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THE AMERICAN DREAM, DEFERRED: CONTEXTUALIZING PROPERTY AFTER THE FORECLOSURE CRISIS

PRIYA S. GUPTA*

ABSTRACT

In a few short years, the American Dream has dried up like a raisin in the sun. Massive foreclosures of the mid-to-late 2000s have left the status of the American Dream of homeownership in serious question. In this paper, I argue that in order to formulate new federal housing and homeownership policy goals, the underlying vision of property rights that informs such policy needs to be examined and re-oriented to one that recognizes the nature of property (specifically with regards to residences) as an interconnected and contextualized regime.

In the decades following World War II, the federal government supported homeownership and egalitarian access to such ownership through legal regimes and rhetoric. The form this promotion took—the push for detached single-family houses—maps a model of property rights that values ownership, separation, autonomy, and a particular legitimate version of the “home.” Despite this promotion, just before and during the Foreclosure Crisis of the mid-2000s, the federal government surprisingly abandoned this rhetoric and paradigm by moving towards a different model of property rights that treated the house as a commodity, evaluated like an investment and bound by the four corners of its mortgage contract. From this model, it could comfortably limit people’s rights to their homes, especially for the ‘irresponsible borrowers’ amongst them. The use of both of these models has shifted the operation of property as a regime in the United States, and, as I argue, not for the better.

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After setting out this narrative, I argue for widening the context in which property rights, and therefore housing policy, are analyzed. I do not craft an entire alternate model of a property regime, but rather offer two perspectives that should, in part, constitute such a model (or models). In formulating these perspectives, I draw examples from the City of Baltimore to argue that property and housing policy should recognize (1) the interconnectedness of property as an institution and (2) the importance of the context in which the investment and contract surrounding a house were made.

INTRODUCTION

To give every American a stake in the promise and future of our country, we will bring the highest standards to our schools and build an ownership society. We will widen the ownership of homes and businesses, retirement savings and health insurance preparing our people for the challenges of life in a free society. President George W. Bush, January 20, 2005¹

Wells Fargo, Ms. Jacobson said in an interview, saw the black community as fertile ground for subprime mortgages, as working-class blacks were hungry to be a part of the nation's home-owning mania. Loan officers, she said, pushed customers who could have qualified for prime loans into subprime mortgages. Another loan officer stated in an affidavit filed last week that employees had referred to blacks as "mud people" and to subprime lending as "ghetto loans." New York Times, quoting former Wells Fargo employees, June 6, 2009²

In a few short years, the American Dream has dried up like a raisin in the sun. One might have thought, based on the explicit government commitment to homeownership throughout the decades following World War II, that in the midst of the Foreclosure Crisis of the mid-to-late 2000s, federal government lawmakers would have acted to provide support for homeowners and for the very policies they had advanced.³ However, they did

1. George W. Bush, Second Inaugural Address (Jan. 20, 2005), available at <http://www.nytimes.com/2005/01/20/politics/20BUSH-TEXT.html>.

2. Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES, June 6, 2009, <http://www.nytimes.com/2009/06/07/us/07baltimore.html?pagewanted=all>.

3. In this Article, I focus on the federal government, primarily the executive and legislative branches. Though the state, municipality, and individual levels of involvement in law and policy

not. This Article explores one aspect of this handling of the Crisis: the slow shifts in the nature of property (specifically in residences) as conceived and enacted by the federal government.

I argue that the federal government chose to treat houses primarily as investments codified in contracts,⁴ which meant that the massive foreclosures were a result of bad investments that were entered into through private contracts (mortgages). Through this analysis, the nature of the house as a “home,” as well as the government’s decades-long role in enabling house purchases, were left out of the discourse. People’s rights to their homes could be comfortably limited, especially for the irresponsible investors and poor negotiators.

This model resulted in a narrow conception of potential solutions, which primarily focused on so-called “systemic” and financial market support as opposed to reforms that would have helped home-buyers more directly. Now, faced with the aftermath of that choice—namely, having purportedly saved the banks and the “financial system”—the way forward for housing policy or foreclosures is unclear.⁵

In order to craft a workable housing policy, we must have in mind a vision of the kind of property regime⁶ around which we want society to be structured.⁷ The power of a property regime to create social order and justice has been recognized by many scholars,⁸ and the desirability of deliber-

relating to the Foreclosure Crisis are also fascinating, they are outside the scope of this Article, except through case study and examples in Parts III and IV.

4. It is not that this investment-based model was completely new, but that the extreme form it took was, as further explained in Part II.

5. See Neil Barofsky, *Foreclosure Crisis Lessons Not Yet Learned*, HUFFINGTON POST (Oct. 5, 2011, 11:13 AM), http://www.huffingtonpost.com/neil-barofsky/foreclosures-mortgage-crisis_b_995922.html?view=print&comm_ref=false (criticizing the government’s initial response to the housing crisis and suggesting strategies to fix “government-sponsored programs”).

6. I am using “regime” in the way that A.J. van der Walt and Eduardo Peñalver do. See A.J. VAN DER WALT, *PROPERTY IN THE MARGINS* 20 (2009) (explaining that “social, economic and political factors help shape regimes . . . [and] are therefore fundamentally political in nature”); Eduardo M. Peñalver, *Reconstructing Richard Epstein*, 15 WM. & MARY BILL RTS. J. 429, 434 (2006) (“In contrast [to a specific government practice or policy], a regime is an entire complex of interlocking practices that constitute the permissible operations of the state.”).

7. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 4 (1999) (stating that “[p]roperty was central to [the Founders’] plan of social stability”); Joseph William Singer, *How Property Norms Construct the Externalities of Ownership* 6 (Harv. Pub. Law, Working Paper No. 08-06, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093341 (stating that “property norms shape our understanding of the *meaning* of property rights and the *legitimate contours of social relationships*”).

8. See *infra* notes 9–10 and accompanying text.

ately crafting a property regime to “enable the have-nots to become haves”⁹ has been expressed by Progressive Property theorists in particular.¹⁰

In the context of post-colonial South Africa, A.J. van der Walt’s project entails “imagin[ing] alternative outcomes” with regard to legal reform, through an approach that focuses on “marginal persons and groups (in the form of those who suffered under the injustices of the discredited regime or whose position must be taken seriously because of the political changes).”¹¹ This approach is particularly appropriate for modern housing policy in the United States, given that low-income and minority populations were significantly targeted by housing policy in the last few decades and, therefore, most affected by the Foreclosure Crisis. A.J. van der Walt goes on to state that this approach attempts to “consider property from this marginal perspective and to develop the implications of such a perspective for property theory in general” and “reflect on thinking about property, particularly thinking about the nature and function of change in property regimes,”¹² methods which I attempt to emulate with this project as well.

This Article endeavors to address this challenge by linking models of property regimes to housing policy in the United States before, during, and after the Foreclosure Crisis.¹³ While I do not attempt to articulate an entire

9. Joseph Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 264 (2006); see also *id.* at 281 (explaining that “[t]he pragmatic view . . . rests on the notion that society (acting through governmental, as well as nongovernmental, institutions) has obligations to act to improve things for the least fortunate and not to rest until that is done”).

10. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (stating that “[p]roperty law should establish the framework for a kind of social life appropriate to a free and democratic society”). While considering how the U.S. property regime and housing policy could be reframed to benefit those currently left out or marginalized by them, I also draw from A.J. van der Walt’s situating of property as a social institution in transformational settings: “Acknowledging the social origins and nature of property also implies that social injustice affects and shapes the property regime; conversely, recognition of the need for social reform implies acceptance of the justification for reform of the property regime, whether it be on a smaller or larger scale.” VAN DER WALT, *supra* note 6, at 21. While van der Walt was referring to South Africa in particular and calling for a complete reformation of that property regime, his mode of analysis offers insight into how more progressive and creative ideas in policy and law can be encouraged with respect to property generally. I believe that this level of social commitment and creativity is very much needed to manage the Crisis and policy posed by the Foreclosure Crisis.

11. VAN DER WALT, *supra* note 6, at 17–21.

12. *Id.* at 21. Please note that this Article takes a similar perspective by looking at primarily low income people affected by foreclosure of their primary residence. I do not directly address foreclosures on second houses, vacation homes, and other purchases of non-primary residential properties.

13. As Nestor M. Davidson and Rashmi Dyal-Chand observe: “Because the current economic crisis started in the housing market and because the response has sparked primal concerns about how the government is reshaping the nature of ownership, it is a crisis even more deeply grounded

alternate model of property, I do submit this project in hope of encouraging a rethinking of how property can be crafted in order to offer more creative, flexible ideas regarding housing policy. To do this, I use a case study of Baltimore as a starting point to explore alternative visions of both property and housing policy that more accurately reflect how property works as a regime (and not just as an individual entitlement).¹⁴

The alternative approaches to property that emerge from this analysis offer two modes of analyzing property: the first draws from what Joseph Singer (borrowing from Martha Minow) has referred to as the “connectedness” of property regimes;¹⁵ and the second is what I refer to as the “context” of homeownership.¹⁶ From these perspectives of property, I offer several speculations on ways to advance housing policy that are based on a more flexible idea of ownership.¹⁷

Much has been written on individual judicial decisions and the actual laws and legislative acts passed in response to the Foreclosure Crisis, as well as on the inadequate regulation prior to it.¹⁸ With this Article, I want to take a step back and examine: (1) how the federal government shifted the terms of the choices it faced in housing policy during the Crisis by adopting

in and evocative of property.” Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 *FORDHAM L. REV.* 1607, 1610 (2010). Their project, focusing on the alternate models of property norms that inform the regulatory response with regard to the homeowners and the financial institutions, is discussed in Part III of this Article. While both of our projects set out to link how ideas of property drive regulatory responses, their project focuses on regulation of homeowners as contrasted with financial institutions that emerged during the financial crisis, and my Article focuses on a historical narrative of housing policy before, during, and now after the Foreclosure Crisis. *See id.* at 1611–12.

14. *See infra* Part III.

15. *See* Singer, *supra* note 9, at 336 (arguing that “property and sovereignty are interconnected and that property cannot exist without government”); *see also* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 110 (1991) (explaining that a “social-relations approach” to legal relationships between people “assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood”).

16. *See infra* Part III.

17. *See infra* Part III.

18. *See, e.g.*, Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 *S.C. L. REV.* 727, 732–35 (2009) (discussing a series of economic, administrative, and practical factors that ought to be considered in any prospective solution to the Foreclosure Crisis); Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 *U.S.F. L. REV.* 621, 622–26 (2011) (arguing that contract law facilitated the subprime mortgage crisis by prioritizing the self-interest of involved parties and creating a business culture with a “moral deficit”); Alan M. White, *The Case for Banning Subprime Mortgages*, 77 *U. CIN. L. REV.* 617, 619 (2008) (analyzing the key factors, including inadequate regulation, that contributed to “such an obviously flawed lending model” and subsequent subprime mortgage crisis).

a commodity-based model of property rights; (2) what problems exist with using this version of property; and (3) how this moment can be used to re-orient property and housing in terms that more accurately represent how property works and that encourage innovative solutions to the current problems in housing policy.

Part I of this Article will explore the federal government's commitment to an "Ownership Society," and the underlying vision of property law that informed it—the "[C]astle [M]odel."¹⁹ While the idea of the home as a castle had existed for centuries,²⁰ the federal government's material support and rhetorical dissemination of this ideal in the mid-twentieth century enabled homeownership of a certain kind of house to be deeply embedded in the American psyche. In the 1990s, the goal of homeownership was expanded from not only *castles*, but as I argue, *castles for everyone*—especially for minorities and poor people.²¹ The move toward egalitarian access involved selling the same physical dream of the castle, but with purported significant investment benefits meant to come from homeownership. Primarily, this meant expansive rhetoric and policies that treated the house as a secure and responsible investment and a way for minorities to be included in American society. While the house had been seen as an investment before, this version of the model took the investment qualities of the house to an extreme.²²

Part II will argue that before and during the Foreclosure Crisis the government increasingly treated houses as commodities—judged by investment criteria bound by contractual terms.²³ During the Crisis, this "Commodity Model" was used to limit homeowners' rights to their homes (investments) by the sanctity of contract with their banks and the strength of their investment (if they had invested wisely, they would not be facing fore-

19. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314–15 (2006). My use of the "Castle Model" and the "Commodity Model" terminology is to illustrate the divergent visions that have informed property and housing. I am not arguing that these were the only models that existed, or even that they are discrete, easily defined models with internal consistency; rather, they are ways of seeing the values and choices that have played dominant roles in constructing property and housing policies.

20. See *id.* at 314–15 (explaining that "[t]he most common image of property is the castle," which is an "idea [] deeply embedded in our consciousness").

21. See *infra* Part I.

22. See *infra* Part II; see also *Building Castles of Sand*, ECONOMIST (Apr. 16, 2009), <http://www.economist.com/node/13492469> (asserting that government support for homeownership swelled pricing in the market, which subsequently "exaggerated the consumer boom while it lasted, and amplified the bust when that came").

23. See *infra* Part II.

closure).²⁴ This model advanced certain problematic versions of property rights in houses: it treated them as fungible investments; it evaluated their worth based on investment criteria, such as market value; and it furthered an extreme form of contract law rhetoric that elevated efficiency, liberty, and private nature beyond their practical limit, to the detriment of the actual property attached to those contracts.²⁵

In an attempt to move away from this system of property, Part III offers several values which begin to constitute an alternative model that recognizes the *interconnectedness* of property and the importance of the *context* in which investments and contracts were made, as informed by examples from Baltimore.²⁶ An “interconnected” vision of property includes actors other than the single buyer (borrower) and lender, and it considers the costs and effects of their relationship on the community, the municipality, the physical property itself, and other taxpayers.²⁷ It also recognizes that these various actors are both affected by and have an effect upon property buyers and lenders. A “contextual” inquiry into the investment aspects of homeownership explores what prompted homebuyers to enter into such investments, what information was available, what incentives were offered and by whom, who benefited from these investments, and how they benefited. A contextual inquiry into the mortgage contract goes beyond what is written or whom the two parties are, and it takes into consideration how such contracts came about, the choices and information available at the time they were made, relative bargaining power, and importantly, how the fact that these contracts are often tied to non-fungible forms of property (homes) for many of the parties impacts the nature of the bargain.²⁸

Finally, in Part IV, I will offer several initial speculations as to how a property regime based on these modes of analysis might translate into housing policy, again drawing on examples currently at work in several municipalities in the United States.²⁹

24. This was done through law, regulation (both adopted and not adopted), and rhetoric, as further explained in Part II.

25. See *infra* Part I.

26. See *infra* Part III.

27. See *supra* note 15 and accompanying text.

28. See *infra* Part III.B.

29. See *infra* Part IV.

I. *CASTLES IN HOUSING* POLICY AND PROPERTY LAW PRIOR TO THE FORECLOSURE CRISIS

Federal housing policy after World War II promoted individual family homeownership in ways that set the stage for the Foreclosure Crisis to come. Through a variety of policy mechanisms described below, the federal government aimed to jumpstart the struggling economy with the promotion of homeownership after World War II.³⁰ Later, in the 1990s and 2000s, this vision was expanded to include low-income and minority families in the so-called “American Dream.”³¹ This background provides a clearer picture of how the Foreclosure Crisis eventually arose and why the eventual policy responses to it were so destructive.

These two promotions—homeownership as the primary means of housing and acceptance of low-income and minority families into American society through expanded lending and homeownership—also sold two particular visions of law: absolute ownership over one’s property and purportedly socially inclusive housing policy based on a particular vision of the legitimate (owned) “home.” Below, I argue that these two prongs of the housing policy proved untenable during the Foreclosure Crisis but have nevertheless found their way into a profound place in American society and cannot be completely abandoned.³²

A. *The “Castle Model” of Property Rights*

The idea of one’s house as one’s castle goes back centuries and is deeply embedded in property law and theory. From Sir Edward Coke’s

30. Unfortunately, a full discussion of *why* they promoted this kind of homeownership is beyond the scope of this Article. Factors included a desire to stimulate the economy after World War II, the convergence of technology (including the automobile) and consumerism, strong lobbying from home building and real estate development firms, and fear of communism (as communal living appeared to promote). For a fascinating historical discussion of this, see ROSALYN BAXANDALL & ELIZABETH EWEN, *PICTURE WINDOWS: HOW THE SUBURBS HAPPENED* (2000); KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); Paul Wiseman, *U.S. Economic Recovery Is Weakest Since World War II*, HUFFINGTON POST (Aug. 15, 2012, 11:58 AM), http://www.huffingtonpost.com/2012/08/15/us-economic-recovery-weak_n_1783065.html (discussing the ripple effects in the economy of home purchases). See also Kristin David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 597 (2009) (stating that “[i]n addition to the private interests [of developers, etc.], government officials have long considered boosting homeownership and new construction to be a reliable means of boosting a sluggish economy”).

31. See generally DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007) (discussing how federal intervention spurred a dramatic shift in residential exclusion).

32. See *infra* Part I.

declaration in 1628 that “a man’s house is his castle”³³ to William Blackstone’s famous description of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,”³⁴ much literature has studied Coke’s and Blackstone’s (in)famous quotes, and qualified them with heavy doses of the reality of property.³⁵ As such, I will not attempt to recreate their arguments here.

The version of this image that I focus on in this Article is best described by Joseph Singer and Joan Williams. In the context of government takings, Singer describes what he calls the “castle model of ownership,” which is a model of property valuing dominion over one’s property.³⁶ This idea of dominion is multi-faceted and entails “sovereignty, management and governance,” along with “power absolute within its judicially-delimited sphere.”³⁷ According to the “castle model[,] . . . within the borders of one’s land, the owner is supreme and can do whatever he wishes.”³⁸ As for operating beyond its borders, “one must obtain the consent of other owners to enter their land and have dealings with them.”³⁹

Another articulation of this model comes from Williams, who adopts Thomas Grey’s terminology of the “intuitive image” of property as absolute control over things (rather than relationships between people as described by many legal scholars).⁴⁰ She acknowledges that this version of absolute property rights is distinct from the actual practice of limited ones,⁴¹ but that the rhetoric of absolutism remains a “hardy perennial,” perhaps because the rhetoric of property in this absolute form was not meant to define actual

33. See Singer, *supra* note 19, at 309 (quoting SIR EDWARD COKE, THIRD INSTITUTE OF THE LAWS OF ENGLAND 162 (1644)).

34. 2 WILLIAM BLACKSTONE, COMMENTARIES *2. He is later quoted as saying that “every man’s house is looked upon by the law to be his castle.” 5 WILLIAM BLACKSTONE, COMMENTARIES *235.

35. See, e.g., LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 3 (2003) (exploring “[t]he growing divergence between traditionally protective notions of property and the realities of the contemporary regulatory state”); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280–93 (1998) (pointing out that “[m]any commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights,” the former of which is embodied by Blackstone); Singer, *supra* note 19, at 314 (suggesting a third model of property in addition to Coke’s and Blackstone’s traditional views that “has been marginalized and suppressed”).

36. Singer, *supra* note 19, at 317.

37. *Id.* at 315 (citation omitted).

38. *Id.* at 317.

39. *Id.*

40. Williams, *supra* note 35, at 278, 281.

41. *Id.* at 280–81.

practice, but rather to stand “in opposition to the abuses of [excessive government power]” and to be used “whenever the scope of government power was at issue.”⁴²

The power of the rhetorical forces of absolutism is not to be understated, as it has provided the raw materials for housing policy discourse (and therefore law)⁴³ for decades and continues to have a strong role in social norms regarding property. According to Williams, the rhetoric and conception of absolutism in property rights is held by “layfolk and experts alike.”⁴⁴ This rhetoric of absolute power over one’s borders feeds directly into the idea of the “American Dream,” which is generally acknowledged to mean owning one’s “own” home.⁴⁵ As discussed in this Section, a modern conception of the castle also appears to incorporate the image of a home as a haven and safe place for families to flourish.⁴⁶ Even if one does not fully achieve complete independence and despotism, or a perfect family life, the images of absolute control and the romantic notion of the home have been manufactured as values toward which property in practice might work and as baselines from which other conceptions can be measured.⁴⁷

42. *Id.* at 282.

43. *Id.* at 281. For an insightful analysis as to how rhetoric constitutes law, see James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (suggesting that rather than “a system of rules,” law is more so a “branch of rhetoric . . . the central art by which community and culture are established, maintained, and transformed”).

44. Williams, *supra* note 35, at 278. This is where she differs from Grey, who attempts to distinguish between a layfolk conception of absolutism from the specialist one. *Id.* at 283–84. Williams acknowledges the complexity in both and succeeds in excavating sufficient evidence that experts alike are prone to default to the intuitive image. *Id.* at 284–93. As such, I tend to agree with Williams on this—while experts may acknowledge the limits of absolutism in law, their conceptions do tend to often use the intuitive image as a baseline. *Id.* at 293–94.

45. See Wenli Li & Fang Yang, *American Dream or American Obsession? The Economic Benefits and Costs of Homeownership*, 30 2010 FED. RES. BANK OF PHILA. BUS. REV. 20, 20–21 (2010) (arguing although homeownership has been “an integral part of the American culture” that “it is not for everyone, at least not on economic grounds”), available at http://www.philadelphiafed.org/research-and-data/publications/business-review/2010/q3/brq310_benefits-and-costs-of-homeownership.pdf.

46. See *infra* Part I.

47. See Singer, *supra* note 19, at 311 (“Ownership connotes wealth, power, security, freedom from want, and independence . . .”).

B. Translating the Castle Model into Housing Policy

1. Building the Myth of “Home” and Ownership After World War II

Castles are alluring. As is owning a single-family home, a romance that was supported by the federal government for decades.⁴⁸ The Castle Model was translated into housing policy and manifested in various promotions of single-family suburban house ownership as the legitimate form of residence for citizens living the American Dream.⁴⁹ Shifts in housing policy immediately after World War II effectively redefined the ideal of *having* a residence to *owning* a castle-like home.⁵⁰

Prior to World War II, significant obstacles to homeownership existed, including large down payments (fifty percent or even higher), high interest rates, and short-term mortgages (three to six years).⁵¹ Homeownership rates were limited to around forty percent.⁵² Through a myriad of government endeavors meant to jumpstart the economy, including the establishment of the Federal National Mortgage Association (“Fannie Mae”), Federal Home Loan Mortgage Association (“Freddie Mac”), the Veterans Administration, and the Federal Housing Administration (“FHA”), government policy morphed the previously restricted mortgage instrument into long-term fixed rate

48. See Barbara Kiviat, *The Case Against Homeownership*, TIME (Sept. 11, 2010), <http://www.time.com/time/magazine/article/0,9171,2013850,00.html> (“For the better part of a century, politics, industry and culture aligned to create a fetish of the idea of buying a house.”); Paul Wiseman, *Feds Rethink Policies That Encourage Home Ownership*, USA TODAY, Aug. 13, 2010, http://www.usatoday.com/money/economy/housing/2010-08-11-housing11_cv_N.htm (asserting that for the past seventy years, “Uncle Sam” has been doing “[w]hatever it takes” to encourage homeownership); William M. Rohe et al., *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research 1* (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. LIHO-01.12, 2001), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/liho01-12.pdf> (“Living in a single-family, owner-occupied dwelling unit is central to the American conception of a secure and successful life.”); Li & Yang, *supra* note 45, at 20 (“Homeownership . . . is an integral part of the American culture.”).

49. Thomas J. Sugrue, *The New American Dream: Renting*, WALL STREET JOURNAL, Aug. 14, 2009, <http://online.wsj.com/article/SB10001424052970204409904574350432677038184.html> (“Federal housing policies changed the whole landscape of America, creating the sprawlscape that we now call home Of new housing today, 80% is built in suburbs—the direct legacy of federal policies that favored outlying areas rather than the rehabilitation of city centers.”).

50. BAXANDALL & EWEN, *supra* note 30, at 87 (“The power of the [American Dream] was so persuasive that a *Saturday Evening Post* in 1945 revealed that only 14 percent of the population would be satisfied to live in an apartment or a ‘used house.’”).

51. See *supra* notes 48–49.

52. Wiseman, *supra* note 48.

instruments with much lower down payments.⁵³ Simultaneously, there was the creation of the secondary mortgage market.⁵⁴ These policies meant, as the government intended, that more and more Americans, particularly veterans, could take advantage of the apparent benefits of homeownership.⁵⁵ These policy apparatuses also coincided with the beginning of the rhetoric extolling the benefits and American-ness of homeownership that would eventually become inextricably ingrained into American society.⁵⁶

Through the decades, American presidents expounded this vision through the programs above as well as through speeches and public statements. President Herbert Hoover's statement embodied American consciousness regarding owning a house quite well: "The sentiment for home ownership is so embedded in the American heart that millions of people who dwell in tenements, apartments, and rental rows of solid brick have the aspiration for wider opportunity in ownership of their own home."⁵⁷

Several aspects of this statement are worth noting. By President Herbert Hoover's account, "dwelling" in an apartment, tenement or rental is separate from the idea of one's "own" home found in the "American heart."⁵⁸ He also said that ballads about homes "were not written about tenements or apartments . . . they never sing about a pile of rent receipts."⁵⁹ In sum, then, having a residence was basically recast as owning one's own home. Moreover, in President Hoover's account, even having one's own apartment or sharing a home with others (presumably with other families)

53. *Id.*; Li & Yang, *supra* note 45, at 21.

54. Though these policies also effectively blurred lines between government and "private" promotion, this fact is often lost in current policy debates. Sugrue discusses the impact of these blurred lines:

Yet the story of how the dream became a reality is not one of independence, self-sufficiency, and entrepreneurial pluck. It's not the story of the inexorable march of the free market. It's a different kind of American story, of government, financial regulation, and taxation. We are a nation of homeowners and home-speculators because of Uncle Sam. . . . It's a story riddled with irony—for at the same time that Uncle Sam brought the dream of home ownership to reality—he kept his role mostly hidden, except to the army banking, real-estate and construction lobbyists who rose to protect their industries' newfound gains Tens of millions of Americans owned their own homes because of government programs, but they had no reason to doubt that their home ownership was a result of their own virtue and hard work, their own grit and determination—not because they were the beneficiaries of one of the grandest government programs ever.

See Sugrue, *supra* note 49.

55. *Id.*

56. See *supra* note 48 and accompanying text.

57. Adams, *supra* note 30, at 574 (citations omitted).

58. *Id.*

59. Sugrue, *supra* note 49.

might not meet the high expectations in the American heart. Indeed, only single-family owned houses appeared to constitute homes. Apartments, rentals, and other arrangements have been cut out of legitimacy with two interrelated results. First, “houses” and “homes” are often synonymous in American public discourse; and second, this vision of single-family homeownership was the form of housing most celebrated as the American Dream from approximately this time forward.⁶⁰

President Hoover also linked aspiration and opportunity with homeownership, a theme that carried through the decades. He is, of course, joined by later presidents, across party lines. For example, President Franklin Roosevelt stated: ““A nation of homeowners is unconquerable.””⁶¹ Joining the sentiment, Presidents John F. Kennedy and Lyndon B. Johnson put in place the administrative structures mentioned above (FHA, Fannie Mae, Freddie Mac) that would eventually enable the expansion of homeownership to low-income and minority populations.⁶²

This sentiment has continued—fast forward to former President Bill Clinton’s model of housing policy, explained by his Housing and Urban Development (“HUD”) Secretary, Henry G. Cisneros, as ““graduat[ing]”” the unhoused from shelters to eventual homeownership.⁶³ While Secretary Cisneros acknowledged that appropriate choices and affordability concerns are important, these steps toward homeownership form a clear hierarchy, with ownership at the top.⁶⁴

In the years immediately preceding the Foreclosure Crisis, President George W. Bush took the commitment to homeownership to the next level in both rhetoric and policy. President Bush, upon being sworn in a second

60. See Henry G. Cisneros, Joint Ctr. for Hous. Studies of Harvard Univ., The John T. Dunlop Lecture, Homes for Americans in the 21st Century: Challenges and Opportunities for the Nation 37 (Sept. 29, 2003), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/m03-2_cisneros.pdf (noting that “[t]he final step of the Housing Continuum” is long-term, owner-occupied homeownership).

61. Li & Yang, *supra* note 45, at 20.

62. See *id.* at 20 (exploring the effect of cheap credit and insurance guarantees offered by Fannie Mae, Freddie Mac, and the FHA); Wiseman, *supra* note 48 (reporting that post-World War II government push for homeownership came “through Fannie, Freddie, the Veterans Administration and the Federal Housing Administration”).

63. Cisneros, *supra* note 60, at 12. Incidentally, at the time he gave the speech in 2003, Cisneros was CEO of American City Vista whose focus “is to build significant numbers of homes . . . in central neighborhoods of major metropolitan areas.” *Id.* at 5.

64. *Id.* at 10. I am not trying to attack all housing policy that promoted homeownership. I am attempting to lay out how these policies were promoted so that their abandonment, as discussed in Part B, is all the more surprising (and unfair), and the need to rework them, as discussed in Part IV, becomes all the more clear.

time, noted the government's commitment to enable citizens to be free of government through owning their homes:

And now we will extend this vision [of a broader definition of liberty] by reforming great institutions to serve the needs of our time. To give every American a stake in the promise and future of our country, we will bring the highest standards to our schools and build an ownership society. We will widen the ownership of homes and businesses, retirement savings and health insurance preparing our people for the challenges of life in a free society. By making every citizen an agent of his or her own destiny, we will give our fellow Americans greater freedom from want and fear, and make our society more prosperous and just and equal.⁶⁵

This rhetoric was backed by policies including down-payment assistance, tax breaks, and other programs to enable more people, especially minorities, to own homes. In fact, President Bush explicitly encouraged public-private partnerships on this front.⁶⁶ And, the private entities embraced this ownership rhetoric, as well, until it seemed the entire country had forgotten that the American Dream had ever meant anything other than ownership.⁶⁷

In short, the federal government encouraged homeownership through ubiquitous rhetoric⁶⁸ extolling the American-ness of the dream of owner-

65. See Bush, *supra* note 1 (emphasis added).

66. Press Release, The White House, Fact Sheet: Am.'s Ownership Soc'y: Expanding Opportunities (Aug. 9, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040809-9.html> ("President Bush issued *America's Homeownership Challenge* to the real estate and mortgage finance industries to encourage them to join the effort to close the gap that exists between the homeownership rates of minorities and non-minorities.").

67. See Angelo R. Mozilo, Chairman, President, & Chief Executive Officer, Countrywide Fin. Corp. & Chairman, Countrywide Home Loans, Inc., Presentation for the Joint Ctr. for Hous. Studies of Harvard Univ., *The American Dream of Homeownership: From Cliché to Mission* 5 (Feb. 4, 2003), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/m03-1_mozilo.pdf (describing their mission as "providing more families with the opportunity to realize their American Dream by becoming homeowners"); see also Sugrue, *supra* note 49 ("James Truslow Adams, the historian who coined the phrase 'the American Dream,' one that he defined as 'a better, richer, and happier life for all our citizens of every rank' also offered a prescient commentary in the midst of the Great Depression. 'That dream,' he wrote in 1933, 'has always meant more than the accumulation of material goods.' Home should be a place to build a household . . .").

68. See generally GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION (2006) (discussing the long-term strategy for returning America to its progressive ideals). See also *Let FHA Loans Help You*, U.S. DEP'T OF HOUS. & URB. DEV., <http://www.hud.gov/buying/loans.cfm> (last visited Nov. 26, 2013). The Department of Housing and Urban Development continues to sell this vision. Its federal website features a picture of a

ship⁶⁹ and supporting that dream through easy credit, which was made possible through the restructuring of the financial incentives for ownership by making it easier to qualify for loans and providing massive subsidies.⁷⁰

2. Castles for Everyone

Homeownership policy at the brink of the Foreclosure Crisis had two important prongs—not just castles, but castles for everyone. From the time President Lyndon Johnson initiated low-income homeownership policies and expanded federal housing subsidy programs (as part of a response to urban riots and racial inequalities),⁷¹ to the National Homeownership Strategy under President Clinton,⁷² and finally through President George W. Bush’s “Ownership Society,”⁷³ the federal government recognized that the gap between nonminority and minority ownership needed to be closed. President Bush’s plans for the ownership society explicitly celebrated the increase in minority ownership during his tenure.⁷⁴ Closing the racial divide of access to property is a laudable goal. As I explain in Part III, however, attempting to meet it through a rigid vision of ownership and investment proved disastrous in the end.⁷⁵

This promotion of mortgages went further than before and proceeded in a way that set the stage for the Foreclosure Crisis (a consequence that had

happy family (a mom, a dad, and their children) with a baseball glove, teddy bear, and a soccer ball. *Id.*

69. See Sugrue, *supra* note 49 (“Every generation has offered its own version of the claim that owner-occupied homes are the nation’s saving grace. During the Cold War, home ownership was moral armor, protecting America from dangerous outside influences. ‘No man who owns his own house and lot can be a Communist,’ proclaimed builder William Levitt.”).

70. See Michael S. Carliner, *Development of Federal Homeownership “Policy,”* 9 HOUS. POL’Y DEBATE 299, 300 (1998) (stating that “[f]ederal government policy toward housing in general, and homeownership in particular, is exercised through three primary mechanisms: tax benefits, regulation of and participation in the financial system, and direct subsidies to housing producers and consumers”); *Building Castles of Sand*, *supra* note 22 (stating “[g]overnments spent a fortune encouraging people to buy houses”).

71. George S. Masnick, *Home Ownership Trends and Racial Inequality in the United States in the 20th Century* 6 (Joint Ctr. for Hous. Studies, Harvard Univ., Working Paper No. W01-4, 2001), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/masnick_w01-4.pdf.

72. See Adams, *supra* note 30 at 587 (“The increase in homeownership rates in the U.S. in the past several decades has been, at least in part, the product of government initiatives such as the Department of Housing and Urban Development’s (HUD) National Homeownership Strategy, which began in August 1994 under Henry G. Cisneros’s leadership. The program’s goal was to achieve record high homeownership in six years As part of this goal, the National Homeownership Strategy encouraged ‘creative financing’ as a positive good.” (citations omitted)).

73. Press Release, The White House, *supra* note 66.

74. *Id.*

75. See *infra* Part III.

ruinous effects on the very “social fabric” the federal government purported to have strengthened). The government encouraged and financed lower credit standards for loans. During Clinton’s presidency, Fannie Mae and Freddie Mac worked to expand lending to minority and low-income populations by making lenders report their loans and by guaranteeing subprime loans (that is, loans with high interest rates given to riskier borrowers).⁷⁶ Additionally, the federal government did not regulate its new mortgage instruments, namely, adjustable rate mortgages (“ARM”) that had come in response to meet the demands for mortgages created by increased capital flows into the secondary mortgage market.⁷⁷ The new mortgage instruments had very low initial teaser rates, where borrowers had to pay only interest for the first few years, followed by massive increases in monthly payments when the interest rate reset.⁷⁸ Further, these instruments often also required low or no down payments.⁷⁹ The lack of regulation surrounding these new instruments was clearly a choice, and by failing to regulate them, they grew like weeds.⁸⁰ The government also chose not to regulate the secondary mortgage market, namely, the increased securitization through collateralized debt obligations (“CDOs”) as well as increased exposure to the risky underlying mortgages and CDOs through the credit default swaps (“CDSs”).⁸¹ Finally, the federal government de-regulated (or chose not to

76. Thayer Watkins, *The Nature and the Origin of the Subprime Mortgage Crisis*, SAN JOSE STATE UNIV. DEP’T OF ECON., <http://www.sjsu.edu/faculty/watkins/subprime.htm> (last visited Nov. 23, 2011). But see Jeff Madrick & Frank Partnoy, *Why Fannie and Freddie Are Not to Blame for the Crisis*, THE NEW YORK REVIEW OF BOOKS (July 13, 2011, 12:02 PM), <http://www.nybooks.com/blogs/nyrblog/2011/jul/13/why-fannie-and-freddie-are-not-blame-crisis/>. I do not attest that Fannie Mae and Freddie Mac caused the Crisis. I do, however, believe that their encouragement and acceptance of subprime loans played a part in structuring the kinds of financing that eventually fueled the reckless lending, which then precipitated the Crisis.

77. Brent T. White, *Walking Away Scot-Free: Trust, Expert Advice, and Realtor Responsibility*, 40 REAL ESTATE L.J. 312, 322 (2011).

78. *Id.* Unfortunately, brokers did not always inform borrowers and/or borrowers failed to understand this. *Id.* at 318.

79. *Id.* at 322.

80. Jodie Bernstein, Director, Bureau of Consumer Prot., Prepared Statement of the Fed. Trade Comm’n on Home Equity Lending Abuses in the Subprime Mortgage Industry (Mar. 16, 1998), available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-home-equity-lending-abuses-subprime-mortgage-industry/grass5.pdf. The government did not pay heed to this 1998 testimony regarding fraud in the subprime mortgage industry. *Id.*

81. *Id.*

regulate) the mortgage industry, specifically the types of banks that could offer mortgages and the fee income structure of mortgage brokers.⁸²

C. *How These Polices Map to the Castle Model of Property Rights*

The top of the hierarchy of housing (or, the American Dream)—the detached single-family house—maps pretty well to the castle image. Rather than shared equity, rentals, or even apartments, ownership of a detached home appears to offer independence, freedom, and all things American, in part because it also offers the physicality closest to the romantic version of a castle⁸³ in modern times. The suburban home is unattached to neighbors, removed from city centers, and is something of which to be proud—a house of one’s own where inside, one can do as one likes.⁸⁴

The single-family detached unit also appears to offer the clearest form of dominion because it has the clearest physical boundaries between it and neighboring properties. From this place, an owner could exercise both “dominion” and “sovereignty, management and governance.”⁸⁵ This unit also promotes the romance of the “home”—a place where one has family, events, security, health, and even spirituality.⁸⁶ Family, the home, and ownership are closely intertwined in this vision: “[t]he American family home has played a large role in our social fabric, and the family unit has been seen as virtually synonymous with the physical structure of the house.”⁸⁷ Indeed, buying a house has become a symbol and a rite of pas-

82. Again, I am not trying to blame the government (and implicitly, the bankers). I am simply trying to highlight several of the regulatory decisions that lead to the environment in which some bankers (and some borrowers) went berserk.

83. As opposed to an actual castle, wherein the ‘owner’ would share space and feudal responsibilities with and be dependent on the labor of many people to keep it functioning.

84. See Adams, *supra* note 30, at 595 n.115 (quoting DONALD MACDONALD, *DEMOCRATIC ARCHITECTURE: PRACTICAL SOLUTIONS TO TODAY’S HOUSING CRISIS* 52 (1996)) (describing several practical and psychological reasons for the societal preference for detached housing and stating that, “for better or worse the image of the single-family home on its own land is a deeply rooted American tradition,” and “[i]n many cases [physical separation from other homes] was a decisive selling point”); see also Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1537 n.55 (2007) (citing CLIFFORD EDWARD CLARK, JR., *THE AMERICAN FAMILY HOME 1800–1960*, 239–41 (1986)) (“chronicling the steadfast importance to Americans of owning a single-family dwelling”).

85. Singer, *supra* note 19, at 315.

86. Cisneros, *supra* note 60, at 13.

87. Korngold, *supra* note 84, at 1536. Korngold further describes the American family home:

[It] remains a foundation of our society: often representing a family’s greatest economic investment and asset and providing a source of stability in difficult economic times; providing a haven from the hubbub of the outside worlds of work and public affairs, es-

sage. With it comes status and an important place in American society.⁸⁸ Additionally, “[i]n such a context [of so much personal and societal importance placed on the home], enduring racial differences in homeownership must be taken very seriously.”⁸⁹ In this march toward the American Dream then, the promotion of “castles for everyone” appears to be inevitable.

The nature of ownership in this story is a cipher, morphing in form but not in norm. Ownership has been the ideal for decades. Although it was not as widespread, it was still highly valued prior to World War II.⁹⁰ In more recent times, however, while physically the unit may appear to be one’s own castle, financially the modern form is far from autonomous, relying on borrowed funds from a bank, actual owned percentages (equity) of varying amounts, and the specter of foreclosure in the background (until recently when it moved to the foreground). This change in the financial form of ownership does not appear to have tarnished its status as the American Dream (although it did affect the reality of these “creative” arrangements during the Foreclosure Crisis). In Parts III and IV, I will return to this idea to advocate for another morphing of the form (and this time, the norm) of ownership.⁹¹

There are tensions even within the Castle Model other than financial ones. For example, there is the reality of limited rights to one’s property and the reality of the values that ownership purportedly promotes (values such as civic responsibility, security, and participation, to name a few).⁹²

pecially in a mobile society; offering opportunities for personal satisfaction through self-actualization and family interactions; presenting a forum for the inculcation of values in children that will support civic discourse and deeds and the realization of personal dreams; and allowing an opportunity to create a pleasing aesthetic.

Id. at 1537.

88. See Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 952 (2008).

89. Masnick, *supra* note 71, at 8.

90. See Korngold, *supra* note 84, at 1535 (discussing how land ownership shaped American society and that “[b]uying land was an especially important means to improve social status for immigrants to the United States”).

91. See *infra* Parts III–IV.

92. See *Building Castles of Sand*, *supra* note 22 (“Governments subsidize home ownership because they think it encourages stable, more law-abiding neighborhoods. The children of homeowners do better at school than the children of renters do. Homeowners are more engaged in local democracy. And, because homeowners must pay off their mortgages, housing supposedly encourages people to save more than they otherwise would.”). For more on this, see LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009).

To the extent that these tensions are within the scope of this Article, they will be folded into the discussion in Part III.⁹³

II. THE FORECLOSURE CRISIS AND AN OLD MODEL OF COMMODIFICATION OF HOUSES, REVISED

Beginning in the mid-2000s, the dream of castles for everyone imploded as many new homeowners found themselves unable to meet mortgage payments, many of which had increased due to the reset of their variable rate mortgages after the initial teaser period.⁹⁴ This led to defaults and a decline in the real estate market, a cycle where home values continued to fall and houses became harder to sell.⁹⁵ Buyers could not refinance or sell their houses to meet their payments.⁹⁶ Lenders foreclosed and faced difficulty when trying to resell.⁹⁷ This situation spread quickly to the financial markets through bonds that depended on payment streams from mortgages and swaps that insured those bonds.⁹⁸ It is estimated that over four million homes have been foreclosed upon since 2007.⁹⁹

Given the overt governmental furtherance of the egalitarian castle, one might have expected some government action to address demands to help home buyers, especially as demands came from the same low-income people whose homeownership the government had purported to support.¹⁰⁰ Instead, the government abandoned the home rhetoric and treated houses primarily as investments or contracts, as explored below.¹⁰¹ Once houses

93. See *infra* Part III.

94. Overall homeownership fell from the peak of ownership at 69% in 2005 to 65.9% in 2011. Adams, *supra* note 30. Homeownership had not been this low since 1997. For African Americans, homeownership peaked in 2004 at 49.7% and fell in 2011 to 44.2%. Press Release, United States Census Bureau, 2011 Housing Vacancy Survey Annual Statistics (2011), http://www.census.gov/housing/hvs/files/annual11/ann11t_22.xls. For Hispanics, ownership peaked in 2005 at 50% and in 2011 had fallen 46.6%. *Id.* African Americans had not had a rate that low since 1997, and the same for Hispanics since 1999. *Id.*

95. White, *supra* note 77, at 322.

96. *Id.*

97. Korngold, *supra* note 18.

98. White, *supra* note 77, at 322.

99. Les Christie, *Foreclosures Fall to Lowest Level Since 2007*, CNN MONEY (Jan. 1, 2012, 8:18 AM), http://money.cnn.com/2012/01/12/real_estate/foreclosures/index.htm. For an overview of the Crisis as it unfolded, see *Foreclosed Justice: Causes and Effects of the Foreclosure Crisis (Part I & II): Hearing Before the Comm. on the Judiciary H. R., 111th Cong.* (2010).

100. Chris Isidore, *The Next Bailout: Homeowners*, CNN MONEY (Mar. 27, 2008, 6:57 AM), <http://money.cnn.com/2008/03/26/news/economy/bailout/index.htm> (discussing protests and populist sentiment regarding the bailout of Bear Stearns and lack of bailout for homeowners, prior to TARP).

101. See Sugrue, *supra* note 49.

became investments or contracts, policymakers focused on narrow policy solutions flowing from this narrow view of legal choices, forcing a choice between banks and homeowners.

First, this Part constructs the “Commodity Model”¹⁰² in order to describe the vision of property rights that informed how housing was treated during the Foreclosure Crisis, as well as to detangle the problems for property and housing policy that arise from using this model.¹⁰³ Second, this Part then explores how this “Commodity Model” operated to confine potential causes and solutions, as evidenced by the rhetoric and regulation propagated by lawmakers. I will argue that this analysis and rhetoric translated into a narrow legal framework that barely addressed problems faced by homeowners struggling with foreclosure—namely the Trouble Asset Relief Program (“TARP”), along with a medley of other acts passed after 2007. This Part concludes with a lengthy discussion regarding the problematic versions of property rights advanced by this treatment of houses and homeowners, mortgages, and mortgage holders.¹⁰⁴

A. *Treating Houses as Commodities Through Rhetoric and Law*

The “Commodity Model” draws from Singer’s “Investment Model” and adds an additional contractual aspect at work during the Foreclosure Crisis—namely, the treatment of houses as investments, *as defined by the contractual agreements* relating to the attached mortgage.¹⁰⁵ In Singer’s Investment Model, a certain form of property is prized above others: property as an investment in a market economy with reasonable expectations of economic rewards.¹⁰⁶ Under this model, regulation of property is evaluated according to how it accords with the “justified expectations of investors.”¹⁰⁷ A legal analysis using this model tests whether the owner’s expectations were “economically justified” and compares those expectations to the regulation in question.¹⁰⁸

102. ALEXANDER, *supra* note 7. Alexander also describes a model of property wherein houses are treated as a “commodity,” but his model (to put it crudely) is a rough combination of the Castle Model and Commodity Model I describe, *supra*, in this Article. Davidson and Dyal-Chand’s approach is more similar to Alexander’s. See *supra* note 13. For my purposes, I think it is helpful to separate how the two models (or parts of the models) came to be prevalent at different times, though they both existed concurrently.

103. See *infra* Part II.A.

104. See *infra* Part II.B.

105. Singer, *supra* note 19, at 309.

106. *Id.*

107. *Id.* at 323 (emphasis omitted).

108. *Id.*

The use of a vision of property primarily as an investment triggered and exacerbated the Foreclosure Crisis and informed the policies meant to stem it. Before the Foreclosure Crisis, the “Investment Model” was used to justify the goal of homeownership for all because the economic benefits appeared to be secure and extensive (a view upon which the government, real estate agents,¹⁰⁹ and banks were all on board). During the Foreclosure Crisis, this model appears to have operated abysmally for bad investors and rather poorly for good investors.¹¹⁰ For bad investors (or “irresponsible” investors as they are called below),¹¹¹ their expectations and situation *ex ante*—the information available to them, the analysis done by mortgage brokers on their behalf, and the encouragement for them to buy—are not considered. Instead, it seems that if one is facing foreclosure, *no* expectations are legitimate ones. Rather, investors are judged at the moment of entry into their mortgage agreements by the *ex post* condition that they are facing foreclosure. From this place of analysis, “economically justified” expectations in Singer’s formulation are reformulated as *contractually* justified expectations.¹¹² The mortgage contract defined the entire boundaries of what an investor is entitled to expect. By looking at the four corners of a “bad” investor’s mortgage contract, any expectation of keeping one’s house if one cannot pay the mortgage is not justified; therefore, no regulation is necessary to save them (the absence of regulation is also a decision regarding regulation, of course).

For good investors, or “responsible” home-buyers that were able to make their mortgage payments and keep their homes, their problems with payments or meeting other creditors were not addressed. Their expectations of economic reward appeared to have been economically justified (even if their house was underwater, as long as they were making payments), which further supported the idea that strong regulation was not necessary.

1. Treating Houses Primarily as Investments

The idea that buying a house was a good investment, and a reliable way of planning for retirement, was not new in property theory or housing policy.¹¹³ In the mid-2000s, however, this model of purchasing houses for

109. See White, *supra* note 77.

110. Both in a slightly different way than it had previously operated.

111. See *infra* Part II.

112. Singer, *supra* note 19, at 323.

113. Houses were treated, at least partly, as investments for decades. See FREUND, *supra* note 31. I argue that in the 1990s, houses began to be seen as investments in an extreme and untenable way, which obscured the context of home purchase and attachment. See *supra* text accompanying notes 105–112.

the purpose of investment was taken to an extreme: First, it was used to encourage massive mortgage borrowing and lending;¹¹⁴ and second, it was used to justify the federal government's failure to save irresponsible investments or investors.¹¹⁵

Although houses had been considered investments as well as homes for decades, before and during the Foreclosure Crisis this became the primary lens through which the government treated the purchase of a house. This treatment allowed the government to: (1) deprioritize policies that would have kept people in their houses, and (2) treat homeowners, during the initial TARP phase, as responsible or irresponsible investors who therefore might "deserve" losing their investments.

The analysis during the formulation of policy responses to the Foreclosure Crisis did not take into account the *context* of the "investments." It was not driven by any significant recognition that the government had played a role in promoting the kinds of homeownership and lending that had led to the Crisis; rather, it was primarily dominated by blame for irresponsible borrowers and lenders.¹¹⁶ A 2008 statement from Senator Richard Shelby of Alabama, the senior Republican on the Banking Committee, typifies this blaming and framing: "There is a line that I believe we should not cross. . . . That line is represented by a taxpayer-funded bailout of investors or homeowners who freely and willingly entered into mortgages that they knew or should have known they could not afford."¹¹⁷

There are several aspects of thinking that Senator Shelby's statement highlights. First, the blame and responsibility is placed only on homeowners and the expectation that they knew or should have known that their mortgages would prove unsustainable.¹¹⁸ By the time Senator Shelby made this statement in 2008, however, evidence of fraud and more complex causation than mere irresponsible borrowing had been brought to light, but

114. Sugrue, *supra* note 49.

115. See *infra* notes 116–117 and accompanying text.

116. See Leonhard, *supra* note 18, at 621 ("Some blame [the financial crisis] on irresponsible borrowers who spent money beyond their means in an ill-fated pursuit of the American dream of home ownership.") (citation omitted).

117. David M. Herszenhorn & Vikas Bajaj, *Tricky Task of Offering Aid to Homeowners*, N.Y. TIMES, Apr. 6, 2008, at A1. See also MONIQUE W. MORRIS, DISCRIMINATION AND MORTGAGE LENDING IN AMERICA: A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME LENDING ON AFRICAN AMERICANS 2 (2009) ("From Wall Street to Main Street, rumors have dominated the public discourse regarding who is most affected by subprime lending and the foreclosure crisis that has ensued. The overall thrust of this discourse has been to blame an 'irresponsible borrower'; however, deeper analysis reveals a different story.").

118. *Id.*

such evidence was ignored in many policy discussions.¹¹⁹ Second, investors and homeowners are linked, as if they faced similar goals and failures.¹²⁰ Other lawmakers similarly focused on the homeowner as a “borrower” as opposed to a seeker or achiever of the American Dream.¹²¹ Third, the idea of assistance is characterized as a “bailout”—the government *saving* the homeowner/investor—as opposed to the government assisting in alleviating a situation that they had no small role in bringing about.¹²² Finally, there is an apparent commitment to principles with no actual basis articulated, e.g., “‘a line that . . . should not [be] cross[ed].’”¹²³ A few months later, TARP appeared to cross every line with regard to the banks.¹²⁴ It is unclear what operative principle was used to determine that bailing out banks that entered into CDOs, which banks should have known were risky, did not cross any lines, whereas bailing out individuals who had entered into deceptively attractive mortgages would.

The executive branch also embraced the rhetorical shift of houses from homes to fungible investments gained through irresponsible loans. Phillip Swagel, former Assistant Secretary for Economic Policy from December 2006 through January 2009, wrote a paper on the decisionmaking that occurred in the government during the mortgage and financial crisis.¹²⁵ Through his position, Swagel, a former academic who, according to Andrew Ross Sorkin, resembled a “wonky government official,”¹²⁶ was privy to the innermost circles of government decision-making during the Crisis.¹²⁷ According to Swagel, while the Department of the Treasury had a focus on housing and foreclosure prevention after August 2008 (note the late timing), there were “political constraints” to having mortgage servicers modify loans, even though this approach did not involve public expenditure.¹²⁸ These political constraints operated tightly “since there was little appetite in Congress for a program that would transparently reward ‘irresponsible’ bor-

119. See White, *supra* note 77, at 332.

120. See Herszenhorn & Bajaj, *supra* note 117.

121. *Id.*

122. *Id.*

123. *Id.*

124. See *infra* Part II.B.

125. Phillip Swagel, *The Financial Crisis: An Inside View*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2009, at 2.

126. ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* 83 (2009).

127. Swagel, *supra* note 125. I quote Swagel at length in this Part as his is one of the few true insider accounts into how decisions were made during this time.

128. *Id.*

rowers who had purchased homes they could never have hoped to afford.”¹²⁹

Swagel’s ambivalence is emblematic of the government’s approach. There was a focus on housing but not on assistance; even the use of voluntary modifications (which usually reduced monthly mortgage payments and not the overall principal amounts, and for which no public money was necessary) was constrained.¹³⁰ According to Swagel, the administration—including the White House and Department of the Treasury—was unwilling to use public money to assist “irresponsible” homeowners, particularly those who had purchased “McMansions” or flat screen televisions.¹³¹ I argue that this focus on “irresponsibility” is one of the main considerations¹³² driving the unwillingness to enact meaningful regulation.

While it may have been a very legitimate concern not to bail out people who had recklessly overspent beyond their means, to paint this portion of the population as material enough to justify no bailout at all is simplistic and sounds like an excuse. It would have taken some work to figure out whom to bail out and by how much, but that complexity should not have meant that such a project should not have been undertaken. The rhetorical force of the above is clearly manifested in the kinds of regulation that emerged from these deliberations, as explained in the next Section.¹³³

Swagel cites public opinion as being against bailouts for homeowners, though public opinion against bailing out the banks did not stop the federal government from doing so, perhaps because bailing out banks appeared to

129. *Id.*

130. *See infra* Part II.B.

131. Swagel, *supra* note 125, at 21. Swagel explains:

Congress appeared to heed this [public] opposition as well: there were constant calls for the Treasury and the administration to do more on foreclosure prevention, but this was just rhetoric. Until the FDIC came out with a proposal late in 2008, there was no legislative support to spend public money to actually prevent foreclosures—the congressional proposal discussed below ostensibly did not use public funds. And as discussed below in relation to the TARP, even in the fall of 2008, Congress’ desire was for the Treasury to spend TARP money for foreclosure avoidance. Members of Congress did not want to have to vote specifically to spend money on this, suggesting that they understood the poor optics of having the government write checks when some would find their way into the hands of ‘irresponsible homeowners.’

Id. at 21–22.

132. Michelle Bachmann, *A Long Term Mortgage Crisis* (Feb. 20, 2009), <http://bachmann.house.gov/long-term-mortgage-crisis>. Michelle Bachmann continued the irresponsible versus responsible rhetoric on her blog. Ironically, if one listens to the voices of the homeowners, it seems that the so-called “irresponsible” defaulters are “rewarded” with options for a bailout, whereas the ones scraping by to make payments are not.

133. *See infra* Part II.B.

be necessary.¹³⁴ Bailing out the lower income portions of the population who had been encouraged to purchase homes, in part based on decades of government propaganda and legal support, however, does not appear to be the material “popular opinion” that was taken into account.¹³⁵

The government could have reframed the causes and potential solutions to the Crisis. It could have taken this opportunity to explain housing policy, how it went wrong, and why they were intervening. Instead, policymakers sidestepped federal government responsibility and focused on voluntary modifications, with no cost to the public.¹³⁶

Rhetoric in this vein has continued. During President Obama’s tenure, the Department of the Treasury website has explicitly stated that the Home Affordable Modification Program (“HAMP”) discussed below “wasn’t a bailout for irresponsible homeowners.”¹³⁷ Even after so much evidence of fraud, fudged paperwork, and improper evaluations were acknowledged, the rhetoric still bemoans the culpability of the homeowner, not of the government or of the complexity of causation.¹³⁸ I will not attempt to prove whether certain homeowners were or were not responsible. I am attempting to demonstrate how the dialogue shifted during the Crisis to blame homeowners as bad investors in a way that exculpated the government from blame or material commitment to a solution.¹³⁹ The policy went from championing increases in homeownership numbers, allowing Fannie Mae and Freddie Mac to guarantee nonprime loans, to blaming the perceived irresponsible homeowner/investor.¹⁴⁰ This change in dialogue and the ensuing legal regimes enabled all the homeowners, not just the “responsible” ones, to be left behind.¹⁴¹

134. Swagel, *supra* note 125 (“[T]he public opposition to such bailouts appeared to be intense—ironically, many people were already angry at the Treasury for supposedly bailing out irresponsible homeowners through Hope Now, even though this did not involve explicit public spending.”).

135. *Id.*

136. *See infra* Part II.B.

137. *What You Haven’t Heard About TARP*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/results/Pages/Index.aspx> (last visited Feb. 3, 2014).

138. *Id.*

139. *See infra* Part II.A.2.

140. In the sources I cite in this Section, when it is stated that a homeowner was irresponsible, it is in the context of a homeowner as an investor—the irresponsibility in question is with regard to the investment quality of buying the house, not an irresponsibility as it pertains to the upkeep or other responsibilities of owning a house. *See supra* text accompanying notes 105–112.

141. *See infra* Part II.B.

2. *Treating Houses as Codified Contracts*

While seeing homes as irresponsible investments may have allowed the government to morally refrain from action, seeing homes as purely private contractual arrangements (mortgages) between borrower and lender enabled the government to stay out of the issue legally.¹⁴²

As Swagel explained, modifying the mortgages in bankruptcy court was attractive partly because it did not cost the federal government any money, but also because it would “abrogate” contracts between lenders and homeowners:

The Treasury opposed the cramdown proposal [to allow bankruptcy courts to retroactively modify mortgages] out of concern that abrogating contracts in this way would have undesirable consequences for the future availability of credit, especially to low-income borrowers. Some current borrowers would benefit from having their mortgage balance reduced, but future borrowers would find it more difficult to obtain a loan.¹⁴³

This view is problematic for several reasons. As explored in Part II.C., it inflates certain views of contract law, which not only subsumes property, but also leaves behind current low-income and minority borrowers facing trouble (purportedly in an effort to protect *future* low-income borrowers, who, at the rate the banks were releasing funds, were unlikely to get credit regardless). Second, it places the government outside the purview of direct action with regard to contracts and pits policy choices as necessarily choosing between banks and homeowners, as further discussed below.¹⁴⁴

In short, now that homeowners could be thought of as irresponsible investors and poor contract negotiators, their rights to their homes (investments) could be limited by the sanctity of contract with their banks and the strength of their investment (that is, if they had invested wisely, they would not be facing foreclosure). From this view of the events, policymakers effectively shifted the rhetoric of houses as “homes” toward houses as investments and contracts—moreover, as investments primarily for the responsible investor and contracts for the responsible negotiator.¹⁴⁵ Either way, very few homes were actually worth saving. Not surprisingly, this process decimated both the “castle” and the “for all” visions along the way.

142. See *Bill Moyers Journal: William K. Black: CSI Bailout* (PBS television broadcast Apr. 3, 2009), available at www.pbs.org/moyers/journal/04032009/watch.html.

143. Swagel, *supra* note 125, at 22–23.

144. See *infra* Part II.

145. See *supra* notes 105–112.

B. This Model Leads to Narrow Solutions: Banks v. Homeowners

Once homes were investments or contracts, this rhetoric translated into potential solutions to the Crisis—solutions that were narrowly defined as a choice between banks and homeowners.¹⁴⁶ Because this model had defined the entire situation in economic terms, it is hardly surprising that banks were prioritized because the Crisis was now taken to be on the “systemic” and financial market level.¹⁴⁷ A multi-dimensional approach to the various problems in the Crisis was ignored as it was seen to be a financial situation that needed a financial fix.¹⁴⁸ And so, the Troubled Asset Relief Program (“TARP”), which was passed as part of a larger act, the Emergency Economic Stabilization Act of 2008 (“EESA”),¹⁴⁹ (the only regulation with real funding behind it) did not actually provide support for the homeowners, as shown by its provisions and implementation.

In its initial form, TARP did not mention any help for mortgage holders,¹⁵⁰ and in its final form, it barely did. The problems of homeowners facing foreclosure were not going to be alleviated directly by saving the banks, and therefore, funding was allocated towards modification and help for homeowners through certain provisions in TARP. According to Neil Barofsky, Special Inspector General for TARP, these provisions were not meant to be “mere window dressing that needed only to be taken ‘into account.’” Rather, they were a central part of the compromise with reluctant members of Congress to cast a vote that in many cases proved to be politi-

146. See Sugrue, *supra* note 49.

147. See Bill Moyers Journal, *supra* note 142. Then-Secretary of Treasury Hank Paulson was interviewed by Jim Lehrer. See *Paulson Defends Federal Financial Rescue Effort*, PBS NEWSHOUR (Nov. 13, 2008), www.pbs.org/newshour/bb/business/july-dec08/paulson_11-13.html. When Lehrer asked him about TARP, Paulson played exactly to the reframing—away from housing, away from government responsibility, and arguing that the best thing for the struggling homeowners was to have the financial system in working order. *Id.* This Article attempts to present alternatives to that frame of thinking.

148. See EDWARD V. MURPHY & BAIRD WEBEL, CONG. RESEARCH SERV., RS22957, PROPOSAL TO ALLOW TREASURY TO BUY MORTGAGE-RELATED ASSETS TO ADDRESS FINANCIAL INSTABILITY 1 (2008), available at <http://fpc.state.gov/documents/organization/110286.pdf>.

149. *Id.*

150. See *id.* at 4 (“The September 20 draft proposal did not include any provisions specifically designed to help home owners facing foreclosure. The September 21 draft requires loan servicers to follow industry best practices and to modify loans in accordance with the Hope for Homeowners Oversight Board. Proponents of such measures might argue that actions to unfreeze mortgage markets will help liquidity flow back into mortgage markets, which in turn might make it easier for borrowers to refinance out of troubled mortgages or sell their homes to avoid foreclosure. Critics might counter that this is a relatively expensive and indirect way to aid troubled mortgage borrowers.”).

cal suicide.”¹⁵¹ Barofsky, upon stepping down from his post, published an op-ed in the *New York Times* in which he laid out his frustrations with the way TARP did not support the homeowners for whom it had been designed because the provision for homeowners was not implemented in any meaningful way.¹⁵² Specifically, the Treasury Department provided TARP funds to the banks without any requirements or incentives to extend credit or increase lending to homebuyers, and without “even . . . request[ing] that banks report how they used TARP funds.”¹⁵³

A look at the text of TARP confirms the ambiguity Barofsky outlines above and reveals that it is unclear whether it was really meant to help.¹⁵⁴ The preamble does not mention homeowners; it is for the financial system and taxpayers.¹⁵⁵ Referring only to mortgages as “certain types of troubled assets,” TARP sees them from a financial system’s point of view as bundled and securitized, not as held by individual homeowners:

An Act To provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers, to amend the Internal Revenue Code of 1986 to provide incentives for energy production and conservation, to extend certain expiring provisions, to provide individual income tax relief, and for other purposes.¹⁵⁶

151. Neil Barofsky, *Where the Bailout Went Wrong*, N.Y. TIMES, Mar. 30, 2011, at A27. Barofsky added:

The act’s emphasis on preserving homeownership was particularly vital to passage. Congress was told that TARP would be used to purchase up to \$700 billion of mortgages, and, to obtain the necessary votes, Treasury promised that it would modify those mortgages to assist struggling homeowners. Indeed, the act expressly directs the department to do just that. But it has done little to abide by this legislative bargain. Almost immediately, as permitted by the broad language of the act, Treasury’s plan for TARP shifted from the purchase of mortgages to the infusion of hundreds of billions of dollars into the nation’s largest financial institutions, a shift that came with the express promise that it would restore lending.

Id.

152. *Id.*

153. *Id.*

154. Troubled Assets Relief Program, H.R. 1424, 110th Cong. (2008).

155. *Id.*

156. *Id.*; see also *id.* at § 119(b) (“(1) TREATMENT OF HOMEOWNERS’ RIGHTS—The terms of any residential mortgage loan that is part of any purchase by the Secretary under this Act shall remain subject to all claims and defenses that would otherwise apply, notwithstanding the exercise of authority by the Secretary under this Act”); Robert Pear, *Crisis Puts Tax Moves into Play*, N.Y. TIMES, Oct. 1, 2008, <http://www.nytimes.com/2008/10/02/business/02tax.html>.

Section 2 explicates the purpose of the EESA, which is to immediately restore liquidity and stability of the financial system (albeit in a way that “preserves homeownership”).¹⁵⁷ By my interpretation, the primary purpose of TARP is not to actually protect people from losing their homes, but rather to save the financial system:

SEC. 2. PURPOSES. The purposes of this Act are—(1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that—(A) protects home values, college funds, retirement accounts, and life savings; (B) preserves homeownership and promotes jobs and economic growth; (C) maximizes overall returns to the taxpayers of the United States; and (D) provides public accountability for the exercise of such authority.¹⁵⁸

The two sections of the Act that address mortgages¹⁵⁹ and the one that amends the HOPE Act¹⁶⁰ merely direct Fannie Mae and Freddie Mac to “encourage” mortgage servicers to modify mortgages.¹⁶¹ This “encouraging” language is hardly a call to action. Not surprisingly, these sections did not result in any real change for homeowners.¹⁶²

157. H.R. 1424, 110th Cong. § 2.

158. *Id.*

159. Sections 109 and 110 of the Emergency Economic Stabilization Act apply to mortgages. *Id.* §§ 109, 110. Section 109 focuses on “foreclosure mitigation efforts,” and § 110 addresses “assistance to homeowners.” *Id.*

160. HOPE for Homeowners Program, 12 U.S.C. § 1715 (2008).

161. Ryan Sherriff & Jeffrey Lubell, *What’s in a Name? Clarifying the Different Forms and Policy Objectives of “Shared Equity” and “Shared Appreciation” Homeownership Programs*, CTR. FOR HOUS. POLICY 11 (2009), http://www.nhc.org/media/documents/Clarifying_Shared_Equity_Homeownership.pdf. Sherriff and Lubell discuss the goal of the mortgage programs:

The goal of [Hope for Homeowners] is to facilitate the refinancing of at-risk mortgages with more affordable mortgages insured by the Federal Housing Administration (FHA). Lenders choosing to participate in the program are required to reduce the principal balances of loans to no more than 90 percent of the current appraised value of a borrower’s home. In return, FHA provides insurance for the refinanced loans, protecting the lenders from losses due to any further defaults. To recoup some of the losses expected from insuring these loans, and to create incentives for refinancing households to stay in their homes, a number of equity-sharing features have been included To date, Hope for Homeowners has experienced very low volume—in large part, many argue, due to excessive red tape and a lack of strong incentives for lenders to participate.

Id.

162. Swagel, *supra* note 125.

If, as Secretary of Treasury Hank Paulson claimed,¹⁶³ TARP was not meant to help homeowners, then what was? Other acts, such as House and Economic Rights Advocates (“HERA”), HOPE, and HAMP, have proved mostly ineffective.¹⁶⁴ Barofsky bemoans this lack of action as well, because fewer loans have been actually modified than planned:

[TARP]’s goal of helping struggling homeowners was shelved until February 2009, when the Home Affordable Modification Program [HAMP] was announced with the promise to help up to four million families with mortgage modifications.

That program has been a colossal failure, with far fewer permanent modifications (540,000) than modifications that have failed and been canceled (over 800,000). This is the well-chronicled result of the rush to get the program started, major program design flaws like the failure to remedy mortgage servicers’ favoring of foreclosure over permanent modifications, and a refusal to hold those abysmally performing mortgage servicers accountable for their disregard of program guidelines. As the program flounders, foreclosures continue to mount, with 8 million to 13 million filings forecast over the program’s lifetime.¹⁶⁵

In the struggle to identify the “best” policy to stem the overall Crisis, the economic rhetoric from the Commodity Model made bailing out the banks appear to be “rational” because it was based on known values (liquidity, economic efficiency, the financial system) and it seemed more predictable and less risky (and not as fuzzy as “homes”) than alternatives based on preventing mortgage defaults.¹⁶⁶ This meant that TARP for the banks came first, actually almost immediately; and TARP for the homeowners was lost in the shuffle.¹⁶⁷ And, although not everyone in Congress agreed with the prevailing views on how homeowners should be treated, the dissenters ap-

163. See Paulson Defends Federal Financial Rescue Effort, *supra* note 147.

164. Davidson & Dyal-Chand, *supra* note 13, at 1628–31. Regarding HAMP, see *Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? (Part 1): Hearing Before the Subcomm. on Commercial & Admin. Law of the Comm. on the Judiciary H.R., 111th Cong. (2009)* (statement of Alan M. White, Professor, Valparaiso Univ. Sch. of Law), available at <http://judiciary.house.gov/hearings/pdf/White090709.pdf>. See also JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING (2011), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf> [hereinafter STATE OF THE NATION’S HOUSING].

165. See Barofsky, *supra* note 151.

166. Swagel, *supra* note 125, at 2–3.

167. *Id.*

pear to have largely failed,¹⁶⁸ and the use of the Commodity Model largely continues to inform policy today.¹⁶⁹

C. This Commodity Model Advances Problematic Versions of Property Rights

This Section explores both how the use of the Commodity Model worked in practice, as well as the problematic implications of using this version of property rights. First, this model uses investment criteria to judge the deserving homebuyer and worthiness of the house itself, which gives rise to an excessive emphasis on the monetary and market value of a house.¹⁷⁰ Second, this model treats houses as fungible entities.¹⁷¹ Finally, it treats the entirety of the entitlement of owners as limited to the four corners of the mortgage contract, which allows contract to subsume property through extreme forms of at least three assumptions—efficiency, liberty, and the private nature of contracts.¹⁷²

1. Treating Houses (Solely) as Investments and House-Buyers (Solely) as Investors

The Commodity Model judges whether a house-buyer deserves to keep his house based on the same criteria one might use to judge an investor. As Joseph Singer noted: “An owner who has invested capital deserves the rewards that accompany the delayed gratification associated with investment.”¹⁷³ The rhetoric and resulting policy described above shows how deserving and responsible went hand-in-hand with regard to house-buyers and aid.¹⁷⁴ Similar to investors, the people who bought houses irresponsibly

168. See Neil Irwin, *Lawmakers Blast Paulson's Management of Bailout*, WASH. POST, Nov. 19, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111801283.html>; Emily Kaiser & Karey Wutkowski, *Lawmakers Rap Treasury on Bailout Plan*, REUTERS, Nov. 12, 2011, available at <http://us.mobile.reuters.com/article/politicsNews/idUSTRE4B874820081211?i=2&irpc=932>; Greg Robb & Ronald D. Orol, *Democrats Lash Out at Paulson over Mortgages*, MARKET WATCH (Nov. 18, 2011, 5:23 PM), <http://www.marketwatch.com/story/paulson-bair-clash-over-aid-to-troubled-homeowners>.

169. See Barofsky, *supra* note 151; White, *supra* note 77.

170. See *infra* Part II.C.1.

171. See *infra* Part II.C.2.

172. See *infra* Part II.C.3.

173. Singer, *supra* note 19, at 322 (referring to Lockean approach).

174. *Id.*

or beyond their means did not “deserve” to keep their homes.¹⁷⁵ Basically, whether these people deserve their house or whether they were responsible depends entirely on whether their investment (the market value of their house) did well.¹⁷⁶

This scenario might have existed before the Crisis. Certainly, if one bought a house far outside one’s means, one might have lost it if one could no longer afford it. But, as further explained in Part III, the inflated rhetoric around responsibility as applied to only monetary terms made avoiding “saving” homeowners even easier when in fact, conditions outside of homebuyers’ control should have made “saving” them more, not less, attractive.¹⁷⁷ These conditions—increased use of new mortgage instruments that were formulated to encourage investments with deceptively attractive rates—rendered it difficult to effectively judge the viability of one’s investment or to invest responsibly. Moreover, at least some buyers with good credit (responsible buyers, perhaps) were pushed into subprime loans despite their eligibility for more favorable rates.¹⁷⁸ From the vantage point of many of the homebuyers facing foreclosure after 2005, it is not clear what makes them any less deserving of their homes as opposed to those who may have been in similar financial circumstances in 2000 but were steered toward a prime loan or fixed rate instrument and (because of excessively favorable market conditions not foreseeable to the average house-buyer, or the average financier for that matter) got to keep their house.¹⁷⁹ This view also does not take into the account the context of why people entered into investments, or what made it no longer tenable, as explored in Part III.¹⁸⁰

The Commodity Model also perceives of the value of a house in only monetary terms. In a discussion of *Kelo v. City of New London*,¹⁸¹ a case involving eminent domain, Singer posits more than one possibility where the City of New London could have had the power to take the Kelos’ property as long as it paid fair market value, which would further the view that the “property is worth what it would likely fetch on the open market, no

175. People appeared to be treated as homogenous irresponsible investors. Also, complicating this point, the “responsible” people, who just barely kept up with their mortgage, had no aid instead of very little aid.

176. *Id.*

177. *See infra* Part III.

178. White, *supra* note 77, at 315. In the case of homebuyers choosing to be foreclosed, however, their breach was criticized as a poor moral decision, as opposed to an investment. *Id.*

179. *See* Korngold, *supra* note 18, at 730–32.

180. *See infra* Part III.

181. 125 S. Ct. 2655 (2005).

more and no less,” and that payment makes owners whole; meaning, if owners are “rational,”¹⁸² they should be “indifferent between keeping the house and receiving the money.”¹⁸³ Singer was not attempting to advance this view, but rather was presenting one way of seeing the situation in *Kelo*.¹⁸⁴ He goes on to acknowledge that “almost everyone would agree that the Kelos have a legitimate complaint when they argue that the money is not the same as the house.”¹⁸⁵ What was a caricature seems to have morphed into a policy view during the Foreclosure Crisis. It is not that policy-makers did not know or acknowledge that it was painful to lose a home, but they did not value this pain in policy practice because the only way to value what is lost is to look at the market value of the house.¹⁸⁶ The use of this metric is related to the fungibility point below, but it also reflects a more general way of seeing a homeowner as an investor and judging them on investment terms. Indeed, it describes a vision where the metrics that constitute what matters in property and housing are the same metrics by which investments are measured.¹⁸⁷

In *Kelo*, the metric was market value. During the Foreclosure Crisis, the metric included market value (when used to describe the loss, as detailed above), but also more generally characterized people who bought homes as responsible and deserving a reward, or irresponsible and not deserving a reward. Further, this metric was based on the same criteria one would use to judge an investor. Did they win in the market? Were they lucky? To put the assertions in this Part very simply, the Commodity Model, as used during the Crisis, uses good investor criteria to give homeowners their just desserts. If a homeowner was not responsible, not only would she lose her investment, but she would deserve to as well. Moreover, because the loss is measured only according to the monetary value of the house, the losing investor appears to lose his monetary investment, no more, no less (to paraphrase Singer’s point above).¹⁸⁸

Therefore, market value plays a role in several ways—it is not just the metric that is used to judge the *amount* of a house-buyer’s loss, but it is also used as the primary metric that determines whether there should have been

182. Singer, *supra* note 19, at 315. With terms like ‘rational’ pervasively used in the rhetoric of investment and houses, how could any alternative frameworks with different values be taken seriously?

183. *Id.*

184. *Id.*

185. *Id.* at 315–16.

186. *Id.*

187. See VAN DER WALT, *supra* note 11.

188. Singer, *supra* note 19, at 315.

an initial investment (“responsible” investor *ex ante*) and whether there should be a loss at all (“deserving” investor *ex poste*).¹⁸⁹ This excessive reliance on market value is problematic because of the complexities of the housing market¹⁹⁰ and because of the treatment of houses as fungible, as explained in the next Part.¹⁹¹

Treating houses as merely investments was self-fulfilling as well. Encouragement of homeownership for all, and the accompanying decreased regulation of mortgage lending, enabled mortgage loans to be made by local banks and later sold off to investment banks.¹⁹² So, local banks not only avoided the risk of such loans, but also avoided the emotional responsibility attached to handling foreclosures. The same community loan officers who had given the loan were no longer the ones deciding and structuring foreclosure (or loan modification) and having to face the consequences of their decisions in their own communities.¹⁹³

2. Fungible Property

The treatment of homeowners as investors whose investments could and should be taken away based on investment criteria shifted the concept of a “home” to that of a fungible investment. Investments are generally fungible in nature—the value is in the increased wealth that one hopes to reap after some time and not in the attachment to the thing invested in.¹⁹⁴ Investments are a means to an end. Residences, however, are generally not thought of in only that way. Homes are personal.¹⁹⁵ One might buy a house with the plan that it appreciate and gain monetary value, but the idea of a home is far greater than the dollars and cents a house might eventually deliver.¹⁹⁶ This respect for the home has informed the law, which has protect-

189. Regarding the last point, whether one deserves the loss depends on a measurement of the value of the house based on market value. If the market value decreased to the point of making the investment unsustainable for the buyer, then the buyer is seen, *ex poste*, as deserving that loss.

190. Individual investments in housing faced difficulties in realistic assessments because of, *inter alia*, asymmetrical available information, government involvement in promotion of lending, excessive rhetoric extolling the values of homeownership, incentives for mortgage brokers, legal structures of lending and borrowing, unequal bargaining power, and fraud. See Korngold, *supra* note 18, at 732–35. These phenomena are addressed throughout this Article.

191. See *infra* Part II.C.2.

192. See Korngold, *supra* note 18, at 730–32.

193. See White, *supra* note 77, at 631–32 (listing estimations of the “external costs imposed on communities” by foreclosures). My thanks to Erica Steinberger for discussion on this point.

194. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 278 (2006).

195. *Id.*

196. *Id.* at 278–79.

ed the home as compared to other kinds of property through various measures such as search and seizure law and the tax code.¹⁹⁷

This idea of sacredness of the “home” is tied intimately with the rhetoric and policies surrounding the American Dream as explained above: security, community, family, and self.¹⁹⁸ Once the romance of the home had become so embedded in American imaginations as the ideas of “home” and “the American Dream,” it is hardly surprising that losses of homes during the Crisis were emotionally traumatic because people felt like they were losing parts of themselves.¹⁹⁹

Seeing a house primarily as an investment fails to take into account all of the emotional and social attachment that people have to their homes, and this stripping of the value placed on the home regresses from the legal protection it has been previously afforded. Once the emotional and social attachment is ignored, it becomes much easier to justify the laws and policies that do not protect the home or the homeowner.²⁰⁰

Baltimore and other places with foreclosed properties show the mismatch between a fungibility model and the actual property rights at stake.²⁰¹ The bank has rights in a borrower’s payments and a security interest in the house, although the bank does not have rights to all that constitutes the “home.”²⁰² The house is fungible to the bank, where it is valued based only on monetary terms. When a foreclosure happens, the owner often loses much more than just the house’s market value because the house is often not fungible to an owner.²⁰³

The alternative vision more fully explored in Part III sees the object that was invested in—the house—and takes into account the context and the loss of the investment.²⁰⁴ This inquiry includes considering the following factors: what induced the owner to buy (the bank’s actions, the government policies); the fact that owners stand to lose more than money if the house is

197. *Id.* at 255–56, 304–05.

198. See Robert J. Schiller, *The Scars of Losing a Home*, N.Y. TIMES, May 18, 2008, <http://www.nytimes.com/2008/05/18/business/18view.html>.

199. *Id.* I am sympathetic to the intuition that the home is not fungible, and I would also like to note that renters need to be included in the definition of “home” and the values it brings. As further explained in Part IV, it is time to rethink ownership as an institution, and part of that would mean expanding the notion of what it means to “have” (rather than “own”) a home.

200. See *supra* text accompanying notes 113–141.

201. See Barros, *supra* note 194, at 277–82 (discussing the strengths and weaknesses of a personal versus fungible view of property, the latter of which factors in emotions, personal comfort, and identity, among others).

202. *Id.* at 282–84.

203. See *supra* note 198.

204. See *infra* Part III.

foreclosed; where the owner will live if foreclosure occurs; the owner's financial situation; how the city will lend support or cope with the issue; the impact on schools and education for any children of the family; and other factors in formulating policy and law.²⁰⁵

3. *Freedom of Contract*

The Commodity Model also shifts focus away from the tangible house to the mortgage and the contract that enshrines it, as evidenced by the regulatory focus on not abrogating contracts and the reluctance to modify them.²⁰⁶ This disassociation of the actual house (or the object of the mortgage, which is the object of the contract) from treatment of the situation and the ensuing primacy of the nature of the contract has several implications for the property regime. Although this Article could explore the implications for the contract regime—namely, through a reality check on the assumptions of free markets, symmetrical information, and equal bargaining power²⁰⁷—this Section will focus on the treatment of contracts only as it intersects with (and subsumes) the property regime, so as not to lose the house in all this (again).

As other scholars have noted, “freedom of contract” is generally meant to promote two values—efficiency and liberty²⁰⁸—through private arrangements. This Section explores how the extreme and unrealistic versions of efficiency, liberty, and the private nature of contracts that were furthered during the Foreclosure Crisis operated to subsume legitimate forms of property rights and values.²⁰⁹

205. See Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 170–73 (2009) (briefly describing “some of the key features of the subprime mortgage market that have led to its ultimate demise”).

206. See *supra* text accompanying note 143.

207. For some interesting coverage of this, see Leonhard, *supra* note 18. Leonhard explores severe informational asymmetry and unequal bargaining power, which plagued subprime mortgage transactions. *Id.* at 623, 629–33.

208. Korngold, *supra* note 84, at 1543 (“Freedom of contract incorporates various concepts, all of which support the enforcement of agreements allocating rights in real estate, whether involving a conveyance of a full fee simple absolute or the carving out of a lesser possessory or non-possessory interest. Such consensual arrangements should be enforced as a general matter because of considerations of efficiency and liberty.”).

209. See *infra* Part II.C.3.a.

a. *The Rhetoric of Efficiency Versus the Reality of Property Values*

According to an economic analysis of the law, “[t]he enforcement of freely-made contracts involving land rights serves to achieve an efficient allocation of our limited land resources. Through voluntary market transactions, property rights end up in *the hands of those who most value them and who will best utilize them.*”²¹⁰ This deceptively simple justification of contracts based on efficiency raises a need to prioritize what kinds of value and uses, as well as whose values and uses, need to be assessed when enforcing contracts. A quick revisit of two concepts discussed above—market value as a measure of value and fungibility of the home—shows that contrary to the above quotation, in many cases of foreclosure, allegedly freely-made contracts did not direct property to the hands of those who most valued or best utilized them.²¹¹

If “those who value [something] most” is meant to be synonymous with those who will pay the most, this view once again judges “value” falsely on monetary terms only.²¹² Attempting to compare the kind of value (emotional, monetary, mental) that an individual or household might have in their already lived-in home with the kind of value (monetary) that a bank holds in the form of a security interest is like comparing apples and oranges, or perhaps worse, comparing apple tree seeds with apple pie. This is further complicated by the difficulty of reselling the house during the 2007 to 2010 period: in the case of foreclosure, it appears that the house now transfers from those who value it greatly (on whatever terms), to an entity that is unable to extract their desired kind of value from it (as banks have had difficulty re-selling).

Moreover, even if one argues that a bank *really* values the security interest in the house (i.e. its confidence in the viability of the security interest gives it confidence to give mortgages), it should still be acknowledged that the other kinds of values, such as emotional attachment, remain lost when the property is transferred to the bank. As explained above in the discussion regarding fungibility, the actual property may often encompass different kinds of value other than monetary value; but if the bank does not value those other things, they are lost.²¹³ In short, because so much depends on how one defines “efficiency” and “value,” it is unclear whether enforcing

210. Korngold, *supra* note 84, at 1543 (emphasis added).

211. See *supra* Part II.C.1–2.

212. See *supra* note 198 and accompanying text.

213. See *supra* Part II.C.2.

mortgage agreements to their exact letter during the Foreclosure Crisis actually leads to efficient and valuable outcomes.

Regarding the second aspect of the idea of efficiency, the evidence raised from Baltimore poses questions as to what kind of use and whose use is prioritized. In Baltimore, foreclosed houses have often been left to rot when they prove impossible to sell.²¹⁴ Clearly, this cannot be effective utilization or use of property rights to a property. Moreover, owning a parcel of land does not give one a right to destroy it.²¹⁵ Perhaps banks could have utilized the borrower's payments (even if modified) in a better way than the actual house, especially when it sits empty.²¹⁶ Confining property and housing discourse to the efficiency/utilization/monetary value terms does not fit when homes, communities, and social welfare are involved so profoundly.

If efficiency as an economic goal is meant to maximize wealth and minimize costs, then once again, the situation furthered in the Foreclosure Crisis was inefficient in several ways. First, the Crisis overall resulted in a massive loss for the U.S. economy.²¹⁷ Second, it is worth looking at whose wealth was maximized (that is, banks that shorted mortgage backed securities) and who suffered losses (that is, cities, taxpayers, homeowners, and many commercial banks). Third, limited land resources, as explored in Baltimore, are going to waste.²¹⁸

Even if efficient contracts are a goal, when circumstances change modification should still be a possibility. The model used during the Crisis saw government involvement in modification as an abrogation of contract.²¹⁹ The lack of modification, however, led to the losses discussed above. Perhaps the reluctance to get involved with modification was also exacerbated by the implicit support for castles and the non-interconnectedness of com-

214. Jannell Ross, *Banks Fail to Maintain Foreclosed Homes in Minority Neighborhoods: Report*, HUFFINGTON POST, Apr. 4, 2012, http://www.huffingtonpost.com/2012/04/04/banks-foreclosed-homes-minorities-banks-reo_n_1404134.html.

215. Singer, *supra* note 19, at 321.

216. See Les Christie, *Zombie Foreclosures: Borrowers Hit with Debts That Won't Die*, CNN MONEY (Feb. 22, 2013, 1:04 PM), http://money.cnn.com/2013/02/20/real_estate/zombie-foreclosures/ (reporting that in cases of hard to sell foreclosures, banks may leave the property empty in the original borrowers' names).

217. According to an estimate by the U.S. Government Accountability Office, the total reduction of output as a result of the financial crisis was listed at a few trillion dollars, and perhaps over ten trillion dollars in total. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-180, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT 15 (2013).

218. See *infra* note 279 and accompanying text.

219. See Swagel, *supra* note 125.

munities. Still, modification might have spread the costs of the Crisis and mitigated the costs overall; instead it placed them squarely away from banks and onto homeowners and taxpayers.

b. Liberty Through Property Rights

In an ideal world, the promotion of liberty through freely-made contracts and private property rights would accord with each other. The ability to decide the terms of one's ownership and payment for a home of one's own together would form the foundation from which one could securely participate in society.²²⁰ When the idea of liberty in contract is taken to its extreme, however, it may be used to justify allowing people to enter into any kind of contract. Contract law itself limits the kinds of contracts that will be upheld in court. For example, a contract of an illegal activity such as blackmail will not be upheld. Rather than focus on the extreme, detrimental way contract law and its rhetoric was implemented, this Section will highlight how the excessive focus on liberty, in the contract sense, serves to hamper liberty in the property sense.

The excessive focus on liberty in contracts led to the deregulation of the mortgage industry—both the kinds of banks that could give mortgages and the kinds of mortgage instruments they used. Both of these innovations enabled the situation in Baltimore and other cities to unfold. The resulting instability of peoples' property holdings certainly did not promote the kinds of liberty that property is meant to promote, nor did it appear to be based on a legal form of liberty in contract negotiation.

Also, the focus on liberty drove the federal government's action not to force banks to modify contracts.²²¹ While this was in line with previous case law regarding compulsive modification, I argue that it goes against other well-established norms of contract law. Robin West's analysis of *Williams v. Walker-Thomas Furniture Co.*²²² is instructive. *Williams* hinged on a "cross-collateral term in the installment sales contract for consumer goods between the retail store and [an] indigent customer."²²³ According to the term, all of the buyer's previous purchases from the store were deemed to be collateral in exchange for credit and an installment

220. Singer, *supra* note 19, at 311. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997) (discussing the two sides of liberty in property—both freedom from public interference and freedom to be an effective citizen).

221. See Swagel, *supra* note 125.

222. 350 F.2d 445 (D.C. Cir. 1965).

223. Robin L. West, *The Anti-Empathic Turn* 14 (Geo. Pub. L. Research Paper No. 11-97, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885079.

method of payment for new goods.²²⁴ This meant “the buyer could lose all past purchased products if she defaulted on a payment for the later-purchased goods.”²²⁵ The court held that “as a matter of law . . . the trial judge had the power to rule that this . . . cross-collateral term was unconscionable.”²²⁶

West uses *Williams* to demonstrate the paternalistic and moralistic aspects of the court’s decision. The court’s decision has been criticized by numerous commentators as paternalistic in that it limited the choices available to buyers (including future buyers other than Ms. Williams) who would “prefer to buy cheaper consumer goods with onerous cross-collateral terms rather than higher priced goods without those terms.”²²⁷ These critics, according to West, would argue that in this process “poor consumers—one group the unconscionability doctrine is presumably designed to protect—lose out.”²²⁸ The decision is also seen as paternalistic in that the judge “substitute[ed] his or her judgment for that of the weaker contracting party in the transaction itself.”²²⁹ The *Williams* court undid the decisionmaking of the weaker party, who may have weighed their own interests and possibility of default and yet assumed the risk on his or her own.²³⁰

While this decision has been criticized for these two paternalistic moves, it has been defended on both paternalistic and moralistic grounds. West first discusses the general view that buyers may not clearly know their own interests or credit-worthiness, and that because of this, contracts are limited in certain areas (for example, in the sale of body parts, health regulations, and child labor).²³¹ Moreover, according to West and Russell Korobkin, intervention in paternalistic terms may be justified based on a behavioral economic approach.²³² Further, West argues that Korobkin’s behavioral economic analysis of *Williams* concludes that:

Rather, limited judicial paternalism might be occasionally justified on the grounds that sometimes individuals are not very good at figuring out the probabilities that they’ll get what they decide “is good for them” from the various choices in front of them, given certain constraints on their abilities to reason about their op-

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 15.

228. *Id.*

229. *Id.* at 16.

230. *Id.* at 20.

231. *Id.* at 24–25.

232. *Id.* at 19.

tions. Paternalism is justified, in other words, not on the grounds that “people are idiots” (as Duncan Kennedy artfully put the point in his classic defense of judicial paternalism from the mid-1980s) but rather, on the grounds that individuals—even smart and educated nonidiotic individuals—are often not particularly rational.²³³

West then refers to Seana Shiffrin’s history of the unconscionability doctrine and how it was “motivated by moralistic revulsion at the contracting behavior of stronger parties, not simply on paternalism *per se*.”²³⁴ In the case of *Williams*, West then concludes:

The offending term in *Williams* might, Judge Wright held, be found by the trial court to be “unconscionable,” but not because Wright believed that from that moment forthwith, buyers should never again be permitted to enter contracts with cross-collateral loan terms, even if they want to, either because “people are idiots” or because they suffer from impaired rationality. Rather, the trial court below should be empowered to strike the term if the judge found a cluster of factors that pertained to the particular case to be, simply, unconscionable: that the buyer was indigent, which the seller in that case knew, that the buyer had eight children, which the seller knew, that on the buyer’s limited monthly income, the buyer could not possibly make the requisite payments for the stereo she was seeking to purchase, which the seller either knew or should have known, that the buyer had only a small balance outstanding on the prior purchased items when she entered the offensive contract, which the seller knew, and that the buyer at the time of default had long since paid considerably more than the purchase price of those prior purchased items, which of course the seller knew. On such a record, Wright held, the trial judge below would be within his power to strike the term.²³⁵

The factors West lays out above—indigency, limited income, limited available information, credit-worthiness, unbalanced payment terms, and likelihood of default—are strikingly analogous to many of the homebuyers who lost their houses during the Foreclosure Crisis.²³⁶ What does *Williams* teach us as to the Foreclosure Crisis? Basically, that when we say “liberty” we do not mean it in the absolute extreme. Or, if we do, we should also acknowledge who wins and loses. And, *Williams* also teaches that moral-

233. *Id.* (citation omitted). For further discussion on paternalism, contracts, and the subprime crisis, see Leonhard, *supra* note 18.

234. West, *supra* note 223, at 26.

235. *Id.* at 26–27 (emphasis added).

236. See Schiller *supra* note 198.

ism can have a place to intervene in the legal decisions. In the current Crisis, by focusing on certain paternalistic aspects of the justification not to intervene in mortgages, the moralistic side of how banks had treated homeowners during and after negotiations has been lost.

As *Williams* introduces and Part III below explores, the context of the contract and the investment should matter in crafting legal decisions. Perhaps if the government had acknowledged the massive bad faith²³⁷ that went into bargaining for the mortgage contract, they would not have been so loathe to support modification more directly. Modification might have been seen as necessary to even out the vastly uneven playing field on which the negotiators had met.²³⁸ The government might have acknowledged just how freely the market was operating. Looking at who lost out during this process from the start—the poor, minorities, poorer cities—would have revealed the kinds of liberty promoted by the freely-made contracts.²³⁹

c. Private Nature of Contracts

As Phillip Swagel points out, and as anyone paying attention to the news during the Foreclosure Crisis would recall, much of the justification for not intervening directly in mortgage contracts rested on the idea that these contracts were private in nature and were between lender and borrower.²⁴⁰ While this narrow construction may be true on its face, this view closes off the possibility of delving into the unequal power of the negotiators. This point is well covered by other scholarship,²⁴¹ so this Section will look at the context and the system in which the contracts were created and argue that the government played, and has always played, a large role in the housing market and mortgages, and that its involvement in mortgages gone wrong would not be the earth-shattering step into pure, private territory as it has been characterized.

First, the government guarantees the credit risk in mortgage.²⁴² In relation to this government involvement in guarantees, Adam Levitin argued

237. See *Bill Moyers Journal*, *supra* note 142 (noting that lending practices were especially questionable when anti-communities, such as ministers selling mortgages, instrument use of minority mortgage brokers, etc., were involved); Leonhard, *supra* note 18, at 638–39 (discussing the extensive manipulation of subpar information and naïve biases by lenders preceding the Crisis).

238. Leonhard, *supra* note 18, at 637–39.

239. *Id.* at 641.

240. *Id.* at 648–49; Swagel, *supra* note 125.

241. Leonhard, *supra* note 18, at 648.

242. *Housing Finance Reform: Should There Be a Government Guarantee?: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. (2011) (statement of Adam J.

that while in “the ideal world” he would “unequivocally prefer to see the U.S. housing finance system financed entirely with private capital,” in practice, the idea of eliminating the government guarantee is not practical and would “kill the housing market.”²⁴³ In other words, the existence of the government’s guarantees on credit risk of borrowers is what makes these private contracts possible in the first place. Levitin went on to argue that the “privatization” of the housing finance system would expose the private capital currently used to finance mortgages to the credit risk from which they are currently insulated because of the existence of government guarantees.²⁴⁴ If the mortgage itself is not entirely private in that the guarantor exists off the page,²⁴⁵ then why not allow the last resort guarantor to have a say in modification if modifying might better preserve all parties’ property?

Second, the history of the federal government’s involvement with the mortgage industry and the American Dream explored in Part I further support Levitin’s point. The federal government, through a variety of programs, regulations, non-regulations, and the legal regime, had promoted conditions that increased the very mortgages from which they sought to distance themselves in the 2000s.²⁴⁶

Third, as Nestor Davidson and Rashmi Dyal-Chand explain, the government had preserved the banks’ property by drawing on different legal norms regarding the privacy of property compared to what they used with regard to the homeowners.²⁴⁷ Davidson and Dyal-Chand argue that the regulatory treatment of the homeowners “adopted wholesale the ‘steady-state’ property norms that prevail during times of relatively stable equilibrium, embodying the relatively more isolationist, opportunity-oriented, risk-rewarding view of ownership[,]” which “dictated choosing the least radical solutions that protected existing property institutions.”²⁴⁸ Yet “in . . . response to failures in wider financial markets, property has arguably liberated regulatory intervention” and regulators adopted “a more interconnected, distribution-protective, stability-oriented, and coordinated view of proper-

Levitin, Professor, Geo. Univ. Law Ctr.), available at www.gpo.gov/fdsys/pkg/CHRG-112Shrg73756/pdf/CHRG-112Shrg73756.pdf.

243. *Id.* Levitin further elaborates: “[d]espite privatization’s ideological appeal, there is a fundamental problem with privatization proposals for the housing finance system: they don’t work. Indeed, fully private housing finance systems simply do not exist in the developed world.” *Id.* at 51.

244. *Id.*

245. *Id.*

246. See Cisneros, *supra* note 60, at 30–31.

247. Davidson & Dyal-Chand, *supra* note 13, at 1645.

248. *Id.*

ty.”²⁴⁹ They further recognize that, with respect to the financial institutions, “[t]he regulatory choice of new norms at this level of crisis response resulted in a new role for government as a coercive owner of property that had previously been perceived as inaccessibly private.”²⁵⁰ The concurrent decisions to be flexible with regard to the property of banks, but not with regard to that of homeowners, demonstrates how the decision not to intervene on behalf of the homeowners was more complex than one based on an assumption of a limited government role in “private” property. We must consider in whose property the government took a role and whose was left alone.

David Dana argues that the post-*Kelo* reform movement, wherein states enacted regulations that limited takings of private property for economic development purposes, “privilege[d] the stability of middle-class households relative to the stability of poor households and, in so doing, expresse[d] the view that the interests and needs of poor households are relatively unimportant.”²⁵¹ We can substitute “middle-class households” with “investment banks” and apply this argument to the Foreclosure Crisis. The expressive power of privileging certain interests was at work again, and this time it meant saving the troubled investment banks through a willingness to be flexible with regard to ideas of banks’ property (as articulated by Davidson and Dyal-Chand), but not with regard to that of troubled homeowners.²⁵² This sent a clear message as to whose interests and needs were a priority.

Dana argues that this privileging does not in itself mean that these reforms should be undone, but rather that “[t]he expressive cost of the reform—the devaluation of the poor in legal and political discourse—might be outweighed by whatever non-expressive benefits the reform produces,” and that that burden to prove otherwise should be placed on the proponents

249. *Id.* Davidson and Dyal-Chand also state that with regard to the method of bailout for the financial institutions, “[e]ven the limited equity ownership taken by the federal government is, in contemporary American terms, a relatively radical move.” *Id.* at 1651. The rationale behind why the government was willing to take these on as bad assets, rather than help transform the bad assets into good ones, is not clear.

250. *Id.* at 1645.

251. David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 365 (2007). Dana’s full argument, for the interest of the reader, is that regulations privileged these interests by orienting eminent domain to condemnations of poor, blighted areas rather than middle-class areas. *Id.* at 365–67. He also acknowledges the population that was most condemned by foreclosures, stating that “[a]t its crudest, the message of the differential treatment of poor households and middle-class households is that staying in your home only really matters if you are a middle-class person in a middle-class home.” *Id.* at 380.

252. Davidson & Dyal-Chand, *supra* note 13, at 1639–41.

of the reform.²⁵³ In the case of the Foreclosure Crisis, the investment terminology and the blame game narrowed the frameworks in which decisions were made, the effect being that much discourse focused on choosing between the homeowners and the banks. Applying Dana's argument here, the expressive power of blaming (and condemning) the low-income and minority homeowners should have been considered to a greater extent, and opponents to providing aid to this group should have borne the burden to justify the withholding of aid.²⁵⁴ This would have flipped the presumption under which discourse appeared to be operating, wherein those in favor of aiding homeowners had to defend such position vigorously but too little avail.²⁵⁵

Finally, intervention of this kind by the government is not unheard of. It is beyond the scope of this Article to discuss in detail, but it is worth noting that in the 1930s, during the Great Depression, many state governments issued moratoria on foreclosures after encouragement of re-negotiation of loan terms did not work.²⁵⁶

D. The Need for a New Model

The Castle Model, propagated for decades, had its own problems, but it should not have been jettisoned without safety nets or notice.²⁵⁷ The Commodity Model appears to be even more problematic for property rights. This model does not take into account other factors—government propaganda, the desire to be a legitimate part of a community or church, purposeful misrepresentation of accounting—that may have played a role in a decision to invest in buying a house. Rather, it judges a responsible investment decision based on the barest criteria of how one might judge an investor—that is, based almost entirely on whether market value increased—and determines from that what arrangements are not, and should not, be kept.²⁵⁸

253. Dana, *supra* note 251, at 366.

254. *Id.*

255. This line of arguments puts us within Radin's approach of privileged homes, as well. See Barros, *supra* note 194, at 277–82 (discussing two ways of privileging the home).

256. Shalendra D. Sharma, *A Political Economy of the U.S. Subprime Meltdown*, 39 ECON. ANALYSIS & POL'Y 171, 171 (2009); David C. Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 FED. RES. BANK OF ST. LOUIS REV. 569, 573–74 (2008).

257. See Singer, *supra* note 19, at 326–30 (“The castle model suggests that property includes certain core entitlements that cannot be taken or infringed without compensation, regardless of the public interests involved.”).

258. *Id.* at 330–32.

When policy solutions were framed, the economic terms of this model further supported the idea that the bailout of investment banks would be a safer bet for the taxpayer than preventing failing mortgages.²⁵⁹ The solutions did not have to be mutually exclusive. Whether to provide bank bailouts must be analyzed separately from the issue of aiding homeowners. As it stands, the solution of the core issues of the Crisis is focused on the banks and the financial system (even if one is dissatisfied with the banks) rather than the homebuyer. How do we reframe the choices we face so that we can move forward with effective housing policy? We need a revised model of property regime to inform housing policy, particularly a more flexible one.

III. INCORPORATING INTERCONNECTEDNESS AND CONTEXT INTO A MODEL OF PROPERTY RIGHTS: BALTIMORE AS AN EXAMPLE

This Article is not an attempt to articulate an entire alternate model of a property regime. Instead, it adds two additional modes to analyzing property—the interconnected nature and the context of property—to the growing body of scholarship that attempts to offer social or public interest normative content to the crafting of a property regime.²⁶⁰ Both of these modes of thinking of property might have lurked in the background when the Castle Model was primarily driving housing policy (through “castles for everyone,” for example), but were basically left out of the Commodity Model.²⁶¹ As explored in this Part, “interconnectedness” draws on Joseph Singer’s work and modifies it based on Baltimore’s experience during the Foreclosure Crisis; “context” takes a wider view of the purchase and ownership of houses. In the case of the Foreclosure Crisis, this analysis entails acknowledgment of the social context of the decision to own a house, the legal history of home-ownership (especially as applied in that geography), and the negotiations surrounding the investment and contract.

A. *The Interconnected Nature of Property—Beyond Castles*

Singer acknowledges that the rules in our property system reflect moral choices and that we must consider the form of social life we support in

259. Wiseman, *supra* note 48.

260. See *supra* note 10 and accompanying text.

261. See *supra* Part II.A. This is ironic because subprime mortgages were put into CDOs and were insured by CDSs, thus the interconnectedness of modern investments should have been obvious, though the physical property aspects of this are often ignored.

the law's formulation.²⁶² His "social relations" approach to property, in turn, is based on Martha Minow's articulation of a more general "social relations approach [that] assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood."²⁶³ This social relations approach to property offers an alternative to the Castle Model that "suppresses the ways in which one castle can be used to invade another," meaning that it oversimplifies the existence of borders between properties.²⁶⁴ In subsequent formulations, Singer referred to this alternate model as the "the good neighbor or environmental conception of property," wherein property rights are "socially situated" and overlap with each other.²⁶⁵ This conception recognizes that the "use of one's land often affects the legitimate interests of neighbors (and thus may be limited to the extent necessary to protect those legitimate interests)," and also emphasizes (perhaps more so than the Castle Model does) that "[p]hysical borders between owners may define the space within which owners are presumptively free to act but those borders do not define the scope of the owner's freedom—nor of the owner's property rights."²⁶⁶ In the various versions of his alternate conception, Singer also acknowledges that "owners have obligations as well as rights" and that protection of society as a whole (or recognition of the systemic effects of property rights) should be a purpose of a property rights regime.²⁶⁷

I focus on the "interconnected" nature of property rather than the "social relations" nature in order to include some "non-social" costs, such as the physical effects to the land and the monetary costs borne by multiple actors. This Article attempts to add to the normative aspect of social obligations that Joseph Singer and Gregory Alexander discuss by offering an additional way of seeing property as a regime of interests, rights, and obligations rather than (merely) as an allocation of rights.

1. *Interconnectedness and Baltimore*

The deterioration of Baltimore's residential property shows how the physical boundaries and freedom within borders idea from the Castle Model

262. See Singer, *supra* note 9, at 334 (acknowledging that "the government response will inevitably shape social life").

263. Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 112, 127 (1987).

264. Singer, *supra* note 19, at 317–18.

265. Singer, *supra* note 7, at 3 (emphasis omitted).

266. *Id.*

267. *Id.*

did not play out in the case of foreclosures. This point is brought home by Baltimore's case against Wells Fargo.²⁶⁸

In January of 2008, Mayor Sheila Dixon, Baltimore's first African American female mayor, joined by the Baltimore City Council, sued Wells Fargo.²⁶⁹ In Mayor Dixon's press release, her office emphasizes the racial aspects of predatory lending by Wells Fargo and the costs to the city:

Wells Fargo has one of the highest rates of foreclosure of any lender in Baltimore, and its foreclosure rate in majority African American neighborhoods is four times the rate in majority white neighborhoods, and twice the City average.

The lawsuit alleges that Wells Fargo is one of the leading causes of the disproportionately high rate of foreclosures in these neighborhoods. Specifically, the suit alleges that Wells Fargo has caused these foreclosures by targeting Baltimore's African American neighborhoods for irresponsible and abusive subprime lending practices designed to maximize short term profits for the Bank.

....

These practices have resulted in an epidemic of foreclosures in Baltimore's most vulnerable minority neighborhoods, which in turn have cost the City millions of dollars in damages.²⁷⁰

Baltimore sued for violations of the FHA based on predatory lending practices and damages to the city as a result of foreclosures that Wells Fargo knew or should have known would result from their lending practices.²⁷¹

By bringing this lawsuit, Baltimore went out on a limb as the first municipality to sue a bank as a result of the Foreclosure Crisis.²⁷² Since their initial suit, others have followed.²⁷³

268. Press Release, City of Baltimore, Baltimore Files First Lawsuit in Nation Seeking to Recover Costs for Injury to City Caused by Racially Discriminatory Lending Practices Resulting in Epidemic of Foreclosures in the City's Minority Neighborhoods (Jan. 8, 2008), available at <http://docs.noodls.com/viewDoc.asp?filename=97700%5CEXT%5C200801080210019876066115.pdf>.

269. *Id.*

270. *Id.* The use of certain words—caused, irresponsible, abusive, profit, costs, vulnerable—speak volumes about this attempt to change the nature of the dialogue from the mainstream blaming of victims. *Id.*

271. *Id.* The first time the city went to court, the judge dismissed its complaint with instructions. Brendan Kearney, *Baltimore Can Proceed with Suit Against Wells Fargo*, MARYLAND DAILY RECORD, Apr. 25, 2011, available at <http://thedailyrecord.com/wp-content/plugins/tdc-sociable-toolbar/wp-print.php?p=197352>. The second time, it was dismissed with clear instructions on how to show causation. *Id.* When the city filed its third amended complaint, the judge found Baltimore's legal arguments plausible. *Id.*

272. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 49 IND. L. REV. 629, 630–32 (2008) ("For the first time, America's cities—mayors and their city

In its Third Amended Complaint, Baltimore laid out the negative physical effects that foreclosures have had on the city. These effects include increased crime, vermin, unkempt yards, garbage, increased maintenance requirements, fire responses, and eyesores.²⁷⁴ These effects clearly transgress any borders one might think define a parcel of property. The physical neighbors suffer from the crime, animal life, garbage, and decreased property values.²⁷⁵ The city claims that it has seen its costs go up as much as \$34,199 per property.²⁷⁶ The banks suffer as well.

Baltimore's situation also demonstrates that communities are affected by foreclosures in a way that goes beyond the physical. When communities are broken up because their members are forced to move and vacant lots then take their place it affects the social fabric of the entire area. If people start to feel unsafe, insecure (tenure-wise), or otherwise disconnected from their homes and communities, the community itself has lost more than what is monetarily measurable.²⁷⁷

In addition, Baltimore demonstrates the interconnected nature of property through the various actors who bear the (interconnected) costs associated with the loss of property through foreclosures. When houses are empty, there is decreased tax revenue, decreased property values, and an increase in costs to the city for maintenance, fire response, crime control, and pest control, among other costs.²⁷⁸ In Baltimore, this has resulted in a difficulty in neighborhood conditions, selling houses, and lower property values.²⁷⁹

councils—have begun to recognize the power of the FHA to bring irresponsible financial institutions, the very ones who have profited at the expense of inner city black and Latino communities, to the table to remedy the injury that the cities have suffered.”).

273. Andrew Martin, *Judge Allows Redlining Suits to Proceed*, N.Y. TIMES, May 6, 2011, at B9.

274. Third Amended Complaint for Declaratory and Injunctive Relief and Damages at 45–46, *Mayor of City of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847 (D. Md. Oct. 21, 2010) (No. 1:08-cv-00062-JFM) [hereinafter Third Amended Complaint].

275. Singer, *supra* note 19, at 337.

276. Third Amended Complaint, *supra* note 274, at 45–46.

277. See Brescia, *supra* note 205, at 168–70 (describing the various consequences on the community of extensive foreclosures).

278. *The Foreclosure Crisis: Hearing Before the H.R. Comm. on Oversight and Gov't Reform*, 112th Cong. 44 (2011) (statement of Hon. Elijah E. Cummings, Cong. Rep. of Md.). A Johns Hopkins University report discusses the effects of foreclosures on Baltimore:

Altogether, foreclosures cost Baltimore families more than \$1.5 billion between 2008 and 2010; the average family lost almost \$150,000. In 2010 alone, we estimate that the city lost \$13.6 million in property taxes. This figure is almost certainly an underestimate of the total loss to the city, because it does not take into account the negative impact that proximity to a foreclosed house has on property values of other homes in the neighborhood.

In July, 2012, the federal government settled multiple claims against Wells Fargo, which effectively ended Baltimore's pending case.²⁸⁰ Baltimore's case would not have been an easy one to win. In order to prove standing, its arguments rested on what some consider a precarious form of causation. The threshold question is: Can a municipality sue a lender for the harms done to it through "private" lending to city residents?

If the court had chosen to apply the Commodity Model strictly, then the answer is probably not, as the corners of the contract would define the parties who had standing. If, however, the court took a wider view that the boundaries of property are not so clearly drawn, and acknowledged that lending to the residents affected the city, then maybe Baltimore would have had a chance. (Wells Fargo must have thought that Baltimore stood enough of a chance to warrant their settlement.) Baltimore provided evidence into the causes of default, including predatory lending practices, and added complexity to the simple story told by an investment gone wrong.²⁸¹ The case, however, rested on the view that the very nature of property was much more than its physical borders and its use as an investment or a contract.

While we can be sympathetic to their claims, we should also be mindful that suing on behalf of Baltimore City may or may not have directly helped the homeowners who struggled through foreclosure. Yet, regardless of the settlement, its approach provides a good example of the interconnected view of property in action. More generally, this approach treats houses as much more than castles, investments, or contracts.

The Castle Model prizes dominion over borders, but those borders are slippery things, as exemplified by Baltimore. Physical harms, costs, and community effects do not appear to respect the borders drawn by owners of properties. Where should borders be drawn? Around houses? Around communities? Baltimore's example challenges the notion that it is productive to draw borders at all in relation to housing.

PETER ROSENBLATT & KATHERINE NEWMAN, KRIEGER SCHOOL OF THE ARTS AND SCIENCES, JOHNS HOPKINS UNIV., *THE IMPACT OF FORECLOSURE WAVES ON THE CITY OF BALTIMORE* 1 (2011).

279. See Brescia, *supra* note 205, at 169 ("One study that estimated the impact of foreclosures in the City of Chicago in the late 1990s showed that single-family homes within one eighth of a mile of a foreclosed home were reduced from between 0.9% and 1.136% per foreclosure. . . . Recent studies predict a range of losses to homeowners across the country due to the current rise in foreclosures from between \$356 billion to \$1.2 trillion in home values nationally.").

280. *Wells Fargo Settlement: A Predatory Lender Pays Up*, BALT. SUN, Jul. 15, 2012, http://articles.baltimoresun.com/2012-07-15/news/bs-ed-wells-fargo-20120715_1_subprime-mortgages-minority-borrowers-mortgage-brokers.

281. Third Amended Complaint, *supra* note 274, at 45–46.

With the Commodity Model, the kinds of effects mentioned above are not acknowledged, and accountability is not placed on any actors beyond the investor. From this view of accountability, narrow solutions were based on saving the banks, and neighbors and city taxpayers ended up paying for the Crisis as shown by the Baltimore example. Here, regardless of the outcome, Baltimore has shown an alternative way of accounting for the Crisis—how the banks are accountable and how to hold them accountable for some of the negative effects and costs.

What would the recognition of interconnectedness into a property regime mean?²⁸² It would mean that the design of property would come from a place that does not only prize individual ownership and boundaries, but also places current exogenous characteristics of the use of property rights into the language of the property regime itself. It would look at the purchase of a house not just as a transaction between borrower and lender, but rather as the entrance of that person into that community municipality, including the costs, obligations, rights, and social effects that come with it. Through this, the owner, the previous owner, the neighbors, the residents, the lender, and the city itself are recognized as players with stakes in the game.

B. Context of Property in Houses

We have seen how the context of the purchase of a house and the default of a mortgage is significant in terms of the nonfungible nature of the house. With regard to housing policy and the Foreclosure Crisis, the context of the defaults, the legal historical context of housing and lending patterns, and the context of entry into the investment and contract are material aspects of property that should drive housing policy.²⁸³ A look at the context: (1) respects the house-buyer as a human agent with expectations and hopes that are more complex than those of the stripped away rational investor; (2) recognizes the government and private entity role in creating the situation that led to the Foreclosure Crisis; and (3) helps show the complex causation that could drive more intricate and effective solutions than the ones previously offered.

282. With respect to the financial institutions, Davidson and Dyal-Chand argued that: “[I]n an extraordinary inversion of prevailing property norms, property ownership served briefly as a locus for efforts to achieve stability, more in the nature of a safety net than a risk enabler, within the free market.” Davidson & Dyal-Chand, *supra* note 13, at 1653. This observation, unfortunately, does not apply to the treatment of homeowners (yet).

283. See *supra* Part II.

This type of inquiry expands the view of the investment beyond the four corners of the contract and the rationality of the investor in a monetary instrument. In the case of the investment, the view is expanded to include: what prompted one to enter into it; upon what information the investment was made; what incentives were offered, and by whom; who won and lost; and what was won and lost. In the case of the contract, it looks beyond what is written or whom the two parties are (the government is not a party), how the contract came about, what each party knew, and to what each party agreed, among other factors.

An approach to policy formulation that includes context would not start the analysis at the point of investment or other deductive metrics as described in Part III. Instead, it would look at the situation from the point of multiple actors. From the point of homeowners, the complex causation of defaults might be uncovered through an empathetic²⁸⁴ inquiry into how it feels to heed the government and banks' encouragement to borrow, to be proud of the achievement of homeownership and the American Dream, only to then lose the home and the Dream. An inquiry of this kind would move away from the simplistic policy decisions that treat the symptoms of the problem without addressing the underlying reasons for the problems. In other words, this kind of inquiry would, for example, move away from framing the decision as one to "save" a number of home-buyers based on a the simple assumption that they borrowed too much for their houses. The approach used by the federal government, however, rested on a number of assumptions regarding responsibility, availability of information, and the government's role as rescuer, all of which a contextual approach revisits.²⁸⁵

When policymakers empathize and research the context of housing and default, they are more likely to design responsive and effective systems of regulation and law. The rest of this Section explores what kind of housing policy results from using a contextual approach by looking at Baltimore in particular: first I analyze the social and legal historical context of buying a

284. See West, *supra* note 223.

285. From the banks' points of view, this might mean unpacking the difference between commercial and investment banks, if one wanted to empathize with an institution and not the people that make it up. Unfortunately, a full analysis of empathizing with the institution of an investment bank is beyond this Article, which is not to dismiss its importance. The intense pressures placed on overworked (lower level) employees to find investments for the influx of capital and the tight timelines that often lead to poor due diligence of commercial banks would also be a fascinating study.

house; second, I explore the investment and mortgage contractual²⁸⁶ natures of buying a house.

1. *The Historical Social and Legal Context of Defaults in Baltimore*

In 1910, Baltimore's City Council passed the nation's first racial zoning ordinance.²⁸⁷ This law divided the city, block by block, into the black and white neighborhoods that, in part, still exist today.²⁸⁸ This ordinance provided a model that was later emulated by many cities across the southern United States, including Richmond, Norfolk, and Roanoke, Virginia; Winston-Salem, North Carolina; Greenville, South Carolina; Birmingham, Alabama; Atlanta, Georgia; and New Orleans, Louisiana.²⁸⁹

The City of Baltimore did not act alone in supporting segregation. The history of federal government involvement in segregation in Baltimore is well detailed in the United States District Court for the District of Maryland's opinion of *Thompson v. U.S. Department of Housing and Urban Development*.²⁹⁰ In that case, the Maryland ACLU, as part of a class action, sued, *inter alia*, HUD and the Mayor and the City Council of Baltimore for violating the Fair Housing Act of 1968 by racially discriminating against blacks with regard to public housing and for violating the United States Constitution by failing "to take required action to ameliorate the effects of past race based discrimination in regard to public housing."²⁹¹ The Maryland ACLU alleged that these violations were manifested by "unfair[] con-

286. I am not discussing the sales contract as the policy discourse did not appear to take this into account.

287. Plaintiff's Ex. 616 at 4, *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (No. CIV.A.MJG-95-304) (used with permission of the University of Baltimore) [hereinafter Hirsch Report] (stating "having used the private real estate market to achieve a significant degree of racial separation, Baltimore's whites already had evidence that government power and assistance were more supportive than subversive in their quest for ever more separation"); *Baltimore Tries Drastic Plan of Race Segregation*, N.Y. TIMES, Dec. 25, 1910, <http://query.nytimes.com/mem/archive-free/pdf?res=9B03E7DF1630E333A25756C2A9649D946196D6CF>; Antero Pietila, *History of Baltimore's Racial Segregation Includes a Hard Look at Newspapers' Role*, BALT. BREW (Mar. 15, 2010, 6:26 AM), <http://www.baltimorebrew.com/2010/03/15/history-of-baltimores-racial-segregation-includes-a-hard-look-at-newspapers-role/>.

288. *Id.*; BARBARA SAMUELS, *THE 1968 RIOTS AND THE HISTORY OF PUBLIC HOUSING SEGREGATION IN BALTIMORE*, ACLU OF MARYLAND (2008), available at http://www.prrac.org/pdf/riots_and_rebirth.pdf. See generally ANTERO PIETILA, *NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY* (2010) (exploring how discrimination toward blacks and Jews has shaped today's cities, including Baltimore).

289. Pietila, *supra* note 287, at 23.

290. 348 F. Supp. 2d 398 (D. Md. 2005).

291. *Id.* at 407.

centrat[ions of] African-American public housing residents in the most impoverished, segregated areas of Baltimore City.”²⁹² The Court found HUD liable for racially segregated public housing and for failing to offer the opportunity for low-income blacks to live in integrated parts of Baltimore:²⁹³

Far from fulfilling HUD’s constitutional obligations to disestablish the vestiges of past intentional segregation and its statutory obligation to affirmatively further fair housing, ‘not a penny’ of the billions of dollars spent by HUD in the Baltimore region has gone to help African-American public housing residents move to integrated neighborhoods.²⁹⁴

While I use this quote to highlight the federal government’s involvement in segregation and unequal housing opportunities, it is also worth noting two other aspects of this case—Baltimore City was not held liable, and the court was directly addressing the public-private cooperation in housing.²⁹⁵

Despite the repeal of the segregation ordinances and the passage of the FHA, racial separation has persisted in Baltimore.²⁹⁶ This segregation directly led to the disastrous consequences seen today as a result of predatory lending and foreclosures.

Those practices of segregation and separation made what is now called “reverse redlining” possible. “Redlining” refers to lending practices where banks demarcated areas, sometimes by literally drawing a red line on maps where blacks and other minorities lived, in order to exclude them from credit.²⁹⁷ “Reverse redlining,” as it is now called, refers to the practice of quite the opposite—demarcating areas where blacks and other minorities live in order to target them for loans with unfavorable terms.²⁹⁸ A city like

292. *Case: Thompson v. HUD*, NAACP LEGAL DEF. AND EDUC. FUND, <http://naacpldf.org/case-issue/thompson-v-hud> (last visited Oct. 1, 2013).

293. As for the City of Baltimore, they were not held liable primarily due to lack of discriminatory purpose and intent during the relevant period, and because of some apparently good faith efforts to rectify the past discrimination. *Thompson*, 348 F. Supp. 2d at 408. Note that Baltimore’s government has gone from Defendant to Plaintiff in the matter of fair housing in just a few years. See *supra* note 270 and accompanying text.

294. *Case: Thompson v. HUD*, *supra* note 292.

295. *Thompson*, 348 F. Supp. 2d at 408. This further highlights the issues raised in Part I regarding the promotion of homeownership and the public/ private nature of housing. “In sum, the line . . . between private and public action was, by the time work began under Titles I and III of the 1949 Housing Act, blurred and, at times, nearly erased.” Hirsh Report, *supra* note 287.

296. Pietila, *supra* note 288.

297. Brescia, *supra* note 279, at 179.

298. *Id.*

Baltimore, where minorities already lived separately, made it all the easier to target them for such loans.²⁹⁹

When these loans began unraveling in the mid 2000s and Baltimore began to suffer from massive foreclosures,³⁰⁰ these foreclosures and abandoned houses were largely concentrated in mixed race and black neighborhoods.³⁰¹

Regardless of the outcome of Baltimore's case against Wells Fargo, the case is revealing regarding the context of the foreclosures—both for the substance of the complaint and supporting documents and for its analysis of Baltimore more generally.

Affidavits from former Wells Fargo loan officers detail the ongoing treatment of blacks and other minorities in Baltimore. Elizabeth Jacobsen, a former Wells Fargo loan officer, discussed how she made more than \$700,000 in commission in 2004, and \$550,000 in commissions and pay in 2005.³⁰² She also explained Wells Fargo's targeting of black communities, including churches, through "wealth seminars" and the use of black loan officers to market these events.³⁰³ In particular, Wells Fargo had a program where it would donate \$350 to a nonprofit of the borrower's choice if the borrower took out a loan; Wells Fargo then tried to sell church leaders on

299. Relman, *supra* note 272, at 629–37 (discussing how the "legacy of discrimination [segregation] . . . has left underserved minority communities particularly vulnerable to the predatory practices of subprime lenders and the devastating consequences of foreclosure that follow close on the forced abandonment of countless homes . . . [and how] reverse redlining arises in cities where there are racially segregated residential living patterns. This means that the people who are most vulnerable to abusive lending practices are geographically concentrated and therefore easily targeted by lenders").

300. Researchers from Johns Hopkins recently estimated that there were 18,000 foreclosures in Baltimore from 2007–2010. ROSENBLATT & NEWMAN, *supra* note 278, at 4. The plaintiff's lawyer in Baltimore's case against Wells Fargo estimated that there were more than 33,000 from 2000–2008. Relman, *supra* note 272, at 632. In 2009, there were 16,400 (or 8 out every 100) vacant or abandoned homes listed in the City of Baltimore. THE BALTIMORE NEIGHBORHOOD INDICATORS ALLIANCE, JACOB FRANCE INST., HOUS. AND CMTY. DEV., VITAL SIGNS 9, at 2 (2010), available at http://bniajfi.org/uploaded_files/0000/0756/vs_9_housing.pdf. Broken down to the neighborhood levels, in eight out of the fifty-five statistical areas in Baltimore, at least one in five houses were empty. *Id.* at 6.

301. ROSENBLATT & NEWMAN, *supra* note 278, at 4. ("Poorer, mixed race neighborhoods had a higher incidence of foreclosure than well-off majority white neighborhoods. The average white neighborhood had 44 foreclosures, less than 4% of its occupied housing stock. The average mixed race neighborhood had 68 foreclosures, more than 6% of its occupied housing stock. Majority black neighborhoods were more like mixed race neighborhoods, with 5.4 % of their houses foreclosed.").

302. Jacobsen Affidavit at 6, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847 (D. Md. 2010) (No. JFM 1:08 CV–00062).

303. *Id.* at 29.

this program.³⁰⁴ Jacobsen also discussed how Wells Fargo loan officers purposely steered people eligible for prime loans (with better interest rates) to subprime loans, how Wells Fargo left massive discretion to the loan officers to determine the amount of fees they would charge,³⁰⁵ and how officers misled people into thinking that the terms of their loans, specifically the 2/28 loans with teaser rates for two years, were more favorable for the loan officers to get the commissions.³⁰⁶

Anthony Paschal, another former Wells Fargo loan officer, is more to the point regarding the role of race in lending: “[Wells Fargo employees] referred to subprime loans made in minority communities as ‘ghetto loans’ and minority customers as ‘those people [who] have bad credit,’ and ‘those people [who] don’t pay their bills,’ and ‘mud people.’”³⁰⁷ He also discussed that Wells Fargo targeted black neighborhoods, avoided a predominantly white county because it was not favorable for selling subprime loans, and discriminated against minority employees within Wells Fargo.³⁰⁸

Race, discrimination, misrepresentation, and fraud—once again, treating house buyers in Baltimore as merely investors—barely scratches the surface of the underlying problems and does little to address the reality of what transpired or what is necessary to prevent similar situations. Revisiting Baltimore shows the disparity at this step, however. The city had its own interests in suing Wells Fargo over the foreclosures. If Baltimore’s lawsuit had been successful, they would have gained something—but it is unclear if this would have benefitted the former homeowners directly, or just the taxpayers (and therefore the former homeowners indirectly). Also, the local government set up segregation, redlining, and the other circumstances that made reverse redlining possible, and it did little to proactively change conditions.³⁰⁹ Even so, Baltimore claimed damages related to only 190 properties. Nonetheless, their perseverance and investigations may have catalyzed support for homeowners in other ways.

304. *Id.* at 27.

305. *Id.* at 24.

306. *Id.* at 12, 13, 15–17.

307. Paschal Aff. at 8, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847 (D. Md. 2010) (No. JFM 1:08 CV–00062).

308. *Id.*

309. See *supra* notes 287–288 and 295–297 and accompanying text.

C. Using Interconnectedness and Context to Inform Investment and Contract

Baltimore exemplifies the community destruction that resulted from the Crisis. Considering the models, if the house were truly fungible, then it would not matter to neighbors, schools, and the city if the banks owned it (assuming that the banks kept it in good shape). Baltimore's experience, however, shows not only that residences are not fungible, but also that losing the investment in a house has social and communal costs that normal investment do not—including impacts on schools, communities, and public health and safety. Treating the house merely as an investment narrowly focuses on the problems and loses sight of these other effects.

Baltimore also demonstrates just how unjust these deserts were.³¹⁰ This Article focuses on property rights, so I do not explore suggestions to increase disclosure requirements or homebuyer protection. But, I would like to note that as a responsible investor, one would also be expected to perform due diligence, which in this case could hardly be done.³¹¹ Material information was clearly kept from borrowers for the benefit and commission of loan officers.³¹² Though one should know the terms of one's loan, as explained in *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, this is not as straightforward as it sounds.³¹³ Besides, despite being given calculations and research into neighboring property values, even "sophisticated" investors did not foresee the kind of bubble burst that occurred.

Taking the wider context of the effects of foreclosures and Baltimore's experience into account shows just how inefficient this debacle was, and how "efficiency" can be a poor metric by which to make policy. As discussed, not only did the value of security (the houses' values) decrease, but looking at Baltimore, it is clear that taxpayers foot the bill of this debacle by dealing with decreased tax revenue and increased costs from nearby foreclosures.³¹⁴

Efficiency as a value in policymaking needs to be balanced with social context, as explained above. This would translate into including a broader spectrum of costs or unquantifiable drawbacks, which policies might trigger. In the context of the Foreclosure Crisis, this would include the troubles

310. See *supra* notes 302–306 and accompanying text.

311. For an analysis of the role of realtors as unofficial and problematic experts, see Brent White, *supra* note 77.

312. Third Amended Complaint, *supra* note 274.

313. *Id.*

314. Complaint at 35, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847 (D. Md. Jan. 8, 2008) (No. JFM 1:08 CV-00062).

that resulted for many different actors—troubles such as personal losses of the home, the breakup of neighborhoods, and effects on schools, education, jobs, and taxpayers.

An alternative approach might explicitly value deliberation (over speed) with regard to property and housing. Revisiting Elizabeth Jacobsen's affidavit,³¹⁵ one cannot help noting that perhaps Wells Fargo should have slowed down and taken time to properly value credit and sales, rather than value speed and more deals. In this way, being less efficient in the short-run might have not only led to greater efficiency but also to greater social benefits of security of tenure in the long run.

Although both property and contract law are supposed to increase liberty, Baltimore demonstrates—looking beyond the four corners of the contract—how liberty was not furthered by the contracts that were enforced during the Foreclosure Crisis.

Treating contracts that relate to land (or houses) differently is not inimical to contract law principles. As Gerald Korngold has noted, although “[a]s an overall guiding principle,” agreements between buyers and sellers are usually enforced on the “theory that this will maximize[] collective wealth[,] there is something different about land transactions compared to other property interests that requires special attention to land allocation agreements.”³¹⁶ And special attention does exist; land is one of the few areas of contract law where a party suing for breach may ask for specific performance as a remedy—real estate has not always been treated as fungible.³¹⁷

Korngold also acknowledges the temporal reach of ownership of simple goods, which will eventually decay, as compared to land, which lasts much longer in time and binds future owners (and perhaps neighbors) who are not party to current arrangements.³¹⁸ I would add that not only future parties, but also many other entities including the community itself and the physical land, are bound by land dealings. In short, while Korngold acknowledges that “[c]ontracts for goods rarely bind third parties, while contracts for realty in effect routinely do precisely that,” especially through degradation of the natural and ecological attributes of land,³¹⁹ I believe his thesis could be pushed further to include more connections. If the interconnectedness with those ahead in time (owners and even neighbors) can be

315. Jacobsen Affidavit, *supra* note 302.

316. Korngold, *supra* note 84, at 1528.

317. *Id.*

318. *Id.* at 1528–29.

319. *Id.* at 1529.

acknowledged, then perhaps there is space to acknowledge other kinds of entities as well. Interconnectedness is not just about owners and physical neighbors, but also about the communities and the city—and as A.J. van der Walt would remind us, those on the margins of property.³²⁰

Korngold also notes that “[land] continues to play a unique and critical economic, social, and political role in the United States. Land is not just another asset in our experience, and future generations will need the ability to effectively utilize and manage this unique resource.”³²¹ With that in mind, perhaps if we can expand the view as to the *value* of land and houses as including much more than their monetary value as commodities, then we can also expand effective “utilization.”

IV. SPECULATIONS ON THE WAY FORWARD FOR HOUSING POLICY

While the primary goal of this Article is to widen the theoretical space for an interconnected and contextualized property regime, it is worth noting some policy choices that would flow from an alternative vision: the rethinking of ownership and the modification of contracts.

A. *Rethinking Ownership*

From a property regime that incorporates and acknowledges its own interconnected and contextual nature, the profound place that ownership has in housing policy can be re-evaluated. Perhaps it is not ownership that should be furthered at such expense, but rather the agency and dignity that come from having secure tenure in a home.³²² While this might mean ownership, it should not necessarily be the case. The Foreclosure Crisis has shown how one size does not actually fit all and that alternative means to secure tenure could mean more secure housing for more people.

In some ways, rethinking ownership should not be entirely contentious, as the Foreclosure Crisis also seemed to highlight just how tenuous “ownership” is in today’s mortgage-backed American Dream. A homebuyer with low equity in their house and who makes payments paycheck to paycheck, knowing that the bank can foreclose if his income dries up, hard-

320. van der Walt, *supra* note 6, at 17–21; *see also supra* note 12 and accompanying text.

321. Korngold, *supra* note 84, at 1529. Although I agree with Korngold’s statement here, I disagree with his use of the phrase “effectively utilize and manage.”

322. Adams, *supra* note 30, at 595 (“In responding to the way in which Americans have seen homeownership as the national ideal, Nathan Straus, former head of the United States Housing Authority, suggested that a different perspective may be more accurate: Under conditions of modern civilization, a man does not have to buy a cow because his family needs milk. He should not have to buy a house because his family needs a home.” (internal quotation marks omitted)).

ly constitutes the kind of “dominion” over one’s borders so celebrated in the Castle Model.³²³ The low equity hardly seems to constitute owning a house, as opposed to a claim to that amount should the bank foreclose. In this way, the Foreclosure Crisis blew the idea of security of tenure out of the water without offering alternatives to the American Dream.

Rethinking the methods by which people have access to homes might also involve expanded shared equity programs, which come in many different forms.³²⁴ One form, what the Center for Housing Policy at Harvard calls the “publicly-funded shared-appreciation” model involves a public loan, subsidy or other form of equity extraction to a home buyer, who “then repays the subsidy or investment upon selling the home, along with some portion of appreciation.”³²⁵ During the Foreclosure Crisis, while some had suggested that these models could have been used in order to keep people in their homes,³²⁶ this idea was not widely implemented, probably because of the requirement of upfront public funds in the form of subsidies to homebuyers facing foreclosure. During this time, the loans or subsidies could have been used to make mortgage payments, as opposed to their usual use toward the down payment. Again, the homebuyer could have paid off the loan upon sale of the house. In the case of “underwater” homes, more research needs to be done as to how the arrangement would work, but it has been suggested that perhaps the government could forgive part of the loan based on the resale value of the house.³²⁷

Michael Diamond has argued that while shared equity “raises for some observers the specter of a less-than-full-ownership interest because the low income home buyer, as a condition of obtaining the financing to permit her to purchase the home, is required to share the equity with others, often future generations of low income home buyers,”³²⁸ these fears are misguided

323. See *supra* Part I.

324. Michael Diamond, *Shared Equity Housing: Cultural Understanding and the Meaning of Ownership* 15 (Geo. L. and Econ. Research Paper No. 11-22, 2011) (stating “[s]hared equity housing raises many . . . questions about the meaning of ownership and property rights”). That is why this Article aims to set out certain parameters of property as a regime before tying that vision to shared equity as a housing policy.

325. Sherriff & Lubell, *supra* note 161, at 7–8 (providing a helpful illustration of how this works mathematically).

326. *Id.* at 10, 29.

327. *Id.* at 10–11; see also *id.* at 13 (discussing public-private hybrid experiments). Also, it is interesting to note that the United Kingdom and Australia have used these programs to some (mixed) success. *Id.* at 15–16.

328. See Diamond, *supra* note 324, at 16 (referring to shared subsidy programs, where the house price is directly subsidized and the buyer agrees not to sell above a certain price, so as to keep the house affordable to future buyers).

for two reasons. First, the fears are based on an assumption that potential low-income home buyers are facing a choice between shared equity homeownership and non-shared equity homeownership (whereas their actual choice of living situations is usually quite different and involves renting not owning). Second, they are based on a definition of homeownership grounded in classical western models of property rights (similar to the Castle Model I describe above) that do not reflect the reality of property in the United States today.³²⁹ With regard to the latter point, Diamond's discussion touches on the way in which this type of ownership raises questions about the nature of ownership and property, and how property itself is a "culturally specific constructed concept."³³⁰ In an earlier piece, he explored the implications for shared equity on property theory and concluded that

the resale restrictions placed on some subsidized homeowners are appropriate elements of public policy and are in keeping with a major strain of understanding in American legal and political thinking about the meaning of property . . . [and] are consistent with other restrictions currently placed on private property in order to meet overriding public concerns.³³¹

In attempting my current project, I am not as sanguine about the acceptance of shared equity as consistent with either major strain in American legal and political thinking regarding property or the appropriate restrictions. It strikes me that during the Foreclosure Crisis and the handling of it, these voices were silenced in favor of a model that turned away from flexibility and recognition of the extent to which private property is not actually based on Blackstonian notions of castle and separation. With that in mind, while my project does not attempt to delve into the intricacies of shared equity programs as his does, it does attempt to further open up theoretical space with regard to property and ownership from which these and other alternate methods of structuring ownership in practice might flow.

Reframing the issue in terms of tenure, not ownership, would also (finally) bring renters into the dialogue. In 2009, late relief was passed for renters whose buildings were foreclosed upon through the Helping Families Save their Homes Act.³³² This Act allows for tenants to stay in their rentals after foreclosure for ninety days or until their lease is finished.³³³ But renters' needs could be addressed in more comprehensive ways through ex-

329. *Id.* at 21.

330. *Id.*

331. Michael R. Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Property*, 29 ST. LOUIS U. PUB. L. REV. 85, 88 (2009).

332. Helping Families Save Their Homes Act, Pub. L. No. 111-22, 12 U.S.C. § 5201 (2009).

333. *Id.*

panding the focus on flexible forms of tenure.³³⁴ Such support might also include improved incentives to rent, such as allowing renters to enjoy the same kind of tax credits that mortgage holders do. These reforms might change the current situation where rental locations are often not desirable and are less legitimate than ownership.³³⁵ Renting today would also accommodate the growing number of people who might find a new job that requires a move, something that became difficult when job growth contracted and selling one's house became harder.³³⁶ Slowly, perhaps the stigma around renting would change.³³⁷ Prior to World War II, many people rented, including the wealthy.³³⁸

This focus on tenure might also open up space to have flexibility in other types of housing patterns.³³⁹ If policies are in fact meant to further distributional and egalitarian goals, then perhaps the focus should have been on creating choices for people regarding living situations based on the reali-

334. See Amanda Erickson, *How Can Renters Have More Control over Their Homes?*, ATLANTIC CITIES, Nov. 18, 2011, <http://www.theatlanticcities.com/housing/2011/11/how-can-renters-have-more-control-over-their-homes/529/> (offering a discussion on renters, respect, and potential alternative arrangements).

335. See Adams, *supra* note 30 at 609–13 (discussing how pro-homeownership policies may be anti-rental policies at their core, based on “some suggestion” that the FHA may have discouraged rentals in favor of ownership and the presence of the real estate lobby, which “has associated homeownership with stability and patriotism” and “politicians and homeownership advocates [who] have unfairly associated rental—and especially public housing—with socialism and the decline of free enterprise” and evidence of the amount of federal funds spent on homeownership support as compared to rental support); see also Kiviat, *supra* note 48, at 1 (“Homeownership contributed to the hollowing out of cities and kept renters out of the best neighborhoods.”).

336. See *id.* at 2 (stating “[b]eing free to move around the country easily means that people can go where the jobs are”).

337. See *id.* at 4 (stating that “[i]n an ideal world, the way you pay for your shelter shouldn’t reflect your socioeconomic status. In Switzerland, one of the world’s richest nations, two-thirds of all families rent. Yet in the U[nited] S[tates], whether you own or rent says something about who you are—and often limits where you can live.”).

338. See JACKSON, *supra* note 30.

339. In her article, Kiviat focuses on the ongoing debate surrounding the restructuring of the housing financing system: “[T]here is this notion that being housed well is synonymous with being a homeowner,” says Raphael Bostic, Assistant Secretary for Policy Development and Research at HUD. “That narrative has got to change.” Kiviat, *supra* note 48, at 1. Kiviat also discusses how it seems ubiquitous not just in rhetoric but in law as well, stating:

Harvard economist Glaeser has looked at how local governments, often spurred on by existing homeowners, restrict housing type. Of the 186 towns and cities within 50 miles (80 km) of Boston, 34 forbid multifamily dwellings such as townhouses and apartment buildings, and another 81 allow them on less than 10% of the available land. People who don’t buy stand-alone houses—for the most part, renters—are not welcome. And that doesn’t just happen around Boston. “In many parts of the country,” says Glaeser, “renters are zoned out.”

Id. at 4.

ties of income. This would mean more creative low-cost housing³⁴⁰ or encouraging financial innovation with regard to progressive mortgage instruments such as private shared equity arrangements. Physically, re-thinking the Castle Model might change the kinds of homes that are available, or the limits to the kinds of separation that people think they can have.

These policies would require thinking that goes beyond raising the bar on acceptable lending practices in order to prevent foreclosures. If such a bar is raised without flexible choices also being offered, it will likely end up with the kind of distributional disparities that were meant to be curbed in the first place. Moreover, the dream of ownership is so embedded in America that it cannot entirely be jettisoned. According to the Harvard Center for Housing Policy, “[d]espite a greater appreciation of the financial risks, preferences for homeownership among renters remain strong.”³⁴¹ Indeed, “[c]onsidering the fact that the most common reasons cited for buying homes are nonfinancial—including a good place to raise and educate children, feelings of safety, and greater control over one’s living environment—the continued appeal of homeownership is not surprising.”³⁴²

B. Beyond Defaults and Toward Wider Solutions

When the financial crisis was at its worst, policy proposals and rhetoric often pitted saving mortgage holders against saving banks.³⁴³ Instead of framing the problem so narrowly as this unattractive mutually exclusive choice, an analysis recognizing the interconnected nature of property and the context of the foreclosures during the Crisis, opens up space for alternative solutions and policies. If viewed through multiple lenses—federal housing policy, local communities, cities, investment and commercial banks, homebuyers, and investors—the Foreclosure Crisis shows how houses could be used to bolster citizen participation, tax bases, community life, investments, and homes, among other ends in and of themselves. From this analysis, it is not as easy to pick and choose winners and losers because in many foreclosure situations actors, communities, and physical structures “lost.”

Moreover, seeing homeowners in the context of their investments and contracts, as well as seeing the nature of the home, allows for homeowners who are unable to make loan payments to be seen as members of a commu-

340. See Erickson, *supra* note 334 (listing a number of affordable options for renters to acquire ownership); see also Sherriff & Lubell, *supra* note 161, at 7–18.

341. STATE OF THE NATION’S HOUSING, *supra* note 164, at 18.

342. *Id.*

343. See *supra* Part I.

nity, as people with hopes, dreams, and attachments, and not just as defaulters. Once they are seen merely as defaulters, potential policy solutions are limited to ones that deal with nonperforming parties to a contract, rather than individuals attempting to achieve the American Dream. And, solutions may go beyond contractual ones, which forces a decision as to whose property is worth protecting—banks' security interests or homeowners' homes.³⁴⁴ In choosing the former, not only were the actors more valued (banks), but a certain kind of property and measurement of value (monetary terms) won the day.

If respect for the contract was meant to respect the banks' property rights that were created and the actual reason for the contract, it did not seem to accomplish either. Yes, banks got title, but to what? The contract was created for the purpose of creating property rights in the house as a security interest, but by focusing only on the words of the contract, while the security interest's value was being decimated, no one won.³⁴⁵

Contextualizing mortgage contracts and the decreasing value of the security interests held by the banks would make it possible to see loan modification not as abrogating expectations, but as respecting them. During the Crisis, it seems that modification would "abrogate" contracts, and was therefore off the table of potential solutions for federal lawmakers, as explored above.³⁴⁶ That said, at least three examples show this view of the contract as immutable was the only way of seeing the investment and contract. First, as previously discussed, Davidson and Dyal-Chand have explored how the treatment of banks and equity holdings by the government turned traditional notions of property and public-private agreements on their head in order to preserve banks' property.³⁴⁷ Similar flexibility in policy might have been applied in order to preserve overarching policy and legal values such as fairness and informed consent in the case of contracts. Second, the federal government did step in and force modification in the case of certain General Motors contracts as part of their agreement to bail out the failing auto giant.³⁴⁸ Third, in August of 2011, the Massachusetts Attorney General settled a lawsuit with a subsidiary of H&R Block and required the

344. See *supra* Part II.

345. See *supra* notes 279–280 and accompanying text.

346. See *supra* Part II.

347. See *supra* notes 247–249 and accompanying text.

348. Sheryl Gay Stolberg & Bill Vlasic, *President Gives a Short Lifeline to Carmakers*, N.Y. TIMES, Mar. 31, 2009, at A1; Mary Williams Walsh & Jonathan Glater, *Contracts Now Seen as Being Rewritable*, N.Y. TIMES, Mar. 31, 2009, at B1.

lender to make \$115 million in loan modifications.³⁴⁹ The lender targeted minority borrowers for loans which they “knew were likely to fail,” and also “gave its employees discretion to charge higher fees to such borrowers.”³⁵⁰ Taken as a whole, these examples highlight the potential to be more flexible when viewing the contracts in context and from the point of view of multiple stakeholders.

Moreover, these examples show the fallacy of the assumption that modification destroys businesses’ and investors’ confidences in the market. General Motors’s contracts were modified in a very public way,³⁵¹ and despite fears that investors would lose faith and the entirety of contract law would be called into question, the sky did not fall down. Therefore, the justification of restoring business confidence in the context of contracts, or in the use of TARP funds,³⁵² should not be accepted merely at face value.³⁵³

Once we recognize the interconnectedness of property and also responsibility for foreclosures, the door opens for a different kind of cost allocation. In Baltimore’s case, this means spreading the costs to the banks that precipitated them.³⁵⁴

But even more generally, if the federal government had recognized its own complicity in its approach to regulation, perhaps the dialogue would

349. D.C. Denison, *Deal Offers Mortgage Relief for Thousands*, BOSTON GLOBE, Aug. 10, 2011, at 7.

350. Joseph William Singer, *Massachusetts Attorney General Settles Lawsuit with Subprime Mortgage Lender, Requiring \$115 Million of Loan Modifications*, PROPERTY LAW DEV.—JOSEPH WILLIAM SINGER (Aug. 10, 2011), <http://blogs.law.harvard.edu/jsinger/2011/08/10/massachusetts-attorney-general-settles-lawsuit-with-subprime-mortgage-lender-requiring-115-million-of-loan-modifications/>.

351. Walsh & Glater, *supra* note 348.

352. At the hearing, Federal Reserve Chairman Ben Bernanke told lawmakers that using the TARP for buying stakes in banks is “critical for restoring confidence and promoting the return of credit markets to more normal functioning.” Rebecca Christie & Alison Vekshin, *Paulson, Democrats Clash on Bailout for Homeowners (Update2)*, BLOOMBERG, (Nov. 18, 2008, 13:00 EST), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTDtdoBgG_t8. He warned that lending in the United States is “still far from normal.” *Id.*

353. See van der Walt, *supra* note 6, at 10 (discussing how investor and business confidence has been used as an excuse in the context of South Africa for various questionable reforms).

354. According to Suzanne Sangree, Chief Solicitor for the Baltimore City Law Department:

This wave of foreclosures in minority neighborhoods really threatens to undermine the tremendous progress the city has made in developing distressed neighborhoods and moving the city ahead economically. Wells Fargo could do a lot, as well as other banks that have engaged in similar practices, to help to curb the flood of foreclosures that the city is experiencing now.

Gretchen Morgenson, *Baltimore Is Suing Bank over Foreclosure Crisis*, N.Y. TIMES, Jan. 8, 2008, at A12; see also *Foreclosure Rates Reflect Human Cost of Mortgage Meltdown* (PBS NewsHour broadcast Mar. 25, 2008), available at http://www.pbs.org/newshour/bb/business/jan-june08/baltimore_03-25.html.

have been open for more creative policy solutions—more effective loan modifications, shared equity, or government guaranteeing of mortgages. In order to conceive of these, as well as to make them politically possible, however, the dialogue has to shift from guilty homeowners who need to be saved to a focus on the deeper problem that requires complex solutions.

V. CONCLUSION

The Foreclosure Crisis revealed the untenability of federal housing policy as informed by models of property that treated the house as a castle or merely as a commodity. Once we revise our rhetoric away from these extremes and toward an interconnected view of property and houses as being contextualized places of social values and uses, then we open up space to satisfy the underlying goals of housing (for example, having access to actual housing) and contracts (markets that work based on genuine information) in ways that do not appear to be in as direct conflict as before. This means that if we accept that we want housing for all, we may accept alternative forms of ownership and some government role in securing this goal.

By taking for granted the initial situation as to how homeowners entered into their mortgage agreement—without taking their situation, opinion, and available resources into account—policies meant to stem the effects of the Foreclosure Crisis further vilified homeowners and avoided real improvements for them or for foreclosures overall. By issuing policies in which the would-be achiever of the American Dream would get entangled, the federal government has a responsibility to act in a way that recognizes the full situation of homeowners and does not, in the face of crisis, simply abandon responsibility for the problems resulting from those policies.

Contextualizing houses, investments, and contracts would analyze the Foreclosure Crisis as more than resulting from irresponsible borrowers or greedy banks, but as resulting from complex and heterogeneous causation, including: federal, state, and local government policies regarding homeownership and other social policies; homeowners and their position in society with regard to their wealth, race, and other contexts; and commercial and investment banks, and mortgage brokers (in sum, the multiple contexts of the housing choices of individuals). Contextualizing property based on this kind of analysis would also open up theoretical and policy space to craft a property regime with recognition of the interconnectedness of the institution and its direct effects on housing policy and, therefore, the Foreclosure Crisis. Finally, this mode of analysis makes possible solutions that rethink the nature of ownership and implementation of the kinds of values that property regimes should further.