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Protecting Tenants at Foreclosure: Federal Expansion of Tenant Rights and the Unintended Consequences

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PROTECTING TENANTS AT FORECLOSURE: FEDERAL EXPANSION OF TENANT RIGHTS AND THE UNINTENDED CONSEQUENCES

Lauren Lynn[†]

I. INTRODUCTION.....	110
II. CONSTITUTIONAL QUESTION	111
A. <i>Taxing and Spending Rationale</i>	112
B. <i>Commerce Clause Rationale</i>	115
III. PREEMPTION	117
A. <i>Protection Over Remedy</i>	117
B. <i>States' Rights</i>	119
IV. BONA FIDE TENANTS	120
A. <i>Coverage and Amendments</i>	121
B. <i>Intent of the Act</i>	122
V. UNINTENDED CONSEQUENCES	123
A. <i>Mortgagors as Tenants at Will</i>	123
1. <i>Suggestion</i>	123
B. <i>Fraudulent Leases</i>	125
1. <i>Effect of Fraudulent Leases</i>	126
2. <i>Suggestion</i>	127
VI. CONCLUSION	128

A mortgage is a double-edged sword. To most, a mortgage signifies yet another new stage in life; responsibility and the ultimate adult goal of home ownership. Unfortunately the economic downturn of 2008 drastically increased the hardship of attaining this goal, and the effects have been wide-felt, displacing both homeowners and renters from their abodes. In particular, and of primary concern to this article, renters have been suddenly evicted as a result of landlords defaulting on mortgages.¹ Many of these renters—dutiful rent payers—are low-income tenants who receive little to no notice prior to their eviction, and who do not have the savings nor income level to afford a sudden move.²

[†] The author would like to thank the following people for their help in developing this Note: Stephen Alton, Professor of Law and Associate Dean for Evening Division Programs, Texas Wesleyan School of Law; David W. Ozbirn, Morgan & Ozbirn, P.C.

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1. Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 245 (2010).

2. *Id.*

110 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

I. INTRODUCTION

The mortgage foreclosure crisis was one of the first indicators of the impending financial crisis of the late-2000s. Termed by some as the “worst financial crisis since the Great Depression,” the United States was not combating the effects in isolation but rather fighting alongside those who, world over, had fallen subject to its effects.³ On the United States home front, the foreclosure crisis forced lenders and the real estate industry to take steps to reverse the increase in household debt and over inflation in home prices and, in the wake of cause and effect, displaced homeowners and negatively impacted the value of surrounding properties.⁴ One of the catalysts of the housing industry collapse was the failure of subprime mortgage-backed securities, the pooling of high-risk mortgages of below-average credit holders held at higher interest rates for sale to investors.⁵ This use of mortgages as collateral exemplified the housing bubble’s “illusion of wealth” that, when popped, unveiled a frightening beast characterized by “an over-extended credit market and overinflated home prices.”⁶

When housing prices began a national decline, mortgage borrowers found their home prices to be significantly less than their mortgages, which had been valued based on an overinflated housing market. As mortgage borrowers began to fail, buyers of mortgage-backed securities likewise found their assets rapidly depreciating in value as mortgage delinquencies grew at an exponential rate.⁷ Mortgagees were thus forced to implement foreclosure proceedings in an effort to recoup their investments.

Borrowers, lenders, and policy makers can all be blamed for the poor financing decisions that resulted in the subprime mortgage crisis, but there are some victims who had no involvement with the financing of their residences.⁸ Homeowners were not the only ones to feel the repercussions of this crisis, as it has been reported that rental units comprised approximately 20% of properties foreclosed upon.⁹ And with an unprecedented 40% of families evicted while tenants, it became an all-too-common occurrence for these tenants to face sudden eviction, unaware that their residences were either being foreclosed upon or even subject to the repayment of a mortgage.¹⁰ Specifically, low income tenants felt the most striking effects.¹¹ Faced with inadequate notice of foreclosure on a property they had no hand in financ-

3. See Tony S. Guo, *Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis*, 4 DEPAUL J. SOC. JUS. 215, 218-22 (2011).

4. *Id.* at 221.

5. *Id.* at 222.

6. See generally Tony S. Guo, *supra* note at 4.

7. *Id.*

8. *Id.* at 225.

9. *Id.*

10. *Id.*

11. *Id.* at 226.

ing, these tenants often found themselves financially unable to secure alternative housing in such limited time periods.¹²

In response, President Obama signed into action the “Protecting Tenants at Foreclosure Act of 2009” (“PTFA” or the “Act”) on May 20, 2009 as part of the Helping Families Save Their Homes Act of 2009.¹³ The purpose of this Act was to alleviate the effects of the foreclosure crisis on tenants, the silent victims of the foreclosure crisis, residing in residential properties.¹⁴

The Act’s relatively young age has led to a variety of unsettled issues and interpretations. The focus of this article is in regard to two such timely rising issues. First is the Act’s applicability to both state and privately funded mortgages as well as property backed by federal mortgages. Current case law has deemed the Act’s application to privately backed mortgage property as unconstitutional, but has failed to analyze Congress’ ability to regulate activities of a local character that comprise a national market under the Commerce Clause.¹⁵

Second is the extent of the Act’s protection to the statutorily defined “bona fide tenant,” and the ways in which these protections, intended for a finite number of affected persons, can be extended, or even abused. The stated purpose of the PTFA is to provide tenant notice protections prior to eviction,¹⁶ and a recent amendment codified in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) attempted to clarify when, after a landlord is foreclosed upon, a tenant’s statutory protections begin.¹⁷ While recognizing Congress’ good faith attempt to narrowly focus upon the facts that trigger when notice protections will arise, the Dodd-Frank amendment can give rise to distinct ways mortgage holders—unintended recipients—can seek PTFA protections. Mortgage holders can reap the benefits of notice protection by either claiming a tenancy at will or entering into a fraudulent lease in the time between a foreclosure proceeding and the amendment clarified notice protection trigger. Thus leading this narrowly intended Act to be expanded in practice; consequently decreasing tenant protection even further.

II. CONSTITUTIONAL QUESTION

PTFA section 702 provides the scope of the Act’s coverage over residential properties as applying to “any foreclosure on a federally-related mortgage loan *or* on any dwelling or residential real property.”¹⁸ While explicitly applicable to all federally-related mortgage

12. *Id.* at 225–26.

13. 12 U.S.C. § 5220 (Supp. IV 2009) (citing §702 under “REFERENCES IN TEXT”).

14. 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

15. *See generally* Collado v. Boklari, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. 2009).

16. Cong. Rec. S8978-01.

17. Guo, *supra* note 4, at 227–28.

18. § 702(a) (emphasis provided).

112 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

loans, this statutory language raises a question as to the Act's constitutionality and applicability to state and privately funded mortgages. Current case law has upheld the Act's constitutionality in regards to federally funded mortgages under the Taxing and Spending Clause but has further held that the Act, as written, cannot apply to private or state-based mortgages.¹⁹ Therefore, the current case law supports ignoring the plain language of the Act in an effort to maintain any semblance of constitutionality.

No case law has yet analyzed the Act's applicability under any other of Congress' enumerated powers. The Commerce Clause, and the rising numbers of foreclosure statistics, appears to provide a satisfactory rationale for Congress' regulation of both state and private mortgages. The Act, as specifically stated in the statutory language, is intended to supplement state power and in no way intended to preempt state laws that provide additional tenant protections.²⁰ Further, the PTFA is intended to afford all renters protection from a nationwide epidemic.²¹ For Congress to intend to apply these protective measures only to renters fortunate—rather disfortunate—enough to have scrupulous landlords holding federally backed mortgages, without enacting any other protective measures for the remaining renters under landlords holding private mortgages, would amount to nothing more than favoritism and a half-hearted attempt to protect American citizens.

A. *Taxing and Spending Rationale*

Current case law has upheld the Act's constitutionality but only in limited application by explicitly changing both the plain language and literal interpretation of the PTFA.²² The New York District Court, Suffolk County, Third District has held that the language of the Act should not be construed literally so as to apply to all housing, but rather this new federal legislation only applies to property on which the mortgage is federally funded.²³

In justifying the Act's continued constitutionality in limited applications, *Collado v. Boklari*, a case of first impression, references the eighteen enumerated powers of the federal government listed in the United States Constitution and concedes Congress' ability to apply the Act to property subject to federally related mortgages to Section 8(1), the Taxing and Spending clause.²⁴ The court in *Collado* admits Congress may regulate how federal agencies, such as the U.S. Department of Housing and Urban Development ("HUD") and Federal

19. *See Collado*, 892 N.Y.S.2d, 734–35.

20. § 702(a)(2).

21. Cong. Rec. S8978-01.

22. *See Collado*, 892 N.Y.S.2d 731, 735–36.

23. *Id.* at 736.

24. *Id.* at 734.

Housing Administration (“FHA”), may allocate their funds, as Congress authorized these agencies’ authority under the same clause.²⁵ The opinion continues to argue that the “creation of rights and responsibilities concerning a private landlord/tenant relationship is not listed” as one of Congress’ enumerated powers, and thus the regulatory ability of Congress is limited to areas not regulated by the states.²⁶ Therefore, because nearly every state has enacted regulations for tenants’ rights in mortgaged property,²⁷ *Collado* construed the PTFA as acting to preempt state law, for which it could find no justification through the Taxing and Spending clause.²⁸

Section 8(1) is generally known as the “Taxation and Expenditure” power under which Congress created and operates its assorted affordable housing departments. The mission of these agencies is to expend federal funds to facilitate and subsidize affordable housing in the United States. Conditioned upon the expenditure of the federal treasury; Congress may regulate how HUD, the FHA and other related agencies are to administer themselves and spend their funds. However, absent a federal subsidy, Congress has no authority to regulate the private relationship of a landlord/tenant which is the province of state law.²⁹

Collado quickly continues this rationale to discredit any attempt to regulate the entire mortgage industry under the “general welfare” language of the Taxing and Spending clause.³⁰

The law is settled that the “general welfare” language does not extend Sec. 8(1) to issues of *local non-interstate concern* such [as] a tenants’ rights unless linked to United States spending through its federal housing agencies. The reason being that to hold otherwise would extend federal control to arguably every area of human endeavor and vitiate the constitutional framers’ requirement that “federalism” involves a limited universe of power and that the states retained all but expressly ceded powers.³¹

The result is to render the Act, on its face, unconstitutional because the word “or” in the statutory language extends the Act’s applicability beyond federally related mortgages to any residential property.³² But rather than declare the Act unconstitutional in its entirety, the court in *Collado* decided to ignore the plain meaning of the word “or” as scrivener’s error.³³ Therefore, *Collado* purports the statute to read:

25. *Id.* 734–35.

26. *Id.* at 734 (citing *US v. Darby*, 312 U.S. 100 (1941)).

27. See Rodrigue-Dod, *supra* note 2 at 255.

28. *Collado*, 892 N.Y.S.2d at 734–35.

29. *Id.*

30. *Id.* at 735.

31. *Id.* (emphasis added).

32. *Id.* at 734.

33. *Id.* at 735.

114 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

“In the case of any foreclosure on a *federally related mortgage loan on any dwelling or residential real property*. . .”³⁴

Under this reading, the statute conforms with the Constitution’s limits on federal authority under the Taxing and Spending clause by not expanding regulation “to individuals who have not attached themselves to the federal purse strings.”³⁵ As support, *Collado* follows the presumption that Congress intends to act constitutionally in the enactment of federal laws, and therefore reasoned that the court may read the Act to make a non-literal interpretation that reconciles and disregards the plain language so as to “correct a manifest error or absurdity.”³⁶ However, directly contrary to, and absent from the *Collado* decision is a report from HUD, that explicitly provides for the Act’s applicability to all mortgages, regardless of their funding.³⁷

The responsibility for meeting the new tenant protection requirements applies to *all* successors in interest of residential property, regardless of whether a Federally related mortgage is present. The immediate successors in interest of a residential property, which is being foreclosed upon, bear direct responsibility for meeting the requirements of the law.³⁸

Further, the immediate successors in interest of foreclosed-upon property bear the burden of complying with the Act’s requirements and are therefore held with establishing that the Act does not apply to their foreclosure proceeding for reasons apart from the constitutionality question to be discussed later in this article.³⁹ Whether the Court in *Collado* was unaware of this report, published on June 24, 2009, or the case decision and report’s publication overlapped, as *Collado* was decided on November 9, 2009 for an eviction notice on July 23, 2009, is unknown. Yet the timing does raise a question as to *Collado*’s conclusion that the use of the word “or” was a “manifest error or absurdity.”⁴⁰

Alternatively, the weight of a HUD “report” is not comparable to the weight of case law. HUD itself is a federal agency, but the HUD report is merely a social mandate intended to keep persons in housing. In *Collado*, the court tried to keep the statute alive because it was apparently unconstitutional as written; judicial activism at its finest. But the court in *Collado* approached the constitutional question of the PTFA’s authority as a threshold issue of whether the “expansion of

34. *Id.* at 736 (emphasis added).

35. *Id.*

36. *Id.* at 735 (citing *Holy Trinity Church v. U.S.*, 142 U.S. 457 (1892)).

37. Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed Reg 30106 (June 24, 2009) (emphasis added); *see also* *Bank of America v. Owen*, 903 N.Y.S.2d 667, 669 (2010).

38. 74 Fed. Reg. 30106.

39. *Id.*

40. *See supra* note 37.

federal authority to areas not involving federal expenditure is constitutionally permissible.”⁴¹ The court’s conclusion of the Act’s limited applicability was therefore entirely based on the Taxing and Spending clause. *Collado*, deeming the Taxing and Spending clause a “catchall” power,⁴² thus takes a bright-line stance on which mortgages Congress can regulate without further examination of their “local non-interstate concern.”

B. Commerce Clause Rationale

The Commerce Clause, enumerated in Section 8(3) of the Constitution, provides Congress the authority to regulate commerce “among the several states.”⁴³ Through the Commerce Clause, Congress has consistently held activities local in nature not to be immune from Congress’ authority, even if they may not be regarded as commerce, so long as that activity is part of an economic “class of activities” that have a substantial effect on interstate commerce.⁴⁴ Therefore, *Collado*’s abrupt conclusion that Congress does not have the authority to regulate is misguided. Although *Collado* was correct in its assertion that Congress does not have the ability to regulate “issues of local non-interstate concern,”⁴⁵ the mortgage industry and the extreme repercussions of increased mortgage foreclosures cannot be argued to have anything but a substantial effect on interstate commerce.

The mortgage industry, specifically the rise in foreclosure numbers over the recent years, results in substantial effects on interstate commerce. In April 2009, approximately one of every 374 homes was foreclosed upon in the United States.⁴⁶ Halfway through 2010, 1.65 million properties had faced foreclosure proceedings.⁴⁷ More specific state examples show the same overall trend. In Florida one in four home loans was in danger of foreclosure with foreclosure proceedings increasing 75% between 2008 and 2009.⁴⁸ During the third quarter of 2009 in California, residents faced 250,054 foreclosure filings, the highest in the nation at the time.⁴⁹

These numbers point directly to *Gonzales v. Raich* and to the idea that Congress can regulate purely intrastate activity if it decides that the total incidence or sheer amount poses a threat to a national market, and further “that failure to regulate that class of activity would

41. *Collado*, 892 N.Y.S.2d at 734.

42. *Id.*

43. U.S. Const. art. I, § 8, cl. 3.

44. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005), *citing* *Perez v. United States*, 402 U.S. 146, 151; *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

45. *Collado*, 892 N.Y.S.2d at 735.

46. Rodriguez-Dod, *supra* note 2, at 244.

47. *Id.* at 245.

48. *Id.* at 244.

49. *Id.*

116 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

undercut the regulation of the interstate market in that commodity.”⁵⁰ There is little argument against declaring the mortgage industry a national market. Although regulated by private, state, and federally created agencies, neither a single state nor its citizens is immune to the financial necessities of a mortgage. Further, the federal government allowed its citizens the choice of avenues or agencies to back their mortgages by not preempting state power, as discussed below. This choice in the mortgage industry created an “economic class of activities” to be regulated, and pertaining to the PTFA, the federal government’s chosen regulation pertains to notice requirements alone.

The statutory language supports this idea of a regulatory scheme, in that it applies both to “any foreclosure on a federally-related mortgage loan” and to “any foreclosure. . .on any dwelling or residential real property.”⁵¹ These are two classes of separate but overlapping regulation. This bifurcation may raise the argument that the statutory language itself takes the PTFA out of the scope of protecting tenants, applying to “any foreclosure. . .on a federally-related mortgage loan,”⁵² regardless of the property’s character. Such an argument is null and void. As established in *Collado v. Boklari*, the Federal Government has every right to regulate the entirety of the mortgage industry, including the PTFA’s intent of alleviating affected tenants, pertaining only to federally backed mortgages. This first statement or prong of tenant protection is a solidification of the power to do so. The second statement declares the Federal Government’s ability to regulate those non-federal-backed mortgages for residential use through the Commerce Clause. For both classes of protection, the Act provides these notice protections to bona fide tenants only.⁵³ As long as the tenant can meet the statutory requirements of a bona fide tenant, the PTFA can be construed to protect commercial, as well as residential, tenants under landlords with federally-backed mortgages.

In its decision against the PTFA’s literal construction, *Collado v. Boklari* further deemed the word “or,” and the resulting reading of an “economic class of activities,” to be the result of a “hastily enacted amendment” that should be ignored “to make it consonant with the function sought to be served.”⁵⁴ Once again, the narrow holding of *Collado* fails for two reasons. First, the primary objective of the PTFA is to provide, at minimum, all tenants of residential properties protections to ensure appropriate notice of foreclosure so that tenants are not abruptly displaced.⁵⁵ The statutory language directly supports

50. *Gonzales*, 545 U.S. 1, 18.

51. § 702(a).

52. § 702(a) (emphasis added).

53. § 702(a)(2).

54. *Collado*, 892 N.Y.S.2d at 735.

55. Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure on Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009); Cong. Rec. S8979.

this goal. Second, the PTFA was originally set to sunset on December 31, 2012.⁵⁶ The Dodd-Frank Act, passed on July 21, 2010, provided for numerous amendments to a variety of acts, including the PTFA.⁵⁷ The only pertinent change made to this “hastily enacted amendment,”⁵⁸ which could therefore also be hastily—even easily—deleted, specifically in regards to the PTFA’s constitutionality, was to extend the Act’s sunset date and applicability to December 31, 2014.⁵⁹ No other substantive changes regarding to which mortgages the Act applies were made. Therefore *Collado* is not a wholesale endorser of the Act, but rather a life preserver for an otherwise court declared sinking ship of unconstitutionality.

III. PREEMPTION

The PTFA does not intend to preempt state power, as concluded in *Collado*.⁶⁰ Instead, it is meant to serve greater protections to residential tenants that, under state laws, were provided little to no eviction protection.⁶¹ The Act specifically provides that “Nothing under this section shall affect the requirements for termination of any Federal-or State-subsidized tenancy or of any State or local laws that provides longer time periods or other additional protections for tenants.”⁶² By its own terms, the PTFA is therefore a supplemental law that in no way has completely preempted state law, and any argument of express preemption is directly overruled.

A. *Protection over Remedy*

The Act also does not impliedly preempt state law. In support, courts are beginning to hold that the PTFA does not provide tenants with a remedy, or federal-private right-of-action, but rather can be raised as a federal defense to unlawful detainer claims. This conclusion began with *Nativi v. Deutsche Bank National Trust Company*, a relatively new case out of the Northern District of California.⁶³ In *Nativi*, the court relied on a four-factor test for deciding whether a

56. 12 U.S.C. 5220 § 704 (Supp. IV 2006) ((citing §702 under “REFERENCES IN TEXT”).

57. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

58. *Collado*, 892 N.Y.S.2d at 735.

59. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. § 1484(2) (2010).

60. Rodriguez-Dod, *supra* note 2, at 252.

61. *Id.*

62. 12 U.S.C. § 5220 (Supp. IV 2006), *see* § 702(a)(2).

63. *Nativi v. Deutsche Bank Nat. Trust Co.*, No. 0906096 PVT, 2010 WL 2179885 (N.D. Cal. May 26, 2010); *Wells Fargo Bank v. Lapeen*, No. C 11-01932 LB., 2011 WL 2194117, at *4 (N.D. Cal. June 6, 2011).

118 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

federal statute creates a federal-private right-of-action as set forth by the Supreme Court in *Cort v. Ash*.⁶⁴

Those factors are (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) whether there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one, (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff, and (4) whether the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.⁶⁵

Placing the majority of emphasis on the second and third factors regarding legislative intent, the court in *Nativi* found no indication for the PTFA to create a remedy, holding that such would be contrary to congressional intent.⁶⁶

Delving into the other factors, the PTFA's language does not provide for any explicit private right of federal action.⁶⁷ In the same way, the Act was not intended to provide for an implied right of action, "because Congress intended the PTFA to be used for protection in state court" rather than provide any federal remedy, and such a remedy "would not be consistent with the underlying purpose of the legislative scheme."⁶⁸ To support the conclusion of protection over remedy, *Nativi* makes reference to a statement by Senator Gillibrand that reads Congress' purpose was "to give *local* governments and *States* the tools they need to tackle this housing crisis."⁶⁹ This belief is mirrored by statements of Senator Kerry, providing: "[S]o what we believe is that this [Act] provides an appropriate level of protection" for tenants in state courts to combat unlawful evictions.⁷⁰ Further, *Nativi* held that the cause of action, unlawful eviction, is based on a claim traditionally regulated by state law, and therefore a federal cause of action cannot be inferred solely on the federal law.⁷¹

Although this conclusion originated in and has been accepted by a number of California District Courts,⁷² courts in other districts have begun to agree with the decision. In what will arguably become a trend of agreement and non-isolated citation, the United States Dis-

64. *Nativi*, 2010 WL 2179885 at *2.

65. *Id.* (quoting *Cort v. Ash*, 422 U.S. 66 (1975)).

66. *Id.* at *2, *4.

67. *Id.* at *3-4.

68. *Id.* at *4.

69. *Id.* at *3 (quoting 155 CONG. REC. S5096 7 (May 5, 2009) (statement of Sen. Gillibrand) (emphasis added)).

70. *Nativi*, 2010 WL 2179885 at *3 (quoting *id.* at S5111 (statement of Sen. Kerry)).

71. *Id.* at *4.

72. See generally *Nativi* 2011 WL 2194117; *Lapeen*, No. C 11-01932 LB., 2011 WL 2194117, at *4 (N.D. Cal. June 6, 2011); *Lemere*, No. CIV S-10-1474 MCE GGH PS., 2010 WL 2696697, at *2.

trict Court of Utah, as recently as November 29, 2011, has rendered the same conclusion as *Nativi*.⁷³ Recognizing that few cases outside of California exist that answer the question of the PTFA's ability to be brought in federal court as a private right of action, the court in *Ingo v. Deutsche Bank National Trust Company* could not distinguish between cases originally filed in federal court and cases originally filed in state court and removed to federal court, thus once more concluding that no federal right of action exists for PTFA claims.⁷⁴

Consequently, *Nativi*, the California District Courts, and *Ingo* have exemplified that the PTFA also does not impliedly preempt state law. States have often followed the long-standing principle that a foreclosure forfeits an existing lease.⁷⁵ In states such as Georgia, for example, tenants benefit from minimum protections under the PTFA where previously no rights existed upon foreclosure.⁷⁶ On the other hand, the PTFA is not applicable in states that provide for greater tenant protection.⁷⁷ Even if these state laws do not pertain specifically to notice requirements as mandated by the PTFA, such as the protections offered by New Jersey and the District of Columbia whereby a tenancy survives a foreclosure without exception, the PTFA does not act to preempt superior protection.⁷⁸ Conversely, allowing tenants to bring this federal law as a federal action would remove tenant protection from state power, because the federal government could deprive the residing tenants, and thus state power, the additional provided protections under state law by ruling under the lesser protections of the PTFA. Again emphasizing the thoughts of Senator Gillibrand, the Act is intended to provide local governments a standard of appropriate level of protection to combat the housing crisis. Thus, the PTFA operates as a minimum requirement, and states are free to enact any laws that provide a form of increased protection over the PTFA's notice requirements, essentially preempting the Act from state applicability.

B. States' Rights

Because it has been conceded that the PTFA provides no federal claim based on a state cause of action, the question then remains whether Congress, in the states with lesser eviction notice requirements, has the authority to *make* the states honor these additional notice protections. *Garcia v. San Antonio Metropolitan Transit Authority* rejected the idea of implied state immunity from federal

73. See *Ingo v. Deutsche Bank Nat. Trust Co.*, No. 2:11-cv-812, 2011 WL 5983340 (D. Utah Nov. 29, 2011).

74. *Id.* at 2.

75. Rodriguez-Dod, *supra* note 2, at 264.

76. *Id.*

77. *Id.* at 264–65.

78. *Id.* at 263.

120 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

regulations because of the difficulty in distinguishing ‘traditional’ functions of state governments from ‘non-traditional.’⁷⁹ Instead, state regulations, such as lesser notice protections for tenant protection, that interfere with a federal regulation are invalid; if a regulation can be supported through the Commerce Clause, it can be applied to the states.⁸⁰

The Constitution does recognize state sovereignty, as powers not delegated to the federal government are reserved for the states, but the decision in *Garcia* is premised on the idea and historical evolution of the 10th amendment as a truism: “In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”⁸¹ Translation: Congress’s Commerce Clause power is not qualified by any implied limitation.

This is not to say that the federal government does not have any limits in its authority over the states. First, Congress has no authority to expand its own power by pressing the states into service, as expressed in *Printz v. United States*, and any increase of federal power at no cost to itself is understood to be a direct infringement on state power.⁸² Second, Congress may not simply “commandeer the legislative process of States by directly compelling them to enact and enforce a regulatory program.”⁸³ Thus, where the states have not regulated at all, the Constitution does not give Congress the authority to require states to regulate. But, Congress can directly implement tenant protections that do not require state regulation.

It is well recognized that the Necessary and Proper clause derives no independent power, but must be rationalized in the pursuit of an enumerated power.⁸⁴ As explained above, the PTFA is correctly applied to all tenants, whether backed by federal, state, or private property mortgages, as a means “necessary and proper for carrying into Execution the foregoing Powers,”⁸⁵ including Congress’ Commerce Clause power. The Commerce Clause is not qualified by any implied limitation and thus does not violate or infringe on any states’ rights.

IV. BONA FIDE TENANTS

The PTFA was passed in response to a dire need for tenant protection from foreclosure proceedings. As a sub-set of the Helping Families Save Their Homes Act, the PTFA provides for the approximately 40% of displaced families evicted because their landlords’ properties

79. *Garcia v. San Antonio*, 469 U.S. 528, 530 (1985).

80. *Id.* at 549.

81. *Id.* at 550.

82. *Printz v. United States*, 521 U.S. 898, 922 (1997).

83. *New York v. United States*, 505 U.S. 144, 161 (1992).

84. *Id.* at 158–59.

85. U.S. Const. art. I, § 8, cl. 18.

were foreclosed upon.⁸⁶ Renters have been described as the “innocent bystanders” and “ultimate victims” in this foreclosure crisis, and the PTFA is meant to serve greater protections to tenants “blindsided when their landlord defaults on the mortgage.”⁸⁷ However, an explanatory amendment and clarification to the Act’s language can allow for the Act’s protection to extend to unintended recipients. The result will be a congested court system and, contrary to the PTFA’s purpose, decreased tenant protection. Unlike the drafting of the PTFA in its entirety, this amendment should be considered a “hastily enacted amendment” with unintended effects.⁸⁸

First, mortgagors will claim that at the moment they are foreclosed upon, they are tenants at will and thus are not excluded by the “bona fide tenant” definition in the statutory language. Second, mortgagors will exploit a seemingly unrestrained ability to enter into fraudulent leases.

A. Coverage and Amendments

PTFA Section 702 provides that “bona fide tenants” of foreclosed properties are entitled to occupy the premises through the end of the original lease term for leases entered into before the notice of foreclosure.⁸⁹ The Act does provide exceptions, whereby the bona fide tenant must receive minimum 90-days notice prior to eviction if that tenant is a tenant without a lease, a tenant at will, or the successive owner plans to occupy the foreclosed property as a primary residence.⁹⁰

A tenant gains the title and protections of a bona fide tenant only if: (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market value for the property or the unit’s rent is reduced or subsidized due to a Federal, State, or local subsidy.⁹¹ Originally, these 90-day minimum notice exceptions uniformly arose “as of the date of such notice of foreclosure,”⁹² however the meaning of “notice of foreclosure” was not statutorily defined in the PTFA. The result was that “notice of foreclosure” was susceptible to a wide variety of interpretations; would constructive notice of imminent sale be sufficient to protect those low-income tenants the act is meant to protect, who are most likely otherwise either unaware of the law or that their landlord’s

86. Rodriguez-Dod, *supra* note 1, at 245.

87. *Id.* at 246.

88. *Collado*, 892 N.Y.S.2d at 735.

89. 12 U.S.C. § 5220 (Supp. IV 2006), *see* § 702(a)(2)(A).

90. § 702(a)(2)(A)–(B).

91. § 702(b)(1)–(3).

92. § 702(a)(2).

122 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

property is even encumbered?⁹³ Was it the date the tenant received actual notice in the mail?

The Dodd-Frank Act attempted to eliminate this ambiguity by striking “as of the date of such notice of foreclosure” in the PTFA and inserting the following definition to clarify the primary residence exception “under any bona fide lease entered into before the notice of foreclosure:”⁹⁴

For purposes of this section, the date of notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court, or pursuant to provisions in a mortgage, deed of trust, or security deed.⁹⁵

Consequently, any limitation on tenants residing “without a lease or with a lease terminable at will”⁹⁶ was extinguished, and the PTFA can now be read to apply to all leases entered into at any time prior to a conveyance of title, even those created by the mortgage holder being foreclosed upon.

B. *Intent of the Act*

Examination of the Congressional Record indicates that Congress specifically intended to benefit tenants who played no hand in the financing of their residences. Senator Dodd, along with Senator Kerry, sponsors of the PTFA, stated that the law was intended “to assist low and moderate-income families and to help tenants who need protections from. . . unscrupulous landlords”⁹⁷ who “should not be allowed to come in, change the locks, and force out tenants who were there legitimately, with an expectation that they were coming home to their same old home.”⁹⁸ Whether Senator Dodd has ever been in the type of predicament he is speaking of however is suspect. And while not applicable to the intent of the Act, it is likely Senator Dodd does not understand that it isn’t the landlord that locks out a tenant, but rather at most a landlord will continue accepting rent knowing a foreclosure is pending.

Further, Senator Dodd stated that tenant families should obtain the benefits the PTFA “was intended to provide” from “persons and entities acquiring properties by foreclosure.”⁹⁹ In summary, the Act was intended to provide renters facing imminent eviction relief from foreclosed upon mortgagors. The outcome however, is anything but conducive to the Act’s intent.

93. *Guo*, *Supra* note 4, at 224.

94. § 702(a)(2)(A).

95. Dodd-Frank Act, Pub. L. No. 111-203 § 1484(a)(B) (2010).

96. § 702(a)(2)(B).

97. 155 Cong. Rec. S8978-01 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

98. 155 Cong. Rec. S5110-5111 (daily ed. May 5, 2009) (statement of Sen. Kerry)

99. 155 Cong. Rec. S8978-01 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

V. UNINTENDED CONSEQUENCES

The PTFA and the Dodd-Frank amendment can allow self-fault, defaulting mortgagors a means for additional protection, whether by claiming a tenancy at will or through a fraudulent lease. The amended Act calls for a minimum 90-day eviction notice to either bona fide leases entered into before title has been transferred to the successive interest holder or to tenants at will and tenants without a lease, and unlike the bona fide leases, regardless of when that interest arose.¹⁰⁰ While this additional protection can apply to both true bona fide tenants and mortgagors claiming a tenancy at will, its effect of demonstrating the level of increased protection is the same.

A. *Mortgagors as Tenants at Will*

First, mortgagor borrowers can provide themselves with the minimum 90-day eviction notice protection by claiming that at the moment their possessory interest is extinguished by foreclosure, their continued presence on the property constitutes either a tenancy without a lease or a tenancy at will in regards to the successive owner. Following common practice among states, foreclosure almost always eradicates any remaining lease or property rights.¹⁰¹ The Act's provision of 90-day notice for a tenant at will or tenant without a lease consequently affords these "tenants" with greater benefits under the law than they would otherwise receive under the terms of their leaseholds.¹⁰²

Because the amended PTFA provides that these rights arise regardless of the date of notice, now understood to be the date of sale, a mortgagor can argue that his "tenancy" has been on-going and accepted as a true contract by the time a property has been sold. Further, because a successor in interest bears the entire burden of complying with the PTFA's notice provisions,¹⁰³ the mortgagor as tenant arguably cannot receive advanced notice that such tenancy will not be acquiesced to. A majority of states offer these holdover tenants little to no protection, and thus the PTFA's notice provisions must be enforced.

1. Suggestion

The stricken language of the Dodd-Frank amendment is as pertinent in providing a solution to this over-application of the PTFA as it was in explaining the problem. Because this type of tenancy can arise at any time, a mortgagor can claim that his or her tenancy was acquiesced to over the time leading up to sale of the property. If this type

100. § 702(a)(2)(A-B).

101. Rodriguez-Dod, *supra* note 2, at 263.

102. *Id.* at 253.

103. §702(a)(1).

124 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

of tenant's rights were to arise upon notice of foreclosure as amended, the subsequent owner could immediately evict the mortgagor as a holdover tenant or tenant at sufferance rather than risk an argument of lease acquiescence. The amended statute also makes no reference to a tenant at sufferance. One of the easiest ways Congress could police this type of fraud is to expressly exclude the mortgagor as a holdover tenant in the statutory language granting protection to a tenant at will or tenant without a lease.

The PTFA's bona fide tenant description should also provide a defense to this claim, but the outcome is unclear. The bona fide tenant definition excludes mortgagors as tenants "under the contract" which gives rise to the tenancy.¹⁰⁴ However, because these rights as a tenant at will or tenant without a lease now arise upon foreclosure, their rights are created in the interim between the sale and the title transfer, even if the two are separated by mere moments. Therefore the contract between the mortgagor and mortgagee did not give rise to this holdover's tenancy.

A possible solution is to argue that the court must require a finding that the lease under which the tenancy is created relates back to an agreement "under [a] contract." This would directly apply to those mortgagors whose holdover tenancy was initiated by and relates to the original possessory or title mortgage. In addition, for *actual* tenants holding a tenancy at will or tenancy without a lease, their rights would still relate back to a contract, whether it be a contract for an indefinite time or an acceptance of continued rent payments after the lease has ended.

A more persuasive defense for successive owners, which does not require argument over statutory language, is the requirement that the lease be the result of an arms-length transaction.¹⁰⁵ Although not defined by the PFTA, an arms-length transaction is commonly referred to as a condition whereby the parties to a transaction are lacking any sort of special connection. Such a transaction is easily identified when three parties are in play, such as the successor in interest, the mortgagor, and the tenant, and the lease is created between the mortgagor and the tenant with no relationship to the successor in interest. No such third party relationship exists when the mortgagor, through continued presence, creates a tenancy in himself. Congress could provide a solution by refining the statutory language to require a third party relationship between the successor in interest and tenant seeking protection.

104. § 702(b)(1).

105. § 702(b)(2).

B. *Fraudulent leases*

Second, the PTFA as amended presents no recourse against a tenant who knowingly enters into a lease or tenancy during foreclosure pendency, or the time between foreclosure and ultimate sale to the successive owner. Senator Dodd, sponsor for the PTFA and whose name is part of the Dodd-Frank Act, stated in his initial support of the PTFA that the law was intended for all bona fide tenants who began renting prior to transfer of title to successive interest holders of foreclosed upon properties.¹⁰⁶ Therefore, the Dodd-Frank amendment did correctly serve its purpose in clarifying to whom the Act was intended to protect, but in such a way, and without any concurrent limitations, that opened the floodgates to additional, unintended recipients.

This problem is not confined to tenants entering into bona fide leases for a specified term in §702(a)(2)(A) during this time, but may also apply to §702(a)(2)(B) if the mortgagor contracts with a tenant as a tenant at will. The result is to open the door to potential fraudulent leases and tenancies whereby mortgagors can employ strategic renting prior to the conveyance of title and, piggy-backing off the now bona fide tenant, be afforded the same minimum 90-day eviction notice protection. This new tenant contract will easily satisfy the definition of an arms-length transaction in regards to the mortgagee or successor in interest, even under this article's suggested change to clarify a third party transaction. And so long as the rental value is for the fair market value of the property, will be difficult to challenge in court.

To further complicate matters, courts have held that a successor in interest bears the burden of complying with the Act's notice requirements to *all* residential properties.¹⁰⁷ It is therefore presumed that an existing tenant of a residential property is a bona fide tenant unless proven otherwise.¹⁰⁸ However, if a successor in interest is sure and has credible evidence that the resident at issue is not a bona fide tenant as defined under the Act, the successor can proceed with eviction proceedings without complying with the 90-day eviction notice requirements.¹⁰⁹ In some instances, whereby the resident is directly in contradiction to the bona fide tenancy requirements under §702(b)(1) and (b)(3), the proof will be easy to attain.

The successor owner may have credible evidence, for instance, that the resident is the mortgagor's spouse or parent, or that the resident rented the property from the prior owner for \$1 a month. Evidence of either would obviate a successor owner's obligation to provide a

106. 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

107. *Bank of Am. v. Owens*, 903 N.Y.S.2d. 667, 671 (N.Y. 2010).

108. 107 *Id.* at 672.

109. *Id.*

126 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

resident with 90 days' advance notice prior to the commencement of eviction proceedings.¹¹⁰

What evidence would be sufficient to overcome this presumption in cases of fraudulent leases, though, is unclear, especially when arguing subjective knowledge of a foreclosure proceeding when all elements of a bona fide tenancy are otherwise met. Further, it can be difficult to distinguish a lease entered into by fraudulent agreement between the mortgagor and tenant from the egregious actions of landlords exploiting renters. For example, some landlords may enter into leases with, and take substantial security deposits from, unknowing tenants with no collusion.¹¹¹ Further, landlords can take advantage of a tenant's lack of knowledge in foreclosure proceedings to keep demanding rent even after the landlord has been foreclosed upon.¹¹²

1. Effect of fraudulent leases

Consequently, because the PTFA provides for no maximum lease term which must be honored, stating only that the lease must be honored "until the end of the remaining term of the lease" unless the successor intends to occupy the property as a primary residence,¹¹³ a mortgagor can attempt to rent out his property for an extended period of time. It may be argued that common lease agreements are on a term of years basis, usually amounting to one year at a time, but an argument has yet to be made in court. Regardless of the outcome however, a mortgagor may provide himself an additional year of protection. Further, because of this potential extended lease term, successors in interest may begin claiming primary residence use on all properties purchased, in an effort to minimize the honoring period to 90-days. The PTFA provides no evidence or precondition requirements on either tenants or successors in interest.¹¹⁴ As a result, this reciprocal fraudulent claim might arise.

The potential for these fraudulent leases also demonstrates how this amendment may take the Act out of its intended scope through a common sense analysis of the bona fide tenant requirement of fair market value. Those capable of finding renters willing to enter into contracts based on collusion are, most likely, not the type of low to moderate-income renters the Act is intended to protect. "This law protects tenants facing evictions due to foreclosure by ensuring that they can remain in their homes for the length of the lease or, at the least, receive sufficient notice and time to relocate their families and lives to a new home."¹¹⁵ Mortgagors facing foreclosure do have suffi-

110. *Id.*

111. Rodriguez-Dod, *supra* note 2, at 246.

112. *Id.*

113. § 702(a)(2)(A).

114. *Owens*, 903 N.Y.S.2d at 671.

115. Cong. Rec. S8978-01.

cient notice and time to relocate their homes to a new location, as their defaulting or late payments on their own mortgage is notice enough of potential and imminent foreclosure proceedings. The Act unequivocally was not intended to help properties' successor owners obtain swift possession,¹¹⁶ but it was also not intended to help defaulting mortgagors.

The repercussions of this ambiguity are not limited to benefits received by unintended recipients. As mortgagors learn how to take advantage of the Dodd-Frank amendment, the courts will become congested with eviction proceeding cases. Those true tenants with actual defenses to immediate eviction will be delayed their day in court, and as such could be immediately evicted by the successor in interest prior to a court's judgment. A court may find that successor in interest liable for damages to the tenant after the fact, but even then those damages may not be able to relieve the agony of living on the street or struggling to find immediate alternative housing.

2. Suggestion

Congress attempted to address the discrepancy of when tenant protections arise by separating tenants with express contractual leases, and declaring the date of notice of foreclosure as the date title has changed hands from the mortgage holder to the successive interest buyer, from tenants without a lease or tenants at will. Because the Dodd-Frank amendment did not have the luxury of court interpretation, such as in *Collado v. Boklari*, and in answers to the question of the PTFA's constitutionality, the effects of this amendment could not wholly be seen at the time of its enactment. The attempt to clarify will create more confusion and interpretation as courts begin to dissect through fraudulent leases.

Instead Congress should distinguish between the date of notice of foreclosure and the date upon which the 90-day notice period shall begin for tenant protection. The date of notice foreclosure should be the exact date a landlord's mortgage is foreclosed upon, regardless of actual tenant knowledge. The landlord or mortgagor thus, by law, will be unable to enter into additional leases prior to title changing hands. The date notice protections should begin can remain at the date where total title is transferred to the successive interest holder.

The necessity and purpose of tenant protection, and the continued concern for unscrupulous landlords, calls for Congress to place additional burdens on the parties involved in the mortgage, landlord, and tenant relationships. Instead of placing the entirety of the burden of tenant protection on the successor in interest to all residential properties, Congress should consider adding a burden on the actual mortgagee, which surely has records of the primary purpose of the buildings

116. *Owens*, 903 N.Y.S.2d at 670.

128 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

they hold out mortgages for, to notify those tenants. The moment the mortgage company forecloses upon a known residential property, which company should be charged with sending a letter of notice to the tenants of the foreclosure, and the potential for their leases to be terminated notwithstanding the tenants' statutorily protected 90-day protection period.

This does leave vulnerable tenants who, perhaps unknowingly or otherwise, either illegally reside in a dwelling or are subject to landlords disregarding the first suggestion of not allowing subsequent leases after foreclosure. A second potential burden, potentially eradicating the need for the previously mentioned burden on mortgagees, is a burden on landlords. The foreclosed-upon landlord should, at the moment of notice of foreclosure (understood to be the moment the mortgage is physically foreclosed upon) be required to mirror the aforementioned burden on mortgagees and notify all tenants of the foreclosure. This would reduce any complaints large mortgagee companies might have about policing landlords and protect those illegal tenants the mortgagee may have no knowledge about. Further, this landlord should face a penalty for noncompliance, by which he or she is required to pay the cost for alternate housing for the displaced tenants that entered into leases with the landlord between the foreclosure and subsequent sale.

In no way does this article suggest lessening the tenants' statutorily provided 90-day protection period. Rather, the burden on the successive interest holder should stand, but as supplemented by the landlords' duty to give the tenants advance notice.

VI. CONCLUSION

The PTFA applies to *all* residential mortgages which work to displace *true* bona fide tenants. While Congress unambiguously has the authority to regulate facets of federal regulation, Congress' Commerce Clause power directly authorizes federal regulation of the entire, national mortgage industry, both privately and federally funded, as a national market which requires a comprehensive national regulatory scheme. By allowing citizens the choice of federal or private based mortgages, and limiting the PTFA's regulation to notice provisions, the PTFA does not attempt to preempt state power or regulate other aspects of privately backed mortgages. Instead, the PTFA supplements current state laws and even has no effect on those state laws which provide for higher notice protections. The PTFA is a floor, not a ceiling.

The Dodd-Frank amendment contains Congress' good faith attempt to clarify a recognized ambiguity in the Protecting Tenants at Foreclosure Act. However, this clarification of *when* notice of foreclosure is dated for tenant protection to begin, without the asset of prior court interpretation, can and will result in continued and evolved forms of

abuse of the Act's protections by unintended recipients. Whether this abuse is by landlords either subsequently claiming a tenancy at will or entering into fraudulent leases, the result is the same: unintended recipients of PTFA protections, clogging of the courts' systems in litigating these factual disputes, and decreased tenant protection.

By distinguishing between the date of notice of foreclosure and the date upon when the tenant notice protection begins, calling for additional burdens placed directly upon landlords of foreclosed upon properties, subject to penalties of complying with those tenants' statutorily provided notice protections and any incidental costs, Congress can both eliminate the ambiguities created by the Dodd-Frank amendment and stay true to the intent of the Protecting Tenants at Foreclosure Act.