay \$200, the foreclosure companies simply return the check The foreclosure company demands the full [amount], plus any fees and fines Hence, in a short six months, the foreclosure company will have reached the magic \$1,800 figure" and can proceed with the foreclosure process.¹⁸⁰

In consideration of California's experiences, Texas would need to include a provision to close this loophole by requiring that HOAs apply any payments received to already existing debt.¹⁸¹ Not only does the application of payment to existing debt benefit the homeowner by buying time before the harsh remedy of foreclosure, it also reduces the possibility that the HOA will experience severe financial difficulties.¹⁸² Fiscal obligations appear constantly as each day of unpaid assessments progresses. If an HOA waits until a court finally orders a judgment or until the forced sale is complete, the HOA may not receive the delinquent amount for a long period of time, making the fiscal obligations

177. PROP. § 209.008(f).

178. See CAL. CIV. CODE § 1367.4(b) (Deering Supp. 2011) (creating a threshold of \$1,800 before foreclosure proceeding may be initiated).

179. *Homeowners Charge that Foreclosure Industry Torpedoes SB 137*, AHRC NEWS SERVICES (Sept. 3, 2006), <http://www.ahrc.se/new/index.php/src/news/sub/article/action/ShowMedia/id/3081> (last visited Dec. 23, 2010).

180. *Id.*

181. See *id.* (describing the problems experienced when there is no legislation that requires HOAs to accept payment in any amount for delinquent fees). *But see* TEX. H.B. 1228, 82d Leg., R.S. (2011) (directing HOAs to provide an opportunity for homeowners to participate in an alternative payment schedule for delinquent assessments). During the 82nd Legislative Session, sections were added to the Texas Property Code establishing an alternative payment plan and instituting a priority of payments. *Id.* However, these changes are only effective for assessments or debts due on or after January 1, 2012. *Id.*

182. See Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 221 (2003) (implying that an HOA may suffer financially when assessments are not paid in a timely manner).

harder to meet.¹⁸³ Yet, if the HOA is able to collect any possible payment from the delinquent homeowner, money is at least being received to cover gaps in the HOA's economic responsibilities.¹⁸⁴

D. *Strengths of a Threshold Approach in Limiting Homeowners' Associations' Power*

Without a doubt, the most obvious strength of the threshold approach is the ability to limit the incidence of foreclosure overall.¹⁸⁵ With more opportunities in place to resolve disputes over unpaid or delinquent assessment fees, foreclosure becomes statistically less frequent, and reduces the prospect of egregious foreclosures for minimal amounts in delinquency.¹⁸⁶ While supporters do recognize that HOAs must have the ability to collect delinquent assessment fees, the foreclosure method for small debts is seen as an extreme measure.¹⁸⁷ Other methods such as small

183. *But see* Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1404 (2004) (claiming that the process of selling property at a public sale could take six to eight months). On average, a judicial foreclosure can take 148 more days than a nonjudicial foreclosure. *Id.* at 1403 n.20.

184. *See* Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, available at <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (stressing the need for HOAs to collect money to provide essential services).

185. *See* Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 207 (2006) (creating a threshold protects the "most important investment that most people will make in their lives: the equity in their homes").

186. *See* *Goddard v. Northhampton Homeowners Ass'n*, 229 S.W.3d 353, 354 (Tex. App.—Amarillo 2007, no pet.) (relaying a situation where an HOA foreclosed on a property for \$600 in unpaid assessment fees); *Sloan v. Owners Ass'n of Westfield*, 167 S.W.3d 401, 403 (Tex. App.—San Antonio 2005, no pet.) (stating that the HOA brought a foreclosure action for \$1,172.82 in delinquent assessment fees); *Hodges v. Canyon Creek Ridge No. 1 Homeowners Ass'n*, No. 05-00-01848-CV, 2002 WL 418201, at *1 (Tex. App.—Dallas Mar. 19, 2002, no pet.) (not designated for publication) (indicating that the foreclosure proceedings were for an unpaid \$750 "special assessment"). *See generally* Karen Ellert Peña, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 324 (2002) (describing a situation where the homeowners spent \$70,000 in litigation costs to defend the HOA's claim for \$115,000 in fines).

187. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006); *see* Ronald B. Cox, *Purchase Money Mortgage Held Superior to Liens for Past Due Assessments*, 47 S.C. L. REV. 26, 30-31 (1995) (claiming HOAs need the ability to collect assessments to provide community services).

claims court, arbitration, and mediation are more appropriate and convenient for small debts, and help foster and maintain healthy relationships.¹⁸⁸

Inadvertently, with the creation of a threshold requirement, more checks and balances will be created within the organization of the HOA.¹⁸⁹ By forcing the HOA to employ other methods of collecting delinquent assessment fees, more parties will be involved in the process, particularly neutral third-parties.¹⁹⁰ Involving third-parties can help ensure that the board of directors does not abuse the power to foreclose.¹⁹¹

A threshold approach also reduces the occurrence of homes being sold for much less than the actual market value.¹⁹² When homes are sold at a foreclosure auction, the minimum bid price can be set as low as the amount owed for delinquent assessment fees.¹⁹³ “Inadequacy of consideration alone does not render a foreclosure sale void if the sale was ‘legally and fairly made.’”¹⁹⁴ Instituting a threshold requirement increases the amount owed

188. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006) (encouraging HOAs to look to other collection practices before resorting to the extreme measure of foreclosure).

189. See Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2540 (2004) (criticizing HOAs for abusing and exploiting the foreclosure power).

190. Mediation involves the participation of an impartial person to facilitate discussion. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (West 2007). An arbitrator is a neutral third person. See *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1198 (11th Cir. 1982) (appointing a neutral third party as the arbitrator for the arbitration hearing).

191. See Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 48 (1990) (asserting POA decision-making powers can be abused).

192. See Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006) (explaining that the “right of redemption” provides a homeowner with a final opportunity to retain equity amassed).

193. *Id.*; see *Inwood N. Homeowners’ Ass’n v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987) (assessing the harshness of selling a home at a foreclosure sale considering the value of the home); *Langever v. Miller*, 73 S.W.2d 634, 634 (Tex. Civ. App.—Fort Worth 1934, writ ref’d) (suing for the difference between the \$25 bid in the sale of a property at a foreclosure auction and the actual value of \$6,500); *Sanders v. Shelton*, 970 S.W.2d 721, 726 (Tex. App.—Austin 1998, pet. denied) (comparing the \$9,000 foreclosure sale price to the property’s \$59,000 fair market value).

194. *Sanders*, 970 S.W.2d at 726 (quoting *Am. Sav. & Loan Ass’n of Hous. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1976)). A sale is not deemed “legally and fairly made” if evidence exists of irregularity that caused the inadequate price. *Id.*

when the home is foreclosed upon, hopefully raising the sale price of the home at the auction and enhancing the opportunity for the return of some equity to the homeowner.¹⁹⁵

E. *Potential Opposition to the Threshold Approach*

Opponents to the threshold approach assert that the change will remove a vital tool in forcing homeowners to meet their assessment fee obligations.¹⁹⁶ In fact, without the fear of foreclosure, opponents further argue homeowners will actually be encouraged to fall into delinquency.¹⁹⁷ Some claim that a number of the cases typically used as support for restraints on the foreclosure power actually involve homeowners who have ignored notices warning of foreclosure.¹⁹⁸ Therefore, instances of foreclosure for minimal amounts are actually rare and do not warrant additional limitations to the already existing safeguards.¹⁹⁹

Without the full, unimpaired power to foreclose, HOAs argue that the financial risk to HOAs and homeowners will increase drastically.²⁰⁰ Increased costs to the HOA inevitably trickle down

195. Cf. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 204 (2006) (stating that the sale of a home for a relatively small amount reduces the homeowner's equity).

196. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2523–24 (2004).

197. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 205 (2006).

198. *Id.*; see *Herrington v. Sandcastle Condo. Ass'n*, 222 S.W.3d 99, 100 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (noting that the homeowner was notified by the HOA of past due assessments and late fees); *Sloan v. Owners Ass'n of Westfield*, 167 S.W.3d 401, 403 (Tex. App.—San Antonio 2005, no pet.) (contending that a written demand for the delinquent assessments was provided to the homeowners before the HOA brought suit); *Cottonwood Valley Home Owners Ass'n v. Hudson*, 75 S.W.3d 601, 602–03 (Tex. App.—Eastland 2002, no pet.) (commenting that the homeowner was notified by certified mail of the total delinquent amount owed to the HOA).

199. See Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2522 (2004) (arguing “actual foreclosure is extremely rare”); Irene Beanie Adolph et al., LEAGUE OF WOMEN VOTERS OF THE HOUSTON AREA, HOMEOWNER ASSOCIATIONS—AMERICAN DREAM OR NIGHTMARE? 5 (2008), available at <http://www.lwvhouston.org/Issues/HOA/HomeownersAssocFacts.pdf> (referencing the Community Associations Institute's claims that foreclosures are rare).

200. See Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing*

to the homeowners, unfairly placing the burden of the delinquent assessment fees on innocent homeowners who have already met their obligations.²⁰¹ With greater financial risk created by the aggregate of delinquent assessments, HOAs could be threatened with the inability to adequately satisfy administrative and maintenance duties.²⁰²

VII. CONCLUSION

Opponents to the foreclosure power of HOAs may still criticize the threshold approach purely due to the existence of foreclosure power.²⁰³ However, the protections provided for homeowners and HOAs in a threshold concept strikes a proper balance between the legitimate interests of both parties.²⁰⁴ Encouraging alternative solutions and prohibiting the use of the foreclosure power for minor delinquencies quell the critics' concerns of an abuse of power by applying protective restraints.²⁰⁵

Regardless, critics will continue to argue that foreclosure is too extreme of an option despite the location of a threshold, even

that Power, 66 TEX. BUS. J. 218, 221–22 (2003) (discussing the effect on the HOA when homeowners fail to pay assessments in a timely manner); *see also* Kellie Dworaczyk, *Foreclosure by Homeowner Associations: Striking a Balance*, HOUSE RESEARCH ORG., INTERIM NEWS (Tex. House of Representatives), July 23, 2002, at 3, *available at* <http://www.hro.house.state.tx.us/interim/int77-10.pdf> (describing a foreclosure action as a tool to collect overdue assessments).

201. *See* Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 221 (2003) (indicating that 90% of homeowners pay assessments on time and are forced to absorb the other 10% for homeowners delinquent on payments).

202. *But cf.* *Raven's Cove Townhomes, Inc. v. Knappe Dev. Co.*, 171 Cal. Rptr. 334, 344 (Ct. App. 1981) (recognizing that mismanagement or non-management of the association can lead to financial risk).

203. *See* Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2540 (2004) (pointing out generally the critical view of foreclosure power by homeowner advocates).

204. *See id.* at 2541, 2542 (favoring a compromise between HOAs and their members). *See generally* Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 224 (2003) (explaining that TRPOPA was an attempt at balancing an effective HOA with homeowner protections).

205. *See generally* Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2540 (2004) (declaring the critics of the foreclosure power to be correct in that, without restraints, HOAs have the potential for abuse).

while acknowledging that collecting assessment fees is imperative to the health of the community.²⁰⁶ The argument is not the need for an HOA or that delinquencies should remain unchecked, but rather, is centered on the most balanced tools for collection of unpaid assessments while remaining true to Texas's history of strong homestead protections.²⁰⁷

206. Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 207 (2006); see *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 637 (Tex. 1987) (recognizing the harsh nature of the foreclosure remedy); Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing that Power*, 66 TEX. BUS. J. 218, 221–22 (2003) (concluding that elimination of the foreclosure power would impair HOAs by forcing them to absorb great delinquencies and decrease their ability to provide beneficial services to the community).

207. TEX. CONST. art. XVI, §§ 49–50; Niki Zupanic, *Keeping Homes Off the Auction Block: California Limits Foreclosures by Homeowners Associations*, 37 MCGEORGE L. REV. 199, 207 (2006); see Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2541 (2004) (encouraging legislators to find a way to retain the foreclosure power while allowing homeowners to live “free from the threat of an unwarranted foreclosure”).