Real Estate Records, the Captive Public, and Opportunities for the Public Good

Charles Szypszak*

TABLE OF CONTENTS

I. INTRODUCTION

Public records of real estate transactions are vital to private ownership and investment. In the United States, the government does not regulate real estate transactions. Public records provide those who acquire real estate interests with a means of giving public notice of their rights. Owners and investors depend on the legal effect given to the records, and the system works well enough to sustain a trillion-dollar real estate market while enabling many millions of Americans to own homes.[1] However, this market success has overshadowed opportunities to make the system more reliable and understandable. Valuable reforms have been identified and

*. Associate Professor of Public Law and Government, School of Government, The University of North Carolina at Chapel Hill. For eighteen years the author was an attorney whose practice focused on real estate.

1. Press Release, U.S. Dep't of Commerce, Bureau of Econ. Analysis, Gross Domestic Product, tbl.3A (July 27, 2007), *available at* http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm (stating that housing accounts for $1.38 trillion of the $13.1 trillion gross domestic product in 2006); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 611 tbl. 956 (126th ed. 2007), *available at* http://www.census.gov/prod/2006pubs/07statab/construct.pdf (showing 68.9 percent homeownership in 2005, nationally).

developed,[2] yet the law remains essentially unchanged, perpetuating an unnecessarily obscure and risky system that generates continued demand for industry participants.

About thirty years ago, knowledgeable academics, attorneys, legislators, and regulators joined in recommending reform of the real estate recording laws.[3] They described prospects for lowering transaction costs and reducing risk by unifying and simplifying the laws and taking advantage of emerging methods for handling records and identifying real estate.[4] Since those observations were made, further developments in technology and geographic information have created new opportunities for beneficial change.[5] But reform remains smothered. The industries and professions whose revenue depends upon real estate transactions—lenders, brokers, attorneys, title companies, and title insurers—perceive no economic incentive to support simplification and clarification. They benefit from a captive public that must rely on others to interpret obscure and complex legal requirements and to help them navigate through a bewildering process. The legislatures that need to overcome this resistance lack the means for understanding the potential for reform, and they do not seem to detect any pressing need for it.

This article discusses the nature of the unduly obscure and complex land records system and the opportunities for reform that are being missed. Part II describes the unsuccessful efforts to reform the real estate transaction laws and the interests of those who benefit from perpetuating the existing system. Part III examines the unnecessary complexity and risk in a system that evolved in the context of nineteenth century real estate transactions, and identifies the most noteworthy opportunities for simplifying and unifying the real estate transaction laws and recording process. The most compelling reforms include unification and simplification of the states' foundational recording laws in order to make the laws more understandable and predictable in application; uniform use of parcel identifiers to describe real estate; adoption of indexing methods that require those who record documents to identify the essential information to be indexed, rather than rely on public officials to determine others' intent; and legislation to protect against abuse of the recording system in an environment in which opportunities for such abuse proliferate.

II. SMOTHERED REFORM OF REAL ESTATE RECORDING LAWS

The laws governing real estate ownership are unnecessarily obscure and idiosyncratic; the information in the governing records is unduly cryptic, and the tools for finding this information are needlessly inexact and antiquated. Experts have identified available opportunities for reform of the fundamental real estate laws and

2. *See infra* text accompanying notes 40-58 and 108-118.
3. *See infra* text accompanying notes 40-58.
4. *See infra* text accompanying notes 40-58.
5. *See infra* text accompanying notes 197-218.

the methods for managing instruments of conveyance,[6] but those benefiting from the existing system have not supported the proposals.[7]

A. *The Obscure and Complex Land Records System*

Real estate conveyances are governed by centuries-old common law that has never been the subject of comprehensive legislative attention. Although real estate law is fundamentally the same across the United States, individual state laws govern[8] and are sufficiently varied that even extensive knowledge of one state's laws may not be sufficient to understand another state's laws.

Real estate law is often defined by archaic terms and concepts.[9] Terms can mean different things in different jurisdictions, with important consequences.[10] Even the most basic real estate concepts can involve idiosyncratic state law variations. This includes, for example, something as basic as the extent of ownership. Two or more owners usually share interests either as "joint tenants" or "tenants in common." A joint tenant automatically becomes the sole owner after the other's death,[11] whereas a tenant in common's interest passes to that owner's heirs rather than automatically to the other common owner.[12] If the deed by which the owners acquired the property does not specify which of these two arrangements is to apply, state law will supply a presumption.[13] The prevailing common law rule recognized joint tenancy whenever the language in the deed could be interpreted as intending that a surviving joint tenant

---

6. *See infra* text accompanying notes 40-58.

7. *See infra* text accompanying notes 63-86 and 98-103.

8. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (stating that property rights in the U. S. are determined by reference to "existing rules or understandings that stem from an independent source such as state law").

9. For example, a New Jersey statute that instructs that conveyances "shall be construed to be of such effect as if such manors, lands, tenements or hereditaments had been then held and continued to be held in free and common socage only," is foreign even to experienced real estate practitioners. N.J. STAT. ANN. § 46:3-3 (West 2003).

10. In Maryland, for example, a record terminating the effectiveness of a security interest in land is called a "release." MD. CODE ANN. REAL PROP. § 3-105 (West 2007). In North Carolina, it is called a "satisfaction," and a "release" is considered to be a deed re-conveying the property from a secured creditor or trustee to the owner. *See* N.C. GEN. STAT. ANN. §§ 45-37.2, 45-41 (West 2007). The distinction matters because a recording fee is not charged in North Carolina for a "satisfaction" document but it is for a "release" deed. *See id.* §§ 45-37.2(a), 161-10(a)(1). Consequently, if someone in Maryland prepared a document with the title "release"—as would be customary in that state—and sent it to North Carolina without a recording fee, it would probably be rejected; but if it were entitled "satisfaction" it would be recorded.

11. *See* 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 51.02[1] (Michael Allan Wolf ed., 2005).

12. *See id.* § 51.01[1].

13. *See id.* § 51.02[1].

succeed to full ownership.[14] Many states have enacted statutes that override common law presumptions and presume that ownership is to be held as tenants in common unless very specific language is used in the deed conveying the property, but the precision with which this must occur varies among the states.[15] In Washington, for example, by statute a joint tenancy is created if the deed "expressly declare[s] the interest created to be a joint tenancy";[16] in Michigan, use of "and to the survivors or survivor of them" in a deed is sufficient to create a joint tenancy;[17] in North Carolina, a conveyance "in joint tenancy" does not create survivorship rights unless the deed expressly refers to such rights.[18] Practitioners are prone not to appreciate these fine distinctions with their own states' laws, and run serious risk of unintended consequences if they prepare even simple deeds for recording in other states. Such legal provincialism is antithetical to the predictability needed in modern interstate transactions.

Obscure rules and local variation are a potent combination for risk of loss due to unintended consequences. The risk does not end with the nature of the governing laws. Real estate is also unique in the extent to which ownership interests are defined by owners through a history of transactions. Rights are derived from a "chain of title," which is a string of conveyances beginning with the first governmental grant.[19] Ownership rights to any parcel of real estate are thus defined by the particular transactional history for that parcel, and cannot be assumed to be the same as any other parcel. The transactional history can only be assessed fully by examining all of the documents in the chain of title, as well as other available information about the property. Those who purchase real estate, or provide finance with real estate as security, must rely on professionals to perform this research and analysis.

Parties to the transactions are also left to decide how to describe the boundaries of what they intend to convey. No prescribed uniform format for property descriptions exists, and problems with ambiguous or conflicting descriptions have been a fertile source of litigation.[20] A common method for describing real estate is by use of a "metes and bounds" description, which refers to distances and angles that a surveyor sometimes precisely calculates, but often someone less expert prepares.

---

14. *See id.*

15. *See id.*

16. WASH. REV. CODE § 64.28.010 (2005).

17. *See* Albro v. Allen, 454 N.W.2d 85, 88-89 (Mich. 1990).

18. N.C. GEN. STAT. ANN. § 41-2 (West 2007).

19. *But see* 16 POWELL, *supra* note 11, § 91.02 (explaining that the doctrine of adverse possession protects someone who occupies land in a manner that exhibits a claim of exclusive ownership against someone who has a claim based on deed conveyances who failed to object to the occupancy within a certain time, typically twenty years).

20. *See, e.g.*, Greenan v. Lobban, 717 A.2d 989, 990 (N.H. 1998) (construing a deed that refers to a boundary "on the shore" of a lake); *see generally* 23 AM. JUR. 2D *Deeds* §§ 247-69 (2007) (referencing numerous cases involving deed interpretation).

Coordinating one property description with the description of adjoining properties owned by someone else does not follow one unified approach. Inaccuracies and conflicts with neighboring property descriptions frequently occur. As described in this article, better identification methods have existed for decades, yet ancient error-prone descriptive methods persist.

The records' reliability depends upon the public's ability to find what affects particular property. Registers may have millions of documents on file. The indexing system is therefore critical for identifying documents that affect interests in and claims to the real estate under consideration. However, the states' indexing systems are neither well defined nor uniformly applied.[21] Only rarely does a statute even specify index format.[22] A typical state law has only the misleadingly simple requirement that registers index "all the parties" to the instrument, with any party conveying an interest indexed as a "grantor" and any recipient as a "grantee."[23] Most statutes give only skeletal direction about the required index contents, typically only prescribing that the register must identify and index "each grantor, donor, mortgagor, and assignor, and each grantee, donee, mortgagee, or assignee,"[24] and most indexing rules only require mention of some form of "description of the land" discerned by the register from the instrument.[25] Examiners do not have a collated public record to review regarding the land's ownership; they are left to trace a "chain of title" by matching grantors and grantees through a history of conveyances.[26] The statutes leave it to registers to determine who in any particular instrument is a "grantor" or "grantee," and none mandates a comprehensive and uniform single system for identifying real property for title search purposes.[27] Some registers have the benefit of rules or internal procedure guidelines, but the complexity can be daunting and the

21. *See infra* notes 22-26, and accompanying text.

22. *See, e.g.*, WASH. REV. CODE ANN. § 65.04.050 (West 2007) (specifying the requirement for eight columns of information including the names, a description of the property, and the tax assessor's parcel identifier or account number).

23. *E.g.*, N.H. REV. STAT. ANN. § 478:6 (2007).

24. MD. CODE ANN. REAL PROP. § 3-302(a) (LexisNexis 2003).

25. WIS. STAT. ANN. § 59.43(9) (West 2007).

26. *E.g.*, N.C. GEN. STAT. § 161-22(d) (2005) (specifying that a deed of trust "may be indexed in the names of the grantor and beneficiary only"). In a typical search, the examiner will begin with the current owner's name, and perhaps the recording information for the owner's deed. The examiner works backward using the grantee index until the chain of conveyances covers the search period, which typically will only go back about 35 years, a period considered sufficiently long for practical purposes. The owners' names will then be searched using the grantor index for security interests and other rights that may have been conveyed during ownership. Each security instrument will then be checked for records of satisfaction to determine whether they still apply. A search involving only a few owners and no complications may take an hour or two. Other records must also be checked for possible adverse claims, such as the tax records and court files. Confusion or complication is frequently encountered, and the project could take several hours or several days.

27. *See id.* § 161-22(g) (stating that the register of deeds may adopt rules and procedures for indexes).

details are likely to be unfamiliar to someone looking for an instrument in the records.[28] For example, even determining whether a name that appears in a document is for a "grantor" or "grantee" is increasingly a challenge. Lenders now commonly use a "nominee" in security instruments to avoid having to record assignments when lenders transfer their interests to other lenders or lending pools.[29] Registers indexing the document must decide whether the "grantee" is the lender, the nominee, or both.[30] This is not a simple question: a Florida court ruled that the status of a "nominee" was so unclear that the court stayed foreclosure because it could not determine who the real party in interest was for a mortgage.[31]

To use the indexes, searchers must be familiar with the rules and local variations for the manner in which names are indexed, such as how names with punctuation are depicted, how complex names are grouped, and when and how abbreviations are used. The challenges are compounding as real estate interests become more creative, transactions less localized, and names more diverse. Recently, for example, lenders have begun to invent long names, often with numbers in them, for single purpose trusts or entities formed to hold security interests, and the names may have more characters than the register's system can include in the index for a particular entry.[32] Precision is essential; registers increasingly use computer databases in which searches are made with field entries, and the names entered by the examiner must match the information exactly to identify records.[33]

---

28. *See, e.g.*, N.C. GEN. STAT. ANN. § 161-22.3 (West 2007) (requiring registers to comply with standards adopted by the registers' association and approved by the North Carolina Secretary of State); *Id.* § 161-22(g) (stating that registers may also adopt internal rules which they are then required to post in their offices); N.C. ASS'N OF REGISTER OF DEEDS, N.C. DEP'T OF THE SEC'Y OF STATE, MINIMUM STANDARDS FOR INDEXING REAL PROPERTY INSTRUMENTS (1997) (putting forth a 53-page document containing such things as alphabetizing, name conventions, and acceptable abbreviations). *See generally* N.C. ASS'N OF REGISTERS OF DEEDS, INTERNAL PROCEDURES MANUAL FOR REGISTERS OF DEEDS (2006), *available at* http://maps.co.randolph.nc.us/departments/downloads/REGISTEROFDEEDS.pdf (demonstrating that registers can refer to an internal procedures manual generated by their respective association).

29. *See* Mortgage Elec. Registration Sys., Inc. v. Nebraska Dep't of Banking and Fin., 704 N.W.2d 784, 787 (Neb. 2005).

30. *See generally In re* Mortgage Elec. Registration Sys., Inc., No. 05-001295SCI-11 (Fla. Pinellas Cir. Aug. 18, 2005), *available at* http://www.msfraud.org/LAW/Lounge/ORDER%20REGARDING%20STANDING%20OF%20MERS.htm, *rev'd*, 2007 WL 517842 (Fla. Dist. Ct. App. Feb. 21, 2007) (holding that a holder of a note has legal standing to enforce it).

31. *Id.*

32. For example, such a name could be: South State Asset Securities Association, Structured Asset Investment Loan Trust, Mortgage Pass-Through Collateral Certificates, Series 2006XYZ56, By Its Attorney in Fact Northern Branch Loan Servicing, LLC. Among others things, a register faces the difficult task of trying to determine whether this entire string comprises a single name, or whether there are multiple names, some in a representative capacity for others.

33. For example, a search for the name "St. James" might require entry into the computer field of STJAMES, without the period or space.

These important aspects of real estate records—the nature of the rights, the method for describing them, and the means for locating controlling documents—need not be so difficult to understand or apply as they have been and continue to be. As the rest of this article explains, experts who understand these laws have identified opportunities for improvement, but the laws and procedures remain largely unchanged.

B. *Smothered Reform*

About thirty-five years ago, a number of knowledgeable attorneys, jurists, academics, and other real estate law experts joined to develop uniform laws governing real estate transactions.[34] Congress heard persuasive testimony about the need for reform to eliminate unnecessary complexity and obscurity, and to reflect modern transactional realities.[35] Contributors noted two main factors that affected the difficulties involved in using land records and, consequently, real estate transaction costs: the possible continued viability of "ancient interests and claims creates doubt over the seller's asserted title, forcing the title examiner, whether lawyer, abstracter, or title insurance company, to trace title to land back many years to assure that no such ancient interests cloud each particular title," and the "hopelessly antiquated and diffuse" recording system in which various records and matters that do not appear in the register's office must be found and considered.[36] Notwithstanding the absence of any principled objection to the proposals, no unification or significant innovation was achieved. The only noteworthy successful development was the federal government's enactment of the Real Estate Settlement Procedures Act, which mandated limited disclosures and regulated some aspects of closings of federally related loans.[37]

1. National Conference Uniform Law Proposals

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") develops and recommends model legislation to clarify matters governed by state law.[38] The Uniform Commercial Code ("UCC") was their most

---

34. *See infra* text accompanying notes 40-58.

35. S. REP. NO. 93-866 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6546, 6547 (describing the HUD-VA Report and subsequent hearings by the Housing Subcommittee).

36. Zane O. Gresham, *The Residential Real Estate Transfer Process: A Functional Critique,* 23 EMORY L.J. 421, 445 (1974).

37. Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§ 2601-17 (2000)).

38. *See* UNIFORM LAW COMMISSIONERS, THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, CONSTITUTION AND BYLAWS §§ 1.2, 6.1, 7.1 (2002), *available at* http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18.

conspicuous success and now governs commercial transactions nationwide.[39] In the early 1970s, encouraged by the UCC's success, NCCUSL developed model uniform statutes addressing the fundamental aspects of real estate conveyances and finance.[40] In 1975, they produced a comprehensive Uniform Land Transactions Act ("ULTA").[41] As described by a contributor to the proposal: "The Act was designed to simplify, clarify, modernize, and make uniform nationwide the real estate sales and sales financing law like the [UCC] had done for the law of transactions in goods."[42] The UCC was a model for many of the proposed rules.[43] The prospect of reform in this area of the law was promising. As one commentator observed, "[l]aw students and recent graduates eagerly anticipated the replacement of the confusing rules of the common law and maxims of equity with an easily understood code."[44]

ULTA applied key UCC concepts to real estate transactions, such as the requirement of good faith in performance of contractual obligations, and incorporation of reasonable implied terms.[45] Proposed secured transactions provisions would have simplified real estate mortgage arrangements and clarified the priority of advances made after the security interests were recorded.[46] The recommendations regarding foreclosures were seen as the most far-reaching; they would have replaced complex, outmoded, and confusing variations with a straightforward method of out-of-court foreclosure.[47] Federal mortgage agencies supported ULTA, especially the unification and simplification of foreclosure rules, which would have made underwriting decisions simpler.[48]

NCCUSL withdrew ULTA without it being adopted by any state.[49] When NCCUSL saw that its comprehensive approach was not going to be accepted, they proposed the major components of ULTA in separate models.[50] A Uniform Land Secured Interest Act ("ULSIA"),[51] addressing mortgage law, was proposed but not

---

39. *See* ELDON H. REILEY, SECURITY INTERESTS IN PERSONAL PROPERTY § 1.3 (2007).

40. Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037, 1037-41 (1996).

41. UNIF. LAND TRANSACTIONS ACT (amended 1977), 13 U.L.A. pt. II 160 (2002).

42. Ronald Benton Brown, *Whatever Happened to the Uniform Land Transactions Act?* 20 NOVA L. REV. 1017, 1017 (1996); *see also* Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069, 1070 (1996) ("ULTA was to be the [UCC] of real estate law.").

43. Benfield, *supra* note 40, at 1044.

44. Brown, *supra* note 42, at 1017.

45. Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1, 4-8 (1980).

46. *Id.* at 9-10.

47. *Id.* at 12-13.

48. Benfield, *supra* note 40, at 1052-53.

49. Brown, *supra* note 42, at 1018.

50. *See infra* note 59 and accompanying text.

51. NAT'L CONFERENCE OF COMMISSIONERS OF UNIF. STATE LAWS, UNIFORM LAND

adopted, though its simplified approach to foreclosure later appeared in some state legislation.[52] One commentator described the problem that ULSIA was intended to address as "an impenetrable level of diversity that cries out for uniform mortgage legislation."[53] These laws never underwent a systematic coordination or simplification, and, as the commentator said: "It seems incredible that the conceptual superstructure of our mortgage laws should rest on a foundation that evolved centuries ago out of the need to evade medieval usury laws and the struggles for primacy between the law courts and the equity courts in feudal England."[54]

NCCUSL also proposed a Uniform Simplification of Land Transfers Act ("USLTA")[55] to address the mechanics of transfers, liens, recordings, and priorities.[56] This refined model also was not adopted in any state.[57] It contained a number of provisions that would have simplified and unified the important rules for recording real estate instruments.[58]

NCCUSL's bold and skillful proposals contained in ULTA, ULSIA, and USLTA faded behind the legal landscape without leaving much evidence of their existence.[59]

SECURITY INTEREST ACT, IN HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 171, 171 (1989).

52. Patrick A. Randolph, Jr., *The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act*, 20 NOVA L. REV. 1109, 1127 (1996) (stating that the simplified approach to foreclosure in ULSIA influenced a number of states in revising their respective laws).

53. Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP. PROB. & TR. J. 289, 298 (1995).

54. *Id.* at 295-96.

55. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT (amended 1977), 14 U.L.A. 343 (2005).

56. Bruce, *supra* note 45, at 13-19.

57. *See* Brown, *supra* note 42, at 1020.

58. *See id.*

59. *See id.* at 1018-20. NCCUSL proposed several model acts for common ownership arrangements, and a few states enacted them, including fifteen states that adopted the Uniform Condominium Act. *See generally* UNIF. CONDOMINIUM ACT (amended 1980), 7 U.L.A. pt. II 450 (2002) (adopted by fifteen states); UNIF. PLANNED COMMUNITY ACT (1980), 7A U.L.A. pt. III 233 (2006) (adopted by one state); MODEL REAL ESTATE TIME-SHARE ACT (1980), 7B U.L.A.175 (2006) (adopted by five states); MODEL REAL ESTATE COOPERATIVE ACT (1981), 7B U.L.A. 49 (2006) (adopted by two states); UNIF. COMMON INTEREST OWNERSHIP ACT (1982), 7 U.L.A. pt. II 1 (2002) (superseded 1994) (adopted by five states); UNIF. COMMON INTEREST OWNERSHIP ACT (1994), 7 U.L.A. pt. I 835 (2005) (adopted by two states). These statutes were less likely to encounter much resistance because they created or validated new forms of ownership without unsettling established interests, but they still failed to achieve widespread acceptance and left practitioners with the need to study the laws for each state.

A uniform act for residential leases, however, has been enacted by a number of states, which affects rights in leases and the process for terminating tenancies. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT (1972), 7B U.L.A. 285 (2006) (adopted by twenty states). The most widely accepted uniform statute affecting real estate transactions is the Uniform Federal Lien Registration Act, which facilitates the recording of federal liens in state recording offices. *See* UNIF. FED. LIEN REGISTRATION

This outcome was not due to principled objections about the chosen solutions. The proposals went unheeded because lawmakers did not perceive any compelling need for reform, and real change was smothered by those who benefit from complexity and risk in real estate transactions.

While the proposals were being advanced, the real estate financing industry was rapidly growing and nationalizing, a development that overshadowed the advantages of fundamental change.[60] The explosion of the secondary mortgage market beginning in the 1970s, which caused lenders to develop standard forms of security instruments,[61] resulted in apparent increases in uniformity of form while the governing laws remained varied and obscure. These macroeconomic trends made reform seem uncompelling, even though widespread benefits would come with change, and in the multi-trillion dollar real estate market, the aggregate effect would be substantial.[62]

ACT (1978), 7A U.L.A. pt. I 328 (2002 & Supp. 2006) (adopted by thirty-eight states).

A few recent efforts address narrow areas of the law and are too new for an assessment to be made about their acceptance. *See generally* UNIF. REAL PROPERTY ELECTRONIC RECORDING ACT (1999), 7B U.L.A. 263 (2006) (clarifying that an electronic document may be recorded in the same manner as paper); UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT (2005), 7B U.L.A. 417 (2006) (requiring payoff statements and enabling recording of affidavits when lenders fail to provide them); UNIF. ASSIGNMENT OF RENT ACT (2006), 7 U.L.A. pt. I (Supp. 2007) (governing security interests in leases).

NCCUSL proposed a number of other model statutes that have had only limited or no success. *See generally* UNIF. VENDOR AND PURCHASER RISK ACT (1935), 14 U.L.A. 689 (2005) (governing purchase and sales agreements for real estate and adopted in thirteen states); MODEL EMINENT DOMAIN CODE (1984), 13 U.L.A. pt. I 1 (2002) (adopted by two states); UNIF. CONSTR. LIEN ACT (1987), 7 U.L.A. pt. III 1 (2002) (same as article 5 of the Uniform Simplification of Land Transactions Act and not adopted by any state); MODEL LAND SALES PRACTICES ACT (1969), 7A U.L.A. pt. II 205 (2006) (governing promotion and sales of subdivisions and adopted in nine states); UNIF. MARKETABLE TITLE ACT (1990), 13 U.L.A. pt. II 305 (2002) (establishing a limitations period on certain title claims); *see infra* text accompanying notes 184-191 (discussing similar legislation adopted by some states). All of these proposals are thoughtful approaches to common issues involving real estate, but none affected the essential laws governing real estate conveyances and finance.

60. Benfield, *supra* note 40, at 1053 ("Banks and other lenders apparently did not consider uniformity sufficiently important to urge adoption of the ULTA, even though the substantive provisions of the ULTA could hardly have been viewed as harmful to lenders. In fact, nationalization of the mortgage market occurred rapidly beginning in the 70s, without the benefit of uniform real estate law.").

61. *See id.*

62. *See Hearing on the Impact of the proposed RESPA Rule on Small Businesses and Consumers, Hearing Before the Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 449 (statement of Sen. Richard C. Shelby, Chairman) (discussing the scale of real estate transactions and the potential for reform); *see also* Real Estate Settlement Procedures Act, 67 Fed. Reg. 49,134, 49,157 (July 29, 2002) (to be codified at 24 C.F.R. pt. 3500) (showing that HUD estimated 105,300,000 annual instances in which the disclosures are made).

As observers of the uniform statutes' dismissal observed: "The overall reform of land law would bring diffuse and hard-to-communicate benefits to the general public. However, changes proposed for each sub-area of the law might upset a small, well-informed, and well-organized group. Thus, the broader the Uniform Act, the more opposition it might be expected to create."[63] Consumers do not have the understanding or incentive to rise in support of reform of real estate conveyance laws. As a United States senator urging reform in 1974 observed: "The typical homebuyer is a babe in the woods with pitifully little bargaining power. He is faced with settlement charges pushed on him by experts on a take-it-or-leave-it basis. The abuses have been well documented."[64] A typical real estate closing involves many thousands of dollars in purchase price and financing, and a number of substantial closing costs, such as lender fees, brokerage commissions, and tax payments, which are satisfied from financing without the kind of scrutiny they would receive if paid separately.[65] This enables those who receive compensation in connection with closings to enjoy the benefits of the flow of funds without having to be challenged about the need or value of their service.

The incentives to perpetuate the existing system have not gone entirely unnoticed. One harsh observation made at the time the models were proposed was that brokers, lawyers, title insurers, and abstractors "have influenced greatly the development of that [process of transferring residential real property] system through their oligopoly control of certain aspects of the system and by their many mutual accommodations."[66] Another reform proponent described the climate as follows: "Specialized institutions grew to deal with transactions in land according to the specialized needs of individual state legal systems. Today, these institutions, including title insurers, local lenders, appraisers, and brokers, regard with suspicion and distrust proposals for sweeping reforms that would do away with the many specialized rules."[67] As yet another observer said: "The residential real estate transfer system in many respects is inefficient and oppressive of the consumer, whether seller or buyer. Both systemic flaws may be traced to the ignorance and disorganization of consumers and the collusive practices of the institutional actors which in some contexts do not appear to operate according to the traditional principles of free market competition."[68]

---

63. Peter B. Maggs, *The Uniform Simplification of Land Transfers Act and the Politics and Economics of Law Reform*, 20 NOVA L. REV. 1091, 1091-92 (1996).

64. S. REP. NO. 93-866 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6546, 6557 (additional views of Sen. William Proxmire).

65. *See* Benfield, *supra* note 40, at 1061 ("Buyers and sellers of real estate act in that capacity so rarely that they are not likely to develop views regarding the desirability of legal change.").

66. Gresham, *supra* note 36, at 422.

67. Randolph, *supra* note 52, at 1112.

68. Gresham, *supra* note 36, at 471.

The entrenched opposition to reform of the real estate laws is consistent with the natural self-interest of those whose professions and industries benefit from perpetuation of an existing system. Economists note the tendency for a diversion of resources from productive investment to attempts to influence decisions that will result in advantages gained by government requirements and restrictions.[69] The descriptive term "rent-seeking" was first employed in this context by Anne Krueger in 1974, and was developed by economist Gordon Tullock with whom the term later became most closely associated.[70] Groups seek advantages through arrangements that do not attract significant public attention, which can occur because the rules are obscure or because their effect is insufficient to spur action.[71] As Tullock said: "Public misunderstanding of the actual situation is almost a logical necessity for the average rent-seeking activity."[72] The public does not understand the land records laws and must rely on others to manage the perceived risk.

The amount at stake for those who benefit from the existing system is substantial. The title insurance industry receives approximately $18 billion in revenue and a net annual income of nearly $1 billion by providing assurances against real estate title problems.[73] About seventy percent of the revenue is retained by the agents who issue the policies,[74] who usually are the attorneys handling the closings. Only about five percent of the revenue is paid in losses incurred for policy coverage.[75] For these impressive rewards, the title insurance industry and those who receive income rely on the impression that real estate titles involve risk.[76]

Additionally, brokers benefit from consumer uncertainty and risk. About six million homes are conveyed each year, eighty percent of which involve a broker.[77]

---

69. *See* GORDON TULLOCK, *Rent Seeking*, *in* 5 THE SELECTED WORKS OF GORDON TULLOCK, THE RENT-SEEKING SOCIETY 11, 11 (Charles K. Rowley ed., 2005).

70. *Id.* at 25.

71. *See* GORDON TULLOCK, *Rent, Ignorance, and Ideology*, *in* 5 THE SELECT WORKS OF GORDON TULLOCK, THE RENT-SEEKING SOCIETY, *supra* note 69, at 214, 224.

72. *Id.* at 225.

73. Neil DasGupta & Richard McCarthy, Special Report, *Strong Housing Market Drives Title Insurance Growth in 2005, but Possible Slowdown Ahead*, A.M. BEST, Nov. 27, 2006, *available at* http://www.alta.org/images/PDF/06ambest_report.pdf.

74. *See* ORICE M. WILLIAMS, U.S. GOV'T ACCOUNTABILITY OFFICE, TITLE INSURANCE: PRELIMINARY VIEWS AND ISSUES FOR FURTHER STUDY 4 (2006) (Testimony Before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, House of Representatives).

75. *See* Dasgupta & McCarthy, *supra* note 73, at 6. About seventy-five percent of revenue is paid in losses under property and casualty insurance. *See id.* at 8.

76. *See generally* Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663 (2003) (discussing title insurance and its role in addressing risks involved with real estate titles).

77. Ann Morales Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 65 (2003).

About 460,000 brokers and agents receive billions of dollars in commission income annually,[78] and have a powerful lobby in the state legislatures to protect their interests.[79] As brokers' ability to market properties to potential sellers is diminished with the Internet and other new means of communication, brokers increasingly rely on the perception that professional guidance is needed to navigate a treacherous closing process.[80]

Many attorneys depend on real estate title searches and conveyance closings for their income. Real estate is an area of practice where most people have some contact with an attorney, which attorneys naturally see as a source of other business. Although the fee for handling a routine closing is not especially lucrative,[81] especially for attorneys who perform the title research and conduct the closing themselves, it is a

---

78. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 416 (2006).

79. Morales Olazábal, *supra* note 77, at 131 ("In their lobbying and public relations efforts, they are represented by a formidable national trade association as well as by local practitioner groups and boards. The individual consumer, by contrast, is alone, lacking in political clout, frequently ill-informed about the state of the law despite disclosure laws, and apparently of least concern to the regulatory setting in some states." (citation omitted)). The landscape includes vitriolic calls to arms. Consider, for example, the tone of these warnings issued by manager of a major realtor website:

> Together, we are fighting what the popular media is calling a "cultural war" where the combatants are defined by either having a "consumer bias" defending the rights of consumers to have access to all the information they want, unbundled services and lower fees or a "REALTOR® bias" dedicated to preserving the status quo, limiting competition, protection of fees and restricting the consumers' right to know. . . . Let me tell you, privately and in non-industry forums, they detest you. They view REALTORS® as an anachronism that has out lived its usefulness.

Mike Long, CEO of MOVE, Inc., Comment to NAR Board of Directors, (May 19, 2006), *available at* http://resource.realtor.com/statichtml/NAR.htm.

80. REALTOR.COM: Why Use a REALTOR®?, http://www.realtor.com/Basics/AllAbout/Realtors/Why.asp?poe=realtor (last visited Oct. 27, 2007) ("Between the initial sales agreement and closing (or settlement), questions may arise. . . . Your REALTOR® is the best person to objectively help you resolve these issues and move the transaction to closing (or settlement).").

81. The fees vary by region, but a reasonable estimate is that a lawyer charges about $350 for a typical residential closing. *See* Letter from Federal Trade Comm. to Ethics Committee, North Carolina State Bar (December 14, 2001), *available at* http://www.ftc.gov/be/V020006.shtm (discussing closing charges in various areas). This does not include the attorney's share of a title insurance premium. A title insurance premium typically is three dollars and fifty cents per one thousand dollars of coverage for an owner, and two dollars and fifty cents per one thousand dollars of coverage for a loan policy, but can be higher in some places, such as in Florida, where the owner's policy premium is more than double the national rate. *See* BARLOW BURKE, LAW OF TITLE INSURANCE § 1.01[C] (3d ed. 2000). If an attorney's commission is seventy percent, which is common, the total revenue for a transaction will be several hundred dollars. The Government Accountability Office found that the cost of title insurance and associated title services was approximately $925. *See* WILLIAMS, *supra* note 74, at 3.

staple of many thousands of attorneys in private practice.[82] Many attorneys aggressively protect their role in real estate closings and mobilize to resist attempts by non-attorneys to infiltrate this arena.[83] A leader among the 1970 reform efforts put it bluntly: "The Bar, with very few notable exceptions, has been far less interested in reform and improvement than in the effect of those changes on their income."[84]

Those who handle real estate transactions have other natural reasons to want the current laws to remain unreformed. One commentator described a "basic conservatism of land title lawyers, who tended to be resistant to change."[85] Another commentator had a similar observation: "Lawyers, particularly, are understandably wary of changes in the law which render their learning obsolete and which require that they learn new and unfamiliar concepts with the attendant pain and possibility of error."[86] Even so, the current system is not susceptible to mastery any more than a simplified and less obscure system would be. The current laws are unclear and difficult to understand, even for those who study them in depth. Those who oppose change may very well benefit from it in the long run, at least if they value working within a system in which the laws are consistent and understandable and the value they add is productive. However, the existing economic dynamic creates strong incentives to resist such change.

---

82. About three-quarters of all lawyers are in private practice, and about half of those private practitioners are solo practitioners. AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS (2006), *available at* http://www.abanet.org/marketresearch/lawyer_demographics_2006.pdf. Many lawyers in firms also have practices involving real estate. A search of the Martindale Hubbell on-line law directory indicates that over 54,000 of the approximately 350,000 listed lawyers indicate real estate as a practice area. Martindale.com, Lawyer Locator, http://www.martindale.com/xp/Martindale/Lawyer_Locator/search_advanced.xml (search "All Countries," "All States/Provinces," and "All Areas," then "All Countries," "All States/Provinces," and "Real Estate") (last visited Oct. 27, 2007).

83. *See, e.g.*, Letter from Federal Trade Comm. and Dep't of Justice to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.shtm ("Together, the DOJ and the FTC have become increasingly concerned about efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of opinions and laws by state courts and legislatures relating to the unlicensed practice of law."); Letter from Federal Trade Comm. and Dep't of Justice to Ethics Committee, North Carolina State Bar (Dec. 14, 2001), *available at* http://www.ftc.gov/be/V020006.shtm (discussing bar efforts to require attorneys to be present at closings); N.C. STATE BAR, AUTHORIZED PRACTICE ADVISORY OPINION 2002-1 (2003), *available at* http://www.ncbar.com/ethics/printopinion.asp?id=656 (discussing limited exceptions to the lawyer's exclusive role in response to Federal Trade Commission).

84. James M. Pedowitz, *Letter to the Editor*, 20 NOVA L. REV. 1029, 1030 (1996). Mr. Pedowitz was a member of the joint editorial board for ULTA and USLTA, and an advisor to the American Land Title Association and the Real Property Probate and Trust Law Section of the American Bar Association. *Id.* at 1029 n.*; *see also* Brown, *supra* note 42, at 1023 (noting lawyers' interest in preserving income was among the main reasons that the uniform law proposals were not adopted).

85. Maggs, *supra* note 63, at 1092.

86. Benfield, *supra* note 40, at 1055.

2. Real Estate Settlement Procedures Act

In the early 1970s, while experts were proposing uniform statutes governing real estate transactions, the United States Department of Housing and Urban Development and the Veterans' Administration commissioned a report concluding that the costs of real estate transactions were excessive for consumers.[87] This report spurred Congressional hearings and enactment of the Real Estate Settlement Procedures Act ("RESPA").[88] RESPA requires advance disclosure of settlement charges to consumers, which is intended to afford borrowers an opportunity to know costs before they are incurred so that consumers may shop comparatively, as an approach to reduce consumer costs through competition.[89] Real estate practitioners are most likely to be familiar with the RESPA innovation known as the "HUD-1"—the compulsory settlement statement disclosure.[90] Settlement agents are required to use the HUD-1 in every real estate transaction "involving a federally related mortgage loan in which there is a borrower and a seller."[91] Regulations direct the settlement agent to itemize all charges to be paid by the borrower and the seller, whether they are paid out of the loan proceeds or from separate funds outside of the closing.[92]

RESPA is based on the reality that those who pay settlement costs rarely understand them and have little ability to affect their imposition through consumer choice.[93] The disclosures give consumers information they probably would not otherwise receive, but the information is limited, not easily understood, and typically is received at or just before closing, giving consumers no reasonable opportunity to shop for alternatives. To illustrate with a salient example, title companies and attorneys are not required to provide details about the components of a combined fee

---

87. *See* D. BARLOW BURKE, JR. & NICHOLAS N. KITTRIE, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, REPORT TO THE FEDERAL HOUSING ADMINISTRATION, H.U.D. AND THE VETERANS ADMINISTRATION: THE REAL ESTATE SETTLEMENT PROCESS AND ITS COSTS (1972).

88. *See* Real Estate Settlement Procedures Act of 1974, Pub. L No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601-17 (2000)); Michael S. Glassman, *Real Estate Settlement and Procedures Act of 1974 and Amendments of 1975: The Congressional Response to High Settlement Costs*, 45 U. CIN. L. REV. 448, 449 (1976) (discussing the origins of RESPA); More Information about RESPA, U.S. Dep't of Housing and Urban Dev't, http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm (last visited Oct. 28, 2007) (discussing the reasons for RESPA).

89. *See* Glassman, *supra* note 88, at 450.

90. *See* 24 C.F.R. § 3500.2 (2007).

91. *Id.* § 3500.8.

92. 24 C.F.R. pt. 3500 app. A (2006).

93. *See* 12 U.S.C. § 2601(a) (2000) ("The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.").

charged for title examination and title insurance, nor are the title insurance agents, who often are the closing attorneys, required to disclose the portion of the title insurance premium they are retaining as commissions.[94] Lenders typically require their borrowers to pay the premium for a title insurance policy for the lender's benefit, providing coverage to the lender for losses due to a title problem impairing the lender's security.[95] For a small additional charge, borrowers can obtain coverage for their investment in the property, yet this option usually is not explained to them.[96] Consumers are unlikely to have any notion that they can comparatively shop for title insurance; they are issued policies for the carrier preferred by the closing attorney or closing professional, who usually has been assigned by the lender providing the financing.[97]

The effect of RESPA was therefore only of slight benefit to consumers. Any attempts at making it more beneficial have been stifled. When HUD proposed changes to the RESPA regulations in 2002, which mostly would have addressed disclosure of mortgage broker compensation but also would have slightly changed some other aspects of RESPA,[98] HUD was overwhelmed with over 40,000 comments from lenders, brokers, title companies, and others who had an interest in the existing process.[99] Typical of the objections that effectively bury reform were those made by legal counsel for the American Land Title Association, who argued that HUD's efforts should not proceed without first appreciating the "diverse and complicated" mortgage and settlement markets.[100] Additionally, the association's legal counsel warned, "charging ahead without giving full heed to the problems and

---

94. *See* 24 C.F.R. pt. 3500 app. A (instructions for lines 1100-1113).

95. *See* Gresham, *supra* note 36, at 453.

96. *See id.* (discussing consumer ignorance regarding title insurance for lenders). The author has extensive experience with title insurance claims in which the owners had no understanding of the nature of the title insurance for which they were charged.

97. According to the General Accounting Office,

> [w]hile consumers pay for title insurance, they generally do not know how to "shop around" for the best deal and may not even know that they can. Instead, they often rely on the advice of a real estate or mortgage professional in choosing a title insurer. As a result, title insurers and agents normally market their products exclusively to these types of professionals, who in some cases may recommend not the least expensive or most reputable title insurer or agent but the one that represents the professional's best interests.

Williams, *supra* note 74, at 5.

98. Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. 49,134, 49,146 (proposed July 29, 2002) (to be codified at 24 C.F.R. pt. 3500).

99. Committee on Banking, Housing, and Urban Affairs, United States Senate, HUD's Proposed Rule on the Real Estate Settlement Procedures Act 1-2, 43 (2004) (statement of Chairman Richard C. Shelby); Sheldon E. Hochberg, *HUD's RESPA Regulations: the Proposals, the Comments, the Future*, TITLE NEWS, Jan.-Feb. 2003, at 13, 13, *available at* http://www.alta.org/publications/titlenews/03/01_01.cfm.

100. *See* Hochberg, *supra* note 99, at 21, 23.

concerns noted in the many excellent comments that have been filed would almost certainly result in successful legal challenges to the final regulations."[101] Those willing to consider reform are thus faced with a paradox. As HUD noted, "[m]any of the current system's problems derive from the complexity of the process; with simplification of disclosures and better borrower education, the loan origination process can be improved."[102] Yet some who benefit from complexity argue that the process cannot be understood well enough for simplification to proceed.[103]

3. Abandoned Federal Model Recording Office Initiative

When RESPA was enacted in 1974, Congress declared that the federal law was intended to result "in significant reform and modernization of local recordkeeping of land title information."[104] In RESPA, Congress asked HUD to study the states' land recording systems and develop models for modernizing and standardizing recording.[105] This initiative resulted when "[v]irtually all of the witnesses in the recent Senate hearings on closing and settlement costs testified as to the urgent need for the Federal Government to take meaningful steps in this area to assist local governments in improving and modernizing their land record systems."[106] The statute directed the Secretary of HUD to

> establish and place in operation on a demonstration basis, in representative political subdivisions (selected by him) in various areas of the United States, a model system or systems for the recordation of land title information in a manner and form calculated to facilitate and simplify land transfers and mortgage transactions and reduce the cost thereof, with a view to the possible development (utilizing the information and experience gained under this section) of a nationally uniform system of land parcel recordation.[107]

Congress also directed HUD to consider whether additional legislation was necessary and to report any

> recommendations on the ways in which the Federal Government can assist and encourage local governments to modernize their methods for the recordation of land title information, including the feasibility of providing financial assistance

---

101. *See id.*

102. Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. at 49,135.

103. *See* Hochberg, *supra* note 99, at 21-22.

104. 12 U.S.C. § 2601(b)(4) (2000).

105. *See id.* § 2601(a)-(b).

106. S. REP. NO. 93-866 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6546, 6553.

107. Pub. L. No. 93-533, § 13, 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2611 (1974)) (repealed by Pub. L. No. 104-208, § 2103(h), 110 Stat. 3009, 3009-401 (1996)).

> or incentives to local governments that seek to adopt one of the model systems developed by the Secretary . . . .[108]

HUD's research found that savings to the public from a modernized system might not immediately be apparent, but in the long run reform reduces settlement costs both for the government and the public.[109] Leaders within HUD noted that "[a]rchaic and inefficient recordation procedures were thought to add to the costs of searching and examining titles."[110] To unify the legal framework, HUD endorsed the uniform real estate transactions laws then being proposed by NCCUSL.[111] The research also found that "a parcel indexing system using unique parcel identification numbers is the most effective means of indexing title documents."[112] HUD established "demonstration projects" in several jurisdictions.[113]

The most ambitious project—to encourage adoption of a fundamentally different title registration process—failed to gain any legislative support.[114] Other more modest projects provided grants for installing computers or for feasibility studies, none of which would have changed the nature of process.[115] In North Carolina, two counties were provided some funds to develop parcel identifier systems to institute an improved method of identifying real estate and indexing records.[116] But the result of these efforts left no appreciable impact on the status quo.[117] In what sounds like exasperation, HUD concluded its project simply by encouraging "efforts to streamline and modernize the daily operations of recorders, clerks and registrar's offices."[118]

The federal government's effort to develop model recording systems was short lived. The part of RESPA authorizing federal involvement was formally stricken from the statutes in 1996 as "obsolete," as part of the Economic Growth and

---

108. *Id.* § 14.

109. Richard J. Patterson & Sandra J. Alexander, *Land Title Records Modernization: An Update on the RESPA Section 13 Research*, 16 REAL PROP. PROB. & TR. J. 630, 632 (1981).

110. *Id* at 630.

111. *Id.* at 633.

112. *Id.* at 636.

113. *Id.* at 638.

114. The proposal was for Summit County, Colorado. *Id.* at 642-43.

115. *See id.* at 638-43.

116. *Id.* at 639-40; Interview with Charles Moore, formerly of the Land Records Mgmt. Section, North Carolina Dep't of Sec'y of State (Oct. 11, 2006) (describing the North Carolina project). Even though a third county in one of the most rural areas of the state was mentioned as involved in the project, the current register has no record of any such project and that particular county's operations have evolved slowly in the same way as other rural counties. Interview with Daphne Dockery, Register of Deeds, Cherokee County, North Carolina (Dec. 6, 2006).

117. *See* Patterson & Alexander, *supra* note 109, at 643.

118. *Id.*

Regulatory Paperwork Reduction Act.[119] Congress thus declared without explanation that there was no further need to study changes to the state land records system, and federal impetus to develop a uniform system ceased.

III. OPPORTUNITIES FOR SIMPLIFICATION AND UNIFICATION

The case for unifying and simplifying the laws governing real estate records and transactions is more compelling now than ever. As the volume and pace of real estate transactions increase, conveyances and financing become increasingly interstate and international, and new tools have emerged for identifying real estate and managing information. The following sections describe several of the most compelling cases for simplification and unification.

A. *Unifying and Clarifying Recording Laws*

State recording statutes are the core of real estate conveyance law. For all practical purposes, these laws have remained unchanged for decades despite dramatic changes in the scope and complexity of real estate ownership and finance and the availability of new technology for managing information. Although the statutes read like riddles, their opacity is misleading because, as applied, they are intended to accomplish essentially the same thing: they give priority in a competition of claims to the party who records first, unless that party acquired the interest knowing about a prior, unrecorded conveyance.[120] A review of the statutes demonstrates that the confusion generated by these statutes is unwarranted and can be substantially diminished with legislative action.[121]

---

119. Reductions in Real Estate Settlement Procedures Act of 1974 Regulatory Burdens, Pub. L. No. 104-208, § 2103(h), 110 Stat. 3009, 3009-401 (1996).

120. *See infra* notes 124-126 and accompanying text.

121. The recording statutes described in the text *infra* govern deeds, and usually also govern security interests in real property. Some states have statutes that separately address security instruments or other particular kinds of conveyances. *E.g.*, N.C. GEN. STAT. ANN. § 47-20 (West 2007) (deeds of trust and mortgages); *id.* § 47-27 (easements). In some instances, however, the rules are ostensibly different. *Compare* 21 PA. CONS. STAT. ANN. § 351 (West 2007) (race-notice statute governing deeds), *with id.* § 622 (race statute governing mortgages). The nuances of priorities within various jurisdictions, especially for certain kinds of security instruments such as purchase money mortgages, construction mortgages, and future advances, are myriad, a complete statement of which would be a Sisyphean undertaking. This article is not intended to be a comprehensive encyclopedia of the recording laws but rather a survey that demonstrates the need for clarity and uniformity. Any omissions or oversights should serve to emphasize this need.

1. The Deceptive Variation Among Recording Statutes

All states have local recording offices for real estate instruments and laws that govern the effect of recording, including dispute resolution if there is a conflict between the sequence of conveyances and the order in which instruments are recorded. The original goal of recording acts was to require those claiming rights in real property to record their instruments so that information was available to potential purchasers and creditors trying to determine the extent of someone's claim to ownership.[122] Most of the states' laws share the same essential features, which take into account both the order of recording and any notice a claimant may have had about a prior, competing conveyance. Recording laws give those who acquire interests a legitimate means of protecting against otherwise undetectable competing claims, by giving priority to interests that are first recorded publicly.

Without a recording statute, if two grantees are conveyed the same real estate, the first conveyance will be acknowledged as effective because the grantor had nothing left to give when the second conveyance was made. Only application of an overarching equitable principle will alter this outcome. The recording laws can change the result based on either or both of two factors: the sequence in which the instruments were recorded, and knowledge about a prior conveyance obtained by means other than the records. The statutes generally are described as one of three types: "race," "notice," or "race-notice."[123] The following are examples of the simplest forms of these three types of recording statutes:

Race	**Notice**	**Race-Notice**
"A deed concerning lands or tenements shall have priority from the time that it is recorded in the proper office without respect to the time that it was signed, sealed and delivered."[124]	"No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies."[125]	"Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."[126]

Only three states still have statutes that ostensibly base priority purely on recording: Delaware, Louisiana, and North Carolina.[127] Many of the states' original

122. *See* 14 POWELL, *supra* note 11, § 82.02[1][c][i].

123. *See generally id.* § 82.02 (discussing the basic features of the three types of statutes).

124. DEL. CODE ANN. tit. 25, § 153 (1989).

125. CONN. GEN. STAT. ANN. § 47-10 (West 2004).

126. CAL. CIV. CODE § 1107 (West 2007).

127. *See* DEL. CODE ANN. tit. 25, § 153 (1989); LA. CIV. CODE ANN. art. 3338 (2007); N.C.

recording laws were race-type statutes but were later modified to take notice into account.[128] Delaware is alone in embracing a pure race statute within the last century, which it did in 1968.[129] As a North Carolina court said, the essence of a "pure" race recording statute is that "no notice to the purchaser, . . . however full and formal, will supply the place of registration."[130] Based on the statute alone, those who record first will have title even if they knew someone else was already conveyed the same property. The courts remain intolerant of such an unfair result and have made exceptions to the ostensible purity of pure race statutes.[131] For example, in Delaware, the only state to adopt a pure race statute relatively recently, the state's supreme court recognizes "equitable mortgages" by which a court may give priority to a mortgage not properly recorded.[132] The Delaware Supreme Court granted priority to a mortgage that was not recorded in the manner required by statute, holding that a competing creditor who was aware of the prior attempt to grant a mortgage "'takes subject to that equity.'"[133] Therefore, lack of actual notice was a judicially imputed condition to priority.[134] The North Carolina Supreme Court also has recognized a court's equitable power to override the recording statute when it held that a corporation could not take title as "an innocent bona fide purchaser for value" when one of its shareholders had actual knowledge of a competing unrecorded claim, although the recording law said nothing about a purchaser who records first having to be innocent.[135] The courts have also avoided the law's potential for inequity by wielding the sometimes omnipotent constructive trust concept. For example, in another North Carolina case the court of appeals used a constructive trust to address conflicts arising from a recorded deed that had omitted part of the land intended to be conveyed, holding that the recording statute did not protect someone who was not a

---

GEN. STAT. ANN. 47-18(a) (West 2007).

128. *See* 14 POWELL, *supra* note 11, § 82.02[1][c][i].

129. *See* DEL. CODE ANN. tit. 25, § 153 (1989); *see also* Mehaffey v. Raley, No. 1442-K, 2002 WL 31112196, at *3-4 (Del. Ch. 2002) (describing statute and refusing to apply a resulting trust to subordinate a prior recorded deed); Cravero v. Holleger, 566 A.2d 8, 19-20 (Del. Ch. 1989) (noting 1968 change to a pure race statute, but holding that the recording act did not apply to the case); N & W Dev. Co. v. Carey, No. 6895, 1983 WL 17997, at *3-4 (Del. Ch. 1983) (noting statute is pure race and refusing to consider claim regarding actual notice).

130. Quinnerly v. Quinnerly, 19 S.E. 99, 99 (N.C. 1894) (quoting Blevins v. Barker, 75 N.C. 436, 438 (1876)).

131. *See* Charles Szypszak, *North Carolina's Real Estate Recording Laws: The Ghost of 1885*, 28 N.C. CENT. L.J. 199, 206-11 (2006) (discussing the matters affecting real estate ownership that do not appear in the statutes in a "pure" race recording jurisdiction).

132. *See* Handler Constr., Inc v. CoreStates Bank, N.A., 633 A.2d 356, 361, 364 (Del. 1993).

133. *Id.* at 364 (quoting JOHN ADAMS, THE DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW 286 (Robert Ralston ed., 8th ed. 1890)).

134. *See id.* at 364-65.

135. *See* Hice v. Hi-Mil, Inc., 273 S.E.2d 268, 272 (N.C. 1981).

"bona fide purchaser for value without notice or someone occupying a similar status."[136] Again, notice is not supposed to matter with a race statute.

Real estate priorities are also subject to variation based on other rights not shown in the real estate records. Someone who gives a deed cannot use the grantee's failure to record as a defense against the deed's enforcement.[137] Recording does not validate a deed obtained fraudulently[138] or without valuable consideration.[139] These exceptions usually follow from a statute's identification of "creditors or purchasers for a valuable consideration" as those who are protected.[140] Also, an owner will be held subject to rights described in an unrecorded instrument if the instrument is incorporated by reference into the owner's deed or another recorded instrument in the chain of title.[141] These exceptions demonstrate that equitable concerns are taken into consideration regardless of the pretended purity of the recording statute.

As stated above, only three states have "pure race" statutes. Most state statutes expressly make someone's knowledge about an unrecorded instrument a factor in determining priority.[142] Seventeen states have statutes in the form of a declaration that an unrecorded instrument is void against someone who acquires an interest in the same real estate *without actual knowledge* of the unrecorded instrument.[143] This type of statute is known as a "notice" statute. Its distinguishing feature is that in a contest between competing grantees, the law subordinates a grantee who fails to record to a later purchaser who was unaware of the first conveyance. Three other states—Connecticut, Oklahoma, and Vermont—have statutes that have been characterized as notice statutes, but these statutes are in a form that is different than other notice statutes.[144] They declare that an unrecorded instrument is not enforceable against

---

136. Arnette v. Morgan, 363 S.E.2d 678, 680-81 (N.C. Ct. App. 1988).

137. *See* Patterson v. Bryant, 5 S.E.2d 849, 851 (N.C. 1939).

138. Twitty v. Cochran, 199 S.E. 29, 30 (N.C. 1938) (explaining that the statute did not give priority to a recorded deed over an unrecorded deed when the former was "a voluntary one made for a fraudulent purpose").

139. *Paterson,* 5 S.E.2d at 851 (holding that the first to record prevails "in the absence of fraud or matters creating an estoppel").

140. N.C. GEN. STAT. §§ 47-18(a), 47-20(a), 47-27 (2005).

141. *See generally* State Trust Co. v. Braznell, 41 S.E.2d 744 (N.C. 1947).

142. *See infra* notes 143-159 and accompanying text.

143. *See* ALA. CODE § 35-4-90(a) (2007); ARIZ. REV. STAT. ANN. § 33-411(A) (2007); ARK. CODE ANN. § 14-15-404 (West 2007); FLA. STAT. ANN. § 695.01(1) (West 2007); IND. CODE ANN § 32-21-3-3 (West 2007); IOWA CODE ANN. § 558.41 (West 2007); KAN. STAT. ANN. § 58-2223 (2006); KY. REV. STAT. ANN. § 382.080 (West 2007); ME. REV. STAT. ANN. tit. 33, § 201 (2007); MASS. GEN. LAWS ANN. ch. 183, § 4 (West 2007); MO. ANN. STAT. § 442.400 (West 2007); N.M. STAT. ANN. § 14-9-3 (West 2007); OHIO REV. CODE ANN. § 5301.25(A) (West 2007); R.I. GEN. LAWS § 34-11-1 (2007); TEX. PROP. CODE ANN. § 13.001(a) (Vernon 2007); VA. CODE ANN. § 55-96 (West 2007); W. VA. CODE ANN. § 40-1-9 (West 2007).

144. *See* CONN. GEN. STAT. ANN. § 47-10 (West 2007); OKLA. STAT. ANN. tit. 16, § 15 (West 2007); VT. STAT. ANN. tit. 27, § 342 (2007).

later grantees but do not expressly state that such later grantees would be bound by the prior conveyance if they had actual knowledge of it.[145] For example, Connecticut's statute provides as follows: "No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies."[146] Although notice is not mentioned, the courts in these states have construed their statutes as denying priority to those with actual notice. The Connecticut Supreme Court held that a court may employ its equitable powers to subordinate an interest based on actual knowledge of a prior unrecorded conveyance.[147] In Oklahoma, the state supreme court held that the statutory phrase "third persons" against whom unrecorded instruments are declared invalid means "subsequent purchasers in good faith, for value and without notice," so that someone with actual notice of a prior conveyance could be subordinated to it.[148] The Vermont Supreme Court reasoned that someone acquiring property with knowledge of a prior conveyance would acquire the property in trust for the first, unrecorded conveyance.[149] These judicial constructions demonstrate that the courts do not allow those who acquire title knowing of someone's prior acquisition to benefit from the recording statute, a concern all courts share regardless of the form of the state's recording statute.

Twenty-three states have statutes declaring that an unrecorded instrument is void against someone who acquires an interest in the same real estate without actual knowledge of the prior conveyance *and who records first.*[150] This is known as a "race-notice" statute. In some statutes, the second grantee's lack of knowledge of the prior conveyance is expressed as "the absence of actual notice,"[151] while in other

---

145. *See* CONN. GEN. STAT. ANN. § 47-10; OKLA. STAT. ANN. tit. 16, § 15; VT. STAT. ANN. tit. 27, § 342. The Vermont Supreme Court compared its state statute to the "notice" statute in New Hampshire. *See* Hemingway v. Shatney, 568 A.2d 394, 396 n.3 (Vt. 1989). However, the New Hampshire Supreme Court considers its state's statute to be a race-notice statute. Amoskeag Bank v. Chagnon, 572 A.2d 1153, 1155 (N.H. 1990).

146. CONN. GEN. STAT. ANN. § 47-10.

147. *See* N.Y., N.H. & H.R. Co. v. Russell, 78 A. 324, 328 (Conn. 1910).

148. *See* Davis v. Lewis, 100 P.2d 994, 997 (Okla. 1940).

149. *See Hemingway*, 568 A.2d at 395.

150. ALASKA STAT. § 40.17.080 (2007); CAL. CIV. CODE § 1107 (West 2007); COLO. REV. STAT. ANN. § 38-35-109(1) (West 2007); HAW. REV. STAT. ANN. § 502-83 (LexisNexis 2006); IDAHO CODE ANN. § 55-812 (2007); MD. CODE ANN. REAL PROP. § 3-203 (West 2007); MICH. COMP. LAWS ANN. § 565.29 (West 2007); MINN. STAT. ANN. § 507.34 (West 2007); MISS. CODE ANN. § 89-5-5 (West 2007); MONT. CODE ANN. § 70-21-304 (2005); NEB. REV. STAT. § 76-238 (2006); NEV. REV. STAT. ANN. § 111.325 (West 2007); N.J. STAT. ANN. § 46:22-1 (West 2007); N.Y. REAL PROP. LAW § 291 (McKinney 2007); N.D. CENT. CODE § 47-19-41 (2005); OR. REV. STAT. ANN. § 93.640 (West 2005); 21 PA. CONS. STAT. ANN. § 351 (West 2007); S.C. CODE ANN. § 30-7-10 (2006); S.D. CODIFIED LAWS § 43-28-17 (2007); UTAH CODE ANN. § 57-3-103 (West 2007); WASH. REV. CODE ANN. § 65.08.070 (West 2007); WIS. STAT. ANN. § 706.08(1)(a) (West 2007); WYO. STAT. ANN. § 34-1-120 (2007).

151. *E.g.*, MISS. CODE ANN. § 89-5-5 (1999).

statutes it is described with a term such as "good faith,"[152] which has been interpreted to include absence of actual notice.[153] One state, North Dakota, expressly warns about the effect of a later recording: "This section shall be legal notice to all who claim under unrecorded instruments that prior recording of later instruments not entitled to be recorded may nullify their right, title, interest, or lien, to, in, or upon affected real property."[154] Other statutes are not so explicitly instructive.

Four states have statutes that are difficult to define as notice or race-notice. The statutes declare that an unrecorded conveyance is invalid against a subsequent grantee without notice, but also state that the unrecorded deed becomes effective when it is recorded, without specifying against whom it becomes effective.[155] Georgia, Illinois, and New Hampshire have statutes in a form that could be construed as pure notice statutes,[156] but they have been interpreted by their state courts as race-notice.[157] The Tennessee statute was applied as a race-notice statute in nineteenth century cases, but commentators doubted whether that interpretation was correct.[158] The District of Columbia has the same kind of statute,[159] but apparently there is no reported case in which a court has characterized the district's statute as race-notice or notice.

These interpretations are but a sampling to illustrate how the recording statutes leave the courts and parties uncertain about important rules governing property rights. Recording statutes are products of centuries-old formulations, ad hoc modifications, and a misconception that they host sacrosanct purity that must be preserved. One commentator offered the following poignant summary: "It is, therefore, impossible to assert precisely the proper interpretation of a particular statute until a jurisdiction's highest court has made a final decision. Indeed, some courts have had great difficulty in determining exactly what kind of statute is in force in their jurisdiction."[160] Moreover, the statutes may make exactitude impossible, despite decades of analysis. In Tennessee, for example, a careful study concluded that the state's recording statute defied precise characterization, and noted that: "It is perhaps strange that such an important issue was not authoritatively settled long ago, but this has not been the

152. *E.g.*, NEV. REV. STAT. § 111.325 (2005).

153. *See* Allison Steel Mfg. Co. v. Bentonite, Inc., 471 P.2d 666, 669 (Nev. 1970).

154. N.D. CENT. CODE § 47-19-41 (1999).

155. *See* GA. CODE ANN. § 44-2-2(b) (Supp. 2006); 765 ILL. COMP. STAT. ANN. 5/30 (West 2007); N.H. REV. STAT. ANN. §§ 477:3-a, 477:7 (2007); TENN. CODE ANN. § 66-5-106 (West 2007).

156. *See* GA. CODE ANN. § 44-2-2(b); 765 ILL. COMP. STAT. ANN. 5/30; N.H. REV. STAT. ANN. §§ 477:3-a, 477:7.

157. *See* Hardin v. City Wide Wrecker Serv., Inc., 502 S.E.2d 548, 550 (Ga. Ct. App. 1998); Davis v. United States, 705 F. Supp. 446, 450 (C.D. Ill. 1989); Brookfield v. Goodrich, 32 Ill. 363, 367 (1863); Amoskeag Bank v. Chagnon, 572 A.2d 1153, 1155 (N.H. 1990).

158. *See* Toxey H. Sewell, *The Tennessee Recording System*, 50 TENN. L. REV. 1, 35 (1982); *see infra* notes 160-163 (discussing the confusion surrounding the Tennessee statute).

159. *See* D.C. CODE § 42-401 (2007).

160. 14 POWELL, *supra* note 11, § 82.02[1][b].

case."[161] The commentator's observations were instructive in another respect. He referred back to cases decided in 1837 and 1900, the first of which involved slave ownership, to find interpretations in which the distinction between a notice and a race-notice statute mattered, and no legislative action has occurred since the courts in those cases expressed dissatisfaction with the statute.[162] Even this commentator was timid about the prospects for reform, because, in light of eleven major features of the laws "believed to warrant special attention and consideration," he said that "[i]f and when a revision is undertaken, however, this would have to be done carefully as the provisions are very sensitive."[163]

The minimal reform that has occurred is best illustrated by Colorado. In 1974, a commentator disagreed with the Colorado Supreme Court's characterization of its statute as race-notice; the commentator contended that such a characterization was unnecessary to the cases decided, and argued for interpretation of the statute as a notice statute.[164] The legislature responded to the confusion not by changing the statute to make it more readily understandable, but by adding to the text a characterization that would be understood by few: "This is a race-notice recording statute."[165] In 1958, South Carolina added a race element to its statute after its supreme court interpreted the law as a notice statute.[166] This was done in response to a case in which a debtor obtained loans from two creditors using the same property as security, misrepresenting to the second creditor that the property was free of liens.[167] The first creditor's mortgage was recorded the next day, a few minutes before the second creditor's mortgage.[168] The court held that the second mortgage had priority because the first mortgage had not been recorded when the second mortgage was made.[169] The court chided the first creditor for not recording "promptly" enough.[170] The legislature disagreed with the outcome and, in a rare instance of legislative involvement in recent decades, changed the state's recording statute.[171]

Even those who write the property law treatises have difficulty characterizing some of the states' laws. Delaware is listed among the jurisdictions with a notice

---

161. Sewell, *supra* note 158, at 35.

162. *Id.* at 35-37.

163. *Id.* at 66-69.

164. *See* Charles G. Rogers, Note, *Real Property—The Colorado Recording Act: Race-Notice or Pure Notice? Colo. Rev. Stat. Ann. § 118-6-9*, 51 DENV. L.J. 115, 116 (1974).

165. 1984 Colo. Sess. Laws 979 (codified at COLO. REV. STAT. § 38-35-109(1) (2006)).

166. *See* 1958 S.C. Acts 1958 (codified at S.C. CODE ANN. § 30-7-10 (2006); *see also* Leasing Enter., Inc. v. Livingston, 363 S.E.2d 410, 412 (S.C. Ct. App. 1987) (discussing the change to the statute).

167. *See* S.C. Nat'l Bank v. Guest, 102 S.E.2d 215, 216 (S.C. 1958).

168. *Id.*

169. *Id.* at 218.

170. *Id.* at 217.

171. *See supra* note 166 and accompanying text.

statute,[172] but according to that state's courts, the statute was amended in 1968 to be a pure race statute.[173] Similarly, South Carolina's statute is described as a notice statute by one treatise,[174] but in 1958 it was amended to become a race-notice statute.[175] As described above, New Hampshire law is confusing; its recording statute has been characterized as a notice statute[176] although the state's supreme court has interpreted it to be race-notice.[177] These inconsistencies are noted not to criticize those doing their best to interpret confusing statutes, but rather to illustrate how difficult it is even for experts to make sense of these laws.

The differences between notice and race-notice statutes are fine and could only rarely matter.[178] Neither lawmakers, nor those who rely on the system, have a principled point of view about the preferred operation of these statutes—few have any understanding of the potential differences. Those who depend on the public records would benefit from rules that were consistent and more predictable in application, rather than obscure variations the application of which becomes clear only after courts have struggled to interpret the statutes.

2. Uniform Law Proposals

The preceding section illustrates that the variation and opacity of the states' recording laws cannot be justified by the rare instances in which the differences would matter in resolving conflicts. Models exist for unifying and simplifying the recording laws. As described above, most states' courts have applied a race-notice analysis in resolving conflicts regardless of the ostensible form of statute, and NCCUSL advanced this approach with USLTA in 1976.[179] This model provides that the grantee of a recorded conveyance takes free of an adverse claim unless at the time of the conveyance the grantee knew of the adverse claim or the adverse claim was the subject of a recorded document.[180] The key parts of NCCUSL's model is as follows:

---

172. *See* 11 JOHN L. MCCORMACK, THOMPSON ON REAL PROPERTY § 92.08(b) & n.286 (David A. Thomas ed., 2d ed. 2002).

173. *See* N & W Dev. Co. v. Carey, 1983 Del. Ch. LEXIS 410, at *9 (Del. Ch. 1983).

174. *See* MCCORMACK, *supra* note 172, § 92.08(b) & n.286.

175. *See* Leasing Enter., Inc. v. Livingston, 363 S.E.2d 410, 412 (S.C. Ct. App. 1987).

176. *See* MCCORMACK, *supra* note 172, § 92.08(b) & n.286.

177. Amoskeag Bank v. Chagnon, 572 A.2d 1153, 1155 (N.H. 1990).

178. For example, assume someone makes a loan to be secured by a mortgage with knowledge of an unrecorded prior mortgage. If the prior mortgagee learns of the second-in-time mortgage and then records first, a race-notice statute would not protect the second-in-time mortgagee because only a good faith purchaser who records first is protected. A notice statute would deny priority to the first mortgagee because it would be void against the second mortgagee who acquired title without notice of the first mortgage.

179. *See* UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 3-202(a) (amended 1977), 14 U.L.A. 343, 377 (2005).

180. *Id.*

> Except as provided by this Article, in addition to the interests a purchaser acquires . . . [with a legally sufficient document], a purchaser for value who has recorded his conveyance also acquires the real estate free of any subsisting adverse claim, whether or not the transferor had actual authority to convey, unless the adverse claim is:
>
> (1) created or evidenced by a document recorded before the conveyance to the purchaser is recorded;
> (2) a use or occupancy inconsistent with the record title to the extent the use or occupancy would be revealed by reasonable inspection or inquiry;
> (3) one of which the purchaser had knowledge at the time his interest was created . . . [or is charged with knowledge acquired by the purchaser's attorney or agent].[181]

The statute lists the following additional exceptions to the first-to-record requirement: rights created by law; fraudulent or illegal conveyances; federal tax claims; certain liens granted retroactive effect; future advances secured by recorded documents and adequately disclosed by them; and other rights or liens recognized by statute.[182] Although these exceptions make the rules far from simple, the model at least consolidates understandable recording requirements and exceptions.[183] By bringing the exceptions to the priority requirement expressly within the recording statute, those who rely on real estate records to protect their property rights would benefit from greater clarity about how rights in real estate are determined. The model also appropriately reflects the recording and priority rules as they have evolved in a majority of the jurisdictions.

USLTA also addressed other aspects of land records commonly left undefined by state statutes. An important question involves how old a claim can be but still remain enforceable. In the absence of a statutorily or judicially imposed limitation, a claim to real estate based on a recorded document can remain dormant indefinitely and still be enforceable. Beginning with Iowa in 1919,[184] some states adopted statutes that cut off very old claims. These statutes, called "marketable title" acts, typically invalidate latent claims that have not been raised for forty years.[185] The acts allow someone to

---

181. *Id.* §§ 3-202(a)(1)-(3), 3-205, 3-206, 14 U.L.A. at 377, 379-80.

182. *Id.* § 3-202(a)(4)-(11), 14 U.L.A. at 379.

183. For an example of a fairly straightforward acknowledgment of off-record interests, *see* IOWA CODE ANN. § 558.41(2) (West 2007) (noting that nothing in the statutory priority is intended to abrogate the collection of property taxes).

184. 1919 Iowa Acts 316-17 (codified as amended at IOWA CODE ANN. §§ 614.29-.38 (West 1999 & Supp. 2006)).

185. CONN. GEN. STAT. ANN. §§ 47-33b to 47-33i (West 2004); FLA. STAT. ANN. §§ 712.01–712.10 (West 2000 & Supp. 2007); 735 ILL. COMP. STAT. ANN. 5/13-118 (West 2003); IND. CODE ANN. §§ 32-20-3-1 to 32-20-4-3 (LexisNexis 2002); IOWA CODE ANN. §§ 614.29-.38 (West 1999 & Supp. 2007); KAN. STAT. ANN. §§ 58-3401 to 58-3412 (2005); MICH. COMP. LAWS ANN. §§ 565.101-

preserve a claim by filing a notice within the limitations period.[186] A number of midwestern states adopted these statutes in the 1940s and 1950s,[187] and at least nineteen states now have them.[188] Marketable title acts are statutes of limitations and are just as enforceable as reasonable limitation periods generally.[189] Courts have found these statutes enforceable, such as the Minnesota Supreme Court, which observed that they "are considered vital to all who are engaged in or concerned with the conveyance of real property."[190] USLTA included a marketable title act with a thirty-year limitation period, except when a notice preserving the claim has been filed within that time and except for claims based on physical evidence, occupancy, mineral interests, federal law claims, and claims appearing on public tax rolls.[191] Such an approach makes sense. Forty years is too long for a claim to be dormant. Claims based on older instruments or events are most likely windfalls to those pursuing them. Widespread adoption and enforcement of marketable title acts would contribute toward elimination of some undeserving claims and reduce some of the avoidable risks—such as stale claims resulting in windfalls—involved with land records.

Serious and open-minded consideration of system reform will uncover other opportunities for improvement. For example, the bulk of the real estate records consist of security instruments—mortgages or deeds of trust, which typically are at least several pages long but in most cases contain standardized terms and conditions. Management of the records could be improved by use of simplified notice recordings, similar to what are used in every state for UCC filings.[192] Recording just the essential

---

.109 (West 2006); MINN. STAT. ANN. § 541.023 (West 2000 & Supp. 2007); NEB. REV. STAT. §§ 76-288 to 76-298 (2003 & Supp. 2006); N.C. GEN. STAT. §§ 47B-1 to 47B-9 (2005); N.D. CENT. CODE § 47-19.1-01 to 47-19.1-11 (1999 & Supp. 2005); OHIO REV. CODE ANN. §§ 5301.47-.56 (LexisNexis 2004); OKLA. STAT. ANN. tit. 16, §§ 71-80 (West 1999); R.I. GEN. LAWS §§ 34-13.1-1 to 34-13.1-11 (1995); S.D. CODIFIED LAWS §§ 43-30-1 to 43-30-17 (2007); UTAH CODE ANN. §§ 57-9-1 to 57-9-10 (2000); VT. STAT. ANN. tit. 27, §§ 601-06 (2006); WIS. STAT. ANN. § 893.33 (West 1996); WYO. STAT. ANN. §§ 34-10-101 to 34-10-109 (2007). Some other states have limitations provisions that could apply to particular claims. For example, California has a modified version of a marketable title act that limits certain kinds of claims based on old records. *See* CAL. CIV. CODE §§ 880.020 to 887.010 (West 2007).

186. *See supra* note 185.

187. *See* Ralph W. Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185, 185 (1951).

188. *See supra* notes 184-185 and accompanying text.

189. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (discussing the general enforceability of reasonable statutes of limitations).

190. Wichelman v. Messner, 83 N.W.2d 800, 816, 825 (Minn. 1957). *See generally* Jay M. Zitter, Annotation, *Construction and Effect of "Marketable Record Title" Statutes*, 31 A.L.R. 4th 11 (1984) (discussing cases applying marketable title acts).

191. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT §§ 3-301 to 3-309 (1976), 14 U.L.A. 343, 385-92 (2005).

192. *See* U.C.C. §§ 9-502(a), 9-521 (amended 2000).

parts of the security interest—such as the parties' names, property identification, and maximum amount of secured indebtedness—would reduce recording volume in a typical registry by more than half, and remove from public access information in which the public has no legitimate interest.[193] Such a "notice" approach is already permitted by statute for certain kinds of real estate interests, such as leases and options.[194] The ULSIA, though not adopted in this country, provided inspiration for such a proposal in New Brunswick, Canada.[195] The Canadian advocates for the proposal described its advantages as "a reduced administrative and archival burden on the registry; greater flexibility in the drafting, amendment, and rollover of security agreements; enhanced confidentiality of the debtor's financial affairs; and simplified informational requirements for registration with a correspondingly reduced risk of invalidating error."[196] Unfortunately, no similar initiative is underway in the United States.

B. *Uniform Parcel Identifiers*

As early as the 1970s, commentators noted the possibility for a more precise and consistent method of describing real estate parcels.[197] The authors of a report submitted in connection with HUD's settlement process reform initiative observed that the absence of standardization in land descriptions was a "major problem" and could be addressed with consistent use of uniform tract or parcel identifiers.[198] One law review author summarized the sentiment for change in method: "All modern commentators agree that the system is slow, clumsy and expensive."[199] By the 1970s, the increase in volume and complexity of land transactions had already made the need for standardization obvious, and even in the early stages of the digital era observers noted "the rapid refinement which has occurred in both hardware and software in the automatic data processing field makes the task less complex and

193. This estimate is based on a review of a random volume at the Randolph County Register of Deeds, North Carolina, which included recordings made between September 11 and 15, 2006. The volume contains 2,618 pages consisting of 554 documents, of which 1,566 pages are for 159 deeds of trust. The average length of a deed of trust was 10 pages, with a range in the number of pages from 3 to 47.

194. *E.g.*, N.C. GEN. STAT. § 47-120 (2005).

195. Norman Siebrasse & Catherine Walsh, *The Influence of the ULSIA on the Proposed New Brunswick Land Security Act*, 20 NOVA L. REV. 1133, 1134-35 (1996).

196. *Id.* at 1137.

197. *E.g.*, Fairfax Leary, Jr., & David G. Blake, *Twentieth Century Real Estate Business and Eighteenth Century Recording*, 22 AM. U. L. REV. 275, 279 (1973) ("The time has come to adopt a unified computer-compatible system for the storage, retrieval, and dissemination of information concerning each parcel of land.").

198. BURKE & KITTRIE, *supra* note 87, at II-A-28.

199. Peter B. Maggs, *Automation of the Land Title System*, 22 AM. U. L. REV. 369, 369 (1973).

expensive."[200] Consequently, commentators noted that "[t]ract indices should be a pre-condition, or a first stage goal of" land record modernization.[201] Unfortunately, almost four decades later, this goal still has not been accomplished or pursued in any serious way.

With a parcel identifier system, tracts of land are assigned numbers keyed to a coordinate or mapping system.[202] Beginning in the 1960s, many states began requiring references in deeds to tax assessor numbers, but this requirement was for keeping tax records and not part of a movement toward a new indexing system for land conveyances.[203] Local governments quickly supported innovation for tax purposes because the change is seen as increasing collections.[204] The importance of parcel identifiers in a real estate conveyance context is that they incorporate a base of information developed with the most precise available methods for describing property boundaries, as well as provide a method for following a chain of title other than by use of grantor and grantee searches. Parcel identifiers involve their own risks of error, in the number assignment stage or as used in a title examination, but these risks can be diminished with appropriate safeguards such as cross-checks in the recording process and use of additional descriptive information in instruments to give confirmation that the numbers are associated with the intended property.[205]

A few states have taken beginning steps toward using parcel identifiers for land records. For instance, in the 1970s, North Carolina authorized counties to require parcel identifiers to be included on any instrument conveying an interest in real estate.[206] In 1977, the registers in counties with such a requirement were authorized to install an official index system using land parcel identifiers.[207] The county's system is first approved by the North Carolina Secretary of State, a review that examines, among other things, the numbering system, the geographic key being used for the identifier numbers, the technology that will be used to generate the index, and

200. BURKE & KITTRIE, *supra* note 87, at II-A-30.

201. *Id.* at V-A-26.

202. For example, the system in Ozaukee County, Wisconsin, uses a twelve-character number with four parts separated by hyphens, with the components defining an area from subdivision-size to subparts of a lot. Register of Deeds, Ozaukee County, Wisconsin, Parcel Numbering System, http://www.co.ozaukee.wi.us/RegisterDeeds/RealEstate/ParcelNumberingSystem.htm (last visited Oct. 28, 2007).

203. *See* Paul E. Basye, *A Uniform Land Parcel Identifier—Its Potential for All Our Land Records,* 22 AM. U. L. REV. 251, 257-58 (1973); *see, e.g.,* N.Y. REAL PROP. LAW § 333(1)-(e)(i) to (e)(ii) (McKinney 2007) (requiring forms to be submitted with deed that provides tax information).

204. Interview with Charles Moore, formerly of the Land Records Mgmt. Section, N.C. Dep't of Sec'y of State (Oct. 11, 2006).

205. Conversation with Joyce Pearson, Register of Deeds, Orange County, North Carolina (Dec. 17, 2006).

206. *See* N.C. GEN. STAT. ANN. § 161-30 (West 2007).

207. *Id.* § 161-22.2.

the accessibility of the information.[208] An approved system becomes the official index.[209] Such limited implementation does not give a measure of such a system's potential for uniformity and consistency, and the few systems in use suffer from unfamiliarity.[210] Other states' efforts also were limited. For instance, in 1988, Pennsylvania adopted an enabling statute, called the "Uniform Parcel Identifier Law," to authorize counties to require the implementation of a uniform parcel identifier system, using tax maps to designate parcel identifiers, but not requiring their use in deeds.[211] Oregon statutes prescribe a particular Oregon Coordinate System to be used in deed descriptions, but make them a supplemental means of identification rather than a required method.[212]

The Uniform Simplification of Land Transactions Act requires instruments to contain geographic reference information if the register maintains such an indexing system.[213] The Property Records Industry Association, an organization of public officials and others involved in property records, encouraged adoption of a unified parcel identifier system, but abandoned its efforts because of the work already undertaken by tax authorities based on local requirements.[214]

Some states have advisory bodies charged with developing recommendations for land records modernization,[215] and implementation of parcel identifiers for land conveyance records should be an integral part of their effort. Unlike some countries

---

208. *See id.*

209. *Id.* § 161-22.2(e)(2).

210. Conversation with Joyce Pearson, *supra* note 205.

211. 21 PA. CONS. STAT. ANN. §§ 331-37 (West 2001).

212. OR. REV. STAT. ANN. §§ 93.360-.370 (West 2005).

213. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 2-302(a)(4) (1976), 14 U.L.A. 343, 367 (2005).

214. *PRIA Accepts Parcel Code Committee Recommendation*, FOR THE RECORD (Property Records Industry Association, Morrisville, N.C.), Winter 2006, at 2, *available at* http://www.pria.us/newsletters/2006winter.pdf.

215. D. David Moyer & Bernard J. Niemann, Jr., *Land Information Systems: Development of Multipurpose Parcel-based Systems, in* THE HISTORY OF GEOGRAPHIC INFORMATION SYSTEMS: PERSPECTIVES FROM THE PIONEERS 85, 113 (Timothy W. Foresman ed., 1998). For instance, "[T]he Wisconsin Land Information Program (WLIP) is a voluntary, statewide program that provides financial and technical support to local governments for land records modernization efforts. All seventy-two Wisconsin counties participate in the Program." *See* Dept. Of Admin., State of Wisconsin, http://www.doa.state.wi.us/Category_print.asp?linkcatid=737&linkid=133&locid=9 (last visited Oct. 29, 2007). The North Carolina Geodetic Survey Section, Division of Land Resources, Department of Environment and Natural Resources, describes its mission as "to apply state-of-the art methods of precise positioning and advanced geodetic techniques to establish and maintain the official survey base of the state of North Carolina and to support mapping, boundary determination, property delineation, infrastructure development, resource evaluation surveys and scientific applications." North Carolina Geodetic Survey Section, Mission, Vision and Strategic Goals,"http://www.ncgs.state.nc.us/mission.html (last visited Oct. 29, 2007).

that have a unified and integrated approach to identifying land,[216] no such approach yet exists in the United States. As many as 80,000 agencies are involved in some way with geographic information, and the approaches at the federal, state, and local levels are fragmentary.[217] Although there are national organizations that work toward development of a coordinated system, to date none have successfully brought title records into the program.[218]

Failure to develop and adhere to a uniform system could result in the emergence of different systems and standards, further balkanizing land record systems rather than simplifying and unifying them. Implementation of a comprehensive parcel identifier system no longer awaits the development of the technologies or techniques. Although use of parcel identifiers for real estate records may not have the obvious immediate returns of increased tax collection, in the long run a reliable system will simplify real estate transactions and reduce the risk of boundary conflicts.

C. *Indexing Requirements*

The essence of recording is making a document publicly accessible. Access depends upon an examiner's ability to locate all instruments describing claims to particular real estate. This depends on the availability of a reliable index. Notwithstanding an index's vital importance, the indexing rules receive little attention in the legislatures and are left to local variation. The Property Records Industry Association, whose membership includes many registers of deeds, aptly described the problem as follows:

> With the millions of individual recorded documents that may be housed within any recording district, this index is essential to allow the users to locate the documents affecting the land in which they are interested. However, you will find differing interpretations of documents in every jurisdiction, often depending on what the caption of the document says and what the body of the document purports the transaction to be.[219]

---

216. The Netherlands has a unified, integrated, cadastral register containing 7 million land parcels and 3.5 million owners. It involves annual registration of 350,000 notarial deeds and 340,000 new mortgages. IAN MASSER, GOVERNMENTS AND GEOGRAPHIC INFORMATION 39-40 (1998).

217. *See id.* at 88-89; Lisa Warnecke, *State and Local Government GIS Initiatives, in* THE HISTORY OF GEOGRAPHIC INFORMATION SYSTEMS: PERSPECTIVES FROM THE PIONEERS 265, 272 (Timothy W. Foresman ed. 1998).

218. The National States Geographic Information Council ("NSGIC") is comprised of senior state GIS managers and "representatives from federal agencies, local government, the private sector, academia and other professional organizations." *See* National States Geographic Information Council, About NSGIC, http://www.nsgic.org/about/index.cfm (last visited Oct. 29, 2007).

219. KATHI L. GUAY & DARREN G. ROSS, PROPERTY RECORDS INDUSTRY ASSOCIATION, WHITE PAPER ON "FIRST PAGE INDEXING REQUIREMENTS" 7 (2005), *available at*

The Association warned of the need for consistency among the more than 3,600 recording offices in the country.[220]

Indexing is not simple in any information processing context yet it receives little attention except by those who must compile them and by those who are frustrated by them.[221] Effective indexing requires an understanding of the context of the information being indexed.[222] Leaving registers to determine indexing information in privately prepared instruments is fundamentally backward. Those who prepare and record instruments should be best able to identify the parties to an instrument whose names should be reflected in the index.[223]

Approximately twelve states have some form of first page indexing content requirements.[224] For example, Washington requires that the first page of an instrument show a title, the parties' names, reference numbers to affected documents, an abbreviated legal description, and a tax parcel or account number.[225] The alternative to including this on the first page is to prepare a cover sheet in a prescribed form with this information.[226] NCCUSL's proposed uniform statutes made the submitter responsible for including in documents presented for recording, or in accompanying instructions, statutorily specified minimum indexing information.[227] The model further provided that the register "may rely on the indexing information supplied and if it is indexed in accordance with the information supplied, neither he, the recording office, nor the State is liable to any person for loss resulting from error in indexing."[228] All states should adopt uniform approaches to requiring submitters to identify the indexing information. In an office handling a multitude of instruments, the register's ability to rely on information clearly supplied by the submitter would be a step toward aligning responsibilities with practicality.

---

http://www.pria.us/1stpageindexing/First_Page_Indexing_Standards_Final.pdf.

220. *Id.* at 8.

221. *See, e.g.*, PAT F. BOOTH, INDEXING: THE MANUAL OF GOOD PRACTICE 2 (2001) ("Indexing is a vital activity that, nevertheless, often goes unnoticed.").

222. *See, e.g., id.* at 3 ("It involves intellectual activity – understanding and analysis of texts and their messages, selection of significant references to relevant topics, assembly of references, choice of suitable vocabulary for the representation of topics, and presentation in an accessible format.").

223. *See* Leary & Blake, *supra* note 197, at 310 ("The obvious answer is that the person presenting an instrument for recording is in a far better position than the subsequent purchaser to see to it that the presented instrument is properly indexed as part of his filing procedure.").

224. GUAY & ROSS, *supra* note 219, at 8.

225. WASH. REV. CODE ANN. § 65.04.045 (West 2007).

226. *Id.* § 65.04.047.

227. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT §§ 2-301(a)(4), 2-302, 2-303 (1976), 14 U.L.A. 346, 365-68 (2005).

228. *Id.* § 6-205(b), 14 U.L.A. at 460.

D. *Control of Potential Abuse*

The current laws governing real estate records evolved in a culture very different from what exists today. During most of this country's history, the typical real estate recording office was in a courthouse, and registers were often personally acquainted with those who presented documents or searched the records. Today a typical real estate recording office, especially in an urban area, is a busy public arena, and the records are increasingly accessible through the Internet. New opportunities and inclinations exist for fraud and other wrongdoing, including identity theft.

The real estate records provide opportunities to collect information about others and to inflict harm and annoyance with false and frivolous filings. Such filings can delay or ruin a real estate transaction or impair someone's capacity to obtain credit. For example, a document can be filed claiming a "nonconsensual lien" against a targeted individual, such as a public official, which purports to claim a right to the target's property unless a response is recorded within a limited time. The target remains unaware of the filing until a search of the record is made in connection with a conveyance or financing transaction. Although the frivolous nature of the recorded claim is apparent, the filing may be sufficient to hold up a transaction while the instrument is investigated, and judicial action may be necessary for a final resolution.

No feasible method for preventing false or frivolous claims from being recorded exists. Registers do not have the legal preparation nor the means to scrutinize the nature of presented instruments. Requiring registers to review documents would endanger legitimate instruments. The only reasonable approach to discouraging abuse of the recording system is meaningful criminal penalties and civil remedies.

At common law someone whose property rights are harmed by false claims might have a cause of action for slander of title. Recovery for slander of title requires proof of false statements about the title to property, malice, and damages.[229] Such actions are rare and typically are raised in connection with challenges to the merits of litigation of which notice has been given.[230] Proving the elements for slander of title, especially malicious intent, is difficult.

Some states have enacted statutes to penalize frivolous or false liens or claims and to provide a civil remedy process for those harmed by them. Wyoming law has a comprehensive statute authorizing a damages award, attorneys' fees reimbursement, and injunctive relief through an expedited hearing process.[231] Wyoming law also makes use of such liens a criminal misdemeanor.[232] Other states consider it a felony

229. *See* Allen v. Duvall, 304 S.E.2d 789, 791 (N.C. Ct. App. 1983).

230. *See id.* (finding only three cases in which slander of title was addressed prior to 1989).

231. WYO. STAT. ANN. § 29-1-311 (2007). The summary review process allows the court ex parte to order a hearing to occur as soon as fifteen days after a petition is filed by someone challenging a lien, and the court may declare the lien invalid, and award damages, if the person claiming the lien fails to appear. *See id.* § 29-1-311(b).

232. *See id.* § 29-1-311(c).

to file a forged, groundless, or false claim intentionally;[233] provide for a damages remedy and award of attorneys' fees for filing a frivolous or false lien or claim;[234] authorize multiple damages;[235] or provide for different remedies based on whether the defendant caused the instrument to be recorded or was merely named in it.[236] Some statutes simply declare claims of nonconsensual common law liens to be invalid.[237]

The toll of money, time, and frustration to remove a wrongful lien cannot realistically be recovered adequately with available common law remedies. An expedited hearing process, enhanced damages, and criminal sanctions are all appropriate approaches to preserving the system's integrity and for discouraging its abuse. States should undertake the legislative steps necessary to deter and punish those who seek to harm or annoy others through misuse of readily available information on which important investments rely.

IV. CONCLUSION

A reliable and accessible public record of property rights is essential to private property ownership and to the formation of capital for economic development.[238] The existing land records system was initially a foundation for impressive real estate development and economic growth in the United States.[239] Historic success does not justify lack of attention to opportunities for improvement, especially in a market and technological environment that could not have been envisioned when the present system was developed. We know that opportunities are being lost for change that would benefit consumers, reduce risk involved in real estate ownership and investment, and advance the administration of justice by reducing uncertainty and the unnecessary consumption of resources. Reform is mired in a political and economic system that is too rewarding for those who benefit from risk and in a legal context too little understood by those with the power to make changes. Unfortunately this situation reflects the dynamic that Gordon Tullock observed: "The rationally casually ignorant voter is a very slender reed on which to build the foundations of democratic

233. *See* KY. REV. STAT. ANN. § 434.155 (West 2007).

234. *See* COLO. REV. STAT. ANN. § 38-35-109(3) (West 2007); IDAHO CODE ANN. § 45-1705 (West 2007).

235. *See* ARIZ. REV. STAT. ANN. § 33-420 (2007); UTAH CODE ANN. § 38-9-4 (West 2007).

236. *See* ARIZ. REV. STAT. ANN. § 33-420; N.M. STAT. ANN. § 48-1A-9 (West 2007).

237. *See* N.M. STAT. ANN. § 48-1A-5.

238. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 149 (2000) (reasoning that countries with undeveloped economies need an "efficiently crafted legal right to have their property integrated into a formal legal system that allows them to use it to create capital").

239. *Id.* at 148 ("At the beginning of the nineteenth century, information about property and the rules that governed it were dispersed, atomized, and unconnected.").

politics," because such a voter "is much more likely to be the recipient of the dispersed costs than of the concentrated benefits of the legislative process."[240] Lawmakers have a responsibility to examine the laws and reform opportunities and overcome entrenched resistance to beneficial change. We should be reminded of Thomas Jefferson's standard: "[T]he excellence of every government is its adaptation to the state of those to be governed by it."[241]

240. GORDON TULLOCK, RENT SEEKING 43 (1993).

241. Letter from Thomas Jefferson to P. S. Dupont de Nemours (Apr. 24, 1816), *available at* http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=241&division=div1.