

2008

Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of the Homeownership

Rachel D. Godsil

David V. Simunovich

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Rachel D. Godsil and David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of the Homeownership*, 77 Fordham L. Rev. 949 (2008).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of the Homeownership

Cover Page Footnote

* Professor of Law, Seton Hall University School of Law. The authors would like to thank Carl Coleman, Jim Freeman, Tristin Green, Solangel Maldonado, and Jon Romberg, as well as all of the participants in Brooklyn Law School's faculty colloquium, and Seton Hall School of Law's summer faculty workshop for constructive suggestions on earlier iterations of this Article. I would also like to thank Daniel Gottlieb for superb research assistance, and Ronald Day, of the University of Pennsylvania Law School, for his tremendous library research assistance in the fall of 2007. ** J.D., magna cum laude, Seton Hall University School of Law; B.A., Political Science, summa cum laude, University of California, Los Angeles.

FORDHAM LAW REVIEW

Vol. 77

December 2008

No. 3

CONTENTS

ARTICLES

PROTECTING STATUS: THE MORTGAGE
CRISIS, EMINENT DOMAIN, AND THE
ETHIC OF HOMEOWNERSHIP.....*Rachel D. Godsil* 949
& David V. Simunovich

WHITE CARTELS, THE CIVIL RIGHTS
ACT OF 1866, AND THE HISTORY OF
JONES V. ALFRED H. MAYER CO.*Darrell A. H. Miller* 999

INTENTIONAL SEX TORTS *Deana Pollard Sacks* 1051

NOTES

INTERPRETING THE PHRASE
“NEWLY DISCOVERED EVIDENCE”:
MAY PREVIOUSLY UNAVAILABLE
EXCULPATORY TESTIMONY SERVE
AS THE BASIS FOR A MOTION FOR
A NEW TRIAL UNDER RULE 33?..... *Mary Ellen Brennan* 1095

SENTENCING LUXURY:
THE VALUATION DEBATE IN
SENTENCING TRAFFICKERS OF
COUNTERFEIT LUXURY GOODS *Jana Nicole Checa Chong* 1147

PROPER ASSERTION OF THE DELIBERATIVE
PROCESS PRIVILEGE: THE AGENCY HEAD
REQUIREMENT*Shilpa Narayan* 1183

ARTICLES

PROTECTING STATUS: THE MORTGAGE CRISIS, EMINENT DOMAIN, AND THE ETHIC OF HOMEOWNERSHIP

*Rachel D. Godsil**

*David V. Simunovich***

Homeownership is in crisis. Millions of families are at risk of foreclosure as they are caught between declining housing values and rising interest payments on adjustable-rate mortgages. The primary concern for such families is not that they will become homeless—most families who lose their homes could afford to become renters—but rather that they will lose their status as homeowners. For families required to sell their property by the government's use of eminent domain, a similar issue arises, as the "fair market value" of some homes (the standard measure of compensation) is generally not enough to allow the family to purchase another home.

The harm of losing one's status as homeowner has a far-reaching impact at both the individual and collective levels. Property ownership ties one to the larger community in myriad ways. As compared to renters, homeowners—even those with the same income, education, and other socioeconomic characteristics—tend to be more civically active and more apt to engage in market transactions linked to their homes. Losing this link to the larger market and community will harm a family's long-term prospects. When many families lose these connections, whole communities suffer.

The link between the mortgage crisis and the full-scale financial meltdown has led to bipartisan support for a degree of government

* Professor of Law, Seton Hall University School of Law. The authors would like to thank Carl Coleman, Jim Freeman, Tristin Green, Solangel Maldonado, and Jon Romberg, as well as all of the participants in Brooklyn Law School's faculty colloquium, and Seton Hall School of Law's summer faculty workshop for constructive suggestions on earlier iterations of this Article. I would also like to thank Daniel Gottlieb for superb research assistance, and Ronald Day, of the University of Pennsylvania Law School, for his tremendous library research assistance in the fall of 2007.

** J.D., *magna cum laude*, Seton Hall University School of Law; B.A., Political Science, *summa cum laude*, University of California, Los Angeles.

intervention unseen since the Great Depression. In this Article, we explore why homeownership is so highly valued—and whether the loss of homeownership status should impel government action. We conclude that this loss does warrant government intervention—but also argue that the myopic focus on homeownership absent an adequate regulatory regime and a broader economic agenda has had dire effects. The families caught by the subprime mortgage debacle were often targeted by predatory lenders because of their membership in vulnerable groups. The government’s failure to prevent this exploitative behavior then requires its intervention now. However, it is crucial to ensure that government intervention does not create insurmountable barriers to entry for aspiring homeowners or moral hazard. Accordingly, our status-preservationist approach would protect only those who would have received loans had sound lending practices been utilized and would counsel against the view that homeownership alone is adequate to ensure healthy communities. Rather, homeownership has in the past been linked to behaviors that create sound communities. In the context of eminent domain, the argument for status preservation is even stronger, as it is justified by the U.S. Supreme Court’s maxim that compensation should be based on fair market value unless doing so “would result in manifest injustice to owner or public.” We conclude by considering the broader implications of the economic meltdown and reflect on whether it has so permanently altered our conception of homeownership that homeowner status is in the process of losing its value.

TABLE OF CONTENTS

INTRODUCTION.....951

I. HOMEOWNERSHIP AND ANXIETY.....954

 A. *Who Owns Their Homes?*.....956

 B. *Mortgage Crisis*.....959

 C. *Eminent Domain*.....964

II. STATUS PRESERVATION.....969

III. TAKING STATUS975

 A. *Jurisprudence of Just Compensation*975

 B. *Evaluating Proposed Alternatives to Fair Market Value*.....977

 1. *Percentage Premium Plans*.....978

 2. *Harnessing the Market: Tax and Insurance Schemes*980

 3. *Variable Compensation Plans*.....982

 C. *Status-Preserving Compensation*983

IV. PRESERVING STATUS IN THE FACE OF DEFAULT985

 A. *Federal Proposals*.....986

 1. *Voluntary or Market-Based Responses*.....986

 2. *Judicial Intervention*.....988

 3. *Taxpayer-Funded Responses*989

 B. *State and Local Responses*990

C. <i>Critical Reception</i>	991
D. <i>Status Preservation in the Face of Foreclosure</i>	994
V. RECONCEPTUALIZING HOMEOWNERSHIP AND STATUS.....	995
CONCLUSION	997

INTRODUCTION

The loss of one's home triggers powerful emotions. Our homes are often the locus of our families and communities. They are akin, some scholars suggest, to a diary, a family album, or a wedding ring.¹ A home is not merely a fungible piece of property easily replaced by another. This set of ideas helps explain part of the political response to the mortgage crisis as well as the criticisms of the current degree of compensation paid to those whose homes are forcibly bought by the government when it exercises its power of eminent domain. In this Article, we are concerned with perhaps an even more profound loss: the loss of one's status as a homeowner.

This loss is implicitly assumed for many families caught by the subprime mortgage debacle—if their homes are foreclosed upon as a result of an inability to pay their mortgages, their ability to obtain another mortgage to purchase a home is severely compromised. The impetus for government action to assist families in these situations (by providing short-term loans, fixing their interest rate, or some other means) is generally not seen as an effort to prevent families from becoming homeless—but rather to enable them to continue to own their homes.

For families confronting the government's exercise of eminent domain, a similar issue may arise. The "fair market value" of some homes (all that the government is generally required to compensate), will not be enough to allow the family to purchase another home—except possibly in another neighborhood so deeply troubled as to render it almost unlivable and vulnerable to future uses of eminent domain. In these circumstances, the government's use of eminent domain will have the effect of casting families from the "ownership society" and causing them to lose access to the social and pecuniary benefits afforded property owners.²

In the Article, we explore whether this loss of homeowner status should in fact impel government action. We conclude, with some caveats, that it should. The families caught by the subprime mortgage debacle were often targeted by predatory lenders as a result of membership in vulnerable groups, and the government's failure to regulate the banking industry provides strong justification for government action. However, we would argue that the myopic focus on homeownership has serious shortcomings

1. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 967 (1982).

2. Our argument is focused upon the loss of homeowner status but is not intended to suggest that renters may not experience losses from the use of eminent domain that are substantial and worth compensating. However, this issue is beyond the scope of this Article.

that are now vividly apparent. In the context of eminent domain, the argument for status preservation is even stronger. The loss of homeowner status, to us, seems to meet the U.S. Supreme Court's maxim that fair market value should apply *unless* "its application would result in manifest injustice to owner or public."³

The harm of losing one's status as homeowner has a far-reaching impact at both the individual and collective levels. Property ownership ties one to the larger community in myriad ways. Homeowners—even those with the same income, education, and other socioeconomic characteristics—tend to be both more civically active and more apt to engage in market transactions linked to their homes.⁴ This involvement often stems from their financial obligations and vulnerability, but it has the effect of creating stronger and more cohesive communities with salutary effects both for their communities and themselves. According to Carol Rose, "[d]espite its appeal to self-interest, commerce also carries a culture: it inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage. To do business, one must learn the ways and practices of others . . ." ⁵ Losing this link to the larger market and community is likely to harm a family and its long-term prospects far more than even the emotional loss of the home.

The potential responses to the subprime mortgage crisis are debated daily in major newspapers and by different political actors, and we will discuss the various arguments currently underway—even as this Article goes to press new proposals are emerging. The issues as applied to eminent domain are more often explored in academic scholarship. Property scholars have expended considerable energy determining when compensation to homeowners subject to the government's power of eminent domain is "just."⁶ The theories of compensation have considered the need to fully compensate property owners for their loss, discourage inefficient takings, mitigate what would otherwise be an onerous individual burden to bear for the public benefit, and introduce elements of distributive justice into a process that has disproportionately burdened stigmatized groups.⁷ Our Article will evaluate these standards proposed as replacements for the fair

3. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

4. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1950 (2005).

5. CAROL M. ROSE, *PROPERTY AND PERSUASION* 147 (1994).

6. See generally Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002). But see Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29 (2003) (arguing for downward adjustment in compensation to combat moral hazard); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 104 (2006) (noting that many scholars have "overstate[d] the [compensation] problem").

7. Stigmatized group in this context refers to "minority groups in the United States victimized by social stigma," which includes racial and ethnic minorities, and more broadly, the poor, the elderly, and politically disempowered groups. Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 2 n.1 (2006).

market standard. Unlike many other commentators, we are not taking the position that compensation should be a tool to impede the use of eminent domain. Rather, for the purposes of this Article, we accept that the government may have good reason to use its power either for a specific public use, such as to build a school or highway or to revitalize an economically distressed municipality. We will note when a particular proposed compensation scheme would seem likely to be so expensive as to render impossible the government's use. In other words, we are not attempting to manipulate compensation to render the use of eminent domain prohibitively expensive. It is our intention to evaluate compensation schemes to ensure a degree of compensation that protects against the loss of homeowner status.

We recognize that the protection of homeowner status as such reifies an existing hierarchy that is problematic in some respects. Homeowners are afforded both significant monetary benefits and social capital that renters are denied. In this Article, with some hesitance, we develop a theory that justifies government action (which practically will be financed by all taxpayers, including renters) to prevent widespread foreclosures and to measure homeowner compensation in the eminent domain context by some metric other than fair market value. We acknowledge that homeowners are currently privileged within our society—and at bottom, we want to ensure that the most vulnerable of those who have attained the status of homeowner retain that status. Our model therefore is progressive and redistributive within the category of homeowners even while we are cognizant that our theory is arguably at the expense of those who are presently excluded from this category. To support our model, we look to the theoretical underpinning of common-law protection of status—particularly in the law of defamation.

We begin this Article by exploring the current nature of homeownership and the catalysts for the current sense that homeowners are at risk. Part I of the Article describes who among Americans are homeowners and the government's role both in increasing the homeownership rate and subsidizing those who own their homes through tax policy. This part assesses the interplay of class and race within the contexts of both the mortgage crisis and eminent domain. Part II considers the justifications for according increased status to homeowners and the empirical studies suggesting the private and public benefits of homeownership. Part III explores the jurisprudence and scholarship of just compensation through the lens of status preservation. Part IV then analyzes the panoply of federal and state government proposals to address the mortgage crisis and whether protecting current homeowners will create undue barriers to entry for aspiring homeowners. Finally, in Part V, we question whether the volatility of the housing market and the easy availability of credit have so altered the nature of homeownership that its status has been changed forever and we consider a new line of scholarship that advocates a wholesale reconceptualization of homeownership.

I. HOMEOWNERSHIP AND ANXIETY

We are experiencing a political moment in which homeownership—among our most hallowed institutions—is seen as dangerously precarious.⁸ The wave of anxiety began with the U.S. Supreme Court’s decision in *Kelo v. City of New London*,⁹ holding that governments were entitled to take private homes when the city embarked upon economic development plans.¹⁰ This anxiety was further exacerbated by the ravages of Hurricane Katrina and has been ignited yet again by the mortgage foreclosure crisis. The latter potentially affects an extraordinary number of households. Mortgage analysts project that as many as “three million subprime mortgages could end up in foreclosure over the next several years.”¹¹

Few are immune when homeownership is perceived to be threatened. Even the vast majority of those who do not yet own their own homes, not surprisingly, aspire to this goal. Along with the obvious benefits of paying monthly to increase one’s own equity rather than enriching a landlord, our culture attributes considerable virtue to homeowners: we believe that they take better care of their property, play more active roles in local governance and schools, vote more frequently, participate in local community building, and in general, constitute more active citizens.¹² As individuals, we value our own homes enormously. For most of us, our home is our single most valuable asset as well as the locus of our family and community. As Margaret Radin famously articulated, the home is part of “the way we constitute ourselves as continuing personal entities in the world.”¹³ We attach to our homes deep psychological and emotional value, which likely translates into the “price” at which we would sell our homes.¹⁴

In addition to its psychological dimensions, homeownership has significant financial benefits. It permits the owner to leverage capital, which can help to buy investment properties, start a new business, send a child to college, or save for retirement.¹⁵ Because we value homeownership and homeowners, the government entitles homeowners to a generous array of benefits, including mortgage and property tax deductions

8. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255–56 (2006).

9. 545 U.S. 469 (2005).

10. *See id.* at 488–89.

11. Edmund L. Andrews, *Relief for Homeowners is Given to a Relative Few*, N.Y. TIMES, Mar. 4, 2008, at C7.

12. Peñalver, *supra* note 4, at 1949.

13. Radin, *supra* note 1, at 959.

14. TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 5–10, 12, 21–30 (2006) (recounting a variety of reasons why owners develop special bonds to a home they live in, and why that relationship should be protected by the government).

15. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6 (2000). Throughout his book, Hernando De Soto demonstrates the transformative power of asset ownership in a functioning capitalist society, and the necessity for an ordered, coherent property system to facilitate wealth accumulation.

and protection from creditors. For many of us, the step of becoming a homeowner is among the most significant of our lives.

Homeownership here obviously means more than simply the material fact of owning a piece of property. Instead, when we say homeowners occupy a particularly valued status within American society, we are using the term status in two separate ways. Most obviously, a homeowner is a person in the position (status) of owning a home—a merely descriptive understanding of status. The weightier use of the word connotes a particular social position in which a person who owns a home is ascribed greater worth than one who does not.¹⁶

The assumption that property owners have greater worth than those without has a long vintage—and underlies many societies' (including early American) property requirements for voting. In support of the link between property and the right to vote, John Adams argued,

Is it not equally true, that Men in general in every Society, who are wholly destitute of Property, are also too little acquainted with public Affairs to form a right Judgment, and too dependent upon other Men to have a Will of their own? If this is a Fact, if you give to every Man, who has no Property, a Vote, will you not make a fine encouraging Provision for Corruption by your fundamental Law? Such is the Frailty of the human Heart, that very few Men, who have no Property, have any Judgment of their own. They talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest.¹⁷

While the express link between political voice and property has long been rejected, the government nonetheless generously subsidizes

16. The uses of the word "status" are many and varied. According to Sir Henry Sumner Maine,

Status, a much discussed term which, according to the best modern expositions, includes the sum total of a man's personal rights and duties, or, to be verbally accurate, of his capacity for rights and duties. It is curious that the word "estate," which is nothing but the French form of "status," should have come to stand over against it in an almost opposite category. A man's *estate* is his measurable property; what we call his *status* is his position as a lawful man, a voter, and so forth. The liability of every citizen to pay rates and taxes is a matter of status; what a given citizen has to pay depends on his estate, or portions of it assigned as the measures of particular imposts. We have, too, an "estate" in land, which so far preserves the original associations of "status" that, as we have just noted, contract may not alter its incidents or nature. Again, as Professor Maitland has pointed out, the Roman Status has also become the State of modern public law, and in that form has refused to be reduced to a species of contract by the ingenious efforts of individualist philosophers, notwithstanding the widespread acceptance of the Social Contract for a century or more.

SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 184–85 n.L (London, John Murray 1906) (citations omitted). Its more modern usage is often attributed to Max Weber. See MAX WEBER, *ECONOMY AND SOCIETY* 305–07 (Guenther Roth & Claus Wittich eds., 1978).

17. Letter from John Adams to James Sullivan (May 26, 1776), in 1 *THE FOUNDERS' CONSTITUTION* 394, 394–96 (Philip B. Kurland & Ralph Lerner eds., 1987).

homeownership in our tax policy, and those who are homeowners continue to be assumed to be particularly valuable civic members.

The notion that there is a lurking danger of losing our homes is therefore a powerful catalyst for political action. And right now, the possibility of losing our homes as a result of natural disaster, mortgage foreclosure, or perhaps most insidiously, as a result of an express political decision that one's property will garner more social utility as a shopping mall seems quite real to many Americans.

A. *Who Owns Their Homes?*

In 2006, 68% of all American households owned their homes. This category includes significant percentages of Americans at every income level, though not surprisingly, the homeownership rate increases with affluence.¹⁸

Homeownership by Household Income Level (calculated from 2005)	
Household Income	% Owner-Occupied
\$5000 to \$9999	42.5
\$10,000 to \$14,999	51.8
\$15,000 to \$19,999	53.3
\$20,000 to \$24,999	55.5
\$25,000 to \$29,999	56.0
\$30,000 to \$34,999	60.8
\$35,000 to \$39,999	62.5
\$40,000 to \$49,999	69.8
\$50,000 to \$59,999	74.4
\$60,000 to \$79,999	81.1
\$80,000 to \$99,999	85.3
\$100,000 to \$119,000	89.6
\$120,000 or more	92.6
TOTAL	68.8

This high rate of homeownership is largely a product of the federal government's decision beginning in the post-World War II era to subsidize homeownership for the middle class. These efforts included the Federal

18. For a discussion of class and homeownership, see Dorothy A. Brown, *Shades of the American Dream* (unpublished manuscript, on file with author). Brown includes a table of homeownership rates by adjusted gross income with data from 2003. We have updated her list with data from 2005.

Housing Administration (FHA) and U.S. Department of Veterans Affairs (VA) homeownership loan programs, which guaranteed 90% of the value of a home as collateral for loans from private banks.¹⁹ The FHA and VA programs allowed new purchasers to provide only a 10% down payment (as opposed to earlier norms of at least 33% to as much as 50% down).²⁰ The programs also allowed for longer repayment periods, which reduced monthly payments.²¹ Between 1934 and 1969, the percentage of American homeowners increased by almost 50%, from 44% to 63% of all households.²²

The federal government continues to encourage and subsidize homeownership in a variety of ways. The Department of Housing and Urban Development (HUD) now provides programs to help low and moderate income families purchase homes.²³ Most significantly, perhaps, homeowners are entitled to deduct both the amount they pay in real property taxes and interest paid on a mortgage secured by a personal residence.²⁴ In addition, imputed rental income is not considered income for tax purposes and therefore is not taxed.²⁵

As Dorothy Brown persuasively argues, the federal government's subsidization of current homeownership does not benefit all homeowners equally.²⁶ First, the deductions increase in value as a household's taxable income increases:

[A] taxpayer in the 35 percent marginal tax bracket, saves 35 cents for every dollar of mortgage interest deduction. Her after tax costs of a \$1 mortgage payment would be 65 cents. On the other hand a taxpayer in the 15 percent marginal tax bracket, saves 15 cents for every dollar of mortgage interest deduction. Her after tax costs of a \$1 mortgage payment would be 85 cents.²⁷

Second, and even more significantly, homeowners who do not itemize their taxes do not benefit at all from the mortgage interest and real property tax deductions—and only one-third of all tax payers itemize their taxes.²⁸ Therefore, a significant percentage of homeowners do not benefit from the government subsidies. And, of course, renters cannot deduct their housing

19. See Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1847 (2004) (discussing the National Housing Act of 1937 and the Serviceman's Readjustment Act of 1944); U.S. Census Bureau, Historical Census of Housing Tables—Homeownership, <http://www.census.gov/hhes/www/housing/census/historic/owner.html> (last visited Nov. 13, 2008).

20. Godsil, *supra* note 19, at 1847–48.

21. *Id.* at 1848.

22. *Id.*

23. See generally U.S. Department of Housing and Urban Development, Homes and Communities, <http://www.hud.gov> (last visited Nov. 13, 2008).

24. Brown, *supra* note 18, at 6 (citing I.R.C. § 163(h) (West Supp. 2008)).

25. *Id.*

26. *Id.* at 3.

27. *Id.* at 9.

28. *Id.* at 11.

expenses, and other borrowers (even for expenses such as student loans) are not entitled to deduct interest expenditures at all. These tax advantages for those homeowners who itemize their taxes are valuable indeed: for fiscal year 2007, they are estimated to be worth \$125 billion.²⁹ President-elect Barack Obama has proposed a change to this approach. During his campaign, he unveiled a plan to institute a universal mortgage credit that would give all homeowners—not just those who itemize their taxes—the opportunity to benefit from their ownership status.³⁰

Along with class disparities in homeownership rates, there are considerable racial disparities. White households are most likely to own homes—with 75% of whites owning in contrast to 60% of Asian Americans, 58% of American Indians and Native Alaskans, 49% of Latinos, and 48% of blacks.³¹ The dramatic differences in the race of homeowners are not accidental. They can be traced in large part to the very federal programs that made mass homeownership possible. The FHA and VA refused to extend mortgage guarantees to black families or to neighborhoods in which blacks had a significant presence. This contributed to concurrent private sector lending discrimination.³² Notably, while the racial disparities appear stark, they actually reflect the highest homeownership rate for blacks and Latinos, and the smallest racial gap in our country's history.³³

The current racial disparities in homeownership rates are not only a byproduct of historical discrimination. Thomas Shapiro has found that blacks are rejected for home mortgages at a 60% higher rate than equally creditworthy whites.³⁴ While the Community Reinvestment Act³⁵ has had some effect by requiring banks doing business in urban communities to meet their credit needs, Shapiro concludes that financial institutions simply redefine “objective” criteria that result in blacks being denied credit at substantially higher rates.³⁶ In addition, blacks and Latinos tend to have significantly less family wealth to rely upon for down payments and the like

29. *Id.* at 7 (citing JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 33, available at <http://www.house.gov/jct/s-1-05.pdf>).

30. Edmund L. Andrews, *The Housing-Loan Crisis*, N.Y. TIMES, Oct. 26, 2008, at WK6; see also Barack Obama and Joe Biden: The Change We Need, Economy, <http://barackobama.com/issues/economy/index.php#home-ownership> (last visited Nov. 13, 2008).

31. U.S. Census Bureau, Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2006, <http://www.census.gov/hhes/www/housing/hvs/annual06/ann06t20.html> (last visited Nov. 13, 2008).

32. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 30 (1995).

33. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53 (2006).

34. *Id.* at 66.

35. 12 U.S.C. § 2901 (2006).

36. See Shapiro, *supra* note 33, at 66–67.

so these minorities often have to pay higher interest rates and costs.³⁷ These facts have significance for both the mortgage crisis and eminent domain.

Indeed, even the symbolic significance of homeownership may have unique salience for blacks and Latinos in light of the United States' history of exclusion. As Irma Muñoz, a Senior Manager with Fannie Mae, described,

I would give speeches on wealth building and about the impact that home ownership has on communities, but I never truly understood what I was saying until very recently. Two years ago, my siblings and I bought our parents their first home in the United States. Soon after they moved in, we were having dinner together. I had never seen as much peace in my parents' eyes as I saw that night. I had never seen them as happy as they were. Home ownership did that for them. After they became homeowners, they became voters. They are involved in the community. They participate in the school system. They advocate for other Latinos in the area. And after September 11, my parents' house instantly had an American flag on the garage door.

My parents feel fully like a part of this country. Home ownership was the catalyst to make sure that they felt like part of the United States.³⁸

B. *Mortgage Crisis*

Homeownership has reached historic levels in part because lenders extended home loans to borrowers who offered little or no down payment. The reduced down payment requirements have significantly lowered barriers to homeownership—which until the financial walls came crashing down seemed to be a positive outcome. However, without a substantial down payment, homeowners began their tenure with a significantly higher debt load, rendering them acutely sensitive to market fluctuations. The risks (and rewards) of exposure to market fluctuations can be demonstrated by a simple example.

Suppose that the Johnson family purchases a \$200,000 home with a 20% down payment (\$40,000) and a loan for \$160,000. The Robertson family also purchases a \$200,000 home, but instead pays only 1% down (\$2000), and obtains a loan for \$198,000. If home prices increase and each home is now worth \$220,000, the Robertsons and the Johnsons have (at least on paper) gained \$20,000. The Johnson family earned the \$20,000 return on a \$40,000 investment; the Robertsons earned the \$20,000 return on a \$2000 investment. The Johnson family provided a larger down payment and earned a 50% return on investment; the Robertson family purchased their home with a lower down payment so they benefit from a 1000% return on investment. In this situation, the Robertsons are in a better position than the

37. *See id.* at 67.

38. *Sixth Annual Harvard Latino Law and Policy Conference: Latino Leadership and Collective Power*, 7 HARV. LATINO L. REV. 75, 93 (2004).

Johnsons because they have been able to reap the same financial reward with significantly less money up front.

Just as the Robertsons will have greater exposure to market appreciation, so too will they be more exposed to home price depreciation. If housing prices decline 10%, then the value of each home in our example will be reduced by \$20,000, bringing the fair market value of each home to \$180,000. The Johnsons, because of their large down payment, still have positive equity in their home. That is, the home is worth \$180,000, but they only owe the lender \$160,000. If the Johnson family has to sell the home in this down market, they will not owe the lender any additional money at closing (though they will of course lose half of their initial investment, or \$20,000). The Johnsons' ability to pay a larger down payment provides them with a cushion against declining prices since they will not have to pay anything out of pocket to the lender if the home sells below its purchase price.

The Robertson family, however, is not as fortunate. Assume the value of their home has also declined in value by \$20,000, and they too sell their home. The Robertsons have borrowed \$198,000, but their home sells for only \$180,000. Unlike the Johnson family, the Robertsons must put forward a significant amount of money (\$18,000 in this example) to sell their home and repay the lender. This simple example demonstrates how leveraging a relatively small down payment (that is, using \$2000 to borrow \$198,000) means that the Robertson family will be more exposed to fluctuations (either up or down) in housing prices.

Understanding the connection between declining housing prices and highly leveraged loans is critical to examining the mortgage crisis. Nationally, housing prices declined 10% in 2006, and experts predict an additional 15% to 20% drop in prices in the near future.³⁹ The weakened housing market means that more than 10% of all homeowners owe their lenders more than the fair market value of their homes⁴⁰ (they are in situations similar to that of the Robertsons in the down market). As demonstrated above, the declining prices will likely have the greatest impact on homeowners who have the least amount of equity in their homes (i.e., those who provided nominal down payments, obtained interest-only mortgages, or those who have not built up equity through mortgage payments). The significance of this reality to the current mortgage crisis cannot be understated. Nearly 30% of all home loans in 2007 were originated with no down payment;⁴¹ among borrowers who did provide a

39. Martin Feldstein, *How to Stop the Mortgage Crisis*, WALL ST. J., Mar. 7, 2008, at A15.

40. Edmund L. Andrews & Louis Uchitelle, *Rescues Weighed as Homeowners Wallow in Debt*, N.Y. TIMES, Feb. 22, 2008, at A1.

41. John Leland, *Facing Default, Some Abandon Homes to Banks*, N.Y. TIMES, Feb. 29, 2008, at A1.

down payment, the average payment has decreased more than 50% in the past 20 years.⁴²

While many homeowners are at risk, those who received subprime loans⁴³ are truly in crisis.⁴⁴ Recipients of subprime loans invariably pay higher interest rates because they are seen as greater credit risks and they often were induced to borrow with no money down, initially low-interest Adjustable Rate Mortgage (ARM) loans, and sometimes, interest-only payment plans. The effect of housing value depreciation then is even more dire for subprime borrowers. The subprime borrower has likely paid less principal in the early years of her tenure as a homeowner, and therefore, is more likely to have negative equity in a down market.

42. *Id.*

43. A subprime mortgage loan is one that fails to meet the criteria for “prime” mortgages, and is determined to have a lower expected probability of full repayment. Creditors ostensibly make this assessment according to “the borrower’s credit record and score, debt service-to-income (DTI) ratio, and/or the mortgage loan-to-value (LTV) ratio. Borrowers with low credit scores, DTIs above 55%, and/or LTVs over 85% are likely to be considered subprime.” John Kiff & Paul Mills, *Money for Nothing and Checks for Free: Recent Developments in U.S. Subprime Mortgage Markets 3* (Int’l Monetary Fund, Working Paper No. 07/188, 2007), available at <http://www.imf.org/external/pubs/ft/wp/2007/wp07188.pdf>. In general, because they are seen as a greater credit risk, subprime borrowers pay higher interest rates, which translate into higher monthly costs. Lenders devised a series of instruments to incentivize subprime borrowers. The most well-known is the “adjustable rate mortgage” (ARM). An ARM refers to a loan for which the interest rate changes periodically, usually in relation to an index, and payments may go up or down accordingly. ARMs are problematic for subprime borrowers for many reasons, but mainly because the monthly payments can fluctuate dramatically, leading to “payment shock” as the initial low interest rate increases. FED. RESERVE BD., CONSUMER HANDBOOK ON ADJUSTABLE-RATE MORTGAGES (2006), available at <http://www.federalreserve.gov/Pubs/arms/armsbrochure.pdf>. ARMs often seem attractive at first blush because of their stated lower interest rates, but they are often accompanied by “points,” or loan fees. *Id.* at 27. A subprime loan also is more likely to have a prepayment penalty, a balloon payment, or both. A prepayment penalty is a fee assessed against the borrower for paying off the loan early—either because the borrower sells the house or refinances the high-rate loan. A mortgage with a balloon payment requires the borrower to pay off the entire outstanding amount in a lump sum after a certain period has passed, often five years. If the borrower cannot pay the entire amount when the balloon payment is due, the borrower has to refinance the loan or sell the house. *Id.* at 20.

44. The causes of the subprime financial crisis are hotly disputed. Some claim that the confluence of falling home prices and skyrocketing interest rate increases for ARMs resulted in an unexpectedly high number of defaults. See Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown* (Duke Law Sch. Legal Studies, Research Paper No. 175, 2007), available at <http://ssrn.com/abstract=1056241>. Other scholars disagree. See Yuliya Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis* (Aug. 19, 2008) (unpublished manuscript, on file with the Fordham Law Review), available at <http://ssrn.com/abstract=1020396> (“[T]he quality of loans deteriorated for six consecutive years before the crisis and securitizers were, to some extent, aware of it. We provide evidence that the rise and fall of the subprime mortgage market follows a classic lending boom-bust scenario, in which unsustainable growth leads to the collapse of the market. Problems could have been detected long before the crisis, but they were masked by high house price appreciation between 2003 and 2005.”). Some place primary blame on the mortgage industry. Governor Bill Richardson of New Mexico argues, “[t]he mortgage crisis was not caused by the people who purchased homes but by how homes were financed.” Bill Richardson, *Bring It Back to the Home*, N.Y. TIMES, Mar. 2, 2008, at WK13.

Consider again the Johnsons and the Robertsons. The Johnsons paid 20% down (\$40,000) on their \$200,000 home and obtained a \$160,000 mortgage for the remainder of the purchase price. Assume that the Johnsons obtained a thirty-year mortgage in which the payments remain constant throughout the terms of the loan (thirty-year fixed). At an interest rate of 6%,⁴⁵ the Johnsons would pay roughly \$960 per month.⁴⁶ After one year, the Johnsons have reduced the principal loan amount by roughly \$2000; after three years, the principal is reduced by \$7000.⁴⁷ This total cost is significantly lower than either of the alternatives below, and demonstrates the benefits of a conventional loan combined with a large down payment. After thirty years, the total cost of owning their home (that is, the cost of the thirty-year fixed mortgage and the \$40,000 down payment) would be \$385,341.

On the other hand, the Robertsons only paid 1% down (\$2000) on their \$200,000 home, and obtained a \$198,000 mortgage for the remainder of the purchase price. They obtained a thirty-year mortgage with a fixed interest rate for the first five years of the loan; the loan adjusts every year after that initial five-year period (5/1 ARM). At an interest rate of 6.375%, the monthly payments during the first year are roughly \$1235; \$1051 of that pays down interest, and \$184 pays down the principal loan amount. After one year, the Robertsons have reduced the principal loan amount by roughly \$2200; after three years, the principal loan amount is reduced by roughly \$7000. Similar to the Johnsons, the Robertsons are reducing their principal loan amount with each payment; this builds the positive equity in the home, and buffers the family against possible declines in the value of the home should they need to sell in a down market. However, the Robertsons (unlike the Johnsons) are subject to the added risk of interest rate increases after the first five years. The total cost of purchasing the home with this loan (again, the cost of the mortgage and the \$2000 down payment) would be \$535,608.⁴⁸

Alternatively, assume the Robertsons obtained a more exotic loan. In this example, they obtain a thirty-year loan that offers interest-only payments for the first three years, and payments composed of principal plus

45. See Bankrate.com, <http://www.bankrate.com> (last visited Nov. 13, 2008) (noting banks offering, on March 15, 2008, thirty-year fixed rate mortgages at 6% interest for borrowers with good credit ratings and 20% down). The interest rates in each of the subsequent examples were also obtained via Bankrate.com. The actual interest rate is irrelevant, however, as the examples are meant to demonstrate the relative effects on the principal loan amount and the total cost of the mortgage over the course of the mortgage.

46. Bloomberg, Bloomberg.com: Calculators, <http://www.bloomberg.com/invest/calculators/index.html> (last visited Nov. 13, 2008) (offering a variety of fixed rate, adjustable rate, and interest-only loan calculators).

47. More specifically, the Johnsons would pay \$959.28 each month; in the first year of the loan, this means that roughly \$800 would pay down interest on the loan, and \$159 would reduce the principal amount of the loan. After one year, the principal loan amount would be \$158,035; after three years, the principal loan amount would be \$153,734.

48. It is impossible to estimate the precise cost of any ARM because the interest rates fluctuate; the overall cost of the loan assumes a 25 basis point increase from year to year.

an interest rate that adjusts each year after the initial three-year period (three-year interest-only ARM). At a rate of 6.5%, the Robertsons would pay \$1070 per month. After three years, they have not reduced the principal loan amount at all—though the lower payments in the first three years save the Robertsons nearly \$6000 compared to the payments under the 5/1 ARM. After the initial three-year period, and assuming a 25 basis point (0.25%) increase in the interest rate,⁴⁹ the monthly mortgage payments would jump to \$1330. In this situation, the Robertsons are exposed to higher interest rates and have no built-in cushion of equity in the home should the family need to sell in a down market. Of the three options discussed here, the three-year interest-only ARM is clearly the most expensive means of purchasing the home, with the total cost of purchasing the home reaching \$575,491.

As of September 2008, a record 1.2 million homes were in foreclosure.⁵⁰ Equally troubling, there were 490,000 foreclosure proceedings initiated between April and June of 2008 (an increase of 9% from January 2008 through March 2008); 2.9 million homeowners were behind on their payments (up 25% from the same period last year).⁵¹ Subprime ARMs accounted for roughly 36% of all foreclosure starts between April and June, despite that they account for only 6% of all mortgages.⁵² At these rates, a subprime ARM is 20 times more likely to end up in foreclosure than a standard thirty-year fixed rate prime mortgage.⁵³ These stark numbers are driven in part by the substantial and sustained depreciation in housing prices. As housing prices decline, sale is not a viable exit option for a homeowner who, for whatever reason, is unable to continue meeting her monthly mortgage payments. This is essentially the problem of the Robertson family in a down market. The scope of this problem is startling: 30% of families holding subprime mortgages are currently “upside down”—meaning they owe more on the loan than the home is worth.⁵⁴ As the economy continues to worsen and more employers shed workers, the pressure on “upside down” homeowners will mount as workers will often need to relocate to secure employment.

The subprime mortgage crisis will fall most heavily on black and Latino homeowners. Blacks and Latinos are more likely than whites—even when controlling for comparable income—to receive subprime loans.⁵⁵ That

49. Again, this is only an assumption; the precise increase or decrease is largely irrelevant for this hypothetical.

50. Les Christie, *Record 1.2 Million Homes Hit by Foreclosure*, CNNMONEY.COM, Sept. 5, 2008, http://money.cnn.com/2008/09/05/real_estate/foreclosures_rise_again/index.htm.

51. *Id.*

52. *Id.* Subprime mortgages accounted for more than 50% of all foreclosure starts in 2007. Jim Zarroli, *Bernanke Urges Banks to Help Borrowers More*, NAT'L PUB. RADIO, Mar. 4, 2008, <http://www.npr.org/templates/story/story.php?storyId=87898693>.

53. *Id.*

54. Andrews, *supra* note 11.

55. Brown, *supra* note 18, at 26; see Paul S. Calem, Kevin Gillen & Susan M. Wachter, *The Neighborhood Distribution of Subprime Mortgage Lending* (Univ. of Pa., Inst. for Law

blacks and Latinos, on average, have lower median household wealth than whites makes it more likely that black and Latino homeowners will default when ARMs reset at higher rates.⁵⁶ A recent study revealed that in 2006 nearly 50% of home loans given to blacks, and slightly more than 40% of those given to Latinos, were subprime.⁵⁷ By contrast, less than 20% of the loans to white borrowers were subprime.⁵⁸ More localized data reveal some markets with significantly higher proportions of subprime loans. For example, Michigan⁵⁹ and Wisconsin had the highest proportion of subprime loans to blacks, with these high cost debts accounting for 70.7% and 61.6%, respectively, of mortgage loans to black borrowers in 2006.⁶⁰ Unsurprisingly, a high percentage of subprime loans can also be found in counties with poverty rates that are above a state's average. In Texas, for example, subprime loans account for slightly more than 16% of all home loans; however, in thirty counties that have poverty rates above the state average, subprime loans account for half of all home loans.⁶¹

C. Eminent Domain

The current political focus on the mortgage crisis was presaged by the response to the Supreme Court's decision in *Kelo*. In the aftermath of the decision, there was a common perception that governments were engaged in widespread abuse of eminent domain, rendering property rights essentially meaningless. The post-*Kelo* reaction was a furious spate of legislative enactments and even a few state constitutional amendments prohibiting the

& Econ., Research Paper No. 03-39, 2003), available at <http://ssrn.com/abstract=478581>; Richard Marsico, *The Higher Cost of Being African-American or Latino: Subprime Home Mortgage Lending in New York City, 2004-2005* (N.Y. Law Sch., Pub. Law & Legal Theory, Research Paper No. 07/08-12, 2007), available at <http://ssrn.com/abstract=1034265>.

56. Christopher L. Peterson, Over-Indebtedness, Predatory Lending, and the International Political Economy of Residential Home Mortgage Securitization: Comparing the United States' Subprime Home Mortgage Lending Crisis to Home Finance in the United Kingdom, Germany, and Japan, at n.4 (Jan. 11, 2008) (unpublished manuscript, on file with the Fordham Law Review), available at <http://ssrn.com/abstract=1083184>.

57. Alan Zibel, *40 Percent of Mortgages Given to Blacks, Hispanics 'High Cost,' S. FLA. TIMES*, Mar. 17, 2008, http://www.sfltimes.com/index.php?option=com_content&task=view&id=595&Itemid=38.

58. *Id.*

59. Evidence is surfacing that suggests that Michigan lenders "steered minority homeowners into high-risk subprime mortgages." Eric Campbell, *Cox's Ties to Mortgage Firms May Explain Inaction on Foreclosures*, MICH. CITIZEN, Mar. 2, 2008, at A1. "Homeowners in the primarily Black Detroit neighborhood, with a median income of \$49,000, received subprime loans at a rate of 70%[,] in the mostly white Plymouth neighborhood, with a median income of \$51,000, subprime loans reached only 17%." *Id.*

60. Al Heavens, *Mortgage Lending to Minorities Drops in 2006*, REALTY TIMES, Oct. 11, 2007, http://realtytimes.com/rtpages/20071011_mortgagelending.htm.

61. Shawnda Hines, *Poorest Counties Hardest Hit by Mortgage Crises*, REUTERS, Feb. 27, 2008, <http://www.reuters.com/article/pressRelease/idUS189623+27-Feb-2008+PRN20080227>.

use of eminent domain for all but the most traditional public uses.⁶² Unlike the mortgage crisis, which is rooted in a real threat to many homes, the *Kelo* perception was mainly a result of overheated rhetoric. For most homeowners, *Kelo* changed very little.

Property rights have never been as static and “secure” as many presume. As law students learn their first year, ownership is not a single concept. Rather, property rights consist of a bundle of rights or entitlements to occupy and use property, to exclude others from it, and to transfer the property to others. Property rights are (and always have been) limited by the interests of others in countless respects. Neighbors may sue in nuisance to limit offensive conduct, local government can limit uses under zoning and land use regulations, and, most dramatically, government may require sale of land for its own use. While most limits upon property receive widespread support from citizens (and law students), this last limit, the government’s power of eminent domain, is a source of considerable anger and anxiety.

The use of eminent domain in fact is not widespread⁶³ and, in the unlikely event that the government acquires one’s home for a highway or a park or to spark economic activity, most homeowners will be well compensated and easily able to purchase another home. With some frequency, homeowners receive significantly more than market value as developers seek to avoid controversy and litigation by negotiating early purchases.⁶⁴ For some, the degree of compensation fails to alleviate the

62. See Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 193–98 (2007).

63. Among the most vocal critics of the use of eminent domain, Dana Berliner documents a recent five-year period that included 10,282 actual or “threatened” takings across all fifty states and the District of Columbia. See DANA BERLINER, CASTLE COAL., PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003), available at http://castlecoalition.org/pdf/report/ED_report.pdf. While this number is not insignificant, it is approximately forty properties per state per year. This amounts to a tiny fraction of properties in each state—and this number includes “threatened” as well as actual takings. More generally, Berliner asserts that the use of eminent domain disparages the “very strong [American] ethic that you work hard so that some day you or your children can own a home.” Diane Cardwell, *Bloomberg Says Power to Seize Private Land Is Vital to Cities*, N.Y. TIMES, May 3, 2006, at B1. Our status-preserving plan honors this American ethic.

64. Garnett, *supra* note 6, at 122–23 (recounting a state agency’s internal audit revealing that “relocation assistance [to homeowners] routinely exceeded the statutory limits” of the Uniform Relocation Assistance and Real Property Acquisition Act); *id.* at 142 (explaining that compensation above the minimum required may reflect the acquiring agency’s attempt to “limit resistance” and to “avoid costly and politically damaging battles in both courts of law and courts of public opinion”). For example, Forest City Ratner Companies, the developer of the multibillion dollar Atlantic Yards Project in Brooklyn, New York, paid \$1.1 million for an apartment that was purchased for \$419,000 one year earlier. Nicholas Confessore, *Forced to Move, Some Find Greener Grass*, N.Y. TIMES, Apr. 10, 2006, at B1. The owners of the apartment referred to the developer as a “fair but savvy negotiator[.]” *Id.* Another displaced resident who described the payment he received as a “very good price” for his property lauded the developer for devoting the time and resources to “treat us as humans.” *Id.*

resentment of a forced sale on the ground that their homes are unique and cannot be replaced merely by money. For many, this categorization will resonate and the political outcry that followed *Kelo* confirms this speculation. Yet it is fairly clear that however significant this emotional loss, most homeowners are able to find another focus for their attachment.

The concern we would like to explore from a societal perspective is for those—many black or Latino—for whom the compensation is inadequate to allow the purchase of another home. Our worry that blacks and Latinos are particularly likely to lose their status as homeowners when the government exercises its power of eminent domain is not merely academic speculation. We began to focus on the issue of the “justness” of compensation in light of our experience studying two communities, the Lower Ninth Ward in New Orleans, whose travails are well-publicized, and Waterfront South in Camden, New Jersey.

The Lower Ninth Ward was among the neighborhoods most devastated by Hurricane Katrina in August 2005.⁶⁵ Pre-Katrina, the neighborhood was already struggling. Comprised of 14,008 residents, 98% of whom were black, the Lower Ninth Ward suffered a severe concentration of poverty, high crime rates, poor educational outcomes, and decades of financial neglect.⁶⁶ Paradoxically, despite these indicators, the Lower Ninth Ward boasted the highest rate of homeownership in Orleans Parish, Louisiana, with 60% of households owner-occupied.⁶⁷ The high homeownership rates suggested prosperity at odds with the reality—most of the homes were constructed in the 1950s and remained within families during the decades that followed. The poverty of the owners precluded adequate investment, and homes were often in poor physical condition prior to the storm. The median home value was tens of thousands less than the Orleans Parish at \$52,420 versus \$88,100.⁶⁸ The Lower Ninth Ward was physically separate from the rest of New Orleans, bound by a waterway, an industrial corridor, and railroad tracks. A high percentage of homes were unoccupied and the neighborhood was often described as blighted.

Though separated by thousands of miles and culturally very distinct, the city of Camden, New Jersey faces similar challenges to those of the pre- and post-Katrina Lower Ninth Ward. As of the most recent census, 53.3% of Camden residents are black, 38.9% are Latino, and 16.8% are white.⁶⁹ Approximately 30,000 of its 87,000 residents live below the poverty level,

65. See Dan Baum, *The Lost Year: Behind the Failure to Rebuild*, NEW YORKER, Aug. 21, 2006, at 46.

66. Cornell University, New Orleans Planning Initiative, Physical, Economic, and Social Attributes of the Lower Ninth Ward, <http://www.aap.cornell.edu/crp/outreach/nopi/index.cfm> (last visited Nov. 17, 2008).

67. *Id.*

68. *Id.*

69. U.S. Census Bureau, Highlights from the Census 2000 Demographic Profiles, <http://factfinder.census.gov> (last visited Nov. 11, 2008). Rachel Godsil has written about Camden elsewhere. See Godsil, *supra* note 19, at 1823 (citing CAMConnect and the National Neighborhood Indicators Database).

40% of Camden households have no employed family members, and 60% receive governmental financial assistance.⁷⁰ Most acute is the experience of those living in Waterfront South. Like the Lower Ninth Ward, Waterfront South is physically separate from the rest of the city as a result of a highway. It is extremely polluted—suffering from among the highest levels of particulate pollution in the state.⁷¹ According to the EPA's National Air Toxics assessment, Waterfront South is one of the two worst census tracts in the country for cancer risk from air pollution.⁷²

Waterfront South contains multiple waste facilities—and two residential areas. One four-block area is known as the Terraces and contains approximately forty-one families. The other, a few blocks north, is comprised of four hundred families. Both areas at one time contained comfortable row houses that were home to ship workers.⁷³ When the shipyard closed, white ship workers and their families left for the suburbs, and many black families purchased the homes.⁷⁴ Residents say that these areas continued to be nice places to live until industry and traffic began to compromise the air quality.⁷⁵ The combination of a highway linking the bridges to Philadelphia, a sewage treatment plant, and an incinerator located blocks away caused residents to abandon their homes.⁷⁶ Urban historian Howard Gillette has written about the Terraces:

The city tore down parts of the Terraces, but lacking funds to complete the job left a few remaining homes on certain blocks, looking incongruous, for their isolation among grown-over lots littered with trash. A few remaining shells attracted drug dealing, and periodically police SWAT teams would sweep the area, passing through the high grasses with guns poised in a scene reminiscent of Vietnam. Prostitution flourished.⁷⁷

Not surprisingly, the market value of the homes remaining in Waterfront South is extremely low. For example, in Waterfront South, a three-bedroom home is valued from \$18,000 to \$50,000, while a similarly sized home in the nearby white working class town of Pennsauken is valued from \$65,000 to \$135,000.⁷⁸

Homeowners in both the Lower Ninth Ward and Waterfront South have recently confronted the possibility of government-induced exit with only

70. HEALTH VISIONS, INC., CAMDEN CITY HEALTH NEEDS ASSESSMENT: PERSPECTIVES OF CONSUMERS IN THE CITY OF CAMDEN, NEW JERSEY 20 (1995), available at <http://www.camconnect.org/resources/documents/healthneedsassessmentv1-8-2.pdf>.

71. S. JERSEY ENVTL. JUSTICE ALLIANCE, FACT SHEET—CAMDEN ENVIRONMENTAL CONDITIONS (2006), available at <http://www.njeja.org/PDF/SJEJA%20ToxicTour%20Factsheet9-06.pdf>.

72. *Id.* at 1–2.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Howard Gillette, *Camden After the Fall: Decline and Renewal in a Post-industrial City 1–2* (manuscript, on file with authors).

78. See National Association of Realtors, <http://www.realtor.com> (last visited Nov. 15, 2008) (search Camden ZIP code “08102”; search Pennsauken ZIP code “08109”).

the fair market value of their homes in hand. While Louisiana is among the states that responded to the *Kelo* decision with an extreme state amendment precluding the use of eminent domain for economic development purposes, the Road Home Plan adopted by the State of Louisiana may have exactly that effect.⁷⁹ The Road Home Plan was intended to provide financial assistance to compensate for Katrina-related damages to Louisiana homes by offering affected homeowners grants to rebuild a principal residence or the option to sell the property to the state at a prestorm fair market value. Under the plan as originally envisioned, homeowners were not entitled to rebuilding grants in areas “where a high proportion of homeowners are choosing not to invest.”⁸⁰ The plan provides affected New Orleans homeowners with a Hobson’s choice: rebuild at their own expense, sell at current (utterly marginal) fair market value to private purchasers, or sell to the state at prestorm fair market values. The third “choice” is the functional equivalent to the state’s power of eminent domain. The City of Camden has spent millions of dollars on redevelopment plans—some of which have included the use of eminent domain in the beleaguered Waterfront South area.⁸¹ While the most recent version of the redevelopment plan for Waterfront South was struck down on land use grounds,⁸² the specter of eminent domain remains.

In both instances, the government reasonably considers certain areas to be better suited for purposes other than their current residential uses. However, in both, if homeowners are compensated at fair market value, they are unlikely to be able to afford to purchase a home elsewhere—except perhaps in another area subject to continuing environmental risks or so blighted that it may be the next target for eminent domain takings.

Some may contend that the government should not be forced to exceed fair market value simply because a particular home is worth so little on the market that its fair market value is inadequate to cover the purchase of another home. This argument is based upon the seemingly reasonable premise that the government need only place the property owner in as good a position pecuniarily as she was prior to the exercise of eminent domain.

79. David Simunovich has written that the way in which the Road Home has been administered should entitle homeowners to the benefits of the URA. David Simunovich, Comment, *The Quiet of Dissolution: Post-Disaster Redevelopment and Status-Preserving Compensation*, 38 SETON HALL L. REV. 331 (2008).

80. LA. RECOVERY AUTH., THE ROAD HOME HOUSING PROGRAMS ACTION PLAN AMENDMENT FOR DISASTER RECOVERY FUNDS 6–7 (2006), available at <http://web.archive.org/web/20061001152419/http://lra.louisiana.gov/assets/roadhome/HousingActionPlanAmendment050306.pdf>. The rebuild restriction was never formally implemented; however, the provision worked its inequitable harm in the months immediately following the storm, when displaced residents made relocation decisions. Simunovich, *supra* note 79, at 352–56.

81. CITY OF CAMDEN, WATERFRONT SOUTH BROWNFIELDS REDEVELOPMENT PROJECT (2000), available at <http://www.ci.camden.nj.us/departments/Waterfront%20South%20Brownfield%20Redevelopment%20Project.pdf>.

82. Dwight Ott, *Camden Judge Rejects Waterfront South Redevelopment Plan*, PHILA. INQ., May 31, 2007, at B3.

However, the U.S. Constitution requires that those whose property is taken shall receive “just compensation.”⁸³ Further, this argument presupposes that the government had no role in determining the value of the property, and that distributive justice concerns cannot be taken into account in determining the “justness” of compensation. Neither assumption is accurate. As we discuss below, government activity tends to be integral to determining the market value of property. In addition, might the status of homeowner have value independent of the specific monetary value of the specific property? If so, for compensation to be “just” when the government exercises its power of eminent domain, it must both recognize its own role in setting property value and compensate to ensure that property owner status is retained.

II. STATUS PRESERVATION

Should government be in the position of preserving homeowner status as such? This part explores arguments both positive and normative that resources should be devoted to ensuring that people maintain their status as homeowners in the contexts of current assaults. Our use of the term “status” here implies a hierarchy—that the status of homeowner is superior to the status of renter, and therefore, the person whose status changes from homeowner to renter is occupying a lesser position.⁸⁴ First, then, we must contend with whether this conclusion is sound—whether in fact homeownership per se is valuable, and then we will grapple with the question of whether the government should subsidize those occupying the preferred status position.

While it has become commonplace, upon reflection it is not entirely obvious why those owning rather than renting a home are accorded a more valued status. In both instances, a person is expending resources to have a property interest in a dwelling. There are legal differences, of course, between a freehold and a leasehold estate in land—and we can begin with the legal distinctions to understand the differences we attribute to homeownership and leaseholds. A person or family who owns a fee simple possesses the largest possible share of the rights in the iconic property bundle (use, possession, the right to exclude, and the right to transfer), while a person or family who possesses a leasehold interest has occupancy rights to the property only for a specified period of time. Other limitations upon use or transfer may also be specified within the terms of the individual lease. In modern times, typically, the fee owner of a rental property is also

83. U.S. CONST. amend. V.

84. Groups fight about status because they are fighting about their relative social identities. J.M. Balkin, *Constitution of Status*, 106 YALE L.J. 2313, 2315 n.2 (1997); see also Bernardo A. Huberman, Christoph H. Loch & Ayse Öncüler, *Status as a Valued Resource*, 67 SOC. PSYCH. Q. 103, 103 (2004) (“Humans strive not only for access to resources and material benefits but also for intangibles such as status, which is characterized by a rank-ordered relationship among people associated with prestige and deference behavior.” (citation omitted)).

subject to legally imposed obligations to the leaseholder, like ensuring that the property is habitable.⁸⁵ These obligations are intended to benefit the renter, but they also mean that the fee owner maintains an active role with respect to the property and that the leaseholder does not exercise significant responsibility over the property. The fee simple therefore entitles the owner to a great deal more autonomy and control over the property than most leaseholds.⁸⁶

Along with its legal dimensions, homeownership has long been imbued with considerable cultural significance.⁸⁷ One aspect of homeownership's cultural significance is its link to wealth creation. As economic geographer Irene Hardill notes,⁸⁸ the role of homeownership in determining a family's wealth is a staple of literature, with examples ranging from Anthony Trollope's Barsetshire stories and George Bernard Shaw's first play, *The Widower's House*, to Andre Dubus's more recent *House of Sand and Fog*.⁸⁹ In each story, a family's future wealth is understood to depend upon retaining ownership of a home. Because our society values wealth and links it to status, it is not surprising that homeownership is accorded more status than renting, which is often viewed as "throwing money down the drain."⁹⁰

If homeownership status is merely a means of garnering some families' wealth (a purely private good), it seems deeply troubling for government to subsidize that status. This apparent contradiction can be explained by other aspects of homeownership. Homeownership and its attendant autonomy and control over property are understood to generate other goods such as better living conditions, involvement in the community, and the ability to ensure greater education and freedom from crime for children.⁹¹ These outcomes, if they result from homeownership, benefit both the individual or household and the community in general, and are much more persuasive in justifying both the greater status accorded to homeowners and government support of that status.

A range of empirical studies have concluded that homeownership does in fact have salutary benefits for households and communities—even ownership in low-income census tracts.⁹² In a recent regression analysis of

85. 2 POWELL ON REAL PROPERTY § 16B.04[2] (Michael Allan Wolf ed., 2000).

86. In a recent popular exploration of the link between status and health, epidemiologist Michael Marmot posits that status is linked with increased longevity and general well-being because those with higher status have more autonomy and control over their lives as well as better opportunities for full social engagement. MICHAEL MARMOT, *THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY* 2 (2004).

87. See generally IRENE HARDILL, *GENDER, MIGRATION AND THE DUAL CAREER HOUSEHOLD* (2002).

88. *Id.* at 48.

89. See *id.*

90. *Id.*

91. See HUD USER, *URBAN POLICY BRIEF NO. 2* (1995), <http://www.huduser.org/publications/txt/hdbrf2.txt>.

92. See, e.g., ROBERT D. DIETZ, *HOMEOWNERSHIP ALLIANCE, THE SOCIAL CONSEQUENCES OF HOMEOWNERSHIP* (2003), available at <http://www.new>

the effect of homeownership upon children, Joseph Harkness and Sandra Newman found both that homeownership is beneficial to children regardless of the neighborhood, and that children of renters do not gain nearly the benefit from more affluent neighborhoods as do children of homeowners.⁹³ The benefits accruing to children are wide-ranging: children of homeowners acquire more education and are less likely to be on welfare; while the findings were less robust, children of homeowners are also less likely to be economically idle and to have children out of wedlock.⁹⁴ Harkness and Newman are careful to note that these findings represent only an initial step and that more research with larger sample sizes is needed. Surveying a wealth of empirical data, economist Robert Dietz similarly reports that homeownership improves “household stability, social involvement, local political participation and activism, environmental awareness, child outcomes, health, crime, and community characteristics.”⁹⁵ Homeownership is also associated with better physical and mental health and lower divorce rates for married couples.⁹⁶ While Dietz notes that the studies linking homeownership and health suffer from weak methodology and encourages more robust studies to confirm these findings, the findings are consistent with a significant literature linking physical and emotional well-being with increased status. In other words, the status we attribute to homeownership has the effect of increasing the well-being of those to whom we confer the status lift.

Another notable finding is that many of the positive outcomes associated with homeownership appear to be linked to the transaction costs associated with both acquiring and vacating a fee simple.⁹⁷ Traditionally, in order to purchase a home, most people must both save for a down payment and have adequate credit to obtain a mortgage. These hurdles determine financial behavior. More importantly, once the fee simple has been acquired, the household tends to be less mobile because the transaction costs associated with moving have been increased considerably. This reduced mobility,

towncdc.org/pdf/social_consequences_study.pdf (reviewing studies); *id.* at 9 (citing Scott Southdale & Kyle Crowder, *Escaping Distressed Neighborhoods: Individuality, Community, and Metropolitan Influences*, 102 AM. J. SOC. 1040 (1997), for the conclusion that homeowners are less likely to relocate from distressed neighborhoods); Joseph M. Harkness & Sandra J. Newman, *Effects of Homeownership on Children: The Role of Neighborhood Characteristics and Family Income*, ECON. POL’Y REV., June 2003, at 87 (reviewing studies).

93. Harkness & Newman, *supra* note 92, at 99.

94. *Id.* at 93–94. Specifically, Joseph Harkness and Sandra Newman found that children of homeowners are estimated to complete a half year more of education, to have a 13% higher graduation rate, a 6% likelihood of completing some post-secondary education, and a 9% less likelihood of being economically idle. *Id.* They found these results to be highly statistically significant even if controls for neighborhood features are added in. The estimates for out-of-wedlock childbearing are favorable but weak. *Id.* at 94.

95. DIETZ, *supra* note 92, at 1.

96. *Id.* at 4–5 (citations omitted).

97. *See id.* at 12–13 (citations omitted).

which might otherwise seem to be a negative, translates into both commitment to place and stability for family.⁹⁸

Once a homeowner has developed a financial stake in a particular dwelling, there is a close link between that financial stake and the well-being of the community in which the dwelling is located.⁹⁹ As we noted, a homeowner's wealth is often largely determined by the value of her home, and therefore, homeowners (unlike renters) have an incentive to maintain their dwellings. Better maintained homes are less likely to be health hazards (for example, lead paint is more likely to be remediated) and they contribute to the aesthetic of a neighborhood. The homeowner's stake in the neighborhood lends itself to community engagement and activism—which both improves neighborhood parks, schools, and the like, and also leads to better emotional health for those so engaged.¹⁰⁰

Though the positive outcomes associated with homeownership are considerable, there are some downsides. The reduced mobility noted above can have a negative effect on the efficiency of labor markets since homeowners may be less willing or able to move to obtain employment.¹⁰¹ In recessionary times, when the housing market declines and the labor market tightens, a family may be whipsawed between the difficulty in selling their home and the location of a job. In addition to the potential downsides of homeownership for families, homeowners are understood to engage in parochial behavior in pursuit of their own interests that harm the public at large. Examples include pressing for restrictive zoning laws against building low- and moderate-income housing and engaging in other sorts of Not in My Backyard (NIMBY) behavior.¹⁰²

Also of concern is the fact that in general, blacks, Latinos, and low-income families benefit less from homeownership than affluent white households.¹⁰³ In a recent paper, Dorothy Brown persuasively argues that black, Latino, and low-income families are often less able to generate wealth from their homes than whites.¹⁰⁴ This difference is a result of multiple factors. First, these households are more likely to hold subprime mortgages with higher interest rates—rendering the cost of the same unit of housing more expensive. Second, homes owned by blacks, Latinos, and low-income families appreciate less than homes owned by affluent

98. *Id.*

99. *Id.* at 4; see LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY BEYOND THE PARCEL* (forthcoming) (on file with authors) (delinking home value from neighborhood characteristics).

100. DIETZ, *supra* note 92, at 6–9 (citing list of studies).

101. *Id.* at 13 (citing Andrew Oswald, *Theory of Homes and Jobs* (Sept. 18, 1997) (unpublished manuscript, on file with the Fordham Law Review)).

102. In earlier work, Godsil explores the role of affluent white Not in My Backyard (NIMBY) behavior in leading to the disproportionate burden of environmentally adverse land uses upon communities of color. See, e.g., Godsil, *supra* note 19; Rachel Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

103. See generally Brown, *supra* note 18, at 24.

104. *Id.*

whites.¹⁰⁵ The combination of higher interest loans and slower or nonexistent appreciation can drastically reduce the accumulation of equity. Relatedly, the Harkness and Newman study found that children of homeowners are slightly more likely to be adversely affected by neighborhood poverty than are children of renters.¹⁰⁶

Even with these caveats, however, it seems clear that homeowner status overall generates net positive outcomes for both families and communities. While black, Latino, and low-income homeowners do not do as well relative to affluent white homeowners, they are still significantly better off than they would be if they were renters.¹⁰⁷ As Newman and Harkness conclude, “[i]t is noteworthy that even with . . . extremely poor neighborhood characteristics, and under the assumption that owner children are, in fact, more adversely affected by these conditions than renter children, effects of homeownership on children’s outcomes tend to be positive.”¹⁰⁸

One question, obviously, is whether there are legal precedents for protecting status qua status. The closest analogy, in our view, is found in the common law of defamation. Defamation law protects against attacks on “reputation”—which while not precisely defined is often understood as akin to status.¹⁰⁹ A central debate within defamation law has been whether reputation should be protected only to the extent that it can be measured in the marketplace—which allows for an interesting parallel with our homeowner conundrum.

One school posits that a good reputation (or framed slightly differently, the reputation of possessing a good character) is merely a form of property. Such a reputation is acquired as a result of a person’s efforts (echoes of Locke’s labor theory) and translates into a form of capital in the form of access to credit or likelihood of benefiting from “patronage and support” from others.¹¹⁰ The concept of reputation as a marketable asset leads to a conclusion that defamation law should protect that which can be valued by the market and sets the limits of damages to that measure.

The property view of defamation law is not entirely supported by either case law or academic commentators.¹¹¹ Several doctrinal elements of defamation law do not cohere with the property conception—most notably

105. Brown cites research showing that homes owned by blacks and Latinos appreciate less partially because of continued racism in the housing market: “Homes lose about sixteen percent of their value when more than 10% of the neighborhood is black.” *Id.* at 23.

106. Harkness & Newman, *supra* note 92, at 96.

107. See Brown, *supra* note 18, at 27.

108. Harkness & Newman, *supra* note 92, at 98.

109. For a thoughtful discussion of defamation law, see Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

110. *Id.* at 694 (quoting JOEL HAWES, LECTURES ADDRESSED TO THE YOUNG MEN OF HARTFORD AND NEW HAVEN, AND PUBLISHED AT THEIR UNITED REQUEST 112 (Hartford, Oliver D. Cooks & Co. 1828)).

111. *Id.* at 697–99.

the doctrine of slander per se or libel under which a trier of fact is empowered to award damages without any proof of actual harm to reputation.¹¹² If reputation is a form of property, and a particular aspersion upon a person's reputation cannot be shown to actually affect the person's ability to capitalize upon their reputation, then it would seem that the reputation was not damaged and that any damages award was merely a windfall. And yet, longstanding defamation law creates an irrebuttable presumption of damages in successful actions for slander or libel per se.

According to Robert Post, the disjuncture between the doctrine and the property conception at defamation law can be explained by an alternative conception of reputation as honor.¹¹³ This form of reputation maps onto the sociological definition of status. As explained by anthropologist John Davis, honor can be understood as "a system of stratification: it describes the distribution of wealth in a social idiom, and prescribes appropriate behaviour for people at the various points in the hierarchy; it entails acceptance of superordination and subordination."¹¹⁴ One's honor is attached to one's status or social position. Aspersions upon honor or status challenge a person's place in her community and fundamental social identity.

This understanding of reputation as honor or status changes the role of defamation law considerably. It becomes a way to vindicate the status/honor that has been impugned, and in so doing, to reify the value of the particular status position. This understanding then coheres with the doctrine of slander or libel per se: it does not matter that the libeled party cannot prove specific pecuniary loss because the harm is to the person's status or honor, and therefore, a large damages award is a communication that the person's status in the community is worth vindicating.

Under this view of reputation, at issue is not only the individual person's loss, but the harm to the social role she inhabits. Therefore, when defamation law is vindicating a particular person, it is also vindicating the public's interest in the protection of the social role.¹¹⁵ While this view may seem somewhat anachronistic—Post suggests that reputation as honor predominated in deference societies like preindustrial England¹¹⁶—defamation law continues to utilize conceptions of damages consistent with the role. More significantly for our purposes, our own society continues to

112. 1 SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 2.8.1 (3d ed. 2008).

113. Post, *supra* note 109, at 699.

114. JOHN DAVIS, PEOPLE OF THE MEDITERRANEAN: AN ESSAY IN COMPARATIVE SOCIAL ANTHROPOLOGY 98 (1977).

115. See Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 745 (1986) (discussing reputation as "a public good, not merely a private possession").

116. See Post, *supra* note 109, at 699.

imbue some roles or statuses with particular significance,¹¹⁷ including, we submit, the role of homeowner.

III. TAKING STATUS

Homeowner status, we have argued, is itself valuable. It leads to positive outcomes across a wide range of variables for every age, race, and economic category. The issue, then, is whether threats to this status should trigger government protection. The argument is easiest when the challenge to homeowner status is external—such as the government using its power of eminent domain to require sale. In this context, the person's homeowner status is only at risk because the government has reached the conclusion that the public good is served by using the property for some other use. In addition, the government is constrained by the Fifth Amendment's just compensation clause. Here, then, the issue is whether compensation that exceeds fair market value is ever justifiable.

A. *Jurisprudence of Just Compensation*

It is useful to begin this inquiry with an understanding of the origins of the government's power of eminent domain.¹¹⁸ Prior to the American Revolution, the colonies appear to have taken for granted the power of government to compel certain uses of land and sometimes to condemn land for government-chosen uses.¹¹⁹ The Framers of the Constitution recognized the necessity of retaining this power, but tempered it with the requirement that private property shall not be taken for public use without "just compensation."

The Supreme Court has long acknowledged the inherent difficulty in adhering to this constitutional mandate. In *Kimball Laundry v. United States*, the Court explained that "only that 'value' need be considered which is attached to 'property'"; the Court then acknowledged that because of subjective attachments to a home, "its value to the owner may therefore differ widely from its value to the taker."¹²⁰ To avoid the definitional conundrum, the Court adopted a fair market standard of compensation.¹²¹ While acknowledging that the property owner would suffer real and uncompensated loss, the Court reasoned that, like the losses due to the exercise of the police power, such was the burden of citizenship.

117. Post suggests an honor code continues to prevail in the military and that roles such as medical doctors continue to have reputational advantages solely as a result of their status. *Id.* at 707.

118. The term "eminent domain" was not coined by the Romans; however, evidence suggests that compulsory takings did exist in some form at this early point in history. Matthew P. Harrington, "*Public Use*" and the Original Understanding of the So-Called "*Takings*" Clause, 53 HASTINGS L.J. 1245, 1249 n.10 (2002) (citations omitted).

119. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282–83 (1996).

120. *Kimball Laundry v. United States*, 338 U.S. 1, 5 (1949).

121. *Id.*

In other cases, the Court has suggested that its case law demands that just compensation makes the owner “‘whole,’”¹²² and restores the owner to “the same position monetarily” that the owner would have occupied but for the taking.¹²³ The Court held in *Monongahela Navigation Co. v. United States* that “compensation must be a full and perfect equivalent for the property taken.”¹²⁴ The *Monongahela* position was reaffirmed in *Seaboard Air Line Railway Co. v. United States* and *United States v. Miller*, when the Court held that eminent domain compensation should put an owner “in as good a position pecuniarily as he would have occupied if his property not been taken.”¹²⁵ However, the Court has never deviated from its conclusion that compensation is just so long as it reflects the fair market value of the property on the date the property is taken.¹²⁶

Fair market value is considered to be “‘what a willing buyer would pay in cash to a willing seller at the time of the taking.’”¹²⁷ Courts have repeatedly held that while the legislature, or any other government actor, may offer a specific amount of money to a property owner, the determination of whether the compensation is “just” remains a judicial question.¹²⁸ Fair market value, therefore, must be measured against the just compensation requirement, and a court may properly adjust an award up or down, so as to ensure that “compensation is ‘just’ both to [a property owner] and to the public that must pay the bill.”¹²⁹

Commentators have long challenged the claim that the fair market value standard sufficiently compensates the owner so as to satisfy the just compensation requirement, and the question was acknowledged but sidestepped in *Kelo*. The *Kelo* Court stated in a footnote that the fairness of the measure of just compensation “while important, . . . [is] not before us in

122. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 516 (1979) (quoting *Olsen v. United States*, 292 U.S. 246, 255 (1934)).

123. *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

124. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

125. *United States v. Miller*, 317 U.S. 369, 373 (1943) (citing *Monongahela*, 148 U.S. at 326); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) (citing *Monongahela*, 148 U.S. at 327).

126. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984). Assessing compensation awarded on the date the property is actually taken creates a problem known as condemnation blight, discussed below, where the condemner artificially lowers its acquisition costs through announcement of plans to condemn a predetermined area. Bell, *supra* note 6, at 67. Christopher Serkin details a variety of possible mechanisms for valuing property according to the fair market value standard. See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw. U. L. REV. 677, 687–703 (2005). Serkin uncovers the theoretical subtexts that may be hidden beneath compensation debates. However, as we state above, we are not hostile to government use of eminent domain. We only seek to ensure that the price paid by the individual affected is not to relegate them to a propertyless status. Our goal is consistent with the argument made by property scholars that takings jurisprudence may reasonably be used as a means to further distributive justice. See, e.g., *id.* at 721.

127. *564.54 Acres of Land*, 441 U.S. at 511 (quoting *Miller*, 317 U.S. at 374).

128. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 417 n.30 (1980) (citing *Monongahela*, 148 U.S. at 327).

129. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

this litigation.”¹³⁰ The challenge, then, is to determine to what extent, if any, a property owner should be compensated beyond the monetary value of the condemned property.

B. *Evaluating Proposed Alternatives to Fair Market Value*

Scholars have sought to advance a familiar range of values in proposing alternative compensation schemes, including compensatory justice, efficiency maximization, and distributive justice.¹³¹ Those most concerned with compensatory justice contend that, to the degree fair market value fails to reflect the total loss to the property owner, the owner has not been fully compensated for her loss. As Judge Richard Posner stated, “[t]he taking in effect confiscates the additional (call it ‘personal’) value that [homeowners] obtain from the property.”¹³²

The challenge for proponents of compensatory justice schemes is to explain why idiosyncratic value should be compensated—particularly since government regulation, such as zoning, limits land value regularly with no compensation at all. Efficiency maximization, perhaps ironically, helps shore up the theoretical weaknesses of the compensatory justice argument. If the government compensation schemes fail to internalize all the costs of a given project, the government may go forward with externality-ridden inefficient projects. Despite the perceived conservative bent of protection of property rights,¹³³ a number of prominent property scholars propose distributive justice as a fair goal for compensation schemes.

Our concern, status preservation, reflects all three considerations. As recognized by the compensatory justice proponents, failing to compensate homeowners for the lost value of homeowner status is an enormous shortfall, and is avoided through status-preserving compensation. In addition, in light of the benefits of homeowner status to the homeowner and society, the failure to internalize the costs of lost homeowner status will cause avoidable inefficiencies, and again, is circumvented in our approach. Lastly, our approach reflects the concern that the most vulnerable class of homeowners will be most at risk from the potential loss of homeowner

130. *Kelo v. City of New London*, 545 U.S. 469, 489 n.21 (2005).

131. For a more detailed analysis of competing compensation plans as compared to a status-preservation scheme, see Rachel D. Godsil & David Simunovich, *Just Compensation in an Ownership Society*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 133 (Robin Paul Malley ed., 2008).

132. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

133. An Internet search confirms the notion that property rights are a more salient concern for “conservative groups.” Conservative legal groups and think tanks (i.e., the Federalist Society, Pacific Legal Foundation, Center for Individual Rights) invariably list “property rights” as among their primary areas of concern while liberal and progressive groups (i.e., American Constitution Society, NAACP Legal Defense Fund, ACLU) fail to mention property or property rights at all. Among academics, a robust scholarship exists challenging the Right’s hegemony over property rights. Notable works include JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1990), and the thoughtful review of Waldron’s book, Jeremy Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622 (1990) (book review).

status. Consequently, as explained below, status-preserving compensation is best suited to provide critical protection of homeowner status in any takings context.

1. Percentage Premium Plans

One of the most frequently suggested alternatives to traditional fair market valuation compensation is a variant of a percentage multiplier, aimed at providing homeowners with compensation above and beyond fair market value. Some scholars propose flat percentage bonuses.¹³⁴ These percentage premium plans (PPPs) are supposed to act “as a balm for the infringement upon autonomy brought about by any forced exchange and . . . to correct the systematic underestimation of value” that occurs in fair market value compensation.¹³⁵ PPPs traditionally call for, say, 10% premiums to be added to all home valuations.¹³⁶ Alternatively, some theorists attempt to introduce some semblance of individuation into PPPs by adjusting premiums based on length of residency,¹³⁷ relative wealth of the condemnee,¹³⁸ or relative value of the community in which the condemnee resides.¹³⁹

However, analyzing these plans from a status-preserving perspective demonstrates fundamental theoretical and practical weakness in PPP approaches. PPPs offer no assurances that a homeowner will be able to preserve his or her status as such. Prior to the institution of the PPP, wealthy homeowner A was in a better position to purchase a new home than poor homeowner B—in other words, the application of the PPP exacerbates the wealth disparity at taxpayer expense. Additionally, there is a high degree of inefficiency and arbitrariness inherent in such proposals. PPPs are just as likely to overcompensate a homeowner as they are to undercompensate.¹⁴⁰ The argument that no amount of monetary compensation can ultimately be “just” does little to add to the eminent domain debate.

134. See, e.g., RICHARD D. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 184 (1985); Barros, *supra* note 8, at 300; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973). Although Robert C. Ellickson was offering his compensatory plan to resolve issues of regulatory takings, the plan is equally applicable to instances of eminent domain takings.

135. EPSTEIN, *supra* note 134, at 184.

136. *Id.*

137. Barros, *supra* note 8, at 300; Ellickson, *supra* note 134, at 736–37; John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 814–15 (2006).

138. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 753–56 (1999).

139. Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 141 (2004).

140. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 993–94.

Troubling for similar reasons are plans that would adjust compensation based on community valuation. While we are sympathetic to the aims of community premiums—advocated most notably by Gideon Parchomovsky and Peter Siegelman¹⁴¹—as a means to recognize the unrecognized value a strong community brings homeowners and to create disincentives to destroy such communities, we are concerned that, as designed, community premiums will also exacerbate existing disparities.

Our predominant concern with such a premium plan is that its valuation of community may result in excluding more vulnerable communities from receiving the benefit. The community premium takes into account “turnover rates” and “amenities” to craft an appropriate multiplier.¹⁴² However, it is precisely the communities without many traditionally recognized amenities and with high turnover rates that often have been,¹⁴³ and will continue to be, targeted for economic development and blight removal takings. The community premium, while laudable in some respects, fails to recognize the unique harms experienced by target communities composed of politically disempowered groups. Another concern is that in such a mass relocation, the government would be forced to pay artificially inflated premiums, creating both a windfall to the property owner who sells the land used for the relocation, as well as a grossly inflated condemnation bill to the general public.

In a slightly different context—a proposed noxious land use—Rachel Godsil has proposed an alternative premium that would specifically address the harms to politically disempowered groups. Godsil has argued that if a landowner seeks to impose a polluting use upon an underprotected, racially segregated community, homeowners subject to the nuisance should have the power to reject the use (impose a property rule) or alternatively, receive the fair market value of their home augmented by a “segregation multiplier” (a predetermined liability rule).¹⁴⁴ The strength of this proposal is its express protection of homeowner status and its redistributive effect. However, the proposal was designed to respond to communities suffering a gross overburden of noxious land uses such that the community could establish that government had failed to provide the sort of regulatory protections applied to similarly situated white communities. In light of current Supreme Court jurisprudence, such dramatic racially identifiable disparities are likely to be the only facts supporting an explicitly race-based remedy.¹⁴⁵ This remedy will thus rarely be available and would not apply

141. Parchomovsky & Siegelman, *supra* note 139, at 139–40.

142. *Id.* at 141–42.

143. See Brief of Amici Curiae NAACP et al. in Support of Petitioners at 7–8, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108). Parchomovsky and Siegelman acknowledge that communities lacking amenities that are characterized by high turnover rates would not necessarily merit a community premium. Parchomovsky & Siegelman, *supra* note 139, at 141–42.

144. Godsil, *supra* note 19, at 1875.

145. Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937 (2008).

to those poor white homeowners who would also likely lose their status as such.

2. Harnessing the Market: Tax and Insurance Schemes

Some scholars advocate the introduction of market forces into compensation schemes through insurance or tax-based models,¹⁴⁶ or elements of direct democracy referenda and community-driven bargaining processes.¹⁴⁷ This section evaluates these proposals in turn.

We are deeply concerned that insurance-based schemes will exacerbate distributive justice concerns. Scholars contend that the introduction of a private sector actor into the just compensation element of eminent domain proceedings would reduce administrative and transactional costs¹⁴⁸ and mitigate the risk of moral hazard by enabling insurance companies to adjust premiums based on the condemnation risk.¹⁴⁹

Some insurance-based schemes call for homeowner self-valuation.¹⁵⁰ Under Lee Anne Fennell's proposal, homeowners would report the value of their home to the government on tax returns and would be compensated at that amount if their property were taken in an eminent domain proceeding.¹⁵¹ In this way, homeowners value their homes prior to a taking and incorporate their own subjective valuation.¹⁵² To control rampant overvaluation, homeowners would receive tax refunds based on the reported property value—the lower the reported value, the greater the refund that a homeowner would receive.¹⁵³ Bell and Parchomovsky propose a similar scheme that allows homeowners to value their own property to reflect their subjective valuation and would only be triggered if the property were designated for condemnation.

Despite their commendable intentions, the insurance and tax models eviscerate the very protections that the just compensation guarantee was meant to extend to stigmatized groups. The notion that insurance-based schemes will result in the "right" takings improperly assumes that insurance companies have absolutely no political influence. In fact, it is more likely that economically depressed neighborhoods will be disproportionately targeted because takings in these areas will result in lower payouts by

146. See generally Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 500–04 (2003); Fennell, *supra* note 140, at 995–1002.

147. See generally Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1491 (2008); James J. Kelly, *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 980–81 (2006).

148. Calandrillo, *supra* note 146, at 495–99.

149. Bell, *supra* note 6, at 32–33; Calandrillo, *supra* note 146, at 495–99, 505, 513.

150. Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007); Fennell, *supra* note 140, at 995–96.

151. Fennell, *supra* note 140, at 995–96.

152. *Id.* at 995.

153. *Id.* at 996.

insurance carriers to homeowners as compared to higher priced neighborhoods.

Most disturbing is the reality that insurance companies adjust premiums based on the likelihood that the insured will eventually require a payout. Residents living in neighborhoods that are prime candidates for economic redevelopment or blight removal would pay higher premiums because they present a higher risk of payout to the insurance company. Thus, the very residents who are least able to afford additional financial burdens would be most at risk of paying unfairly high premiums. Furthermore, it is highly likely that homeowners will attempt to save money in the short term by not carrying insurance. While this choice could be chalked up to individual discretion, the regressive pressure of such plans should be acknowledged. Not only would residents in economically depressed areas pay higher premiums, there is also a substantial risk that some homeowners (likely those who can least afford it) would carry no insurance, leaving them completely vulnerable to a taking without any compensation.

Tax-based schemes are equally problematic. They create the obvious incentive for poor homeowners to undervalue their homes for the purposes of some potential taking, at some unknown time in the future, in exchange for greater tax returns that are definite, immediate, and sorely needed. While Fennell's proposal limits the self-valuation to 100% to 200% of the assessed value and therefore protects against a dramatic undervaluation,¹⁵⁴ assessed values are often much lower than actual fair market value, and her proposal offers little value to low-income families who are unlikely to overvalue their homes for the reasons described. And though Bell and Parchomovsky's proposal is triggered at a specific point in time, they fail to acknowledge the difficulty that a poor family will have in achieving any greater protection for its property under a self-valuation scheme.¹⁵⁵ To the extent that their scheme is intended to provide more protection for deeply undervalued homes or, in the case of the poor family, from being unable to afford to purchase a replacement home, assessing a higher than market value has serious risks that a poor family is unable to afford. The first, of course, is if the government demurs and chooses against the condemnation once the costs are greater than anticipated, the poor family is unlikely to be able to afford the greater taxes. In addition, they will have great difficulty selling on an open market, and therefore, will be unable to exercise exit in the future. Finally, such restraints on alienation will render such homes impossible to mortgage should that be necessary for equity in the future.

We are more sympathetic to the aims of proposed public referenda plans or proposals to grant displaced homeowners with alienable rights of return in the post-taking community, which seek to vest greater control in the individuals who will be most directly affected by the eminent domain process. Majority approval, or even approval by supermajorities, would

154. Fennell, *supra* note 140, at 997.

155. Bell & Parchomovsky, *supra* note 150, at 903.

obviously ensure that certain takings receive at least some degree of express public approval.¹⁵⁶

These alternatives seek to incorporate distributive justice concerns into hypothetical compensatory schemes, and present perhaps the most desirable alternatives to an expressly status-preserving compensation plan. Nevertheless, they fail to provide comprehensive protection to all property owners confronting the threat of eminent domain proceedings. Most significantly, the various schemes only apply when the use of eminent domain is intended to promote economic development rather than the full range of government land uses. Therefore, those property owners who lose their land to a highway, for example, remain unprotected.

A right of return that can be sold to others has significant merit. However, we have several concerns. First, granting the right of return will likely lead to avoidable inefficiencies. Second, the right of return as applied may be both prohibitively expensive and procedurally cumbersome. Those significant concerns aside, the right of return concept does address many distributive justice concerns. It grants owners of the property the right either to benefit directly from the redevelopment of their neighborhood and its increased amenities and job opportunities, while also granting them the choice to recoup the profits and use the proceeds to relocate.

3. Variable Compensation Plans

A final category of compensation plans are those premised on the notion that compensation need not, and indeed should not, be uniform for different uses of eminent domain. Under this approach, property owners whose property is condemned for a classical public use such as a road or a post office should receive fair market value, while, as articulated by James Krier and Christopher Serkin, "just compensation is adjusted upward in specific ways as the use of condemned property moves from classic public use to possible public use to naked transfer."¹⁵⁷

This version of a spectrum compensation proposal appears likely to meet our status-preserving standard for those homeowners whose property was condemned for purposes other than classic public uses. If undertaken in good faith, the government's projection of the value of a property taken for a revitalization project would seem likely to be adequate to allow for reasonable replacement housing; if not, it would seem to be a rather ill-conceived project. The risk, perhaps, is undervaluation of properties intentionally designed to lower compensation costs. This risk seems likely to be mediated by both public oversight and the need to attract investors. The weakness of the proposal, as we have articulated above, is its suggestion that fair market value is adequate when property is taken for traditional public uses.

156. Kelly, *supra* note 147, at 928-29.

157. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 867.

Serkin has also proposed a more dramatic version of variable compensation as one component of a scheme under which local governments are entitled to choose among the full menu of property rights' protective devices, varying from the least to the most protective.¹⁵⁸ Serkin offers a compensation model that includes fair market value as least protective, market value with specified damages or a percentage premium as a middle ground, and a gain-based measure as the most protective.¹⁵⁹ For the reasons we have already described, under both the least protective and the middle range of regimes, affected property owners may well lose their status as homeowners. In addition, the middle range of protection provides a regressive bonus to more valuable properties. The goals Serkin furthers in his significantly broader article are likely to be equally advanced by raising the floor of compensation for poor property owners.

C. Status-Preserving Compensation

Traditional fair market value compensation fails to ensure the homeowner is "made whole" after a taking. To date, most alternative compensation plans are likely to leave some homeowners unable to preserve their status as homeowners. The most effective, efficient, and just alternative is a compensatory scheme that preserves the homeowner's status as such. Additionally, this status-preserving scheme also permits fiscally constrained governments to invoke the eminent domain power to expand the market of affordable housing,¹⁶⁰ encourage economic development,¹⁶¹ and foster a tax base to support the provision of critical infrastructure and support services.¹⁶²

The compensation scheme best designed to protect the most vulnerable homeowners—the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (URA)—was adopted by the federal government in the aftermath of the urban renewal debacle.¹⁶³ The URA mandates that homeowners be compensated for moving expenses, mortgage costs that arise from early payment, closing costs, as well as a replacement payment to help ensure homeowners are provided with comparable post-taking housing.¹⁶⁴ The URA defines comparable housing as (1) decent, safe, and sanitary; (2) adequate in size to accommodate the occupants; (3) functionally equivalent to the acquired property; and (4) located in an area not subject to unreasonable adverse

158. See Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007).

159. See *id.* at 910–11.

160. See Brief for Brooklyn United for Innovative Local Development et al. as Amici Curiae Supporting Respondents at 2, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108) (describing plans for redevelopment of the Atlantic Yards in Brooklyn, New York to expand the supply of affordable housing).

161. *Id.* at 3–4.

162. See *id.* at 8.

163. 42 U.S.C. § 4622(a)(1)–(3) (2000).

164. *Id.* §§ 4622–4624.

environmental conditions.¹⁶⁵ We do not suggest that the other models of compensation proposed by academics are valueless. The vast majority are seeking to further ends different than those we seek to protect. Instead, we argue here that the URA's replacement model should serve as a sort of Rawlsian floor. For compensation to be just, it must at minimum ensure that it is adequate to preserve homeowner status.

Losing a home because of eminent domain undoubtedly carries with it lasting trauma for an unwilling seller. However, the URA's flexible definition serves to preserve homeowner status, and can move displaced residents living in substandard housing into improved living conditions. While this provision certainly does not eliminate the psychic and emotive harms caused by takings, it reinforces the condemner's obligation to displaced residents, and ensures, if nothing else, that an evicted homeowner can at least maintain her homeowner status. Furthermore, if the condemning authority cannot secure comparable replacement housing within the statutory relocation assistance amount, the URA expressly permits the condemning authority to provide compensation beyond the statutory limits.¹⁶⁶

The URA status-preserving scheme eliminates inefficiencies created by the percentage premium plans discussed above. The URA plan extends the greatest protection to displaced homeowners and the broadest leverage to takers to adjust compensation to actual market conditions, thereby ensuring that redevelopment plans are not only uniquely tailored to the community at issue, but also maximally efficient. This responsiveness is absent in flat percentage premium plans, community premiums, complete relocation plans, and premiums adjusted according to condemnees' length of residence in a community or socioeconomic status.

Status-preserving compensation is also highly responsive to distributive justice concerns. It eliminates the problem of condemnation blight¹⁶⁷ because compensation is not based on the value of the acquired home, but on its replacement value. Furthermore, while it reinforces homeownership as a core American ethic, it does not create perverse pressures that arise in insurance- and tax-based compensation schemes, and extends the same level of protection to homeowners that condone the proceedings as to those who holdout.

The U.S. Government Accountability Office (GAO), however, has concluded that the implementation of the URA has not matched its promise. While the GAO's primary findings concerned the inadequacy of business

165. 49 C.F.R. § 24.2(a)(6) (2007).

166. 42 U.S.C. § 4626(a); *see also* Garnett, *supra* note 6, at 122–23.

167. Condemnation blight describes the reduction in value of a property that occurs after it is announced that the property will be condemned. Bell, *supra* note 6, at 67. Condemnation blight artificially lowers acquisition costs because fair market value is measured by “‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.” *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

relocation costs, there was a general sense among officials that the URA's statutory caps were too low to compensate fully for relocation costs. More study is required to determine exactly how the URA has functioned in practice—and why its promise has not been realized.

IV. PRESERVING STATUS IN THE FACE OF DEFAULT

The mortgage crisis has not generally been viewed as likely to lead to a rash of homelessness—rather, it has raised the specter of people losing homes they purchased. In other words, most who are concerned about the mortgage foreclosure debacle recognize that homeowner status is at issue. This part evaluates the many proposals offered at various stages of the mortgage crisis to assist at-risk homeowners and considers whether the same arguments supporting increased compensation in the eminent domain context translate into general principles against which proposed responses to the mortgage crisis can be judged. As discussed below, the mortgage crisis raises very different issues than the eminent domain context because some of the proposals at issue will raise barriers to entry for those aspiring to homeowner status. Here, then, we see a need to balance one set of interests—protecting current homeowners—with another.

Government officials at federal, state, and municipal levels have proposed plans based upon the central assumption that “special safeguards should be thrown around home ownership as a guarantee of social and economic stability.”¹⁶⁸ Thus, notwithstanding the reality that willing participants¹⁶⁹ arrived at binding contractual agreements as to the rights and obligations of each to the other, federal and state governments are taking steps (albeit not proactively) to alter those agreed-upon obligations. Government efforts range from facilitating voluntary, industry-led programs to multibillion dollar community block grants, and court-imposed rewriting of the terms of the mortgage agreements. As this Article goes to press in the late fall of 2008, the mortgage crisis has spiraled into a global financial crisis.¹⁷⁰ The Bush administration brokered a \$700 billion bailout of our leading financial institutions under the auspices of the U.S. Department of Treasury.¹⁷¹ While the timing of this publication precludes a comprehensive analysis of the bailout, we consider the varied responses to the mortgage crisis in the months leading up to the bailout and offer preliminary reactions with our dual concerns of status preservation and protection of aspiring homeowners in mind.

168. L. Randall Wray, *Lessons from the Subprime Meltdown* 44 (Levy Econ. Inst. of Bard Coll., Working Paper No. 522, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1070833 (quoting President Franklin Roosevelt).

169. Ignoring for the moment arguments of imperfect information and claims of predatory lending.

170. Edmund L. Andrews, *Fed Offers Wall St. Banks New Loans to Ease Crisis*, N.Y. TIMES, Mar. 12, 2008, at A1.

171. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

A. Federal Proposals

As the extent of the mortgage crisis becomes apparent, federal lawmakers have proposed a wide array of responses. In contrast to the eminent domain context, in which the federal government has long followed the practice of providing fair market value or replacement value under the URA to condemnees, the federal response to the mortgage crisis is much more contentious. Competing factions within the federal executive and legislative branches have offered a veritable panoply of responses. These proposals are animated by competing conceptions of who should bear the cost of widespread mortgage defaults, the proper degree of direct government intervention in the free market, and principles of equity and personal responsibility.¹⁷²

1. Voluntary or Market-Based Responses

Initially, the Bush administration emphasized voluntary industry-sponsored proposals to respond to the lending crisis. One of President George W. Bush's first efforts—the Hope Now program—brought the nation's largest lenders and investors together to “yield[] a promising new source of relief for American homeowners.”¹⁷³ Hope Now was designed to assist subprime borrowers who are current on their mortgage payments but cannot afford the payments once a higher, adjusted interest rate kicks in.¹⁷⁴ Hope Now, estimated initially to provide assistance for more than one million homeowners, was intended to provide eligible homeowners with the opportunity to refinance into a lower cost FHA loan, as well as the chance to freeze interest rates for five years.¹⁷⁵ However, narrow eligibility and limited workout capabilities have blunted the impact of this program. After

172. The discussion below focuses on efforts to address the current mortgage crisis, not those that seek to prevent the recurrence of a similar situation. A number of preventative measures have been put forward, and they are generally directed at recalibrating the balance of information between borrower and lender and increasing governmental regulation of the mortgage lending industry. The Mortgage Reform and Anti-Predatory Lending Act of 2007 would establish a national licensing system for mortgage lenders and a duty of care standard for home loan originators, require the lender to make a finding of the borrower's “reasonable ability to repay” a home loan, and proscribe refinancing unless a creditor determines a net tangible benefit would accrue to the borrower. Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (2007). The American Home Ownership Preservation Act of 2007 would mandate the disclosure of mortgage broker and loan originator compensation, as well as an assessment of the borrower's ability to repay a mortgage in light of “property taxes, property fees, adjustment in interest rates, and property insurance.” American Home Ownership Preservation Act of 2007, S. 2114, 110th Cong. (2007). The Fair Mortgage Practices Act of 2007 would subsidize homeownership counseling, require licensing and disclosure requirements and limit prepayment penalties for certain types of ARMs. Fair Mortgage Practices Act of 2007, H.R. 3012, 110th Cong. (2007).

173. Press Release, Office of the Press Sec'y, Fact Sheet: Helping American Families Keep Their Homes (Dec. 6, 2007), available at <http://www.whitehouse.gov/news/releases/2007/12/20071206-7.html>.

174. *Id.*

175. *Id.*

more than two months in effect, only ten thousand subprime borrowers were advised by Hope Now administrators that they were eligible for the plan's loan workout provisions.¹⁷⁶ Even the *Wall Street Journal*—traditionally a strong advocate of voluntary industry-sponsored reforms—acknowledged the plan's "limited impact on the growing mortgage crisis."¹⁷⁷ The president of the National Community Reinvestment Corporation, John Taylor, criticizes the Hope Now program for doing nothing more than "postponing the foreclosure."¹⁷⁸ Yet despite this limited impact, one conservative think tank considers Hope Now to be the "right approach" because it strikes the appropriate balance between "doing nothing . . . or allowing the government to alter thousands of private contracts."¹⁷⁹ As the months progressed, administrators have been able to reach a much larger number of at-risk homeowners. As of this writing, Hope Now has worked with 2.3 million homeowners.¹⁸⁰

Hope Now's failure to make a meaningful impact on the market led the administration and six leading lenders to create Project Lifeline, designed to help homeowners who are more than ninety days in arrears on their mortgages.¹⁸¹ Project Lifeline permits qualified homeowners to stay foreclosure proceedings for thirty days and also offers, in limited circumstances, the opportunity to negotiate new terms.¹⁸² Despite being hailed by Treasury Secretary Henry Paulson as "an important new initiative,"¹⁸³ others consider it "nothing new"¹⁸⁴ and merely "a PR stunt."¹⁸⁵

The Bush administration also launched FHASecure, offering homeowners with non-FHA ARMs the opportunity to refinance into lower-cost FHA loans.¹⁸⁶ In an attempt to bolster demand, the administration also eased rules on Fannie Mae and Freddie Mac,¹⁸⁷ removing limits on the size

176. Ruth Simon & Tom McGinty, *Earlier Subprime Rescue Falters—December Plan Has Done Little to Help Borrowers in Dire Circumstances*, WALL ST. J., Feb. 13, 2008, at A3.

177. *Id.*

178. William Heisel, Marc Lifsher & Maura Reynolds, *Defaults Slide as State Puts on the Breaks*, L.A. TIMES, Oct. 24, 2008, at C1.

179. David C. John & Alison Acosta Fraser, *HOPE NOW: One Step to Resolve the Subprime Mortgage Crisis*, HERITAGE FOUND. WEB MEMO, Dec. 13, 2007, http://www.heritage.org/Research/Regulation/upload/wm_1742.pdf.

180. Heisel, Lifsher & Reynolds, *supra* note 178.

181. Simon & McGinty, *supra* note 176.

182. *Id.*

183. *Id.*

184. *Id.*

185. Damian Paletta & James R. Hagerty, *Lenders Step Up Efforts to Avert Foreclosures*, WALL ST. J., Feb. 12, 2008, at A3.

186. U.S. Department of Housing and Urban Development, FHA Secure Fact Sheet—Refinance Options, http://portal.hud.gov/portal/page?_pageid=73,1827972&_dad=portal&_schema=PORTAL (last visited Nov. 15, 2008).

187. Fannie Mae and Freddie Mac are government-sponsored entities that are the largest buyers of American home mortgages.

of the loans the two entities can hold.¹⁸⁸ The move was lauded by some Senate Democrats, who were also calling for additional steps to loosen regulation of the lending giants.¹⁸⁹ President Bush also proposed, and Congress ultimately passed, the Mortgage Forgiveness Debt Relief Act of 2007, amending the tax code to exclude from gross income, for a period of three years, cancelled mortgage debt on a principal residence loan.¹⁹⁰

The FHA next implemented the Hope for Homeowners program (H4H).¹⁹¹ Among other criteria, H4H uses means-testing to target certain at-risk homeowners (i.e., those whose mortgage payments consume more than 31% of their gross monthly income).¹⁹² The program allows a homeowner to exchange a high-cost ARM for a thirty-year fixed mortgage backed by the FHA, and lenders will voluntarily write down the value of the mortgage to 90% of the current value of the home (giving the homeowner a 10% equity stake in the home).¹⁹³ In exchange, and among other obligations, the homeowner must enter into an appreciation and equity sharing agreement with the FHA.¹⁹⁴

2. Judicial Intervention

Some Democratic members of Congress have offered competing proposals to curb the effects of the mortgage crisis that would vest bankruptcy judges with the authority to rework the terms of a home loan attached to a principal residence—an authority they already possess with respect to mortgages secured by vacation homes and investment properties.¹⁹⁵ The proposals have taken a variety of forms. One example is

188. Vikas Bajaj, *Regulators, Trying to Help Housing, Ease Limits on Loan Giants*, N.Y. TIMES, Feb. 28, 2008, at C1.

189. *Id.*

190. Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (excluding the amount of loan forgiveness exceeding two million dollars).

191. Federal Housing Administration, HOPE for Homeowners, http://portal.hud.gov/portal/page?_pageid=73,7601299&_dad=portal&_schema=portal (last visited Nov. 17, 2008).

192. *Id.*

193. *Id.*

194. *Id.* The equity and appreciation sharing works on a sliding scale. If the borrower sells the home within one year of the workout, the Federal Housing Administration (FHA) takes 100% of the equity and appreciation; after one year, the government takes 90%; after two years, 80%, and so on. After five years, the scale stops sliding, and the FHA's share in any equity and appreciation in the home is fixed at 50% for the life of the loan. *Id.*

195. The policy of not permitting a bankruptcy workout on a mortgage secured by a primary residence is “intended to encourage the flow of capital into the home lending market.” Adam J. Levitin & Joshua Goodman, *The Effect of Bankruptcy Strip-Down on Mortgage Markets* 4 (Georgetown Univ. Law Ctr., Research Paper No. 1087816, 2008) (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring)), available at <http://ssrn.com/abstract=1087816>. That is, by providing greater security to investors via the foreclosure option, it is possible for lenders to offer lower interest rates on primary residences, thereby encouraging the expansion of homeownership among borrowers who would be otherwise unable to afford payments based on higher interest rates.

the Foreclosure Prevention Act of 2008.¹⁹⁶ Under the Foreclosure Prevention Act, a bankruptcy judge could, for example, rework the terms of a mortgage secured by a primary residence.¹⁹⁷ A judge could change a 3/1 interest-only ARM into a thirty-year fixed mortgage at the prevailing market rates.¹⁹⁸ Other proposed rewrite provisions would freeze interest rates on ARMs for a number of years, halt foreclosures for ninety days,¹⁹⁹ and eliminate prepayment penalties for home mortgages.²⁰⁰ President-elect Obama strongly supports legislation authorizing bankruptcy judges to modify and reduce mortgages for homeowners and will likely encourage Congress to implement such legislation.²⁰¹

In a similar vein, Professor John Geanakoplos and Susan Koniak offer a proposal under which the terms of a mortgage would be rewritten not by a bankruptcy judge but by independent contractors with experience in local real estate markets.²⁰² This proposal has the obvious benefit of attempting to preserve homeownership for at least some homeowners, limiting losses by the holder of the mortgage security, and of lessening the burden on the federal judiciary. The proposal is also unique in its understanding of the complex world in which mortgage-backed securities operate and how the system can frustrate the ability of the lender and borrower to agree to revise the terms of the loan. This proposal has the benefit of allowing mortgages to be renegotiated without a full-fledged bankruptcy filing.²⁰³

3. Taxpayer-Funded Responses

Members of Congress have proposed a number of other ambitious, though moderately less contentious, remedies. In addition to the bankruptcy workout provision, the Foreclosure Prevention Act of 2008 would provide four billion dollars in block grants to state and local governments for mortgage counseling, acquisition and redevelopment of blighted or abandoned properties, and the extension of financing support to

196. Foreclosure Prevention Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654; *see also* Emergency Home Ownership and Mortgage Equity Protection Act of 2007, H.R. 3609, 110th Cong. (2007).

197. Foreclosure Prevention Act, 122 Stat. 2654.

198. *Id.*

199. Nick Timiraos, *Candidates Differ on Housing—Clinton Embraces Direct Intervention on Certain Issues*, WALL ST. J., Feb. 20, 2008, at A7.

200. American Home Ownership Preservation Act of 2008, S. 2114, 110th Cong. § 5 (2008).

201. Barack Obama and Joe Biden: The Change We Need, Protect Homeownership and Crack Down on Mortgage Fraud, <http://barackobama.com/issues/economy/index.php#homeownership> (last visited Nov. 15, 2008).

202. John D. Geanakoplos & Susan Koniak, Op-Ed, *Mortgage Justice Is Blind*, N.Y. TIMES, Oct. 30, 2008, at A39.

203. However, one of us is wary of sacrificing federal judicial oversight for administrative efficiency in this situation. This concern is motivated by evidence suggesting that some lenders targeted vulnerable groups for exotic, high-cost loans; without proper oversight, the independent contractors could continue to exploit these at-risk homeowners.

struggling homeowners.²⁰⁴ The National Affordable Housing Trust Fund Act of 2007 provides funding for single-family mortgage insurance and housing counseling targeted to help low-income borrowers.²⁰⁵ The Expanding American Homeownership Act of 2007 (EAHA)²⁰⁶ and the FHA Modernization Act of 2007 (FMA)²⁰⁷ are directed at bolstering the housing market through strengthening demand. The EAHA would extend the maximum insurable term of repayment on FHA-insured loans to forty years (from the current thirty-five year maximum) and would reduce down payment requirements.²⁰⁸ The FMA would reduce down payment requirements to 1.5% of the loan amount (down from the current 3%), allow consideration of alternative credit rating information (i.e., utility, rent, and insurance payment histories), and would introduce measures to reduce the burden of applying for FHA loans, cited as an important factor in the rise of more expensive, non-FHA-insured subprime lending.²⁰⁹

After some initial equivocation regarding the appropriate level of government intervention,²¹⁰ Republican Senator, and former presidential candidate, John McCain advocated for dismantling Fannie Mae and Freddie Mac and selling each entity back to the private sector.²¹¹ Senator McCain also proposed that the government purchase the adjustable rate mortgages of between 200,000 and 400,000 homeowners, and provide the borrowers with more affordable, fixed-rate mortgages.²¹²

B. State and Local Responses

State and local governments have also responded to the mortgage crisis with a host of proposals aimed at curbing the localized effects of foreclosures, which include a reduced tax base and an increased likelihood of blighted neighborhoods as homes are left empty. Some state and local governments offer plans that place money or services directly into the hands of taxpayers, some of which are targeted specifically at low- and moderate-income borrowers.²¹³ For example, Seattle offers nominal loans to help homeowners through difficult months;²¹⁴ Massachusetts offers debt

204. Foreclosure Prevention Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

205. National Affordable Housing Trust Fund Act of 2007, H.R. 2895, 110th Cong. (2007).

206. Expanding American Homeownership Act of 2007, H.R. 1852, 110th Cong. (2007).

207. FHA Modernization Act of 2007, S. 2338, 110th Cong. (2007).

208. Expanding American Homeownership Act, H.R. 1852.

209. FHA Modernization Act, S. 2338.

210. Maeve Reston, *McCain Pitches a Mortgage Plan*, L.A. TIMES, Apr. 11, 2008, at A17.

211. Andrews, *supra* note 30.

212. *Id.*; see also JohnMcCain.com, Immediate Relief for American Families: Gas and Food Prices, <http://www.johnmccain.com/issues/jobsforamerica/relief.htm> (last visited Nov. 15, 2008).

213. William Yardley, *Foreclosure Aid Rising Locally, as Is Dissent*, N.Y. TIMES, Feb. 26, 2008, at A1.

214. *Id.*

refinancing paid for through state-issued bond revenue;²¹⁵ and North Carolina subsidizes the cost of providing mortgage counselors for homeowners struggling with loan repayments.²¹⁶ The State of New York, on the other hand, is considering a more active role in the mortgage market itself, with proposals to freeze foreclosures for one year,²¹⁷ require lenders to negotiate with borrowers prior to foreclosure, establish a lender's duty of care to the borrower, and mandate that the lender make a finding of the borrower's ability to repay the loan as a necessary predicate to extending a home loan.²¹⁸

Some local governments are considering even more aggressive steps. A San Diego City-County task force is contemplating a proposal to purchase certain empty homes with the goal of reserving them for lower wage workers. In a similar vein, Providence, Rhode Island officials are hoping to transfer some foreclosed-upon properties to nonprofits with the goal of establishing an affordable housing reserve.²¹⁹ In one of the more dramatic responses, the sheriff of Cook County, Illinois simply refused to carry out any foreclosure-related evictions because too many renters were being evicted without any notice.²²⁰ The office resumed evictions only after receiving assurances that good faith renters would receive adequate notice of impending evictions.²²¹

C. Critical Reception

Proponents of the bankruptcy workout provision tend to frame the debate around "whether the mortgage bankers are going to win or the American families facing foreclosure are going to win."²²² The workout provisions—which critics call "cram-downs"²²³—are described by proponents as narrowly tailored to target the most deserving borrowers, and necessary responses, considering the perceived failure of President Bush's market-

215. *Id.*

216. *Id.*

217. Manny Fernandez, *Bill Would Set Foreclosure Moratorium*, N.Y. TIMES, Mar. 3, 2008, at B3.

218. Patrick McGeehan, *Spitzer to Present a Plan to Reduce Foreclosures*, N.Y. TIMES, Mar. 4, 2008, at B3.

219. Michael Corkery & Ruth Simon, *As Houses Empty, Cities Seek Ways to Fill the Void*, WALL ST. J., Feb. 6, 2008, at B1.

220. Azam Ahmed & Ofelia Casillas, *Sheriff: I Will Stop Enforcing Evictions; Legal, Real Estate Experts Wonder How Dart's Promise Will Play Out*, CHI. TRIB., Oct. 9, 2008, at 1.

221. Azam Ahmed, *Cook County to Resume Foreclosure Evictions; Dart: Tenants to Be Notified in Advance*, CHI. TRIB., Oct. 17, 2008, at 27.

222. Paul Kane, *Republicans Block Consideration of Housing Relief Package in Senate*, WASH. POST, Feb. 29, 2008, at A3 (quoting Sen. Dick Durbin).

223. Les Christie, *Foreclosure Prevention Plan Under Attack*, CNNMONEY.COM, Feb. 22, 2008, http://money.cnn.com/2008/02/21/real_estate/cram_downs_coming/.

driven efforts.²²⁴ Ellen Harnick of the Center for Responsible Lending lauds the means-tests included in the proposed bankruptcy workout provisions under which, “if you can afford to pay your mortgage, you don’t qualify. If you can’t afford to pay even after the mortgage balance is reduced, you’re not eligible.”²²⁵ In response to criticism that the workout provision would yield a substantial increase in mortgage interest rates because of the shift in the allocation of risk between the borrower and the lender, Professor Adam Levitin concluded, based on an analysis of previously authorized workout provisions, that such a provision would result in an increase of only fifteen basis points (0.15%) in home loan interest rates.²²⁶

On the other hand, opponents of the rewrite provisions frame the debate as a bailout for “investors, lenders and speculators.”²²⁷ Opponents stress that the cram-down provisions undermine contractual obligations and will lead lenders and investors to “charge a higher interest rate [on new loans and refinancings], . . . more points on the mortgage and . . . higher down payments.”²²⁸ The Mortgage Bankers Association, a group that is admittedly “pulling out all the stops”²²⁹ to prevent passage of a cram-down provision, contradicts Professor Levitin’s prediction and warns of a full 150 basis point (1.5%) increase in mortgage rates.²³⁰

Government responses that go beyond bankruptcy workout provisions have been criticized for creating avoidable barriers to entry by “encourag[ing] lenders to limit their lending to only the very best credit risks.”²³¹ It is argued that any direct government intervention into the refinancing of loans, or even the outright assumption of at-risk loans,²³² would reward irresponsible behavior and create moral hazard.²³³ That is, borrowers and lenders will be more likely to assume imprudently high risks in the future on the assumption—either accurate or not—that government

224. *Id.*; see also Martin Crutsinger, *Paulson Rejects Government Bailouts*, USATODAY.COM, Feb. 28, 2008, http://www.usatoday.com/news/washington/2008-02-28-3286029141_x.htm.

225. Christie, *supra* note 223 (quoting Ellen Harnick).

226. *Id.*

227. Crutsinger, *supra* note 224 (quoting Treasury Secretary Henry Paulson).

228. Edmund L. Andrews, *Bush Vows to Veto a Mortgage Relief Bill*, N.Y. TIMES, Feb. 27, 2008, at C4.

229. *Id.*

230. Christie, *supra* note 223.

231. Ronald D. Utt, *H.R. 3915 Would Impose New Burdens and Limits on Moderate Income Borrowers*, HERITAGE FOUND. WEB MEMO, Nov. 14, 2007, http://www.heritage.org/research/economy/upload/wm_1703.pdf.

232. See Edmund L. Andrews, *A ‘Moral Hazard’ for a Housing Bailout: Sorting the Victims from Those Who Volunteered*, N.Y. TIMES, Feb. 23, 2008, at C1 (describing a proposal by Bank of America advocating a massive federal intervention by creating a Federal Homeowner Preservation Corporation to “buy up billions of dollars in troubled mortgages at a deep discount”).

233. Ronald D. Utt, *President’s Homeownership Proposals Should Be Sent Back to the Drawing Board*, HERITAGE FOUND. WEB MEMO, Feb. 7, 2008, http://www.heritage.org/Research/Economy/upload/wm_1802.pdf.

intervention would be forthcoming in the event of a severe economic downturn. Even President-elect Obama initially noted that a government-imposed freeze on foreclosures and interest rate increases would “drive rates through the roof” for new or refinanced loans²³⁴—though as the financial crisis deepened, Obama called for a three-month foreclosure freeze.²³⁵

Free market advocates assert that “our economic system of letting people make their own decisions is sustainable only if people bear the consequences of those decisions.”²³⁶ They emphasize the unfairness of government intervention to help overextended homeowners while ignoring renters who chose not to expose themselves to risky loans or homeowners who are making the sacrifices to meet their mortgage payments.²³⁷ Indeed, resentment by those who would not benefit from government intervention is quite prevalent, placing pressure on public officials to market their efforts as anything but a “bailout.”²³⁸

Proponents of direct government intervention—including many investment banks, traditional advocates of a market unfettered by government action—note that banks are simply “too integral a part of the global economy” to be left “stew[ing] in the consequences of their own folly.”²³⁹ This concern ultimately led to the successful passage of the \$700 billion bailout that, as this Article goes to print, grants the Treasury Secretary broad authority to respond to the credit and housing crisis.²⁴⁰ Others stress that government intervention is necessary because homeowners were improperly steered to higher-cost loans, that lenders extended loans to borrowers without properly verifying the borrower’s

234. Timiraos, *supra* note 199.

235. Carolyn Lochhead, *Candidates on Offensive as Final Debate Looms; Obama Pitches Relief: Foreclosure Freeze and Tax Breaks—but Vague on Funding*, S.F. CHRON., Oct. 14, 2008, at A12.

236. Douglas Elmendorf, *What Should Be Done to Help Households Facing Foreclosure?*, BROOKINGS INSTITUTION, Nov. 2007, http://www.brookings.edu/opinions/2007/11_mortgages_elmendorf.aspx.

237. *Id.*

238. Yardley, *supra* note 213.

239. Michael R. Sesit, *Subprime Mess Highlights Need for Tough Rules*, BLOOMBERG, Feb. 28, 2008, http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_sesit&sid=a2um5kMtLCLM; see also Damian Paletta, *Worried Bankers Seek to Shift Risk to Uncle Sam*, WALL ST. J., Feb. 14, 2008, at A2; Kathleen M. Hawley, *Wall Street Embraces Government to Avoid Recession*, BLOOMBERG, Feb. 1, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBahn5eH_8cI.

240. The risk of moral hazard is likely even greater in the wake of the government’s recent market intervention, including rescue packages for Bear Stearns, Fannie Mae, Freddie Mac, and AIG. In addition, the \$700 billion package, passed as the Emergency Economic Stabilization Act, gives the Treasury Secretary broad authority to respond to the credit and housing crisis. See Peter Baker, *When 535 Take on Number 1*, N.Y. TIMES, Oct. 5, 2008, at WK1. The package was originally introduced “as an effort to rescue banks by buying their troubled mortgage-related assets.” David Cho, Binyamin Appelbaum & Zachary Goldfarb, *Bailout Expands to Insurers*, WASH. POST, Oct. 25, 2008, at A1. However, the sheer magnitude and fluidity of the economic crisis has forced a reevaluation of both the means and the ends of the bailout. *Id.*

ability to repay, or more broadly, that the sheer number of homeowners at risk of foreclosure compels a federal response.²⁴¹

D. *Status Preservation in the Face of Foreclosure*

In the mortgage context, the concept of status preservation must move back one step before it provides a helpful guidepost for discerning among the many proposals intended to respond to the mortgage crisis. The current mortgage mess is partially a result of unscrupulous lending practices in which families that should have been offered traditional fixed-rate mortgage terms were offered riskier instruments. A spokesman for Countrywide Financial, a lender that was active in promoting exotic loans, recognized that “[c]onfusion and misrepresentation” characterized the marketing of these loans.²⁴² It is also a result of unsound lending practices in which loans were extended to households that never had the means to repay them in the first instance.

A nuanced concern for protecting homeowner status should distinguish between the two situations. In the first, the household was duped into accepting mortgage terms that deprived it of the financial certainty homeownership (as opposed to a leasehold) generally offers. The various proposals that protect homeowners in such situations are on sound footing. However, in the second scenario, the borrower would never have become a homeowner in the absence of admittedly irresponsible lending practices. Preserving this homeowner’s status is unlikely to work out in the long run if the owner’s finances are not stable enough to ensure future payments.

A wide variety of experts from opposing political perspectives appear to agree that when mortgages are “underwater” and the borrower is without means to repay the loan, both lender and borrower are better off if the principal is modified to reflect the fair market value of the home.²⁴³ The reason for this slightly counterintuitive argument is that the lenders must incur the cost of litigation, and even then generally recoup less than fair market value after a foreclosure, so the lender and the borrower are better off if the risk of default and foreclosure is minimized.²⁴⁴ Ironically, then, to prevent the mortgage crisis from casting many current homeowners out of the ownership society, we are seeking a result that requires lenders, in circumstances in which status preservation warrants government intervention, to accept only the fair market value of the homes that secured their loans. The challenge for policymakers is to achieve this result while

241. See, e.g., CTR. FOR RESPONSIBLE LENDING, SOLUTION TO HOUSING CRISIS REQUIRES ADJUSTING LOANS TO FAIR MARKET VALUE I (2008), available at <http://www.responsiblelending.org/pdfs/court-supervised-modifications-would-make-large-scale-foreclosure-prevention-possible.pdf>.

242. David Streitfeld, *Mortgage Plan May Aid Many and Irk Others*, N.Y. TIMES, Oct. 31, 2008, at A1 (quoting Countrywide Spokesman Rick Simon).

243. *Id.* (quoting Federal Reserve Chairman Ben Bernanke, FDIC Chairman Sheila Blair, and Treasury Secretary Henry Paulson).

244. See Andrews & Uchitelle, *supra* note 40.

minimizing barriers to entry for future aspirants to homeownership, reducing moral hazard in the mortgage lending industry, and avoiding unfairly shifting the burden to taxpayers (homeowners and renters alike) of correcting for imprudent financial decisions by banks and individuals. As this Article goes to print, policymakers are grappling with the most effective means to achieve these competing goals. However, as we discuss in the next part, the financial crisis has forced a reckoning as to whether homeowner status in fact should play so central a role in our culture.

V. RECONCEPTUALIZING HOMEOWNERSHIP AND STATUS

Underlying the central assumption of an expressly status-preserving perspective is that the ethic of homeownership has not been fundamentally altered during the years of rapid home value appreciation. The prospect of the creation and leveraging of wealth in the form of appreciating home equity has undoubtedly been one of core elements of homeownership. However, it is possible that the potential for rapid appreciation in home values created an expectation of homeownership not as a means of “constitut[ing] ourselves as continuing personal entities in the world” but as nothing more than an investment vehicle.²⁴⁵ Alternatively, some have suggested that the availability of mortgage-backed loans without any down payment and variable interest rates altered the expectation that homeownership required financial prudence and enabled future stability. If one can become a homeowner without having to save for a down payment and if one’s monthly costs are apt to vary with the market, how different really is homeownership from a leasehold?

Anecdotal evidence suggests this reconceptualization has in fact occurred on at least some level. Numerous companies now market themselves as being in business to help homeowners “walk away” from homes with negative equity.²⁴⁶ Professor Ted Sinai frames the issue this way:

“Now it’s like [homeowners] can do their renting from the bank, and if house values go up, they become the owner. If they go down, you have the choice to give the house back to the bank. You aren’t any worse off than renting and you got a chance to do extremely well. If it’s heads I win, tails the bank loses, it’s worth the gamble.”²⁴⁷

In addition to market-based responses to the exigencies of our volatile housing crisis, academics have long questioned whether it is normative for homeownership to necessitate such an all-encompassing assumption of

245. Radin, *supra* note 1, at 959.

246. For example, WalkAwayHome.com proclaims, “You wouldn’t keep a losing or worthless stock would you? . . . No equity? . . . [W]alk away!” Walk Away Home, <http://walkawayhome.com> (last visited Nov. 15, 2008). Similarly, Walk Away Plan stresses that “walking away is a viable option.” Walk Away Plan, http://www.walkawayplan.com/walk_away_plan.html (last visited Nov. 16, 2008) (emphasis omitted).

247. Leland, *supra* note 41. Professor Ted Sinai fails to mention the adverse credit risks of foreclosure; however, it seems that these risks are outweighed at the time of purchase by the prospect of large gains in home equity.

investment risk. Housing values depend only to a limited degree on the particulars of the dwelling. The same house can vary in cost by literally millions of dollars depending upon the conditions of the neighborhood, community, city, and state in which it is located, as well as larger systemic factors such as interest rates and employment trends. However, homeownership currently requires a homeowner to assume both those risks she can control (her roof, for example) and the many she cannot.

In her forthcoming work, Lee Ann Fennell proposes a new legal arrangement (Homeownership 2 or H.20) that would allow prospective homeowners to limit their investment and risk of loss to the parcel-specific factors they can control, and to allow other investors to assume risks for both the off-site local factors (schools, crime rates, neighborhood amenities) and off-site systematic factors.²⁴⁸ This legal arrangement will allow a homeowner to choose to purchase the right to “consume” a home and the benefits of its location in a particular neighborhood, city, and state, without assuming the risk of loss should the value of homes in that particular location decrease. Of course, the homeowner will not reap the benefits if the value of the home increases for reasons related to the off-site factors, but the homeowner will still have equity in the home based upon any payments she makes and any improvements she provides.

While Fennell is the first to propose a new legal construct to achieve the goal of limited investment, as she acknowledges, variations on the idea have been percolating for decades.²⁴⁹ Beginning in the 1970s, a few local communities have encouraged homeowner stability by offering programs to protect homeowners against losses in equity. Some of these programs were created in response to specific perceived threats, such as the white flight that bedeviled cities in the 1970s, while others are more recent attempts to stabilize homeownership in declining cities such as Syracuse, New York.²⁵⁰

H.20 and these local government equity protection programs are animated by the goal of allowing homeowners to protect themselves from the decline in housing values, but are different in important respects. A community-based program is intended to promote homeowner stability and is financed by taxpayers. By contrast, H.20 is a market-based proposal that will allow private investors to assume the risks of the investment share of housing values. As such, H.20 is designed to allow for greater detachment

248. See FENNEL, *supra* note 99.

249. See *id.* (manuscript at 229 n.10, 250) (citing ANDREW CAPLIN ET AL., SHARED EQUITY MORTGAGES, HOUSING AFFORDABILITY, AND HOMEOWNERSHIP, FANNIE MAE FOUNDATION REPORT 9–10 (2007), available at <http://cess.nyu.edu/caplin/SEM2007.pdf>; ANDREW CAPLIN ET AL., HOUSING PARTNERSHIPS: A NEW APPROACH TO A MARKET AT THE CROSSROADS (1997)). Methods for allowing homeowners to share the risk of depreciation include the creation of tradeable futures and options based upon housing indexes, shared appreciation mortgages and shared equity mortgages, limited equity cooperatives, and housing partnerships. *Id.* (manuscript at 229). Each of these alternatives allows an occupying homeowner to limit her investment in her property and to share both the upside and downside risk with investors. *Id.*

250. *Id.* (manuscript at 228–29 & nn.8–9).

from communities once homeowners may choose a more limited investment in the communities in which their homes are located. In so doing, H.20, as Fennell acknowledges, necessarily allows investors' primary goal of profit maximization to replace homeowners' mixed goals of housing consumption and equity maximization.²⁵¹ This intrusion of detached pure profit maximization has troubling implications. It threatens to interfere with both homeowners' and a community's autonomy, and it weakens the homeowner's connection with her community. The less fraught connection between homeowners and communities may have salutary effects on some of the downsides of homeowner anxiety—less incentives for exclusivity preference and NIMBY behavior. However, as Fennell notes, investors may assume similar positions with less connection to the human elements of any community.

It is too early to tell whether Fennell's proposal and others' work limiting homeownership, or market concepts such as mortgage "walkers,"²⁵² are a sign of a fundamental shift in the way the status of homeownership is understood. An important question is whether the proliferation of H.20 and the like would change the status we currently confer upon homeowners and alter the incentives for government to encourage and facilitate homeownership. Such a shift may lead to a society in which the government shifts attention away from the ownership society as an end and more broadly to our shared interest in economic prosperity.

CONCLUSION

Government is instituted to protect property of every sort This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.²⁵³

Our society has a long and controversial history of protecting property ownership. Now that the ranks of the property owners include the working poor, as well as many black and Latino families that have long been denied government largesse, it would be ironic indeed if government decided to withdraw from its historic role of protecting ownership status. We think it crucial, however, to balance the need to support those who have already attained homeownership status with the interests of those who still aspire for it. In addition, the excesses of an unregulated mortgage industry altered some of the fundamental underpinnings of homeownership by eliminating any need for prepurchase investment and establishing such variability in monthly loan payments that households were denied any semblance of stability and certainty.

251. *Id.* (manuscript at 281).

252. Nicole Gelinas, *The Rise of the Mortgage 'Walkers,'* WALL ST. J., Feb. 8, 2008, at A17.

253. James Madison, Property (Mar. 29, 1792) *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 598, 598–99.

This Article presents two very different contexts in which homeownership status is threatened. The first, eminent domain, presents a clear case for government protection. The government is making an affirmative choice to compel a transfer of ownership and is constitutionally required to provide just compensation in exchange. Our argument is simply that the government must compensate the household if the status increment of their property is at risk. Existing federal law implicitly requires such compensation by ensuring that a family receives compensation adequate to purchase a comparable home—if state and local governments do not voluntarily follow suit, federal courts should intervene.

The mortgage foreclosure crisis is more complex. While many families were preyed upon by unscrupulous lenders and are deserving of government intervention, in some instances, families bear responsibility for agreeing to accept loans they should have realized they were financially unable to repay. At the same time, however, rampant foreclosures will harm not only individual families, but also whole communities. We recommend that the panoply of proposals to respond to the crisis be considered with goals of protecting status preservation and ensuring sufficiently available credit for aspiring homeowners.

Finally, we suggest some reasons to distrust proposed reconceptualizations of homeownership. The notion of allowing families to choose not to assume the risks of the investment component of homeownership or to walk away from an existing loss has obvious appeal. Our concern is that delinking a homeowner's financial stake in a community undermines the very reason that homeownership has value beyond the individual family's portfolio. Homeownership has long been considered the bedrock of societal connection and stability—and the status we confer among homeowners is largely a byproduct of this principle.